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PRZYWRÓCENIE NIEWAŻNYCH LUB ZMIENIONYCH PRZEPISÓW PRZEZ TRYBUNAŁ KONSTYTUCYJNY

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Adnotacja. Niniejszy artykuł dotyczy kwestii przywrócenia mocy lub poprzedniej wersji ustawy, która straciła moc lub została zmieniona przez inną ustawę, która została później uznana za niekonstytucyjną. Artykuł analizuje źródła doktrynalne i praktyki sądów konstytucyjnych Ukrainy, Mołdawii, Bułgarii, Łotwy, Czech i Słowacji, które zawierają argumenty zarówno za takim przywróceniem, jak i przeciwko niemu. Na podstawie wyników badania zauważono, że głównym czynnikiem warunkującym możliwość lub niemożność takiego przywrócenia jest zastosowana zasada działania decyzji Trybunału Konstytucyjnego w czasie. Mimo to nawet w krajach o podobnych regulacjach prawnych, podejście do rozwiązania tego problemu nie jest takie samo. W artykule zauważono, że wznowienie lub poprzednia wersja ustawy, która straciła moc lub została zmieniona przez prawo niekonstytucyjne, jest dopuszczalnym postępowaniem sądowym. Jednak jego automatyczne stosowanie jest niepożądane. Zamiast tego Trybunał Konstytucyjny powinien mieć swobodę wyboru, kiedy zastosować tę technikę.

Słowa kluczowe: Trybunał Konstytucyjny, postępowanie konstytucyjne, przywrócenie nieważności ustawy.

RESTORATION OF THE INVALID OR AMENDED LAW BY THE CONSTITUTIONAL COURT

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Abstract. This article examines the issues of the restoration of the validity or previous wording of a law, that was invalidated or amended by another law, which was later declared as unconstitutional. The article examines the doctrinal sources and case-law of the constitutional courts of Ukraine, Moldova, Bulgaria, Latvia, the Czech Republic and Slovakia, which contain arguments both in favor of such renewal and against it. As it was found, the main factor determining the possibility or impossibility of such a restoration is the temporal effects of the Constitutional Court judgment. Despite this, even in countries with similar legal regulations, approaches to solving this issue are not the same. It was noted that the restoration of the validity or previous wording of the law, which was invalidated or amended by an unconstitutional law, is an admissible judicial technique. However, its automatic application is undesirable. Instead, the Constitutional Court should be empowered at its own discretion to choose when to apply this technique.

Key words: Constitutional Court, constitutional justice, restoration of the invalid law.

ВІДНОВЛЕННЯ НЕЧИННИХ АБО ЗМІНЕНИХ НОРМ КОНСТИТУЦІЙНИМ СУДОМ

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Анотація. Ця стаття присвячена питанню відновлення чинності або попередньої редакції закону, який втратив чинність або був змінений іншим законом, який надалі був визнаний неконституційним. У статті розглядаються доктринальні джерела та практика конституційних судів України, Молдови, Болгарії, Латвії, Чехії та Словаччини, які містять аргументи як на користь такого відновлення, так і проти нього. За результатами дослідження відзначено, що основним чинником, який обумовлює можливість чи неможливість такого відновлення, є застосовуваний принцип дії рішення Конституційного Суду в часі. Незважаючи на це, навіть у країнах зі схожим правовим

регулюванням підходи до вирішення цього питання неоднакові. В статті відзначено, що відновлення чинності або попередньої редакції закону, який втратив чинність або був змінений неконституційним законом, є допустимим судовим прийомом. Однак його автоматичне застосування небажано. Натомість Конституційний Суд має бути уповноважений на власний розсуд обирати коли застосовувати цей прийом.

Ключові слова: Конституційний Суд, конституційне судочинство, відновлення нечинного закону.

Statement of the problem. In practice there are often situations when the Constitutional Court ought to decide on the constitutionality of the law that cease the validity of another law or amends its wording. In this case, a question may arise whether the unconstitutionality of the said law will entail the restoration of the invalid law (that ceased to be in force or was amended according to the unconstitutional law). Among other things, it could be questionable whether this restoration would occur automatically or should the Constitutional Court set it in its judgment. In doctrine and case-law of the constitutional courts of the different European countries, different approaches and views on how these issues should be resolved are supported.

The relevance of the research topic is confirmed by the fact, that there is no consistent position of the Constitutional Court of Ukraine, the Supreme Court of Ukraine or the parliament on whether the restoration of validity of the law, that ceased to be in force or was amended according to another law, must take place in the event that the latter is declared as unconstitutional.

Status of research. The said issue was subject of researches of such researchers, as Lyubchenko P., Riznyk S., Neimanis J., Staugaitytė V., Tanchev E., Valchev D. In this article some materials of their researches were used.

In addition, this controversial issue was considered in case-law of the constitutional courts of Ukraine, Latvia, Moldova, Lithuania, Czech, Slovakia, Bulgaria. It also was analyzed and used in this article.

The purpose of the article is to analyze and systematize approaches in doctrine and case-law whether the law, that ceased to be in force or changed its wording according to the unconstitutional law, must restore its validity or previous wording if the latter is declared as unconstitutional. According the results of the study will be made conclusions and recommendations, that could be used by the constitutional courts while considering cases of the constitutionality of legal acts. In the course of writing the article, an analytical analysis of doctrinal sources, case-law of the constitutional courts of European countries and **a comparative method** were used to identify common features and differences in the views of scientists and judges on the problem that is the subject of the study.

Presentation of the main material. For a sake of efficiency of constitutional control, a judgment of the Constitutional Court must be sufficiently self-executing: with its issuing negative consequences, produced by the unconstitutional legal act, must be eliminated to the maximum extent without involving other parties to its executing (in particular, a parliament).

One of the techniques providing this self-execution of the judgment of the Constitutional Court is the restoration of the validity or previous wording of the legal act, that was invalidated or amended according to another legal act, that was declared as unconstitutional by the judgment of the Constitutional Court (hereinafter such an invalid act or its previous wording will be called as "**the former law**" – and the law, that invalidates or amends the former, will be called as "**the new law**").

In Ukraine, this issue became particularly relevant and debatable in 2010, when the Constitutional Court of Ukraine in its judgment dated 30 September 2010 № 20-rp/2010 declared as unconstitutional the amendments to the Constitution of Ukraine and set the restoration of its previous wording.

Such a result of consideration of this case received extremely contradictive assessments of researchers, which can be partially explained by the fact, that the CCU used this technique first time in its practice. For example, prominent Ukrainian researcher Lyubchenko P. notes, that by restoring the previous wording of the Constitution of Ukraine, the Constitutional Court overstepped its competence defined by Article 147 of the Constitution, and encroached on the competence of the parliament (Любченко, 2016, pp. 18–20). Slightly less categoric position took another Ukrainian researcher Riznyk S., claiming that while resolving the question whether "the former law" should be restored in this scenario, one must take into account whether the procedure for the adoption of "the new law" (that is unconstitutional) was infringed. It means, that the restoration of "the former law" can take a place only in one particular situation: when "the new law" is declared by the Constitutional Court as unconstitutional because of the infringement for the procedure of its adoption (Різник, 2014, p. 55).

In any event, we could have accepted the restoration of the previous wording of the Constitution of Ukraine as fait accompli – if a similar dispute did not arise again after less than 10 years. In 2018 the Constitutional Court of Ukraine declared as unconstitutional Law "On All-Ukrainian Referendum" (2012), according to which Law "On All-Ukrainian and Local Referendums" (1991) was invalidated. In 2018 no one cared whether the law of 1991 year restored its validity due the fact, that the law of 2012 was declared as unconstitutional. But surprisingly for everyone in Ukraine, later the Supreme Court stated in its judgment dated 25 October 2019 in case No. 826/17872/18 that the former law of 1991 actually did restore its validity (despite the fact, that the CCU didn't expressly set it in its judgment). Later a similar question aroused in case No. 9901/123/20, that was resolved by the Supreme Court, and one of its judges agreed in its separate opinion, that the law of 1991 should be treated as valid.

This position of the judges of the Supreme Court was faced with mild critic in the parliament, but neither the Supreme Court, nor the Constitutional Court, nor even the parliament itself took any actions to clarify the ambiguity whether the law of 1991 actually is valid and to this day no one gave any authoritative answer to that question.

As we can see, in Ukraine on the level of doctrine and case-law there is no any consensus whether "the former law" restore its validity in the event of invalidation of "the new law" by the Constitutional Court. So, in order to find an answer to this question let's take a closer look on doctrine and case-law in other European countries.

When the so-called "kelsenian" model of the Constitutional Court was designed in 1920, its author, Hans Kelsen, noted the need to delimitate the CC from the "positive" legislature not only institutionally, but also in terms of his jurisdictional powers – which meant to prevent too big concentration of powers in the hands of newly established, alongside the parliament, institution. Therefore, it is possible to conclude that there is a certain irony in the fact that the idea of a restoration of "the former law" by the Constitutional Court was first time proposed by the H. Kelsen himself in Austria during the 1929 reform. According to the consequences of this reform if the Constitutional Court of Austria declared "the new law" as unconstitutional, "the former law" automatically restored its validity, but the Constitutional Court was empowered to rule otherwise. Nevertheless, statistically the Constitutional Court of Austria almost always ruled against the restoration of "the former law" (Drinóczi, Tímea & Schneider, Philipp, 2014, pp. 33–34). Later similar rule of the restoration of "the former law", if the CC won't rule otherwise, was introduced in the Constitution of Portugal (Joaquim de Sousa Ribeiro, Esperança Mealha, 2010, p. 8). Nowadays Austria and Portugal are the only two countries in Europe, where the question of the restoration of "the former law" in the event of "the new law" is declared unconstitutional was decided directly in national constitutions.

Meanwhile in Austria and Portugal the question of the empowerment of the constitutional courts to restore the validity of "the former law" was resolved in constitutions, in other European countries approaches to resolve the said issue is somehow contradictory.

The matter of the restoration of the validity of "the former law" is not problematic in those legal systems, where the judgment of the Constitutional Court can have retroactive effect (*ex tunc*). This is explained by the fact that the principle *ex tunc* presupposes voidness of the unconstitutional legal act: that means, that the unconstitutional act doesn't produce any legal consequences from the moment of its adoption (but usually the Constitutional Court is free to rule otherwise). Therefore, a legal act, that amends or invalidates another act, does not produce any legal effects in the legal system, including those regarding the invalidation and amending of other acts. An example of such countries is Germany (Staugaitytė, 2006, p. 289). But this matter is much more complicated in countries, where the judgment of the Constitutional Court may produce legal effects only for the future (i.e. where only principles *ex nunc* and *pro futuro* are applied). In those countries even in case the legal act is recognized as unconstitutional, it still produces legal effects before the moment of issuing of the judgment by the Constitutional Court (including those of invalidation and amending of other legal acts).

On the doctrinal level many researchers hold different views on how to resolve this issue. For example, former judge of the Constitutional Court of Bulgaria and a member of the Venice commission Evgeni Tanchev as an argument against a restoration of the validity of "the former law" points out, that as a result of its internal contradiction in the law can occur. In his opinion, such a restoration of "the former law" is possible only if a judgment of the Constitutional Court has retroactive effect (i.e. in an event a principle *ex tunc* is used) (Tanchev, 2014, p. 60). Nevertheless, later he spoke in favor of a possibility of restoration of "the former law" – this time his position was motivated by the fact, that the said restoration would prompt a legislature to amend the law that was reviewed by the Constitutional Court (Tanchev, E., Toader, T., Granat, M., & Catană, V., 2016, p. 6).

Prof. Valchev D. approves an idea of a restoration of "the former law" by the Constitutional Court and points out that it would save time and efforts, which a parliament would have to spend to eliminate any omissions and lacunas that occur as a result of the declaring "the new law" as unconstitutional (Valchev, D.).

Prominent Lithuanian researcher Staugaitytė V. notes that according to H.Kelsen, however restoration of "the former law" by the Constitutional Court is a "positive" (i.e. norm-making) activity, it is nevertheless admissible, because the restored law ("the former law") was already introduced to the legal system by the parliament and the Constitutional Court doesn't make its content. She points out that in the event of a non-restoration of "the former law" after "the new law" was declared as unconstitutional, we would agree that this unconstitutional law, despite the judgment of the Constitutional Court, saved some of its unconstitutional effects. And, therefore, the judgment of the Constitutional Court in this case loses its meaning – especially if the unconstitutional legal act was meant only to invalidate or amend other acts. The author points out that, for example, such point of view was taken by the Constitutional Tribunal of Poland, which sticks to the opinion of neediness of a restoration of "the former law", which was invalidated or amended by the unconstitutional law. Summarizing her opinion, Staugaitytė V. notes that in a sake of efficiency of constitutional control the Constitutional Court should be empowered to determine in its judgments whether "the former law" restore its validity or previous wording. In the event the Constitutional Court choose to restore "the former law", it must review constitutionality of both new and former laws – because judgment of the Constitutional Court wouldn't achieve its purpose in the event of a restoration of another unconstitutional law (Staugaitytė, 2006, pp. 288, 294, 300–301).

Disputes of this kind are resolved in not less contradictive manner also by the constitutional courts. For example, the Constitutional Court of the Republic Lithuania in its judgment dated 24 January 2014 declared as unconstitutional the amendments to the Constitution of the Republic Lithuania, according to which some of the rules that regulated National bank's activity was changed. Despite the fact, that those amendments were declared as unconstitutional and invalid, the Constitutional Court pointed out that the previous wording of the Constitution (i.e. "the former law") didn't restore its validity. The Court explained, that takin into account the concept of the Constitution as an act, that cannot have gaps and internal contradictions, the mere absence of the said rules in the Constitution will

not mean that it now contains a legislative gap – instead of it, as the Court clarified, the parliament should adopt a new law, that would regulate this issue.

After two years a similar dispute was resolved by the Constitutional Court of Moldova, which in its judgment dated 4 March 2016 declared as unconstitutional some amendments to the Constitution of Moldova concerning the elections of the President of the Republic. The Constitutional Court pointed out, that the previous wording of the Constitution (as "the former law") automatically restores its validity after an invalidation of the law by which it was amended.

As we can see, while resolving similar disputes concerning constitutionality of the amendments to the constitutions the constitutional courts of Ukraine, Lithuania and Moldova took different views as to the effects of their judgments. But sometimes this contradiction may occur even in case-law of the same Constitutional Court.

As an example, we can point out to the contradiction of case-law of the Constitutional Court of Bulgaria. In its judgment dated 31 October 1995 this Court stated that in the event of declaring as unconstitutional of the law, that amends or invalidates another law, the latter restores its validity (previous wording) automatically. The Court explained its position by the impermissibility of the occurrence of legal gaps due to declaring of "the new law" as unconstitutional. Three of the twelve Court judges expressed separate opinions to this judgment, although for different reasons. Judge Todor Todorov expressed the concurrent opinion and noted that such a restoration of "the former law" isn't "a positive" (norm-making) activity of the Constitutional Court, since "the former law" gains back its validity not because of the direct will of the Constitutional Court, but because it is some kind of an automatic legal effect entailing from the fact of declaring "the new law" as unconstitutional (that is the restoration of "the former law" takes place *ex lege*). Judge Pencho Penev, on the contrary, expressed the dissenting opinion and cautioned that the restored in a such way law can be unconstitutional as well, so in this scenario the judgment of the Constitutional Court of the unconstitutionality of one law will bring back to life another unconstitutional law. So, according to him, in the such situations the Constitutional Court should review the constitutionality of both former and new laws.

After 25 years the Constitutional Court of Bulgaria in its judgment dated 28 April 2020 completely changed the said approach and reinterpreted the Constitution in a such way, that in the event of declaring "the new law" as unconstitutional this doesn't lead to the restoration of "the former law". The Court explained this reinterpretation by the notion that the automatic restoration of "the former law" may cause a constitutionally-unacceptable collisions in the legal field. No need to say that this judgment of the Constitutional Court was extensively criticized by its judges in their separate opinions and by the researchers at the doctrinal level (Stoilov, 2016, p.78).

Another example is the Constitutional Court of the Czech Republic, whose approaches to the restoration of "the former law" have also changed over time. This Court in the judgment dated 05 August 2014 noted, that for a long time it held on the opinion, that a law, that amends another law, cannot be an object of constitutional review by itself, because it merges with the body of the amended law; in the event of declaring as unconstitutional the law, that amended or invalidated another law, the latter doesn't restore its validity. Nevertheless, the Constitutional Court expressively overruled this approach in the said judgment. As to the question of the restoration of "the former law", the Constitutional Court took the position that as a general rule this restoration doesn't take a place, but in particular situations the Court itself is free to choose whether the restoration must happen – that is when it is needed to protect human rights or when the Constitutional Court can predict that the legislature will fail to fill a gap, that would occur in the event of declaring "the new law" as unconstitutional. In other words, the Constitutional Court of the Czech Republic overruled its case-law in favor of the position, according to which "the former law" doesn't restore its validity if the "the new law" is declared as unconstitutional, but the Court can rule otherwise.

A similar approach is also supported in case-law of the Constitutional Court of Latvia – according to which "the former law" doesn't restore its validity or previous wording, but in a sake of the protection of human rights the Constitutional Court can rule otherwise (Neimanis, 2019). In this scenario the Court notes about the said restoration from a specified date directly in an operative part of its judgment (you can see the example of it in the judgment dated 16 December 2005).

Analyzing aforementioned case-law of the constitutional court of Bulgaria, Czech and Latvia it can be concluded that most often, according to courts' and judges' opinions, the issue of a restoration or non-restoration of "the former law" should be decided taking into account whether human rights and freedoms will be protected or violated as a result.

The risks of violation of human rights in event of restoration of "the former law" can be demonstrated on the example of case-law of the Constitutional Court of Slovakia. While in Bulgaria speculations of the Constitutional Court judges on the automatic restoration of the validity of the unconstitutional law (as "the former law") in the event of unconstitutionality of "the new law" was of hypothetical nature – in Slovakia such fears were justified in a specific case. In 2003 the Constitutional Court of Slovakia declared as unconstitutional the law, that established amount of the fee for late payment of debt between hospitals and their suppliers, finding that this fee was too high. As a result of its judgment the previous wording of the said law automatically restored its validity – but, unfortunately, it provided even higher amount of the fee. In another words, the restored law was even more unconstitutional. Later the Constitutional Court had to deal on the constitutionality of the restored law in another case in which it was declared as unconstitutional (Florczak-Wątor, 2020, p.193). In the Slovak law on Constitutional Court a rule was later introduced, according to which "the former law" doesn't restore its validity. As we can see, in this case the existence at that time of the rule of automatic restoration of "the former law" became a factor in the ineffectiveness of constitutional control, since the Constitutional Court had to deal twice with essentially the same case and human rights was violated in the interval between them (because the unconstitutional law was automatically restored).

Conclusions. Analyzed doctrinal sources and case-law shows that a technique of a restoration of a so-called "the former law" is widely used by the constitutional courts and can contribute to effectiveness of constitutional control. This technique can speed up the overall restoration of the legal field to the state, that preceded the adoption of the unconstitutional law.

On the other hand, it can be noted that the said restoration shouldn't be automatic, since such the automatic restoration can lead to bringing back an outdated or unconstitutional law in the legal field. In this scenario, the restored law can be even more unconstitutional, than the law that was already declared as unconstitutional by the Constitutional Court.

As it was shown, three approaches to solving this issue are supported in the doctrine and case-law:

1) "the former law" does not restore its validity (the previous wording). Such an approach still allowed the Constitutional Court of Lithuania to resolve a specific case on the constitutionality of amendments to the Constitution without creating gaps in it, but obviously in other cases such an approach could be less effective in the situation where the unconstitutionality of the law cannot be completely eliminated without restoring "the former law";

2) "the former law" automatically restores its validity (the previous wording) even if the Constitutional Court does not indicate this it its judgment (Moldova and at a certain stage Bulgaria and Slovakia). From the analyzed case-law it appears that this approach is the most problematic, as it carries the risk of distorting the legislative field due to the restoration of outdated norms, or due to the restoration of unconstitutional laws;

3) as a general rule, "the former law" does not restore its validity (the previous wording), but the Constitutional Court is free to rule otherwise (Austria, Latvia, Moldova, the Czech Republic). This approach is the most optimal, as it allows to combine the strengths of the rules on restoration and non- restoration of "the former law". It follows from the analyzed case-law that the use of this approach does not create risks and it ensures a higher effectiveness of constitutional control compared to the first two approaches.

Based on it, the following conclusions and recommendations can be made:

1) restoration of "the former law" is one of the permissible techniques and sometimes even a desired effect of the Constitutional Court judgment;

2) there are no prevailing evidences and positions supporting statement that "the former law" can be restored only if "the new law" is declared as unconstitutional due to infringement of the procedure for its adoption;

3) restoration of "the former law" shouldn't be an automatic effect of the Constitutional Court judgment of declaring "the new law" as unconstitutional. The general rule must be of non-restoration of "the former law", unless the Constitutional Court expressly rules otherwise in its judgment;

4) the Constitutional Court should be *expressis verbis* empowered to restore the validity or previous wording of the law, that was invalidated or amended by the unconstitutional law. Such powers must be authorized directly by the parliament – otherwise, at the level of the Constitutional Court case-law this issue may be resolved in an inconsistent way, which was demonstrated on the examples from the Constitutional Court of Bulgaria case-law;

5) preferably the said empowerment of the Constitutional Court to restore "the former law" must be enshrined in the Constitution. But there are no any strong indications, examples or consensus amongst reviewed European countries, according to which this issue cannot be resolved at the level of ordinary law (for example, the law on the Constitutional Court) or even at the level of the Constitutional Court case-law;

6) while deciding on whether "the former law" should be restored, the Constitutional Court must pay attention to the risks of emergence of distortions in the law or restoration of another unconstitutional law. So, the Court must be free to decide on constitutionality of both new and former laws, and to choose what previous wording of the law must be restored if needed.

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