



**Covid-19 and
Constitutional
Review:
Assessment of
the Effectiveness
of the Constitutional
Court of Georgia**



ევროკავშირი
საქართველოსთვის
The European Union for Georgia



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Introduction

The constitutionality of specific restrictions related to Covid-19 and the general model of virus management in Georgia has come under question multiple times within the framework of constitutional litigation. The Constitutional Court, however, still has not answered any of these questions. Moreover, the highest institution of constitutional law in Georgia has not issued any official rulings on the constitutional lawsuits related to Covid-19, nor has it otherwise contributed to the discussion at large. The purpose of this document is to analyze the effectiveness of constitutional litigation regarding the lawsuits related to Covid-19, as well as to uncover the potential objective or subjective reasons for its observed passivity in these matters.

The data in this analysis comes from the website of the Constitutional Court of Georgia (www.constcourt.ge). As well as the information disclosed by the court in response to our FOI request.

1. Constitutional Lawsuits Related to Covid-19 and Their Respective Plaintiffs

The curfew was not the first case when the constitutionality of the fight against Covid-19 and the restrictions put into place to prevent its spread came under question. The Constitutional Court has already received [15 constitutional lawsuits](#) on this issue. It is noteworthy that every constitutional lawsuit was filed by natural persons, while one – from a non-governmental organization – was filed by a legal person within the framework of ordinary competence¹. It should also be noted here that the common courts have not used the instrument of constitutional submission to address the restrictions related to Covid-19. The same is true for the opposition parties of the Parliament of Georgia.

Registered Constitutional Complaints and Their Plaintiffs

Natural Persons and Legal persons (ordinary competence)	15
1/5 of the Parliament of Georgia	0
Constitutional Reference of the Common Courts of Georgia	0

¹ Meaning the most widely used competency, considered under sub-paragraph “e” of Article 19 of the Organic Law of Georgia “On the Constitutional Court of Georgia”.

2. Necessity of Timely Hearings of Registered Constitutional Lawsuits

There are several reasons that make the timely hearings and rulings by the Constitutional Court on constitutional lawsuits related to Covid-19 necessary.

2.1. Threat of Leaving Constitutional Lawsuits Unaddressed (Termination of Proceedings)

Restrictions and challenged normative acts associated with Covid-19 undergo changes at a fast pace. For instance, so far² 65 formal changes have been introduced to ordinance N322 of the Government on Georgia “On the Approval of Isolation and Quarantine Rules”. Moreover, each ordinance that introduces changes will, as a rule, change several normative requirements, add more, or alter their content.

According to the legislation,³ prior to deciding the issue of the acceptance of a lawsuit by the Constitutional Court for consideration under the merits, declaration of the norm under dispute as void will result in the unconditional termination of the case. The Constitutional Court considers any type of changes made to a disputed norm, even a purely technical one rather than a change to its contents, grounds to declare said norm void.⁴

Consequently, if the Constitutional Court does not decide to accept a lawsuit for consideration on the merits before the disputed norm is declared void, the Court will not be able to adequately evaluate the constitutionality of the judicial issues raised by the lawsuit and have an in-depth hearing on it, nor will it be able to establish the appropriate constitutional standards. Notably, the Constitutional Court has already had to or will have to partially terminate cases related to Covid-19 on this basis.⁵

2.2. Delayed Rulings and Impossibility of Redressing Unconstitutional Restrictions of Rights

Every regulation related to the pandemic is limited in time and by the duration of the pandemic itself. If the Court does not issue timely rulings on constitutional lawsuits

² The period between May 23, 2020 and November 15, 2020.

³ Paragraphs 2 and 7 of Article 29 of the Organic Law of Georgia “On the Constitutional Court of Georgia”.

⁴ According to the practice established by the Constitutional Court of Georgia, “the new wording of a disputed norm may give rise to different legal circumstances, the content under appeal may change significantly, insignificantly or not at all. However, the old version of the norm, valid at the time of registration of the constitutional claim, is considered invalid in any case. June 24, 2014, ruling №1/3/559 of the Constitutional Court of Georgia on “Intellect Publishing Ltd., Artanuji Publishing Ltd., Diogenes Publishing Ltd., Logos Press Ltd., Bakur Sulakauri Publishing Ltd., Trias Publishing House Ltd. and Citizen of Georgia Irina Rukhadze v. Minister of Education and Science of Georgia”, II-5).

⁵ For example, see June 5, 2020, recording notice №1/9/1505 of the Constitutional Court of Georgia on “Paata Diasamidze v. Parliament of Georgia and the Government of Georgia”, also lawsuit N1544 where the norm appealed in the lawsuit was changed the day following its registration.

accepted for consideration on the merits, the process of effectively redressing rights that had been restricted unconstitutionally will face significant challenges.

The principal problem associated with the constitutionality of the restrictions related to Covid-19 arises due to paragraph 1 of Article 45³ of the Law of Georgia “On Public Health”. This norm, by its content, is a temporary one and will lose its judicial power on January 1st of 2021. Even if it becomes necessary to extend restrictions, a new norm is expected to be established instead (even one with minor grammatical or other kinds of changes), which would make the existing norm void and become a technical basis for terminating all constitutional litigation of the related lawsuits.

Specifically, according to the decision of the Constitutional Court, a disputed norm becomes void from the moment of the announcement of the corresponding ruling. At the same time, the ruling will have no direct effect on the persons whose rights were unconstitutionally violated within the framework of the revoked norm. For example, if the Constitutional Court rules the imposition of a curfew unconstitutional, the curfew will be revoked, and no new fines can be issued for violating it. The persons who were fined before it was declared unconstitutional, however, will have no way of being compensated for the fines they paid, or at the very least will have to go through grueling and long judicial processes to receive recompense. Crucially, it has already been 5 years since a constitutional lawsuit (on the application of the decision of the Constitutional Court to past legal relations, the effects of judicial acts) on the possibility of redressing rights based on a belated ruling by the Constitutional Court was brought to the Constitutional Court, but the court has yet to issue a ruling.⁶

The various restrictions related to Covid-19 had an effect on each citizen of Georgia, with thousands of them being fined for one reason or another. Based on the complicated nature of the epidemiological situation of the country, measures are expected to become even stricter and the use of more mechanisms for the restriction of rights is likely.

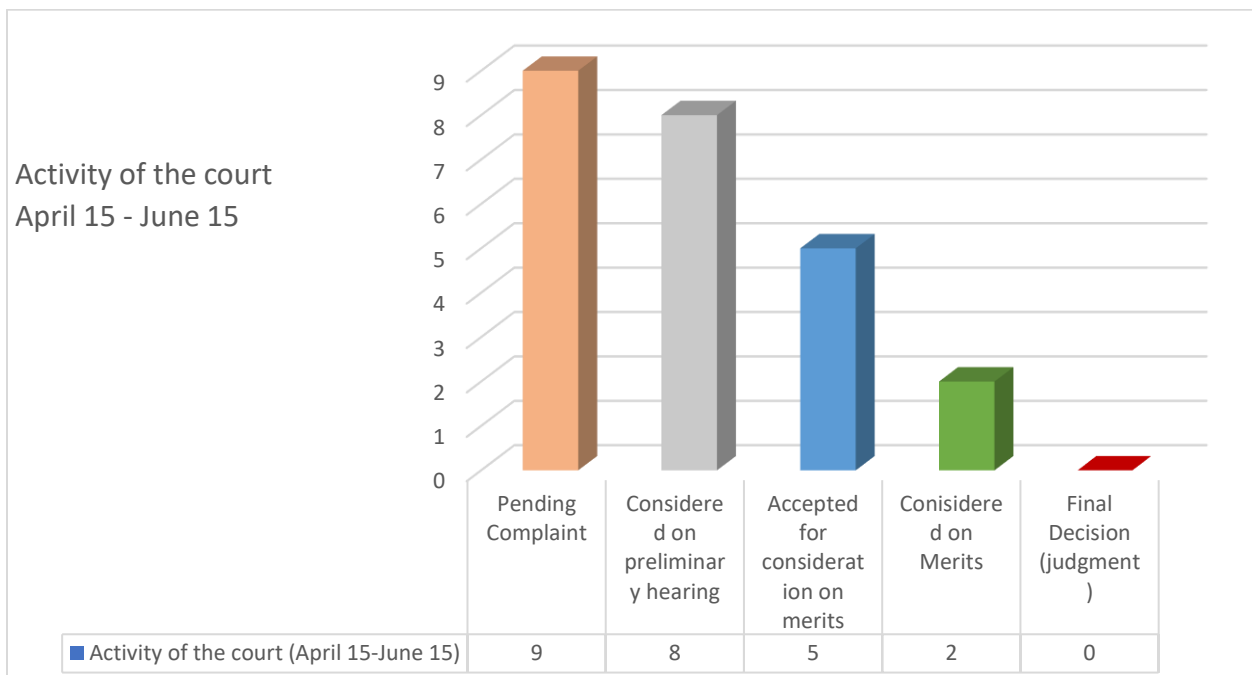
Therefore, in order to ensure the protection of principal rights of the citizens through constitutional control, the Constitutional Court must keep pace with the judicial challenges arising from the spread of the novel coronavirus and effectively fulfill its mandate originating from the Georgian Constitution – guaranteeing the implementation of the obligations of the Georgian Constitution and thereby ensuring the protection of human rights.

⁶ See February 25, 2016, recording notice №3/1/719 of the Constitutional Court of Georgia on “Rustavi 2 Broadcasting Company Ltd. and Georgia Television Ltd. v. the Parliament of Georgia”.

3. Dynamics of the Response to Constitutional Lawsuits from 15 April till 15 of June of 2020

The first constitutional complaint regarding Covid-19 was logged in 16 of April. In the period of April-May of 2020, 9 constitutional lawsuits related to Covid-19 were filed with the Constitutional Court. 8 of these lawsuits pertained to the restrictions put into place during the countrywide state of emergency that would become void as soon as the state of emergency ended (May 22, 2020). It was therefore important for the Constitutional Court to make a decision to proceed with consideration of these cases on the merits in a timely manner.

The Constitutional Court demonstrated exemplary effectiveness. Before the end of the state of emergency, it held executive sessions and issued corresponding judicial acts on 7 out of the 8 constitutional lawsuits. Moreover, the Court admitted the 1 lawsuit pertaining to the restrictions enacted after the end of the state of emergency that was filed with it into consideration on the merits within 11 days.



In summary, 9 constitutional complaints were registered over the period of April and May the Constitutional Court considered 8 (approximately 90% of the total) of them within the framework of an executive/preliminary session and adopted corresponding judicial acts (3 Rulings and 5 Recording Notices). In addition, Constitutional Court Considered 2 complaints on merits. The average time it took to consider one lawsuit within the framework of an executive/preliminary session was less than 8 days.

The fact that the lawsuits were considered so effectively created an expectation among the public that constitutional control during the pandemic would be effective and that the

corresponding rulings would be issued swiftly. Nevertheless, as seen from the data below, this expectation was not met.

4. Dynamics of the Response to Constitutional Lawsuits from 15 June 2020 Onwards

As effective as the Constitutional Court had been during the period of April-May 2020, it proved to be equally ineffectual after June. Specifically, the Constitutional Court did not have a response to any of the 6 constitutional lawsuits filed with it after June. All of the lawsuits, until the day they are registered with the court, are awaiting a preliminary hearing and all except one challenge the constitutionality of the current restrictions stipulated by the government.

On July 30, Constitutional Court held hearings to consider 2 lawsuits related to the state of emergency on the merits. These two lawsuits were considered as a single case, and the Constitutional Court has still not issued a final judgment on the case at this time.⁷

Between June 1 and today, this is the full extent of the response of the Constitutional Court to the lawsuits pertaining to Covid-19. The Constitutional Court has had no response whatsoever to the constitutional lawsuits filed after June.

Complaint N	Registration Date	არსებული სტატუსი	განმხილველი
1498	23.04.2020	Waiting for the Final judgment	II Chamber
1499	23.04.2020	Waiting for the Final judgment	I Chamber
1502	11.05.2020	Waiting for the Final judgment	Plenum
1503	19.05.2020	Waiting for the Final judgment	Plenum
1504	19.05.2020	Waiting for Preliminary hearing	Plenum
1505	25.05.2020	Waiting for consideration on merits	I Chamber
1515	22.06.2020	Waiting for consideration on merits	I Chamber
1516	22.06.2020	Waiting for consideration on merits	I Chamber
1523	06.07.2020	Waiting for Preliminary hearing	Plenum
1529	21.07.2020	Waiting for consideration on merits	I Chamber
1535	01.09.2020	Waiting for Preliminary hearing	I Chamber
1548	12.11.2020	Waiting for Preliminary hearing	I Chamber

⁷ This case combined constitutional lawsuits N1502 and N1503, which were considered during the same session. The consideration of the case under the merits lasted 2 days.

5. Circumstances that May Explain the Ineffectiveness of the Constitutional Court

Before reaching final conclusions, it is important to consider the circumstances that may be impeding the effectiveness of the Constitutional Court.

Circumstance N1: The situation arising from the spread of the coronavirus does not impede the activities of the Court

Far more restrictions were in effect in Georgia during the state of emergency, including a restriction on the freedom of movement between cities. Despite this fact, during this time, the Constitutional Court managed to effectively consider the lawsuits pertaining to the coronavirus within the framework of executive sessions.

Simultaneously, the Constitutional Court [questioned witnesses/experts remotely and had its own session transmitted with no issues](#) during several hearings. Moreover, the Court began using the [electronic system of constitutional litigation](#) that gives participants the opportunity to provide and receive materials of the case electronically. This is a clear indication that the Constitutional Court has sufficient infrastructure to organize remote hearings and guarantee the public's access to them.

In any case, even if organizational challenges unknown to the public exist, they cannot be considered sufficient justification. The Court had more than enough time to resolve the issue of administering the hearings. It should be noted that, as of now, the Constitutional Court has not introduced any changes to its internal regulations to take into account the issues related to Covid-19.

Circumstance N2: The ineffectiveness of the Constitutional Court is not caused by the legislation

Organic Law of Georgia "On the Constitutional Court of Georgia" requires the Court to consider a case in a tighter time frame under certain circumstances. No such lawsuits/submissions, however, have been filed with the Constitutional Court in 2020.

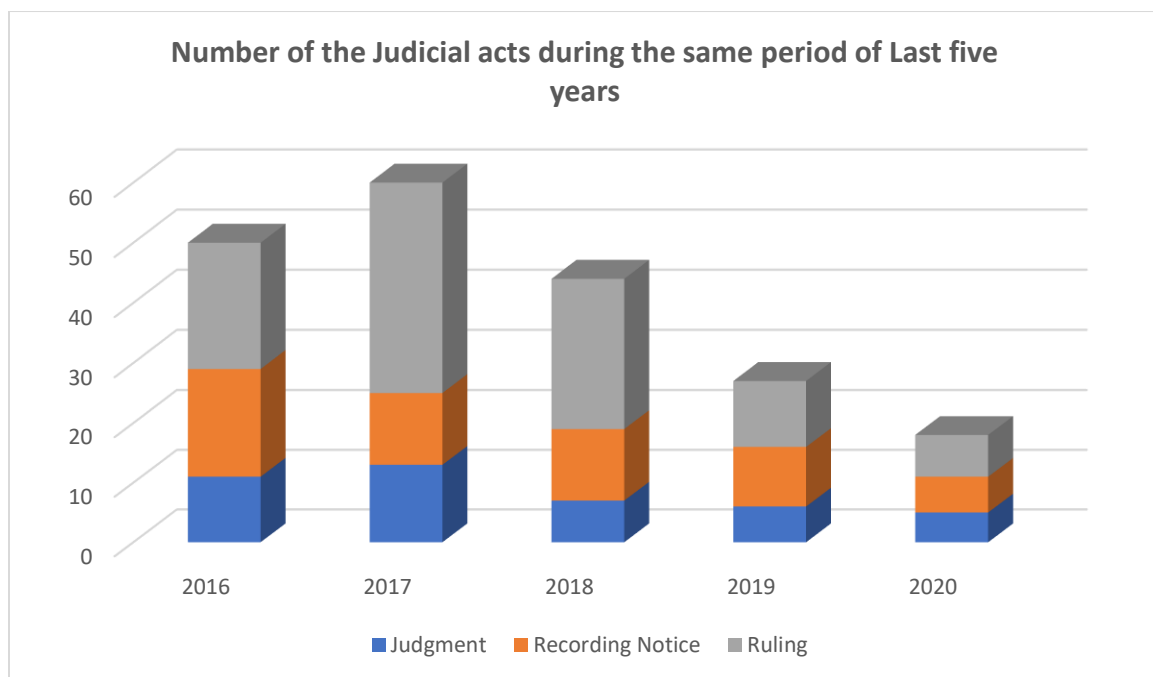
3 constitutional submissions of the general court were filed in 2020. The legislation does not establish a tighter time frame for the consideration of general court submissions. According to paragraph 5 of Article 22 of the Organic Law of Georgia "On the Constitutional Court of Georgia", the filing of a constitutional submission will pause the

timeframe of the proceedings of the constitutional lawsuits filed under ordinary competence. Nevertheless, the filing of a general court submission has not, on its own, become a basis of changing the dynamics of litigation. As an example, we can consider constitutional submission N1478. Said submission was filed with the Constitutional Court on January 10, 2020, but the 16 constitutional lawsuits, including some related to Covid-19, subsequently filed with the Court were considered by the Constitutional Court with no issues. Simultaneously, the Court has held no executive session or hearing to consider on the merits of the abovementioned submission or the two remaining submissions so far.⁸

Circumstance N3: The Constitutional Court was not overloaded with other cases

The chief criterium used to evaluate the dynamics of the activity of the Constitutional Court is the judicial acts it issues. Such acts come in three categories: recording notices, judgements, or rulings (as well as conclusions, although the Court has yet to issue any).

Between June 1, 2020, and today (November 15, 2020) the Constitutional Court issued 18 acts. Compared to the identical period in the previous 5 years, this is a significantly lower number (2016 – 50 acts; 2017 – 60 acts; 2018 – 44 acts; 2019 – 34 acts). Moreover, in terms of the judicial acts issued in relation to the number of constitutional lawsuits that had been filed, the Constitutional Court is establishing a negative record of the dynamics of litigation.



⁸ This information is true as of 13:00 on November 15, 2020.

Circumstance N4. The decrease in the effectiveness of the Constitutional Court coincides with the appointment of the new chairperson and deputy chairperson

The analysis of the response of the Constitutional Court to the lawsuits related to Covid-19 filed with it reveals that the effectiveness of constitutional control worsened significantly following June 2020. The Constitutional Court practically refused to consider any new constitutional lawsuits or to rule on the constitutional lawsuits already taken into consideration on the merits at this time.

At the same time, no objective circumstances that could have significantly impacted the effectiveness of the Constitutional Court were revealed. The absence of objective reasons strengthens the suspicion that the changes among specific members of the Constitutional Court are in fact a potential reason for the absence of any activity in terms of the consideration of the lawsuits related to Covid-19 in this period.

The Board/Plenum Considering the Chief Constitutional Lawsuits Related to Covid-19

The principal constitutional lawsuits related to the state of emergency that had been filed with the Constitutional Court – arguably including the Decree of the President – are considered by the Plenum of the Constitutional Court.⁹ At the same time, one of the lawsuits related to the state of emergency (N1498) is considered by the second Chamber of the Court.

Meanwhile, every single constitutional lawsuit that go beyond the scopes of the state of emergency and requires to check the constitutionality of the current restrictions¹⁰ fall to the first Chamber.¹¹ The first Chamber also considers the constitutionality of the curfew enacted during the state of emergency as well as the curfew established after November 9th 2020.¹²

⁹ Constitutional lawsuits N1502 and 1503.

¹⁰ Where Article 45³ of the Law of Georgia “On Public Health” and the authority given to the Government of Georgia came under dispute.

¹¹ Constitutional lawsuit N1505 was given to the first Board. Per paragraph 3 of Article 31² of the Organic Law of Georgia “On the Constitutional Court of Georgia”, it should also have been assigned constitutional lawsuits N1515, N1516 and N1529.

¹² See the April 30, 2020, N1/6/1499 recording notice on the case of “Mikheil Samnidze v. the Georgian Government” of the Constitutional Court of Georgia and Constitutional complaint N1548.

Changes of the Chairpersons of the Plenum and First Board of the Constitutional Court

In April and June of 2020 the Plenum of the Supreme Court elected two new members of the Constitutional Court, [Vasil Roinishvili](#) and [Khvicha Kikilashvili](#). June 2020 also marked the expiration of the term of office of the Chairperson of the Constitutional Court – Zaza Tavadze. [Merab Turava](#) was elected as his replacement. At the same time, the newly elected (in 8 days from taking the oath) Justice, Vasil Roinishvili, was appointed Deputy Chairperson of the Constitutional Court. Therefore, Merab Turava became the Chairperson of the Plenum of the Constitutional Court of Georgia, while Vasil Roinishvili became the Chairperson of the first Board.

Authority of the Chairperson of the Plenum/Board in Relation to the Influence over the Dynamics of Litigation of Cases

The Constitutional Court holds hearings on cases in the format of either an executive session or consideration under the merits, both of which can be held with or without an oral hearing. At the same time, an act of the Constitutional Court (ruling, judgement, recording notice) is issued as a result of a session held in the deliberation room.

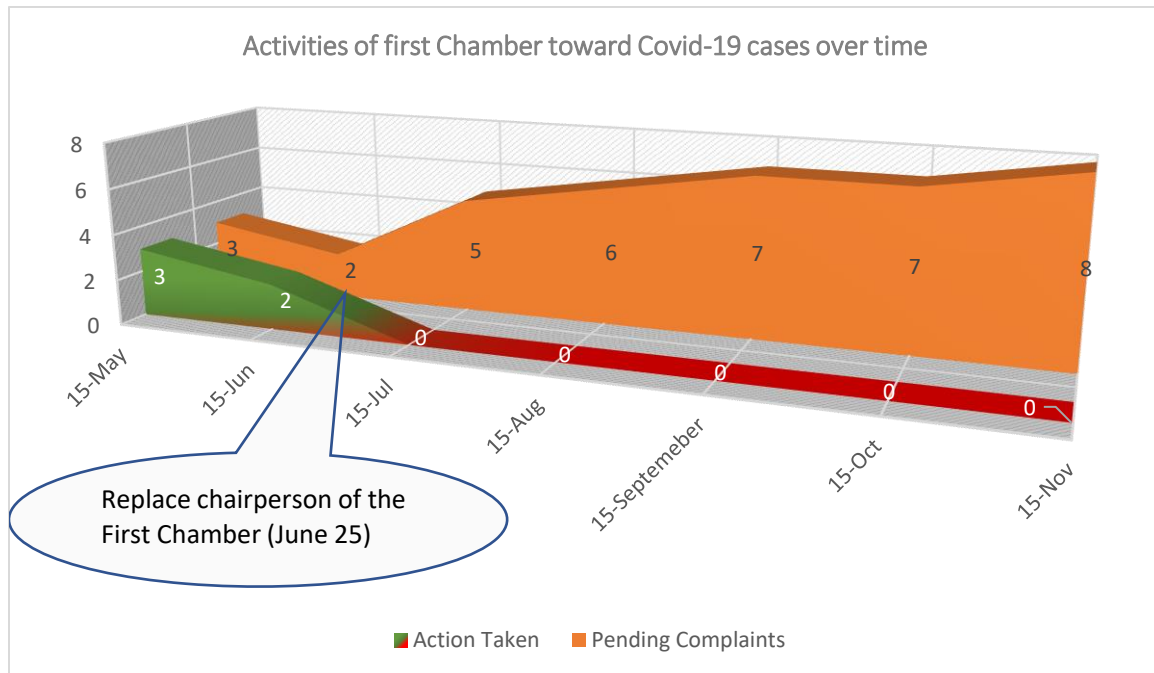
According to paragraph 3 of Article 17 of the [Rules of the Constitutional Court of Georgia](#), the respective Chairperson makes the decision to hold sessions of the Plenum/Board of the Constitutional Court. According to paragraph 2 of Article 36 of the same Rules, the same rule is in effect when it comes to the judicial sessions to adopt a judicial act of the Constitutional Court.

Subsequently, the chairperson of the Plenum or the corresponding Board of the Constitutional Court can have significant influence over the dynamics of the sessions of the Court. Specifically, formally, even if the majority of the members of the Court wish so, a session of the Constitutional Court cannot be held without the chairperson's approval, nor can any acts of the Constitutional Court be issued.

Data indicates that the approach of the Court to the lawsuits related to Covid-19 underwent a radical shift following the changes in the staff of the Constitutional Court. The discussion around the declaration of a second state of emergency is becoming more prominent in the country, all while the Plenum of the Constitutional Court and the second Board of the Constitutional Court still have not made rulings on the lawsuits filed during the first state of emergency.

The effectiveness of the Constitutional Court is significantly impeded by the lack of activity of the first Chamber which has been tasked with considering every constitutional lawsuits related to current restrictions. Specifically, following the appointment of the new Chairperson of the first Board, the Board has not considered any case on merits and has not

delivered final judgment. Activity of the first chamber toward Covid-19 cases dropped near 0 and became symbolic.



These circumstances create the impression that the considerations of the lawsuits related to Covid-19 are being purposefully impeded in the Constitutional Court and/or the persons authorized to consider these cases have not fully realized the importance and necessity of the effectiveness of constitutional control during pandemic.

6. The Extent to Which the Lawsuits Pertaining to Covid-19 Give the Court the Ability to Effectively Respond to the Issues

Firstly, it should be noted that the potential problems in the contents or form of the lawsuits does not reduce the burden of the Constitutional Court, and it is still obligated to issue corresponding acts in a timely manner. This burden is especially important when it comes to the lawsuits pertaining to Covid-19, so that the Court can avoid inaccurate judicial expectations related to the constitutional lawsuits that were filed and the sense of the ineffectiveness of constitutional control does not arise among the public.

It is noteworthy that 4 constitutional lawsuits¹³ dispute Article 45³ of the Law of Georgia “On Public Health”, as this article defines the extent of the powers transferred to the government. This norm specifically gives the government the power to carry out measures pertaining to Covid-19 and is the chief reason for the constitutional problems that arise as a result. Among others, the curfew was declared on the basis of this norm. Ruling on the constitutionality of

¹³ Constitutional lawsuits filed under the number: N1505, N1515, N1516 ოპ N1529.

this norm with regard to various constitutional rights, including the freedom of movement, has been requested within the framework of several constitutional lawsuits. Notably, the first constitutional complaint (N1505) challenging the constitutionality of the key legal provision was accepted on merits on 5th of June 2020. The First Chamber of the court took no further action to decide that case and to establish proper constitutional standards.

Additionally, the Constitutional Court has taken into consideration on the merits several lawsuits specifically in relation to the constitutional problems identified within the framework of the measured adopted in the state of emergency. Notably, the court is still deciding the cases regarding the first state of emergency where there is ongoing discussion for announcing the second one.

7. Necessity of Timely Rulings on Registered Constitutional Lawsuits

By holding hearings and issuing corresponding rulings on the constitutional lawsuits that have been filed with it, the Constitutional Court has an opportunity to put an end to the systemic constitutional and judicial problems related to the Covid-19 situation and finally establish the existing constitutional-judicial standards in the country. This is crucial for bringing the state model of pandemic management within the constitutional framework.

This process has gained special urgency under the circumstances of a newly convened parliament. Specifically, the newly elected parliament will have to decide the issue of extending the powers transferred to the government or adopt replacement regulations before 2021.

Ruling on the lawsuits taken into consideration under the merits is vitally important. If the Court does not establish corresponding constitutional standards, preventing the violations of human rights in the fight against Covid-19 will become significantly more difficult. At the same time, considering the fact that the rulings of the Court are not retroactive, redressing the unconstitutional restrictions of rights will become practically impossible and will require disproportionate effort.

It is noteworthy that the Venice Commission discusses the importance of the courts and the necessity of their engagement in its interim report on Covid-19. The Commission notes that the judicial system must provide effective means for the protection of the rights of individuals. Notably, the conclusion talks specifically about the need for the involvement of constitutional control in the oversight process of the emergency measures pertaining to the pandemic.¹⁴

¹⁴ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), opinion No. 995/220. [INTERIM REPORT ON THE MEASURES TAKEN IN THE EU MEMBER STATES AS A RESULT OF THE COVID-19 CRISIS AND THEIR IMPACT ON DEMOCRACY, THE RULE OF LAW AND FUNDAMENTAL RIGHTS](#). Par. 77, 78.

As noted above, the Constitutional Court has not issued a single ruling on the conditions of human rights during the pandemic. This kind of passivity of the Constitutional Court does significant harm to public trust in constitutional control and gives rise to doubts about potential unhealthy processes within the Court itself.

Conclusion

During the initial stages, the Court actively considered cases. During the period of approximately one month, the Court heard 8 constitutional lawsuits within the framework of executive sessions. Through such impressive activity, the Court created an expectation that constitutional control would be effective during the pandemic and corresponding rulings would be issued in a timely manner.

There was a radical shift to this state of affairs beginning in June 2020. In the past 5 months, the Constitutional Court has not taken a single new lawsuit into consideration under the merits, nor has it issued any rulings on the lawsuits it had previously taken into consideration under the merits. As an example, while a dispute regarding the declaration of a second state of emergency arose in the public, the Court still had not ruled on the lawsuits pertaining to the first state of emergency declared in the beginning of 2020 that it had taken into consideration under the merits.

Such a radical reduction in the effectiveness of the Court is not related to any objective circumstances. At the same time, the period coincides with the changes in the chairpersons of the Plenum and the first Board of the Constitutional Court. It is noteworthy that the principal constitutional lawsuits pertaining to Covid-19 were to be considered precisely by the Plenum and the first Board. Simultaneously, according to the legislation, constitutional lawsuits cannot be considered without the approval of the chairperson of the respective Plenum/Board, nor can a deliberation be held to decide on the ruling.

The radical shift in the approach of the Constitutional Court to the lawsuits related to Covid-19 and the delay in their consideration does significant harm to the quality of the protections of human rights. At the same time, it leaves the impression that the Constitutional Court has lost the will and/or power to react to the constitutional problems pertaining to Covid-19 in a timely and effective fashion.

In any case, it can be unequivocally stated that constitutional control, when it comes to the issues related to Covid-19, is currently ineffective and purely symbolic. This significantly increases the risks of unconstitutional restrictions of principal human rights and freedoms.