

**Kristine Kuprava, PhD student** 

Ivane Javakhishvili Tbilisi State University, Georgia

kristikuprava@gmail.com

## POWERS OF THE CONSTITUTIONAL COURT TO CHECK THE CONSTITUTIONALITY OF CONSTITUTIONAL AMENDMENTS

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**ABSTRACT:** *An essential prerequisite for the effective exercise of the right to a fair trial is a complete understanding of the matters falling within the jurisdiction of the Constitutional Court of Georgia. In this regard, it is important to have a legal analysis of whether a judicial body of the Georgian Constitutional Review is equipped with the authority to verify the constitutionality of constitutional amendments. Accordingly, the article is dedicated to the complex and comparative analysis of the theoretical and practical problems arising to decide on the issue of admission for the consideration of constitutional claims substantially, particularly whether the constitutionality of constitutional amendment belongs to the jurisdiction of the Constitutional Court of Georgia. The article will also discuss specific recommendations for the improvement of legislation in this field and the establishment of unified judicial practices.*

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**KEYWORDS:** Constitutional Control; Effective Constitutional Justice; Admissibility of Lawsuit; Constitutional Amendments; Unamendable Provisions.

### 1. Introduction

In a constitutional state people has constituent power. Anyone who has the power to amend the constitution, participates in this sovereignty. The power to amend or change the constitution also includes anyone who, with constitutional force, disproves the doubtful content of the constitution (Guggenberger, Bernd/Würtenberger, in Erkvania 2017, 218). The question of the admissibility of reviewing constitutional laws remains, according to the prevailing opinion, a matter for the interpretation of the respective national constitutional law. „If there are no special provisions on unamendability, then it can usually be inferred that all parts of the constitution are subject to possible amendment. In some national constitutional systems, some basic principles have been considered to be protected in the sense that it would be ‘unconstitutional’ to change them. This question depends on the interpretation of national constitutional law, and there is no general solution to the issue, even though it can be argued that there are legal principles that are so fundamental that even the constitutional legislator should not be allowed to break them. This could be of particular importance in times of crisis and turmoil, or in countries where the democratic legitimacy of the constitutional legislator can be called into question, even if the question of which basic principles should be considered important enough to set implicit limitations to constitutional change is debatable and, to some extent, subjective. On the other hand, it can be held that proposals for unacceptable constitutional amendments should be met with open debate, and criticised on substance (as well as on the basis of binding international law and European standards) – not by formally invoking unwritten and unclear principles of implicit unamendability“ (Venice Commission, 19 January 2010).

There is no universally accepted standard in comparison with the participation of constitutional courts in the process of making constitutional amendments (Venice Commission, 20 December 2010). "In the theory of constitutional law and practice, the exercise of judicial control over the process of revision of the Constitution is a relatively uncommon practice. As a rule, it can be expressed in the form of further constitutional control over preventive, procedural, and/or "unamendable/permanent" norms. However, the fundamentals, scale, and frequency of applying these forms are varied." (Ruling N1/1/549 of the Constitutional Court of Georgia, 2013).

In this article will be covered the discussion on the constitutionality of the constitutional amendment, indeed this jurisdiction has contentious contradiction or not in the comparative constitutional law. It will be also related to the concern - has the Constitutional Court of Georgia has the legal opportunity, based on a claim related to basic human rights or within the abstract norm control, to discuss the constitutionality of the constitutional amendments in a formal sense or in a material perspective. What is more, the article will cover the criterion, in which cases can be judicial review of constitutional amendments a valid and effective mechanism and in under which condition.

The article examines the legislative requirement referring to the admission for submitting the constitutional claim for the consideration providing to refuse it in the admissibility stage when a matter does not belong to the judgment of the court. In particular, the purpose of the article is to scrutinize the authority of the Constitutional Court of Georgia to discuss the constitutionality of constitutional amendments. The article surveys the pertinent legislative grounds and the practice of the Constitutional Court of Georgia as well as studies the experience of other countries on the jurisdiction of constitutional amendments. The conclusion embraces an analysis of the results of the study including possible solutions to problems and relevant recommendations.

## **2. Analysis of the legislation for exercising constitutional control over constitutional amendments**

The norms regulating the activities of the Constitutional Court of Georgia give the court the authority to accept only the issues that fall within the scope of its powers for consideration on merits. A constitutional claim/submission shall not be accepted for consideration unless the Constitutional Court judges any disputed issues specified in it (Organic Law of Georgia on the Constitutional Court of Georgia, Paragraph 1(a) of Article 31<sup>3</sup>(1), 1996). This basis for the admissibility of a constitutional claim in constitutional proceedings is of important function and has a great practical purpose.

To evaluate the scope of constitutional control, it is necessary to analyze the Supreme Law of the country which provides the issues (Constitution of Georgia, paragraph 4 of Article 60, 1995) related to the jurisdiction of the Constitutional Court of Georgia. The list does not allocate the authority of the Constitutional Court to assess constitutional law. Nevertheless, the Constitutional Court of Georgia shall review the constitutionality

of the normative act concerning the fundamental human rights recognized by Chapter 2 of the Constitution based on the claim of a natural person, legal entity, or public defender. In addition, the Constitutional Court of Georgia shall make a decision in compliance with a claim of the President of Georgia, one-fifth of the Members of the Parliament, or the Government about the procedure established by the Organic Law (Constitution of Georgia, sub-paragraphs (a) and (b) of Paragraph 4 of Article 60, 1995).

The analysis of the adjacent legislation establishes that the constitutional amendment in Georgia is a normative act and occupies the highest place in the hierarchy of normative acts with together the Constitution of Georgia (Law of Georgia on Normative Acts, Article 7(2), 2009). "The Constitution of Georgia shall be the supreme law of the state. It takes precedence over other legal acts. All other legal acts shall comply with the Constitution of Georgia." (Law of Georgia on Normative Acts, Article 10(1), 2009). "The Constitutional amendment of Georgia is an integral part of the Constitution of Georgia" (Law of Georgia on Normative Acts, Article 10(2), 2009) and is adopted in cases of strict scrutiny.

Analyzing legal grounds, it is necessary to mention a controversy about "permanent" norms of the Constitution of Georgia. Some of the authors indicate the absence of similar norms in the Constitution of Georgia, and according to them, the reforms of the Constitution of Georgia did not affect the permanence of the norms of the Constitution and its internal hierarchy (Luashvili 2018, 90). The others believe that Article 4 of the current Constitution (Article 7 of the Editorial Board of the Constitution applicable before December 16, 2018) should be considered as such a provision (Kobakhidze 2019, 49; Erkvania 2017, 218). Following this provision, "the State acknowledges and protects universally recognized human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other universally recognized human rights and freedoms that are explicitly referred to herein, but that inherently derive from the principles of the Constitution." (Constitution of Georgia, Paragraph 2 of Article 4, 1995).

Although Georgian legislation does not envisage a formal hierarchy between constitutional norms, the abovementioned informal hierarchy is established in the Constitution of Georgia deriving from its content and logic. An obvious example of this is Article 4 of the Constitution: "Based on this constitutional record, universally recognized human rights and freedoms are acknowledged inalienable and supreme human values, which provide the status of permanent constitutional provisions, the so-called protected norms for the relevant norms of the Constitution in a conceptual point of view." (Kobakhidze 2019, 49).

It is important to focus on paragraph 3 of Article 3 of the current version of the Constitution of Georgia, according to which "no one has the right to seize power. The current term of office of a body elected in the general election shall not be extended or reduced by the constitution or law." Unlike the previous version of the Constitution, the current version of the Constitution of Georgia contains a norm, a legislative basis that

allows for discussion of the internal hierarchy in the Constitution and the "permanent" norms (Kobakhidze 2019, 235; Baramashvili, Macharashvili 2021, 162). It provides authority for the Constitutional Court and in fact, obliges to consider the constitutionality of the constitutional amendments if, for example, the Parliament of Georgia decides the term of the President of Georgia to extend or reduce by constitutional law." (Kobakhidze 2019, 235). Therefore, this is another legal basis for the Constitution of Georgia to be equipped with this particular power.

### **3. Practice of the Constitutional Court of Georgia on the procedural/substantial review of the constitutional amendment**

The Constitutional Court of Georgia, following its firmly established practice, does not discuss the content of the constitutional amendment with the Constitution of Georgia. The issue of examining the compliance of constitutional amendment with the Constitution has become the subject of judgment of the Constitutional Court three times (Ruling N2/2/486 of the Constitutional Court of Georgia, 2010; Ruling N1/2/523 of the Constitutional Court of Georgia, 2012; Ruling N1/1/549 of the Constitutional Court of Georgia, 2013). However, these claims were not accepted by the court for consideration on merits. Since 2013, the issue of similar content has not been appealed to the Constitutional Court to revise within the current version of the Constitution.

The recent case (Ruling N1/1/549 of the Constitutional Court of Georgia, 2013) is of particular importance, within which the claimant appealed the amendments and additions of the Constitutional amendment of Georgia to determine the term of the next elections of the President of Georgia. According to the disputed norm, paragraph 9 of Article 70 of the Constitution of Georgia was created by the following edit: "Regular presidential elections shall be held in October of a calendar year when the President's powers expire. The President of Georgia shall fix the date of the elections not later than 60 days before the elections." As reported by the claimants, imposing the disputed norm contributed to extending the term of the incumbent President, therefore, the regulating norm of holding any public office was granted a retroactive status by the Parliament of Georgia, grossly violating the principles of public law. The authors of the lawsuit believed that it is not allowed to change the authority of any official during the period for which he is elected (appointed).

Justifying the refusal to accept the claim for consideration the Constitutional Court based its logic on the constitutional amendment, which from the moment of its coming into force, loses its independent normative content and becomes a constituent part of the Constitution. Accordingly, the satisfaction of the claim meant that the provision of the Constitution was invalid simultaneously (Ruling N1/1/549 of the Constitutional Court of Georgia, 2013). In addition, the motivational section indicated that the Constitutional Court is not equipped with the authority to declare the norms of the Constitution invalid concerning the principles of the Constitution

since there was no resource for discerning normative concepts in the Constitution of Georgia (Ruling N1/1/549 of the Constitutional Court of Georgia, 2013). Some scholars still share the developed opinion of the court (Khetsuriani 2020, 99; Eremadze 2013, 78).

The judicial body exercising constitutional review did not deem it necessary to change the practices established in the previous two cases. Regarding the proper performance of the role and functions of constitutional justice, it pointed out that "the Constitutional Court shall apply all the resources provided by the Constitution to effectively and adequately implement its (Constitutional Court) purpose and function. But, in the meantime, it shall operate within the confines of the Constitution because it is the basis of its performance and the limit of competence." (Ruling N1/1/549 of the Constitutional Court of Georgia, 2013)

The Board did not share the opinion of the authors of the constitutional claim regarding permanent norms, noting that the Constitution of Georgia neither specified the norms based on the principle of "permanence"/"invariance", nor did it establish a formal hierarchy between constitutional norms according to legal force. The fact that the different norms of the Constitution may adhere to different values did not indicate their hierarchical subject.

The Constitutional Court did not rule out the authority of the court to assess the constitutionality of the constitutional amendments concerning the Constitution of Georgia from a formal point of view, in particular, the extent to which the procedure provided by the Constitution for adopting a constitutional amendment was protected. However, since the legislation did not explicitly state the consequences of violating the procedure established by the Constitution for the adoption of constitutional amendment, in the assessment and the discussion of the content of the amendments, the court did not consider it necessary to determine the scope of its competence in this section (Ruling N1/1/549 of the Constitutional Court of Georgia, 2013). However, some authors do not share this assumption of the Constitutional Court (Loladze, 2013).

In conclusion, the court summarized that "the Constitution of Georgia does not provide for revising the Constitution and adopting a constitutional amendment, except for the free and democratic manifestations of the will of the constitutional majority of the legislative government. The revision of the constitution is part of the political process, which is executed following the will of the people, through representatives elected by them." (Ruling N1/1/549 of the Constitutional Court of Georgia, 2013)

#### **4. Constitutional control over constitutional amendment abroad**

As a result of analyzing the legislation of foreign countries, the following categories are mainly identified in terms of exercising the powers of constitutional control over constitutional amendment: 1) Countries that discuss the constitutionality of constitutional amendment neither in content nor formal terms (e.g. Belgium, France (Venice Commission, 2012)); 2) The countries that discuss the constitutionality of constitutional

amendment includes two subcategories: a) pre-control (e.g. Armenia (Venice Commission, 2020), Ukraine (Venice Commission, 20 June 2022; Constitution of Ukraine, Article 159,1991) and post-admission control; b) substantial control (e.g. Germany (Gröpl 2014; BVerfGE 3, 225, 1953; Gegenava, Papashvili 2015, 62) and only control of the admission process, the same procedural control (e.g. Hungary (Venice Commission, 2013; Decision 45/2012. (XII. 29.) of the Constitutional Court of Hungary; Case II/648/2013 of the Constitutional Court of Hungary).

Scrutinizing the reviews of the Venice Commission (Venice Commission, 7 December 2022) on the constitutionality of constitutional amendments over the years, it can be said that the Venice Commission has not established a rigid standard regarding the compatibility and scope of constitutional amendments, and it does not provide a unified approach to the time of control (a priori or a posteriori) and the nature of control (procedural or substantial) (Venice Commission, 7 December 2022).

Considering the report, the legal provision in some countries is unclear, in others, it is theoretically possible to review the constitutional amendments but it has never been applied in practice, and in certain states, the trial is rejected based on the argument that courts cannot challenge the constitutional legislature (Venice Commission, 20 June 2022) (which was shared by the Constitutional Court of Georgia).

Following the report of the Commission on Constitutional Amendments, designing the adherence to the constitutional amendments procedure by the Constitutional Court is much more widespread than a further consideration of whether the amendment violates the "permanent" provisions or principles of the Constitution (discussion about content) (Venice Commission, 20 June 2022).

A rather rare procedural mechanism found in some new democratic countries is a mandatory and systematic review of constitutional amendments by the National Constitutional Court before it is adopted by the Parliament (A Priori Review) (Venice Commission, 19 January 2010). Such a requirement is especially met in Azerbaijan, the Republic of Kyrgyzstan, Moldova, and Ukraine (Constitution of Azerbaijan, Article 153; Constitution of the Kyrgyz Republic, Article 97; Constitution of Moldova, Article 141.2; Constitution of Ukraine, Article 159). Although the Constitutional Courts made a useful contribution to guide further parliamentary and public debate, the involvement of a Priori court in the process of making amendments introduced excessive rigidity and blocked political debate (the pattern of a strong intra-executive conflict between the the Parliament and the president over the constitutional reform in Moldova, in 2000) (Venice Commission, 19 January 2010).

The Venice Commission recognized the posterior reviews of constitutional amendments in several countries such as Austria, Germany, Bulgaria, Turkey, Portugal, the Czech Republic (Venice Commission, 2013; Decision Pl. US 27/09 of the Constitutional Court of Czech Republic, 2009) and identified abolished constitutional amendments for breaching the procedures or even violating material boundaries.

According to the Venice Commission, even though further consideration of the Constitutional Court (A Posteriori Review) is more widespread, such control cannot be observed as a general rule of law and a requirement for supremacy (Venice Commission, 2012). Conforming to the Commission's assessment, the Constitutional Courts' power to review and repeal part of the Constitution is a controversial and extremely difficult issue, especially when the Constitution does not contain "unamendable/permanent norms" (Venice Commission, 2015). Substantial constitutional review of constitutional amendment is a "problematic instrument that must be implemented only in countries where it already derives from a clear and established doctrine and even there it should be exercised with the margin of appreciation of the constitutional legislator." (Venice Commission, 2022).

Some constitutions include "unamendable/permanent" norms, provisions that are legally excluded from revision. For instance, the basic law for the federal Republic of Germany (The Basic Law for the Federal Republic of Germany, Article 79, para. 3, 1949; Battis, Edenharter 2022, Rn. 205) treats federalism as a form of German territorial arrangement and regards it "unamendable" provision (2 BvE 2/08, 216; Marsch, Vilain, Wendel, 2015, Rn. 36; Dürig/Herzog/Scholz/Herdegen, 2024, Rn.89; ; BeckOK GG/Dietlein, 2024, Rn. 22-53; Javakhishvili 2021, 179). In this respect, the constitutions of Italy (Constitution of the Italian Republic, Article 139, 1947) and Turkey (Constitution of Turkey, Article 4, 1982; Barak 2011, 322; Roznai, Yolcu 2012, 185) are also noteworthy. "unamendable/permanent" constitutional provisions indicate an internal hierarchy of constitutional provisions.

A review of comparative constitutional law specifies that most constitutions do not take into account "unamendable/permanent" provisions. In this regard, the Venice Commission believes that the imposition of an internal hierarchy with permanent norms does not comply with international standards (Venice Commission, 19 January 2010) and it cannot be regarded as a European standard. However, this characteristic is increasingly met in countries where Constitutional Courts are competent to repeal unconstitutional laws (Venice Commission, 20 June 2022; Venice Commission, 2013).

According to the assessment of the Commission, most constitutional systems operate on the assumption that all constitutional provisions have similar/equal normative power, and the government that revises the Constitution has the power to change existing and other constitutional provisions. As a result, one constitutional provision cannot be evaluated against another. The lack of judicial scrutiny of the constitutional amendments is due to the idea that the constitutional revision is legitimized by the people and is an expression of public sovereignty (Venice Commission, 2012).

On the other hand, it is important to focus on the assessment of the Venice Commission related to "unamendable/permanent" provisions (such as Article 157 of the Constitution of Ukraine), following which these provisions help to strengthen the justification of the exercise of further substantial control, even if it is a very

"controversial and extremely difficult issue". (Venice Commission, 20 June 2022). The "unamendable/permanent" norms serve to immunity to a certain part of the Constitution from any constitutional amendment (Preuss, 2011, 430).

The Venice Commission recommends only formal/procedural revision of the constitutional amendments and reinforces the position that all constitutional systems must ensure democratic judicial control to provide the adoption of constitutional amendments under the established constitutional procedures. Such formal review exercised by the court cannot interfere with the sovereign rights of the constituent government to protect democracy (Venice Commission, 2020).

The Venice Commission applies a more accurate approach to the substantive consideration of constitutional amendments in comparative constitutional law (Venice Commission, 2020). The Commission notes that the constitutional amendments should be reviewed only in countries where they derive from a clear and established doctrine. Even there, the process should be exercised with the margin of appreciation of the constitutional legislator (Venice Commission, 2020).

The Venice Commission recognizes that the determination of the scope and nature of the constitutional amendments in a particular country is the result of making a complex balance between the principles of "public sovereignty" and "rule of law", which also implies the imposition of reasonable boundaries on judicial interference. Even if the Parliament is the main arena for providing constitutional amendments in almost all European states, it may also be appropriate for the National Constitutional Court to compulsory and systematic review before or after adopting the proposal for the constitutional amendments by the Parliament (Venice Commission, 20 June 2022).

To sum up, the Venice Commission has acknowledged that even if it is a complex issue that varies between countries, judicial review of constitutional amendments can be a valid and effective mechanism under certain conditions, especially when the Constitution contains eternal articles, and considering the constitutionality of such amendments, following a clear and established doctrine, help states avoid the changes accepted in violation of constitutional requirements (Venice Commission, 20 June 2022). The substantial revisions of constitutional amendment in compliance with the basic principles of Constitution can be observed when the Constitution explicitly establishes such a hierarchy (Dürr, Schnutz, in Yildirim, Engin 2024, 819).

## **5. Conclusion**

In conclusion, the discussion on the constitutionality of the constitutional amendment is not characterized by contentious contradiction since the court considers not one provision of the Constitution with another, but

a new document/law that implies amendments to the old text of the Constitution. This is supported by international practice, according to which, when an amendment is made to the Constitution, the relevant constitutional amendment is appealed and not the new provision of the Constitution.

The Constitutional Court of Georgia has the legal opportunity, based on a claim related to basic human rights or within the abstract norm control, to discuss the constitutionality of the constitutional amendments – the relevant constitutional law or a part thereof concerning the fundamental principles of the Constitution of Georgia or fundamental human rights (Kobakhidze 2019, 235). Comparative-legal research has shown that in countries of a similar order where constitutional amendments are normative acts and the Constitutional Court has the competence to evaluate normative acts referring to human rights, the Constitutional Courts consider them not only in a formal sense but also from a material perspective.

Since this analysis of the chapter clearly outlined the differences of opinion, whether the Constitutional Court has the jurisdiction to review constitutional amendment, there are two possible ways to resolve this issue:

1. To provide greater definition and clarity, it shall be recommended to amend the first paragraph of article 19 of the Organic Law of Georgia on ‘the Constitutional Court of Georgia’ and specify that according to the Constitution of Georgia, the Constitutional Court shall evaluate normative acts with the force of law including the constitutional amendments which is a normative act following the Law of Georgia "On Normative Acts".

2. In addition, it will be reasonable to establish a separate provision for the form, content, scope, and most importantly, the results of satisfying the relevant constitutional claim by the Constitutional Court.

3. It is recommended (independently of the legislative amendments which is the prerogative of the legislature) for the Constitutional Court to take into account the result of the 2017-2018 reform of the Constitution of Georgia, as well as the "unamendable/permanent" norms in the basic law following the legal literature and consider/revise/alter the practice, which has not changed since its establishment in 2013.

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