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THE INSTITUTION OF SUSPENSION OF THE DISPUTED ACT WITHIN THE CONSTITUTIONAL REVIEW

ABSTRACT

Suspension the operation of a disputed act is an essential instrument, which aims to serve efficient protection of human rights and fundamental freedoms in the process of constitutional review. According to the case law of the Constitutional Court of Georgia, this particular role of the mechanism of suspension of the norm is caused by several important factors. Most importantly, suspension the operation of a disputed act is the ability to establish the basis (legal capacity) for the Constitutional Court of Georgia, to provide an instant response when there is an urgent need. Irreplaceable nature of this instrument gains particular importance, not only in practical terms but academic as well. Within this paper the basic essence of suspension, the certain precondition for suspension well-established by the case law of the Constitutional Court of Georgia case law, particular issues such as the interrelation between entail irreparable consequences to one of the parties and the restriction of the rights of the others is discussed. Further, the paper analyses the non-systematic approach of the legislator in the legislative amendments to the instrument and the shortcomings identified in the constitutional review of the court.

INTRODUCTION

The literature dedicated to human rights is usually characterized by an extremely high-sounding terminology. Hence, it seems that the authors are trying to emphasize the utmost importance of individual liberties by utilizing the most high-flown comparisons. The phrase “vitaly important“ can frequently be found in such works, however its meaning is not always as literal as it is in the case at hand. In order to demonstrate that the mechanism of suspension of the norm is indeed vital for carrying out essential tasks of the Constitutional Court of Georgia and guaranteeing the performance of its activities, it would suffice to examine just one case from the practice of the Court. In one of such cases, the Court had to suspend a norm, which was

directly affecting the human life.¹ Simplicity and pragmatism are typical to such clear examples, whereby the Court is bound to act within the frames of an unambiguous area, and where there are almost no alternatives to the decision. However, other practical examples illustrate that the complexity of the adoption of the mechanism of suspension of the norm consists, on the one hand, in achieving the balance of interests, namely - the protection of the political equilibrium, and on the other hand - in insufficient efficiency of the aforementioned instrument.

In parallel to the importance of the mechanism of suspension of the norm, in a practice of judicial review of the Constitutional Court of Georgia is to increase its purpose. In the vast majority of cases, the applicants submit a motion to the suspension of the norm but not so successfully. The number of suspended norms is scarce. Conceivably, this result, on the one hand, may be explained by the cautious approach of the Court, or by understanding the complexities of the accompanying risks, and on the other hand, by an inconsecutive and unsubstantiated claim of the complainants. In both cases, it is crucial to understand the purpose, basic standards and practical characteristics of the suspension of the norm. In addition, the viability of any mechanism essentially depends on the vision and formulation of its user, as well as the legislative author. Despite the fact that, at first glance, the Constitutional Court of Georgia develops a sequential practice, in certain decisions cases decided by the Court leaves the space for a divergent, contradictory opinion.

I. THE INSTRUMENT OF SUSPENSION THE OPERATION OF A DISPUTED ACT AS THE SOLE AND EXCLUSIVE PROTECTION OF THE RIGHT

The actual effectiveness of the right of the fair trial set forth in the Constitution is of great importance for the Rule of Law and the Democratic State. "The most important guarantee for securing the full enjoyment of this or that right is exactly the possibility to protect it before the court. If there is no possibility to avoid the breach of a right or restoration of breached right, if there is no legal leverage, enjoyment itself of the right will be questioned".²

According to the interpretation of the Constitutional Court, the right to a fair trial, among others, protects fair hearing and deciding in the Constitutional Court. Furthermore, "the right to access to the court, which also entails the right to access to the Constitutional Court, cannot be illusory, but should create a real possibility of restoring the right in a due manner and provide for an efficient tool of protecting the right."³ Judicial review (Constitutional Justice) is effective if the

¹ Citizen of Georgia Levan Gvatua v. the Parliament of Georgia Recording Notice №3/9/682, the Constitutional Court of Georgia, November 25, 2015.

² Public Defender of Georgia v. the Parliament of Georgia Decision №1/466, the Constitutional Court of Georgia, June 28, 2010. Paragraph II-14.

³ Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia Decision №3/2/577, the Constitutional Court of Georgia, December 14, 2014. Paragraph II-30.

complainant has an expectation and a real possibility to protect his rights - through the way of effective prevention or prevention of violation of the right. In order to ensure effective protection of the rights of the complainant, the legislation envisages suspension the operation of a disputed act. It is noteworthy that the existing legislation on Constitutional Proceeding for preventive means of protection of rights envisages only one mechanism - Suspension of a disputed act. In this respect, the legislation of other countries is, in some cases, more flexible. Under Article 59 of the Law of the Republic of Albania “On the organization and functioning of the Constitutional Court” the Constitutional Court may decide to suspend the activity of the political party or organization until it will provide the final decision.⁴ Under article 64 of “Rules of the Constitutional Court of Bosnia and Herzegovina”, The Constitutional Court may, of its own motion or at the request of an applicant or appellant, adopt an interim measure it deems necessary in the interest of the parties or the proper conduct of the proceedings before the Constitutional Court.⁵ Under article 32 of Act “on the Federal Constitutional Court of Germany,” in a dispute, the Federal Constitutional Court may provisionally decide a matter by way of a preliminary injunction if this is urgently required to avert severe disadvantage, to prevent imminent violence or for another important reason in the interest of the common good.⁶ The preliminary injunction is also understood as a court's right to suspend the entry into force of the law.⁷

Moreover, in some countries, the constitutional courts enjoy competence to direct state authorities to carry out positive actions to prevent damage to the applicant (e.g Federal Republic of Germany, Malta, Liechtenstein, South Africa, Swiss Confederation). The main purpose of the mechanism of suspension of the disputed act, as already noted, is to prevent the irreparable violation of the person's right. The disputed norm, in some cases, may cause irreversible damages to the plaintiffs, when the timely and principled response of the court is given to the essentially valuable force of life. The disputed norm may, in some cases, cause irreparable damage to the claimant, in such a time the timely, principled response of the court is given to life-saving valuable power.⁸

According to the interpretation of the Constitutional Court of Georgia “suspending the force of a disputed provision is an extremely relevant preventive measure for protecting a right and signif-

⁴ Article 59, Law of the Republic of Albania “On Organization and Functioning of the Constitutional Court”, July 15, 1998, accessible here: http://www.gjk.gov.al/web/law_nr_8577_date_10_02_2000_84.pdf [last visited on June 1, 2019].

⁵ Article 64, “Rules of Proceedings of the Constitutional Court of Bosnia and Herzegovina”, November 17, 2014, N569/14, accessible here: <http://www.ccbh.ba/osnovni-akti/pravila-suda/drugi-dio/?title=poglavlje-ii-odluke-i-drugi-akti-ustavnog-suda> [last visited on June 1, 2019].

⁶ Article 32, Law of Germany “On the Federal Constitutional Court”, August 11, 1993, BGBl. I S. 1473. 8373 accessible here: <https://www.gesetze-im-internet.de/bverfgg/BJNR002430951.html> [last visited on June 1, 2019].

⁷ Anita Rodiņa, ‘Content and problematic aspects of interim measure: jurisprudence of the Constitutional Court of Latvia’ (2013) 6 Constitutional Law Review 118 in Act on the Federal Constitutional Court. Legal texts, 29. Bonn: Internationes, 1996, p. 29.

⁸ Citizen of Georgia Levan Gvatua v. the Parliament of Georgia (n 1).

icantly conditions the efficiency of the Constitutional court”.⁹ Consequently, use of the institution at the necessary time and required scale it is necessary and indispensable for the claimants who are in danger of violating fundamental rights. Thus, the existence of this preventive institution for the protection of the rights acquires a particular assignment for its importance and the circumstances that the legislation does not provide other preventive measures to protect the rights.

II. PRECONDITIONS OF SUSPENSION OF OPERATION OF A DISPUTED ACT AND ASSOCIATED RISKS

Under Article 25(5) of the Organic Law of Georgia on Constitutional Court of Georgia, “if the Constitutional Court finds that operation of a normative act may entail irreparable consequences to one of the parties, can suspend the operation of a disputed act or its relevant part until a final judgement on the case is adopted or for a less period of time“. Mentioned norm requires the fact of causing irreparable damage to one of the parties as a precondition of suspension. However, this mechanism is not only related to the satisfaction of these circumstances. In other words, the Constitutional Court's practice established the preconditions, in case of which the conflict of values between legal safety and effective protection of human rights will be decided in favor of the latter.

The Constitutional Court decides the issue of suspension of the disputed act *ex officio*¹⁰ or by the request of the parties. In a number of cases, the Constitutional Court declared that according to article 25(5) of the organic law of Georgia “On the Constitutional Court of Georgia” established crucial mechanism of constitutional jurisdiction ensuring preventive protection of rights or public interest in case there is a danger that the disputed norm may result in irreparable consequences. According to the interpretation of the Constitutional Court of Georgia, “an irreparable consequence means a situation where the norm can cause irrevocable violation of the right and consequences cannot be corrected even if the norm is recognized as unconstitutional. Further, the person has no other legal capacity to avoid such an outcome“.¹¹

At the same time, according to the Constitutional Court, "motion on the suspension of the disputed act may be met if such a decision can prevent the irreparable consequence of the appli-

⁹ Non-Commercial Entity “Human Rights Education and Monitoring Centre (EMC)” and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-35.

¹⁰ On its own initiative, the Constitutional Court suspended the disputed norm just once. See the group of the members of the Parliament (Zurab Abashidze, Giorgi baramidze, Davit Baqradze and others, totally 39 deputies) v. the Parliament of Georgia Recording Notice N3/6/668, the Constitutional Court of Georgia, October 12, 2015. Paragraph II-26-28.

¹¹ Georgian young lawyers' association v. the Parliament of Georgia Recording Notice № 1/3/452,453, the Constitutional Court of Georgia, May 20, 2008. Paragraph II-2.

cant's side".¹² Based on the above, the grounds for suspension of the disputed norm may only be in the exceptional case if their suspension changes the legal status of the complainant, it is possible to prevent damage that could result by operation of the disputable norm.

Furthermore, in deciding the issue of suspension of the disputed act, the Court also takes into consideration the interests of third parties. "In each specific instance when deciding to suspend a disputed provision the court should evaluate the threat of violating the right of the others caused by suspension".¹³ Therefore "the Court applies suspension measure solely in extreme circumstances, only in the cases, when the threat of irreparable damage to a party is clear and there are no risks of unjustified limitation of a third party or public interest".¹⁴

Accordingly, the suspension of the disputed norm is related to the number of conditions, which should be present cumulatively: 1. The threat of irreparable consequence to the plaintiff, which can not be eradicated if the Court satisfies the claim; 2. This threat should be actual and instant; 3. The person has no other legal capacity to avoid such consequences; 4. The suspension of the disputed norm shall result in the prevention of the damage to the applicant (prevention); 5. Suspension of the norm shall not constitute an unjustified restriction on the rights of others.¹⁵

The suspension of the norm on the basis of these preconditions is well established in the legislation of other countries and in the international courts. The Venice Commission suggests, that the suspension conditions should not be too strict.¹⁶ However, especially in the case of normative acts, when applying the suspension measure, it should be taken into consideration the damage that can not be remedied.¹⁷

However, when there is a presumption of constitutionality of the disputed act, suspension of the norm is more precarious, because the norm in the legal area will be terminated without the substantive study of the issues. Prolonged "legal vacuum" created by the suspension of a disputed provision and thus violation of third party interest were the threat seen by the Constitutional Court.¹⁸ According to the interpretation of the Constitutional Court of Georgia, "generally com-

¹² "Television Compani Sakartvelo Ltd" v. the Parliament of Georgia Recording Notice №1/7/681, the Constitutional Court of Georgia, November 13, 2008. Paragraph II-34.

¹³ Citizen of Georgia Sophio Ebralidze v. the Parliament of Georgia Recording Notice № 1/509, the Constitutional Court of Georgia, November 7, 20012. Paragraph II-9.

¹⁴ Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-34.

¹⁵ Ketevan Eremadze, *Freedom guardians in search of Freedom*, (Meridiani 2018) 406.

¹⁶ European Commission for Democracy Through Law (Venice Commission), *Comments on the Draft Law on the Constitutional Court of the Republic of Serbia* <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)039-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)039-e)> 'accessed 20 November 2018'

¹⁷ European Commission for Democracy Through Law (Venice Commission), *Study on Individual Access to Constitutional Justice*, <[www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2010\)039rev-e](http://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2010)039rev-e)> 'accessed 25 November 2018'

¹⁸ Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-19.

pulsory rule of behavior determined by normative act serves the correcting the relevant areas of public life and achievement of the Specific legitimate aim, defending public and private sector's interest. In some cases, Suspension the operation of a disputed act may limit both public and private interests and may damage the value of which is to be protected".¹⁹

In view of this, special attention should be given to the scope of the regulation, the aims and legal condition of the people who have interest in norm maintenance. Suspension of the disputed norm is a significant threat to legal security. On the grounds of legal security the legislation of some states does not envisage the mechanism of suspension of a disputed act (e.g.: Algeria, Andorra, Armenia, Azerbaijan, Belarus, Bulgaria, Czech Republic, France, Hungary, Latvia, Luxembourg, Moldova, Montenegro, Portugal, Russia, Sweden, Ukraine). Apart from legal security, the suspension tool is also the subject of politically motivated criticism, since the Constitutional Court can solve the matter without consideration on merits and can influence the political processes through these and other leverage.

However, rejection of the use of this mechanism based on the fear of negative consequences of the suspension of the norm has the same risk of damaging the benefits of the constitution as it does at every time, with a thoughtless use. Statistically, constitutional courts final judgments take months, in some cases years. In this process the suspension of disputed provision is the only way, on the one hand, for complainant not to suffer irreparable damage and, on the other hand, to give the Constitutional Court a sufficient, objective time for a reasonable decision on the case. Therefore, the Constitutional Court has to take special care during decision making to correctly evaluate opposed interests, associated risks of suspension or denial of suspension and to decide in a matter, when absolute realization and protection of fundamental rights to be unquestionable.

III. LEGISLATIVE FORMATION OF THE INSTITUTE OF SUSPENSION OF NORMATIVE ACT

The initial edition of the suspension instrument has been the subject of legislative changes twice. On both occasions, the Constitutional Court found the newly established norms unconstitutional with respect of Article 42 of the Constitution of Georgia (edition of the Constitution till the 16th of December 2018), on the grounds of effective protection of human rights.

In the first case, the legislator restricted the terms of suspension of the normative act and after the expiration of the time limit ensured suspended act automatically to become valid.²⁰ The court simply should have evaluated constitutionality of the norm, in the "regime of counting down stopwatch". The legitimate aim of this regulation of the legislator was to prevent the negative consequences of the suspension of the norm for the third parties. The Court shared the

¹⁹ *supra* note 20, Paragraph II-22.

²⁰ The Law of Georgia (649-II) on Amendments to the Organic Law of Georgia on the Constitutional Court of Georgia, Article 1(3).

mentioned legitimate aim and recognized that the normative act served the protection of the third party from negative consequences due to the suspension of a disputed act. However, the Court declared the provision unconstitutional on the grounds of blanket, absolutely restricting character and *a priori* prioritized the third-party interests. The Court's ability to balance opposing interests, which is the main element of the function of the Constitutional Court, was taken by the Parliament and in this way the Court's flexibility was significantly reduced.²¹ The Court considers, that achieving the legitimate aim was possible by less limiting measures. In particular, suspending the force of a disputed provision with respect of certain individuals. Due to the Constitutional Court's interpretation, in certain instances, when, for instance, the possibility of damage caused by the suspension of the normative act is high, such mechanism could indeed represent a more accurate, better fitted tool for solving a problem, which on one hand protects the interests of a plaintiff to avoid violation of his/her rights and on the other hand suspension of the normative act less likely causes reducing the risk of violation of public interests or reducing the threat of violation of third persons rights.²²

Allegedly, this kind of explanation and approach provided by the Court should help the legislator in understanding the importance of the suspension instrument, as well as in the process of finding the best ways to form a new edition.²³ However, second, the newly formed regulation, was still not viable.

In the new model of suspension, again based on the grounds of protecting the interests of third parties the flexibility of the instrument was limited. The first difficulty in the legislative change was the stages of the use of the institute of suspension. The Court was authorized to suspend the norm at the Stage of Preliminary Session. In connection with this, the plaintiff's position has been shared that, as a result of the enforceability of a disputed normative act, irreparable damage could be caused at any stage of the hearing.²⁴ As for the second issue, the legislator considered that in some cases the effect of temporary suspension was consistent with the recognition of the norm as unconstitutional, and based on this motive, the use of this instrument was subject to the Plenum competence. The Constitutional Court declared a new edition of the norm unconstitutional, as it considered the unjustified prohibition of suspension of the norm for the Chamber, under conditions where the Chamber was authorized to recognize disputed act unconstitutional. Furthermore, it was pointed out that deciding the issue by the Chamber and later by the Plenum

²¹ Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-43-44.

²² *ibid* Paragraph II-25.

²³ The Law of Georgia (5161-RS) on Amendments to the Organic Law of Georgia on Constitutional Court of Georgia, Article 9(a).

²⁴ Members of Parliament of Georgia (Davit Bakradze, Sergo Ratiani, Roland Akhalaia, Levan Bejashvili and other 38 parliamentarians), Citizens of Georgia – Erasti Jakobia, Karine Shakhparoniani, Nino Kotishadze, Ani Dolidze, Elene Samadbegishvili and others, also members of Parliament of Georgia (Levan Bejashvili, Giorgi Ghviniashvili, Irma Nadirashvili, Petre Tsiskarishvili and other 38 parliamentarians) v. the Parliament of Georgia Decision № 3/5/768,769,790,792, the Constitutional Court of Georgia, December 29, 2016. Paragraph II-132.

adopted by majority of the full list of members, was unreasonable for the general rule of decision making by the Constitutional Court.²⁵

If the Constitutional Court indicated that the new regulation was unreasonable and was making the instrument (suspension of the norm) illusory, the Venice Commission considered the same issue strange and illogical. The newly formed edition was completely rejected by the Commission's conclusion.²⁶

It should be noted that the amendments made by the legislature were preceded by the suspension of the norm in two important cases such as "Rustavi 2"²⁷ and "National Bank".²⁸ The presumption of a conscientious legislator gives us the reason to think that his motivation to make changes to the existing rule and to somehow limit the limits of the mechanism must have been determined by the difficulties seen in practice, reducing the risk of violation of the interests of third parties and not dictated by the fear of suspension of the disputed norms in the above mentioned cases. However, it is also clear that in the best case, the legislator could at least share the position expressed in the pre-judicial decisions of the court and insured the risks in the individual cases allowed for individual suspension. It is worth mentioning that the legislative amendment was not supported by the part of the Parliamentarians from the very beginning and this opposing part was the plaintiff in the case. By addressing the Constitutional Court, the Plaintiff successfully continued the fight, which was lost at the legislative level.²⁹ As a result, they defended the effectiveness of the Constitutional Court, in other words, human rights and freedoms.

Nowadays, the reform of the Organic Law of Georgia on "Constitutional Court of Georgia" is not related to the mechanism of suspension of the norm. The position of the legislator to leave this instrument unchanged, may be a result of sharing a convincing argument of the Court, as well as a result achieved by the enforceability of the decision of the Constitutional Court.

Undoubtedly, the role of the legislator in the effective functioning of the instrument of suspension is visible in presenting the adequate model for the Constitutional Court, and afterwards its practical efficacy is the Court's burden. This, seemingly natural process from the legislative body, is seriously obstructed by the deficiency of the right decisions. Generally, the defective or more likely unconstitutional norms adopted by the Parliament on the Constitutional Court, are a threat not only to the legal order but also the functioning of the Court itself, the protection of human rights. Taking into consideration the above-mentioned assumption and previous changes,

²⁵ *Supra* note 24, paragraph II-163.

²⁶ European Commission for Democracy Through Law (Venice Commission), *Georgia Opinion on The Amendments to The Organic Law on The Constitutional Court And to The Law on Constitutional Legal Proceedings* <[https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)017-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)017-e)> accessed 25 November 2018.

²⁷ "Broadcasting Compani RUSTAVI 2 LTD" AND "Television Compani SAKARTVELO LTD" v. the Parliament of Georgia Recording Notice №1/6/675, the Constitutional Court of Georgia, November 22, 2015.

²⁸ Members of Parliament of Georgia (Zura Abashidze, Giorgi Baramidze, Davit Bakradze and other 39 parliamentarians), v. the Parliament of Georgia (n 7).

²⁹ *Andras Sajó, Limiting Government: An Introduction to Constitutionalism* (M Maisuradze tr, T Ninidze (ed) Sezanne Print 2003) 291.

it is important that the Parliament of Georgia make any subsequent amendment more scrupulously, proportionally to the objective of the goal.

In addition, it is clear that equipping the Constitutional Court with an adequate instrument and creating mechanisms that will ensure the purposeful functioning of the court is not only the prerogative of the legislative body but also, its obligation.

IV. DEFICIENCIES IN PRACTICE IDENTIFIED WHILE SUSPENDING THE OPERATION OF THE NORM

The Constitutional Court used a temporary measure in practice – suspension of the operation of the disputed norm – several times (six times). The aim of the present article is not a detailed review of each of them, but the attention will be paid to the deficiencies that the authors think are in practice.

A. Assessment Criteria for Irreparable Damage to One of The Parties

As already mentioned, one of the preconditions for the suspension of the operation of the disputed norm is the fact of causing irreparable damage to the party. At the same time, this is the circumstance that the Court assesses in the first place (in case of its absence, there is no need to evaluate other preconditions for suspension of the norm). The obligation to indicate the damage and to assert it is the burden of the complainant. Although the Court has the competence to suspend the norm by its own initiative, in the absence of sufficient reasoning, it always refuses the final suspension of the norm. On the one hand, such an approach may be justified with the objective caution of the Court, but on the other hand, the absolute transfer of the burden of proof to the claimant reduces the role of the court, which ultimately raises questions about the efficiency of justice.

B. The Danger of Deprivation of Liberty as a Reparable Damage

A number of complainants apply to the Constitutional Court with demand to suspend the disputed norm. This is especially true in relation to the criminal norms. After the Constitutional Court of Georgia made its first decision on the proportionality of the penalty set for certain acts,³⁰ the claims to assess the constitutionality of the punishments and motions on suspension of the provisions establishing responsibility have increased. However, the Constitutional Court does not uphold the claim regarding the suspension of the disputed norm of the complainants who have faced a particular threat to deprivation of liberty, or who are already imprisoned, based on the same argument. In particular, according to the firmly established practice, the provisions of criminal liability in the form of deprivation of liberty (which may be unconstitutional) are not

³⁰ Citizen of Georgia Beka Tsikarishvili v. the Parliament of Georgia Judgment №1/4/592, the Constitutional Court of Georgia, October 24, 2015.

causing irreparable damages to the complainant. In other words, the Court notes that the judgment of the Constitutional Court is the basis for the revision of the judgment, including the part of the imposed sentence. For this reason, the fact that the applicant may be imposed a punishment in the form of deprivation of liberty on the basis of disputed provision, can not be used for justification of the irreparable result.³¹ Consequently, the fact that the decision of the Constitutional Court creates a legal basis for revising the criminal case, gives the complainant a chance to get the unfairly restricted freedom based on unconstitutional norms back. The Constitutional Court itself creates comfort in the absence of additional justification to refuse the suspension of the disputed norm.

Naturally, the relevant justification for each act adopted by the Court and the objective reasoning of the decision is essentially important for the authority of the Court. According to the interpretation of the Constitutional Court, “the part of a right to a fair trial is the right to reasoned judgment [...] Unreasoned, unclear and general formulations may create impression to the parties that the justice was arbitrary and lacked transparency. The Court needs to demonstrate the reasoning the judgment is based on with enough clarity.”³² Moreover, “the decisions of the Constitutional Court shall promote development of the law. Whether each decision is in accordance to this goal, how effective and fair the judiciary is; objective responses to these questions are in the decisions itself.”³³

Consequently, in the justification of certain acts the Court shall be required to be consistent, adequate and should not invoke the feeling of injustice and bias in the society (especially for the claimant party). As already mentioned, when the Court reviews the constitutionality of the punishments, it does not uphold the applications on the suspensions of the operation of the norm on the grounds of absence of irreparable damage. The Court notes that if the disputed norm is recognized as unconstitutional, the decision of the Constitutional Court as the newly revealed circumstance will become the basis for the complainant's release.

It seems paradoxical that the Constitutional Court develops such an argument in relation to the right that the Court describes in the following manner: “it represents one of the cornerstones of the fundamental rights and, according to the Constitution, is subject to special protection.”³⁴

³¹ Citizen of Georgia Paata Cherkezishvili v. the Parliament of Georgia Recording Notice №1/17/882, the Constitutional Court of Georgia, October 13, 2017; Citizen of Georgia Lasha Bakhutashvili v. the Parliament of Georgia Recording Notice №1/2/696, the Constitutional Court of Georgia, February 6, 2017; Citizen of Georgia Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. the Parliament of Georgia Recording Notice №1/21/701, 722, 725 the Constitutional Court of Georgia, December 20, 2016; Citizen of Georgia Giorgi Putkaradze v. the Parliament of Georgia Recording Notice №1/11/657, the Constitutional Court of Georgia, June 17, 2016.

³² Non-Commercial Entity “Human Rights Education and Monitoring Centre (EMC)” and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-10.

³³ Ketevan Eremadze, ‘Topical problems related to legal effect of decision of the Constitutional Court of Georgia’ (2013) 6 Constitutional Law Review 3.

³⁴ Citizens of Georgia – Levan Izoria and Davit-Mikheili Shubladze v. the Parliament of Georgia Judgment №1/2/503,513, the Constitutional Court of Georgia, April 11, 2013. Paragraph II-1.

Moreover, the Court clarifies that “the restriction of physical freedom and especially the most intense form of it - deprivation of liberty hinders and sometimes completely excludes the realization of other rights and freedoms by an individual”.³⁵ Consequently, it is incomprehensible and unexplained in the light of this fact what gives the Court underlying basis to say that the deprivation of the liberty of persons based on the unconstitutional norm is not causing irreparable damage to them. It is true that if the Constitutional Court declares the disputed provision unconstitutional, revision of the judgment will be done to prevent human rights violation in the future, but from a submission of a constitutional complaint to the Court before the final judgment (which is often related to a long-term perspective) on the basis of unconstitutional norm, unconstitutionally deprived liberty will always be irreversible for the complainant. In this regard, parallel can be drawn to a completely opposite practice of the Constitutional Court of Germany, according to which depending on the unconstitutional basis deprivation of a person's freedom is a threat of irreparable damage to a person based on the argument that freedom has a special weight in the constitutional values.³⁶

Consequently, the reasoning provided by the Constitutional Court of Georgia does not comply with the actual content of the restriction while evaluating the threats of irreparable damage to the complainant. The reasoning developed by the Court in the process of suspension of the norm of criminal responsibility is causing injustice for the complainants, which should be considered logical and rational in the case at hand. In the case of deprivation of liberty people are deprived of other rights, hence, deprivation of liberty based on an unconstitutional norm is one of the most intense forms of violation of human rights. Accordingly, it is a significant gap in the practice of the Constitutional Court, that there is no space for the suspension of norms of responsibility. In this regard, it is interesting to rely on the decision of the Constitutional Court of Germany in the light of which the Court's assessment of the use of the temporary measure is the composition of the specific crime and the risks of the person. In contrast to the Constitutional Court practice for the effects of the judgment of the Constitutional Court in the criminal law, without consideration danger of the crime, threats from the person and other related issues, the impossibility of restoring damages are excluded. This approach significantly degrades the basic human rights, which is why it is necessary to improve the practice of the Constitutional Court of Georgia in this regard.

³⁵ Public Defender of Georgia v. the Parliament of Georgia Judgment №2/1/415, the Constitutional Court of Georgia, April 6, 2009. Paragraph II-6.

³⁶ Order of 19 May 2010 BvR 769/10, Paragraph 2, available is here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/05/rk20100519_2bvr076910.html accessed on November 20, 2018. However, in this case the Court refused to decide a matter provisionally by way of a preliminary injunction indicating the circumstance that the complainant was a significant threat. In particular, he was convicted of committing crimes like human trafficking, body injury, illegal deprivation of liberty and sexual violence. Taking this into consideration there was a risk that he would commit a crime that could cause physical and psychological damage to the victims.

C. The Appointment of Judges Based on Possible Unconstitutional Norms as Reparable Damage

An interesting example of the refusal to suspend the norm is found in the №3/2/717 Recording Notice of the Constitutional Court.³⁷ The complainants requested to suspend norms that regulate the appointment of judges.³⁸ However, the Court did not consider a possibility of the arbitrary decision on appointment of judges and subsequent impossibility to appeal as an irreparable damage to the applicants. Public goals such as the efficiency of the justice and the interests of other candidates were named by the respondent in order to justify a necessary increase of the number of judges at the court.³⁹ The difficulty of this decision is caused by the high political price of the issue and complexity of damage. However, since there was no legal possibility to dismiss already appointed judges or to reverse the appointment procedure, it was quite obvious that the Court's refusal to suspend the disputed norm would have caused an irreparable damage to the applicants. This is true, especially, when considering the legal effect of the judgement of the Constitutional Court. Even if the Court declared the disputed norms unconstitutional, it might have still been impossible to alter the decision on the appointments already made on judges.

In that case, the Court could take into consideration the interests of the judiciary not being under a potential, but under a real threat. In that regard, instead of formal approach, the Court should have taken more accurate way when balancing conflicting interests.

The focal point of the case was the analysis and subsequent evaluation of the interests that allegedly confronted the interests of the complainant. In particular, according to the Court's assessment, there were two interests in conflict with the complainants' interest. Firstly - the interest of other judges who participated in the competition and secondly – public interest to a speedy trial. Unfortunately, the Court did not consider that the danger the disputed norms were creating for the complainant were equivalently problematic to other judges as well. As for the public interest, increase of the number of judges for the purpose of achieving speedy trial, could not outweigh the public interest of appointment of the judiciary pursuant to the constitutional norms. In addition, it should be noted that any mistake made in the judiciary system related to the appointment of the judges or termination of their authority, is irreparable *ipso facto*.⁴⁰ If the Court had shared the above-mentioned reasoning, the difficulty of suspending the norms under the established standards would have remained in the part of the complainant's irreparable damage. In particular, the claimant party was damaged by a possible unsubstantiated decision and impos-

³⁷ Citizens of Georgia – Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v. the Parliament of Georgia Recording Notice №3/2/717, the Constitutional Court of Georgia, June 1st, 2016.

³⁸ *ibid* paragraph II-16.

³⁹ *ibid* paragraph I-21.

⁴⁰ The same arguments were mentioned by judges in the dissenting opinion. See, Dissenting opinion of the members of the Constitutional Court – Ketevan Eremadze and Maia Kopaleishvili on the Recording Notice №3/2/717 of the Constitutional Court of Georgia of 2 June, 2016.

sibility of appeal, however, we can not exclude with absolute probability that this damage could be restored in the future. In that regard, since no damages were present for the third parties and the fact that appointment of the judges on constitutional norms would definitely outweigh the public interest of speedy trial, the Constitutional Court was obliged to share above-mentioned logic and suspend the legal force of the disputed norm. Thus, the efficiency of the mechanism of suspension should not be reduced by indicating the possibility of future hypothetical remediation. It is noteworthy that the Constitutional Court was allowing with the previous practice the existence of a normative act that could not contain the threat of damage to the interests of third parties and that it would not be justified to assess the suspension with the strict framework.⁴¹ The Court could have balanced the opposing interests with such an approach.

Knowing its own slow decision-making pace the Court should have predicted the possible negative consequences if it declared the norms unconstitutional. Alternatively, the Court could decide the case rapidly, which also would have saved the interest of the claimants. Taking into consideration the arguments, it is arguable if there was a mistake when the Court did not suspend the norm or the solution itself is correct, though "strictly formalistic". In any case, it is unequivocal that the appointment of judges on the grounds of disputed norms has not been helpful for the justice system and human rights at all.

D. Practical Shortcomings Related to Balancing of The Third-Party Interests

As already noted, when deciding on the suspension of the operation of the disputed norm, the Constitutional Court assesses the negative legal effects caused by the suspension of the norm. In other words, the norm will be suspended only in the case of exemption, when the benefit protected by the suspension of the act (irreparable damages to the complainant) exceeds the risk of violation of the rights of others. In accordance with the practice of the Constitutional Court, "in each case while making the decision on suspension of the disputed norm the Court shall assess a threat to the violation of the rights of others".⁴² In this sense, however, the Court is not consistent with regard to the risk assessment of third parties and/or public interest.

With regard to this issue the Recording Notice of the Constitutional Court of Georgia of 22 November, 2015 in the case of "Broadcasting Company Rustavi 2 Ltd" and "TV Company - Sakartvelo Ltd" v. the Parliament of Georgia" is interesting. In this case, the Constitutional Court of Georgia granted complainants' motion and suspended article 268.z of the Civil Procedure Code of Georgia pending final decision. The disputed provision set out a rule on immediate enforcement of a judgment of the court of first instance. In particular, if the delay of enforcement of the judgement caused by extraordinary circumstances may inflict substantial damage to

⁴¹ Non-Commercial Entity "Human Rights Education and Monitoring Centre (EMC)" and the Citizen of Georgia Vakhushti Menabde v. the Parliament of Georgia (n 3). Paragraph II-40-41.

⁴² Citizens of Georgia – Giorgi Okujava, Elene Skhirtladze, Giorgi Ghlonti and others v. the Parliament of Georgia Recording Notice №1/5/860, the Constitutional Court of Georgia, February 7, 2017. Paragraph II-13

the party requesting payment, or if the delay may make the enforcement impossible, at the request of the parties, the court may, in full or in part, order immediate enforcement of judgments.

The Constitutional Court suspended the operation of the disputed norm on the grounds that the immediate execution of the decision of the common court against the complainant might have caused the loss of the right to the disputed property. At the same time, the complainant had no foreseeable legal opportunity to return the property, which would cause irreparable damage.⁴³ However, in the Recording Notice, the Constitutional Court did neither assess the scope of the disputed provision, nor the legal relationship regulated on its basis. The Court suspended the disputed norm without referring to any of its normative content (it is noteworthy that the Constitutional Court declared only the normative content of the disputed norm unconstitutional, in particular, the normative content of sub-paragraph “g” providing for the immediate enforcement of a court judgement on the transfer of disputed property). In addition, the Court does not assess the threats of violation of the rights of others due to the suspension of the norm operation in its acts. Consequently, the Court, without additional argumentation, deviated from the standards of suspension established by its own case-law.

Special attention should be paid to the difficulties that emerged from this recording notice of the Constitutional Court and the elimination of which has since become a problem for the common courts. In order to demonstrate the scope of the problem, we will briefly review the suspended norm and the risks that the Constitutional Court had not (could not) foreseen and were left beyond the legal assessment. More specifically, in the practice of the common courts the immediate enforcement was used with respect to various disputes, for example, the disputes related to the non-performance of contract and other property disputes, including the cases where immediate performance of the action agreed by the liable person is essential and vital for the complainant. In addition, this provision was also actively used in reviewing family matters, in particular, juvenile cases, where the issue was related to granting the right to take a child abroad, as well as determining the place of residence of a child and the regulation of parental and child relations. In addition to civil disputes, immediate execution was also applied to administrative cases, including the claims on annulment of an individual administrative act, on issuing of an administrative act and on performing an action.

In this respect, the practice of the common courts and the circumstances of how the judicial body tried to define/modify the legal vacuum for human rights is interesting. The ruling of the Supreme Court of 20 May 2016 (Case No. 260-248-2016) reflects the reasoning of Tbilisi City Court and the Court of Appeal, according to which, despite the fact that the Constitutional Court suspended the norm of the immediate enforcement, the courts ordered immediate enforcement on judgment, including the reference to international conventions and indication of how im-

⁴³ “Broadcasting Compani RUSTAVI 2 LTD” AND “Television Compani SAKARTVELO LTD” v. the Parliament of Georgia (n 24).

portant it can be for the development of the child and its relationship with the parent (in most cases) the immediate execution of the decision made on this issue. Consequently, the common courts tried to bring in action the suspended norm in the specific case through the references and analogy of the international conventions and other arguments. However, decisions made by the common courts in favor of human rights and informal approach to the issue may be assessed positively. The protection of human rights is the primary function of the Constitutional Court. However, according to certain opinions in scholarly literature, the protection of human rights is primarily a function of the common court.⁴⁴ The Federal Constitutional Court of Germany notes that the Common Courts are obliged to tackle the facts of violation of the fundamental rights enshrined in the Constitution.⁴⁵ In terms of the protection of the basic rights, both Common Courts and the Constitutional Court perform parallel functions.⁴⁶

IN LIEU OF CONCLUSION

Assessment and adjudication of the case to the Constitutional Court is often related to the long-term perspectives.⁴⁷ Due to the objectives of restoration of the violated rights or prevention thereof, long-term perspectives of adjudication on the dispute in some cases is sufficient ground for considering the Court as an inefficient mechanism for defending complainant's constitutional rights. Such assumption is obvious during acute disputes, especially when the timely reaction from the Court is decisive to neutralize the risks of irreversible violation of complainant's rights.

Suspension of operation of contested provision is a significant competence of the Constitutional Court, in which the Court has the capacity to suspend the operation of possibly unconstitutional provision, before it adopts final judgment. The purpose of this competence is to avoid the irreparable harm for complainants, in order the constitutional justice to be sensible for them. Despite of functional importance of this competence, the Court should be considerate of the negative consequences, which can be caused in some cases by the suspension of legal provision. Therefore, the Constitutional Court faces challenge to balance the opposing interests.

The particular examples discussed in this article give us the possibility to conclude that there are cases in the Court's practice that can be characterized by certain shortcomings. These shortcomings are the subject not only to discussions but to objective criticism. Besides, another problem is derived from the uniform reasoning of the Court in assessing the possible damage. The appli-

⁴⁴ Giorgi Khubua, Constitutional Court as Constitutional Authority, G in Nona Todua (ed) Guram Nachkebia – 75 Anniversary Collection (Meridiani 2016) 462 in Sodan, H., Staat und Verfassungsgerichtsbarkeit, 2010, S. 61, BVerfGE 96, 27.

⁴⁵ *ibid* BVerfGE 49, 2525.

⁴⁶ Schlaich, Das Bundesverfassungsgericht, 4. Aufl. 1997, Rn. 19 in *supra* note 44.

⁴⁷ Monitoring Results of the Constitutional Court of Georgia, 26 May, 2018, available here: <https://idfi.ge/public/upload/IDFI_Photos_2018/Rule_of_law/final_monitoring_results_of_the_constitutional_court_of_georgia_geo.pdf> accessed on November 25, 2018.

cant party cannot be convinced by the Court's reasoning when it indicates merely the fact that possible damage is not serious enough. In addition, it is also uncertain and arguable what is the quality of possible damage that can acquire the standard of seriousness and what test can be used to evaluate its seriousness in each particular case. In the light of the above-mentioned questions, the legal acts of the Court should be more well-founded, and the Court is obliged to resolve different legal issues in a more convincing manner. It is indisputable, that for the purpose of the effectiveness of the instrument of suspension of the operation of the disputed act, the Court is required to evaluate the interests of the applicant party in each individual case, as well as the quality of the damage caused by its suspension and motivated by cautiousness, not to deny the real needs of individuals. At the same time, in the absence of judicious perception to the instrument of suspension of operation of disputed act from the Parliament, the Court, within the realm of the basic principles and article 31 of the Constitution of Georgia, should try to find the resources to make this instrument more flexible and effective.