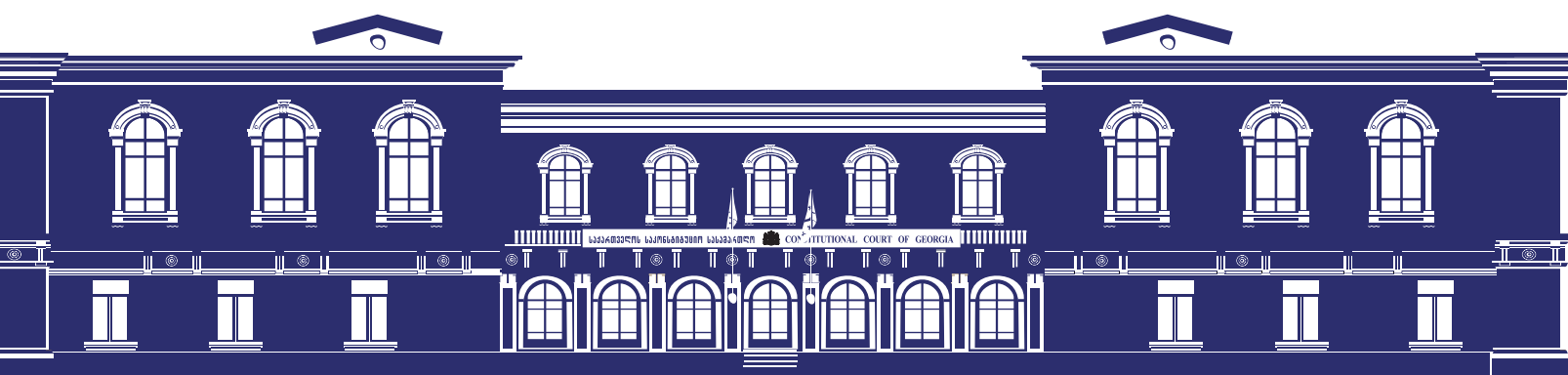


# CONSTITUTIONAL COURT



20  
YEARS

LANDMARK  
DECISIONS





# CONSTITUTIONAL COURT

20  
YEARS

LANDMARK  
DECISIONS

This year, the Constitutional Court of Georgia celebrates its 20th anniversary, which is enough to evaluate its accomplishments. Much like Georgia's state-building, the Constitutional Court kept evolving and developing, as the vital institution. Today, it can confidently be said, that the Constitutional Court has become a strong and an independent institution, administering constitutional justice, while the city of Batumi has become its home.

Georgia, a young democracy, faces significant challenges. Since its establishment, the Constitutional Court of Georgia has been a crucial contributor to promoting legal culture, and universal values in society, which has strengthened trust in the Institution. I'm proud, that the judgments of our Court have significantly contributed to increasing the quality of democracy, and the establishment and development of human rights standards and safeguards.

It must be noted, that the Constitutional Court enjoys active and fruitful cooperation with international partners, including the Venice Commission, the European Court of Human Rights, Constitutional Courts of other countries, foreign educational institutions, and non-governmental organizations.

Since 2014 the Constitutional Court of Georgia is the Chair of the Conference of European Constitutional Courts. It is also noteworthy, that during the past 20 years Georgia is the first non-EU member state to hold the presidency of the Congress.

The present publication brings together landmark decisions of the Constitutional Court. Each of these cases are invaluable from the perspective of restoring claimants' rights, as well as, for the development of constitutional justice, in general. The present compilation will serve as a helpful resource for every lawyer, researcher, and a student of law.

George Papuashvili



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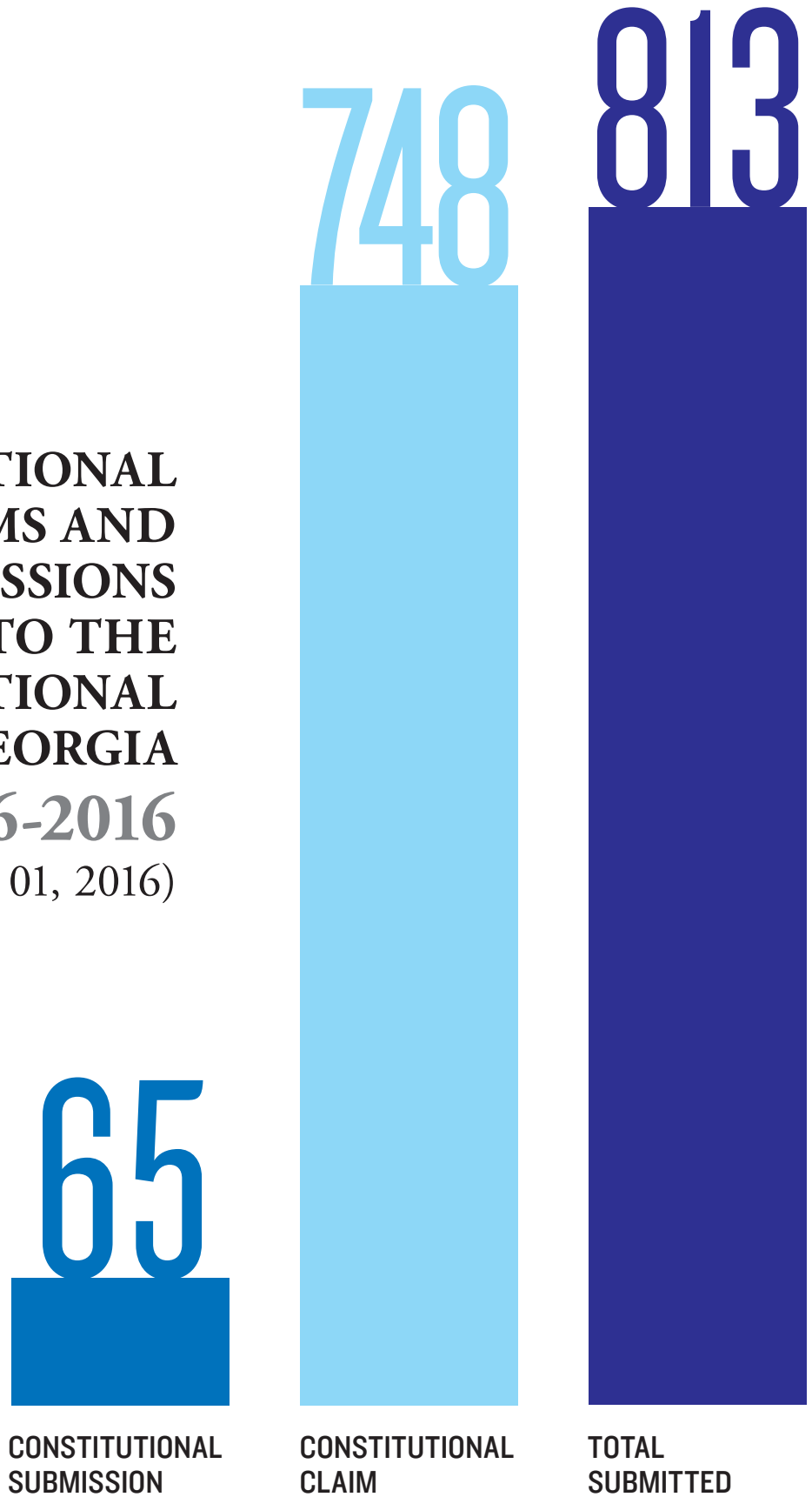
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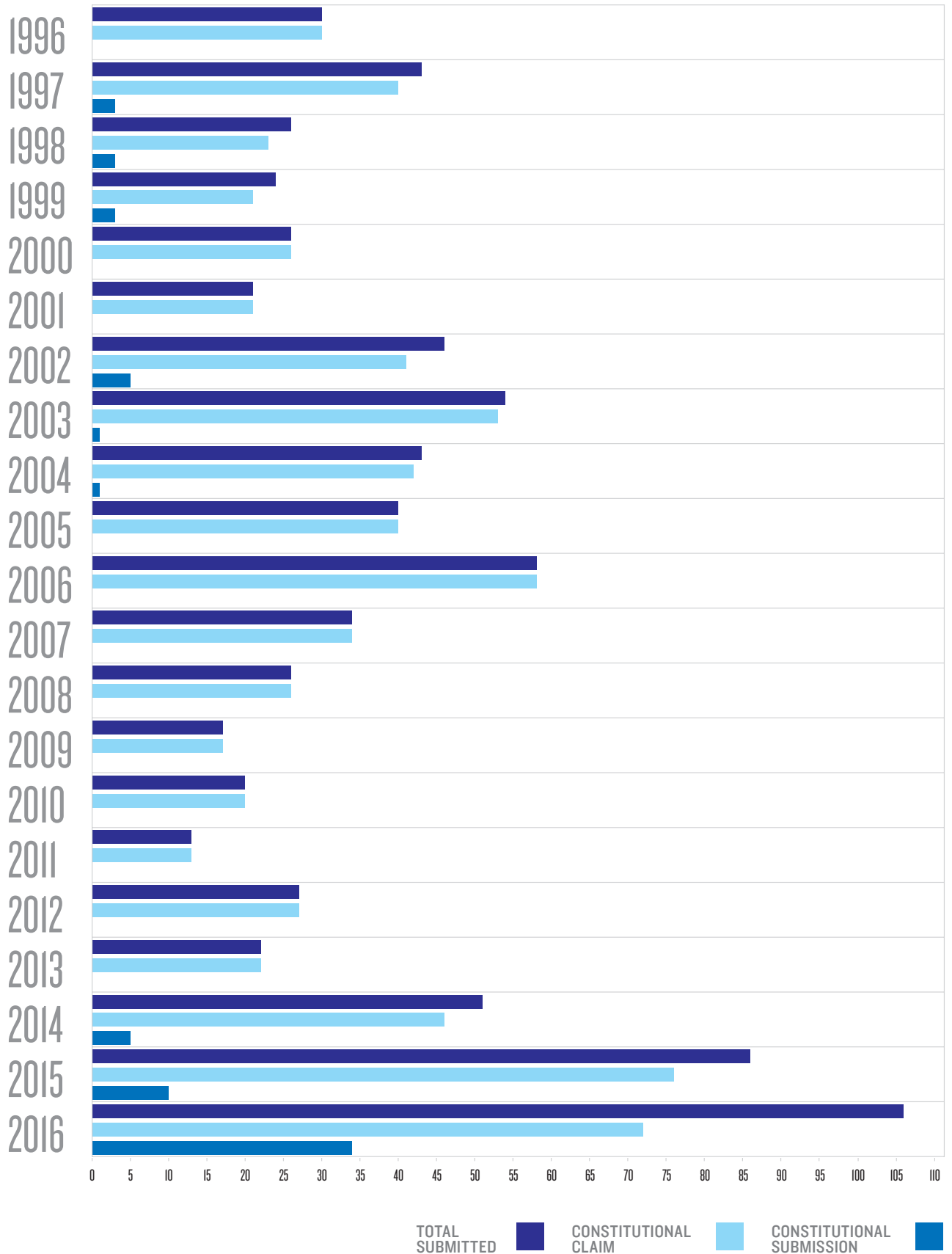
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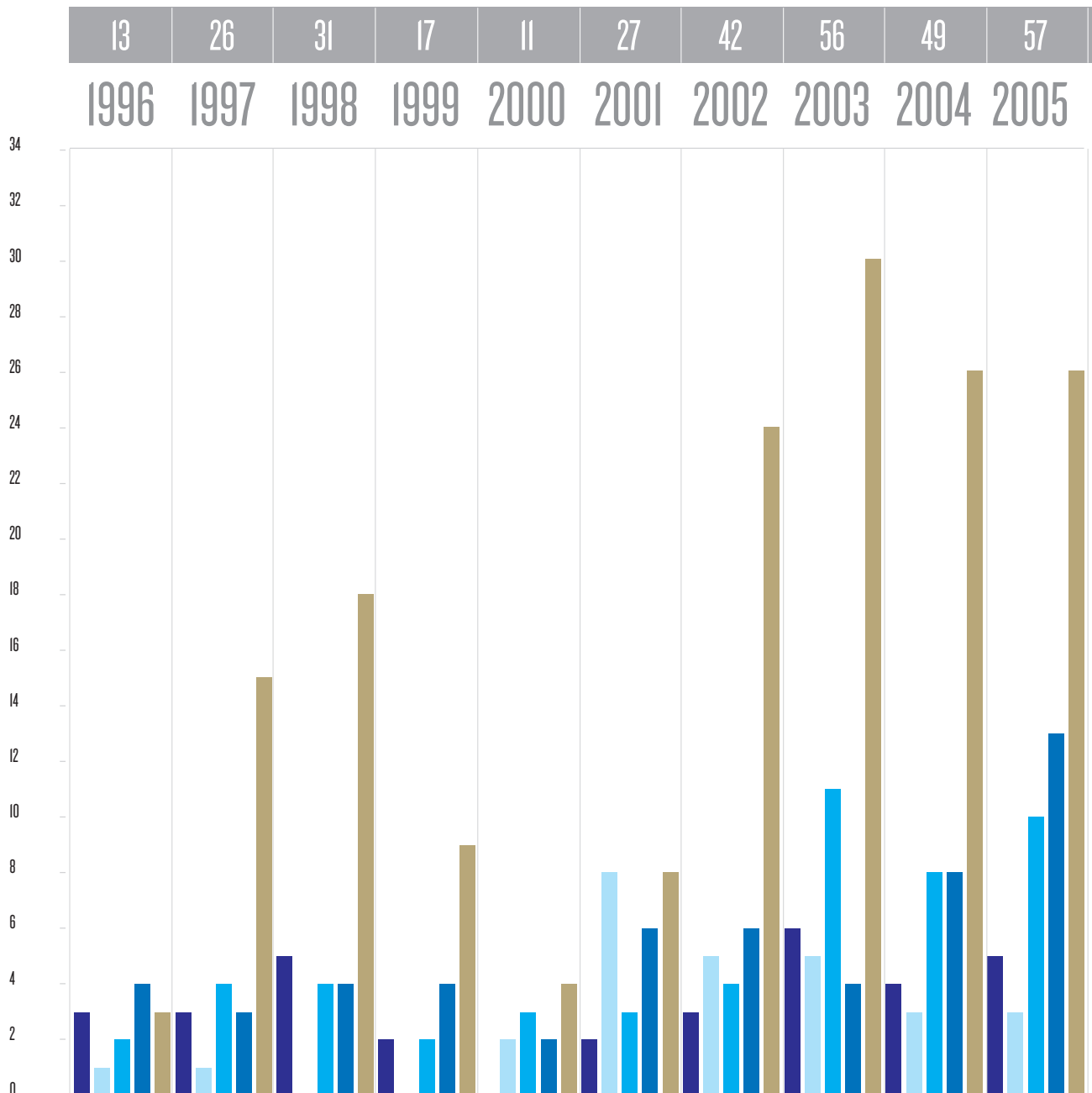
**CONSTITUTIONAL  
CLAIMS AND  
SUBMISSIONS  
SUBMITTED TO THE  
CONSTITUTIONAL  
COURT OF GEORGIA  
1996-2016**  
(As of August 01, 2016)

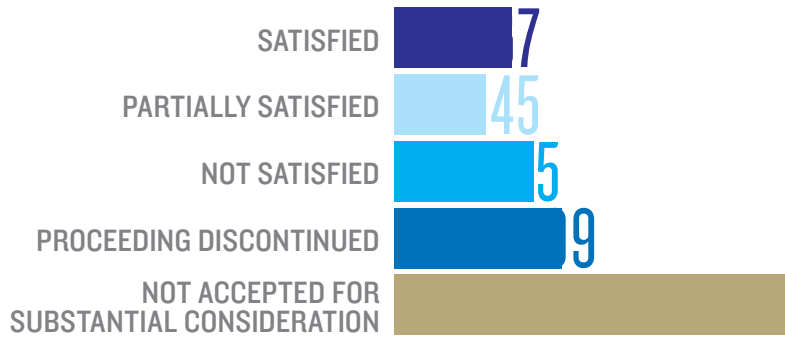






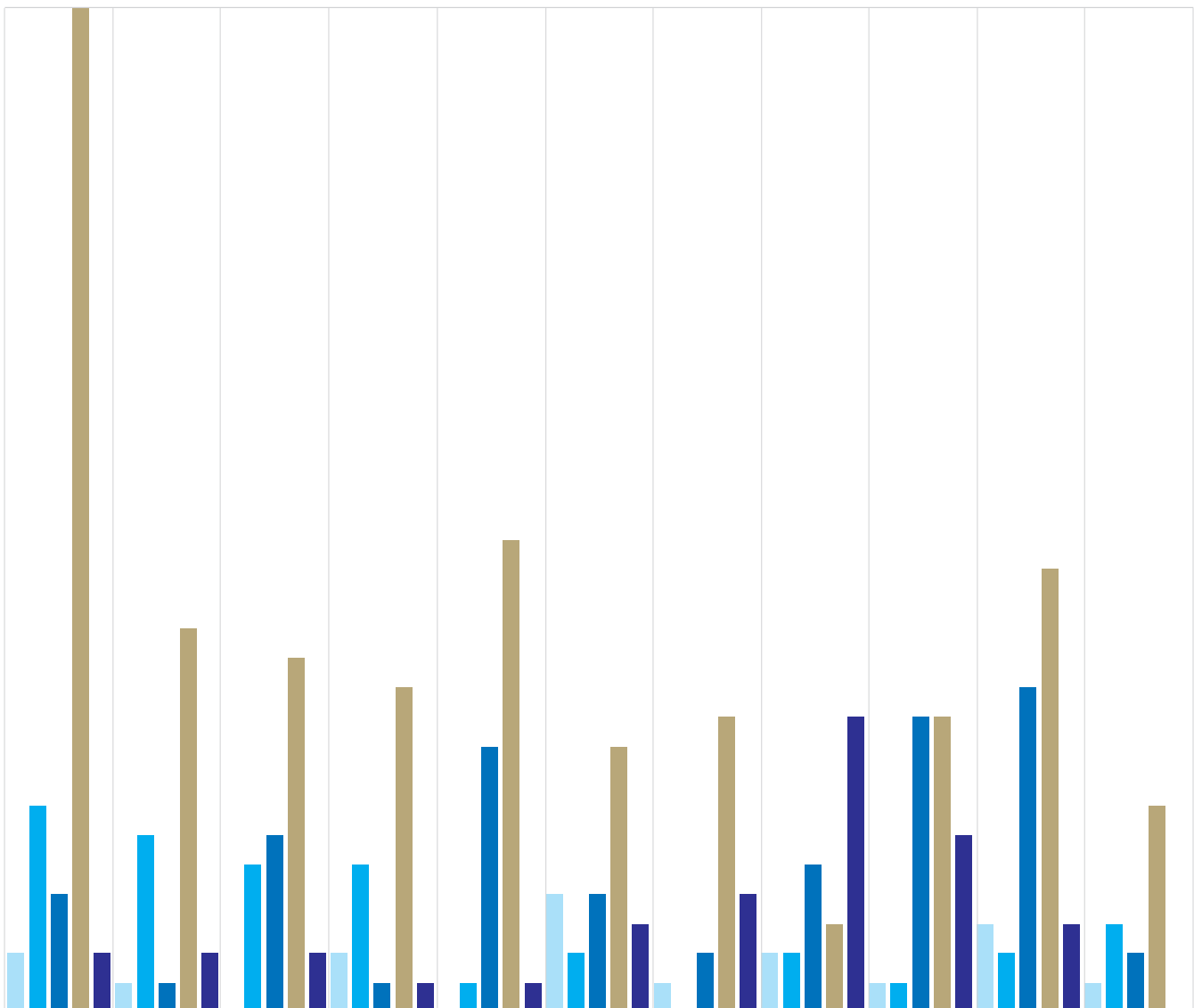
# OUTCOMES OF THE CONSTITUTIONAL CLAIMS AND SUBMISSIONS SUBMITTED TO THE CONSTITUTIONAL COURT OF GEORGIA 1996-2016





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CONSTITUTIONAL SUBMISSION OF THE CHUGURETI DISTRICT COURT ON THE CONSTITUTIONALITY OF CONFISCATION OF PROPERTY AS AN ADDITIONAL PUNISHMENT UNDER ARTICLES 23 AND 96 OF THE CRIMINAL CODE OF GEORGIA

**1/51, JULY 21, 1997**

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**SUBJECT OF DISPUTE**

Tbilisi Chugureti District Court referred a constitutional submission to the Constitutional Court on the constitutionality of confiscation of property as an additional punishment under Articles 23 and 96 of the Criminal Code of Georgia. According to the author of the constitutional submission, the disputed norms were unconstitutional with regard to Article 21 (the right to property) of the Constitution of Georgia.

**REASONING**

First, the Constitutional Court underscored, that the case under review was limited to the constitutionality of confiscation of property, as an additional punishment, and it did not address the so-called “specified confiscation”. The former means taking of legally acquired property, while the latter allows for confiscating of property, that was acquired illegally, through crime, and therefore may not be considered as private property.

The Court emphasized, that the right to property is an inviolable and supreme human value, “the basis of human existence” and the cornerstone of democratic society, social and rule-of-law state. “The conditions of development of free Commerce in Georgia have allowed the constitutional entrenchment of right to property “. The institution of confiscation of property stems from the Soviet past, was fully preserved in the Soviet legislation, and this is how it found its way into the current criminal legislation of Georgia.

The Court determined, that legalization of confiscation of property was equal to lack of protection of the right to property and it contradicted Paragraph 1 of Article 21 of the Constitution, which guarantees the universal right to property and declares it inadmissible to abolish this right.

The Court emphasized that, “the Constitution of Georgia confers certain social functions on the right to property. The enjoyment of the right to property should not violate the rights and freedoms of others...” The Court pointed out, that if these requirements are not met or there are other circumstances established by law, the Constitution of Georgia allows for restriction of the right to property under Paragraph 2, Article 21 of the Constitution and for taking of property under Paragraph 3 of Article 21 of the Constitution..

The Constitutional Court based its judgment on the definition provided by Article 34 of the Criminal Code of Georgia, according to which “confiscation of property is taking of private property entirely or partially by the state under the state ownership without compensation.” Paragraph 3 of Article 21 of the Constitution of Georgia allows for taking of property only for pressing social need and only with appropriate compensation. Therefore, the Court concluded, that the confiscation of property foreseen in Article 23 of the Georgian Criminal Code did not correspond to taking of property under Paragraph 3 of Article 21 of the Constitution of Georgia, since it did not meet one of the conditions required for such acts – ensuring appropriate compensation for the property owner.

Furthermore, the court highlighted that “the results of confiscation of property is not compatible with the fundamental principle of individualization of punishment, since it is usually addressed not only against the criminal, but also against his/her innocent family”.

Therefore, Paragraph 5 of Article 23 of the Criminal Code of Georgia, and the part of the sanction of Paragraph 2 of Article 96 of the Code, that provided for confiscation of property as an additional punishment, was declared unconstitutional.

CITIZENS OF GEORGIA – PHIRUZ BERIASHVILI, REVAZ JIMSHERISHVILI,  
AND PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA  
**2/3/182,185,191, JANUARY 29, 2003**

**SUBJECT OF DISPUTE**

Public Defender and the citizens – Phiruz Beriashvili and Revaz Jimsherishvili disputed several norms of the Criminal Procedure Code of Georgia with regard to Article 18 (right to liberty) and Article 42 (right to fair trial). Namely, the subject of dispute were those norms of the Criminal Procedure Code of Georgia, which provided: **A.** Grounds for arresting an individual, 12-hour period of detention and his/her rights within this period; **B.** Various aspects of rights of defence of a suspect and an accused person; **C.** Imprisonment of an accused under trial for up to 30 months; **D.** The duty to share the results of expertise with the body carrying out criminal proceedings, if the expertise was initiated by a party; **E.** The list of decisions of a body carrying out criminal proceedings, which could have been appealed in the court.

**REASONING**

The Constitutional Court first discussed the group of disputed norms related to the grounds of an arrest and the status of an arrested person. Paragraph 1 of Article 142 of the Criminal Procedure Code of Georgia listed a number of specific grounds of arrest (being caught at the crime scene, testimonies of eye-witnesses against specific person who committed the crime, or the discovery of the traces of crime on the person in question, etc.). Paragraph 2 of Article 142 added a general clause to that list empowering respective bodies to arrest a person based on the “other data”, which provided cause for doubt that a person had committed a crime. The Court referred to Paragraph 5 of Article 18 of the Constitution, which states that “a person may be arrested in cases prescribed by law.” and concluded, that “the Constitution of Georgia does not allow for arresting an individual, based on the “other data”. The Court decided, that for the purposes of Constitution, the disputed norm did not “prescribe the cases” when arrest could take place, and hence, restricting liberty of a person based on this norm was not permissible.

According to the disputed norms, during the 12 hours after bringing an arrested person to the investigative body, a protocol of arrest should have been drafted and legality and reasons of arrest should be verified. After that, the respective body, with the consent of a prosecutor, would adopt a resolution to start a

criminal case and to declare the person suspect or to release him. Only from this moment did a person have the rights provided for suspects and was informed about those rights. The Court took it into consideration, that the Chapter II of the Criminal Procedure Code of Georgia did not list an arrested person as the party to criminal proceedings, which meant that “an arrested person, for the first 12 hours of an arrest, is deprived of those fundamental rights, which the lawmaker provides for suspects (e.g. right to silence, guarantee against self-incrimination, and the right to summon a defender).

The Court noted, that a person should be considered arrested from the moment when the law officer restricts his/her liberty guaranteed by the Constitution. Paragraph 5 of Article 18 of the Constitution demands, that an arrested person is informed about his/her rights and the grounds for restriction of his/her liberty upon his/her arrest and the demand of an arrested person for the assistance of a defender shall be met immediately. Therefore, the Court concluded, that “informing an arrested person about his/her rights shall take place immediately upon arrest, demand for the assistance of a defender shall be met in maximally reasonable time”. Based on the disputed norms, an arrested person was restricted to fully enjoy the right of defence guaranteed by Article 18 of the Constitution of Georgia.

The Court determined, that the content of Paragraph 2 of Article 146 of the Code, which intended to verify the legality of an arrest within the first 12 hours, was unclear and ambiguous. The Court underscored that the competent officials themselves were responsible to carry out arrest only if there were legal grounds for arrest. Arrest in the absence of grounds of arrest would amount to unlawful restriction of liberty. Therefore, the norm, due to its ambiguous nature, allowed to unlawfully infringe on the constitutionally protected liberty.

Given all of the above-mentioned arguments, with respect to Paragraphs 3 and 5 of Article 18 of the Constitution, the court declared those disputed norms unconstitutional, which allowed to arrest a person based on the “other data”, to draft an arrest protocol only after bringing an arrested person to the investigative body premises, to verify the reasons and the

lawfulness of an arrest and to provide the status of a suspect during the next 12 hours. At the same time, the norm of Article 145 of the Code, which stated that a competent official could arrest a person, when appropriate grounds were present, was declared constitutional.

The second group of disputed norms concerned the exercise of the right to defence of a suspect and an accused. According to one of the disputed norms, a defender was allowed to join the case before the first interrogation of a suspect took place, which, according to another norm of the Code, was to take place during the first 24 hours of bringing an arrested person to the investigative body premises. Therefore, the Court concluded, that law-enforcement bodies were left free to arbitrarily choose when to let a defender to intervene in the case. The Court noted, that an arrested suspect needs assistance of a defender for protection of his/her lawful interests not only before the interrogation takes place, but from the very moment of arrest. The court referred to Paragraph 5 of Article 18 of the Constitution, which does not stipulate specific time, but declares, that the request of an arrested person for the assistance of a defender shall be met immediately and in the maximally reasonable time. Hence, the Court declared Paragraph 5 of Article 72 unconstitutional.

However, the Court determined that the norm that stated, that a person could not have more than three defenders was constitutional with regard to Articles 18 and 42 of the Constitution. The Court considered, that the Constitution requires that at the moment of detention, or arrest, a person has access to the assistance of a defender, but the Constitution does not define the maximum number of defenders one is entitled to.

The Court reviewed the norms, which limited the amount of time an accused and a suspect could spend face-to-face with their lawyers to up to one hour. The Court pointed out, that face-to-face meeting with a defender is a form of legal assistance. A person must be given reasonable, enough time and an ability to prepare for self-defence, and meet with the lawyer of his/her choice. The Court deemed, the disputed norms to be incompatible with Paragraph 3 of Article 42 and Paragraph 5 of Article 18 of the Constitution. While it is true, that the Constitution does not require an unlimited time for meeting with the defenders, it does require, that this time is reasonable, which must be defined based on complexity of each individual case, and with consideration of lawful interests of defence and investigation.

The Court also reviewed a norm, which gave a suspect and an accused three hours to select and invite his/her defender. If

the defender failed to show up in three hours, the body carrying out the criminal proceedings would offer to appoint a defender for him/her. If a person refused the offer, he/she would have to protect his/her rights themselves. The Court concluded, that three hours was a reasonable time not only to select and invite a defender of choice, but also for the designated defender to show up on the premises. Therefore, it was determined, that the norm complied with standards set in Paragraph 5 of Article 18 and Paragraph 3 of Article 42 of the Constitution.

According to other norms related to the right of defence, if the defender had valid reason for failure to participate in the case, the body responsible for legal proceedings was entitled adjourn hearing or postpone investigative actions for maximum of 10 days. And if the defender failed to show after this date, they offered a defendant to invite another defender or they would appoint one for him/her. The court analysed other norms of the Code and concluded, that not only were the disputed norms ambiguous and contradictory, but it placed the defence party in an unequal position because, if the prosecutor failed to show up, unlike the defender, case would be adjourned in every case.

The court pointed out, that pursuant to Paragraph 3 of Article 42, defence party should have not only a reasonable amount of time, but also the possibility for thorough defence. Since the disputed norms put defence in an unequal position compared with the prosecution, and restricted the right to defence, they were declared unconstitutional with regard to Paragraph 3 of Article 42 of the Constitution.

The Court also discussed the content of the disputed norms that afforded maximum 10 days to adjourn hearing in case a defender failed to show up. The court pointed out that the Constitution requires that defence party has reasonable, enough time and opportunity to thoroughly prepare its defence. As to the case, when valid reason does not allow the defender to show up, this issue was left for regulation by the specific, ordinary legislation (in this case, the Criminal legislation). Therefore, the Court found these norms not violating the Constitution of Georgia.

In the Court's opinion, those norms, which provided for appointment of a new defender if the previous defender failed to show up, were not unconstitutional. The Court found that, according to the Constitution, the desire of a defendant, to have a defender should prevail, but the Constitution does address the issue of so-called "compulsory defence" of a detainee or an arrested person.

The Court also evaluated the norms of Article 162 of the Criminal Procedure Code of Georgia, which defined, that pre-trial

detention of an accused person terminated at the moment, when case files were submitted to a court. Past this moment, a person was given the status of a person under trial and the time of his/her detention could be extended up to 30 months. The claimant argued, that with the introduction of the notion of a person under trial, the lawmaker was circumventing the constitutional requirement of Paragraph 6 of Article 18 of the Constitution, which stipulates that maximum duration for pre-trial detention of an accused must not exceed 9 months. The Court did not share this argument and pointed out that, Paragraph 6 of Article 18 of the Constitution sets forth terms of arrest and detention for suspects and accused persons only; the terms of detention of persons under trial up to the moment of their sentencing by the court is left beyond the scope of this Constitutional clause altogether. Since a person under trial was deemed to have a distinct procedural status from an accused person, it was concluded, that disputed norms did not violate Paragraph 6 of Article 18 of the Constitution of Georgia.

The Court also reviewed the disputed norms, which introduced the duty of a party to share with the body in charge of the proceedings information about an expertise they had initiated on their own and once the expert opinion was made available, to present it to that body. Paragraph 8 of Article 42 of the Constitution includes a right against self-incrimination or

against incrimination of a close relative. The Court determined, that this part of the Constitution referred to testimonies only and did not cover other types of evidence, such as an expert opinion. Therefore, it was determined, that the disputed norms were not unconstitutional.

Finally, the Court evaluated the norm of the Criminal Procedure Code of Georgia, which defined the list of the decisions and actions carried out by a body in charge of criminal proceedings, which could be appealed in Court. The list did not define every possible decision and action of respective law-enforcement bodies. Therefore, the claimants argued, that disputed norm interfered with the right to apply to a court and to appeal other decisions and actions under Paragraph 1 of Article 42 of the Constitution. The Court noted, that the competences of the Constitutional Court are limited to judging the constitutionality of existing texts of legal acts with regard to the Constitution and it is unable to determine how exhaustive is the list of rights defined in the legal act. Hence, this part of the claims was not upheld.

The Court did not uphold the claims regarding the norms that stated the rights of suspects, since it decided that, these norms were not related to the state of rights of an arrested person. The Court also did not think it necessary to declare unconstitutional those norms, which merely referred to other norms that contained unconstitutional restrictions.

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## CITIZENS OF GEORGIA – IRAKLI LEKVEISHVILI, KOBA GOTSIRIDZE, KOBA KOBAKHIDZE AND THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA AND THE PRESIDENT OF GEORGIA.

**1/1/138,171,179,209 FEBRUARY 23, 2003**

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### SUBJECT OF DISPUTE

The Public Defender of Georgia and several persons, who served as judges, under the ordinance of the President of Georgia, disputed the norm of the Organic Law of Georgia on Common Courts (Paragraph 1 of Article 852), that allowed the President of Georgia to confer with its ordinance the powers of a judge for up to 18 months on a person who had successfully passed the qualification exam or certification for judge. The norm was disputed with regards to Paragraph 1 of Article 29 of the Constitution of Georgia (right to have access to and serve at public office).

Additionally, the claimants disputed the norm of the Order #176 of 25 March, 1998 of the President of Georgia On Approval of the Statute of Contest for Selection of Judicial Candidates,

which banned contest participants from appealing decisions of the Council of Justice or requesting reasons for refusal (the Paragraph 7 of Article 10) with regards to Paragraph 1 of Article 24 (right to freedom of expression), Paragraph 1 of Article 29, and Paragraph 1 of Article 42 (right to fair trial) of the Constitution.

### REASONING

Discussing the disputed institution of a person “exercising the powers of a judge”, the Constitutional Court first elaborated standards, according to which, “the nature of a legal category is defined not by its name, but by its content, in this particular case, the functions delegated to a person.” Therefore, the Court

discussed whether a person appointed by a presidential ordinance for 18 months was any different from a person, who won the competition ran by Council of Justice and was appointed to serve as a judge for 10 years. Both persons carried out judicial functions – administered justice, took an oath to occupy the office, signed judicial decisions. Hence, the Constitutional Court concluded, that a judge and a person “exercising the powers of a judge” were “persons with identical functions”.

Furthermore, the Court decided, that persons, who were appointed under the disputed norm, could not be considered as judges appointed for a probationary period; Georgian legislation, allowing appointment of judges for any kind of probationary period, would be unconstitutional. On the other hand, it found that in fact, persons appointed under the disputed norm, were placed in the situation of probation.

The Constitutional Court concluded, that the disputed norm prescribed a rule for appointment of judges. Furthermore, the appointment lasted for up to 18-months maximum. Article 86 of the Constitution of Georgia stipulated in imperative manner and without exception that appointment on the position of a judge should be no less than 10 years.

The Court interpreted Article 29 of the Constitution of Georgia, which entitles a person to have access to public service to stipulate the same requirement for appointment of judges as Article 86 of the Constitution – a judge shall not be appointed for less than 10 years, whereas the disputed norm allowed it.

The Court referred to the information of the Council of

Justice, that as of February 5, 2003, 116 persons had been appointed to the position of judge for 18 months under the disputed norm. 47 out of them became judge, while 52 still had the status of “persons exercising the powers of a judge”. The Court took into consideration the following circumstance: there were only 271 positions of judges in the common courts and only 187 out of these judges were appointed for 10 years. This indicated, that the disputed norm, which violated the requirements of Article 86 of the Constitution of Georgia, was applied on a massive scale and had become more of a rule, rather than an exception to the rule.

The Court emphasized the following: conferring judicial functions for a limited time negatively affects the independence of judges. Appointing judges for a prolonged period of time, or indefinitely was considered to be crucial for protection of judges from unlawful interference. Additionally, the independence of judges is further strengthened by a number of social safeguards, which accompany this position. The person who has been delegated the functions of a judge, did not have access to respective social safeguards and once again, his/her independence was not ensured in this respect either.

Given all of the above-mentioned, the Court determined that the disputed norm was not compatible with Paragraph 1 of Article 29 of the Constitution and declared it unconstitutional.

The disputed norm of the Presidential Order was abolished before the adoption of the judgment by the Court and, therefore the Court terminated the legal proceedings with regards to it.

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## LLC “UNISERVICE” V. THE PARLIAMENT OF GEORGIA

**2/6/624, DECEMBER 21, 2004**

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### SUBJECT OF DISPUTE

The claimant, LLC “Uniservice”, which had its financial and economic documentation seized for the purposes of investigation, disputed Paragraph 7 of Article 290, and Paragraph 2 of Article 293 of the Criminal Procedure Code of Georgia with regards to Paragraph 1 of Article 42 of the Constitution of Georgia (right to fair trial). The disputed norms prohibited appeal against the court order or a resolution, related to implementation of investigative operations.

### REASONING

The Court interpreted, that the disputed norms prohibited ap-

peal against court orders, that allowed to search, seize, and inspect apartment or other property without the consent of their owners. The problem was not solved by another norm in the Criminal Procedure Code of Georgia, which provided for the review of legality of the investigative actions at the stage of consideration of the case by the first instance court. At the stage of consideration of the case by the court, only a suspect or an accused could employ this mechanism. An investigative action could have been directed against other persons as well, which were not necessarily parties to the proceedings, and hence, did not have access to the mechanism, which provided

for the review of legality of investigative actions. Furthermore, if the case was terminated at the stage of preliminary inquiry and it was not referred to the court, appealing the legality of investigative actions would not be possible in this scenario either.

Neither did the Law of Georgia on Control of Entrepreneurial Activities, which provided for examination of documentation of an enterprise, for the purpose of discovering violations of law and also, provided for an appeal against the respective order of a judge, provide a solution to the problem. This Law stipulated that it did not apply to the activities regulated by the Criminal Procedure Code, which was the case with the claimant.

The Constitutional Court emphasized, that by appealing against court decisions, including decisions that allow investigative actions, to a higher instance court, a person exercises the rights enshrined in Paragraph 1 of Article 42 and this is a right granted to legal persons as well. In each specific case, the rule of appeal and the list of court instances may differ, but the norm adopted by the lawmaker must conform to the principles provided in Paragraph 1 of Article 42 of the Constitution of Georgia. Restriction of the right is permissible, if it serves legitimate aim and reasonable proportionality is maintained between the means applied, and the goal pursued.

The Court found, that the legitimate aim of search and seizure was to extract an object of crime, a weapon or an evidence, which would help establish circumstances of the case. The restriction of a right to apply to a court must have been linked to these aims. However, the Court determined that, appealing the court decision, that allowed these investigative actions, would not compromise achieving these aims, since the very fact of

appealing the decision, would not amount to stopping these actions. The Court responded to the argument, that appealing the court decision could cause delays in the investigation of the case and thus, violation of the time limits on the proceedings as defined by respective laws. In its response, the Court stated, that “difficulties of administrative nature, which may arise as a result of appealing court decisions, may not serve as the ground for restricting a right to apply to a court”. The lawmaker had the possibility to adopt a mechanism, which would not violate the principles of fair trial and investigation, and at the same time, would defend the rights of a person. Furthermore, the following was to be taken into consideration: courts adopted decisions to allow investigative actions based on the motion submitted by the investigative body in question and the other party often did not have a possibility to participate in the proceedings and present their arguments. Furthermore, the appeal mechanism could be available to the investigative body as well, whenever such need arose. Given all of the above-mentioned circumstances, the Court found that the restriction in question was not proportional and did not serve the purpose of achieving legitimate aims of investigation.

Therefore, the Court determined that the disputed norms violated Paragraph 1 of Article 42 of the Constitution of Georgia. In view of the same arguments, related to violation of reasonable proportionality between means applied and legitimate aims, the Court determined that the disputed norms also violated Paragraph 1 of Article 6 of the European Convention on Human Rights, which the claimants had referred to further strengthen their argumentation.

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## CITIZENS OF GEORGIA – VAKHTANG MASURASHVILI AND ONISE MEBONIA V. THE PARLIAMENT OF GEORGIA

**1/3//393,397, DECEMBER 15, 2006**

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### SUBJECT OF DISPUTE

Persons, who were imprisoned for showing manifest and gross disrespect of the court of law, disputed the norms of the Civil Procedure Code of Georgia and the Criminal Procedure Code of Georgia, that A. Provided for imposition of imprisonment for up to 30 days for showing manifest and gross disrespect of the court of law under a court order (Paragraph 6 of Article 208 of the Criminal Procedure Code of Georgia, Paragraph 5 of Article 212 of the Criminal Procedure Code of Georgia); B. established,

that the court order should be adopted by the presiding judge through deliberations in the courtroom or by the chair of the respective court – without oral hearing and could not be appealed (Paragraph 7 of Article 208 of the Criminal Procedure Code of Georgia, Paragraph 6 of Article 212 of the Civil Procedure Code of Georgia). These norms were disputed with regards to Paragraphs 1 and 2 of Article 18 (right to liberty) and Paragraphs 1 and 3 of Article 42 (right to fair trial) of the Constitution.



**REASONING**

The Constitutional Court interpreted Article 7 of the Constitution, which stipulates, that in exercising authority, the people and the state shall be bound by human rights and freedoms as directly applicable law. Article 7 presents general ground for the principle of proportionality. The principle of proportionality is a criterion for assessment of restriction of human rights and it disallows restricting human rights further than absolutely necessary in a democratic society.

The Court first reviewed the imprisonment procedure for manifest and gross disrespect of the court of law with regards to Paragraphs 1 and 3 of Article 42, and Paragraph 1 of Article 18 of the Constitution.

The right to apply to court, which ensures the right to appeal every decision of the government, that violates human rights to a court, is not an absolute right. The state is allowed to regulate this right as long as it serves legitimate aim, ensures that proportionality between the aim and the means, and does not violate the essence of the right itself. The Court determined, that the legitimate aim of restricting the right, as provided in the disputed norm, was to deliver functional, fast, efficient justice, to ensure order at the court of the law, and to protect the authority of the courts. To achieve this aim, the following mechanism was selected: imposition of imprisonment on a person showing disrespect for a court for up to 30 days and nights under the order, adopted without oral hearing, or with deliberations in the courtroom by the presiding judge or the chair of the respective court, which could not be appealed. The claimants argued that three aspects of the right to fair trial were violated: 1. The right of the person to know why the responsibility is imposed on them and to defend oneself in the process leading to his/her imprisonment; 2. The impartiality of a court; 3. The right to appeal the decision of a court.

The Constitutional Court found that according to Paragraph 3 of Article 42 of the Constitution, persons sentenced to imprisonment have the right to defend themselves through presenting their arguments personally, and/or the right to the assistance of a defender, which is practically impossible when the case is adjudicated without oral hearing, or via deliberations in the courtroom. Furthermore, providing a person with defence means not only physical availability of defender, but also the possibility to adequately prepare once defence. Since the disputed norms did not provide a person with such possibilities, Paragraph 7 of Article 208 and Paragraph 6 of Article 212 were declared unconstitutional with regard to Paragraph

3 of Article 42 of the Constitution of Georgia.

The Court declared that the prohibition of appeal of the court order on the imposition of imprisonment was also unconstitutional. The Court pointed out, that Article 42 of the Constitution includes not only the right to apply to first instance court, but also to appeal to the higher instance courts. "For the situation of a person deprived of liberty it does not matter, whether liberty was restricted based on a judicial sentence, an order or a decree. Therefore, he/she must have the same opportunity to appeal against the deprivation of liberty regardless the basis of the deprivation." While discussing the legality of restricting the right of appeal to a court in case of deprivation of liberty, the Court elaborated on the European Convention of Human Rights, namely on Articles 6, 5, Article 2 of the Optional Protocol #7 to the Convention, which provide the right to appeal and enhance Paragraph 1 of Article 42 of the Constitution of Georgia. The Court concluded, that in part of prohibiting the right of appeal, the disputed norms violated Paragraph 1 of Article 42 of the Constitution of Georgia. Additionally, the Court emphasized, that denial to review the legality and reasoning of detention, regardless of the grounds of detention, violated the right to liberty recognized by Article 18 of the Constitution.

The votes of the members of the Chamber were split equally on the issue whether the disputed norms contradicted the principle of the impartiality of the court. Part of the members of the Chamber (**Ketevan Eremadze and Konstantine Vardzelashvili**) did not share the argument, that when the addressee of the gross and manifest disrespect to court of the law is the judge himself/herself, he/she would necessarily be biased in the process of adoption of an order on the disrespect to the court since he/she would simultaneously be the victim, the prosecutor, and the judge in the case. In some scenarios, it was possible that the judge indeed, would not be impartial, but when the doubts of impartiality of the judge are present, the judge is legally obligated to recuse oneself. Therefore, part of members of the bench concluded, that in each individual case the judge should be allowed to evaluate whether it can remain impartial, and take decision adequate to the committed violation.

The votes of Justices were also split in half with regards to the constitutionality of the second part of the disputed norms that provided for imposition of up to 30 days of imprisonment for showing gross and manifest disrespect to the court of the law with regard to Paragraph 2 of Article 18, and Paragraph 1 of Article 42.

Part of the Justices (**Ketevan Eremadze and Konstan-**

**tine Vardzelashvili**) did not share the argument that since the disputed norms provided for deprivation of liberty based on the court order, instead of judgment, this was the violation of Paragraph 2 of Article 18 of the Constitution. They interpreted, that the purpose of Article 18 is to ban deprivation of liberty without the consent of the judicial branch of the government. For the purposes of reviewing the constitutionality, it was not the formal name of the judicial legal act that was of material importance, but the issue, which was decided by this act and the manner of its adoption. The members of the Chamber also pointed out, that it was not for the Constitutional Court to ascertain the type of a specific violation of law or assessment of adequacy and lawfulness of the legal liability for a specific violation. They concluded, that the disputed norms did not violate Paragraph 1 of Article 42, and Paragraph 2 of Article 18 on account of the principle of judicial impartiality as well, due to the same reasons that were provided in the process of reviewing the rule of adoption of the order..

Justices **Vakhtang Gvaramia and Beso Zoidze** shared the argument, that objectively, the disputed norms presented basis for bias and the problem could not be remedied with a mere possibility to appeal an order. Since the disputed norm providing for the deprivation of liberty for showing disrespect to the court of the law was organically intertwined with the norm already declared unconstitutional (which prescribed the procedure of adoption of an order), in order to fully eliminate the danger of violation of constitutional rights, these norms should have been declared unconstitutional as well.

According to the Law on the Constitutional Court of Georgia, if votes of members of the Chamber split equally, respective norms are declared constitutional. Therefore, the claim of the claimants to declare Paragraph 6 of Article 208 of the Criminal Procedure Code of Georgia, and Paragraph 5 of Article 212 of the Civil Procedure Code of Georgia unconstitutional with regard to Paragraph 1 of Article 42, and Paragraph 2 of Article 18, was not upheld.

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CITIZENS OF GEORGIA ZAUR ELASHVILI, SULIKO MASHIA, RUSUDAN GOGIA AND OTHERS AND THE PUBLIC DEFENDER OF GEORGIA  
V. THE PARLIAMENT OF GEORGIA  
**2/1/370,382,390,402,405, MAY 18, 2007**

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**SUBJECT OF DISPUTE**

The Public Defender and minority stockholders (in possession of less than 5% of voting stocks) of various joint stock companies disputed the norm of Article 533 of the Law on Entrepreneurs, according to which, the majority stockholder (in the possession of more than 95% of voting stocks) had a right to purchase for an equitable price the remaining stock owned by other stockholders against their will. According to the claimants, the disputed norm contradicted Article 14 (right to equality before the law), and Article 21 (right to property) of the Constitution of Georgia.

**REASONING**

The disputed rule of compulsory sale of stock to majority stockholders was first evaluated with regard to Article 21 of the Constitution of Georgia. Paragraph 1 of Article 21 recognizes and ensures the right to property, also protects property from such interference, which is not allowed under Paragraphs 2 and 3. Therefore, the norm, which violates Paragraphs 2 and 3 of

Article 21 will automatically violate Paragraph 1 of Article 21 as well. As the disputed norm concerned the right to own stocks, the Court determined that stock, as a document certifying the ownership of a property and as a voting instrument is protected by Article 21 of the Constitution.

Next, the Court differentiated the restriction of the right to property regulated by the Paragraph 2 of Article 21, from expropriation of property as regulated by the Paragraph 3 of Article 21. The Court noted, that the institute of expropriation set forth in Paragraph 3 of Article 21 is characterized by explicit formal features – it involves the deprivation of property by the state itself (though its competent bodies) for pressing social need or urgent necessity and for achievement of public goals. In this case, deprivation of property should be understood as expropriation and it does not encompass every scenario of deprivation of property against the will of the owner.

As for the “restriction of right to property”, in the Court’s opinion, this provision empowers the state to define the sub-

stance and scope of property in view of the social nature of property. In this case, the state establishes the legislative framework, but it is not necessarily a direct or indirect party to the specific relationship. Therefore, a rule on compulsory sale of stocks, that in effect forced minority stockholders to act against their will, constituted a restriction of the right to property and should be reviewed under Paragraph 2 of Article 21 of the Constitution.

Evaluating restriction of the right to property under the disputed norm, the Court considered, whether the impugned restriction served the “pressing social need” provided in Paragraph 2 of Article 21. The Court interpreted, that “pressing social need” is a concept subject to change in space and time, depends on specific social needs, the nature of specific property and its social importance. Additionally, acting to meet the pressing social need does not necessarily presuppose actions aimed at mitigating negative consequences. It includes actions that aim to bring about positive results for the society or for the parts of the society.

The Court found, that at the given moment of social development, attracting of foreign investments was of vital importance, and thus, there was a need of devising effective legal mechanism for mergers, liquidations, and reorganizations of companies and the institute of compulsory sale of stocks was an indispensable part of it. It would contribute to the formation of effectively organized enterprises and development of securities market.

However, the compulsory sale of stocks did not itself represent a universal tool to bring positive change to every enterprise, and concentration of more than 95% of stocks under one majority stockholder did not automatically trigger a social need for the procedure of compulsory sale of remaining stocks. The Court specifically highlighted, that compulsory sale of stocks shall only take place in cases, when it is necessary for the proper functioning and development of an enterprise.

From this perspective, the disputed norm could not strike a fair balance between the interests of majority and minority stockholders, since the disputed norm did not clearly demonstrate the aim of the procedure of compulsory sale of stocks. Majority stockholder had the opportunity to buy stocks, even when this

was not needed for the enterprise at all. Furthermore, minority stockholder only learned about the compulsory sale of his/her stocks via announcements in printed media and did not have an opportunity to learn why were his/her stocks were sold and to voice his/her opinion. Minority stockholder was left without legal remedies to defend itself from the majority stockholder who abused his/her economic power.

Additionally, to establish equitable price of stocks purchased under the rule of compulsory sale of stocks, the procedure offered two mechanisms – first, the determination of equitable price either by an independent expert, or by a broker, which could be appealed in a court, and a second, determination of equitable price according to rules of the by law of enterprise itself. In the latter case, the interests of minority stockholder would suffer again, and he/she did not have a legal defence mechanism in case he/she disagreed with the price set according to the by law of the enterprise.

Considering the afore-mentioned circumstances, the Court found, that despite legitimate aim presented, the means employed were inadequate and disproportional, and hence, declared the existing compulsory sale of stock rule unconstitutional with regard to the Paragraphs 1 and 2 of Article 21 of the Constitution.

The Court also evaluated the disputed norm with regard to Article 14 of the Constitution and did not find, that minority stockholders were subjected to differential treatment on the basis of the “status of property”. The Court pointed out, that corporate relationships are asymmetrical relationships in capital-based companies. The nature of corporate relationships causes the differentiation of the rights, obligations and liabilities of the participants in line with the financial participation of stockholders in the company. Differentiation of their rights and duties could not be considered as differential treatment in analogous situations and unequal approach to essentially similar subjects. The state is not required to achieve universal equality without due regard of the legal nature of a relationship. Therefore, the disputed norm was found to be compatible with Article 14 of the Constitution.

GEORGIAN YOUNG LAWYERS' ASSOCIATION AND THE CITIZEN OF GEORGIA –  
EKATERINE LOMTATIDZE V. THE PARLIAMENT OF GEORGIA  
**1/3/407, DECEMBER 26, 2007**

**SUBJECT OF DISPUTE**

The Georgian Young Lawyers' Association and its representative disputed the constitutionality of a norm of the first sentence of Paragraph 2 of Article 9 of the Law of Georgia on Operative-Investigative Activities, according to which, undertaking an operative-investigatory activity, which restricts legally protected confidentiality of communications through telephone or through other technical means, is allowed only under the order of a judge and by the resolution of a prosecutor, or on the basis of a written application of a person, who is a victim of illegal conduct, or if there is data about an illegal conduct, which is punished by the Criminal Code of Georgia with imprisonment for no less than 2 years. Conjunction "Or" following the words "under the order of a judge and by the resolution of a prosecutor" allowed for a reading of the norm, according to which the restrictive operative-investigatory activity could have been carried out without the order of a judge, on the basis of other grounds the norm had listed. It was disputed with regard to Paragraph 1 of Article 20 of the Constitution of Georgia (right to inviolability of private life).

**REASONING**

The Constitutional Court highlighted the peculiar nature of the case under review, which consisted in the fact, that the claimant disputed not the specific text of the norm itself, but its vagueness and a possibility of its multifarious interpretations. Hence, the Court had to consider the constitutionality of permissible restrictions on the protected right to confidentiality of communications through telephone or through other technical means, and at the same time, to answer the question, when the vague norm should be considered unconstitutional.

The right to inviolability of private life comprises the private sphere of an individual's live and development, which must be protected from interference of the state and other persons. The right to protected confidentiality of communications through telephone or through other technical means safeguards oral and written communication via any means. The state, in general, is forbidden from reading the content of communication conducted via various means, and may not carry out surveillance on with

who and how often communication takes place. However, the right to private communication is not absolute. The Article 20 of the Constitution itself, determines when the right it protects can be restricted, which serves the purpose of striking a balance between private and public interests. The Court evaluated to what extent could the legislator balance public and private interests and clearly show it into the disputed norm.

Since the subject of dispute was the vague nature of the norm, the Court noted, that the legislator is obliged to adopt "precise, clear, unambiguous, and foreseeable laws (norms) that meet the requirement of legal certainty." A product of the legislator can only be deemed to be the law if it satisfies quality requirements of a law and for this purpose, it is crucial that the law is accessible and foreseeable.

Evaluating foreseeability and accessibility of the disputed norm, the Court noted, that norms that restrict confidentiality of communications through telephone, or through other technical means are subject to even stricter requirements, since the interference in the right has a secret nature, a person is not able to participate in the court proceedings, where restricting of his/her freedoms is being decided, and this process is accompanied by restriction of the interests of the third persons, with whom the primary target of secret surveillance has communication, and who are devoid of an opportunity to defend themselves. Given all of this, the law must provide very clear and manifest notice, as to when and how their rights could be under the risk of restriction. The specific nature of interference required additional prerequisites: **A.** The norm must have been sufficiently precise, so that competent authorities could identify the limits of their powers and not have the possibility of arbitrariness or setting the limits of their powers independently; **B.** The citizens should have been able to know when their rights could be violated and exercise their right to apply to a court.

Determining the general approach about the vagueness of a norm, the Court also pointed out, that "the vagueness of the norm does not amount to its unconstitutionality as long as it is possible to reasonably interpret the norm through legal methodology, so that the true essence of relations regulated by

the norm becomes clear with sufficient persuasion.”

The Disputed norm regulated the conditions of implementation of a specific operative-investigative measure. Restriction of confidentiality of communication was allowed only: **A.** By the order of a judge and by the resolution of a prosecutor, **B.** On the basis of a written application of a person, who is a victim of illegal conduct, **C.** If there was data on an illegal conduct, which the Criminal Code of Georgia punished with imprisonment for no less than 2 years.

During the grammatical construction of the disputed norm, the Court noted, that the word “or” is a conjunction that is connecting two words of the sentence or two sentences, and defines relationship between them. The conjunction “or” offers a choice of one option from number of alternatives or application of one option from a number of possibilities, through eliminating the remaining options. Hence, it is assumed, that the disputed norm stipulated alternative conditions for carrying out operative-investigative activities, and a choice of one option eliminates others. According to the Court, the conjunction “or” allowed reading it in such a manner, that the norm had listed three equally important alternative conditions.

The Court interpreted the disputed norm in conjunction with other norms that were related to it. The court determined, that the number of norms of the Law on Operative-Investigative Activities provided for the restriction of the inviolable right of communication carried out through technical means only based on the order of a judge, adopted in response the reasoned motion of a prosecutor. Despite this, the fact that the general rule was given in the disputed norm as one of the alternative conditions, ruled out the fulfilling the requirement of “order of a judge” if two other options were present. The Court found out

that, the disputed conjunction “or” stipulates alternativeness of the provided conditions and this could not be ruled out through interpreting Paragraph 2 of Article 9 in conjunction with other norms of the same law.

The afore-mentioned finding could not be altered even by the fact, that a practice of using the norm in an unconstitutional manner could not be documented, since the very meaning of the norm did not allow for uniform reading of the norm.

Additionally, the Court noted, that of Article 20 of the Constitution permitted the restriction of inviolability of the right to privacy only by a judicial decision or during an urgent necessity. The Court assessed, whether other options, presented as “alternatives to a court order”, fitted the definition of “urgent necessity”. For the purposes of Article 20 of the Constitution, urgent necessity is a state of affairs, when achieving public interests must take place immediately, and such urgency does not allow to secure appropriate court order. The two conditions, listed in the disputed norm, were not by their nature linked to urgent necessity, which may or may not be present at the same time as grounds listed in the Paragraph 2 of Article 9. Therefore, this argument could not be used to prove that the norm was constitutional.

The Court found out, that the norm could not satisfy criteria for transparency and accessibility. Its reasonable interpretation, by using legal methodology, provided one version of its meaning which did not comply with the Constitution. Therefore, in the disputed norm, the comma and the word “or” following the words “by the order of a judge and by the resolution of a prosecutor” made them incompatible with the principles of foreseeability and legal certainty, and violated Article 20 of the Constitution of Georgia.

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## CITIZEN OF GEORGIA, SHOTA BERIDZE AND OTHERS V. THE PARLIAMENT OF GEORGIA

**2/1/392, MARCH 31, 2008**

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### SUBJECT OF DISPUTE

67 persons employed in small enterprises disputed the norm of Paragraph 6 of Article 12 of the Law of Georgia on Privatization of State Property which placed the that employees of small enterprises in the fields of trading, food and other services on the territory of the Autonomous Republic of Ajara under preferential treatment allowing them to directly

buy these enterprises from the state. The Constitutionality of the afore-mentioned norm was disputed with regard to Article 14 (right to equality before law) and Article 31 (obligation of the state to care for the equal socio-economic development of the whole territory of the country) of the Constitution of Georgia.

**REASONING**

According to the claimants, the disputed norm placed them in an unequal position. Hence, the Court interpreted Article 14 of the Constitution. Article 14 of the Constitution stipulates, that everyone is equal before the law, regardless the extensive list of characteristics (e.g. race, color, place of residence, etc.) which is provided in the same article. Among the grounds for discrimination, Article 14 does not mention “place of employment”, which was the basis of granting advantage under the disputed norm. However, the Court determined, that granting privilege to a certain group of persons based on this characteristic still required constitutional-legal review with regard to Article 14 of the Constitution: “Article 14 of the Constitution establishes not only the fundamental right of equality before the law, but the fundamental principle of equality before the law. It aims to ensure equality before the law, not to allow essentially equal persons to be treated as unequal and vice versa. If we look at it from grammatical perspective, the list of grounds in Article 14 seems to be exhaustive, but the aim of the norm is significantly larger in scale, than to simply prohibit discrimination based on the characteristics listed in it...Solely narrow grammatical interpretation would impoverish Article 14 of the Constitution of Georgia and reduce its importance in the constitutional-legal realm.” Therefore, the list of discrimination grounds was determined as non-exhaustive and it was declared, that constitutionality of differential treatment that is based on other grounds should also be reviewed with regards to Article 14 of the Constitution of Georgia.

The Court found out, that the disputed norm put essentially equal persons in an unequal legal conditions. Preferential conditions were created for a certain category of persons, who were employed in small enterprises (balance value of less than 100.000 GEL) on the territory of the Autonomous Republic of Adjara; While, in the remaining parts of Georgia, persons employed in similar enterprises did not benefit from the same advantageous legal regime.

The Parliament of Georgia acted within its authority, when it enacted the disputed norm and hence, it was bound by the requirements of Article 14 of the Constitution. It was also clear, that the Parliament did not intend to put the claimants and other the persons in similar situation in an unequal position. However, as the Court pointed out, it is not always required that the body that adopts such norms is doing it intentionally: “What matters is not the legislative intent, but the real consequences it generated”. On the other hand, placing persons in an unequal situation does not automatically mean that Article

14 is violated if there are “adequately weighty, reasonable and necessary aims”. The actions of the legislator must be substantially justifiable, non-arbitrary and proportional.”

In evaluating proportionality, the Court took into consideration, that on the one hand, the regulation had social importance, and the state has a broad margin of appreciation in this field, while on the other hand, differentiation was conducted based on the ground, which the claimants objectively could not alter in order to benefit from the available preferential treatment.

After having studied legislative history of the norm adopted by the Parliament, the Court determined, that on May 29, 1994 the Order #178 of the Head of the Georgian State, “Regarding Measures to Speed Up and Regulate Privatization”, was adopted. This order approved the rule, which provided the employees of small enterprises in the fields of trading, food service and other services with the opportunity to directly buy from the state their respective enterprises during one year. Due to the political reasons specific to the Autonomous Republic of Adjara and due to actions of local authorities, the privatization of respective enterprises under the afore-mentioned order did not take place in the Autonomous Republic of Ajara. Therefore, the Court determined, that, and by adopting the disputed norm which was analogous to the Order #178 of 1994, and providing the employees of small enterprises that operated in the Autonomous Republic of Adjara with the advantage in the process of privatization constituted restoration of fairness towards these group of people and an optimal, proper and necessary way to defend their social interests. There was no other means, that would be better or more advantageous for achieving the aim pursued by the legislator. Therefore, it was concluded, that the disputed norm was compatible with Article 14 of the Constitution of Georgia.

The Constitutional Court also interpreted Article 31 of the Constitution, which establishes the duty of the state to take care for the equal socio-economic development of the whole territory of the country. The Court determined, that this constitutional norm is, on the one hand, a show of solidarity towards territorial entities of the Country, while on the other hand, it is an expression of the principle of social state and aims to create as equal living conditions throughout the Country, as possible, which objectively cannot ever be fully achieved and thus is the subject of constant care. Despite the fact, that the afore-mentioned article is part of Chapter 2, which enshrines the fundamental rights and freedoms, the Court found that, Article 31 does not establish fundamental right and therefore, the disputed norm could not be reviewed with regards to it.



THE PUBLIC DEFENDER OF GEORGIA, CITIZEN OF GEORGIA ELGUJA SABAURI AND  
CITIZEN OF RUSSIAN FEDERATION, ZVIAD MANIA V. THE PARLIAMENT OF GEORGIA  
**1/1/428, 447, 459, MAY 13, 2009**

**SUBJECT OF DISPUTE**

The Public Defender of Georgia and the persons, against whom unfavorable Criminal laws, adopted after commission of unlawful acts, were applied, disputed Paragraph 1 of Article 3 of Criminal Code of Georgia with regard to the second sentence of Paragraph 5 of Article 42 (prohibition of retroactive application of laws establishing responsibility) of the Constitution. The disputed norm allows retroactive application of the Criminal law, if it abolishes criminality of an act or mitigates punishment, but prohibits retroactive application of the law, that establishes criminality of an act or aggravates punishment. According to the claimants, limiting the prohibition of retroactive application only to those laws, which regulate establishment of criminality of acts or aggravation of punishment, allowed law-enforcement authorities to retroactively apply other laws (e.g. laws on probation or statutory limitations), which were unfavorable to a person.

**REASONING**

First, the Constitutional Court interpreted Paragraph 5 of Article 42, which, as a whole, strengthens the principle of legality (*nullum crimen sine lege*). Namely, the first sentence of the Paragraph 5 of Article 42 forbids holding someone responsible on account of an action, which did not constitute a criminal offence at the time it was committed. The second sentence of the same paragraph, on the one hand, forbids retroactive application of the law, and on the other hand, introduces an exception – if the law mitigates or abrogates responsibility, it may be applied retroactively. The Court noted, that these sentences of Paragraph 5 of Article 42 are in organic unity and ensure, that violation of law and responsibility for it, as the compilation of coercive measures taken by the state – will be determined by the laws enacted at the time the violation in question was committed.

Majority of the Chamber of the Court did not share the argument that the disputed norm narrowed the constitutional guarantee and forbade retro activity in two cases only – establishment of criminality of an act and aggravating the “punishment”. The Court found, that the terms “criminality” and “punishment” fully conformed with the term “responsibility” in

Paragraph 5 of Article 42 of the Constitution, since “criminal responsibility does not exist without criminality of an act and its punishment” and every criminal measure, whatever name it is given, is linked to them.

Additionally, the Court noted, that introducing criminality and aggravating the punishment for it should not be narrowly interpreted as criminalization of certain acts by law, or some general increase of penalties for them, but should also cover scenarios, in which, due to certain circumstances, a criminality of a specific act committed by a specific person is introduced or punishment is aggravates for a specific person.

Given the afore-mentioned argumentation, the Court determined, that if statutory limitation for criminal prosecution has expired, this means that the person is discharged from criminal responsibility and a specific act he/she committed is no longer criminal. Extending limitation period after the person has expectation that he/she is now absolved from criminal prosecution, constitutes “establishment of criminality”. In such cases, the disputed norm did forbid retroactive enforcement of the newly adopted law.

Unlike the previous scenario, if statutory limitation for a specific act has not expired, its extension based on a new law does not constitute violation of constitutional prohibition on retroactive application of a new law, as in this case the person could not have a lawful expectation, that the state would not be able to prosecute him for his/her acts, within the established period and that he would be discharged from responsibility.

Additionally, the Court determined, that the words of the disputed norm “aggravates punishment” must not be interpreted to cover only increase of sanctions. Elimination of a possibility of probationary sentence based on the new law, which was adopted after the crime has been committed, must be considered as indirect aggravation of punishment and retroactive application of such laws would be unconstitutional.

Despite the fact, these was a different practice of interpretation and application of the disputed norm, the Court decided, that the content of the norm itself was decisive. According to

this approach, if a norm can only be interpreted in a way that contradicts the Constitution, it must be considered as unconstitutional. However, if a norm can have dual interpretation, and it also allows for interpretation in conformity with the Constitution, then it must be interpreted in a manner that is conforming to the Constitution and should be viewed as constitutional.

Considering, that the disputed norm could be interpreted in manner to cover norms on statutory limitation and probationary sentences, and could prevent retroactive application of unfavorable laws adopted after the offence had been committed, the Court determined that the norm was constitutional with regard to Article 42 of the Constitution of Georgia.

#### THE JUDGMENT HAS THREE DISSENTING OPINIONS

Justice **Konstantine Vardzelashvili** expressed his dissenting opinion regarding the reasoning of the judgment. He noted, that the terms “criminality” and “punishment” might indeed have specific meaning attached to them and not allow for broad interpretation for the purposes of the Criminal Code. However, for the constitutionality of the norm, it was decisive that, the disputed norm never introduced an opportunity to retroactively apply Criminal law to other aspects of criminal responsibility. Additionally, Article 47 of the Law of Georgia on Normative Acts stipulates, that a norm may be applied retroactively, if this is explicitly stated in the law. Considering this and the rules on the temporal scope of application of the Criminal Code, the disputed norm did not give a reason to read it in an uncon-

stitutional manner. According to the approach offered in the dissenting opinion, when there is no contradiction between the Constitution and the disputed norms, “but law does not give clear instructions or leaves this or that issue open”, the law-enforcement authority is allowed to find the provision regulating the specific issue directly in the Constitution. Therefore, the disputed norm did not contradict the Constitution.

Justice **Ketevan Eremadze**, in her dissenting opinion, argued, that in the Criminal Procedure Code and Criminal Code, the lawmaker clearly differentiates between criminal responsibility and punishment and equating these terms is not permissible. Additionally, systemic analysis of the disputed norm did not rule out, but even gave reasonable ground for the interpretation, that except for cases of establishment of criminality of an act and aggravation of punishment, the Criminal Code could be applied retroactively. According to this dissenting opinion, it an ambiguous norm provides reasonable ground for unconstitutional interpretation, it fails to meet the requirements of foreseeability and must be declared unconstitutional. Therefore, the disputed norm should have been declared unconstitutional.

According to the dissenting opinion of Justice **Vakhtang Gravamia**, Paragraph 5 of Article 42 of the Constitution prohibits retroactive extension of statutory limitation both when it is already expired, and when it is still running. Different interpretation would result in the so-called “eternal criminal prosecution”, which would not only damage the rights of specific persons, but legal security as well.

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## CITIZENS OF GEORGIA – GIORGI KIFIANI AND AVTANDIL UNGIADZE V. THE PARLIAMENT OF GEORGIA 1/3/421,422, NOVEMBER 10, 2009

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#### SUBJECT OF DISPUTE

The claimants, Giorgi Kifiani and Avtandil Ungiadze, disputed the part of Paragraph 2 of Article 14 of Law of Georgia on Broadcasting prohibiting concerned persons the right to apply to court when the broadcaster violated **A.** The duty to provide facts in programs with due accuracy and correct mistakes in a timely manner (Paragraph 1 of Article 52); **B.** the duty to report facts in a just and precise manner, to clearly separate fact from opinion, and to identify the author of the opinion (Paragraph 1 of Article 54). **C.** The prohibition of programs or advertisements containing obscenity, that violate human dignity and basic rights

(part of Paragraph 4 of Article 56); **D.** Prohibition of broadcasting of programs, that may have harmful effects on the development of minors, when there was a high probability that minors would have access to such programs.

The claimants also disputed Paragraphs 1 and 2 of Article 59 of the same law, and Paragraph 4 of Article 17 of Law of Georgia On the Protection of Minors from Harmful Influence, which determined, that all of the above-mentioned violations could be appealed not in courts, but solely within the self-regulation mechanisms functioning within the broadcasting institutions.



According to the claimants, disputed norms violated the first Paragraph of Article 42 of the Constitution (right to fair trial).

#### REASONING

The Court interpreted that, the right to apply to a court, protected by Article 42 of the Constitution, is an instrumental right – when an impugned norm limits the right to apply to a court, the claimant, first needs to argue that this norm limits their ability to apply to a court for protecting of their rights and freedoms.

The claimant notes, that violation of duties stipulated by Paragraph 1 of Article 52 infringed upon his honor and dignity, and stripped him off of possibility to seek financial compensation for the damages resulting from the violation in question. The Court indicated, that the obligations stipulated in the Law on Broadcasting does not, automatically establish the right of viewers on fulfillment of these obligations, since the goal of the Law is not to provide the rights for viewers. Protection of human honor and dignity, and in appropriate cases, the possibility for financial compensation and correction of mistakes, are provided and ensured by other laws –the Civil Code of Georgia and the Law of Georgia on Freedom of Speech and Expression. Both laws ensured that right to apply to a court in case human honor and dignity were infringed, and the disputed norm does not rule it out.

Article 52 of the Law on Broadcasting addressed qualitatively and quantitatively different circumstances – dissemination of imprecise facts. The Court explained, that dignity, as well as, any other right, may not change in line with the subjective opinions of different individuals. It must, to a certain degree, satisfy the criteria of objectivity and universality. “Only the fact that a person dislikes this or that TV Show due to their values, religion or world view, cannot be considered as an interference in the right to dignity.” Impreciseness of facts mentioned under Article 52 does not mean that the information disseminated infringed on person’s honor or dignity. Therefore, prohibition

of applying to a court regarding the dissemination of imprecise facts by a broadcaster does not mean prohibition of application to the court when the disseminated information infringed person’s honor and dignity. Additionally, the claimants could not demonstrate which of their rights were infringed if broadcasters violated their duties listed under Article 54. Therefore, the impugned norm in this part was not declared unconstitutional.

Paragraph 4 of Article 56 regulated transmission of advertisement or program that infringes dignity and fundamental rights. The lawmaker considered a theoretical possibility here, that any right could be violated, and simultaneously, unambiguously prohibited appealing against this violation in a court. The Constitutional Court declared, that it was exactly for courts to balance the freedom of expression of broadcasters against the dignity and fundamental rights of others, based on the form, content and social importance of the expression. Therefore, with regard to Paragraph 4 of Article 56, prohibition of the right to apply to a court was declared unconstitutional.

In the part of the claim concerning the harmful influences on minors, the claimant challenged the content of “immoral” programs, which were unacceptable to him and which was “perverting” future generations. The Court noted, that in a democratic society, it is not allowed for a state, a court, a person, or a group of persons to press their moral norms or world views upon other social groups. “Lack of acceptance of the values, positions, ideas of a broadcaster, may not serve as the ground to limit its freedom of expression. The state is required to protect objectively identified interests, but not subjective feelings.” The justiciability of questions of morality by courts will negatively affect the independence of broadcasters. It is true, that parents have the right to bring up their children according to their moral values, but this does not grant them a right to demand from broadcasters (or, from other private persons) to transmit only those shows, which conforms to their moral standards. Therefore, this part of the claim was not upheld.

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## THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA 1/466, JUNE 28, 2010

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#### SUBJECT OF DISPUTE

The Public Defender of Georgia challenged a norm stated in Sub-Paragraph “A” of Article 39 of the Organic Law of Georgia on the Constitutional Court of Georgia, according to which,

foreigners not residing in Georgia, stateless persons and foreign legal enteritis were not allowed to apply to the Constitutional Court of Georgia. According to the claimant, the disputed norm

violated Paragraph 1 of Article 42 of the Constitution of Georgia (right to fair trial).

### REASONING

Evaluating the prohibition on application to the Constitutional Court of Georgia imposed on aliens, stateless persons and foreign legal entities, the Court interpreted whether these persons are the holders of the fundamental rights provided in the Second Chapter of the Constitution of Georgia. Article 7 of the Constitution calls fundamental human rights universal rights, which indicates that these rights belong to every individual. The Constitution differentiates between "citizen", "human", a "every person", "everyone", and "person" in the title of the Second Chapter of the Constitution of Georgia, as well as in the text, defining specific rights. This indicates, that some rights, due to their nature, indeed belong to the citizens, however the majority of rights belong to every human being. The Court took into consideration, that there are other articles of the Constitution of Georgia that state that "foreigners residing in Georgia" are bound by the legal order of Georgia (Article 44) or equal to the citizens of Georgia (Article 47). However, the Court decided that, "each constitutional right defines its holders, therefore, the issue of enjoyment of constitutional rights by foreigners not residing in Georgia should be ascertained within the scope of a constitutional norm establishing the relevant constitutional right."

Based on the analysis of the domestic legislation, the Court determined, that foreigners and stateless persons "residing in Georgia", also Georgia's legal entities, did not include all those foreigners, stateless persons and legal entities, who were the subject of Georgian legislation, and respectively, who enjoyed rights enshrined by the Constitution of Georgia. Based on the analysis of Paragraph 1 of Article 42 of the Constitution, the Court determined, that the right of access to both, common courts, and to the Constitutional Court, belongs to every person, and restricting this right based on citizenship status or place of residence was not allowed by the Article 42 itself. Therefore, this was an interference in the right.

Judging the proportionality of the interference, the Court assessed legitimate reasons provided by the respondent. The respondent argued, that the Constitutional Court, deciding on legal norms, determines legal order in the Country and this is a right reserved to citizens only, in the same way, as the parliament is elected solely by the citizens of Georgia.

The Court alleged, that the Constitutional Court does not make choices according to the will of the appellant. It does not matter whether the appellant is a citizen of Georgia, or a foreigner, The Court's decision will not change by this fact, as the Court can only ascertain what the Constitution requires. This makes it a principally different from the legislative body, whose elections are free from foreigner participation, so that the will of citizens is not overshadowed or altered in any way. Both, the citizens and the foreigners go to the Court for remedy for their violated rights, not with the goal to participate in law-making processes. When they are granted equal constitutional rights, the remedies to protect these rights must also be equal. Therefore, the goal provided by the responded was not considered to be legitimate.

The Court also failed to share the argument, that the foreigners, stateless persons, and foreign legal entities had the right to go to the lower courts, or the European Court of Human Rights for protection of their constitutional rights. The Court determined, that in individual cases, appealing to the Constitutional Court (e.g. in scenarios, where the source of the violation of individual's right is a law, or where the Convention does not recognize the rights enshrined in the Constitution), is a different, and the only opportunity to protect the right, and alternative mechanisms cannot substitute it. Based on this, the Court determined, that the disputed norm violated Paragraph 1 of Article 42 of the Constitution of Georgia.

Article 89 of the Constitution of Georgia did not change this finding of the Court, which stipulates that "citizen" was afforded the right to appeal to the Court (Paragraph "a"), while Paragraph "f" of the same article mentions "person". The Court did not believe it was needed to provide exhaustive interpretation of the norm, as it decided, that in view of the contents of Article 89, it was not a provision establishing right. It determined the competencies of the Constitutional Court and procedural rules, which served to establish effective and adequate mechanisms to realize rights enshrined in Article 42 of the Constitution. The purpose of Article 89 could not have been violation of the right enshrined in Article 42. "A competence of any public authority cannot narrow down, limit, or alter the content of any right, because the very goal of determining the competencies of the state bodies within the Constitution is exactly full ... protection of constitutional rights. Therefore, the means to achieve the aim cannot contradict and eliminate that aim."

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CITIZEN OF GEORGIA, BITCHIKO TCHONKADZE AND OTHERS V.  
THE MINISTER OF ENERGY OF GEORGIA  
**2/1/473, MARCH 18, 2011**

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**SUBJECT OF DISPUTE**

Consumers of natural gas disputed the norm of the Order #69 of the Minister of Energy of September 25, 2007 on the Deregulation and the Partial Deregulation of Natural Gas Distribution, according to which, gas tariff for gas consumers registered before August 01, 2008 could not exceed state-determined upper limit (partial deregulation), while gas tariff for those consumers, who registered after August 01, 2008, including the claimants to the present case, was free of such limits and the distributor was not restricted in setting the price for gas distribution. The disputed norm was disputed with regard to Article 14 (right to equality before law) of the Constitution of Georgia.

**REASONING**

The Constitutional Court interpreted the right to equality enshrined in Article 14 of the Constitution and noted, that Article 14 includes a list of grounds, which “indicate which characteristics may not serve as grounds for unequal treatment. These characteristics derive from factors that define human identity and is based on respecting their dignity and has its own historical prerequisites”. The existence of the list indicates, that differentiation of humans based on these grounds is associated with heightened risk of discrimination and there is a primary need to restrict such differentiation. However, this does not rule out that there are cases, when unreasonable differentiation between humans takes place, which are also prohibited by Article 14: “The Constitution prohibits any scenario, that involves differential treatment of persons essentially equal before the law (or vice versa) without reasonable and objective justification”.

Therefore, it had to be determined, whether the disputed norm had introduced differentiated regulation for essentially equal persons and if this differentiation, considering its reasons and justification, could be considered as discrimination, since not every differential treatment is discrimination.

According to the disputed norm, consumers who registered before August 01, 2008, received natural gas for a price within limited tariff, set by the Energy and Water Supply National Regulatory Commission of Georgia, while for other consumers no upper limit on tariff was applicable. Therefore, the disputed

norm resulted in legal consequences for physical persons who consumed natural gas and had introduced different safeguards for protection of different groups of consumers at the natural gas consumer market. The Court found, that the consumers registered before August 01, 2008 and consumers registered after that date had the same legal interest of state protection and hence, were considered to be essentially equal.

Differential treatment of essentially equal persons is evaluated with the strict scrutiny or rational differentiation test, depending on the ground of differentiation or its intensity. If the “the differentiation introduced by the norm, is based on classical, specific grounds and/or can be described as highly intense”, the strict scrutiny is applied. Under the strict scrutiny, it must be ascertained, whether the interference was absolutely required to meet the compelling state interest. In all other cases, test of rational differentiation is used, under which it suffices **A.** To justify rationality of differential treatment (including maximum realistic nature, inevitability or necessity of differentiation); **B.** to find realistic and rational link between the objective reason for differentiation and the consequences of its application.

Considering the grounds of differentiation, the Court noted, that imposition of deregulated regime was not linked with individual’s personal, property or other characteristics and was not related to the mutable or immutable human nature; the differentiated legal protection, provided by the disputed norm, was linked to the date of registration as consumers of natural gas. Evaluating the intensity of differentiation, the Court pointed out, that it was decisive “how far differentiation distances equal persons from equal opportunities to participate in social relationships”.

In the case under review, in evaluating the intensity of differentiation, the Court reviewed the difference between partially deregulated and fully deregulated regimes, and at the same time, took into consideration, that differential treatment had a temporal nature. The limited tariff, in itself, did not absolutely guarantee, that natural gas could be consumed for a fixed price. After all, the upper limit of gas tariff could also change. Global changes on the market would result in increased gas price for

both types of gas consumers, under deregulated regime and partially deregulated regimes. However introduction of upper limit on tariffs protected on group of customers from changes that were not caused by changes at global market, and in this aspect, it did distance the two groups from each other. However, the Order #69, which included the disputed norm, aimed to facilitate competition on the markets and to avoid monopolistic price fixing, which is also a certain guarantee to ensure reasonable pricing.

The Court analyzed the legislation of the energy sector, and determined, that since 2005 changes were taking place, so that gas distribution could be deregulated step-by-step. The Order #69 served the purpose of this policy, adopted in 2007, since it gradually expanded the circle of persons who were subjected to deregulated pricing. The representative of the respondent noted, that the disputed norm was not permanent and before 2013 deregulation would cover all the consumers. The Court pointed out, that the shorter the differentiated regulation regime, the less intense is an interference in the right to equality. Therefore, due to the temporal nature of the norm, it was determined, that the disputed differentiation was not of high intensity. Given the aforementioned aspect, the disputed norm was reviewed under the rational differentiation test.

The Court took into consideration Article 30 of the Constitution of Georgia, which mandates the state to support the

development of free markets, while the limited tariffs constitute restriction of free markets. To protect the market from monopolistic prices, the limited tariff would exist until emergence of alternative provider, which would provide gas in line with the market demand. According to the Respondent, at the given state, due to the lack of alternative providers, the full deregulation of the field was associated with the risks of market shocks and monopolistic pricing. Therefore, the Court determined, that partial deregulation directed at a certain group of persons, aimed to maximally mitigate negative effects of the reform and served a reasonable goal.

Furthermore, the consumers registered before August 01, 2008, those who had an opportunity to enjoy fixed tariff for natural gas, had stronger legal expectations and financial interests towards the regulation than those persons, who registered after the date and never enjoyed gas supply for the limited tariff. Since partial deregulation was applied for the group of persons, for who the risks of full deregulation would be most painful, the Court found, that singling out these group of people from a larger group of consumers was based on objective circumstances.

Considering the temporal nature of the disputed norm, its aim, and reasonable identification of group of people for differential treatment, the Court determined, that the disputed norm did not discriminate the claimants and was constitutional with regard to Article 14 of the Constitution of Georgia.

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POLITICAL ASSOCIATION OF CITIZENS, “MOVEMENT FOR UNIFIED GEORGIA” AND “CONSERVATIVE PARTY OF GEORGIA”, CITIZENS OF GEORGIA –ZVIAD DZIDZIGURI AND KAKHA KUKAVA, GEORGIAN YOUNG LAWYERS’ ASSOCIATION, CITIZENS, DACHI TSAGURIA AND JABA JISHKARIANI, THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA

**№2/482, 483, 487, APRIL 18, 2011**

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**SUBJECT OF DISPUTE**

Opposition Parties, representatives of civil society and the Public Defender of Georgia argued about the norms of the Law of Georgia on Assemblies and Manifestations and the Code of Administrative Offences of Georgia, which, they believed, violated Article 19 of the Constitution (right to freedom of speech, thought, conscience, religion and belief), Article 24 (freedom of expression) and Article 25 (right to public assembly). Disputed norms: **A.** banned manifestation and assembly participants to intentionally occupy parts of roads used for movement and to

block it with temporary constructions and/or with other objects; **B.** established rules to immediately suspend manifestation at the request of the competent authority, if the participants violated the rule with regards to occupation of parts of roads used for movement. **C.** Prohibited holding assemblies and manifestations within the 20 meter radius from the entry of the administrative establishments and buildings, listed in the Law, including the entrances of courts and residences of judges; **D.** Banned organized movement by group of vehicles, if it completely oc-

cupied the traffic part of the road ; **E.** Banned public calls for overthrowing constitutional order of the land, and/or called for violent change of power in the Country; **F.** Banned making paintings and scriptures on the facades and adjacent territories of administrative buildings; **G.** Established, that non-citizens of Georgia were not allowed to organize assembly (manifestation) and be accountable for it; **G.** Established, that a physical person could not be the “principal” of assembly and manifestation, and hence, an initiator of the action; **H.** Banned the employees of the Investigative Service of the Ministry of Finance to either organize an assembly and manifestation, or to participate in them.

#### REASONING

The Constitutional Court separated the scopes of articles 19, 24 and 25 of the Constitution from each other and determined, that the right to assembly is composed of two aspects: assembly, as a form of expressing opinion and an opinion, which is expressed through the assembly. A gathering of individuals, which does not intend to express opinion, is not protected by Article 25 of the Constitution of Georgia. Therefore, assembly and manifestation is a specific form of dissemination of opinion and information protected by Article 24. Hence, regulations related to expression of opinion through assemblies and place, form or content of these assemblies, equally fall within the scopes of Article 24 and Article 25 of the Constitution of Georgia. Unlike these articles, the aim of Article 19 of the Constitution is to ensure the freedom of speech, thought, conscience, religion and belief, as a guarantee of inviolability of the inner self (forum internum) and personal space of an individual. Interfering in this right is only permissible to protect rights of other individuals, who share private space with a person. When an opinion or an expression leaves this private space and is at odds with the interests of persons outside of the personal space or with public interest, “expression” of such speech or thought is no longer protected under Article 19 of the Constitution, but instead, falls under the protection of Article 24 of the Constitution.

The Court determined, that disputed norms, which prohibited blocking of traffic part of the road, when this was not required by a number of participants, established a reasonable balance between constitutional rights of the participants of assemblies and the rights of movement, of professional activities or the right to property of other persons. While it is true that the right to assembly includes the right to choose the location, form, and content of such an assembly, it does not mean that on any given time and location, the rights of individuals not participating in

the assembly can be restricted arbitrarily. Exception to this rule is a manifestation, with high number of participants, for which, blocking of traffic is a “by-product” and without blocking the traffic it would be impossible to hold an assembly. The Court decided it was constitutional to ban blocking roads with objects, cars and with temporal constructions, which, in addition to the above-described, would also delay the realization of the functions of law-enforcement bodies or the ability of emergency services to provide necessary assistance. The proportionality of the regulation also stemmed from the fact, that either blocking the traffic or closing the road, did not immediately result in the cessation of the assembly. The assembly participants were still able to free the road they had unlawfully occupied and continue with the action.

In contrast to this, another disputed norm empowered local municipal authority to demand immediate dissolution of the assembly, when the assembly participants had violated any of the legislative requirement related to occupation of the traffic part of the road. This norm, was declared unconstitutional. The Court decided, that the least restrictive measure in this case would be to demand from assembly participants to bring the gathering in line with the requirements prescribed by law.

Unlike previous judgment on this issue (№2/2/180-183), the norms of the Law on Assemblies and Manifestations of Georgia and the Code of Administrative Offences of Georgia, which imposed blanket ban on holding assemblies within the 20-meter radius from the entrances of the number of administrative bodies, establishments and organizations, were declared unconstitutional. To introduce the ban with the goal of ensuring proper functioning of public institutions, their functions, locations and risks of holding rallies in their vicinity had to be taken into consideration. For some establishments, the 20-meter radius rule was justified, for some – not. With regard to courts, estimating adequate distance, without prior knowledge of the number of participants of the manifestation and without consideration of its nature, was deemed impossible. Therefore, it was determined, that disputed norms restricted the right of assembly in a disproportionate manner, even when it did not pose a threat to the functioning of respective administrative building; Furthermore, on some occasions, the ban made it impossible to hold an assembly at all. At the same time, in order to avoid unjustified interference in the private lives of judges, and to ensure their independence, the ban of assembly near the residences of the judges were deemed proportional, when the addressee of the assembly is personally the judge.

In order to protect the right of movement of other persons and to uphold public order, the ban on an organized attempt to entirely block highway by a group of cars was also declared as proportional restriction, since the prohibited movement made road completely inaccessible to other means of transportation, reduced traffic flow, and increased threats of roadside accidents.

Ban on public calls for overthrowing government and/or calls for violent change of constitutional order was also declared constitutional. The Court pointed out that in order for the state to cease assembly, two criteria must be present: a call for violent replacement of government, and, real danger of materialization of the violent calls, which needs to be analyzed in specific context and circumstances. With regard to violent calls, the analysis of respective legislation allowed the Court to conclude, that disputed norm banned only those calls, which intended to realize criminal acts. At the same time, the Law provided for the cessation of assembly, when such calls turned massive in character, i.e. the probability of violent acts was high. Therefore, the disputed norm was declared constitutional with regard to Articles 24 and 25 of the constitution.

The Court assessed ban on arbitrary placement of paintings and scriptures and symbols on the facades of administrative buildings and surrounding territories, pointing out that such ban served the legitimate aim to render public space equally accessible to all. Equal enjoyment of state and municipal property is only possible when unified rules are in place, and individuals arbitrarily are not placing paintings or symbols. The Court did not find alternative, least restricting mean to achieve this aim. Therefore, the ban was declared constitutional.

The Constitutional Court reviewed the norm of the Law of Georgia on Assemblies and Manifestations, which prohibited persons not residing in Georgia to be responsible parties for the assemblies held in Georgia – either in the capacity of an organizer or a principal, even when the goal of their assembly was not political in nature and the restriction was not justified with the legitimate aim of limiting political activities of foreigners and declared it unconstitutional with regard to Article 25 of the Constitution of Georgia. Also, the norm, that banned physical persons from their ability to serve as the principals or initiators of an assembly, was declared unconstitutional. The Court decided, that the right to assembly intends to enable individuals to participate in it, but also to affords him/her the right to initiate and organize it. The Court could not find reasonable explanation as to what

was the purpose of the restriction imposed on this aspect of assembly rights of physical persons.

The Court found it constitutional to ban the employees of the Investigative Service of the Ministry of Finance to participate in a peaceful assembly, since they are vested with functions similar to those of the employees of the Ministry of Internal Affairs. Article 25 of the Constitution itself prohibits the persons charged with such responsibilities from the right to participate in assemblies and manifestations.

*The Constitutional Court of Georgia reviewed the Law on Assemblies and Manifestations for the first time in its 2002 decision (№2/2/180-183) in the Case of “Georgian Young Lawyers’ Association and Zaal Tkeshelashvili, Nino Tkeshelashvili, Maia Sharikadze, Nino Basishvili, Vera Basishvili and Lela Gurashviliv. The Parliament of Georgia”. One of the challenged norms was Article 8, which required submission of notification by organizers of assembly and entitled respective authority not to accept this notification in certain cases determined by the Law. The Court decided, that the existence of such notification requirement was constitutional in itself, because it allowed the state to take necessary steps, to ensure that an assembly was held, on the one hand, and to protect the interests of the third parties, on the other hand. However, the mechanism of “not accepting the notification” was not constitutional, since it turned notification into a permit. Since Article 25 of the Constitution allowed only notification of public authorities, as a unilateral act to provide information, and not a permit, the respective part of Article 8 of the Law was declared unconstitutional.*

*The Court also declared Article 14 of the same law unconstitutional, since it allowed local bodies to ban organization of manifestation, if there was the data verified by police, that the assembly in question would threaten “constitutional order, the lives of citizens and their health.” The Court pointed out that, all of the listed acts were unlawful and punishable by law. Therefore, if the circumstances established by police confirmed such threats, it was the duty of the courts, not of local bodies, to take decision on these unlawful actions.*

*The claimants also disputed ban on blocking the entrances of the buildings of those administrative bodies and establishments, that were listed in the Law, but unlike the Judgment of 2011, the Court decided, that the Law listed those specific establishments, whose proper functioning would be threatened if the assemblies were held on their premises, and therefore, public order would be violated as well. The claimants also disputed ban on the foreigners to hold assemblies, (the same norm was*



also disputed in the case of 2011), however, in 2002 the Court found that, the Young Lawyers' Association of Georgia had no standing to argue on behalf of other persons, even if they were its members.

It is noteworthy, that the right of assembly of foreigners became the subject of constitutional complaint for the third time, in the case of "Citizen of Moldova, Mariana Chicuv. The Parliament of Georgia" in 2012. In its judgment of 18 April, 2011, the Constitutional Court of Georgia declared the norm unconstitutional (the following words "also the persons who are not Georgian citizens" in Paragraph 2 of Article 5 of the Law of Georgia on Assemblies and Manifestations), which stated, that persons who did not hold Georgian citizenship could not be responsible for assemblies; the unconstitutional restriction was imposed on foreigners and stateless persons. According to the new norm adopted by the Parliament of Georgia, stateless persons were no longer banned from enjoying this right,

but foreigners still could not be responsible for or organizers of assemblies. The Constitutional Court of Georgia compared disputed norm in the ongoing case with the norm that was declared unconstitutional by the April 18, 2011 decision, not only formally, but in view of their legal consequences as well. The Court found, that the disputed norm partially duplicated the norm that was declared unconstitutional – namely, foreigners residing in Georgia were subject to a blanket ban of the right to organize and be responsible party of assemblies, in a manner that did not allow exceptions for assemblies of nonpolitical nature. When the disputed norm repeats the same norm, which has already been recognized as unconstitutional, the Court is entitled to invalidate it, by issuing a ruling, and without the consideration of a case on merits. Hence, the Court Ruling of December 14, 2012 (1/ 5/525) invalidated the disputed norm of Paragraph 3 of Article 5 of the Law on Assemblies and Manifestations of Georgia.

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## PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA 1/1/477, DECEMBER 22, 2011

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### SUBJECT OF DISPUTE

The Public Defender of Georgia disputed the constitutionality of Paragraph 2 of Article 2 of the Law of Georgia on Military Reserve Service with regard to Article 14 (right to equality before the law) and Paragraphs 1 and 3 of Article 19 (freedom of religion) of the Constitution of Georgia. The disputed norm made it mandatory for every citizen of Georgia to serve in the military reserve service, including those persons, who had conscientious objection, i.e. whose faith forbade them to serve in the military service.

### REASONING

The Constitutional Court interpreted right to freedom of religion, protected by Article 19 of the Constitution of Georgia, which includes the right to choose, reject or change religious or non-religious faiths, without interference of state, i.e. protects the inner realm of human thinking. Interference in the inner space of an individual can be exercised by ideological, psychological and moral pressure, intimidation, coercion to abandon certain belief systems or forcing someone to change it, which is absolutely prohibited by the Constitution of Georgia. At the same time, the right to freedom of religion in-

cludes the right to practice the religion and live according to its rules, since without it, recognition of freedom of religion would be meaningless. The right of an individual to lead his/her life according to his/her faith, can be restricted based on the Paragraph 3 or Article 19, when it is necessary for the protection of rights of others.

The Court also interpreted conscientious objection and noted, that it is based on religious or on non-religious belief, which forbids a person to kill others. Therefore, these persons refuse take weapons and serve during the wartime, which necessarily presupposes the use of force, and refuse serve in the military service during the peace, which is preparation for wartime actions.

The Court determined, that the refusal of the conscientious objectors is directly related to these people, their lifestyles and it not directed at sharing these beliefs with the others. Conscientious objection is expressed only when the state requires these persons to act against their faith and is caused by the necessity to maintain this faith, due to which, in terms of consequences, there is only little difference between having the faith and expressing it. Based on the afore-mentioned, the Court was able to conclude, that Article 19 of the Constitution protects the right

to conscientious objection. Additionally, the Court pointed out, that conscientious objection, it is not enough that the decision is motivated by faith; such decision must be a unconditional requirement of his/her faith and it must be of crucial importance for determination of personality and identity of a person.

Following interpretation of Article 19 of the Constitution, the Court provided systematic interpretation of the disputed norm of the Law on Military Reserve Service and determined, that there was not difference between the activities of a reserve and a military personnel, since the immediate function of a military reserve was to participate in combat activities and to prepare for them. Therefore, the reserve and the military service could provide similar grounds for conscientious objection. Despite this, Georgian legislation only acknowledged the conscientious objection of military recruits, by allowing them to serve in an alternative, non military service and did not grant the same opportunity to those who were called to serve in reserve or who were already serving in reserve. Due to this, it was determined, that the disputed norm constituted an interference into the right to freedom of religion.

According to the respondent, the legitimate aim of the interference was to defend the Country and state security, which was aim of Article 101 of the Constitution as well. Article 101 stipulated the obligation to defend Georgia. The Court noted, that Article 101 per se, does not specify that defending Georgia must be conducted through the mandatory military service; defending Georgia does imply that it must only be defended with weapons of war. Therefore, Article 101 of the Constitution of Georgia did not rule out that right to conscientious objection was be protected under Article 19 of the Constitution.

Discussing proportionality of interference, the Court pointed, that in exceptional cases (and not in general), coercion to reject expression of faith might be extremely close to violating inner realm of freedom of religion. The disputed norm meant to coerce persons with conscientious objection to act against their beliefs and serve in the military reserve service. If they refused to do so, they would be held liable. "The State requires persons with conscientious objection to act against the requirements of their own beliefs, which in fact, in the given situation, practically amounts to demanding them to reject their faith by their acts".

Therefore, the disputed norm constituted an unjustified and intense interference in the freedom of religion, which was amounted to deprivation of possibility to exercise the right at all. Furthermore, achieving aim could have been done with less interference – an alternative civil service could have been introduced for persons called into military reserve service too. Therefore, it was determined, that the disputed norm violated the freedom of religion.

The Court evaluated the disputed norm with regard to Article 14 of the Constitution. Imposing an uniform duty to serve in the military reserve service on everyone, the Law did not intend to restraint any minority. However, the Court noted, that the neutral nature of the law does not itself and always preclude unjustified differentiation. "A general and a neutral law, if it treats everyone in an equal manner, including those who are unequal, is itself violating the principle of equality."

Since the persons called to serve in reserve can have different faiths including faiths, which generate conscientious objection, a neutral law introducing a uniform duties for them, in fact established a differential, unequal regime. Therefore, the disputed norm prescribed equal treatment of essentially unequal persons (those reservists, who had conscientious objection and those reservists, who did not have it). Furthermore, it was established, that reservists were differentiated based on "religion and other views", i.e. based on a specific ground listed under Article 14 of the Constitution.

Evaluating interference in the right to equality, the Court noted: "When a norm, on the one hand, results in violating the right to freedom of religion, and on the other hand, differentiates these persons from others, based on the ground of faith... it is impossible to be compatible to constitutional requirements, which mandate that in everyone is equal before the law regardless of their faith."

Hence, the normative content of the disputed norm, which established a duty to serve in the military reserve service for those persons, who were motivated by their faith to reject military service, was declared unconstitutional both, with regard to the Paragraphs 1 and 3 of Article 19, and Article 14 of the Constitution. However, the general constitutionality of military reserve service was not challenged in this case and therefore the judgment did not address this issue.



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THE PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA  
**1/1/468, APRIL 11, 2012**

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**SUBJECT OF DISPUTE**

The Public Defender disputed existing system of licensing of the broadcasting via network cable or via satellite, which, unlike licensing of frequency-based broadcasting, was not predetermined by a limited resource – the necessity to effectively distribute frequency spectrum. Namely, the subject of the dispute were those norms of the Law of Georgia on Broadcasting, that **A.** Required that license is obtained in order to broadcast via network cable or satellite (the “T” Subparagraph of Article 2); **B.** required general (at least 2 thematic variety of broadcast programs) or special (one theme for broadcast programs) license and broadcasting within the scope of respective license (Paragraph 3 of Article 38); **C.** Defined procedure for the National Regulatory Communications Commission to grant or modify license (Paragraph 5 of Article 38) or, **D.** To revoke or suspend (Paragraph 4 of Article 38) the license; **E.** determined 30-day period for decision on granting license (the first sentence of the first Paragraph of Article 41). These norms were disputed with regard to the Paragraphs 1 and 4 of Article 24 (right to freedom of expression) of the Constitution.

**REASONING**

The Constitutional Court noted, that Article 24 of the Constitution “specifically protects the opportunity to disseminate opinion and information via various means of communication.” The disputed norms interfere in the right of a person to disseminate information via cable or satellite systems and conduct broadcasting without hindrance. In order to establish whether the interference in the right to freedom of expression is constitutional, it must serve a legitimate aim determined in Article 24 of the Constitution and must reasonably relate to it – otherwise, the restriction would be impermissible. To evaluate constitutionality of interference, it should be established, how proportional, narrowly tailored and least restrictive the applied means is in achieving the aim.

In discussing legitimate aims, the Court pointed out, that the State was not motivated by need to effectively manage limited resource – frequency spectrum, when it applied licensing requirement and thus regulated cable and satellite broadcasting. There was another argument, the so called “technological

neutrality principle”, which means that broadcasters should be regulated irrespective of the resources they utilize, due to the fact, that they have a special effect on the audience. However, the Court did not consider this was a legitimate aim either. The Court evaluated the constitutionality of the disputed norm separately, in the case of cable-based broadcasting and in the case of satellite-based broadcasting.

According to the respondent, licensing for cable broadcasters serves the purposes of state security, territorial integrity, public safety and protection of rights of others. These aims were achieved by eliminating the political parties, administrative authorities and non-resident persons from the domestic broadcasting markets, which itself served the aim to protect the independence of broadcasting “from foreign interests or influence of political groups” and saved it from monopolies and ensured pluralism of broadcasting. Licensing in its turn ensured enforcement of legislative prohibition of broadcasting by these persons. The Court noted, that for elimination of persons, that did not have the right to broadcast at all from the group of prospective broadcasters, the right to freedom of expression of those other persons, who had interest in broadcasting, were unjustifiably restricted; It was exactly them, who were subjected to requirement to acquire state consent before they could start broadcasting.

The Court found, that licensing also was not necessary in order to make broadcasters comply with the legal duties and regulations. Since, with or without licenses, the person who carried out broadcasting, was still bound with by legally established responsibilities and if they were violated, the state was allowed to take appropriate measures provided by the law. The Court also determined, that the licensing process did not include examination of technical resources of the persons who had interest in broadcasting, which made it further unjustified to have licensing for cable broadcasting in place.

The Court pointed out, that in order to protect public security and to defend the rights of others, the state could have applied less restrictive means – could have requested from a person, who was interested in broadcasting via cable, to disclose his/her identity. However, the state did go beyond the aim, when it

demanded permit issued by an administrative body for launching of cable broadcasting. Hence, where cable broadcasting was concerned, the licensing duty was determined to be unjustified interfere in the freedom of expression and was declared unconstitutional with regard to the Paragraphs 1 and 4 of Article 24 of the Constitution of Georgia.

The Court also evaluated the disputed norm, which established that cable broadcaster was required to carry out transmission under the scope of general or specific license. If the broadcaster wanted to change the topics of the programs, which were determined by the type of license it had acquired from the regulator, the broadcaster was forced to modify the license. However, since the Court determined, that the licensing duty itself was disproportional means to achieve legitimate aims named by the respondent, the Court determined that the norm that required broadcaster to modify license was also an unreasonable means to achieve legitimate aims. Therefore, the norm that determined the types of licenses was also declared unconstitutional with regard to the Paragraphs 1 and 4 of Article 24 of the Constitution.

Considering that the norms that required licensing for cable broadcasting and determined the types of licenses were declared unconstitutional, the Court terminated proceedings with respect to other disputed norms, which determined rules and terms for licensing of cable broadcasters.

Due to the technical characteristics of satellite broadcasting, it is substantially different from cable broadcasting. When broadcasting is conducted via satellite system, the signal transcends the boundaries of a given country; the artificial satellite itself may be a legal person incorporated in another country. Since satellite broadcasting touches upon the sovereign interests of

other country, it is subject to international regulation, which aims to defend the interests of a broadcasting country, the recipient country and their citizens and also to ensure unhindered trans-border broadcasting. As part of this regulation, the government of a broadcasting party is required to provide information about the broadcaster.

The Court noted, that when the activities of a person is linked with the jurisdiction of other countries, the state has relatively broader margin of appreciation. In the given case, the introduction of licensing, as well as classification of licenses served the aim of complying with the international obligations and through their fulfillment, protection of rights of Georgian citizens to freedom of speech and information. Therefore, licensing of satellite broadcasting, requiring a person interested in satellite broadcasting to present identifying information to the regulator and to determine the type of broadcasting and area of its coverage, was found by the Court to be formal, content-neutral and reasonable restriction, which was in compliance with Article 24 of the Constitution of Georgia.

The Court pointed out, that the claimant disputed procedure of licensing and its terms because it considered the licensing mechanism itself was unconstitutional; the claimants did not provide independent reasons why the decision-making rules of licensing was unconstitutional. Since licensing requirement, in the case of satellite broadcasting, was found to be constitutional, the rules on issuance of license, its modification, or the types administrative procedure for revoking it, as well as 30-day period for making a decision, as they were challenged by the claimant, were found constitutional with regards to Paragraphs 1 and 4 of Article 24 of the Constitution of Georgia.

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## CITIZEN OF DENMARK, HEIKE CRONQUIST V. THE PARLIAMENT OF GEORGIA

### 3/1/512, 26 JUNE, 2012

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#### SUBJECT OF DISPUTE

Citizen of Denmark, Heike Cronquist disputed the norms of the Law of Georgia On Agricultural Land Ownership, which stated that: 1. Foreigners could only purchase the land, if it was an inheritance or if he/she had lawfully owned it as the citizen of Georgia (respective words of the Paragraph 1 of Article 4); 2. Under the exception to the rule, the foreigners were required to dispose of the land within the six months of appropriating

it (respective words of the Paragraph 11 of Article 4); 3. If the foreigner failed to do so, the land would have to be taken by the decision of the court (respective words of the Paragraph 11 of Article 4); 4. The taking of property would be carried out according to the norms of the "Law of Georgia on Procedures to Forfeit Property for Necessary Public Needs" (the Paragraph 13 of Article 4). These norms were disputed with regards to

Article 21 of the Constitution of Georgia (right to property) and the Paragraph 1 of Article 47 (equal rights for foreigners residing in Georgia).

#### REASONING

The Constitutional Court interpreted the right to acquire property, enshrined in Article 21 of the Constitution, which entitles every person to become property owner and imposes negative duty on the state not to interfere in the process of property acquisition. Since the disputed norms only allowed a foreigner to acquire agricultural property either through inheritance or if he/she had owned the land lawfully, as a citizen of Georgia, the Court found that, the disputed norm restricted the right of the foreigners to acquire property in Georgia.

The Court separated two forms of interference in the constitutional right – abrogation of universal right to acquire property and restriction of the right to acquire property. The second sentence of the Paragraph 1 of Article 21 of the Constitution of Georgia, declared it impermissible to “abrogate... The right to property, ..the right to acquire, dispose and inherit property”. This provision, on one hand, determines the aspects of the ownership of the property, and on the other hand, declares the choice of the state in favor of private property. “Abrogation of the universal right” will take place, if a political decision is made to abolish private property. The disputed norm regulated narrow field and had specific object – agricultural land. Therefore, the disputed norm was to be evaluated not as an abrogation of the universal right to property, but as a restriction of the right to own property in the sense of the Paragraph 2 of Article 21 of the Constitution.

The Paragraph 2 of Article 21 requires, that forfeiture of the property is conducted “for pressing social need”, which, is a notion of flexible concept changing in view of its context. The Constitution does not require, that the restriction of the right to property is conducted only with the goal of avoiding inevitable negative social consequences – it suffices that the restriction aim to bring about positive results for society or parts of society.

The respondent, in order to argue for public necessity of the existing norm, named several legitimate aims: improvement of agricultural structures and rational use of land, state security, economic and ecological safety of the country. The Court determined, that improvement of agricultural structures could be achieved by the state regardless of the nationality of the landowner. Additionally, there were no threats identified

as a result of land ownership by foreigners, which would link the restriction of land ownership with legitimate aims named by the respondent, especially considering the fact, that a foreigner could establish a legal person in Georgia and purchase property through it, which would effectively allow him/her to circumvent the restriction. Therefore, the Court determined, that the disputed norm did not ensure any significant public interest and it violated the Paragraph 2 of Article 21 of the Constitution. As a rule, if a procedure violates the standard on restricting the right to property as determined by the Paragraph 2 of Article 21 of the Constitution, it simultaneously violates the Paragraph 1 of Article 21 of the Constitution. Therefore, the disputed procedure was declared unconstitutional with regard to both, Paragraph 1 and 2 of Article 21 of the Constitution.

The Court found, that the second disputed procedure, which mandated a foreigner to dispose of the land within the six months of its inheritance, restricted not the process of inheriting property, but the right to own and dispose of property, which was already acquired through inheritance. The procedure was also declared unconstitutional with regards to the Paragraphs 1 and 2 of Article 21 of the Constitution, using the same arguments. The Court discontinued the case with respect to the Paragraphs 12 and 13 of Article 4 of the Law of Georgia On Agricultural Land Ownership, since the Paragraph 11 of Article 4 was declared unconstitutional and the remaining norms no longer contained any danger to the constitutional right in question.

With regards to Article 47 of the Constitution, the Court found, that the Article ensures the right is equally provided to citizens of Georgia and to foreigners living in Georgia. The legislation that restricts the rights of foreigners must be evaluated with regards to the right restricted, or when an equal legal treatment is sought – with regards to Article 14 of the Constitution (right to equality before the law). Therefore, proceedings in this segment of the case were discontinued as well.

*After the Heike Cronquist v. Parliament of Georgia decision, the Law of Georgia On Agricultural Land Ownership was amended on June 28, 2013, which introduced the right of foreigners to own property of agricultural land, but the norm was suspended until December 31, 2014. Therefore, during this period, foreigners could not acquire agricultural lands, which was challenged by the Austrian Citizen Mathias Huter with regards to Article 21 (right to own a property) and Article 14 (right to equality before the law).*

*The №1/2/563 Ruling, the Court considered whether the disputed norm was an “overruling norm” of the judgment of*

June 26, 2012, i.e. repeating the content of the norm already declared unconstitutional. As the Court pointed out, in this case, verbal similarity of the disputed norm is insignificant in comparison with the similarity of legal consequences.

According to the respondent, a certain amount of time was required, to elaborate a state policy regarding agricultural land ownership, refinement of the system of land and accuracy of land registry data. In order to avoid mass sale of cheap lands by foreign citizens, a temporary restriction was adopted and this was the substantial difference from the norm already declared unconstitutional.

The Constitutional Court found, that the arguments brought in by the respondent were substantially identical to the aims named in the previous case and again, it could not demonstrate how ownership of land by foreigners hindered the state to adopt

relevant policies and refine land registry. The Court also noted, that temporal boundaries of the norm in general, affect the intensity of interference in the constitutional right. However, the norm of the same content was declared because it did not logically relate to the legitimate aims named by the respondent. Therefore, the enactment dates of the new norm did not change the fact that the constitutional right was violated.

The Court Concluded, that the disputed norm did not differ substantially from the norm already declared unconstitutional and therefore, without the substantial consideration of a case, declared it unconstitutional with regards to the Paragraph 2 of Article 21 of the Constitution of Georgia. Considering the above-mentioned reasoning, evaluating the disputed norm with respect to Article 14 of the Constitution was not deemed necessary.

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## CITIZEN OF GEORGIA, GIORGI GACHECHILADZE V. THE PARLIAMENT OF GEORGIA 2/1/524, APRIL 10, 2013

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### SUBJECT OF DISPUTE

Citizen of Georgia, Giorgi Gachechiladze disputed norms of the Law of Georgia on Environmental Protection, which **A.** Allowed interested persons to sign a deal with the Ministry of Energy and Natural resources, and during the deal period, any act the person committed in the process of utilizing environmental and natural resources would be considered legal (the Paragraph 1 of Article 5710); **B.** Neither state nor municipal authorities would impose either administrative or civil responsibility, duty or tax on the person for his/her committed acts (the Paragraph 3 of Article 5710); **C.** It was declared impermissible to review the lawfulness of person's actions and to impose administrative and civil responsibilities, duties or taxes (the Paragraph 4 of Article 5710). These norms, in the claimant's view, allowed inflicting immeasurable amount of damage to the environment, and were disputed with regard to the Paragraphs 3, 4 and 5 of Article 37 (right to live in healthy environment) of the Constitution of Georgia.

### REASONING

The Constitutional Court interpreted, that the Paragraphs 3 and 4 of Article 37 establishes fundamental human rights to claim from the state protection of the environment. "The Paragraph 3 of Article 37 is addressed to preventing, in real time, existing

threats to environment and the damages done to it, while the Paragraph 4 aims to protect the interests of future generations, so that, in parallel to developing the Country, environment, that is safe for health, is maintained."

Based on Paragraphs 3 and 4 of Article 37 of the Constitution, the State is obligated to consider and maximally limit negative effects of its actions (projects, activities) on environment (negative obligation) and at the same time, to protect the environment from damages inflicted by private persons (positive obligation). As part of its positive obligations, the state must construct legal system, which ensures presence of reasonable expectation, that in case of environmental damage, adequate legal mechanisms will be applied to the person, which will act as preventive mechanism of environmental damage.

By analyzing respective legislation, the Court found out, that in case of violations committed in the field of environmental protection and natural resource consumption, there are two simultaneous mechanisms applied to the liable person: responsibility for violation and an imposition of obligation to compensate damages. Under the disputed norm, a person who had an interest, and made a deal and paid the state a financial compensation for it was free from both forms of responsibilities.

The Court took into consideration, that the disputed norms did not limit authorities to sign the disputed deal with persons who might have committed in the past or would commit in the future the violations, and absolved these persons from liability in both cases; Furthermore, they were not required to investigate potential acts of violation committed by respective persons, either before or after signing of the deal. Therefore, the impugned norms provided for discharge of persons from legal responsibilities for an unlimited amount of violations in return to payment of the official compensation, which had the effect of abolition of every restriction that legislation had established in the field of environmental protection and usage of natural resources. The legal norms, established to prevent violations, had in fact lost the "detering effect". The Court found, that the Paragraphs 3 and 4 of Article 37 definitely aim to prevent authorities from granting a person such a broad freedom for actions and it conflicts with the positive obligation of the state to protect environment safe for health. Therefore, the disputed norms constituted the restriction of the right in question.

Reviewing the public interest behind the restriction, the Respondent accepted the claim and indicated, that there was no legitimate aim in adopting the disputed norm. The Court pointed out, that when the deal was signed in a manner, that the impact of past and future damage to environment by the person was not known, and when such damage could have been impossibly large, even if there was a public interest, it would be impossible to find a reasonable balance between this interest and the right to live in healthy environment. When the extent of damage is unknown, it is naturally impossible to determine the level of compensation for environmental damage. Therefore, the Court determined, that "The Law of Georgia On Environmental Protection" Paragraphs 1 and 3 of Article 5710 violated Paragraphs 3 and 4 of Article 37 of the Constitution of Georgia.

The Constitutional Court also interpreted the Paragraph 5 of Article 37 of the Constitution, which establishes the right to receive timely information about the state of environment, which is an important part of the right to safe environment. It is, on the one hand, binding the state to inform any interested party about the state of affairs of environment with the infor-

mation it has at its disposal, and on the other hand, binds the state with positive obligation to constantly collect and analyze information about the state of environment

With regard to the latter right, disputed was the Paragraph 4 of Article 5710 of the Law of Georgia on Environmental Protection, which provided, that during the period covered by the deal, made in the field of environmental protection and natural resources, the state and local authorities were banned from the right to examine lawfulness of actions of respective persons which, in the claimant's opinion, impeded the state to collect data on the state of environment.

Analysis of legislation showed, that the authorities monitor the state of environment via two main mechanisms. First, they identify violations in the field of environmental protection and natural resources and react to them, which involves inspection of persons who do business in the field. And second, state authorities research environment and study it, not with the purpose to reveal specific violations committed by persons, but to understand various elements of environmental health and the factors that impact them.

Reviewing this part of the claim, the Court separated the scope of Paragraph 5 of Article 37 of the Constitution, which protects the right of access to information about the state of environment, from the scopes of Paragraphs 3 and 4 of the same article, and pointed out, that the aim of the Paragraph 5 of Article 37 is to ensure accessibility of information and not imposition of responsibility for damages to environment.

The Court determined, that for the purposes of imposition of responsibility for violations, the disputed norm restricted inspection of persons who had signed the deal, but it did not ban authorities from collection of information about the state of environment. Therefore, the Court determined, that the disputed procedure did not hinder realization of existing legal mechanisms, which regulate data collection on the state of environment (which were not disputed by the claimant) and it did not limit or narrow the competencies of the respective state authorities to collect and make accessible the information about the state of environment. Therefore, the Court found, that the dispute norm did not violate Paragraph 5 of Article 37 of the Constitution of Georgia.

CITIZENS OF GEORGIA, LEVAN IZORIA AND DAVID-MIKHEIL SHUBLADZE  
V. THE PARLIAMENT OF GEORGIA  
**1/2/503,513, APRIL 11, 2013**

**SUBJECT OF DISPUTE**

The claimants disputed constitutionality of those norms of the Law on Police of Georgia, that, **A.** authorized a policeman to stop a person, if a reasonable doubt existed, on the probable commission of crime (the Paragraph 1 of Article 91); **B.** Established, that the duration of a stop was a reasonable time necessary to negate or confirm the doubt (the Subparagraph 2 of Article 91); **C.** When a reasonable doubt existed, for their own security needs, authorized policemen to perform examination of the person's outer cloths, and if the examination revealed the need for search, it was performed by the rule established by the Criminal Procedure Code of Georgia (the Paragraph 4 of Article 91). These norms were disputed with regard to the Paragraphs 2, 3 and 5 of Article 18 (right to liberty), the paragraph 1 of Article 20 (right to privacy) and the Paragraph 3 of Article 42 (right to defence) of the Constitution.

**REASONING**

The Constitutional Court interpreted Article 18 of the Constitution, which protects personal liberty of a person, permits restriction of the right to liberty under various circumstances, conditions, and terms. While interpreting relationship between the Paragraphs 2 and 3 of Article 18, the Court determined, that Paragraph 3 of Article 18 allows for relatively short and less intense restriction of liberty, while the Paragraph 2 regulates cases of relatively longer restrictions of liberty (pre-trial detention, punishment, etc.).

The central issue for determination of compatibility with of disputed norms with Article 18, was to ascertain whether a stop under the disputed norms amounted to "arrest". The Court determined criteria of an arrest: restriction of liberty, which **A.** legally or factually presents criminal prosecution; **B.** Must be related to the fact of restriction of liberty and transferring and/or placing a person in a closed (fenced) space, a without the consent of the person in question; **C.** The duration of restriction of liberty must be long enough, so that it amounts to arrest as defined by Article 18 of the Constitution. Even of one of these criteria rare met, for the constitutional purposes, a stop would be considered as detention. The Court determined, that stop

under the disputed norms was not conducted as part of criminal prosecution. To determine the form of interference and its duration, the Court interpreted what "reasonable doubt" and "reasonable time" meant.

The Court pointed out, that to stop a person is a mechanism for crime prevention and its timely eradication. It is practically impossible to detail every possible ground and circumstance for stopping in the law, however the doubt must stem from such facts, circumstances, or their totality, which can be clearly described and articulated and which will persuade impartial observer in the reasonable nature of the doubt. In the same manner, "reasonable time" was interpreted, as the amount of time, which is absolutely required, to verify the reasonable doubt. The Court determined, that the disputed norm established the power of a policeman to stop a person for a short period of time. The stop will qualify as detention, if the time of the stop significantly exceeds the time allowed for examination of person, who has violated traffic rules. Additionally, the person must be freed as soon as the reasonable doubt has been verified. Therefore, the Court did not share the argument, that reasonable duration and reasonable doubt were ambiguous and hence, did not effectively protected individual rights from unjustified interference in them.

As to the powers of police after the stop, the Court pointed out, that the disputed norm required the person who has been stopped, to stand still and do not interfere with examination of his/her outer garments. His refusal to follow any other demand of from the police may not serve as the ground for any stricter measures against him.

On the basis of the above-mentioned, the Court concluded, that an act of stopping a person is not equal to arrest, but is a relatively less intense form of interference in the freedom to liberty and is in compliance with Paragraphs 2 and 3 of Article 18 of the Constitution.

When deliberating on the right to defence, the Court determined, that a stop is not related to carrying out criminal prosecution against a person, it does not aims to arrest a person and is not linked to examining factual circumstances of an admin-



istrative violations, and is extremely limited in time. Thus, it does not reach the degree of intensity that would evoke the need to enable a person to request an assistance of a defender, a right provided for in Paragraph 5 or Article 18 of the Constitution.

The person stopped on the basis of the disputed norms, was not required to respond to police questions and to testify. Furthermore, he/she could apply to a court if the stop had no legal ground and if a police tried to interrogate a person, he/she could refuse to respond or request an assistance of a defender. Therefore, the disputed norms were in compliance with the right to defence provided for in the Paragraph 3 of Article 42 of the Constitution of Georgia.

At last, the Court evaluated the power of examination of outer garments with regard to Article 20 of the Constitution,

which prohibits interference in the private life. Physical examination constituted an interference in Paragraph 1 of Article 20, which can take place via physically touching person's cloths or inspection via instruments. However, examination does not involve checking the inner parts of clothing or taking cloths off, which would amount to search. Examination of outer garments is only applied in specific circumstances – when there is a reasonable doubt of threat, which requires police to react immediately. Otherwise, safety of police cannot be ensured. The Court found, that the disputed norm was clear and specific in determining the limitations of state authority and it allowed a possibility for examination of outer garments only in case of urgent necessity. Therefore, the disputed norm was in conformity with Paragraph 1 of Article 20 of the Constitution of Georgia.

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CITIZENS OF GEORGIA – ALEXANDER BARAMIDZE, LASHA TUGUSHI, VAKHTANG KHMALADZE AND VAKHTANG MAISAIA V. THE PARLIAMENT OF GEORGIA  
**2/2/516,542, MAY 14, 2013**

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**SUBJECT OF DISPUTE**

Several civil rights activists, and a person convicted for the act of espionage, disputed the norm of the Criminal Code of Georgia (Paragraph 1 of Article 314), that criminalized collection and transfer of not only information containing state secrets of Georgia, but of other data as well upon instructions of a foreign intelligence services, or foreign organization to the detriment of Georgia. This Paragraph was disputed with regard to Paragraphs 1 and 4 of Article 24 (freedom of expression) and the Paragraph 5 of Article 42 (the principle of legal certainty) of the Constitution of Georgia.

**REASONING**

The Constitutional Court pointed out, that Article 24 of the Constitution of Georgia protects any form of collection and transfer of information, both at the initiative of a person and upon the instruction of others. Therefore, the disputed norm, which banned collection of information upon the instruction of a foreign intelligence, or foreign organization, interfered in the constitutional right. Furthermore, to achieve legitimate aims, in limiting the freedom of expression, the lawmaker must take into consideration the so-called “chilling effect” on the protected right. The “chilling effect” means, that a person, afraid of potential sanctions, imposes restriction on himself/herself

and refuses to enjoy the right to freedom of expression, even in parts, which the lawmaker did not intend to restrict and where such necessity did not arise, “which in and itself equals to disproportional restriction of the right in question”.

The disputed Paragraph of Article 314 of the Criminal Code of Georgia prescribed legal responsibility for intentional crime, which consisted of the three elements: 1. The fact of collection and transfer of information; 2. That happens upon instruction of a foreign intelligence or foreign organization and 3. That is detrimental to the interests of Georgia. Since other norm of the Paragraph 1 of Article 314 invoked responsibility for processing the data and transfer of state secrets, the Court interpreted, that the disputed part of the norm covered a wide spectrum of information, which did not contain state secrets. In this case, penalization of the act was linked not to the type of information, but to collaboration with the foreign intelligence services or foreign organization to the detriment of Georgia.

Foreign intelligence, by its nature, represents a threat for the security of other country, since the intelligence activities are directed to gain supremacy over the state, which is the object of interest of intelligence. Since cooperation with foreign intelligence is in and of itself detrimental to the state, and at the same time, the intelligence services may be interested in acquiring

any type of information regardless of its open or secret nature, the Court found that, the restriction could not be formulated in narrower terms without limiting its effectiveness. Therefore, the disputed norm was a necessary instrument to protect the security of the state and due to clarity of the terms, it did not have the “chilling effect”. Hence, the disputed norm, where it introduces ban on acting upon the instruction of a foreign intelligence, was found constitutional with regard to Article 24 of the Constitution of Georgia.

In interpreting the disputed words “a foreign organization”, the Court pointed out, that here the norm refers to those organizations, which are not related to the foreign intelligence, since if this link is present, then it would be qualify as cooperation with foreign intelligence. It is true, that terrorist organizations, movements that failed to be recognized as states and some private companies may pose no less risk to state security than foreign intelligence, but the disputed norm does not provide any additional characteristic to determine the nature of “foreign organization”. On the one hand, it depended on the interpretation of courts, and on the other hand, on the potential addressee of the norm, to understand which organizations were meant under the disputed norm. The Court indicated, that the disputed norm did indeed have a “chilling effect” when it introduced a ban on collaboration with a “foreign organization”: a person may perceive as a potentially detrimental to the interests of Georgia and may refuse to cooperate with a wider circle of foreign organizations, than the norm had intended. . Therefore, the disputed words of the norm – acting upon the instruction of a “foreign organization” – were found to be disproportional

restrictions and incompatible with the Paragraphs 1 and 4 of Article 24 of the Constitution of Georgia.

The disputed norm was also reviewed with regards to the first sentence of Paragraph 5 of Article 42 of the Constitution, which not only required that there should be no responsibility without law but also establishes qualitative standards of law. The principle of legal certainty is part of it, which on the one hand, requires foreseeable and unambiguous legislation to prevent arbitrariness of law enforcement authorities, and on the other hand, establishes a guarantee, that a person has a clear notice about the acts, which will result in legal responsibility, so that he/she regulates its behavior accordingly.

Since transferring information about Georgia to foreign intelligence is under any circumstances, detrimental to the interests of Georgia, the Court found that, in this part, there was not problem with foreseeability of the law. As for ban on collaboration with a “foreign organization”, the Court pointed out, that what counts as “detrimental to the interests of Georgia” depends on the multiplicity of factors. The disputed norm allowed such a broad interpretation, that courts applying this law, had refer to their own judgment to determine which collaboration with foreign organization would be detrimental for Georgia. Furthermore, it was highly probable, that the different courts would end up with different conclusions. Hence, an act punishable by criminal law was not determined by the law, but by the law enforcement authority. Therefore, part of the disputed norm, where it banned collaboration with a foreign organization, was declared unconstitutional with regard to Paragraph 5 of Article 42 of the Constitution of Georgia.

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## CITIZEN OF GEORGIA TRISTAN MAMAGULASHVILI V. THE PARLIAMENT OF GEORGIA 1/3/534, JUNE 11, 2013

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### SUBJECT OF DISPUTE

The claimant, who was forced to abandon his residence in the village of Dvani, in Kareli Municipality, challenged the norm of Paragraph 1 of Article 1 of the Law of Georgia on Internally Displaced Persons from the Occupied Territories of Georgia. According to the impugned norm, only people displaced from the territories determined by the Law of Georgia on The Occupied Territories were considered to be internally displaced persons (IDPs). The norm was disputed with regard to Article 14 of the Constitution of Georgia (right to equality before law).

### REASONING

The Constitutional Court determined, that the “Law of Georgia on Internally Displaced Persons from the Occupied Territories of Georgia” defined several preconditions to assign the status of an IDP: **A.** the fact of forced displacement of a person; **B.** Forced displacement due to the threats to his/her life, liberty and health or threats to his/her family.; **C.** Forced displacement of a person due the occupation of territories, aggression and mass violation of rights by a foreign country. However, this



was not enough; the following requirement, that the disputed norm stated, was a decisive factor – a person that met all the requirements, was supposed to be displaced directly from the Occupied Territory (a territory listed in the Law of Georgia on the Occupied Territories). People in the similar situation as the claimant, whose places of residence were adjacent to the Occupied Territories recognized by the law, but which had not been legally recognized as occupied, fell outside the scope of the law and were left without the social guarantees provided by the law. However, these persons abandoned their houses due to occupation, and due to the lack of security guarantees, could not return home.

According to the Court, persons displaced from the territories listed in the Law of Georgia on the Occupied Territories and the persons, who are displaced from the territories outside the, de facto jurisdiction of Georgia, are essentially equal in view of the grounds of their forced displacement, reasons of displacement, state of violation of their rights, and experienced and expected threats.

The occupation is “creeping” and due to the arbitrary nature of the actions of the foreign countries’ military forces, the geography of those territories, where de facto jurisdiction of Georgia does not apply, constantly changes. However, the Court found it important, that on the territories, that the law had not recognized as occupied, but which de facto are the occupied due to the actions of occupation forces, the situation is the same as in the Occupied Territories.

The differentiation between the displaced persons from the legally recognized Occupied Territories and those territories, which were not recognized as occupied, was not based on one of the grounds listed in Article 14 of the Constitution, including, “place of residence”. However, the interference had an intense nature, namely, the disputed norm “considerably, significantly distances essentially equal persons from the possibility to equally participate in the specific social relations, namely...practically excludes the opportunities of persons in identical circumstances as IDPs to enjoy guarantees related to

the status of IDPs.” Therefore, the Court assessed the challenged differential treatment by using the strict scrutiny test, i.e. it had to determine, whether differential treatment served a legitimate aim and if so, if it was a permissible, necessary and proportional means to the aims pursued.

The Court determined, that the disputed norm was aimed at protecting the vulnerable group of persons, who suffered as the result of the occupation of the territories and the state was determined to take on respective responsibilities towards these persons. However, the disputed norm was not a valid, permissible means to achieve the aim, since it left some persons, displaced as a result of the occupation of territories, without the IDP status. It resulted in unjustified differentiation of essentially equal groups of people, since it linked granting the IDP status to the fact of displacement from the territories defined by the Law of Georgia on the Occupied Territories while it excluded the people displaced on the same grounds and due to the same reasons from the territories not recognized as the occupied territories from the seekers of status of IDPs. The Court concluded, that the disputed norm was unconstitutional with regard to Article 14 of the Constitution of Georgia.

The Court also noted, that if the same problem – denial of the status of IDP status to persons displaced due to the occupation of territories was present in other norms, relevant normative content of those norms was also invalidated under the present Judgment. Norms of identical content, which cause identical problem, would be considered as incompatible and overruling of the present Judgment.

The Court also highlighted, that the issue of the adjudication and of the judgment was not the determination of legal status of the territories, where Georgian jurisdiction is not available due to the de facto control of foreign country. The Constitutional Court declared unconstitutional only those regulations, which granted the IDP status only to those persons, who were forcibly displaced from the Occupied Territories recognized by the law.

CITIZENS OF ISRAEL – TAMAZ JANASHVILI, NANA JANASHVILI AND IRMA JANASHVILI V. THE PARLIAMENT OF GEORGIA

**3/1/531, NOVEMBER 5, 2013**

**SUBJECT OF DISPUTE**

Claimants disputed Paragraph 4 of Article 426 of the Civil Procedure Code of Georgia with regard to the Paragraph 1 of Article 42 (right to fair trial) of the Constitution of Georgia. According to the disputed norm, application to the court to claim annulment of the judicial decision or reopening of proceedings due to the newly discovered circumstances was not allowed after 5 years, from the moment when the judicial decision became final.

**REASONING**

The house owned by the claimants, became state property in 2005 by the decision of the court, but the owners did not know about it. After five years from adoption of the court decision, the claimants applied to the court to request annulment of that decision, however the court rejected their application as the limitation period had been expired.

The Constitutional Court reviewed only the challenged part of the disputed norm – application of the 5-year limitation period to the claims for annulment of court decisions, when the following ground (Subparagraph “C” of the Paragraph 1 of Article 422 of the Civil Procedure Code) for annulment is present – a person, whose lawful interests and rights had been affected by the disputed court decision, had not been invited to the court hearing. The Court determined, that under the Civil Procedure Code of Georgia, persons in the claimants’ position, , could join the proceedings in the capacity of third parties or as proper respondents. Therefore, the constitutionality of the disputed limitation period was only reviewed with regard to persons, who had this procedural status.

The Court pointed out, that reopening of proceedings aimed at annulment of judicial decision, when appropriate grounds are present, is an important component of the right to fair trial that Article 42 protects. The enacted legislation allowed the possibility, that persons, whose rights and legal interests had been affected by the decision, could know nothing about the court decision that affected their interests; while the disputed norm, with the adoption of the 5-year limitation period, effectively limited the possibility of these persons to request annulment of the court decision, and thus, defend their rights. The Court

evaluated the proportionality of the restriction of the right to fair trial.

The application limitation period (period, during which person can claim his/her rights through application to court) serves important public interests, which are ensuring an effective, an objective and a fair administration of justice, legal security and certainty, establishing order and stability in legal relationships. As time passes, evidence changes, gets destroyed, or becomes more difficult to obtain, which makes evidence less trustworthy; reliable evidences may not be available at all, which increases the risk of errors in the legal proceedings. From this perspective, limitation periods are one of the effective safeguards to ensure that cases are correctly decided. At the same time, limitation periods allow courts to not to adjudicate cases, which are nearly impossible to be solved in an objective manner, which serves the purpose of preventing artificial burdening of the courts. The Court pointed out, that trustworthiness of court decisions is based on the authority of the courts and the finality of the decisions, which is crucial for the purposes of legal security and stability.

After establishing legitimate aims of the restriction, the Court separately evaluated its proportionality with regards to judicial decisions in favor of the private persons and decisions in favor of the state. When the dispute is between two individuals, the need of defending the rights of the persons, who are in the similar position as the claimants of this case, is counteracted by the need to protect the rights of those persons, who may face the threat violation of their rights in case of reopening of legal proceedings after, certain period of time had passed. They may no longer be able defend their interests, since the evidence may have become inaccessible; Moreover, the possibility of a right becoming the subject of dispute for an indefinite time, brings ambiguity and restricts the rights-holders in the process of enjoying their rights. To strike the fair balance between these interests, the Court determined, that 5 years was minimal, but objectively fair, reasonable and foreseeable time for the interested parties to request annulment of court decision, especially when the

right to real estate is to be defended. The data of public registry of real estate is publicly available irrespective of physical location of a person, and furthermore, the owners of real estate have various duties, whether or not they utilize their property, which increases a probability that the person will become informed about the changes of the ownership status of their property.

The Court saw different balance of interests in case, when the decision is made in favor of the state, and at the same time, violation of rights is caused by unlawful acts or if the interested parties know the circumstances, which, would result in the decision favorable to them, had these circumstances been presented to the court earlier. The Court pointed out, that the restriction of the right to request annulment of court decision is still legitimate in its aims, but these aims are substantially altered with respect to the state, since it is not related to the threat of violating the rights of private persons. The state is a guarantor of legal security, but it may not expect other persons to satisfy this interest, which results in a different balance of interests unlike the case, where only private persons were involved. The Court pointed, that in these cases, the supreme interest of avoiding the violation of human rights prevails, and in order to protect the rights, irrespective of the 5-year limitation period, there still should be a possibility to annul the court decision.

Therefore, the Court found, that the disputed norm was not a proportional means to achieve the legitimate aim, in the respective part of the claim, related to the Subparagraph "C" of Article 422 of the Civil Procedure Code of Georgia, which restricts the fair trial rights of the proper respondents and third persons with independent claim, when the court decision, which touches upon their right, is favorable to the state and they know such circumstances/evidences, which, would result in a court decision favorable to them, had they been presented to the court in the previous legal proceedings.

The Court unambiguously indicated, that in order an interested party to be entitled to request annulment of the final court decision after 5 years, this must be the only remedy for their rights; At the same time, they must present to the court appropriate evidence, which prove the presence of one of the grounds, provided in Article 423 of the Civil Procedure Code of Georgia (newly discovered circumstances to reopen the proceedings). Additionally, when deliberating on the request of these persons to annul court decision, the court must apply clear criteria, in order to establish, that the person did not know and objectively, could not know, that a decision existed that affected his/her interests.

Given the above-mentioned, the disputed normative content of Article 426 was declared unconstitutional with regard to Paragraph 1 of Article 42 of the Constitution of Georgia.

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CITIZENS OF GEORGIA – LEVAN ASATIANI, IRAKLI VACHARADZE, LEVAN BERIANIDZE, BEKA BUCHASHVILI AND GOCHA GABODZE V. THE MINISTER OF LABOUR, HEALTH AND SOCIAL AFFAIRS

**2/1/536, FEBRUARY 4, 2014**

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**SUBJECT OF DISPUTE**

The claimants disputed the norms of the Order of the Minister of Labour, Health and Social Affairs (Article 24 of the order #241/N, Appendix #1 "On Determining Restrictions on Donations of Blood and Its Components", and the respective parts of Paragraph 2 of Article 18 of the Appendix #1 of 2007.27.11 Order #282/N "On Determining Mandatory Procedures for Blood Transfusion Establishments") with regard to Article 14 of the Constitution (right to equality before the law) and Article 16 (right to free development of personality). According to the disputed procedures, "homosexuality" was a risk group for HIV/AIDS. Designation as AIDS risk group was the ground for an

absolute prohibition on blood donation, and hence, homosexuals were prohibited from becoming blood donors.

**REASONING**

In order to evaluate disputed norms with regard to articles 14 and 16, it was required to determine the meaning of the term "homosexuality". The court decided, that it could not be understood "as a form of sexual behavior only, as it can also mean one's sexual orientation."

While evaluating norms with regards to Article 14 of the Constitution, the Court determined that the persons

grouped under the term “homosexuality” were treated differently from those persons, who were not prohibited to be donors of blood and blood components, despite their sexual behavior and orientation. While Article 14 of the Constitution does not list sexual orientation as one of the grounds of discrimination, the list is not exhaustive according to the well-established practice of the Court and unequal treatment based on other grounds should not be left beyond the scope of review.

The Court also determined, that differential treatment established by the disputed norms “significantly distanced equal persons from equal opportunities to participate in a specific social relationship,” since, homosexuals were prohibited to donate blood for indefinite time and without exception. Therefore, the court assessed differential treatment with strict scrutiny test, i.e. it ascertained whether the imposed restriction served valuable public aim and if so, whether the means employed to achieve this aim, was necessary and the least restrictive.

According to the arguments presented to the Court, sexual contact between men poses higher risk of transmitting infections. Therefore, the disputed norms serve clear legitimate aim – to protect the lives and the health of the recipients of blood and blood components, by eliminating those donors from the process of transfusion, who pose higher risk of transmission of infectious diseases. Furthermore, medical examination of blood, cannot fully ensure that donor-to-recipient transmission of HIV virus does not take place, due to the existence of the so called “window period” – incubation period of virus, during which time blood test is unable to detect it. Risks present within the “window period” make it necessary to carry out additional measures, in addition to blood test – collection of additional data from a potential donor by a doctor.

Furthermore, the court took into consideration, that standard tests require several months, while emerging medical technologies effectively reduce “window period” down to several days. Nevertheless, in any case, once enough time has passed, fail proof identification of virus in the blood is possible. Therefore, it was possible to introduce a temporary restriction instead of absolute (permanent) prohibition, based on the “window period” for “MSM<sup>1</sup>” group of the general

homosexual population.

Given all of the above-mentioned, the Court determined, that disputed norms contained unjustified strict unequal treatment and restricted the right beyond actual necessity, since on the one hand, it had introduced absolute restriction, even beyond the “window period” with regard to homosexual man, who engage in risky behavior, and on the other hand, due to the extremely broad nature of the term “homosexuality”, the prohibition extended to those persons, who were not engaged in risky sexual behavior. Therefore, disputed norms were declared unconstitutional with regard to Article 14 of the Constitution of Georgia.

While considering Article 16 of the Constitution, the Court pointed out, that the right to free development of personality includes the right of the claimants to become donors of blood and blood components, and act in line with their inner values via this action, which is a component of self-realization and development process. At the same time, it was noted, that the right to personal self-development is not an absolute right and restriction can be introduced to protect the health and lives of the recipients of blood and blood components.

However, the disputed norm referred to a social group (“homosexuality”) and introduced unnecessary restrictions with regard to the rights of persons who belonged to this group. The Court pointed out, that a restriction should have been directed not towards belonging to a social/demographic group, but towards risky sexual behavior, and at the same time, the restriction must be applicable for a period of time, when the behavior continues to remain risky, from the point of view of safe blood donation.

The disputed norm eliminated those persons from the process of blood donation, who self-identified as homosexuals, but did not engage in risky sexual behavior. Furthermore, homosexual men, who engaged in risky sexual behavior were deprived of opportunity to donate blood for an indefinite time, despite the fact that neutralization of the risks of transmission of infections did not need it. Therefore, disputed norm was also declared unconstitutional with regard to Article 16 of the Constitution of Georgia due to disproportional restriction of the right to personal development.

1 “MSM” stands for “Men who have Sex with Men”

CITIZENS OF GEORGIA – DAVIT KANDELAKI, ZURAB DAVITASHVILI, EMZAR GOGUADZE, GIORGI MELADZE AND MAMUKA PACHUASHVILI  
V. THE PARLIAMENT OF GEORGIA

**1/2/569, APRIL 11, 2014**

**SUBJECT OF DISPUTE**

Claimants, the members the Board of Trustees of LEPL “Public Broadcaster” disputed constitutionality of the norm (Paragraph 3 of Article 2) of the Law of Georgia on amendments to the Law of Georgia on Broadcasting (N833-RS), which allowed the Board of Trustees, to start working from the moment of election of its 7 members, who were elected under the new rule and thus to discharge before expiration of its tenure the existing Board of Trustees. The norm was disputed with regard to Paragraph 1 of Article 29 of the Constitution of Georgia (right to have access to and serve at public office).

**REASONING**

The Constitutional Court interpreted Article 29 of the Constitution and noted, that “public office”, for the purposes of this article is a term of autonomous meaning. It is not limited to state-political officials and public officers determined by the law; it covers a whole spectrum of labor relationships, where the employer is the state, reimbursement of the work of an employee is funded from the state budget and the person carries out public functions. The Court differentiated Article 29 from Article 30 and emphasized, that the scope of Article 29 is limited to carrying out public functions, while Article 30 sets forth standards of protection for labor relations in the private sector.

The members of the Board of Trustees (trustees) carried out their duties and managed and governed the Public Broadcaster – an independent legal entity under public law according to the law and they were elected by the Parliament of Georgia. This placed the board of trustees under the scope of Article 29, not Article 30 of the Constitution. Therefore, the disputed interference – termination of their positions before expiration of tenure was reviewed with regards to Article 29 of the Constitution of Georgia.

The Court noted, that since the Board of Trustees is a guarantee of editorial, managerial and financial independence of the Public Broadcaster, in order to fulfill these purposes, the independence of its members was of crucial value, and annulment of their positions before expiration of tenure must have

been reviewed within the scope of constitutional guarantee of independence of a Trustee. This was based on Article 24 of the Constitution, which guarantees not only freedom of expression of media, in this case, the Public Broadcaster, but also the independence of its governing body. Furthermore, the Court pointed out, that the standards of Article 29 of the Constitution were to be interpreted in connection with the constitutional principle of legal trust, since when a citizen is appointed to a position for a determinate period of time, he/she has respectively, legitimate expectations and these expectations can only be restricted when important public interest is present.

The Court shared the arguments of the respondent, that the introduction of more representative, effective and transparent model of Board of Trustees of the Public Broadcaster was an important public goal. However, the Court decided that, the disputed norm was not the least restrictive means to achieve this aim. The Parliament could reform management system of the Public Broadcaster, without discharging the members of the existing Board of Trustees before expiration their tenure and with their participation.

Since the competencies of the Board of Trustees were not altered significantly, co-existence of both, the old and the news members could not be ruled out due to the fact, that according to the new procedure, it was no longer the President, but different actors (the Public Defender, the Parliamentary Majority, MPs outside of Parliamentary Majority, Supreme Council of the Autonomous Republic of Adjara), who presented the candidates for Board of Trustees to the Parliament. The Court did not share the argument of the expert, that opposing interests and views of members elected under the old and the new procedure excluded the possibility of collaboration. The Court emphasized, that it is exactly the cooperation of persons with different perspectives that creates “the foundations of pluralism and diverse social inclusion”.

The argument that the new rule of appointment of the members of the Board of Trustees was better than the old rule, was not considered to be enough to terminate the offices of the

existing members of the Board of Trustees before expiration, especially, considering the fact, that the interests of the claimants were related to the public interest of the Public Broadcaster and the independence of its Board of Trustees. The Court pointed out, that, the essence of certain public offices lies in its independence from the political branches of the government, while the terms of the office – is one of the substantial components, that guarantees that the person employed at the office has stable job and remains independent. Restriction of the independence of respective public officials and the principle of non-interference in their functions can only be limited in special cases, when the goal of the interference is to improve the functioning of public office. Otherwise, annulment of office before its expiration may take place regularly, which will render the independence of respective bodies questionable.

The Court believed, that in the present case, there was no special occasion for interference demonstrated, since the respondent could not explain what the urgent necessity was in annulment of the functions of existing Board of Trustees before its expiration, and why was this vital for the Public Broadcaster to continue fulfillment of its legal functions. At the same time, the restriction jeopardized individual and institutional independence of the members of the Board of Trustees.

In view of all of the above-mentioned, the Court determined, that annulment of the office of the Board of Trustees of the Public Broadcaster of Georgia before its expiration was not absolutely required means to achieve the aim, and the disputed norm was declared unconstitutional with regards to Paragraph 1 of Article 29 of the Constitution of Georgia.

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## CITIZEN OF GEORGIA, GIORGI UGULAVA V. PARLIAMENT OF GEORGIA

### №3/2/574, MAY 23, 2014

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#### SUBJECT OF DISPUTE

Claimant, the Mayor of Tbilisi, Giorgi Ugulava challenged constitutionality of Article 159 of the Criminal Procedure Code of Georgia, that regulated dismissal of an official elected via secret, universal, equal and direct suffrage, if he was charged with criminal offence and a risk was present, that his continued occupation of the office would obstruct investigation, compensation of costs incurred due to his crime, or he would continue felonious activities (Article 159) with respect to Paragraphs 1 and 2 of Article 29 of the Constitution of Georgia (the right to hold state and public office). Additionally, the subject of the dispute was the fact that the Court, which decided on the suspension of the official, was allowed to try a case without oral hearing (Article 160) with regard to Paragraph 1 (the right to oral hearing) and paragraph 3 (the right to fair trial) of Article 42 of the Constitution of Georgia.

#### REASONING

The Constitutional Court deemed that the interference in the right guaranteed by Article 29 did take place, namely, the limitation of the right of the "elected official to carry out duties uninterruptedly, granted by Tbilisi voters for the duration of 4 years via secret, universal, equal and direct suffrage. However, in the given context, the constitutionally protected right is not

limited to the applicant's private interest, but it is also connected to such an important public interest, as is the realization of the voters' will."

Addressing the proportionality of interference with respect to Article 29 of the Constitution, the Court determined, that the interference served legitimate purpose – to carry out investigation effectively, and achieving this legitimate purpose is equally important with regard to every defendant, including high level elected officials. Nevertheless, the duration of the suspension of the official continued until the final court ruling, and e.g. for some final judgments, the law has not introduced any time limitations. While it is true, that suspension is a temporary proceeding, it may continue indefinitely. This is decisive with regard to elected officials, since their service in the public office is constrained by time limits, and it will objectively be impossible for them to make-up for the time lost and reinstate themselves to office. Since it is an elected office, filled by persons, who are elected by popular vote in regular elections, it cannot be jeopardized.

Therefore, when an elected, high-level official is suspended for an indeterminate period of time, this may effectively equal to removing him/her from office, which renders the restriction of the right a particularly grave, intense character. Furthermore,



the law has not stipulated mechanisms to either substitute, or review this temporary measure, until the final court judgment is delivered, even if there is no objective need and ground to continue imposing it. Despite the fact, that the Court believes the measure is lighter punishment than imprisonment, which would also allow to achieve legitimate purpose, due to its restrictive nature and absence of review mechanisms, the measure was found to disproportionately restrict Article 29 of the Constitution.

Additionally, the Constitutional Court considered the rule of adoption of decision with regard to the impugned measure by court. Deciding the case without oral hearing does not necessarily violate the right to a fair trial if the restriction serves legitimate purpose, and if the specific issue to be resolved by a court does not necessitate this guarantee. Components of the right to a fair trial “shall be applied in case, and to the measure that is objectively required for specific protection/to avoid violation”.

The Court opined, that the need for oral hearing presents itself, if the defendant’s participation in the trial could affect resolution of a particular legal issue. All the more so when the courts evaluate factual circumstances, and when

new evidence presented by a party could affect the court decision. Analysis of the impugned norm revealed, that in this particular case the court had to examine factual evidence – it had to decide whether there was a probable cause that the defendant, if he stayed in office, would interfere with the investigation, hinder compensation for damages, and would continue committing unlawful acts. Additionally, it was also revealed that, not only was he deprived to participate in oral hearing, but he was not even able to submit written evidence before the court. Therefore, the Court determined, that the impugned norm violated 1 paragraph of the Article 42 of the Constitution.

Right to a fair trial implies that the person is equipped with adequate, effective and sufficient legal means to impact future court decision. In the given case, the Court deemed that this could not be achieved without oral hearing. Therefore, the Court ruled that, “hearing without oral arguments does not in itself and always equal to violating the rights of a person. However, when oral hearing is required for full enjoyment of rights, hearing without oral arguments violates not only Paragraph 1 of Article 42 of the Constitution, but also right to a fair trial guaranteed under Paragraph 3.

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CITIZENS OF RUSSIA – OGANES DARBINYAN, SUSANNA ZHAMKOTSYAN AND  
CITITENS OF ARMENIA – MILENNA BARSEGHYAN AND LENA BARSEGHYAN  
V. PARLIAMENT OF GEORGIA

**2/3/540, SEPTEMBER 12, 2014**

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**SUBJECT OF DISPUTE**

Citizens of foreign countries residing in Georgia challenged the constitutionality of the norms of “The Law on General Education”, that **A.** Exhaustively defined the subjects who qualified for free public education (citizens of Georgia, persons with neutral ID cards or persons with neutral travel documents, foreign citizens with the status of Georgian compatriots and foreigners, whose right to receive free public education is regulated under international treaties Georgia is signatory to or on the basis of legislative reciprocity) and therefore, did not fund general secondary education for those, who were not listed in the disputed norm (the Paragraph 7 of Article 22), and **B.** Defined the rule for receiving a standard voucher confirming state financing of general secondary education for foreign nationals and persons without nationality. A prerequisite for receiving the voucher

was payment of fixed sum to the state budget by the respective person (the Paragraphs 2 and 3 of Article 221). These norms were disputed with regard to Article 14 (the right to equality before law) and the Paragraphs 1 and 3 of Article 35 (the right to education) of the Constitution of Georgia.

**REASONING**

With regard to Article 35 of the Constitution, it was to be established, whether foreign nationals living in Georgia were qualified subjects for receiving free general secondary education. According to Article 35 of the Constitution, the right to receive education and its forms belongs to “everyone”, while professional and higher education is only accessible to the citizens of Georgia. With historical interpretation of the norm,



the Court found out, that before 2006, Article 35 limited not only professional and higher, but also general education to the “citizens” of Georgia. With the adoption of 2006 amendments, the words “Citizen of Georgia” was removed from the free general education context, which broadened, in the Court’s opinion, the circle of the subjects qualified for free general education. Hence, the Constitution does not stipulate neither in Article 35, or anywhere else any exceptions to the right to education for foreigners living in Georgia. According to Paragraph 1 of Article 47 of the Constitution, constitutional rights are distributed equally to citizens and foreigners residing in Georgia, unless the Constitution has defined an exception to this general rule. Therefore, the right to receive free general education is equally accessible both, to the citizens of Georgia and foreigners residing in Georgia.

Pursuant to the Paragraph 3 of Article 35 of the Constitution, general secondary education must be fully state funded, while the disputed norm ruled this out for the claimants, who didn’t qualify for an opportunity to receive financing for their educational needs, and thus, the right protected by Article 35 was restricted.

In discussing the proportionality of the restriction, the Court first of all highlighted that education allows an individuals to fully develop their skills and abilities, including the ability to engage in critical analysis, effectively become able to integrate in the society, learn to understand each other and become tolerant, independently lead their own lives and become financially independent. “Full realization of the right to education is vitally important for the development of a democratic society, while – limitation of accessibility to education will permanently devoid a person to live a full life”. However, the right to receive free general secondary education, despite its extreme importance, is not absolute.

The representative of the Parliament of Georgia named the savings to the limited state funds as the legitimate purpose for the norm. The Court pointed out, that the state has a broad margin of appreciation, when it comes to limited resources and economic planning. However, existing resources, first of all, must be dedicated to effective realization of fundamental

human rights

The Court stressed, that elementary and secondary education equips a person with basic knowledge and with such skills, which are invaluable for the individual’s development. Inability to read and write, will handicap a person in their everyday life. Furthermore, restriction of the right to education is followed by lowered social status of an adolescent, and the stigma of “an uneducated”, which will scar them for life. This creates a risk that in the Country there will be a “shadow society”, which will not only damage these persons themselves, but might impact negatively the economic well-being of the Country and even on criminogenic situation. Therefore, saving resources on education can result in higher future costs caused by a lack of education. Furthermore, the Court found out, that by 2013, within the disputed norm, in total 467 persons had requested from the Ministry of Science and Education the financing and the money the state had paid out equaled to GEL 117.497 and 75 Tetris, which in the Court’s opinion, could not be considered a heavy toll on the State Budget. Therefore, the Court decided, that the restriction of the right to education for foreigners residing in Georgia was disproportional and the respective part of the disputed norm was declared unconstitutional with regard to Article 35 of the Constitution of Georgia.

Additionally, the Court evaluated the norm in question with regard to Article 14 of the Constitution of Georgia and determined, that indeed, essentially similar persons were treated differently: foreigners residing in Georgia had the same need for free general education, as did the Georgian citizens as well as Georgian nationals living abroad. Due to classical discrimination and its high intensity, the Court applied strict scrutiny tests and verified whether a necessary state interest justified differential treatment. As it became apparent, the Respondent failed to successfully argue why offering the right to free general education to foreign nationals would be an unacceptable burden for the State Budget or would damage any other interest of the State. Hence, the respective normative content of the disputed norms were declared incompatible and declared unconstitutional with regard to Article 14 of the Constitution as well.

CITIZENS OF GEORGIA – IRAKLI KEMOKLIDZE AND DAVIT KHARADZE  
 V. PARLIAMENT OF GEORGIA  
**2/4/532,533, AUGUST 8, 2014**

**SUBJECT OF DISPUTE**

Persons recognized legally incapable were appealing a list of norms of the Civil Code of Georgia, Civil Procedure Code of Georgia and the “Law of Georgia on Psychiatric Care”, which in their opinion, contradicted Articles 14, 16, 17, 18, 24, 36, 41 and 42 of the Constitution of Georgia. Namely, disputed were the norms of the Civil Code of Georgia, that **A.** Restricted persons recognized incapable due to their severe intellectual disability or mental illness, in their freedoms to willingly and actively acquire civil rights and responsibilities; **B.** Declared legally void expression of will of legally incapable persons; **C.** Prohibited persons who were recognized legally incapable from the right to marry; **D.** Declared legal guardians as lawful representatives of the persons, who were then empowered to represent the subject of their guardianship with third parties without specific appointment, including at the courts, and were entitled to sign every necessary agreement on behalf of persons recognized legally incapable.

Also disputed were those norms of the Civil Code, **A.** That appointed guardians to legally represent the interests and defend persons recognized legally incapable in the courts; **B.** When the person recognized legally incapable had recovered from their disability, only the legal guardians, family members or psychiatric institutions had the right to apply to the courts to annul legal guardianship, and to restore the persons in their capacities.

Additionally, disputed were the norms of the “Law of Georgia on Psychiatric Care”, that **A.** Stipulated, that in the place of a person recognized legally incapable, the information about his/her disease and psychiatric care was to be given to his/her legal guardian, **B.** Stripped of the person recognized legally incapable from the right to participate in private legal matters; **C.** In order to administer treatment, it requested an informed consent of the legal guardian of the person recognized legally incapable, but side-stepped the will of the person him/herself. **D.** Allowed the legal guardian of the incapacitated person to choose psychiatric care facility, and to stop medical examinations/treatment; **E.** Gave the right to doctors, for the purposes of security, to restrict enacted rights of the persons recognized legally incapable; **F.** Declared treatment voluntary, if the legal guardian, not the patient, had asked for it, and had signed informed consent.

**REASONING**

With regard to Article 16 of the Constitution of Georgia (the right to take necessary actions for the purposes of autonomy and for personal development), the Court first evaluated the group of norms of the Civil Code of Georgia, which constituted a unified regime and restricted persons, who had been recognized legally incapable, due to their severe intellectual disability or “mental illness”, from their liberties to willingly acquire and act upon rights and responsibilities, to represent selves with third parties, sign deals and turned them entirely dependent on their legal guardians for an indeterminate amount of time. Therefore, an entire class of persons, much like claimants in the present case, were declared as lacking the ability to express their freewill, regardless of complexity of specific relations or risks. Considering this, taking away capacities in an absolute and blanket manner, for an indeterminate amount of time, amounted to losing autonomy, in practically every aspect of life and was seen, as a highly intense interference in the right.

The legitimate purpose of a restriction, according to respondent, was to defend the rights and interests of the persons with mental disabilities. The Court determined that Article 58, which annulled every single deal negotiated by a mentally disabled person, including those deals that benefited these persons, undoubtedly went beyond the purpose to defend the persons with mental disorders, and were disproportionate restrictions. Therefore, this norm was declared unconstitutional with regard to Article 16 of the Constitution of Georgia.

Those norms stipulating the status of being recognized legally incapable as well as those that totally replaced the individual’s will with the will of his/her legal guardian was not interpreted as justifiable means with the aim of taking care of the person recognized legally incapable. The existing normative approach was completely ignoring the reality, that limitation of mental disorders is characterized with the wide-ranging gradations limiting the ability of persons with mental disorders to comprehend the results of their actions to a varying degree. The disputed norms, however, were applied to every and all persons with the status of recognized as mentally incapable, and took away from them the possibility to realize those ca-

capacities, which they did still have in their possession. The Court pointed out that an optimal mechanism to recognize a person legally incapable should allow a court to take into consideration the damage on the decision-making capacity of a person with mental disorders and must ensure as much as possible, that the rights and freedoms of this person are protected. Furthermore, the purpose of guardianship lies in supporting the person in the decision-making process and not in substituting their will in every field of life. Therefore, it was determined, that the disputed norms disproportionately restricted the right to free development of personality of the persons recognized legally incapable, and were declared unconstitutional with regard to Article 16 of the Constitution of Georgia.

Another group of norms evaluated with regard to Article 16 of the Constitution were those norms of the “Georgian Law on Psychiatric Care”, that restricted legally incapable persons in their freedom to choose the psychiatric care facility, a doctor and decide on commencing treatment. The Court pointed out that, the right to self-development includes that right of an individual to submit him/herself to this or that kind of treatment, choose a doctor and a care facility. When a person is incapable to give informed and freely made consent to the treatment plan, interference in the right is permissible, if this will benefit the welfare of the person in question; however, when the person is capable to consent independently in an informed manner, allowing an interference in his/her health, such decisions shall only be made with his/her consent.

Since recognition of legal incapacity does not involve examination of the level of mental disorder, a person recognized legally incapable may possess this kind of capacity, but he/she is unconditionally excluded from the process of medical decision-making that will impact his/her health, which results in ignoring of his/her rights. Therefore, these norms also disproportionately interfered in the right, protected by Article 16 of the Constitution and thus, were declared unconstitutional.

The Court did not find interference in the article 16 in those norms of Civil Procedure Code that took away the right from incapable persons to independently apply to a court, when they had recovered from their mental disorder, with the request for restoration of capacities, and to join legal proceedings, launched at the initiative of other persons. Furthermore, the part of the norm, that afforded a guardian, a doctor and a psychiatric care facility to go to the court and ask for restoration of the capacity of the person, was not intended to violate the right to self-development, since the aim of the norm was to restore a person

in his/her rights.

The Court pointed out, that these disputed norms instituted a restriction on the right enshrined in Article 42 of the Constitution (right to apply to a court). Therefore, the Court determined, that a person recognized incapable must not depend on the goodwill of his/her legal guardian, family members or psychiatric care facilities to be able to enjoy the right to apply to a court, a right that will protect these persons from abuses of power. Based on these reasons, the above-described norms were declared unconstitutional with regard to the Paragraph 1 of Article 42 of the Constitution of Georgia.

Additionally, these norms were evaluated by the Court with regard to Article 14 of the Constitution. The Court determined, that the disputed norms established specific norms for the persons recognized legally incapable and capable persons were not given any preferential treatment with regard to the norm in question. There was no differential treatment between adults, regardless of their status of recognized capacities. Therefore, these norms were declared constitutional with regard to Article 14 of the Constitution.

The respective article of the Civil Code of Georgia that prohibited marriage, if one of the future spouses was recognized legally incapable, was evaluated with regard to Article 36 of the Constitution. The disputed norms took away from the person recognized legally incapable the possibility to turn cohabitation with a partner into legal recognition of their voluntary union into an act of creating a family. The legitimate purpose of the disputed norms was to protect the persons recognized legally incapable from forced marriage and protect their right to property from interference.

The court found, that there was a least restrictive mechanism to achieve this legitimate purpose— by allowing marriage through the consent of legal guardian or respective body, which allowed for individualization of interference into the right to marry. If a person has social skills to understand non-material results that accompanies a marriage, which is not established at any moment when the recognition of incapacity takes place, taking away the right to marry represents a disproportionate interference in the right. Therefore, without taking into the account the individual mental capacities, restricting the right of the persons recognized legally incapable was declared unconstitutional with regard to the Paragraph 1 of Article 36 of the Constitution of Georgia.

The following norms, that regulated recognition of a person legally incapable, limitation of the right to marry and regulations related to psychiatric care, were assessed in relation to Article

14 of the Constitution of Georgia, since the claimant argued, that persons recognized legally incapable were subjected to differential treatment when compared to persons with equal skills but not recognized as incapable. The Court found, that the general characteristic of the social group in question is the recognition as legally incapable, which is based on their mental disorder. Membership of the group or transferring to other group is not dependent on the will of the persons recognized legally incapable. The Court concluded, that classical discrimination was taking place, regulated by Article 14 of the Constitution and hence, it applied "strict scrutiny" test to find out if it was justified.

Within the test, the Court determined, that since it was possible to identify individual capacities of the persons and tailor the status of incapable onto them, the existing norms, that dictated the process of recognition of persons legally incapable, annulment of the acts of persons recognized incapable, and complete substitution of the freewill of a person recognized legally incapable with the will of the legal guardian, also the prohibition of the right to marry, were not interferences absolutely necessitated and therefore, violated Article 14 of the Constitution of Georgia.

Furthermore, the claimant disputed the norm of the "Law of Georgia on Psychiatric Care" that disallowed a person recognized incapable to receive information about his or her own disease and psychiatric care with regard to Article 16 of the Constitution (the right to free development of his/her personality), Article 24 (right to freedom of expression), and Article 41 (the right to become acquainted, in accordance with a norm prescribed by law, with the information about him/her stored in state institutions as well as official documents existing there). The Court highlighted, that the disputed norm regulated relations, that arise in the process of psychiatric care, which is not part of the right to freedom of expression, which includes the right to disseminate information (with regard to Article 24). At the same time, since psychiatric care facility, even it is a state institution, is not a body tasked with carrying out public functions, and for the purposes of Article 41, cannot be counted as "state institution". Therefore, the disputed norm was declared constitutional with regard to both constitutional rights.

As for Article 16 of the Constitution, the Court indicated, that it defends the right of a person to independently make decision regarding own health and treatment, and access own health records is crucial for making such decisions. Therefore, the disputed norm restricted the claimant in his right protected by Article 16, to access information about own health, thus

constituted an interference in this right. The Court declared the norm as disproportionately restrictive, since it failed to recognize varying degrees of the quality of specific mental capacities of persons recognized legally incapable, and with blanket ban, stripped them of their rights to receive information about their own health conditions. Therefore, the norm was declared unconstitutional with regard to Article 16 of the Constitution.

The Paragraph 3 of Article 15 of the "Law of Georgia on Psychiatric Care" allowed the doctors, in exceptional cases, with the purpose of safety, "to limit the rights of patients placed under stationary care, including the right to be protected from inhuman and undignified treatment. The norm was challenged with regard to the Paragraph 1 of Article 17 of the Constitution, which stipulates, that "honor and dignity of an individual is inviolable". Paragraph 2 of Article 17 prohibits various forms of inviolability in physical and mental integrity, among others, inhuman treatment and infringement upon honor and dignity. The Court pointed out, that this is an absolute right and the state is mandated not only to restrain from such treatment, but to ensure that third parties do not interfere with this right. Word-by-word analysis of the norm illustrated, that it allowed in certain conditions to treat patients placed under stationary care, in a manner that was inhumane and degrading. Therefore, the disputed norm was declared unconstitutional with regard to the Paragraph 1 and 2 of Article 17 of the Constitution.

Also disputed was norm of the "Law of Georgia on Psychiatric Care" that declared, that with the consent of legal guardian of a patient, the placement of a patient in the stationary care facility was voluntary treatment. The norm was disputed with regard to the Paragraphs 1 and 2 of Article 18 of the Constitution, which defends inviolability of liberty of an individual – right to movement and restriction of the right to free movement, including, for the purposes of forced treatment and allows interference with the right only with a court decision.

The Court determined, that for the purposes of Article 18 of the Constitution, the placement of a person in psychiatric stationary facility, based only on the consent of his/her legal representative, cannot be interpreted as the will of the person, even if the patient is devoid of his/her ability to express his/her will that will meet the standard for such expression. Due to peculiar characteristics of mental disorder, placement in the stationary facility may last for long periods of time, for several months or even years, i.e. far beyond the 48 hours that the Constitution allows for. Therefore, interference with Article 18 in such form, nature and intensity, specific procedural safeguards

are required, namely verification by the courts, if restriction of personal liberty takes place for more than 48 hours. Since the disputed norm allowed for extra-judicial interference with

the individual's right to liberty, it was declared unconstitutional with regard to the Paragraphs 1 and 2 of Article 18 of the Constitution of Georgia.

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CITIZENS OF GEORGIA – VALERI GELBAKHIANI, MAMUKA NIKOLAISHVILI AND ALEXANDER SILAGADZE V. THE PARLIAMENT OF GEORGIA  
**1/4/557,571,576, NOVEMBER 13, 2014**

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**SUBJECT OF DISPUTE**

The claimants disputed normative content of Paragraph 3 of Article 329 of the Criminal Procedure Code of Georgia, which prohibited the application of the following rules of the Code to the criminal prosecution cases, that were initiated before entry into force of the Code (on October 1, 2010): **A.** Being accused for maximum term of 9 months until the pre-trial hearing and, **B.** Use of jury trial. According to the claimants, the disputed norm violated Article 14 (right to equality before the law) and Paragraph 1 and the Paragraph 2<sup>2</sup> of Article 42 (right to fair trial) and Paragraph 5 (principle of retroactive application of the more lenient law).

**REASONING**

For the purposes of right to equality before the law, the Constitutional Court considered the accused persons in criminal prosecution cases that started October 1, 2010 and after that date as essentially equal, since they had equal procedural status and equal interest with regards to procedural safeguards. The differential treatment significantly distanced these two groups of persons from the equal opportunities – for the first group, the prosecution could have lasted forever, while for the latter group, it should terminate after 9 months. Therefore the differential treatment was considered to be intensive. Automatic application of the terms provided in the new Code on cases initiated before its entry into force would result in automatic release from responsibility of accused persons, who were hiding or would leave investigation with less than 9 months, which would truly damage the implementation of thorough investigation and administration of justice in these cases. However, according to the strict scrutiny test, the Court found, that there existed a least restrictive means to achieve the stated aim – namely, if the 9 month period

would start running not from the moment of indictment in the old cases, but from the date, when the Code of 2009 entered into force, it would place both groups of accused persons on the equal footing and would not endanger the legitimate aim as well. Additionally, Article 14 of the Constitution was found to be violated by the fact that, jury trials did not apply to the criminal prosecution cases started before the entry into force of the Code of 2009. The Court could not see any justification for this differential treatment. Discrimination with regards to the right of access to jury trial, was considered by the Court to violated the right to fair trial as well.

Furthermore, the Court reviewed whether the disputed norm violated the principle of application of the more lenient law. It should be ascertained, whether the Constitution allows or requires the lawmaker to retroactively apply a law that mitigates liability. The Court rejected the argument, that since the second sentence of Paragraph 5 of Article 42 bans retroactive application of laws that impose liability, hence the opposite – that is application of legislation that mitigates liability is mandatory. According to the Court, this line of argumentation would not be justified, since these postulates serve substantially different goals and do not precondition each other. Prohibition of retroactive application of a law comes from the principle of rule of law state and is related to the principle of legal certainty and ensuring legal safety. These values are not basis for retroactive application of laws that mitigate liability. However, in the Court's opinion, the latter is also related to the principle of rule of law state, since "it serves to achieve the two of its main goals" – **A.** To protect a person from such interference in his liberty, which is not necessary to achieve legitimate aim in a democratic and rule of law state and **B.** To promote humanity.

The Court concluded, that "a person must be held liable, for committing an act, that is genuinely dangerous for society, and at that, within legal framework, that is objectively neces-

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<sup>2</sup> The party could not present arguments, regarding the incompatibility of the disputed norms with Paragraph 2 of Article 42 of the Constitution (the right to be tried by the competent court).

sary and enough to achieve the aims of imposing punishment for the specific offence.”Therefore, when the state no longer considers a certain act to be dangerous for society or believes that the punishment pertaining to it is excessive, imposition of responsibility, prescribed by laws before their amendment or application of more severe penalties for an act becomes meaningless. It is true, that the Constitution does not establish such unconditional and absolute duty of retroactive application of more lenient law as it does with regards to prohibition of retroactive application of the laws that introduce responsibility. However, the Constitution it does restrict the state’s discretion

and requires, that the state does not interfere in the right more than necessary.

The Court also pointed out, that the procedural norms are be related to Paragraph 5 of Article 42 only if in substance they are linked to decriminalization or de-penalization of an act, or mitigation of punishment. The scope of jurisdiction of jury trials and the 9 months period of being an accused, including a rule of termination of prosecution does not still define the scope of responsibility and is not logically related to the decriminalization of an act or mitigation of liability. Therefore, the Court found, that the disputed norm did not violate Paragraph 5 of Article 42 of the Constitution.

CONSTITUTIONAL SUBMISSION OF THE SUPREME COURT OF GEORGIA REGARDING THE CONSTITUTIONALITY OF ARTICLE 546 AND THE PARAGRAPH 1 OF ARTICLE 518 OF THE 1998 CRIMINAL PROCEDURE CODE OF GEORGIA

**3/3/601, SEPTEMBER 24, 2014**

**SUBJECT OF DISPUTE**

The Supreme Court of Georgia submitted a constitutional submission regarding the constitutionality of Article 546 and the Paragraph 1 of Article 518 of the February 20, 1998 Criminal Procedure Code of Georgia that preclude acquitted persons to lodge an appeal at the Appellate Court (Paragraph 1 of Article 518) or Court of Cassation (Article 546). These norms were disputed with regard to Paragraph 1 of Article 42 of the Constitution of Georgia (the right to a fair trial).

**REASONING**

The Supreme Court of Georgia received an appeal from a person, who was acquitted by the Appellate Court. However, based on Article 168 of the 1998 Criminal Procedure Code of Georgia, due to violation of bail rules, , the money he had paid as bail was transferred to the State Budget. The person who was acquitted was attempting to reclaim this sum. The Supreme Court of Georgia found that the disputed norms did not allow the acquitted person to appeal the not guilty verdict. Hence, the Supreme Court addressed the Constitutional Court with constitutional submission to evaluate the constitutionality of these norms.

The Constitutional Court pointed out, that the right to appeal is an integral part of the right to fair trial, which on the one hand, preventively ensures to avoidance of potential errors and on the other hand, allows to right the wrongs committed at the lower courts. Paragraph 1 of Article 42 also guarantees

the right to access the Supreme Court, which is a constitutionally established cassation court.

The disputed norms define the circle of subjects, who have the right to file appellate and cassation appeals, but they fail to mention persons who have been found not guilty, effectively precluding them from the right to appeal not guilty verdicts. Not guilty verdict in itself implies that there was no evidence that a crime was committed by the charged person, and therefore, there is no longer a risk to sentence p him/her. However, “a person found not guilty may still be interested in appealing the verdict. This may be related to any issue included in the verdict, which directly is not related to alleged crimes he or she committed, but potentially, may be limiting his /her rights”. From the case submitted by the Supreme Court of Georgia, it was clear, that not guilty judgment may have restricted the rights and interests of an acquitted person.

The Constitutional Court pointed out that, none of the procedural mechanisms, including appealing to a higher instance court, is a unique and irreplaceable instrument to protect the right. The Court researched, whether the legislation included alternative legal mechanisms, which would allow the person to adequately protect his or her rights. In this, the ban on the right to appeal not guilty verdict would not be interpreted as interference with the right to a fair trial. According to respondent, the rehabilitation mechanism foreseen by the Code served



exactly this kind of alternative. However, since the mechanism of rehabilitation only guaranteed compensation for damages incurred as a result of wrongful acts, while acquitting a person does not automatically mean that an unlawful act took place against a person, the Court did not interpret this mechanism as an alternative to appealing not guilty judgment. Therefore, the disputed norm was declared unconstitutional with regard to Paragraph 1 of Article 42 of the Constitution, as it interfered with the right to a fair trial.

According to the established practice, the Court pointed out, once again that the right to appeal is not an absolute right and it can be restricted to achieve legitimate public purpose and with the use of proportionate means to achieve such purpose. The Court pointed to the principle of swift and-effective justice

as the legitimate purpose: “naturally, justice system should not be overburdened with the appeals of those persons, who do not actually possess interest in issue”.

Nevertheless, the Court found that, the employed judicial remedy did not commensurate with the protected right. If the person’s not guilty verdict restricts his other rights or lawful interests and due to disputed norms, he or she is left without judicial remedies, this represents an intensive interference with the right to a fair trial and the argument of cost-effective justice cannot be positioned to balance the imposed restriction – it is devoid of reason to believe that for the purposes of swift and effective justice to make full enjoyment of the right to a fair trial impossible. Therefore, impugned norms were declared unconstitutional with regard to Paragraph 1 of Article 42 of Constitution.

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## CITIZEN OF GEORGIA ZURAB MIKADZE V. THE PARLIAMENT OF GEORGIA 1/1/548, JANUARY 22, 2015

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### SUBJECT OF DISPUTE

Claimant, Zurab Mikadze disputed the norms of the Criminal Procedure Code of Georgia which stated, that hearsay is admissible evidence, if is supported by other evidence (Paragraph 3 of Article 76) and provided that judgment of conviction (Paragraph 2 of Article 13) and indictment (Paragraph 1 of Article 169) could be based on hearsay. These norms were disputed with regards to Paragraph 3 of Article 40 of the Constitution (Principle of founding judgment of conviction on the irrefutable evidence).

### REASONING

Before the consideration on merits of Zurab Mikadze’s constitutional claim, Paragraph 3 of Article 76 of the Criminal Procedure Code was amended. The new version of the norm specified, that hearsay supported by other evidence that is not hearsay. Therefore, since the disputed norm was abolished, the constitutional proceedings were terminated with regards to this part of the claim.

The Constitutional Court interpreted the principle enshrined in Paragraph 3 of Article 40 of the Constitution, that imposition of responsibility should be based only on irrefutable evidence. The principle intends to eliminate errors or risks of arbitrariness in the process of prosecution, by banning dubious evidence that could be used against defendant.

The Court explained, that the definition of hearsay (Article

76), the Paragraph 1 of Article 169, which requires totality of evidence sufficient for a probable case for indictment of a person, and the requirement of Paragraph 2 of Article 13, that judgment of conviction should be based only on a body of consistent, clear and convincing evidence that, beyond reasonable doubt, proves the guilt of a person in the Criminal Procedure Code “together form procedural basis, that transforms hearsay into the valid evidence, not only for indictment, but also for conviction of an accused.” If hearsay is confirmed by other evidence, nothing excludes the possibility, that court will found a judgment of conviction essentially on a hearsay. Therefore, hearsay, as a rule, was an acceptable, trustworthy, and valid evidence, much like other types of evidence.

Against this reality, the Constitutional Court noted, that in general, hearsay is a less trustworthy evidence and has many risks. Since a source of information is a person who does not appear in the court, the court has no opportunity to evaluate his/her disposition and attitudes towards events in question. It is true, that law requires identification of the source of the information, but it fails to specify how the source can be properly verified. Besides, warning the witness about the liability for perjury, which is an important safeguard to ensure trustworthiness of testimony, is not effective tool in this case, since the person, who has testified cannot confirm the trustworthiness



of the person who disseminated the information.

This situation was further aggravated by the following: hearsay could be used even when an eyewitness (on whose words were the basis of hearsay) appeared himself/herself in the court and testified there. There was a possibility to use several hearsays to prove the same fact and the law even allowed a double hearsay (when even the source of information named by the witness, had not witnessed the fact himself/herself).

Given these characteristics of hearsay, the Court determined that automatic admission of hearsay was not justified. However, the Court also noted, that hearsay can be used in special cases, if an objective reason exists, which makes it impossible to interrogate the very person, whose words are basis for hearsay and when this is required by the interests of justice (e.g. when there is a threat of intimidation of witness). The most important aspect is that, in each case, the trial court should evaluate the arguments brought by the body in charge of criminal prosecution to justify the use of hearsay.

However, instead of this, the disputed norms established a general rule of admissibility of hearsay and its application was admissible even, when there was no necessity for it stemming from the interests of justice. Neither the reasonable doubt standard required for the judgment of conviction, nor the standard of probable cause, required for indictment of a person, could rule out application of hearsay, as one of the main evidence in the case. There was a high probability, that the effect of hearsay on the court and on the jury would be stronger, than it was allowed by its limited trustworthy nature.

The Court highlighted, that the use of hearsay carries with it the risk of creating of false impression with regards to guilt of a person and can only be admissible in exceptional cases and not as a general rule, as prescribed by the Criminal Procedure Code of Georgia. Therefore, the normative content of the disputed norms, which allowed to found judgment of conviction or indictment on a hearsay, was declared unconstitutional with regards to Paragraph 3 of Article 40 of the Constitution.

## CITIZENS OF GEORGIA – UCHA NANUASHVILI AND MIKHEIL SHARASHIDZE V. PARLIAMENT OF GEORGIA

**1/3/547, MAY 28, 2015**

### SUBJECT OF DISPUTE

Claimants challenged the constitutionality of norms of the Election Code of Georgia, which stipulated that for the parliamentary elections **A.** 73 single-mandate majoritarian electoral districts were to be created, of which 10 districts – in Tbilisi (Paragraph 1 of Article 110); **B.** For the parliamentary elections, each municipality, except Tbilisi, constituted a single-mandate majoritarian electoral district. These norms were disputed with regard to Article 14 (equality before law) and the Paragraph 1 of Article 28 (right to vote) of the Constitution of Georgia.

### REASONING

The Constitutional Court noted, that right to vote, enshrined in Article 28 of the Constitution, does not require any particular electoral model to be implemented, but existing model must ensure free and equal representation of the popular will in formation of a government. The lawmakers must ensure, that citizens have equal access to elections and equal opportunity to influence final results of the elections. Active voting right significantly limited by minimizing the weight of the vote.

The disputed norms had exactly this kind of effect: in 2012 parliamentary elections, the number of single-mandate districts created varied greatly in the number of voters. e.g. in Kazbegi Electoral District, registered voters were 17 times fewer, compared to the Vake District and 22 times fewer than Saburtalo Electoral District. Despite these differences, the constituents of each electoral district could only elect one representative to the Parliament of Georgia. There were total of 3.613.851 voters registered in all of Georgia, of which 1.025.455 were registered in Tbilisi. Therefore, Tbilisi had 28% of all voters, but only 14% (10 mandates) of all mandates. Therefore, numerous residents of Tbilisi could wield lesser impact on the results of majoritarian elections, compared to those constituents who resided in other electoral districts (e.g. Kazbegi, Abasha, Krtsanisi, etc.) and were registered voters. Such distribution of mandates, which precludes to form proportionate single-mandate electoral districts represents interference with the rights of the claimants.

According to the argument of the respondent, such deviation from the principle of voter proportionality was conditioned

by the fact that majoritarian elections entail representation of administrative units, rather than the representation of the constituents. After analysis of constitutional provisions (Articles 4, 5 and 52) the Court concluded that local municipal units do not enjoy constitutional legitimacy to participate in forming the national bodies of government and elect their representatives to the Parliament. The only subject, that participates in forming the Government and elects its representatives to the Parliament are the people. The essence of majoritarian system is not to ensure territorial representation, but the personified representation when the people elect specific individuals and thus establish more direct relationship between the voters and the elected representative.

The Court acknowledged that it is virtually impossible to establish what represents an absolutely proportionate “weight” of votes in the process of delineating the borders between electoral districts, but such inequality will be acceptable if it is supported by reasonable arguments and if a government strives to minimize voter inequality.

The Court did not rule out a possibility that administrative borders of territorial units are taken into consideration when electoral districts are determined. On some occasions, peculiarities of certain regions can dictate rational disproportionate division between electoral districts. The deviation may be justified if certain constitutional-legal reasoning is present, e.g. the Court took into the consideration that municipalities, as a rule, are firmly established territorial units and coupling electoral

districts with municipal units may eliminate risks of election subjects manipulating electoral borders. However, even after consideration of this argument, the difference between electoral districts should not be more than it is necessary.

The Court reviewed proportionality principle of votes and based its judgment on the “Venice Commission” 2002 “Code of Good Practice in Electoral Matters” and noted, that permissible deviation from this principle may not go above 10%, and in exceptional cases (e.g. to protect the rights of minorities) – 15%.

In the case under review, the electoral districts were mechanically linked with municipalities, without taking into consideration the number of voters registered. As a result, unusually high deviation from the principle of voter proportionality had taken place and it resulted in disproportionate representation in the representative body of the government. Therefore, the impugned norms were declared unconstitutional with regard to Paragraph 1 of Article 28 of the Constitution of Georgia.

The Court also determined, that unequal treatment of voters registered in high-density electoral districts were evident in contrast with electoral districts that had very few voters registered in them. The collective weight of one segment of voters was unjustifiably increased at the expense of other group of voters. Consequently, the Court found that the impugned norms did not respond to constitutional principle of equality before the law and declared disputed norms unconstitutional with regard to Article 14 of the Constitution.

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## CITIZEN OF GEORGIA, GIORGI UGULAVA V. THE PARLIAMENT OF GEORGIA №3/2/646, SEPTEMBER 15, 2015

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### SUBJECT OF DISPUTE

Claimant, Giorgi Ugulava challenged Paragraph 2 of Article 205 of the Criminal Procedure Code of Georgia, which allowed for the imposition of detention for 9 months for each criminal case, when these cases were related to crimes committed prior to imposition of detention with regard to Paragraph 1 and Paragraph 6 of Article 18 (right to liberty) of the Constitution of Georgia. The claimant also disputed: **A.** The norms, which allowed for detention based on the probable cause standard (Paragraph 11 of Article 3 and Paragraph 2 of Article 198) with regard to Paragraph 1 of Article 18 of the Constitution; **B.** the norms, which allowed the use of detention for prevention of crime (the

following words of Part 2 of Article 198 “or, will commit a new crime” and Sub-Paragraph “G” of Article 205) with regard to Paragraph 1 of Article 18; **C.** The norm, which imposed the duty to prove new circumstances before the court on the defence party, in order to revoke or revise preventive measure (the third sentence of Paragraph 8 or Article 206) with regards Paragraph 1 of Article 42 (right to fair trial) of the Constitution.

### REASONING

First, the Constitutional Court interpreted Paragraph 6 of Article 18 of the Constitution of Georgia, according to which, the

term of detention on remand of an accused shall not exceed 9 months. Unlike the prior judgment of the Constitutional Court (Judgment N2/3/182,185,191, January 29, 2003), the Court decided that 9 months' clause does not cease to apply when the case of the defendant is submitted to the court. The goals of application of detention (administration of justice, prevention of a new crime) remain unchanged during the entire duration of criminal prosecution, until the defendant is found guilty or innocent. Paragraph 6 of Article 18 of the Constitution protects defendant from being under the pre-trial detention for an indefinite term, which may be caused not only by arbitrariness of prosecution, but also delays or errors in adjudication of the case by the trial court. The Court interpreted, that for the purposes of the Constitution, "any person under criminal prosecution" is defendant until found guilty; "detention on remand" is a constitutional term (its meaning is independent of ordinary legislation), which involves a temporary restriction of freedom for up to maximum of 9 months. Furthermore, the state is not allowed to extend this constitutional term, even when the detention serves legitimate aims – if the court fails to adopt decision on the guilt of the defendant he must be released from detention.

The aim of Article 18 is to force the state, to adopt judgment of guilt in a timely manner, when the person is under detention and considers 9 months to be sufficient to reach this aim. When the person is indicted with several charges, detention imposed with regard even one of the charges, allows to reach the aims of detention with regards to all charges equally. "In cases of simultaneous indictment with several charges, to determine the maximum term of detention on remand in each criminal case, the time that the defendant spent in custody since the indictment, even if imposed within other criminal case, should be deducted from the applicable term of detention." Therefore, it is unconstitutional to apply detention on remand against person in a criminal case, if since his/her indictment s/he has spent 9 months in custody (in any criminal case).

The Court noted, that constitutional claim does not pre-

clude requesting detention for those criminal cases, which were committed by a person after he was placed in custody; or, which were committed prior to detention, but appropriate evidence for indictment was only revealed after he was placed in custody. Additionally, constitutional requirement precludes artificial separation of cases with the goal to prolong the duration of detention, when the new grounds (appropriate facts, information) for criminal prosecution was already known to the prosecutors, and they were sufficient for indictment.

The court decided, that Paragraph 2 of Article 205 of the Criminal Procedure Code of Georgia did not prevent the aforementioned manipulations to prolong 9 months term of detention, and that it allowed to leave a person in custody in one particular criminal case, in the circumstances, when the defendant had already spent 9 months in custody since the moment, when enough evidence was available to indict the person. Therefore, normative content of Paragraph 2 of Article 205 violated Paragraphs 1 and 6 of Article 18 of the Constitution of Georgia.

The Court did not uphold claimant's demands in the part, where he was disputing the application of detention on the ground of standard of probable cause and placing a person in custody to prevent commission of new crimes. The disputed norms gave clear and simple instructions to the court, to determine whether the grounds for detention of defendant was totality of evidences and information, which would persuade an objective person in the necessity of application of detention. Therefore, the disputed norms precluded unsubstantiated application of detention, and burden of proof fell entirely on prosecution.

The disputed procedure for revision of the preventive measure was substantially amended during the consideration of case on merits by the Constitutional Court (third sentence of Paragraph 8 of Article 206 of the Criminal Procedure Code of Georgia), due to which the Court terminated constitutional proceedings in this part.

CONSTITUTIONAL SUBMISSION OF THE SUPREME COURT OF GEORGIA REGARDING THE CONSTITUTIONALITY OF THE PARAGRAPH 4 OF ARTICLE 306 OF THE CRIMINAL PROCEDURE CODE OF GEORGIA, AND CONSTITUTIONAL SUBMISSION OF THE SUPREME COURT OF GEORGIA REGARDING THE CONSTITUTIONALITY OF THE SUB-PARAGRAPH “G” OF ARTICLE 297 OF THE CRIMINAL PROCEDURE CODE OF GEORGIA  
**3/1/608,609, SEPTEMBER 29, 2015**

**SUBJECT OF DISPUTE**

The Supreme Court of Georgia submitted: **A.** A constitutional submission to determine the constitutionality of the norms of the Paragraph 4 of Article 306 of the Criminal Procedure Code of Georgia, that binds the Court with cassation claim, in cases when the law enacted decriminalizes the offence after it was committed, with regard to Paragraph 3 of Article 40 of the Constitution (Principle of founding judgment of conviction on the irrefutable evidence); and, **B.** A constitutional submission to determine the constitutionality of the norms of the Sub-Paragraph “G” of Article 297 of the Criminal Procedure Code of Georgia, that binds the court with the cassation claim, when there is repeated conviction for the same crime with regard to the Paragraph 4 of Article 42 of the Constitution of Georgia (right to fair trial).

**SUBSTANTIATION OF THE JUDGMENT**

The Supreme Court of Georgia reviewed an appeal from a person convicted for carrying a knives. The law, that decriminalized to carry a knife, was enacted after the above-mentioned offence was committed. Despite this, the disputed norm did not allow the Court the possibility to acquit this person, due to the fact that the Court was not allowed to go beyond the frames of the appeal – in this case, the defendant was only demanding mitigation of his sentence. The Supreme Court of Georgia argued, that this contradicted Paragraph 3 of Article 40 of the Constitution, according to which, a judgment of conviction shall be based only on the evidence beyond a reasonable doubt.

The Constitutional Court determined that, the problem identified in the constitutional submission concerned retroactive application of the new law on an action annulled by the law in question, a principle enshrined in the second sentence of the Paragraph 5 of Article 42 of the Constitution, and not the Paragraph 3 of Article 40 of the Constitution. Since the submission did not address the later, this constituted a ground for rejecting the constitutional submission. However, given that it was

a constitutional submission, which ensured a peculiar instance of cooperation between common courts and the Constitutional Court, in order to uphold the supremacy of the Constitution, the Constitutional Court still went ahead and accepted the constitutional submission prepared by the Supreme Court of Georgia: “It is satisfactory, that the constitutional submission clearly identifies constitutional problem, which the author of the constitutional submission strives to resolve...Constitutionality of the disputed norm/norms will be evaluated against the constitutional provision that answers to the disputed matter identified by the author of the constitutional submission.” The disputed norm was evaluated to respond to the Paragraph 5 of Article 42 of the Constitution of Georgia.

The Constitutional Court responded to the argument that, impugned norms were derived from the principle of adversarial system of proceedings. The court determined that adversarial nature of the proceedings, enshrined in the Paragraph 3 of Article 85 of the Constitution, differs from the model of adversary process. The first, in its essence, affords a party to argue its case before the court with full array of possibilities, and being a constitutional guarantee, it may not demand from the court to ignore fundamental constitutional principles, even when the parties do not demand that these principles are upheld. Due to the purpose of this principle, the Constitutional Court determined that the following argument did not have ground: that, if the judge went ahead and upheld constitutional principles upon his/her initiative, he/she would be violating this principle. Additionally, adversarial or inquisitorial models may have their own peculiarities, but there is a list of issues, which oblige the courts to adjudicate them on their own initiative, and regardless of the demands put forward by the parties to the case. The question of which law should a court apply to a case, falls under such a requirement.

Constitutional principle of applying mitigating law, offers the lawmaker a possibility to apply the more aggravating laws

with respect to crimes committed at a time, when in certain cases, it is objectively necessary to achieve the purpose of imposing punishment. Nevertheless, the impugned norm banned the principle in a blanket manner, depending on procedural circumstances – whether the necessary party came forward with the claim or not. It was not related to the issue of what constituted sufficient, and adequate responsibility for any specific offence. Therefore, disputed norm, the Paragraph 4 of Article 306 of the Criminal Procedure Code of Georgia, was declared unconstitutional with regard to the Paragraph 5 of Article 42 of the Constitution.

The Court also defined the Paragraph 4 of Article 42 of the Constitution, which foresees that no one shall be convicted twice for the same crime, which is a guarantee to avoid double jeopardy and arbitrary persecution. Due to newly revealed evidence,

or due to significant errors during the criminal proceedings, proceedings may be re-launched, or be renewed, but this may only take place based on previously enacted laws, as well as laws that have certainty ingrained in them. The principle of prohibition of double jeopardy is an absolute constitutional requirement, since, unless a possibility of repeated conviction for the same crime is eliminated, the fundamental principles of legal certainty become meaningless. The disputed norm completely stripped the Appellate Court of the opportunity to re-assess whether the principle of prohibition of double jeopardy was violated, and if this was the case, it was unable to annul or review the decision of previous instance courts. Therefore, Sub-Paragraph “G” of Article 297 of the Criminal Procedure Code of Georgia was also declared unconstitutional with regard to the Paragraph 4 of Article 42 of the Constitution of Georgia.

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## CITIZEN OF GEORGIA, BEKA TSIKARISHVILI V. PARLIAMENT OF GEORGIA 1/4/592, OCTOBER 24, 2015

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### SUBJECT OF DISPUTE

The claimant, Beka Tsikarishvili challenged the constitutionality of the normative content of the Paragraph 2 of Article 260 of the Criminal Code of Georgia, which envisaged imprisonment from 7 to 14 years for purchasing and possession of up to 70 grams of dried leaves of cannabis for personal use, with respect to the Paragraph 2 of Article 17 of the Constitution of Georgia (prohibition of inhuman, cruel or degrading treatment or punishment).

### SUBSTANTIATION OF THE JUDGMENT

The Constitutional Court noted, that in determining criminal procedure policies, the state has a broad margin of appreciation, i.e. when deciding what acts to criminalize and what should the sentence for the act. However, state discretion is not limitless: the state must choose the degree of legal liability before the law, which is adequate and effective to neutralize risks deriving from the action in question. Furthermore, “the state cannot interfere with human freedoms (and rights) more than it objectively is required”.

In this context, the Constitutional Court evaluates sentence with regard to the Paragraph 2 of Article 17 of the Constitution, to determine proportionality between the graveness of the crime and the sentence given for it – the punishment will

either be declared as inhuman and degrading if its duration is grossly disproportionate with respect to the substance of the offense committed and threats deriving from it. Additionally, the law must ensure that the judge/prosecutor has enough discretion to weigh each and every relevant factor in an individual case (the damage caused, the quality of a guilty acts, etc.), so that disproportionate sentence is not handed.

The Court also indicated, that the existence of a sentence is only justified, when it is an adequate means to achieve the purpose of the sentence, since otherwise, the sentence becomes an end in itself, which is not compatible with the concept of a legal state. The Court discussed the aims of a sentence: restoration of justice, re-socialization, private (of crime committed by the same person) and general (of a crime committed by other person) prevention, and it determined, that the purposes of the sentence must be reached in tandem. General prevention solely is not enough to impose punishment. Punishing a person only for the purposes of preventing others from the same crime, turns a person into a tool to fight crime, into a weapon, which is not justifiable itself and thus, renders punishment as grossly disproportionate.

In this particular case, the subject of dispute was not to test constitutionality of disallowing cannabis from lawful circulation

(decriminalization), but to dispute the constitutionality of the proportionality of the sentence for purchasing and possessing large quantities of cannabis (50-500 grams). To determine proportionality of the sentence, the Court evaluated the nature of the act itself and the risks associated with the act in question. The legitimate purpose of criminalizing the act of purchasing and possessing cannabis was to prevent distribution of cannabis and with this, to protect the health of individuals, public order and safety. The Court determined, that the “assessment of constitutionality of the impugned norm is reviewed in conjunction with the very legitimate purposes the norm itself.”

Discussing the legitimate purpose of protecting the health, the Court differentiated damages that affected the health of the person committing the act, from damages, inflicted on the health of other persons. While it is true, that the health of the person who consumes cannabis may become subject to various levels of health risks, but the Court found it unreasonable to imprison a person solely because he/she committed an act against his/her own health. “In this case, restricting liberty of a person only serves the general prevention purpose, so that others do not commit the same acts and do not harm their own health.” Therefore, based on the legitimate purpose of protecting the health of an individual, imposing punishment in the form of restricting liberty for the act of purchasing and possession of the respective amount of cannabis (up to 70 grams), was declared disproportional in terms of achieving the stated legitimate purpose.

While discussing the threats of purchasing and possession cannabis, the Court did not side with the argument that there is a link between consuming cannabis and committing other crimes, since offered research and data did not support the claim that the consumption of cannabis itself causes a person to commit other crimes (according to the expert, the nature of the substance in question, the risk of committing other crimes is the same or less, as in the case of persons under the influence of alcohol). On the other hand, the Court saw the legitimate interest of the state to control distribution of cannabis, as it damages health of individuals. In this regard, the Court established that, if the quantity of cannabis is large, it poses a threat due to the fact that it was not purchased and stored with an intent of personal consumption, but for the purposes of reselling it, and in this case, the state is entitled to impose commensurate punishment. However, the Court discussed that disputed norm within the limits of quantity, which the claimant had at the moment of his arrest (69 grams) and it did not find, that dried cannabis up to

70 grams is a quantity, which indicates unquestionable intention of reselling it, especially, given the fact, that according to the expert, the risk of over-dosage of cannabis is minimal, which allows a person to consume 50-7- grams of cannabis in a short amount of time. Another point to consider: the impugned norms had imposed blanket punishment for purchasing/storing up to this quantity of cannabis, and the prosecutor was not required to find out the intention of the act, whether it was for personal consumption or for the purposes of reselling it.

The Court concluded, that in these circumstances, with regard to the disputed amount of cannabis, when the threat of selling it and damaging the health of others is only hypothetical, restriction of liberty for an act that only damages the health of a person committing the act, is disproportional and inadequate, and thus violates the Paragraph 2 of Article 17 of the Constitution of Georgia.

In his dissenting opinion, the member of the Constitutional Court, Merab Turava opined, that indeed, the imposed sanction for purchasing and possessing cannabis (7-14 years of imprisonment) was clearly disproportional with regards to the act committed, however, the Court should not have recognized the norm that anticipates restriction of liberty for purchasing and possessing of cannabis in indicated amount as unconstitutional. Given the threats associated with the crime in question, the Court should have left it upon the state to impose the commensurate punishment, with the condition, that the judge/prosecutor were allowed to mitigate liability by taking individual circumstances into the consideration.

*After the decision in Beka Tsikarishvili case, the Supreme Court of Georgia submitted 3 constitutional submissions to the Constitutional Court of Georgia, where they challenged the constitutionality of the Paragraph 1 of Article 260 of the Criminal Code of Georgia, which foresaw imprisonment for up to 6 years for illegally purchasing and possession of up to 50 grams of dried cannabis for personal consumption.*

*In its February 26, 2016 Order #3/1/708,709,710, the Constitutional Court of Georgia pointed out that, the disputed norm was analogous to the norm already declared unconstitutional – i.e. if it resulted in the restriction of the same constitutional right with the same means and with the same legal consequences, it was deemed as “superimposing norm” and was to be declared unconstitutional without the substantial consideration of a case by the court.*

*In this regard, the Court found that the disputed norm foresaw restriction of liberty for up to 6 years for the pos-*



*session of up to 50 grams of dried cannabis for the purposes of personal consumption. The Court's previous decision declared it unconstitutional to restrict liberty or any amount of time for purchasing and possessing up to 70 grams of dried*

*cannabis. Therefore, the disputed norm was determined as a superimposing norm of the October 24, 2015 decision of the Constitutional Court of Georgia and was declared unconstitutional.*

PUBLIC DEFENDER OF GEORGIA, CITIZENS OF GEORGIA – GIORGI BURJANADZE, LIKA SAJAJIA, GIORGI GOTSIRIDZE, TATIA KINKLADZE, GIORGI CHITIDZE, LASHA TUGUSHI, ZVIAD KORIDZE, NELP “OPEN SOCIETY GEORGIA FOUNDATION”, NELP “TRANSPARENCY INTERNATIONAL GEORGIA”, NELP “GEORGIAN YOUNG LAWYERS ASSOCIATION”, NELP “INTERNATIONAL SOCIETY FOR FAIR ELECTIONS AND DEMOCRACY” AND NELP “HUMAN RIGHTS CENTER” V. PARLIAMENT OF GEORGIA  
**№1/1/625, 640, APRIL 14, 2016**

#### SUBJECT OF DISPUTE

Public Defender and others challenged the constitutionality of legal norms that entitled respective state bodies, for the purposes of Investigative Activities, to install equipment at the telecom operators, that would enable them to access information in real time (the first sentence of Sub-Article “A” of Article 83 of the Georgian Law on “Electronic Communications”, and the Paragraph 4 of the Article 1433 of the Criminal Procedure Code of Georgia). Also challenged were the powers of the same state bodies to copy databases accessible in the communication system and store it for up to two years. (the first sentence of Sub-Article “b” of Article 83 of the Georgian Law on “Electronic Communications”). Furthermore, the claimants believe the so called “two-key electronic system” is unconstitutional, which requires the permission of the Personal Data Protection Inspector to electronically authorize law enforcement agencies’ lawful interception of communications (Article 31 of the Criminal Procedure Code of Georgia). According to the claimants, the impugned provisions violated Article 16 of the Constitution (everyone has the right to free development of his/her personality) and the first paragraph of Article 20 of the Constitution (Everyone has the inviolable right to a private life).

#### REASONING

The Constitutional Court opined that in order to enjoy the right protected under Article 16 of the Constitution (that everyone has the right to free development of his/her personality) not only is it important, that private space remains actually and factually inviolable, but a firm sense of inviolability is required as well – even the thought of a third party having an access to this space

undermines and hinders free development of individual. Specific components of the right protected under Article 16, including the inviolability of communication carried out via various technical means – i.e. the Data anonymity is protected under Article 20 of the Constitution. Restriction of the aforementioned right is only permissible by a court decision or also without such a decision in the case of the urgent necessity.

The court also determined, that the first sentence of Sub-Article “a” of Article 83 of the Georgian Law on “Electronic Communications” authorizes the Operative-Analytic Department of the State Security Service to access data in real time by setting up necessary infrastructure at the communication source-end. Furthermore, the Paragraph 4 of the Article 1433 of the Criminal Procedure Code of Georgia provides for 2 scenarios in which these technical means can be applied: a. secretly intercept and record phone conversations (hereinafter “phone conversations”) and b. the state can retrieve and retain any communication meta data from telecom operators’ networks, computer networks and systems.

The Constitutional Court pointed out, that collection and retention of information in real time may be the sole effective means to investigate crime in an urgent manner and hence, it serves legitimate purposes. The Court, however, points out that once given the right to install equipment at the servers of telecom operators, and to eavesdropan indefinite number of persons, copying and retaining metadata by the very same agency – the State Security Service, which itself is carrying out investigation, and is interested in collecting as much data as possible – is already a weapon of psychological influence due to



increased risks of violating the right to a private life. Therefore, in this case the state is required to make sure that the threat of arbitrary acts is eliminated and the aforementioned risks are balanced by adequate control mechanisms.

With this purpose, the lawmakers introduced the control mechanism: the Personal Data Protection Inspector. The Inspector oversees the process of eavesdropping phone conversations that falls under the so called "lawful surveillance management system". This special computer system executes orders to launch or to cede eavesdropping phone conversations of specific subjects based on the orders coming from the law-enforcement body. Lawful surveillance management system is activated, and therefore dependent, on the electronic consent of the Personal Data Protection Inspector ("to-key electronic system")

The Court determined, that the inspector only consents to activate the lawful surveillance management system, which precludes her from the ability to oversee those phone conversations that are carried out via various equipment and software, and also permitted by the law. Furthermore, the Inspector does not have the right to audit surveillance infrastructure to check whether such alternative mechanisms are deployed. Hence, the Court believed that there was a possibility for the respective body to act beyond the Inspector's control (and therefore, without the permission of the courts).

It was determined, that the second covert act – to retrieve information from the internet in real time may amount to no lesser degree of interference with private life as compared to eavesdropping the phone conversations. At the same time, this investigative act was not even covered by the imperfect mechanism – the two-key electronic mechanism.

The Inspector's mandate to oversee collection of information in real time does not constitute sufficient external control which is adequate and effective. Therefore, the Court ruled that the existing model was not the least restricting and proportional when interfering in person's private life. It was deemed that article 16 of the Constitution was violated, since the resources concentrated at the hands of the State Security Service were not subject to any kind of actual control and hence, persons were left in constant fear and concern over their private life. In these

conditions, individuals have to get accustomed to the fact, that they may be sharing their private space with undesired third party, which eliminates the freedom for free development of one's personality. Besides, since the control mechanisms afforded to the Data Protection Inspector do not guarantee that the real time data collection will take place only by the order of a judge (or, in the case of the urgent necessity, with the post-factum consent of a judge), the disputed norms also violate the first paragraph of Article 20 of the Constitution.

As for the right to copying and storing metadata for 2 years, the Court ruled, that identification data, i.e. data that provides information on "who, to whom, when, by what technical means, from which location and for how long did the communication last" still represents both, interference with the right to a private life protected under Article 20, and interference with the right to free development of his/her personality (Article 16), whether or not the data was potentially accessed and used in the future.

Control, and potential to inspect data storage to balance out uncontrolled risks of accessing personal information via special electronic system, available to the Data Protection Inspector, were also deemed insufficient by the Court. In addition to absence of effective mechanisms, the Court also held, that the intensity of interference with the right was further aggravated by the length and the blanket character of the interference.

The Court noted, that the system of copying/retention of identification metadata serves legitimate purposes, but it should avoid concentration of such information at the hands of an agency interested in collecting information, such as the Security Service. "Retention of identification data by an agency that is distanced from investigative functions, does not have organizational interest in this regard, is equipped with firm and sufficient safeguards to ensure its independence, and is subject to effective control, would credibly reduce risks for the potential infringement of rights".

Therefore, the Constitutional Court declared every disputed norm unconstitutional with regard to Article 16, and the first Paragraph of Article 20, but postponed deadline for entry into force of the decision until March 31, 2017.



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