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(VENICE COMMISSION)

GEORGIA

**AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT OF GEORGIA
ON THE EFFECTS OF CONSTITUTIONAL COURT DECISIONS
ON FINAL JUDGMENTS
IN CIVIL AND ADMINISTRATIVE CASES**

**Adopted by the Venice Commission
at its 115th Plenary Session
(Venice, 22-23 June 2018)**

on the basis of comments by

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Table of Contents

I.	Introduction	3
II.	Request.....	3
	A. Background	3
	B. Questions	4
III.	Analysis.....	5
	A. General remarks.....	5
	B. Individual remedy vs. legal certainty	5
	C. Relevant types of individual access to the constitutional court.....	6
	1. Full individual access.....	6
	2. Normative constitutional complaint	7
	3. Preliminary request to the Constitutional Court.....	8
	D. Reopening of proceedings by the ordinary courts.....	8
	E. Temporal effects.....	9
	1. Moderate <i>ex tunc</i> effects	10
	2. Strict <i>ex nunc</i> effects	10
	3. Rule for the instant case.....	11
	4. Moderate <i>ex nunc</i> effect	11
	5. <i>Ex nunc</i> systems allowing the constitutional court to define retroactive effects of its decisions.....	12
	6. <i>Ex nunc</i> systems with a limitation of retroactive effects in time	13
	7. Conclusion on temporal effects	13
	F. Situation in Georgia	14
IV.	Conclusion	15

I. Introduction

1. By message of 19 April 2018, the President of the Constitutional Court of Georgia, Mr Zaza Tavadze, requested an *amicus curiae* brief from the Venice Commission on the effects of constitutional court decisions on final judgments¹ in civil and administrative cases.

2. Ms Jana Baricová, Mr Christoph Grabenwarter, Mr Gagik Harutyunyan and Mr Il-won Kang have been invited to act as rapporteurs for this *amicus curiae* brief, which is based on the translation of the challenged provisions and relevant legislation provided by the Court (CDL-REF(2018)021).

3. This *amicus curiae* brief was drafted on the basis of comments by the rapporteurs and adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

II. Request

A. Background

4. The President of the Constitutional Court explained the background of the request as follows:

5. The Constitutional Court of Georgia (hereinafter referred to as the CCG) adjudicates on two constitutional complaints challenging the constitutionality of various norms of the Civil Procedure Code and the Organic Law on the Constitutional Court. Both complaints are lodged by the same claimants and have been joined into a single proceeding. The challenged provisions determine the effects of the decisions of the CCG and notably whether they can affect preceding legal relationships and can be invoked as a ground for reopening final judgments in civil and administrative law matters (*res judicata*).

6. Paragraph 1 of Article 23 of the Organic Law on the Constitutional Court stipulates that a declaration of a norm as unconstitutional results in its invalidity from the moment of the promulgation of the relevant decision of the CCG. Paragraph 10 of the same Article provides that if the disputed provision is found to have a similar meaning to the provision that had previously been declared unconstitutional by a decision of the CCG, it shall become invalid from the moment of the promulgation of a relevant ruling of the CCG.

7. Paragraph 1 of Article 423 of the Civil Procedure Code of Georgia (the disputed norm) determines the grounds for reopening proceedings on final court judgments (*res judicata*) and does not include decisions of the CCG as a ground for reopening. The provision applies to both civil and administrative law cases.

8. The claimants argue that the decision of the CCG should constitute an effective remedy for the protection of human rights. The party indicates that paragraphs 1 and 10 of Article 23 of the Organic Law on the Constitutional Court allow only a prospective effect of the CCG decisions and preclude its retroactive application. Therefore, the decisions do not influence legal relationships that had been finalised before the publication of the CCG decision, which diminishes the ability of the CCG to remedy human rights violations.

¹ As concerns terminology, there is a wide range of terms used in the Member States of the Venice Commission. Some constitutional courts adopt “judgments”, others “rulings”, “findings” or “decisions”. In order to make a distinction between the constitutional court and the ordinary courts, this opinion refers in general to “decisions” of constitutional court and “judgments” of ordinary courts. The purpose of the this terminology is purely pragmatic.

9. The claimants state that the CCG must have discretion to decide on a case-by-case basis from which date an unconstitutional normative act becomes invalid and to determine that its decision has retrospective effect.

10. The claimants further argue that the decision of the CCG should be recognised as being a legal ground for the reopening of final judgments (*res judicata*) in civil and administrative matters based on the norm declared unconstitutional by a decision of the CCG. The claimants assert that the disputed norm precludes the abovementioned remedy and is therefore unconstitutional.

11. Based on the arguments provided above, the claimants emphasise that disputed norms diminish the effectiveness of the CCG and, therefore, are incompatible with the right to a fair trial (Paragraph 1 of Article 42 of the Constitution of Georgia).

12. The Respondent (the Parliament of Georgia) opposed the constitutional complaints by referring to Paragraph 2 of Article 89 of the Constitution of Georgia, which stipulates that “A normative act or a part thereof declared unconstitutional shall cease to have legal effect from the moment of the promulgation of the respective decision of the Constitutional Court”. Therefore, the respondent states that the Constitution of Georgia explicitly determines that the decisions of the CCG only have prospective effect and do not affect previous legal relationships.

B. Questions

13. The President of the Constitutional Court of Georgia asked the following question:

1. “What is the best European/International practice regarding application of constitutional provisions establishing human rights? What is the scope and the effects of their application:
 - a. On relationships between private person and the State?
 - b. On relationships between private parties?
2. In Georgia the Constitutional Court is the sole judicial body responsible for constitutional review and protection of human rights from unconstitutional laws. However the CCG is not authorised to declare judgments of the general courts unconstitutional and invalidate them (there is no full constitutional complaint to the CCG). Considering the abovementioned:
 - a. Based on European/International best practice, what are the consequences the decision of the CCG (declaring the relevant provision unconstitutional) should have on civil/administrative law transactions/cases which have been closed before its promulgation?
 - b. What should the effect of the decision of the CCG be on an on-going legal dispute in which a general court has to decide on civil/administrative law transactions/cases which have been closed before the promulgation of the Constitutional Court decision?
 - c. What should the effect of the decision of the CCG be on final judgments of general courts? Should the decision of the Constitutional Court become grounds for reopening a final judgment (*res judicata*) which is based on an unconstitutional provision?
3. Paragraph 2 of Article 89 of the Constitution of Georgia reads as follows: “A normative act or a part thereof declared unconstitutional shall cease to have legal effect from the moment of the promulgation of the respective decision of the Constitutional Court”.
 - a. What are the European/International standards regarding the temporal effect of Constitutional Court decisions, particularly in countries where constitutions incorporate similar provisions?

b. How do relevant courts interpret/apply similar constitutional provisions? Do these provisions restrict constitutional courts from encompassing certain legal effects of their decisions on preceding legal relationships?”

III. Analysis

A. General remarks

14. The request by the President of the CCG mainly refers to the best European/international practices concerning the effects of decisions of constitutional courts on final judgments of ordinary courts that were based on a legal provision that was found to be unconstitutional by the Constitutional Court. These questions need to be seen in the context of a wide variety of systems regulating such effects. Each of these systems has advantages and drawbacks, in theory and/or in practice. Therefore, a direct reply to the request for the identification of “best practices” will, as such, not be possible in all cases.

15. The issues raised in the request by the President of the Constitutional Court of Georgia arise in countries where a specialised constitutional court has been established. In countries where a supreme court also acts as the constitutional court, the question of a relationship between these two types of courts is not an issue.

16. This *amicus curiae* brief only relates to civil and administrative cases. In criminal cases (and in some countries also in cases of administrative offences), typically retroactive effects apply and a criminal case that is based on a provision that was found unconstitutional by the constitutional court will be reopened by the ordinary courts.² This need not necessarily lead to a release of the sentenced person, because the act committed may be punishable under other – possibly even stricter – criminal provisions.

17. The question of the effects of constitutional court decisions on the final judgments of ordinary courts also relates to the issue of individual access to the constitutional court. One of the questions is, notably, what the effects of a constitutional court decision in the case at hand are. Therefore, the main types of individual access will be briefly referred to below. Nonetheless, the issue also arises in respect of decisions of the constitutional court that do not relate to individuals. The question as to what happens with final judgments which were based on an unconstitutional provision also comes up when the constitutional court decision was the result of an appeal by an institutional actor.

18. This *amicus curiae* brief for the Constitutional Court of Georgia does not purport to provide a complete overview of the various systems in the Member States of the Venice Commission. It will only identify a number of relevant systems by way of example.

B. Individual remedy vs. legal certainty

19. The principles of individual remedy and of access to courts are closely intertwined. They are expressed through the right to a fair trial in Article 6 ECHR.³ In the context of this *amicus curiae* brief, the question arises as to how individuals can benefit from decisions of the constitutional court that find a legal provision unconstitutional. From the perspective of an individual, it is hard to understand how one can be bound by a judgment known to be based on an unconstitutional law. What is the remedy available to an individual in order to overcome this particular situation?

² Study on individual access to constitutional justice, CDL-AD(2010)039rev., para. 194.

³ Rule of Law Checklist, CDL-AD(2016)007, para. 106.

20. On the other hand, one of the inherent characteristics of the rule of law is the principle of legal certainty⁴ and the protection of citizens' trust in the law, which includes the prohibition of retroactive effects of legal regulations and their provisions.⁵ Under normal conditions, legal regulations and their provisions shall only have *pro futuro* effects and not retroactive ones, because retroactive effects would seriously disrupt the requirement of their internal coherence and general accessibility, which would inevitably lead to situations in which a person's conduct carried out in accordance with the law in force could subsequently be declared illegal or without any legal effect on the grounds that the relevant legal rule has been modified or abolished.

21. Legal certainty is all the more important in the horizontal relationship between private parties, notably in civil cases. The rights of third parties (as seen from the relationship between the applicant and the State) should – to the extent possible – not be retroactively affected if the relationship between the first individual and the State changes. If a final judgment adjudicated in favour of one private party, but the legal provision on which that judgment is based is invalidated upon request by the 'losing party', the 'winning party' would lose already acquired rights through a new final judgment. Another aspect is the principle of equality. Different treatment of cases in the past depending on imponderabilia of concrete court proceedings might create situations of unequal treatment without sufficient justification.

22. The fact that the legal provision on which that judgment was based is not constitutional cannot be held against that party. The re-opening of the case with the possible outcome that the other party might win the case therefore affects the rights of this party. This does not mean that such a case should in no way be re-opened, but whether and how the case can be re-opened will depend on the applicable system. The rights resulting from the original judgment merit consideration in the concrete case. The invalidation of a law will of course potentially affect a high number of cases.

23. In the end, in choosing a system of effects of constitutional court decisions, a balance must be found between the principles of individual remedy on the one hand and legal certainty on the other.⁶

C. Relevant types of individual access to the constitutional court

1. Full individual access

24. The Venice Commission's report on individual access to constitutional justice found a combination of a full constitutional complaint with preliminary requests to the constitutional court as the most complete from the viewpoint of human rights protection.⁷

25. Typically, full individual constitutional complaints⁸ can be used to challenge:

- final judgments of ordinary courts and
- decisions of public authorities, the latter provided that they cannot be reviewed by administrative courts;
- measures, i.e. legal acts or other acts issued by the relevant authorities, which do not fulfil the formal criteria of a decision, but which directly affect or may affect the rights, legally protected interests or duties of individual persons and legal entities; as well as
- in some systems, acts designated as laws that are not general norms but that specifically address only one person or set of facts ("individual law").

⁴ Rule of Law Checklist, CDL-AD(2016)007, II.B.

⁵ Rule of Law Checklist, CDL-AD(2016)007, II.B.6.

⁶ See Opinion No. 172/2002 on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, CDL-AD(2002)005, para. 11.

⁷ Study on individual access to constitutional justice, CDL-AD(2010)039rev, para. 108-109.

⁸ Study on individual access to constitutional justice, CDL-AD(2010)039rev, para. 79.

26. The individual can bring full individual constitutional complaint proceedings only after having exhausted all other legal remedies. The powers of the constitutional court are thus limited by the principle of subsidiarity, i.e. the constitutional court may decide on challenged acts only after all instances of the ordinary courts have pronounced themselves or when no appeal to an ordinary court is possible.

27. The advantage of the full constitutional complaint is that when the constitutional court comes to the conclusion that there was a violation of human rights, it may directly annul the final judgment or last instance act, no matter whether the unconstitutionality resides in the norm or its application. Depending on the system, the constitutional court can either directly settle the case or, typically, refer the case back to the ordinary court or the authority for further proceedings.

28. Depending on the system and the specific circumstances, the constitutional court can also prohibit the continued violation of the human rights concerned; or, if possible, order that the authority which has violated that right reverts to the state of affairs before the violation occurred.

29. The drawback of full constitutional complaints is that they quickly make up the majority of the case-load of the constitutional court, sometimes representing more than 90 per cent of the case-load. As a result, the constitutional court may be overburdened by cases which lack any constitutional dimension, only because the parties are dissatisfied with the judgment of the ordinary court. In order to deal with the heavy case-load, in countries with a full constitutional complaint to the constitutional court, there usually are a number of filters in place, for instance time limits, mandatory legal representation, simplified decisions on manifestly unfounded cases, etc.⁹ In addition, the organisation of the constitutional court must be streamlined, the judges render decisions in smaller chambers,¹⁰ and the judges need to be supported by a sufficient number of legal assistants.¹¹

2. Normative constitutional complaint

30. Several countries allow direct individual access to the constitutional court, but only for complaints against allegedly unconstitutional normative provisions ("normative constitutional complaint").¹² Through this type of complaint, an individual has the right to appeal to the constitutional court against the violation of his or her human rights through an individual act that is based on a normative act, the constitutionality of which is contested.

31. In systems that provide for a normative constitutional complaint, the individual act applying the normative act cannot be attacked as such before the constitutional court. The control by the constitutional court does not concern the implementation of the normative act. As a consequence, a normative constitutional complaint is not an effective remedy if the unconstitutionality resides in the application of the norm, but not in the norm itself.

32. Normative constitutional complaints exist in a number of Eastern European countries. An interesting case is Ukraine, where the recent constitutional amendments introduced a normative constitutional complaint. The Law on the Constitutional Court extends the effects of this complaint by allowing the Constitutional Court to refer a final judgment of an ordinary court back to that court if the Constitutional Court discovers that the challenged norm is constitutional, but its application by the ordinary court was unconstitutional.

33. The Ukrainian constitutional complaint thus shows some similarities with a full constitutional complaint, but there are limits. First, the applicant cannot appeal against the application by the

⁹ Study on individual access to constitutional justice, CDL-AD(2010)039rev, section II.1.

¹⁰ Study on individual access to constitutional justice, CDL-AD(2010)039rev, para. 225.

¹¹ Study on individual access to constitutional justice, CDL-AD(2010)039rev, para. 224.

¹² Study on individual access to constitutional justice, CDL-AD(2010)039rev, para. 77.

ordinary court; the appeal must be directed against the norm applied. The applicant can only hope that during the norm control, the unconstitutional application is discovered by the Constitutional Court. In addition, once the Constitutional Court has found a legal provision to be constitutional, future complaints against the same provision might be inadmissible. This means that the similarity between the new Ukrainian constitutional complaint and a full constitutional complaint would fade over time as legal provisions increasingly become 'cleared' as constitutional.¹³

3. Preliminary request to the Constitutional Court

34. In ordinary legal proceedings, the judge (and the parties) may be confronted with a legal provision which seems to be unconstitutional, but that the judge would be obliged to apply in this case. In order not to force the adoption of a judgment on the basis of this possibly unconstitutional provision, the ordinary judge (judge *a quo*) can stay the proceedings in the case at hand and refer the question of the unconstitutionality of that provision to the constitutional court (judge *ad quem*).

35. Such referrals to the constitutional court are called preliminary requests or, in some countries, exception of unconstitutionality or concrete review.¹⁴ Depending on the system, the doubt as to the constitutionality can originate with the ordinary court judge or can be based a request by the parties. Again depending on the system, the judge may be obliged to make the request or s/he does so only if s/he is convinced of the seriousness of the doubt. The case pending with the judge *a quo* is stayed until the constitutional court renders its decision and it is resumed and decided on the basis of the decision of the constitutional court.

36. In most cases, the ordinary court addresses the constitutional court (judge *ad quem*) directly, but in some countries the request must first be sent to a supreme court, which acts as a filter by deciding whether the doubt as to the constitutionality of the provision is serious enough.

37. The very nature of such a preliminary request requires that when the constitutional court finds that the challenged provision is unconstitutional, this provision cannot be applied in the case at hand.¹⁵ This does not mean that the provision will necessarily lose its force *erga omnes*. The further effects depend on the system in place.

D. Reopening of proceedings by the ordinary courts

38. When a constitutional court refers a case back to an ordinary court (e.g. as the result of a full constitutional complaint), corresponding provisions in the respective procedure code should allow the ordinary court to act on this referral (and oblige it to do so).

39. Such provisions typically directly refer to decisions of the constitutional court but, depending on the interpretation of the relevant procedure code, they could also be intrinsic and result from general provisions. The general grounds for the reopening of civil proceedings applied in many European countries are that a final judgment may be reopened if there are certain, very specific facts, decisions or evidence relating to the original proceedings, which could not (yet) be presented in these proceedings without the fault of the applicant and these elements could lead to a more favourable judgment for the applicant. Depending on the interpretation of such a rule, even a decision of a constitutional court invalidating a legal provision on which the judgment was based could constitute grounds for reopening

¹³ Ukraine - Opinion on the draft Law on the Constitutional Court, CDL-AD(2016)034, paras. 42-45.

¹⁴ For some authors, the term concrete review covers any constitutional court case relating to an individual (as opposed to abstract review). This use of the term would also cover the full constitutional complaint.

¹⁵ Study on individual access to constitutional justice, CDL-AD(2010)039rev., para. 170.

proceedings. In most countries, however, a direct link of the new judgment or decision to the concrete case is required.

40. The ordinary court would then examine whether the constitutional court's decision could lead to a more favourable result for the applicant. This means that the reopening of proceedings must be examined and admitted by the ordinary court. In addition, not every human rights violation established by the constitutional court is a ground for the reopening of proceedings. The ordinary court would examine the possible effects of the constitutional court's decision on the concrete case.¹⁶

E. Temporal effects

41. The core task of a constitutional court is to identify legal provisions that contradict the constitution and to remove these provisions from the body of laws ('negative legislator'). Unconstitutional laws, or parts of it, should be removed or invalidated because they contradict the Constitution which has a higher rank. A number of questions arise as to the temporal effects of decisions of unconstitutionality.

42. For the purpose of this opinion, it is not necessary to examine the postponement of temporal effects. Many constitutional courts may decide that the invalidation of these unconstitutional provisions will only take place in the future, often up to one year or 18 months after the decision of the constitutional court enters into force. This means that during this period of time, the unconstitutional provision will continue to be applied, even though its unconstitutionality has already been established.

43. The only exception is the "rule for the instant case"¹⁷ (see below) where it exists. The application of a legal provision that is known to be unconstitutional may be justified by the need to maintain legal certainty, to provide for equality and to avoid a legal gap without any applicable provision. This period gives time to the legislator to adopt a new, constitutional provision that replaces the one that was found unconstitutional. The unconstitutional provision loses its effect by virtue of the decision of the constitutional court and the legal gap really opens only if the legislator remains inactive during this period.

44. As concerns the validity of the unconstitutional legal provisions, there are two schools of thought:

- If a law which is incompatible with the constitution is thought to be null and void, the decision of the constitutional court, which finds a law unconstitutional, has an *ex tunc* (as from then) effect. This is also called the doctrine of nullity.
- If a law which is incompatible with the constitution is thought to be effective until it is abolished, the decision of the constitutional court which finds a law unconstitutional has an *ex nunc* (as from now) effect.

45. As the Study on individual access to constitutional justice notes: "[t]he doctrine of nullity ('*Nichtigkeitslehre*') opposes itself to the doctrine of "invalidability"¹⁸ ('*Vernichtbarkeitslehre*'). This creates a dilemma; requiring a choice to be made between doctrinal coherence (if the unconstitutional act is considered as never having been part of the legal order) and legal

¹⁶ See e.g. ruling of the Constitutional Court of the Slovak Republic ref. II. ÚS 421/2012 of 13 December 2016, which refused to admit a complaint for further proceedings after allowing the reopening of proceedings before the Constitutional Court – www.ustavnysud.sk.

¹⁷ In German *Anlassfallregelung* or *Ergreiferprämie*.

¹⁸ Meaning that the law can be invalidated.

certainty (with continuing validity of acts based on the derogated act prior to the entry into force of the constitutional court's decision)".¹⁹

1. Moderate *ex tunc* effects

46. Only relatively few countries provide for *ex tunc* effect of constitutional court decisions. The German legal system is widely regarded as a well-known example for an *ex tunc* effect of the decisions of a constitutional court. In this case, *ex tunc* means that the unconstitutional provisions are considered to be invalid as from their adoption. The decision of the constitutional court finding the unconstitutionality is not a constitutive act invalidating these provisions. It only identifies provisions which are unconstitutional and which are already invalid. The advantage of this concept is its abstract clarity. The supremacy of the Constitution is so important that unconstitutional provisions are invalid *per se*.

47. However, in practice, a rigorous application of this concept would lead to unforeseeable results in individual cases, which are based on the application of the unconstitutional provision. For instance, a decision finding a provision on marriage unconstitutional (for instance because of a contradiction with the principle of equality) would then result in the invalidity of all marriages concluded under this provision. This is, of course, an unacceptable result for society. Therefore, even in states with *ex nunc* effects on the law itself, these effects are regularly excluded for final judgments that do not lose their legal force.

48. In Germany, the decision of the Constitutional Court finding a legal provision null and void does not have the general effect of invalidating final judgments that were based on that provision. According to Article 79 para. 1 and 2 of the Law on the Federal Constitutional Court, "non-appealable decisions based on a legal provision which was voided [...] shall remain unaffected" but "[e]xecution of such a decision is not permissible".

2. Strict *ex nunc* effects

49. The alternative doctrinal concept, *ex nunc* effects, means that the decision of the constitutional court not only identifies an unconstitutional provision that was invalid as from its adoption, but the decision is constitutive and repeals / invalidates the unconstitutional provision.

50. The invalidation of unconstitutional provisions *ex nunc* (in its variants below) is the most common system with regard to the effects of decisions of constitutional courts.²⁰

51. In its strict form, this means that the legal provision that was found unconstitutional remains even applicable to facts that arose before the invalidation entered into force. With the exception of the rule for the instant case (below), decisions of the constitutional court do not influence legal relationships that had been finalised before the publication of the decision. The logic justifying this solution is that legal certainty is given a high priority over individual remedy. In order to provide a remedy in the case which led to the decision of the constitutional court, the rule for the instant case is necessary as an incentive for individuals to appeal to the constitutional court.

52. The Austrian Constitution²¹ established a system of a strict *ex nunc* system with a rule for the instant case. Article 140 para. 7 of the Federal Constitutional Law stipulates that the law

¹⁹ Study on individual access to constitutional justice, CDL-AD(2010)039rev, para. 187; H. Steinberger, Models of Constitutional Jurisdiction, Science and Technique of Democracy, no. 2, p. 19.

²⁰ Study on individual access to constitutional justice, CDL-AD(2010)039rev., para. 190; Decisions of constitutional courts and equivalent bodies and their execution, CDL-INF(2001)009, p. 13.

²¹ Articles 140(5) of the Austrian Constitution provide that the repeal of a law or an ordinance as unconstitutional by the Constitutional Court takes effect from the day when the repeal was

invalidated by the Constitutional Court shall continue to apply to the circumstances effected before the decision of the Court, with the exception of the instant case. The Court may, however, extend the effect of its decision to parallel cases pending before courts or administrative authorities at a certain point in time.

3. Rule for the instant case

53. If the *ex nunc* effect is strictly applied, even though the provision is abrogated by the constitutional court, the rights of the applicant in a case of a (normative or full) constitutional complaint cannot be protected, because the invalidation of the unconstitutional provision only acts *pro futuro*. The unconstitutional provision still has to be applied to the facts of the instant case, the facts of which took place before the decision of the constitutional court.

54. However, an individual who brings a case to the constitutional court that leads to the invalidation of an unconstitutional provision provides a valuable service to the State and to the whole population. This person does not only act in his/her private interest, but in the interest of all citizens. Therefore, this person “merits” better treatment than other citizens, who did not complain to the constitutional court. Otherwise there is no incentive for a private person to bring such a case to a constitutional court.

55. Such preferential treatment is sometimes called the “premium for the catcher”,²² the idea being that citizens are to “hunt” for unconstitutional provisions and the applicant who “catches” the unconstitutional provision receives better treatment.

56. This means that there is a retroactive effect of the decision applying only to the applicant’s case. This should incite people to be the first applicant to appeal to the constitutional court. As a consequence, sometimes, when it becomes known that a case is pending before the constitutional court that is likely to succeed, other persons who are in a similar situation will also, very quickly, bring a complaint in order to benefit from the rule for the instant case. This can lead to a high number of applications that are often merged into joint proceedings.

57. In Korea, for instance, the law only allows for a strict *ex nunc* effect of the decision of the Constitutional Court in non-criminal cases: “(2) Any statute or provision thereof decided as unconstitutional shall lose its effect from the day on which the decision is made. (3) Notwithstanding para. 2, the statutes or provisions thereof relating to criminal penalties shall lose their effect retroactively [...]”.²³ However, the Constitutional Court interpreted the Constitutional Court Act in conformity with the Constitution and allowed retroactive effects of the decision of the Constitutional Court in the applicant’s case. Otherwise, even though the provision which is applied in the case is found unconstitutional, the rights of the applicant could not be protected. The Korean Constitution and the Constitutional Court Act allow the individual constitutional complaint. This means that the Constitutional Court should provide a remedy to successful applicants.

4. Moderate *ex nunc* effect

58. Some countries have a moderate version of the *ex nunc* effect. In this form, the *ex nunc* effect means that only final court judgments remain unaffected by the invalidation of a provision on which they are based. The decision of the constitutional court invalidates the unconstitutional provision as of the date of the pronouncement of the decision. In principle, this provision remains part of the legislation prior to the decision. However, on-going cases and any new cases will be based on the result of the decision of the constitutional court and the

promulgated by the Federal Chancellor or the competent provincial governor (*Landeshauptmann*), unless the Constitutional Court sets another term, which must not exceed 18 months.

²² *Ergreiferprämie* in German.

²³ Article 47 of the Constitutional Court Act of Korea.

unconstitutional provision will no longer be applied, even in cases relating to facts that occurred before the decision. As a consequence, no special rule for the instant case is necessary, because the applicants' final judgment by the ordinary court will be quashed and the new judgment will not be based on the invalidated legal provision.

59. Again, depending on the system, there are two alternatives: final court judgments may remain enforceable or they may remain only formally valid and become unenforceable.

60. Even if the doctrinal approach is different from that of *ex tunc* systems, the practical results of the latter approach are similar to a moderate *ex tunc* logic.

61. In Slovakia, for instance, the decisions of the Constitutional Court have an *ex nunc* effect, but final judgments in civil or administrative matters that were based on a provision found unconstitutional by the Constitutional Court become unenforceable. These judgments remain formally valid, but the obligations imposed by these decisions can no longer be enforced. The obligation for performance deriving from such a judgment becomes a natural obligation, i.e. when the obligation is performed, for instance a certain amount is paid to the other party, the return of this amount cannot be requested, but the payment of the amount could not have been enforced. Non-enforceable judgments or parts of them (e.g. those of a declaratory nature) remain unaffected.²⁴

5. *Ex nunc* systems allowing the constitutional court to define retroactive effects of its decisions

62. In some countries, the constitutional court itself may decide on the effects of a decision finding a legal provision unconstitutional.

63. In the Czech Republic, there is extensive case law on the issue of legal aspects of abstract constitutionality review. Findings of the Constitutional Court are considered constitutive legal acts and have, in principle, *ex nunc* effects. The Constitutional Court ruled that the rule of law principle expressed in Art. 1.1 of the Czech Constitution also includes the principle of legal certainty, which is composed of the principle of protection of trust in the law, and the principle of non-retroactivity, and that the invalidation of an unconstitutional law under Art. 87.1.a of the Constitution is not retroactive.²⁵

64. However, this principle cannot be understood in an absolute and overly formalistic way. In exceptional cases, the Constitutional Court's findings have retroactive effects.²⁶ They are admissible if they are absolutely necessary as a last resort for the purposes of protection of constitutionality and if they do not lead to disproportionate interference in legal certainty, especially in vertical relations if the unconstitutional provision regulates the relationship between a public authority and an individual who would benefit from the invalidation.²⁷

65. The case-law of the Constitutional Court of the Czech Republic admits that when it comes to vertical relationships (between the state and individuals), a finding of unconstitutionality may have retroactive effects, because in vertical relationships it is necessary to give priority to the protection of fundamental rights over legal certainty and trust in the law. *"When declaring an already abrogated law unconstitutional and assessing the previous actions of a public authority in the light of constitutionally compatible legal regulation with ex tunc effects, true retroactivity*

²⁴ Section 41b.2 of the Law on the Constitutional Court.

²⁵ Finding of the Constitutional Court of the Czech Republic ref. IV ÚS 1777/07 of 18 December 2007.

²⁶ Finding of the Constitutional Court of the Czech Republic ref. Pl. ÚS 55/10 of 1 March 2011.

²⁷ VOJÍŘ, P.: Obnovení platnosti zrušeného zákona nálezem Ústavního soudu. *Časopis pro právní vědu a praxi*. [Online]. 2011, č. 2, pages 170-181. [cit. 2018-05-01]. Available at: <https://journals.muni.cz/cpvp/article/view/6378>

*does not constitute violation of the principle of protection of citizens' trust in the law or interference with legal certainty or acquired rights.*²⁸

66. As a result, the rights of third parties could be seen as the limits of the retroactive application of the constitutional court decision when the constitutional court itself can decide on the effects of its own decisions.

6. *Ex nunc* systems with a limitation of retroactive effects in time

67. Armenia has a special position in this respect because Article 68, paragraph 14, of the Law on the Constitutional Court, provides that *"The administrative and judicial acts that were adopted and implemented on the basis of the general acts that were annulled and found unconstitutional [...] within three years before the Constitutional Court decision entered into force shall be revised by the administrative and judicial bodies that adopted those in the procedure stipulated by the Law."* This means that the decisions of the Constitutional Court have a retrospective effect on all ordinary court judgments and administrative decisions taken during the last years before the entry into force of the decision of the Constitutional Court.²⁹

68. In practice, this system is much more retroactive than moderate *ex tunc* systems, which maintain the formal validity of final court judgments, but make them unenforceable.

7. Conclusion on temporal effects

69. Already this brief overview shows that there is a wide variety of systems regulating the effects of constitutional court decisions on final judgments of the ordinary courts that are based on provisions that are found to be unconstitutional. It shows, however, that it is exceptional for final court judgments to lose their validity due to a decision by a Constitutional Court declaring a norm unconstitutional, on which the decision was based. Unenforceability of such judgments is more often accepted.

70. In the past, the Venice Commission showed a slight preference for a combination of a system of invalidation *ex nunc* (including a special rule for the instant case where the system is applied in a strict sense), together with the possibility for the constitutional court to order a retroactive effect if this is required, under certain conditions.

71. In the Opinion on the draft law on the Constitutional Court of Montenegro, the Commission stated: "A general retroactive effect should be avoided as this could have *"very costly and negative effects (also on third parties)"*³⁰ and *"It seems safer to have a general ex nunc effect with the exception of the petitioner who should benefit from the complaint and to leave the determination of possible retrospective effects of an individual complaint to the Court."*³¹ Such a system would give the constitutional court enough flexibility to establish a balance between the principles of individual remedy and legal certainty. However, such a preference does not mean that other systems are not in line with European standards.

²⁸ Finding of the Constitutional Court of the Czech Republic ref. Pl. ÚS 38/06 of 6 February 2007.

²⁹ In its Opinion on Amendments to the Law on the Constitutional Court of Armenia, CDL-AD(2006)017, the Venice Commission suggested "Instead of the fixed three year rule, the Court could be given the powers to determine this period."

³⁰ Opinion No. 479/2008 on the Draft Law of the Constitutional Court of Montenegro, CDL-AD(2008)030, para. 58.

³¹ Opinion on the Draft Law of the Constitutional Court of Montenegro, CDL-AD(2008)030, para. 67 (emphasis in the original).

F. Situation in Georgia

72. In Georgia, the Constitutional Court (CCG) has exclusive jurisdiction for constitutional review. However, the CCG is not authorised to declare judgments of the ordinary courts unconstitutional. The individual constitutional complaints addressed to the CCG³² challenge the constitutionality of a normative act, but not the constitutionality of the application of a normative act. Thus the CCG exercises a normative constitutional complaint, not a full constitutional complaint.

73. It seems that Georgia, in principle, follows a system of invalidation of an unconstitutional provision *ex nunc*. Invalidation takes effect on the date of the publication of the decision of the Constitutional Court.

74. On the face, the law allows only a prospective effect of the decision of the Constitutional Court of Georgia and precludes its retroactive application in non-criminal cases. There is no explicit rule for the instant case, which accompanies direct appeal systems with strict *ex nunc* effects.

75. Without such a “premium for the catcher”, the decision of the Constitutional Court could not have any impact on the case from which the constitutional complaint originated. As a consequence, in order to avoid the existence of a non-remedial remedy, the CCG may well decide to apply the rule for the instant case without an explicit legislative basis. The determination of the precise effects of the decisions of the CCG will be a matter for the Court itself to decide.

76. Considering the wide range of legal systems, it does not fall short of European standards for the decisions of the Georgian Constitutional Court to have an *ex nunc* effect.³³

77. Against this background, it also would not fall short of European standards for Article 423 of the Civil Procedure Code of Georgia to not include decisions of the Constitutional Court as explicit grounds to reopen final judgments.

78. The Georgian legislation does not seem to explicitly give the power to the Constitutional Court to decide on the effects of its decision but again, in the absence of an explicit rule, it will be for the Constitutional Court to decide on that matter. While the Venice Commission is in favour of such a competence for a constitutional court, it cannot be concluded that the exclusion of this competence falls short of European standards.

79. A different assessment seems indicated with regard to preliminary request proceedings. If a legal provision is declared invalid by the Constitutional Court due to a preliminary request by a court, a retroactive effect of the decision applying to the applicant’s case seems evident. The preliminary request would not make any sense if it remained without effect on the case that was brought by the judge *a quo* who concluded “that there is a sufficient ground to deem the law or other normative act, applicable by the court while adjudicating upon the case, fully or partially incompatible with the Constitution”.³⁴ When the Constitutional Court decides that the law or normative act is unconstitutional, the ordinary *a quo* judge will no longer apply the provision that has been declared void by the Constitutional Court.

80. This brings the Georgian system close to systems with a moderate *ex nunc* effect.

³² Article 89.f of the Constitution.

³³ Article 89 para. 2 of the Constitution, Article 23 para. 1 of the Organic Law of the Constitutional Court.

³⁴ Article 19 of the Organic Law on the Constitutional Court.

81. The question of European standards with regard to the reopening of criminal cases due to decisions of constitutional courts may be left open, because Article 310 of the Criminal Procedure Code of Georgia stipulates, in any case, that a judgment shall be reviewed due to newly found circumstances if there exists a decision of the Constitutional Court of Georgia that has found that a criminal law applied in that case is unconstitutional.

IV. Conclusion

82. The request for an *amicus curiae* brief by the President of the Constitutional Court of Georgia refers to best practices relating to effects of final judgments that have been based on a legal provision that was later declared invalid by a constitutional court.

83. The overview provided in this *amicus curiae* brief shows both the variety of systems and the complexity of the matter. In general, it is exceptional for final judgments to lose their validity due to a decision by a Constitutional Court declaring a norm unconstitutional, on which the judgment was based. Unenforceability of such judgments is more often accepted.

84. In view of the variety of systems, this brief avoids giving direct replies to the President's questions, in particular to questions 1.a and 1.b on relations between private persons and the State and between private parties, and instead attempts to identify which models might be relevant for the interpretation of the Georgian legislation by the Constitutional Court of Georgia.

85. It seems that the Georgian legislation provides for an *ex nunc* system, but the legislation does not provide for a direct answer to all the questions related to the effects on final judgments of the ordinary courts that were based on legal provisions that were found unconstitutional by the Constitutional Court.

86. It will be up to the Constitutional Court of Georgia to find, within the limits of the Constitution, a balance between the principles of individual remedy on the one hand and legal certainty on the other, when it interprets the applicable legal provisions.

87. The Venice Commission remains at the disposal of the Constitutional Court and the Georgian authorities for any further assistance they may need.