

*Law*

## Constitutional Court Supervision of Georgia's International Treaties

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**ABSTRACT.** The jurisdiction of the Constitutional Court of Georgia extends to all types of international treaties. The Constitutional Court of Georgia carries out supervision of international treaties both in advance (preventive) and subsequently (repressive).

In the case of finding an international treaty unconstitutional, it is advisable to set a legal date after the expiry of which the international treaty, recognized as unconstitutional, will lose force. During this term state bodies will be enabled to carry out appropriate procedures towards denouncing the international treaty. © 2013 Bull. Georg. Natl. Acad. Sci.

*Key words:* Constitutional Court of Georgia, international treaties.

Supervision of Georgia's international treaties is the competence of the Constitutional Court of Georgia. According to the basic law of Georgia, the Constitutional Court of Georgia "Considers disputes connected with questions of the Constitutionality of treaties and international agreements (subclause "e" of the first clause of Article 89). Legislative definition of this competence is given also in the organic law". On the Constitutional Law of Georgia [1: 86-130], according to which, on the basis of a constitutional suit or constitutional submission it is empowered to consider and decide "the question of the Constitutionality of international treaties and agreements" (subclause "b" of clause 1 of Article 19).

According to international-legal Acts [2: 90-120], and national legislation [3: 24-42], an agreement concluded in written form with a foreign state(s) or organization(s) is considered an international treaty

which is regulated by norms of international law, irrespective of whether it is presented by a single or several interconnected documents and irrespective of its concrete name.

The above definition of an international treaty contains several conceptual features without which an act concluded by Georgia will not be considered an international treaty. Namely, an international treaty must be concluded with relevant subjects - states or international organizations (1), in written form (2); it must be the manifestation of the will of two or more subjects of international law - an agreement, which rules out unilateral acts of the states (3), it represents the object of regulation by international law, which means that the rule of concluding a treaty, implementation and obligation is ordered only by international law norms and intra-state law will not affect the legal validity of an international treaty (4) (It should be

noted that it is according to this feature that international treaties are demarcated from political agreements between states and from treaties that are regulated by different intra-state legal names of one of the countries) [4: 20-23]. Incidentally, the number and name of interrelated documents concluded as a treaty are irrelevant. The latter two characteristics, namely the quantity of documents and their names, do not constitute conceptual features of an international treaty, for as justly noted in legal literature, it is impossible to consider the act as an international treaty, on their basis. They have no essential impact on the legal nature or force [5: 91,92; 4: 45-48] of an act concluded between the subjects. Bearing this in mind, the legislative definition of the competence of Georgia's Constitutional Court under discussion is wrong, in my view, and calls for specification. The function word "or" must not be used in it, for "treaty" and "agreement" in this context are terms of equal value. As I have noted above, both in the Georgian law "about Georgia's International Treaty" and in the 1969 Vienna Convention it is pointed out that terms denoting a treaty are not of essential significance for the concept of treaty and it may be expressed under different names: treaty, agreement, convention, pact, charter, etc. Hence the use of the function word "or" in this case creates the impression of 'treaty' and 'agreement' being different international legal acts, which is wrong. Unlike law, the statement of the Georgian Constitution on this authority of the Constitutional Court is relatively more precise, in which the two terms, 'treaty' and "agreement" are represented with the function word "and" ("e" subclause of clause one of Article 89). In my view in order to avoid terminological misunderstanding, it will be advisable to formulate the legislative definition of the indicated competence of the Constitutional Court in the following way: "discussion of the issue of the constitutionality of international treaties".

True, the above criteria do allow clause 2 of Article 65 of the Constitution of Georgia to determine which an international agreement concluded between

subjects of international law will be considered an international treaty, yet for an international treaty to be authentic it is necessary for it to be a valid act, not opposed to the basic principles of international law. Otherwise, such a treaty will be declared null and void and will not create the rights and duties envisaged by the treaty: The 1969 Vienna Convention gives an exhaustive list of the bases of international treaties becoming null and void, namely, if the treaty is concluded through force or the threat of use of force, by deception, bribery, etc. Also if it contradicts the imperative norms of general international law (*ius cogens*) [6].

If an agreement concluded between subjects of international law meets all the above demands, then it will be considered a full-valued international treaty. But in order for an international treaty to give rise to the rights and duties envisaged for the parties to the treaty it should be made operative or come into force. According to the Vienna 1969 Convention, the rule and date of a convention coming into force is decided by agreement among the states party to the treaty participating in the talks. If such date or agreed rule is not defined, then the treaty comes into force when all the state participants of the talks express their consent to the treaty being mandatory for them (first and second clauses of article 24). For its part, consent to the treaty being mandatory may be expressed by signing the treaty, exchanging of the instruments that make up the treaty, ratification of the treaty, its acceptance confirmation, accession to it or in any other means to which the states participating in the negotiations agree (Article 11). By coming into force an international treaty becomes operative and hence mandatory for all participants, who must observe it in good faith (the principle: *pacta sunt servanda*).

An international treaty generates obligations with respect to the entire state as the subject of international law, non-fulfillment of which will entail the state's international law responsibility. Hence, as said above, in conformity with the principle *pacta*

*sunt servanda*, the state is obligated at the intrastate level, to take all measures to implement the international treaty. At the same time according to the Vienna Convention of 1969, a state cannot refer to the propositions of its own intrastate law in justification of the non-fulfillment of an international treaty (Article 27). If the norms of the national law contradict the propositions of an international treaty, the state is obliged to alter these norms and make them conformable to the demands of an international treaty. As a rule, the techniques of incorporating international treaties in the system of intrastate law are defined by the country's constitution and other legislative acts. Georgia is assigned to the category of countries that automatically confer legal intrastate force on an international treaty [4: 156]. According to the Georgian Constitution "Georgia's" international treaty or agreement, if it does not contradict the Georgian Constitution, constitutional agreement, has priority force with respect to intra-state normative acts" (clause 2 of Article 6) - This norm of the Constitution, as rightly noted in legal literature, serves two purposes: on the one hand, it ensures the incorporation of international treaties in the system of Georgian law and their direct operation, and on the other, defines the place of international treaties in the hierarchies of Georgian normative acts - their legal force [4: 157]. True, this norm of the Constitution does not point out directly that an international treaty is a constituent part of the Georgian Constitution, but in comparison (apart from the constitution and constitutional agreement), conferring priority legal force to it would lose sense were it not implied to be a constituent part of the system of Georgian normative acts. The ground for any different view on this issue is fully ruled out by the law on "Georgia's International Treaties", in which, along with reiteration of the above proposition, it is directly indicated that "Georgia's international treaty is an inalienable part of the Georgian Constitution" (clause one of Article 6). Here there is also an indication on their direct op-

eration, with a stipulation, namely, officially published propositions of Georgia's international treaties, which determine the rights and obligations of concrete character operate directly in Georgia if they do not need the adoption or specifying intra-state normative act (clause 3 of Article 6). Although the above propositions of the law "On Georgia's International Treaties" fully convey the spirit of the Georgian Constitution regarding the legal force and operation of international treaties, it (its clause one of Article 6) is still not stated correctly.

It should be noted from the start that an international treaty is not part of Georgian legislation but part of intra-state law. The Georgian law "On Normative Acts" gives an exhaustive list of the normative acts that belong to Georgian legislation. It says, in particular, that Georgian legislation consists only of legislative acts and bylaws (clause one of Article 7). As is seen from this law, an international treaty is neither a legislative law nor a bylaw. Therefore, it cannot be a constituent part of legislation. The Law on Normative Acts per se assigns an international treaty to normative acts, giving it a place defined by the Constitution of Georgia in the hierarchy of normative acts, without considering it as part of legislation.

In my view, in this case the legislator acted correctly, for an international treaty is a specific variety differing from legislative acts and bylaws. Leaving aside the existing historical structures and functional differences [7: 20,21; 8: 45], it will suffice to note that by the effective legislation only those legal normative acts will be considered legislative acts and bylaws that are adopted by the Georgian Constitution and other legislative acts by observing the procedures determined for them. This demand is not met by international treaties, for quite different rules are laid down for their preparation, passage, coming into force and abrogation. Hence an international treaty is a constituent part of Georgia's normative system of law (and of legislation). Proceeding from this, the above-noted statement of the law "On Georgia's International Treaties" should be altered.

An international treaty, as a system of Georgia's normative acts, - a constituent part of intra-state law - is subject to control by the Constitutional Court, whose aim is to ensure the conformity of international treaties with the country's basic law, and in the final analysis, the supremacy of the Constitution.

This power of the Constitutional Court is in its essence, constitutional supervision of norms, but is represented in the form of a separate, independent authority, for its implementation is linked to many peculiarities, which is accounted for by the specific nature of an international treaty [9: 193].

On the basis of the Georgian Constitution, which defines the competence of the Constitutional Court in this sphere ("e" subclause of the first clause of Article 89) it may be concluded that the jurisdiction of the Constitutional Court of Georgia extends to all types of international treaties (interstate, intergovernmental, interdepartmental). If the act is an international treaty, then according to subclause "e" of clause one of Article 89, it may be subject to the supervision of the Constitutional Court. Hence the Constitution does not provide for exceptions. By the effective legislation it is impossible to restrict the limits of this competence according to the type of international treaty or by any other feature.

It is noted in the legal literature that the Georgian Constitution does not specify at which stage (before concluding a treaty, after its conclusion) can Georgia's Constitutional Court discuss the question of the constitutionality of an international treaty and arrive at a decision. In the opinion of these authors, this question is clarified by clause 2 of Article 38 of the Georgian organic law "on the Constitutional Court of Georgia", according to which constitutional representation can be filed at the Constitutional Court prior to the ratification of an international treaty as well [4: 226-228]. I am inclined to take issue with this view. True, the "e" subclause of clause one of Article 89 does speak generally about international treaties and this of course implies international - legal acts that are already in force for Georgia. However, clause 4 of

Article 65 of the same Constitution states clearly that the constitutionality of an international treaty can be checked prior to its ratification as well, i.e. before the recognition of the international treaty as being obligatory for Georgia. This norm of the basic law reads: "In the case of the filing of a constitutional suit or submission to the Constitutional Court it is impermissible to ratify a relevant international treaty or agreement prior to the decision made by the Constitutional Court". That this power of the Constitutional Court is not entered in the first clause of Article 89 of the Georgian Constitution does not alter the situation, for Article 89 of the basic law does not give an exhaustive list of the powers of the Constitutional Court and accordingly it is not the only empowering norm for the Constitutional Court. "It is defined in this norm that the Constitutional Court of Georgia implements other powers defined by the Georgian Constitution and the organic law" (subclause "z" of the first clause of Article 89). It is such power that is consolidated in clause 4 of Article 65 of the Georgian constitution. The organic law "On the Georgian Constitutional Court" specifies further the limits of the power of the Constitutional Court, laying down that both international treaties that have come into force and international treaties subject to ratification before their ratification may come within the jurisdiction of the Constitutional Court (Article 38).

Here we cannot bypass a question that, in my view, is connected with determining the limits of the powers of the Constitutional Court. Namely, on the basis of Article 21 of the Georgian law on "Georgia's International Treaties", a view is put forth in the legal literature, according to which the jurisdiction of the Georgian Constitutional Court extends in the shape of preliminary control not only to international treaties to be ratified but to all international treaties prior to their recognition as mandatory for Georgia. In connection with this K. Korkelia notes that, whereas Article 38 of Georgia's organic law on "Georgia's Constitutional Court focuses attention only on the possibility of determining the constitutionality of inter-

national treaties to be ratified, clause one of Article 21 of the Georgian law "On Georgia's International Treaties" underlines not their ratification but the "recognition of an international treaty as mandatory for Georgia". This implies recognition of an international Treaty as mandatory by both the Georgian Parliament and Georgia's Government: In Korkelia's view, the practice of the Georgian Constitutional Court must play a decisive role in overcoming this contradiction [4: 237,238].

It should be said for the sake of objectivity that, unlike clause 4 of Article 65 of the Georgian Constitution, the law on Georgian International Treaties does indeed broaden the limits of preliminary supervision by the Georgian Constitutional Court, laying down that "Prior to the recognition of an international treaty as mandatory by Georgia, in the case of an authorized subject filing a suit, Georgia's constitutional Court takes a decision on the constitutionality of the international treaty" (clause one of Article 21). Thus, here the legislator deems not only treaties to be ratified as objects of preliminary supervision by the Constitutional Court but all those international treaties (to be ratified and non-ratifiable) with respect to which intra-state procedures have not yet been completed for them to be recognized as mandatory for Georgia.

In my view, when the legislator was formulating the above-said norm of the law on Georgia's international treaties, he did not take into account the demand of the Georgian Constitution according to which the powers of the Georgian Constitutional Court are defined only by the Georgian Constitution and the organic law (subclause "z" of clause one of Article 89). As "the law on Georgia's International Treaties" is not an organic law, extension of the power of preliminary supervision by Georgia's Constitutional Court is impermissible by this legislative act. This legislative collision is overcome not by the practice of the Constitutional Court - as we are advised - but by introducing relevant changes in the law on Georgia's international treaties and by bringing its norms into conformity with hierarchically higher legislative

acts (the Constitution and the Organic law). In the meantime, in clarifying this question we must be guided only by the Georgian Constitution (clause 4 of Article 65) and by the organic law on "Georgia's Constitutional Court" (clause 2 of Article 38), which considers only international treaties to be ratified as objects of preliminary supervision by Georgia's Constitutional Court.

I should like to touch upon one more question that points to the imperfection of the law of Georgia's International Treaties. According to this law, only those international treaties may come under the purview of the Constitutional Court that are not recognized as mandatory for Georgia (Article 21). As to the possibility of checking the constitutionality of an international treaty that has come into force by the Constitutional Court, nothing is said on this in the law. It follows that according to this law, Georgia's Constitutional Court has the right of only preliminary supervision of international treaties, which is obviously wrong. According to the Georgian Constitution and the organic law on the "Georgian Constitutional Court", as noted above, Georgia's Constitutional Court is entitled to consider and decide the constitutionality of an international treaty to be ratified as well as one that has come into force. Proceeding from this, I deem it necessary for the law on Georgia's International Treaties to provide for the power of the Constitutional Court in the sphere of checking the constitutionality of international treaties and the legal consequences connected with the ruling of the Constitutional Court on cases of this category.

Thus, the Georgian Constitutional Court carries out both preliminary (preventive) and subsequent (repressive) constitutional supervision of international treaties. It should be said here that this is the only case when Georgia's Constitutional Court is invested with the right of preliminary supervision - and that only with respect to international treaties to be ratified, prior to their ratification. It should be noted in this connection that not all countries' constitutional organs of supervision are authorized to check

the constitutionality of international treaties. For example, the Supreme Court of the USA and the Turkish Constitutional Court are deprived of such power. Article 90 of the Turkish Constitution states directly that it is impermissible to appeal against international treaties at the Constitutional Court on the ground of their unconstitutionality [10: 337]. In most countries (Austria, Albania, Andorra, Bulgaria, Hungary, Germany, Greece, Spain, Slovenia, Russia, Armenia, Azerbaijan, Estonia, etc.) international treaties are subject to constitutional court supervision. However, in Azerbaijan, France, Armenia, Russia, Estonia and some other countries it is carried out only in the form of preliminary supervision. Incidentally, in Armenia such supervision is obligatory with respect to international treaties to be ratified [11: 265,266; 12: 78].

The international treaties that need ratification by the Georgian Parliament for them to come into force are determined by the Georgian Constitution. According to clause 2 of Article 65 of the Constitution of Georgia.

Except for those international treaties and agreements which envisage ratification, ratification of such international treaties is mandatory which:

- a) envisages entrance into an international organisation or into inter-state unity.
- b) is of a military character.
- c) concerns the territorial integrity of the state or the changing of the state's borders.
- d) concerns the borrowing and distribution of a loan to the state.
- e) requires a change in international legislation or the adoption of necessary laws and acts possessing the power of law for the fulfillment of changed obligations.

Although the Constitution gives an exhaustive list of the varieties of international treaties that need ratification, the law on Georgia's International Treaties expands further the cycle of International Treaties to be ratified, including such treaties that need ratification by another legislative act (subclause on "V" of Article 14).

In this connection it should be primarily ascertained to what extent is it justifiable to expand the list of international treaties determined by the Constitutional law on Georgia's international treaties. Shedding light on this is of major importance, for it concerns the question of the limits of the Parliament's competence in the sphere of the foreign relations of the state and it may become the ground of dispute between the legislative and executive powers [4: 240,241]. The point is that ratification in this case plays the role of parliamentary supervision over the foreign political activity of the executive power, as expressed in the need of parliamentary approval or ratification of some treaties concluded by the executive authority, for them to be recognized as obligatory for Georgia. Otherwise it will lack legal force. But for this parliamentary supervision not to be unlimited, and accordingly the balance not be disturbed between the legislative and executive powers in the spheres of foreign policy the Constitution defines, on the one hand, the limits of implementing constitutional supervision for a particular case by listing the international treaties subject to obligatory ratification, and on the other hand, points out that the Georgian Parliament supervises the work of the Government and carries out other powers only within the framework of the Constitution (Article 48). Proceeding from this, we may conclude that the Georgian Parliament is empowered to ratify the international treaties that are envisaged only by the Constitution (clause 2 of Article 65), and not by any other legislative act. Hence, in my view, the possibility of determining the obligatoriness of ratifying a new variety of an international treaty by reverse to the law on Georgia's international treaties contravenes the demands of the Constitution, and it should be brought into accord with the basic law.

If on the basis of the above norm of the law on Georgian International Treaties the obligatoriness of ratifying a new variety of international treaty is envisaged by some other legislative act, then e.g. the President of Georgia may, on the basis of the Consti-

tution (clause "b" of the first clause of Article 89) and the organic law on "Georgia's Constitutional Court" apply to the Georgian Constitutional Court with a Constitutional suit and demand the declaration of the disputed norms of the above-noted legislative acts as unconstitutional with respect to Article 48 and clause 2 of Article 65 of the Georgian Constitution. In this case satisfying the constitutional suit according to clause 2 of Article 23 of the organic law of "Georgia's Constitutional Court" will entail the annulment of the disputed norms of the normative acts that violate their competence from the time of their coming into operation. This means that legislative acts passed on their basis, in particular, the Parliament's resolution on the ratification of a concrete international treaty will lose force. This of course does not mean that the international treaty will be recognized as unconstitutional. It will enter force following the completion of the intra-state procedures for international treaties not liable to ratification. A dispute over competence should be decided in the same way in the case when an international treaty to be ratified is recognized as obligatory for Georgia by the executive authority through bypassing the Parliament. In this case unlike the former one, the plaintiff and the defendant exchange their roles.

As I noted above, in the case of dispute over competence, the question of the constitutionality of an international treaty is not considered *per se*. The Constitutional Court, in the framework of this authority resolves only the question - bearing in mind the demands of the Constitution - in the competence of which state body rested the right of recognizing a particular international treaty as obligatory for Georgia. As to the question of the conformity of the content of the international treaty with the Constitution, the Constitutional Court considers it within the framework of the right to check the constitutionality of the international treaty in the form of preliminary and subsequent supervision.

At preliminary (preventive) constitutional supervision of an international treaty only an international

treaty submitted to Parliament for ratification can be considered by the Georgian Constitutional Court. According to the law on Georgia's International Treaties, an international treaty is submitted to Parliament for ratification only by the President of Georgia (clause one of Article 15). But before Parliament takes a decision on the ratification of an international treaty not less than one fifth of the members of Parliament, on the basis of the organic law on the "Constitutional Court of Georgia" (clauses one and two of Article 38) is entitled to apply to the Constitutional Court on checking the constitutionality of an international treaty or its separate provisions to be ratified.

Entry of a constitutional submission stops the discussion in the Georgian Parliament of the question of the ratification of the treaty and, as noted, clause 4 of Article 65 of the Georgian Constitution, its ratification is impermissible before a decision is made by the Constitutional Court.

It should be noted that of the subjects entitled to make a submission to the Constitutional Court investment of only one fifth of the members of Parliament with the right to demand preliminary constitutional supervision of an international treaty is, in my view, determined by two circumstances. In the first place, as only the President of Georgia is entitled to submit an international treaty to Parliament for ratification, it is assumed that he considers the treaty concluded by the executive power or by himself to be constitutional. Hence, the President of Georgia and the Georgian Government in this case, logically, do not need investing with power to submit to the Constitutional Court. On the other hand, if the President of Georgia or the Georgian Government and the Parliamentary majority supporting them will attempt to ratify an international treaty incompatible with the Constitution, the Parliamentary minority is given the chance - by submitting to the Constitutional Court - to prevent recognition of an unconstitutional international treaty as obligatory for Georgia. Proceeding from this, granting this right to a definite group of MPs serves the interests of upholding the Parlia-

mentary minority and in the final analysis, of ensuring the supremacy of the Constitution.

The Georgian organic law on the “Constitutional Court of Georgia” defines the legal consequences that follow the recognition of the unconstitutionality of an international treaty or its parts. According to the organic law, recognition of the unconstitutionality of an international treaty or separate parts of it will cause the impermissibility of ratifying an international treaty pronounced unconstitutional (clause 5 Article 23). It follows from this norm that the effective legislation does not provide for the possibility of partial ratification. This means that at pronouncing at least part of an international treaty unconstitutional ratification of the remaining part of the international treaty is impermissible. This rule appears quite logical, for partial ratification in this case would entail introduction of unilateral amendments in the text of an international treaty agreed by the contracting parties, which opposes the very nature of the treaty. In discussing the legal consequences of a decision by the Constitutional Court on the constitutionality of an international treaty, it is pointed out in juridical literature that in the case of pronouncing an international treaty unconstitutional the state may follow three alternatives: a) refuse the obligatory recognition of the international treaty; b) in agreement with the contracting parties introduce a change in the international treaty to bring it into conformity with the Constitution of Georgia; c) to introduce a change in the Constitution of Georgia to ensure compatibility between the international treaty and the Constitution [4: 228, 229]. Which path the state will choose depends on various circumstances: however, the latter two alternatives allow for an international treaty to enter into force [13: 199]. The law on “Georgia’s International Treaties” proposes only one path for such case, namely, recognition of an international treaty as obligatory for Georgia is possible only after relevant changes have been introduced, in due form, in the Constitution (clause 3 of Article 21). It would have been advisable to have it pointed out that rec-

ognition of an international treaty as obligatory for Georgia is possible when alterations are made in it and it has been brought to conformity with the Constitution of Georgia. Here, the state is faced with a choice: which is more important for the state: preservation of the Constitution unchanged and renouncement of the international treaty or making relevant changes in the Constitution and ratifying the treaty. Of course, the stability of the Constitution and the supremacy of the state is one of the most important principles. Therefore in all cases of revealing an incongruity of an international treaty with the country’s basic law it is impermissible to introduce changes in the Constitution. But there may also be a case when the necessity of ratifying a treaty may outweigh the priority of the Constitution. For example, the ratification of the international convention “On Doing away with all Forms of Racial Discrimination” in Austria (1972) made necessary the introduction of changes in the country’s Constitution while at Austria’s joining the European Union (1995) a Federal Constitutional Law was adopted through a referendum on concluding a treaty of accession, this causing a general revision of the constitution of this country. It is significant that the Constitution of Austria contains a norm (Article 50) on the conclusion of international treaties that entail changes in the Constitution [14: 142-144]. By way of an example the “Treaty on the European Union” or the so-called Maastricht Treaty, can also be cited. The signing of the final text of the treaty in question was completed on 7 February 1992, followed by the process of its ratification by the Parliaments of the member states. As is noted in the legal literature, probably no other founding treaty has come across such serious difficulties at the ratification stage as this one. The point is that the Treaty of Maastricht strengthened further the federal principles of the European Union at the expense of ceding the sovereign prerogatives of the member states [5: 132; 15: 9; 16: 142-148]. Hence the question of the compatibility of this treaty with national constitutions acquired actuality. Thus, in



France, where only preliminary constitutional supervision of international treaties operates, the President of the country addressed the Constitutional Council regarding the constitutionality of the international obligations envisaged by the Treaty of Maastricht, on their entry into force and the need for their possible revision. The Constitutional Council pronounced the Maastricht Treaty unconstitutional in relation to several articles of the French Constitution. The Congress of the French Parliament introduced changes in the Constitution - more precisely, it added a new chapter dealing with the European Union. At the same time the President of France called a referendum for French citizens to decide on their attitude to the law that allowed the country's President to ratify the treaty. The participants of the referendum supported the ratification of the treaty. Following this, a group of deputies addressed the Constitutional Council to give its ruling on the extent to which the Treaty of Maastricht corresponded to the altered propositions of the Constitution and to what extent was the law approved by the referendum constitutional. This time the Constitutional Council recognized the Treaty of Maastricht as compatible with the Constitution, while it did not accept the deputies' question for consideration of the constitutionality of the referendum law under the motive that it was not empowered to check the constitutionality of acts approved at a referendum [17: 302,303]. An analogous problem was resolved by Spain and Germany through preliminary constitutional supervision [17: 304; 16: 143].

Thus, preliminary constitutional supervision is a highly effective means which enables - prior to acknowledging international treaties as obligatory for the state - to determine their compatibility with the constitution and to take appropriate measures. This allows to preclude the possible opposition between the obligation to fulfill an international treaty, incompatible with the Constitution, and the principles of the supremacy of the Constitution.

When concrete facts of opposition of these principles are in evidence, an absolutely different rule of solving the question is in force in those countries in which international treaties have priority legal force in comparison to national legislation, including the basic law. Thus, in the Constitution of the Netherlands we find the direct indication that "any provision of an international treaty that contradicts the Constitution is adopted by not less than two thirds of the deputies of the States General (clause 3 of Article 91) [18: 491]. Owing to this, the court in the Netherlands is obliged - in the case of a collision between the international treaty and the Constitution - to use the norms of the international treaty [4:23]. According to the constitution of Portugal (clause 4 of Article 279), following the acknowledgment of an international treaty as unconstitutional by the Constitutional Court, this international treaty may be ratified only in the case of the Republican Assembly passing it by the quorum necessary for the revision of the country's Constitution. In my view, this rule discredits the idea of hierarchicalness of the supremacy of the Constitution and diminishes the significance of Constitutional Court supervision in ensuring Constitutional legality.

Unlike preliminary constitutional supervision, at further constitutional supervision of international treaties the circle of subjects entitled to apply to the Constitutional Court is much wider. According to the organic law on the Georgian Constitutional Court, the President of Georgia, the Government of Georgia and not less than one fifth of the members of the Georgian Parliament are entitled to file a constitutional case on the constitutionality of international treaties or their separate propositions (clause one of Article 38).

In the course of further constitutional supervision of an international treaty, an effective international treaty, i.e. one that has come into force, is within the jurisdiction of the Constitutional Court of Georgia. Incidentally, it is irrelevant in what way (by ratification, the Act of the President) the international

treaty has entered into force. The main thing is for it to be effective so that the Constitutional Court may examine it. However, taking into consideration the technique through which the international treaty entered into force, the legislator determines different rules at filing a constitutional suit. Namely, according to the organic law on the “Georgian Constitutional Court”, if the international treaty was not subject to ratification and it came into force through some other (non-parliamentary) way, then the above-named subjects, without any preconditions, have the right to file a suit with the Constitutional Court on the constitutionality of this international treaty (or its separate provisions) (subsection “g” of clause 2<sup>1</sup>, Article 38). But if the international treaty is ratified, i.e. has entered into force by an act of Parliament, then a constitutional suit may be entered on the denunciation or annulment of the international treaty within 30 days of the refusal of the Georgian Parliament and if Parliament does not resolve this question within 30 days, then a constitutional suit may be entered not earlier than 31 and not later than 60 days from raising the question before Parliament of denouncing or annulment of the treaty (“a” and “b” subsections of clause 2<sup>1</sup> of Article 38). Thus, it is not always possible to examine the constitutionality of a ratified international treaty through the Constitutional Court. It provides for definite preconditions and is limited to a definite time. The essence of the above regulations is that if Parliament decides in favour of an international treaty to come into force (through ratification), then it should not be declared unconstitutional, bypassing the Parliament, but first the latter’s attention should be drawn to overcome the collision found between the international treaty and the constitution. But if Parliament refuses to bring an unconstitutional international treaty into conformity with the Georgian Constitution or in general does not take a decision on this issue, only after this is it - with a definite deadline - for the entitled subject to file a suit with the Constitutional Court. Setting deadlines in this case is dictated in the interests of meet-

ing international treaties in good faith and preservation of stability in international relations. The organic law leaves open the question of who has the right - prior to entering a suit at the Constitutional Court - to raise the question in the Georgian Parliament about denouncing or annulling a ratified international treaty (or its separate provisions). In this connection K. Korkelia suggests that “The subjects submitting to Parliament and those entering a suit in the Constitutional Court coincide” [4: 231]. If we share this assumption, it is not difficult to guess that those subjects are the President of Georgia, the Government of Georgia and not less than one fifth of the members of the Georgian Parliament. This reasoning is logical. However, the law on Georgia’s International Treaties does not give ground for such an assumption, for according to the law just cited, the submission to Parliament for suspending a ratified international treaty is made only by the President of Georgia (clause 4 of Article 35). It follows that if the President of Georgia does not show initiative and does not submit this proposal to Parliament, the two subjects that refer to Parliament - the Government of Georgia and not less than one fifth of Members of Parliament - will not have the opportunity to exercise their right, granted to them by the law, to appeal to the Constitutional Court about a ratified international treaty.

In my view, an appropriate change should be made in the organic law on the “Constitutional Court of Georgia” (clause 2<sup>1</sup>, Article 38) and in the law on the “International Treaties of Georgia” (clause 4, Article 35) in order for the above-named subjects of appeal to the Constitutional Court on the constitutionality of ratified international treaties be enabled to exercise their right.

Although Georgian legislation clearly defines the right of the Georgian Constitutional Court to discuss the question of the constitutionality of international treaties - both prior to their recognition as obligatory for Georgia and after their entry into force, - in the opinion of some authors it is unclear whether the Georgian Constitutional Court can discuss the con-

stitutionality of international treaties at the time when Georgia has expressed her consent to recognize the obligatory nature of an international treaty but the latter has not yet entered into force for Georgia (e.g. because the time required for the treaty to come into force, and so on) [4: 233]. I do not think that we are here dealing with vagueness, for in the organic law on "Georgia's Constitutional Court" (clause 2<sup>1</sup>, Article 38) it is pointed out clearly that only an effective law, i.e. one that has come into force, can become the object of subsequent (repressive) supervision by Georgia's Constitutional Court, if Georgia's international treaty is recognized as obligatory for Georgia, but its coming into force is linked to some fact, e.g. some date, recognition by some other state as obligatory to it, etc., then this international treaty will become obligatory after the occurrence of this fact and, accordingly, it may enter the jurisdiction of the Georgian Constitutional Court only after this. In the above-cited span of time an international treaty cannot be subjected to preliminary supervision by the Constitutional Court, for only an international treaty to be ratified can become the subject of supervision by the Constitutional Court prior to its ratification. A special case like this in relation to international treaties to be ratified may arise only following the recognition of this international treaty as obligatory for Georgia, i.e. after its ratification. Therefore, such international treaty too may be subjected only to subsequent constitutional supervision after the fact necessary for the treaty to come into force is recorded.

The constitutionality of international treaties may be supervised within some other authority of the Constitutional Court of Georgia as well. I have partially touched upon this question in connection with disputes over competence, namely, when the Constitutional Court examines the dispute between state bodies as to which of them is competent to decide the question of recognition of a particular international treaty as obligatory.

The constitutionality of international treaties may be checked also within concrete supervision of norms

by the Constitutional Court and protecting the basic human rights.

Under concrete supervision of norms according to the organic law on the "Constitutional Court of Georgia", "If at examining a concrete case in a common court the court concludes that there exists sufficient ground to consider the law or other normative act that the court must use in deciding this case fully or partly as not in accordance with the Constitution it will apply to the Constitutional Court. The discussion of the case will resume following the decision of the Constitutional Court" (clause 2, Article 19). Of course, the normative acts indicated in those norms imply international treaties as well, for as already noted, they constitute part of intra-state normative acts and their use is fully justified in taking a decision on the case [19: 126]. The Constitutional Court of Georgia has a case in practice when on the basis of the submission of a common court the constitutionality of an international treaty was examined [20: 39-47].

The same may be said of the competence of the Constitutional Court in connection with the protection of basic human rights, the normative acts adopted in connection with Chapter Two of the Constitution of Georgia come within the jurisdiction of the Constitutional Court. Of course, along with legislative acts and bylaws implied are many international treaties that are recognized as obligatory for Georgia and are directly related to questions of Chapter Two of the constitution of Georgia, i.e. human rights and basic freedoms. Proceeding from this, if an international treaty (or part of it) does not conform with human rights and basic freedoms, recognized by Chapter Two of the Constitution of Georgia, the Constitutional Court can recognize a disputed international treaty (or part of it) as unconstitutional on the basis of a suit filed by physical and legal persons, as well as the public defender (ombudsman).

Thus, in the final analysis, the constitutionality of international treaties may be discussed and decided in the Constitutional Court of Georgia on the

basis of a submission by the President of Georgia, the Government, not less than one fifth of the members of Parliament, the common court, the public defender, and physical and legal person. Incidentally, it is noteworthy that the organic law on the "Constitutional Court of Georgia" determines the various juridical consequences of the decisions of the Constitutional Court according to within which competence of the Constitutional Court the constitutionality of an international treaty is examined. When the constitutionality of an effective international treaty is discussed within the competence specially determined by the Constitutional Court of Georgia (subclause "v" of the first clause of Article 19 of the organic law), this recognition of the disputed act (or its separate parts) as unconstitutional will entail the annulment of the international treaty (or its separate parts) (clause 5, Article 23 of the organic law), and if the question of the constitutionality of an international treaty is examined with the competence of concrete supervision of the Constitutional Court or the protection of basic human rights (subclause "e" of the first clause of Article 19 and clause 2), then confirmation of the unconstitutionality of a disputed act (or its parts) will entail its declaration as null and void from the moment of the publication of the relevant decision of the Constitutional Court (clause 1 Article 23 of the organic law).

Annulment of an international treaty implies recognition of this act as annulled from the moment of its coming into force. The Constitution of Georgia does not provide for such legal consequences of a decision of the Constitutional Court. According to the basic law an act or its part, pronounced as unconstitutional loses legal power from the moment of the publication of a relevant decision of the constitutional Court (clause 2 of Article 89). Such deviation from a rule determined by the Constitution is impermissible and it should be brought into conformity with the demands of the basic law.

Constitutional order requires that any decision of the Constitutional Court, dealing with the consti-

tutionality of normative acts, should entail the loss of the legal force of a normative act pronounced as unconstitutional, including, of course, an international treaty, only from the moment of the publication of a relevant decision of the Constitutional Court. This means that the decision of the Constitutional Court will not have retroactive force. However, restoration of constitutional order in this case will still not be enough owing to the specificity of international treaties. The point that annulment of an unconstitutional treaty, or pronouncing it as having lost force from the moment of publication of the decision of the Constitutional Court in either case means unilateral abrogation by Georgia of the international treaty because of its unconstitutionality. The "Georgian Law on International Treaties" (subclause "l" and "m" of Article 3) does not provide for the discontinuance or abrogation of an international treaty on this basis. Because of this, as is rightly noted in legal literature, a situation is created when an international treaty will remain obligatory for implementation at the international level, while it ceases to be in force at intrastate level, which is tantamount to a breach of international obligations [4: 236].

To overcome the above-cited collision it is suggested in the legal literature in the case if the Constitutional Court finds an international treaty unconstitutional, to introduce a practice according to which, the Georgian Constitutional Court will order the state body that has expressed readiness to acknowledge an international treaty as obligatory to implement appropriate procedures towards the denunciation of the international treaty [4: 236].

In my view, due to the specificity of the conclusion of an international treaty and its abrogation, in the case of an international treaty being declared unconstitutional, it is preferable to use the norm envisaged by clause 2 of Article 25, according to which a legal act or its part recognized as unconstitutional loses its legal force from the moment of publication of a relevant decision of the Constitutional Court, if

no other data is determined by law. Conformably with this “it will be advisable for the organic law on the “Constitutional Court of Georgia to set a reasonable date, after the expiry of which an international treaty (or its part), declared to be unconstitutional loses legal force. During this period the state bodies will be given the chance to carry out relevant procedures

aimed at denouncing the international treaty. At the same time, it will be necessary to take into consideration the above provision of clause 2 of Article 25 of the organic law on the “Constitutional Court of Georgia” in clause 2 of Article 89 of the Constitution of Georgia in order to avoid incompatibility between the organic law and the basic law.

*სამართალი*

## საქართველოს საერთაშორისო ხელშეკრულებების საკონსტიტუციო საკონტროლო

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საერთაშორისო ხელშეკრულება, როგორც საქართველოს ნორმატიული აქტების შიდა-საქართველოში შესრულების მიზანშეწონილი ნაწილი, ეკვმდებარება საკონსტიტუციო საკონტროლოს, რომლის მიზანია ქვეყნის შიდა კანონთა საერთაშორისო ხელშეკრულებების შესაბამისობის და, საბოლოო ანგარიშში, კონსტიტუციის უზენაესობის უზრუნველყოფა. საქართველოს კონსტიტუციით და “საქართველოს საკონსტიტუციო საკონტროლო შესახებ” საქართველოს ორგანული კანონით, საერთაშორისო ხელშეკრულებების კონსტიტუციური საკონტროლის უფლებამოსილება, თავისი არსით, ნორმატიული კონტროლია, მაგრამ იგი ცალკე, დამოუკიდებელი უფლებამოსილების სახითაა წარმოდგენილი, რადგანაც მისი განხორციელება დაკავშირებულია მრავალ თავისებურებასთან, რომელიც საერთაშორისო ხელშეკრულების სპეციფიკური ნიშნებია. საქართველოს საკონსტიტუციო საკონტროლო იურისდიქცია ვეღარა შეიძლება საერთაშორისო (სახელმწიფოთაშორისი, სამთავრობოთაშორისი, უწყებოთაშორისი) ხელშეკრულებების ვრცელდება. საქართველოს საკონსტიტუციო საკონტროლო ახორციელებს საერთაშორისო ხელშეკრულების როგორც წინასწარ (პრევენციული), ისე შემდგომ (რეპრესიული) საკონსტიტუციო კონტროლს. საქართველოს საკონსტიტუციო საკონტროლო წინასწარ (პრევენციული) კონტროლს ეკვმდებარება მხოლოდ საქართველოს სარატიფიკაციო საერთაშორისო ხელშეკრულებების რატიფიკაციის შემთხვევაში, როდესაც საქართველოს საკონსტიტუციო საკონტროლო ენიშნება წინასწარი (პრევენციული) კონტროლის უფლებამოსილება. საერთაშორისო ხელშეკრულების შემდგომი (რეპრესიული) საკონსტიტუციო კონტროლის დროს, საქართველოს საკონსტიტუციო საკონტროლო განსჯადი შეიძლება იყოს მხოლოდ საქართველოს მოქმედი საერთაშორისო ხელშეკრულება. საკონსტიტუციო საკონტროლო მერ საერთაშორისო ხელშეკრულების არაკონსტიტუციურობის შემთხვევაში მიზანშეწონილია კანონით გატა-

