



**Ivane Javakhishvili Tbilisi State University**  
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## Constitutional Court Decision Pro Futuro Effect and its Development in Georgia

*Article concerns effects of constitutional court decisions in time, more precisely, suspension of rendered decisions enactment (Hereinafter - "Pro Futuro Effect"). The first part of the article discusses development tendencies and characteristics of range of specialized constitutional control countries' Pro Futuro Effect legal and judicial practice. As for the second part, it concerns Pro Futuro Effect of the Constitutional Court of Georgia judicial practice and afterwards, its establishment in normative structure of the Constitution of Georgia.*

*Article's Special attention is dedicated to identification and discussion of Pro Futuro Effect usage legal grounds. In the light of experience of various specialized constitutional control mechanism countries, issues regarding constitutional court decision inactment suspension for concrete term and its determination principle will be reviewed.*

*Study and analysis of various countries experience introduced in the article and so as of Constitutional Court of Georgia practice gives us an opportunity to get specific idea about the basis of operation and need of the Pro Futuro Effect within the constitutional ruling practice. Outcome of the research presented to you as the article, in our reality, contributes to guaranting the usage of Pro Futuro Effect in constitutional ruling practice to be subordinated to right direction of legal logic.*

*Article is based upon analyzing methods of comparative, judicial practice and normative acts.*

**Key Words:** *Constitutional court decision, effect in time, suspension of rendered decisions inactment, Pro Futuro Effect, specialized constitutional control mechanisms.*

### 1. Introduction

Constitutional court decision has Pro Futuro Effect when it states that declared unconstitutional normative act continues to be in legal force for some time in the future which means that the decision will enter in legal force when stated time expires and the time is stated by the decision of constitutional court itself. In the examples of various countries, Pro Futuro Effect is not considered as a general rule from the perspective of national law but constitutional control bodies still use it in specific cases when they see that It is necessary to give time to the lawmakers in order for them to amend declared unconstitutional normative act or if the want to avoid "legislative hunger" or to maintain legal foreseeability principle.

This issue has been urgently raised in lawmaking of Constitutional Court of Georgia because of which we have decided to study Constitutional court decision Pro Futuro Effect. Firstly, we will focus

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\* Doctoral Student at Ivane Javakhishvili Tbilisi State University, Faculty of Law.

on practice of foreign countries in terms of Pro Futuro Effect establishment in their legislation and development of the effect. Afterwards, normative acts and practice of Constitutional Court of Georgia towards Pro Futuro Effect will be reviewed.

Purely for the purposes of terminology matters, it has to be noted that Pro Futuro Effect in Israel is called-“Suspension of annulment declaration” and in France-“Delayed annulment”.<sup>1</sup> Notwithstanding terminology differences, scholars agree to gather those different terminologies under the umbrella of Pro Futuro Effect.

## **2. International Experience**

### **2.1. Federal Republic of Germany**

Germany is one of the countries which applies Federal Constitutional Court (hereinafter-GFCC) decision’s Pro Futuro mechanism. If normative act is declared unconstitutional GFCC establishes deadline for provisional use of the act. GFCC also has power to establish deadline for lawmaker to create new normative act. The deadline’s term hinges upon infringement importance or other emergency circumstance. We have to also take into account complexity of the normative acts which have to be issued and special requirements for the matter to be regulated.<sup>2</sup>

It has to be noted that Pro Futuro mechanism isn’t directly regulated in constitutional justice legislation of Germany. Instead of invalidating normative act GFCC fairly often uses the latter exclusive measure, which, as a matter of principle, is not exclusive any more. From the perspective of retroactivity legal basis of shifting to Pro Futuro function is article 35 of the Law on GFCC according to which: “GFCC is empowered to determine addressee of its decision and in specific cases, it is also entitled to state in its decision method of execution“.

#### **2.1.1. General Basis for Use of Pro Futuro Effect**

According to the GFCC judicial practice usually two alternative circumstances shall exist for GFCC to avoid invalidation of normative act and instead to use Pro Futuro Effect.<sup>3</sup>

- First circumstance appears towards laws which can’t become constitutional only just by invalidation and their “constitutional healing” is only possible by using other way.

- Second circumstance is present when invalidation of normative act appears to be much more conflicting with the constitutional system than provisional application of the unconstitutional law.

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<sup>1</sup> *Millet F. X.*, Temporal Effects of Judicial Decisions in France, the Effects of Judicial Decisions in Time, *Ius Commune Europaeum*, Cambridge, 2014, 114.

<sup>2</sup> *Gertrude L. W.*, The Constitutional Court’s Relationship to Parliament and Government, National Report Prepared for The XV<sup>th</sup> Congress of the Conference of European Constitutional Courts by The Federal Constitutional Court of Germany, 2011, 285.

<sup>3</sup> See there, *Bluggel J.*, Unvereinbarerklärung Normkassation durch das Bundesverfassungsgericht, *Humbolt*, 1998, 3.

### 2.1.2. Tax Cases

A basis for Pro *Futuro* mechanism application, establishment of the practice and the interpretation of abovementioned normative act is also legal safety (GFCC is especially oriented at this matter) for the purpose of giving to the legislator enough time for “soft” shifting from unconstitutional act to constitutional one avoiding sensitive side effects of the process. This matter is especially important for tax legislation where specific public interest such as of fiscal nature does exist. GFCC decisions where Pro *Futuro* mechanism is applied in most cases concerns tax legislation constitutionality issues.<sup>4</sup> According to aforementioned motivations GFCC not once hindered application of Pro *Futuro* Effect when using it would much more mitigate taxpayer’s burden. Beginning of this practice is connected to the GFCC case called “incompatibility” in 1966 where with retroactivity effect Federal lands of Germany were losing 41% of their annual tax income.<sup>5</sup>

Cases of Tax Law, Law on Public Officer and Budget Law prove fiscal reasonableness of GFCC towards legislator and also its preliminarily readiness to safeguard public funds from squandering unconstitutionality and hesitant budgetary outcomes which would result from immediate annulment of unconstitutional act. Accordingly, court highlights that continuing application of unconstitutional<sup>6</sup> tax law act which as well is limited to specific time may be necessary for protecting state’s fiscal activity and stability as a whole.<sup>7</sup>

It has to be also noted that GFCC in some cases inspite of its fiscal reasonableness avoids application of Pro *Futuro* Effect because it doesn’t consider impact of unconstitutionality declaration to be important enough from the perspective of fiscal logic.<sup>8</sup> For example, GFCC in students’ tuition fee (the fee was due and payable at the beginning of each semester) case decided not to use Pro *Futuro* Effect. The court interpreted that party’s financial loss that might result from not using Pro *Futuro* Effect may not justify avoidance of immediate annulment (“Ex Nunc”) taking into account reliable fiscal and budget planning interest. According to the case, accumulated tuition fees were not as important for the budget as to stop the court from applying “Ex Nunc” effect because this kind of decision couldn’t jeopardise fiscal stability.<sup>9</sup>

### 2.1.3. Alternatives to Prevent Unconstitutionality

There are cases suggesting alternative means for preventing unconstitutional situation alongside annulment of unconstitutional act. This usually concerns laws which contradict equality right. The

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<sup>4</sup> *Drinoczi T., Scheider P.*, The Legitimation of a Re-Enactment of Former Law and Temporal Effects of Judgments in a Constitutional Democracy, Comparative Study in the Light of Recent Jurisprudence of Crostias Constitutional Court, 2009, 36.

<sup>5</sup> BVerfGE 21, 12 (p. 39f).

<sup>6</sup> *Schroeder W.*, Temporal Effects of Decisions of the German Federal Constitutional Court, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 28.

<sup>7</sup> BverfGE 3153.

<sup>8</sup> *Schroeder W.*, Temporal Effects of Decisions of the German Federal Constitutional Court, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge 2014, 29.

<sup>9</sup> BverfGE 1733.

right is infringed when substantially equal individuals are treated unequally and substantially unequal individuals are treated equally. When the right is infringed there are usually several ways to solve the problem.

Legal norms discriminating groups of citizens may be expanded or annulled. The third option is abolishment of discrimination by establishing new legal regime based on completely new legal basis. Separation of Powers Principle suggests that it's legislator's prerogative to decide how to manage discriminating legal norm. On the contrary, court has a discretion to only interpret the law not to write one. In these kind of cases GFCC respects legislator's aforementioned basic responsibility to choose from several ways and solve the circumstance causing discriminating situation.

One of the typical example is GFCC's decision on the case regarding law on non-smokers in 2008. The law differentiated between big restaurants and little pubs and bars. The court defined that legislator is entitled to allow or prohibit smoking in public entities and restaurants or to suggest specific exceptions that's why GFCC after declaration of unconstitutionality of the norms of the law left the arena for legislator to solve the problem of differentiation.<sup>10</sup>

#### **2.1.4. Sport Bet Case**

Sport Bet Case of GFCC is one of the most interesting cases which represents attitude of Germany towards applying Pro Futuro Effect. The court has to deliver a judgment on private bookmaker's constitutional claim on the issue whether State Lottery Act of Bavaria was in consistent with Freedom of Work Principle thus, 12th article of Basic Law of Germany. The act provided the monopoly of state lottery (betting) in Bavaria so prohibited betting opportunity for any kind of private party. What's more, betting was considered a crime according to the Criminal Law of Germany. GFCC decided, that the act was inconsistent with the Basic Law of Germany. The court didn't immediately annulled the act but stated that it would be in legal force until 31th of December in 2007 (The Transitional Period).<sup>11</sup>

GFCC defined that legislator had two constitutional ways to enforce the judgment and thus, reselove the problem. Among those ways it was upon legislator to choose. One way was to maintain the monopoly of the state but in this case the legislator would become obliged to manage and fight against gambling problems of Germans. On the other hand, the legislator could liberalise the whole market of betting but in the meantime, effectly control the industry together with the state.<sup>12</sup> GFCC trusted the choise to the legislator.

#### **2.1.5. Public Workers' Wage Case**

The classical older example of application of Pro Futuro Effect is a decision of GFCC on Public Worker's Wage Case.<sup>13</sup> The court stated that the Federal Law on Wages wasn't adequately consistent

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<sup>10</sup> BverfGE 2409, 2419.

<sup>11</sup> BverfGE 1054/01.

<sup>12</sup> *Schroeder W.*, Temporal Effects of Decisions of the German Federal Constitutional Court, *The Effects of Judicial Decisions in Time*, Ius Commune Europaeum, Cambridge, 2014, 25.

<sup>13</sup> BverfGE 1261,1267.

with the minimum living requirements of Public Workers thus, GFCC declared the specific norms of the law unconstitutional. In case the court declared the law unconstitutional immediately, the beneficiaries of the law couldn't have chance to any way claim their wages until the enforcement of judgment because the Basic Law of Germany fully trusted the public worker's wage issues to the existing regulation. GFCC didn't see the opportunity to establish transitional period itself. Thus, declaring the norms unconstitutional together with the application of Pro Futuro Effect guaranteed that public workers wouldn't lose their existing income until revised constitutional regime would come into force.<sup>14</sup> According to the rendered decision of GFCC unconstitutional situation is maintained. Thus, the court avoids "Legal Vacuum" from coming into force as the court calls it itself or "Legal Chaos" as called in legal academic literature. GFCC makes choice in favour of the unconstitutional situation but slightly closer to the constitution than would be in case of a situation not managed and regulated by legal norms at all.<sup>15</sup>

#### **2.1.6. Establishment of Deadlines and Instructions**

In Germany maximum deadlines for Pro Futuro Effect fluctuates between 1 to 2 years but in some case it may be much longer.<sup>16</sup> For example, after declaration of unconstitutionality of one of the norms of the Law on Elections (concerning observation procedures of election process) almost 3 years were granted to the legislator for issuing a new law. Also, there are cases when less than 1 year is applied.<sup>17</sup> GFCC declared unconstitutional norms concerning social benefits and the given deadline for the legislator was less than 11 months for issuing a new regulation. The reason for that was that amounts dedicated to the social benefits concerning living minimum wasn't taken into account in budget.<sup>18</sup>

GFCC decided that the Law on Property Tax has to continue functioning because in that way the Court had avoided undesirable legal outcome that might appear if the Legislator wouldn't do it's job of issuing new rule or couldn't do it within the specified deadline. GFCC stated that the law has to continue being in legal force until 31th of December in 1996. If until the end of transitional period new regulation wouldn't be issued, it's clear that after elapsed term the unconstitutional norm of the law wouldn't be applicable any more and if the tax is collected it would be arbitrarily against the judgment of GFCC.<sup>19</sup>

In some cases GFCC also gives binding instructions concerning the requirements for the legislator that should be taken into account before revision of the unconstitutional act.<sup>20</sup>

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<sup>14</sup> *Schroeder W.*, Temporal Effects of Decisions of the German Federal Constitutional Court, The Effects of Judicial Decisions in Time, *Ius Commune Europaeum*, Cambridge, 2014, 25.

<sup>15</sup> See there, *Schuppert G. F.*, Rigiditat und Flexibilitat von Verfassungsrecht, 1995, 32.

<sup>16</sup> BVerfGE 117.

<sup>17</sup> *Barbateanu V.*, The action in time of constitutional courts, *Journ. Constitutional review constitutional jurisdictions*, 2004, 507.

<sup>18</sup> BVerfG, Judgment of the First Senate of 9 February 2010 – 1 BvL 1/09.

<sup>19</sup> BVerfGE Judgment of the First Senate 93, 121.

<sup>20</sup> BverfGE 2487.

The Court often doesn't fully trust the legislator in terms of how the revisions are made to the unconstitutional act in order for it to become constitutional. For example, in Sport Bet Case GFCC explicitly interpreted "Legal requirements of the Basic Law of Germany according to which new regulations should be adopted" for the legislator.<sup>21</sup>

## **2.2. Republic of France**

Constitutional Council of France also has the right to determine the time which would be initial point for its decisions to come into force which at the same time means for unconstitutional outcomes to become effective. The legal basis for the aforementioned right is 62th article of the Constitution which entitles the Court to set annulment date and also to apply Pro Futuro Effect.<sup>22</sup> What's about the council, from the very beginning we have to identify the difference between the rights-constitutional a priori and constitutional a posteriori.<sup>23</sup>

It has to be noted that the council rarely applies Pro Futuro Effect in terms of its a priori right.<sup>24</sup> For instance, in case of the law on Genetically Modified Products the council delayed coming into force of its decision. The council established 6 months interval for the legislator to have opportunity of resolving unconstitutional problems of the law. The Parliament has quickly fulfilled its obligation of issuing new law which would be in consistent with the Constitution.<sup>25</sup>

From the perspective of the statistics, one of the researcher's numbers are interesting which states that the council applied Pro Futuro Effect at 19% of the cases out of 110 cases which declares partial or full annulment of norms. This numbers are good examples to measure the following: to what intensity is Pro Futuro Effect applied in France.<sup>26</sup>

Amendments in 2008 gave the green light to a posteriori constitutional review. The amendment itself was revolutionary towards legal customs of France. From the start of 1st of March in 2010 Constitutional Court of France has started new era of evolution. The new wording of article 62, part 2 of the Constitution states that in accordance with a posteriori review, unconstitutionally declared norm is annulled from the moment of the judgment's publication or from the date indicated in the judgment.<sup>27</sup> On the basis of the aforementioned rule constitutional council is entitled to decide the issue of time shifting for the annulment effect.<sup>28</sup>

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<sup>21</sup> BverfGE 1054/01.

<sup>22</sup> Constitution of France 4 October 1958.

<sup>23</sup> *Kakhiani G.*, Institute of Constitutional Control and Problems of Its Functioning in Georgia: Analysis of Legislation and Practice, Dissertation, 2008, 26 (in Georgian).

<sup>24</sup> *Sweet A. S.*, The Constitutional Council and the Transformation of the Republic, Journ. Yale Law School Legal Scholarship Repository, 2008, 2.

<sup>25</sup> The French Constitutional Council Decision 2008-564 DC of the 19<sup>th</sup> of June 2008.

<sup>26</sup> *Millet F. X.*, Temporal Effects of Judicial Decisions in France, The Effects of Judicial Decisions in Time, *Ius Commune Europaeum*, Cambridge, 2014, 116.

<sup>27</sup> Constitution of France 4 October 1958, Artiel 62.

<sup>28</sup> *Barbateanu V.*, The Action in Time of the Constitutional Courts, Constitutional Review, Constitutional Jurisdictions, 2004, 508.

Constitutional Council of France has already utilized its right to apply Pro Futuro Effect. By this means the council gave the legislator an opportunity of amending argued norm and thus, avoidance of “Legal Vacuum”. If legislator doesn’t enforce a judgment in given deadline and doesn’t do it’s job of filling up of “Vacuum”, thus, solving the problem of unconstitutionality, the norm declared unconstitutional stops being in legal force automatically which should be somewhat considered as sanction towards legislator.

For example, from the aforementioned perspective interesting judgment of Constitutional Council of France is about norms providing pension of soldiers which lost french citizenship in result of decolonization. The council decided that the norms declared unconstitutional should stay in legal force until 1st of January in 2011.<sup>29</sup>

### **2.2.1. General Motivation of the Constitutional Council for Applying Pro Futuro Effect**

There are several reasons for applying Pro Futuro Effect, thus, utilizing the right guaranteed by the Constitution rather than immediate annulment of the act by the constitutional council.<sup>30</sup> The delayed time usually fluctuates between 3 to 17 months. The main motivation behind this tactic for the council is not to interfere in legislator’s competence. The council always tries to show its institutional respect towards the parliament. What’s about other reasons, from the short-term perspective an immediate annulment might have much more damaging results than provisional maintaining of unconstitutional act would have. As a rule, in such cases the constitutional council between rule of law and foreseeability principles makes choice in favour of the latter.<sup>31</sup>

It’s legislator’s competence to fill up the unconstitutional act. According to this principle, the council is always careful not to intervene in legislator’s prerogative so to be safe from being blamed for exceeding its powers. Thus, the court often prefers to apply Pro Futuro Effect and to determine transitional measures itself rather than the immediate annulment. By this means the court upholds its decision and states that a court doesn’t have as much general power of review as it has a legislator. The council especially showed this attitude in criminal justice cases. For example, in its well-known case by annulment of the law regulating arrestment the council decided that “It’s not the council’s discretion to make changes to the rules concerning criminal procedures in order to compensate existing unconstitutional situation”.<sup>32</sup> The same approach was showed in case called Names of Internet Domains where judges<sup>33</sup> applied the following argument: “The council isn’t obliged to determine principles of civil and commercial obligations which is able overcome unconstitutionality of a normative act”.<sup>34</sup>

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<sup>29</sup> The French Constitutional Council Decision 2010-1 QPC of the 28<sup>th</sup> of May 2010.

<sup>30</sup> The French Constitutional Council Decision 2012-268 QPC of the 27<sup>th</sup> of July 2012.

<sup>31</sup> *Millet F. X.*, Temporal Effects of Judicial Decisions in France, *The Effects of Judicial Decisions in Time*, Ius Commune Europaeum, Cambridge, 2014, 116.

<sup>32</sup> The French Constitutional Council Decision 2010-14/22 QPC of the 30<sup>th</sup> of July 2010.

The French Constitutional Council Decision 2010-32 QPC of the 22<sup>th</sup> of September 2010.

<sup>33</sup> The French Constitutional Council Decision 2010-45 QPC of the 6 October 2010.

<sup>34</sup> *Millet F. X.*, Temporal Effects of Judicial Decisions in France, *The Effects of Judicial Decisions in Time*, Ius Commune Europaeum, Cambridge, 2014, 117.



### 2.2.2. Landmark Case

In France landmark case in which the council initially established its area of power towards Pro Futuro Effect is considered the case rendered in 25 March of 2011.<sup>35</sup>

In the aforementioned case judges reviewed the code on civil and military pensions which set up right on heir's pension when it was more than one successors from various families. In case of being at least two families with one or more adoptees the argued norm stated that from the perspective of dividing of the heritage on equal parts between families number of their adoptees shouldn't be taken into consideration. The members of the council decided that the argued act infringed the equality principle. They have also decided to apply Pro Futuro Effect during 9 months in order for the legislator to have time for reconsidering the act. Annulment delay is closely connected to the Separation of Powers Doctrine. Often, respect to a legislator appears in connection with the presence of competitive interests which has to be balanced towards constitutional rights being at stake.<sup>36</sup>

The aforementioned decision mainly is based upon the circumstance that the council didn't have such power as has the legislator and declaration of unconstitutionality of the argued act for the adoptee would have the effect of annulment of its granted rights (already existing social aid is implied)<sup>37</sup>. If the court would have decided otherwise, thus, not have used Pro Futuro Effect which also means that it had immediately declared the argued act unconstitutional we would have been in the "Legal Vacuum" mentioned above and at the same time the claimant would have lost its pension until readoption of the new act.<sup>38</sup>

### 2.3. Republic of Austria

In Austria the Constitution dated in 1920 centralized reviewing of normative acts in one constitutional court. At that time, the court had already had the power of applying Pro Futuro Effect.<sup>39</sup> Initially, application of Pro Futuro Effect was limited up to 6 months. Later, in 1929 the term prolonged to 1 year and in 1992 to-18 months.<sup>40</sup>

In spite of legislation on constitutional court of Austria directly stating as a rule ex nunc effect application for decisions, in fact (at this point, dominant idea of Austrian system is "Legal Reliance"), Constitutional Court of Austria in almost half of its so called "annulling" decisions applies Pro Futuro Effect instead of ex nunc effect (application of Pro Futuro Effect is an exception rather than a rule).<sup>41</sup>

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<sup>35</sup> The French Constitutional Council Decision 2010-108 QPC of the 25<sup>th</sup> of 25 March 2011.

<sup>36</sup> See there.

<sup>37</sup> It is Interestingly, when using the Pro Futuro mechanism for the right to equality, a similar practice has been established in Georgia, which we will discuss below.

<sup>38</sup> *Millet F. X.*, Temporal Effects of Judicial Decisions in France, *The Effects of Judicial Decisions in Time*, Ius Commune Europaeum, Cambridge, 2014, 120.

<sup>39</sup> *Stelzer M.*, *The Constitution of the Republic of Austria: A Contextual Analyses*, Hart Publication, 2011, 176.

<sup>40</sup> *Stelzer M.*, Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria, *The Effects of Judicial Decisions in Time*, Ius Commune Europaeum, Cambridge, 2014, 64.

<sup>41</sup> *Popelier P., Verstraelen S., Vanheule D., Vanlerberghe B.*, *The Effect of Judicial Decisions in Time: Comparative Notes*, Ius Commune Europaeum, Cambridge, 2014, 7.

Applying Pro Futuro Effect on annulling decisions by Constitutional Court of Austria means that a judgement while enforcing is formulated with a priori constitutional regulation of positive legislator which signifies that the final result of annulling decision of the constitutional court is present by means of annulling unconstitutional norm with adopting a new one which has to be done by the constitutional court in specified deadlines.<sup>42</sup> In terms of procedural nuance, also interesting fact is that the constitution entitles the constitutional court to establish Pro Futuro Effect and specific deadline if it considers being necessary which doesn't need a motion from a respondent.

### **2.3.1. Respodent's Interest Towards Applying Pro Futuro Effect**

According to Austrian researchers the government of Austria requires from the constitutional court to apply Pro Futuro Effect on the regular basis. The reason for that as the government itself states is that the reforms are needed to make certain legal norm constitutional and at the same time by this means "Black Holes" in legislation are avoided. As a requirement from the government concerns idea of time establishment right the court appears to be excited to accept the requirement as somewhat compensation for losing a case. In the constitutional court judicial practice there are only several cases when the court strictly stated that annulment delay and detailed setting of legal measures weren't manifestly<sup>43</sup> necessary or weren't taken into consideration in specific cases.<sup>44</sup> Despite of this the court almost regularly sets time. Setting of time is managed by the exact date or in some cases there is time period appointed which is limited to 18 months. The court often gets criticized for intensive time setting and especially for not giving reasons and argumentation for this kind of actions.<sup>45</sup> Year 1929 revision of the Constitution requires for the court to determine specific reasons for time setting. By refusing this requirement the court obviously infringes initial idea of Pro Futuro Effect and applies it more as a rule than an exception.<sup>46</sup>

Local researchers also state that taking into consideration all aforementioned, the court's approach in the last decade towards several cases was much more careful. They bring an example of a case in which the court refused to apply Pro Futuro Effect in spite of demand of the government.<sup>47</sup> In this case, the act declared unconstitutional not only wasn't consistant with the constitution but also infringed constitutional principles of rule of law and democracy.<sup>48</sup> What's more, the court at least in several cases respected obligations of Austria coming from the contract with European Court of Human Rights by refusing the demand of the government to apply Pro Futuro Effect. The court with

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<sup>42</sup> *Haller H.*, Die Prufung von Gesetz. Ein Beitrag zur verfassungsgerichtlichen Normenkontrolle, Springer Verlag, 1979, 248.

<sup>43</sup> VFSLG 18603/2008.

<sup>44</sup> VFSLG 12649/1991.

<sup>45</sup> *Stelzer M.*, Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria, The Effects of Judicial Decisions in Time, Ius Commune Europaeum, Cambridge, 2014, 68.

<sup>46</sup> See there, 69.

<sup>47</sup> VFSIG 16327/2001; VFSIG 17394/2004.

<sup>48</sup> VFSIG 15488/1999; VFSIG 11646/1988; VFSIG 11591/1987; VFSIG 15129/1988; VFSIG 12649/1991.

this decision to some extent took into account international obligations of Austria. In a case similar to aforementioned, the court decided that demanded term should be reduced to 6 months.<sup>49</sup>

### **2.3.2. Drawbacks of Pro Futuro Effect**

Taking into consideration of the fact that in Austria researchers criticize the constitutional court for applying Pro Futuro Effect. Specifically, they think that by means of applying the effect by the court it gives some kind of compensation to the legislator for lost case. Therefore, the legislator wins time and has opportunity to revise the act found unconstitutional in calm manner in parallel to the infringement of the constitutional rights. Because of all this, functions of constitutional control bodies in Austria become at stake.

Stating that in Austria applying Pro Futuro Effect from an exception became a rule is quite fair and this is also shown by statistics. According to the last decade's research (2002-11): the court applied Pro Futuro Effect in 103 cases out of 213 which is almost 50% of total cases. In 2010, when the court applied the effect most actively, there were 13 cases in favour of applying Pro Futuro Effect out of 16 which amounts to 80% of total cases. In 2004, the court used the effect more moderately and the result was 10 cases out of 35 which amounts to almost 30% of total cases. It is hard to imagine that all of the cases even in 2004 were exceptions.<sup>50</sup>

#### **Schedule №1**

Statistics of normative acts' annulment delay by Constitutional Court of Austria, reviewed period (years 2002-2011)<sup>51</sup>

<b>Years</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
Fully satisfied/ partially satisfied	30	26	35	23	23	19	14	7	16	20
Delayed	19	15	10	8	10	7	7	3	13	11

### **3. Establishment of Applying The Pro Futuro Effect by Constitutional Court of Georgia**

The legislation on the Constitutional Court of Georgia didn't provide for The Pro Futuro Effect since its establishment till 2018. More than two decades were necessary for Georgian constitutional justice for the implementation of The Pro Futuro Effect. First steps in this regard were made in 2002 when the second and third paragraphs of article 25 of the organic "Law on Constitutional Court" were formed as follows:

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<sup>49</sup> *Stelzer M.*, Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria, *The Effects of Judicial Decisions in Time, Ius Commune Europaeum*, Cambridge, 2014, 69.

<sup>50</sup> See there, 67, 75.

<sup>51</sup> See there, 75.

1. “A legal act or its part declared as unconstitutional shall become void from the promulgation of a relevant judgement of the Constitutional Court, unless a different time limit is set by the law”.<sup>52</sup>
2. ”An act of the Constitutional Court must be enforced immediately after promulgation unless a different time limit is set in the act”.<sup>53</sup>

According to these revisions the court was entitled to apply The Pro Futuro Effect but at the same time its decision was enforceable from the moment of its announcement. As we have already mentioned above, with these contradictory norms the court functioned for a long time and because of that realization of constitutional justice, also principles of rule of law and legal security faced serious problems.

What’s more, application of The Pro Futuro Effect by the court was hindered by Article 89, paragraph 2 of the Constitution of Georgia which stated that a judgement of the Constitutional court of Georgia was final and legal act or its part declared as unconstitutional became void from the promulgation of a relevant judgement of the Constitutional Court.<sup>54</sup> By means of the constitutional reform in 2017, paragraph 5th of the article 60 of the constitution newly stated that “An act or a part thereof that has been recognized as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof”.<sup>55</sup> It can be considered that the latter constitutional revision has established the normative basis for applying The Pro Futuro Effect. The important impact on starting this reform was made by practician lawyers’ and researchers’ opinions stated in various international conferences and scientific researches.<sup>56</sup>

The court’s judgement has two different outcomes. Often, with a declaration of unconstitutionality a legislator doesn’t need to adopt a new law because a declaration of unconstitutionality of a legal norm itself is enough for the prevention of future infringement of constitutional rights.<sup>57</sup> In specific cases, after the annulment of the argued legal norm it is also necessary for a new act to be adopted which will regulate legal relationships as to become inconsistent with the Constitution.

Georgian practician lawyers indicate on the organic law on ”Constitutional Court of Georgia”, paragraph 3 of the article 25, regarding aforementioned second option and state that a process of lawmaking, objectively, needs some time, that’s why immediate enforcement obligation can’t create a reasonable expectation for a legislator to enforce these changes second or third day after the promulgation of judgment. Nevertheless, legislative changes need to be made in a reasonable time. In

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<sup>52</sup> Organic Law of Georgia on the Constitutional Court, Article 25, Paragraph 2, Parliamentary Agencies of Georgia №001, 31/01/1996.

<sup>53</sup> See there, article 25, paragraph 3.

<sup>54</sup> See there, article 89, paragraph 3.

<sup>55</sup> See there, article 60, paragraph 5.

<sup>56</sup> *Babeki V., Fishi S., Reichenberger Ts.*, Revision of the Constitution - Georgia's Road to Europe, 2012, 172 (in Georgian).

<sup>57</sup> *Eremadze K.*, Problems Related to the Issue of Legal Force of the Decision of the Constitutional Court of Georgia, *Journ. Review of Constitutional Law*, 2012, 6<sup>th</sup> ed., 18 (in Georgian).

any case, it's interesting what would be the future of specific legal relationships before adopting changes even if they would be issued by a legislator in a limited and reasonable timeframe (but, in certain cases, it can objectively take a long time because of possible complicated nature of an act or maybe because of a possible disagreement between political powers). In this case the reality is that an unconstitutional act is already annulled and a new one isn't yet adopted. How should legal relationships be continued and what practical power does a decision of the Constitutional Court have?<sup>58</sup>

Corresponding the aforementioned legal matter, until 2017 there wasn't any solution to the problem in the legislation on constitutional control but despite this fact, there were examples from the practice of the Constitutional Court where the court itself tried to find the most acceptable and right way.

### **3.1. Initial Practice of the Constitutional Court of Georgia**

The very first attempt of the Constitutional Court of Georgia regarding the aforementioned matter is connected with the case called "Shalva Natelashvili Case"<sup>59</sup> where the court declared partial unconstitutionality of the resolution adopted on 15 September 2002 by the Energy Regulatory National Committee of Georgia (SEMEK) regarding electricity tariffs. The part of the resolution which concerned electricity tariffs' procurement for the Georgian population and "Electricity Fee Payment Rule According to the Fixed Tariff" adopted by SEMEK's resolution of 31 December, 2001 was declared unconstitutional.

The problematic issue was that declaration of unconstitutionality of the act regulating electricity tariffs would have caused the abolishment of the tariffs itself until a new normative act was adopted. Thus, the electricity supply would have been terminated to the Georgian population until a new tariff was set. That's why the court tried to resolve the problem by stating in the decision that the argued act is declared unconstitutional from the moment of the decision's promulgation and in addition to this, the court granted to the legislator 2 months for the setting of new tariffs, thus it applied The Pro Futuro Effect.

Therefore, the court formally didn't infringe the obligation of the Constitution and the law concerning time for enforcement of decisions and annulment of an act declared unconstitutional, by stating these requirements in its decision but meanwhile the court also applied The Pro Futuro Effect as not doing so can cause an infringement of the rights of the Georgian population and thus, in reality, the court prolonged operation of acts declared unconstitutional.<sup>60</sup>

The aforementioned decision was criticized a lot because according to the legislation applicable at that time, the court wasn't empowered by the right of applying The Pro Futuro Effect. The organic law on "Constitutional Court of Georgia", specifically, paragraph 3 of article 25 grants the right to the

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<sup>58</sup> See there, 19.

<sup>59</sup> Decision of the Constitutional Court of Georgia of December 30, 2002, №1 / 3/136.

<sup>60</sup> *Eremadze K.*, Problems Related to the Issue of Legal Force of the Decision of the Constitutional Court of Georgia, *Journ. Review of Constitutional Law*, 2012, 6<sup>th</sup> ed., 19 (in Georgian).

court of delaying to render a decision but not to delay an annulment of an act declared unconstitutional.

It has to be noted that the aforementioned problematic issue concerning the application of The Pro Futuro Effect was known to the court as well that's why in its decision following the mentioned case the court still applied The Pro Futuro Effect but not indicated at the organic law on "Constitutional Court of Georgia", paragraph 3 of article 25 at all.

The Constitutional Court of Georgia in its 29th January of 2003 N2/3/182, 185, 191 cases called "Georgian citizens Firuz Beriashvili, Revaz Jimsherishvili and Public Defender of Georgia against the Georgian Parliament" declared unconstitutional several norms of criminal procedure code concerning arresting of a person and its right to defense. It was inevitable for the argued norms to be declared unconstitutional as long as they caused infringement of constitutional rights. Though, at the same time, the court acknowledged that argued norms like most of the norms of the Criminal Procedure Code were applicable in every minute towards the unspecified circle of persons. That's why the argued norms needed to exist in order to avoid on the part of the legislator while in a legal vacuum a possibility of abuse of power, thus concluding with infringement of constitutional rights granted to the people. The court granted to the legislator reasonable time (3 months) for adequate regulation of these matters but it wasn't clear whether the court meant to keep the application for legal norms declared unconstitutional until adoption of new ones just like it did in the previous case. What's more, the court didn't state in its decision about the annulment of the normative act declared unconstitutional.<sup>61</sup>

Notwithstanding the aforementioned issues, the Constitutional Court of Georgia established the practice of applying The Pro Futuro Effect towards legal acts declared unconstitutional. Examples of this are decisions rendered until 16th of December, 2018 which is the time before legal activation of The Pro Futuro Effect towards decisions of the Court. It is interesting that in aforementioned decisions the court indicated at the paragraph 3 of the article of the "Organic Law on Constitutional Court" as the legal basis for application of the The Pro Futuro Effect in spite of the fact that this legal norm's regulatory purpose was clear not to be application of The Pro Futuro Effect.

### **3.2. Basic Motivation of the Constitutional Court of Georgia for Applying The Pro Futuro Effect**

The motivation of the Constitutional Court of Georgia when applying The Pro Futuro Effect basically stands for avoiding "legal vacuum" and to grant an opportunity to the legislator according to public, private interests to enforce a decision of the court in a reasonable timeframe and in accordance with the Constitution. For instance, in the "Case of 112"<sup>62</sup> the court took into account the circumstance the basic source for the "LEPL 112" was the tariffs payed by the Georgian population by cutting off amounts from their telephone balance. Purely to avoid ceasing of the main financing source for this important public authority the court applied The Pro Futuro Effect, thus, it gave a time for the state to search for alternative sources. Also, in one of the cases the court directly stated that the immediate annulment of the argued norms at the time of promulgation of the decision may cause negative effect

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<sup>61</sup> See there, 20.

<sup>62</sup> Decision of the Constitutional Court of Georgia of July 5, 2019 №2 / 3/1279.

for the market of defending service and for its customers. Therefore, the legislator has to be granted to a reasonable time for resolving the aforementioned issue in consistent with the Constitution. The court also could take into consideration the approach of the GFCC according to the “Student Tuition Fee Case”.<sup>63</sup> Thus, the court could take into account the amount of the unearned income and according to this approach it could have thought on not applying The Pro Futuro Effect. Therefore, customers won’t be in a situation where 112 tariffs are cut off on the basis of the unconstitutional legal norm lasting for a half of the year.

### **3.3. New Practice of the Constitutional Court of Georgia**

The Constitutional Court of Georgia in the “Zero Auction Case”<sup>64</sup> also stated that the immediate annulment of the argued act until solving its problem of consistency with the Constitution would cause the second repetitive auction (including the property on which transitional property rights disappear after realization) impossible to be held which may infringe rights of participants of the enforcement procedure. Therefore, the court considers that the Minister of Justice of Georgia should be given a reasonable time for resolving unconstitutional matters towards concrete auction procedures.<sup>65</sup>

The court in “Justices’ Disciplinary Proceeding Case”<sup>66</sup> also stated that in case of immediate annulment of the argued legal norms there will be the situation when disciplinary measures can’t be applied against justices until legal norms declared unconstitutional won’t become consistent with the Constitution. The impossibility of applying disciplinary measures against judges isn’t a demand of claimant and also, it isn’t the purpose of the court for declaration of unconstitutionality of argued norms. Therefore, the court considers that the legislator has to be given a reasonable time for resolving the problem of the rule according to which judges are dismissed from their duties.<sup>67</sup>

The interesting practice<sup>68</sup> of the court has been also established towards the article 14 of the Constitution (Nowadays, the article 11 of the Constitution). When unconstitutional legal norm grants inappropriate privilege to one party or vice versa, the court states that it’s the legislator’s discretion to decide in favour of one of ways for removing inequality. Specifically, whether it empowers second party with the same privilege or ceases the favoured party’s privilege. In these kinds of cases the court states that it isn’t a positive legislator and that’s why the court applies The Pro Futuro Effect, thus granting the right to the legislator to choose which way to move forward in terms of removing inequality. It’s interesting that the GFCC has a similar practice towards the equality right and so does the Constitutional Council of France and the Supreme Tax Court of the Netherlands.<sup>69</sup> In latter’s cases

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<sup>63</sup> Decision of the Constitutional Court of Georgia of December 14, 2018 №2 / 11/747.

<sup>64</sup> Decision of the Constitutional Court of Georgia of May 28, 2019 №2 / 2/867.

<sup>65</sup> See there.

<sup>66</sup> decision of the Constitutional Court of Georgia of November 16, 2017 №2 / 5/658

<sup>67</sup> See there.

<sup>68</sup> Decision of the Constitutional Court of Georgia of December 14, 2018 №2 / 13 / 1234,1235.

Decision of the Constitutional Court of Georgia of July 2018 №1 / 2/671.

Decision of the Constitutional Court of Georgia of April 18, 2019 №1 / 1/655.

<sup>69</sup> BNB 1999/271, 12 May 1999; BNB 2006/322, 11 August 2006.

it's clear that when infringement of the equality right appears the court lets a legislator to choose how to solve this problem. This kind of approach also is applied towards the Tax Law in terms of applying of the The Pro Futuro Effect.<sup>70</sup>

In the judicial practice of the Constitutional Court of Georgia we can find cases when the court applied the paragraph 3 of the article 25 of the “Organic law on Constitutional Court” in its initial content and delayed enforcement of a decision without delaying annulment of legal norms declared unconstitutional. The same issues were present in cases of “Gelbakhiani, Nikolaishvili, Silagadze”<sup>71</sup> and “Hearings”.<sup>72</sup>

#### **Schedule №2**

Statistics of normative acts' annulment delay by Constitutional Court of Georgia, reviewed period (years 2014-2019, September)

<b>Years</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>
Fully satisfied/ partially satisfied	11	9	12	18	14	9
Delayed	2	0	1	4	6	5

#### **4. Conclusion**

Analysing legal acts and judicial practices of several countries show that a fairly considerable part of Specific Constitutional Control countries including Georgia came into the conclusion that it's crucial to establish flexibility in time which means taking action towards legal mechanism implementation for The Pro Futuro Effect.

Such a delay of enforcement of an act of a constitutional control organ in which annuls outcomes of decisions of constitutional courts may from time to time be applicable when neat restoration of unconstitutionality has a priority towards immediate annulment of an argued act. Constitutional Courts while applying The Pro Futuro Effect also take into account a risk of immediate annulment of an argued act. The balance between constitutional values is always taken into account and what's about human rights and freedoms providing their guarantor-legal stability is a permanent purpose for the constitutional jurisdiction.

Clearly the decision of a constitutional court shouldn't infringe public or private interests. When a court based on proportionality principle and after a thorough examination of private and public interests, would conclude that an act is unconstitutional it has to render this kind of decision because if

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<sup>70</sup> *Gribnau H., Lubbers A.*, The Temporal Effect of Dutch Tax Court Decisions, The Effects of Judicial Decisions in Time, *Ius Commune Europaeum*, Cambridge, 2014, 191.

<sup>71</sup> Decision of the Constitutional Court of Georgia of November 13, 2014 №1 / 4 / 557,576.

<sup>72</sup> Decision of the Constitutional Court of Georgia of April 14, 201 №1 / 1/625, 640.



not a court itself would infringe the Constitution. Despite the aforementioned, this kind of “right” decision shouldn’t create much more serious problems in terms of infringing human rights or public interests.

According to the aforementioned review of legislation and judicial practices of various countries we can put out the cases where a court considers that applying the Pro Futuro Effect, thus, maintaining unconstitutional legal norms for some time, is much less harmful than applying ex nunc effect. These kind of cases are as follows:

- The Situation according to which by the annulment of a legal norm “legal vacuum” is created which jeopardizes legal security and leaves concrete legal relationship out of any kind of regulation at all;
- Annulment of tax legislation norms which jeopardize state fiscal discipline and its firmness;
- Declaration of unconstitutionality towards the equality right when it becomes a positive legislator’s discretion to choose which way to be favored in terms of restoration of the equality right;
- Also, cases when a decision of a court isn’t self-enforceable and enforcement issues are shifted towards legislator.

Based on reviewed countries examples a general approach of granting to a legislator a certain time for applying appropriate measures is revealed. As it appears, the time fluctuates between 5 months and 2 years. Also, it has been revealed that constitutional control bodies not almost trust a legislator’s good faith towards a decision’s appropriate enforcement. In their decisions they indicate obligatory instructions which have to be definitely taken into consideration on the side of a legislator when adopting a new regulation.

Together with the issue of The Pro Futuro Effect of decisions of a constitutional court and in the example of Austria it has been revealed that this mechanism can also have side-effects which should be also regarded as a bad example. The bad example in the case of Austria was that application of the Pro Futuro Effect has been like a reverence towards a losing party-the legislator. Another disadvantage of the effect in case of Austria was that according to the statistics (the court applied The Pro Futuro Effect in 103 cases out of 213 which is almost 50% of total cases) application of the Pro Futuro Effect from an exception became a rule which is inadmissible from the perspective of the Austrian legislation.

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