**№2/2/579 Batumi, July 31, 2015**

**Composition of the Board:**

Zaza Tavadze – Chairman of the Hearing;

Otar Sichinava – Member;

Lali Papiashvili – Member, Judge Rapporteur;

Tamaz Tsabutashvili – Member.

**Secretary of the Hearing**: Darejan Tsaligava.

**Title of the Case:** Citizen of Georgia Maia Robakidze v. the Parliament of Georgia.

**Subject of the Dispute:** Constitutionality of the wording “this Code" of the first section of article 72 and the wording "by this Code" of the second section of article 72 of the Criminal Procedure Code of Georgia with respect to paragraph 7 of Article 42 of the Constitution of Georgia.

**Participants of the Hearing:** Representative of the Claimant – Giorgi Gotsiridze; Representative of the Parliament of Georgia – Tamar Meskhia; Specialist - Badri Niparishvili.

**I**

**Descriptive Part**

1. On March 7, 2014 a constitutional claim (registration N579) was lodged to the Constitutional Court of Georgia by the citizen of Georgia Maia Robakidze. On March 10, 2014 N579 constitutional claim was assigned to the Second Board of the Constitutional Court of Georgia.
2. Preliminary session of the second board of the Constitutional Court without oral hearing was held on May 7, 2014 for ruling on admission of the N579 constitutional claim for consideration on merits. Pursuant to the Recording Notice N2/3/579 of May 9, 2014 constitutional claim N558 was admitted for consideration on merits. The oral hearing on merits was held on September 10, 2014.
3. The legal basis for submission of the constitutional claim indicated in the claim is paragraph 1 of article 42, subparagraph “f” of paragraph 1 of article 89 of the Constitution of Georgia, subparagraph “e” of paragraph 1 of article 19 and subparagraph "a" of paragraph 1 of article 39 of the organic law of Georgia “On the Constitutional Court of Georgia”, articles 15 and 16 of the Law of Georgia “On Constitutional Legal Proceedings”.
4. According to the first section of article 72 of the Criminal Procedure Code of Georgia "evidence obtained as a result of essential breach of this Code and other evidence legally obtained based on such evidence is inadmissible and has no legal force if it deteriorates legal condition of an accused". The second section of the same article defines that "evidence is also inadmissible if it is obtained according to the rules prescribed by this Code, but reasonable doubt about its possible replacement, essential change in its characteristics or disappearance of the existing trace on it is not negated".
5. According to paragraph 7 of article 42 of the Constitution of Georgia "Unlawfully obtained evidence shall have no legal force".
6. It is indicated in the constitutional claim that the Claimant Maia Robakidze is accused in commission of crime prescribed by subparagraph "b" of the third section of article 180 of the Criminal Code of Georgia. According to the definition of the Claimant on the preliminary hearing the prosecution party presented information obtained by a private individual in breach of the Criminal Code of Georgia and the law of Georgia "On Operative-Investigatory Activity". Due to the mentioned the defence party presented the motion before the court requesting declaration of the evidence inadmissible. The court did not uphold the motion, however the Claimant indicates that since summarising judgment on the case has not been delivered yet and at the same time there is a possibility for higher instance court to change the decision on admissibility of the evidence the disputed provision might directly breach her right, therefore she is authorised to dispute its constitutionality.
7. The Claimant indicates that the disputed provision is unconstitutional since it declares inadmissible only the evidence which is obtained through violation of "this Code", thus the Criminal Procedure Code of Georgia and it does not declare inadmissible evidences obtained through violation of the rules prescribed by other normative acts, for example the Criminal Code of Georgia, the law of Georgia "On Operative-Investigatory Activity", "On police". At the same time, the Claimant explains that based on the disputed provision the evidence which is obtained in accordance with the rules prescribed by the mentioned legal acts is considered to be admissible even in cases when reasonable doubt about its possible replacement, essential change in its characteristics or disappearance of the existing trace on it is not negated.
8. The Claimant indicates that the rules of gathering evidences are regulated not only by the Criminal Procedure Code but also by other normative acts. For instance the Claimant indicated to the law of Georgia "On Operative-Investigatory Activity" which prescribes the conditions and procedures of secret surveillance on personal communication of an individual. If personal conversation of an individual is illegally recorded or secret video surveillance is conducted against him/her the law "On Operative-Investigatory Activity" as well as article 20 of the Constitution will be breached, however it will not breach the Criminal Procedure Code, because the latter does not regulate the procedure of secret surveillance and recording. Therefore based on the Claimant’s assessment the disputed provision considers such evidence to be admissible.
9. The Claimant also indicates that according to the article 100 of the Criminal Procedure Code of Georgia the investigator and the prosecutor are authorised to start investigation only after receiving notice about crime, while the laws of Georgia "On Operative-Investigatory Activity" and "On police" prescribe the measure which might be oriented on the prevention of crime or gathering sufficient information about crime in order to start investigation. Therefore, some measures prescribed by the mentioned normative acts are conducted prior to commencement of investigation; however, the breach of the law by the relevant authorities could not become grounds for inadmissibility of evidence, because they were obtained before commencement of investigation and therefore are outside of the scope of application of the Criminal Procedure Code.
10. The Claimant indicates that the constitutional provision has wider scope compared to the disputed provision and it prohibits validity of the evidence obtained through breach of any law. According to the Claimant's opinion breach of law indicated in paragraph 7 of article 42 of the Constitution refers not only to the parties of the criminal proceeding but also evidences obtained by private individuals and prohibits the use of such evidence in any, criminal, civil and/or administrative, proceedings.
11. According to the definition of the Claimant the constitutional guarantee of inadmissibility of the unlawfully obtained evidence serves several aims. Specifically, it ensures prevention of unlawful conduct by the investigating agencies, since evidence obtained through illegal act will be declared inadmissible and judgment of conviction will not be delivered based on it. At the same time the Claimant considers that the constitutional guarantee of inadmissibility of the unlawfully obtained evidence serves protection of judicial authority, since judicial authority and its perception in the society becomes questionable when the judge declares unlawfully obtained evidence admissible. The Claimant considers that one of the main aims of the constitutional guarantee is to ensure legitimacy of the judgment of conviction, specifically the judgment of conviction should be based only on lawfully obtained evidences; otherwise punishment of the offender will be conducted based on the unlawfulness. The Claimant also indicates that the rule of inadmissibility of unlawfully obtained evidence is instrumental mechanism to ensure protection of individual's private life.
12. In order to substantiate her argumentation the Claimant refers to the case-law of the European Court of Human Rights and the Supreme Court of the United States of America.
13. The Claimant considers that the rule established under article 78 of the Criminal Procedure Code, according to which the origin of the documents presented as evidence should be verified, is not able to remedy the problem. According to the reasoning of the Claimant verifying the origin of the evidence does not imply the possibility to assess its lawfulness. It only entails identification of the author of documents.
14. The Claimant also indicated that the existence of the general principles prescribed by the Criminal Procedure Code should not be taken into consideration during assessment of constitutionality of the disputed provision. According to her opinion the principles prescribed in the Criminal Procedure Code; including inviolability of human dignity and private life autonomously do not establish any legal results unless it is reflected in a specific rule. Therefore, mere fact that acquisition of evidence contradicts a general principle recognised by the Criminal Procedure Code cannot become ground for declaring evidence inadmissible.
15. During the hearing on merits the Claimant party indicated that the disputed provision clearly considers any evidence which is obtained in breach of any normative act except the Criminal Procedure Code of Georgia to be admissible. At the same time, according to the definition of the Claimant any information which is presented before the court by an authorised individual could be considered as evidence regardless who obtained it.
16. The Claimant party drew attention towards the amendments of the Criminal Procedure Code and the law of Georgia "On Operative-Investigatory Activity" adopted on August 1, 2014. According to the amendments procedure of conducting some Operative-Investigatory measures became prescribed by the Criminal Procedure Code of Georgia and the clause was added in the law "On Operative-Investigatory Activity" according to which declaration of Operative-Investigatory measure illegal is a ground to consider information obtained through this measure as inadmissible evidence in accordance to the rules prescribed by the Criminal Procedure Code of Georgia. The Claimant defined that by the new regulation her problem is only partially solved, since the rules of several measures are still prescribed by the law "On Operative-Investigatory Activity" as well as by other normative acts. Therefore, declaring evidence obtained in breach of these rules is still impossible based on the disputed provision.
17. The Claimant considers that the argument of the Respondent party, according to which paragraph 7 of article 42 of the Constitution regulates only the evidence illegally obtained by parties of criminal proceeding is unfounded and in conflict with the aims of the Constitution of Georgia. The Claimant indicates that in the process of gathering evidences not only private person but also state representatives, for example the Public Defender, the Auditor General or employee of the Revenue Service, might be participating. These individuals might obtain evidences as a result of breach of the law determining their authority. The Claimant considers that such evidences should be considered as inadmissible, because the objective of paragraph 7 of the article 42 of the Constitution is to restrict any state representative from breaching the law in the process of exercising their authority.
18. During the hearing on merits with respect to the second section of article 72 of the Criminal Procedure Code the Claimant party indicated that the term "obtain" has different meaning for the purpose of article 72 of the Criminal Procedure Code and paragraph 7 of article 42 of the Constitution. According to the Criminal Procedure Code the term "obtain" implies unity of certain acts as a result of which evidences are gathered. According to paragraph 7 of article 42 of the Constitution the mentioned term implies not only obtaining evidences in the meaning of the Criminal Procedure Code, but also fixation of already acquired evidences in accordance to the rules of criminal procedure. Therefore, the Claimant considers that cases when the evidence is obtained in accordance to the Code, but reasonable doubt about its possible replacement, essential change in its characteristics or disappearance of the existing trace on it is not negated constitutes interference within the scope protected by paragraph 7 of article 42 of the Constitution and should be assessed with respect to this constitutional provision.
19. The Claimant party also indicated that every instance prescribed by the disputed provision is not problematic with respect to paragraph 7 of article 42 of the Constitution. Specifically, essential change in the characteristics of evidence or disappearance of the existing trace might happen naturally, without human interference after the lapse of some period which does not constitute unlawfulness. In such cases inadmissibility of the evidence derives from the third paragraph of article 40 of the Constitution, according to which "any suspicion that cannot be proved as provided by law shall be resolved in favour of the accused". With respect to paragraph 7 of article 42 of the Constitution the disputed provision acquires unconstitutional content in cases when the representative of the law enforcing agency obtains evidence in accordance to the procedures established by the law and after that intentionally changes its characteristics or makes the trace disappear from it.
20. During the hearing on merits the representative of the Respondent party indicated that objective of paragraph 7 of article 42 of the Constitution is to ensure inadmissibility of evidences obtained in breach of relevant law by the party of criminal proceeding and not by any participant of it. Furthermore for the purpose of this provision only breach of the law based on which party is enabled to obtain evidences is relevant. According to the definition of the Respondent main rules of obtaining evidences for prosecution are prescribed by the Criminal Procedure Code and the law of Georgia "On Operative-Investigatory Activity". Declaring evidences of defence party inadmissible based on the first section of article 72 of the Criminal Procedure Code is less probable, because based on the disputed provision the issue of admissibility of evidence arises only if it deteriorates legal condition of an accused. Based on the above mentioned, the Respondent party considers that every basic rule based on which parties obtain evidences is prescribed by these two normative acts and significant breach of any of them results is inadmissibility of evidences.
21. According to the definition of the Respondent in criminal legal proceeding it is possible for an individual who does not constitute investigative authority to obtain evidences by breaching special rules; however paragraph 7 of article 42 of the Constitution does not guarantee inadmissibility of evidences obtained in breach of any laws. According to the definition of the Respondent each law prescribes suitable responsibility for unlawful act, however there is no duty to declare evidence inadmissible since the constitutional guarantee on inadmissibility of evidences binds parties of the criminal proceeding and not every individual.
22. The Respondent party also indicated that the right protected under paragraph 7 of article 42 of the Constitution is not an absolute one and the legislator is allowed to set some restrictions for achievement of constitutional legitimate aims. In the present case avoidance of crime, state security and social safety as well as proper administration of justice constitute such legitimate aims.
23. During the hearing on merits the Respondent party drew attention towards the regulation prescribed by the Criminal Procedure Code of Georgia of February 20, 1998, according to which evidence obtained in violation of not only the Code but also any other laws was considered inadmissible. According to the definition of the Respondent the legislator considered the mentioned rule to be excessively wide, because it did not adequately ensure achievement of legitimate aims. Therefore, the procedural acts in relation to gathering evidences was reconsidered and gathered in two main normative acts, violation of which results in inadmissibility of evidences.
24. Head of secretariat of the Criminal Chamber of the Supreme Court of Georgia Badri Niparishvili was invited as a specialist on the case.
25. According to the definition of the specialist only information which is directly obtained by the parties is considered to be evidence. At the same time, obtaining evidences does not always imply that it is at all times done through the activity of the party. Not only creation of some information as a result of activity of the party but also receiving information which was previously created by other individual is considered as obtaining evidence.
26. The specialist also indicated that on the stage of deciding the admissibility of evidences only issue of essential breach of the Criminal Procedural Code is assessed. However, declaring evidence as admissible does not automatically imply obligation to use it during the delivery of the final judgment. According to the definition of the specialist based on the first and the second sections of article 259 of the Criminal Procedure Code the court judgment should be lawful, which implies compatibility to the Constitution of Georgia, this Code and other laws, provisions of which were used during criminal proceeding. Therefore, the specialist considers that although such evidences might be declared as admissible on preliminary session, the final judgment of the court still cannot be based on the evidence obtained as a result of violation of law. On the stage of delivery of the judgment the law establishes higher standard compared to the one used for deciding on admissibility of evidences. The standard implies compatibility of evidences not only to the Code, but also to the Constitution and other laws.

**II**

**Reasoning Part**

1. According to paragraph 7 of article 42 of the Constitution of Georgia "Unlawfully obtained evidence shall have no legal force." The mentioned Constitutional provision is the expression of Rule of Law principle, according to which prosecution and conviction of an individual based on the unlawfully obtained evidences is intolerable.
2. The principle of the Rule of Law obliges the state to create evidentiary rule, which will ensure noncontroversial establishment of facts relevant for the case and fair trial for an individual based on the evidences obtained in accordance with Georgian law and international standards of human rights protection.
3. Incontrovertibility of evidences relates predominantly to the legality of mechanism employed for obtaining them. The system of values established by the Constitution requires employing tools and mechanisms compatible with constitutional standards and respecting human liberty and dignity during the administration of justice. Absence of strict legislative regulation of criminal proceeding and evidence gathering leads to risks of arbitrariness from the state.
4. The Constitutional restriction on use of unlawfully obtained evidences aims at establishment of the objective truth on criminal cases, protection of rights/liberties of participants of proceeding, increase of the trust of the public and participants of proceedings towards the justice and responsibility of the agencies authorised to conduct criminal prosecution. In the end the above mentioned ensures fairness of process and exercise of the right to a fair trial by the accused.
5. The judgment of conviction results in intensive restriction of human rights, thus, imposition of suitable responsibility on individual who illegally obtained evidences is not sufficient mechanism for ensuring effective prevention of violation of the rights of the accused and the existence of real guaranties for exercising the right to fair trial. Therefore, the Constitution establishes inadmissibility of unlawfully obtained evidences as an effective mechanism against the arbitrariness from the participants of the proceeding.
6. Establishing criteria on admissibility of evidences by the law constitutes important guarantee for protection of rights and freedoms of the accused. It prohibits implementation of parties' own interest in expense of unlawful violation of dignity and fundamental constitutionally recognised rights and freedoms of other individuals.
7. Unlawful gathering of evidences is not justified even by difficulties related to prosecution of individuals who committed the most serious crimes and/or investigation of organised crimes. Otherwise, administration of justice will exceed legal boundaries and become the tool of unlimited power, which is in conflict with constitutional standard of personal liberty of individual.

**Constitutionality of the wording “this code" of the first section of article 72 of the Criminal Procedure Code of Georgia with respect to paragraph 7 of Article 42 of the Constitution of Georgia**

1. According to the first section of article 72 of the Criminal Procedure Code of Georgia (hereinafter - CPC) "evidence obtained as a result of essential breach of this Code and other evidence lawfully obtained based on such evidence is inadmissible and has no legal effect if it worsens the legal condition of the accused". The Claimant considers that the wording "this Code" narrows the rule prescribing inadmissibility of the evidences and creates the possibility for evidences obtained in violation of other laws to be declared admissible, thus contradicts the principle established under paragraph 7 of article 42 of the Constitution.
2. According to the section 23 of the article 3 of CPC evidence is "information or an item, document, substance or any other object containing the information submitted to the court in the manner prescribed by law, which parties use in a court to prove or refute certain facts and make their legal evaluation, perform duties, protect their rights and lawful interests, and which a court uses to establish whether there exists a fact or action because of which a criminal proceeding is conducted, whether a certain person has committed a certain action and whether or not a person is guilty, also to establish circumstances that affect the nature and degree of liability of the accused, and characterise the person." According to this legal definition the evidence might be any item which contains information. The CPC does not define the catalogue of information carrier which can be presented by the parties. Therefore, any item containing information might be presented before the court if it is characterised with relevance, admissibility and incontrovertibility.
3. The CPC determines types of evidences and rules of their gathering. Specifically, the evidence might exist as testimony, physical evidence or/and document. However, their contents and forms of material expressions are different (for example it could be photo, computed file, audio/video tape, trace, item, object).
4. According to section 23 of article 3 of the CPC the item containing information relevant for criminal case does not qualify as evidence unless it is presented before the court in accordance to the rules prescribed by the law and thus, comply for example with the requirements of article 83 of the CPC. At the same time, the evidence declared admissible by the court might not be used during the delivery of court judgment, if it does not comply with the requirement prescribed by article 82 of the CPC. However, in relation to unlawfully obtained evidences the barrier established by this provision is not able to independently fulfil its function unless the ground for declaring evidence inadmissible is adequately determined by article 72 of the CPC.
5. According to the first section of article 72 of the CPC "evidence obtained as a result of essential breach of this Code and other evidence lawfully obtained based on such evidence is inadmissible and has no legal effect if it deteriorates legal condition of an accused".
6. The criminal procedural code does not prescribe the notion of "admissible evidence". Admissibility of evidences is regulated based on the so called principle of negative enumeration and evidence is considered admissible unless there is ground for declaring it inadmissible.
7. The CPC prescribes general and special rules for declaring evidences inadmissible. The general rule established by article 72 of the CPC is not exhaustive and grounds for declaring evidences inadmissible are prescribed by other provision as well (special regulation is prescribed, for instance by section 3 of article 75 of the CPC, section 31 of article 144 of the CPC, section 6 of article 131 of the CPC, section 9 of article 169 of the CPC, etc.).
8. At the same time grounds for inadmissibility of evidences presented on the criminal case are not prescribed solely by the Criminal Procedure Code. For instance, according to the second sentence of the second paragraph of the law of Georgia "On Operative-Investigatory Activity" declaring Operative-Investigatory measure unlawful creates ground for declaring information obtained through this measure inadmissible evidence in accordance to the rule prescribed by the Criminal Procedure Code of Georgia.
9. The first section of article 72 of the CPC relates to evidences obtained as a result of violation of the law and there is real possibility that the law enforcer might use it with the meaning disputed by the Claimant. The mentioned content of the disputed provision also derives from its historic interpretation. Specifically, section 6 of article 7 of the CPC of 1998 prescribed that "the evidences obtained through breach of law does not have legal force". According to the Criminal Procedural Code currently in force inadmissibly of the evidences is limited only to the violation of "this Code".
10. The specialist invited on the court hearing defined that although according to the first section of article 72 of the CPC evidences obtained in essential violation of any normative act except the Criminal Procedure Code are admissible the court will not use such evidence during deciding on the case on merits and thus, there is no risk of delivery of court judgment based on the unlawfully obtained evidences. The specialist referred to the first and second sections of article 259 of the CPC according to which "Court judgment shall be lawful, reasoned and fair. The court judgment is lawful if it is delivered in accordance with the requirements of the Constitution of Georgia, this Code and other laws of Georgia provisions of which were used during the criminal proceeding". The specialist indicated that during assessment of evidences the court should take requirements of the law of Georgia into consideration and if it determines that evidences are obtained through violation of any provision of any law he/she should not base judgment on this evidence. Otherwise, delivered judgment will be considered unlawful.
11. The Constitutional Court of Georgia does not uphold the mentioned statement of the specialist due to the following circumstances: 1. the Court judgment cannot be considered as unlawful, in cases when the court based it on evidences determined as admissible according to the CPC or on evidences use of which is determined to be legal. 2; the second section of article 259 indicates on lawfulness of judgment; however it does not state anything regarding the standards determined for the delivery of the court ruling. Therefore, the CPC does not contain a provision, which excludes the use of such evidences for adoption of court warrant on implementation of procedural or investigative measures restricting the constitutional rights of individuals (for example court warrant of search and seizure, imposition of seizure of property, arrest of an individual); 3. According to the Criminal Procedure Code admissibility of evidences is checked on preliminary hearing stage of the proceeding. Even in cases when based on article 239 of the CPC additional new evidence is presented during the hearing on merits the court is restricted in ability to review admissibility of such evidence and it merely decides on allowing such evidence on court hearing; 4. The issue acquires special relevance when the case is decided by the jury. Even if based on article 259 of the CPC the court is able to ignore some evidence during the judgment delivery, the similar possibility is not prescribed by the CPC with respect to a jury trial. The CPC determines that admissible evidences should be presented before the jury. Therefore, if evidence is formally compatible to the requirement determined by the CPC but is obtained in significant violation of other normative act, there is no ground for declaring it inadmissible based on article 72 of the CPC; thus, it is presented before the jury.
12. The term "obtain" envisaged in paragraph 7 of article 42 of the Constitution of Georgia has its autonomous meaning and it should be defined in the light of the aims of this constitutional provision. As it was already indicated the guarantee prescribed by paragraph 7 of article 42 of the Constitution of Georgia serves ensuring the effective protection of procedures established for evidence gathering and human rights. The mentioned guarantee can be effective only if it covers every relationship conducted in the process of acquisition of object containing information by the authorised agencies. If constitutional protection covers only some stages or some individuals and not every state agency which obtains evidence it would lead to risks of arbitrariness and ineffectiveness of the constitutional guarantee. Based on the spirit of paragraph 7 of article 42 of the Constitution of Georgia unlawfully obtained evidence does not have legal force regardless which subject obtained it or on which stage the law was violated by the relevant state authority. Otherwise, the agency responsible on prosecution would be able to arbitrarily avoid fulfilment of legal requirement by assigning evidence gathering to other agencies and giving legal force to unlawfully obtained evidences. Such approach would endanger effectiveness of the guarantee prescribed by paragraph 7 of article 42 of the Constitution.
13. Similar to paragraph 7 of article 42 of the Constitution of Georgia the first section of article 72 of the CPC refers to the evidences "obtained" in essential breach of the CPC. Despite the use of identical words the term "obtain" used in the law has autonomous meaning which is different from the meaning of the Constitutional notion.
14. The Constitutional Court agrees with the specialist's statement according to which based on the second section of article 25 of the CPC gathering and presenting evidences are the competences of the parties. For the purpose of Criminal Procedure Code the notion "obtain" constitutes acquisition of object containing information by the subjects defined by the law (the parties) for the purpose of presenting it to the court. Therefore, acquisition of object containing information by other subjects (for instance by the victim, a witness, expert) does not constitute "obtain" within the meaning of the Criminal Procedure Code. Therefore the disputed provision does not cover the instances when the evidence was unlawfully obtained by other participants of the proceeding, which do not constitute the parties of the criminal case, or do not act on behalf of them. Hereby, information which is obtained by the participant of the proceeding in essential violation of the requirement of other law, but was transferred to the party in accordance to the procedural rules constitutes admissible evidence based on the disputed version of the first section of article 72. Similarly, in cases when evidentiary information was obtained by the law enforcing agencies in violation of other law, but its procedural fixation was conducted in accordance with the requirements of the CPC, such information also constitutes admissible evidence based on the disputed provision.
15. The Criminal Procedure Code establishes free assertion principle, it does not prescribe exhaustive list of items containing evidentiary information and enables the use of object containing any information relevant for the case as evidence. Gathering evidences on criminal case is conducted from many sources, in different form and via employing different methods. At the same time the process of gathering evidences cover wide spectrum of legal relationships.
16. The procedure of gathering evidences is regulated by several normative acts. The legislator is not obliged to exhaustively prescribe every method and tool employed for gathering information relevant for the criminal case solely by the Criminal Procedure Code. Therefore, in the process of assessing constitutionality of the disputed provision the legitimacy of the legislator to determine (according to his view) the role of legal acts regulating evidence gathering in the system of legal acts and at the same time move rules regulating evidence gathering in other acts at any time also needs to be taken into consideration.
17. Current law contains rules regarding gathering some evidences not only in the Criminal Procedure Code, but also in other legislative acts. For example, the law of Georgia "On Electronic Communication", the law of Georgia "On Operative-Investigatory Activity", the law of Georgia "On Accounting and Financial Audit", the organic law of Georgia "On the Public Defender of Georgia" and other normative acts contain some regulations prescribing the opportunity to obtain information important for criminal case. For example according to article 15 of the organic law of Georgia "On the Public Defender of Georgia" "statements, appeals and letters sent to the Public Defender of Georgia by persons placed in penitentiary institutions, or other places of detention and restriction of liberty shall be confidential. They may not be opened and censored; they shall be sent immediately to the Public Defender of Georgia". According to paragraph 3 of article 19 of the same law "the meetings of the Public Defender of Georgia/a member of the Special Preventive Group with detainees, prisoners or persons whose liberty is otherwise restricted, convicted persons, persons in psychiatric facilities, old people’s and children's homes shall be confidential. Any kind of eavesdropping and surveillance shall be prohibited". Therefore, based on the disputed provision information which is obtained in violation of the mentioned requirements (eavesdropping of conversation with the Public Defender of Georgia or familiarising with the content of letter sent to him/her), but form of its procedural fixation is respected (for example questioning of the relevant person at the court, as a witness) might be used as evidence. Moreover, subparagraph "b" of the second paragraph of article 10 of the law of Georgia "On Accounting and Financial Audit" prohibits disclosure of the professional secrecy without consent of the individual. Similarly, the law of Georgia "On police" prescribes the rule of conducting some police activities. For instance - frisk and examination (article 22), special inspection and examination, including examination of a person, of an item or a vehicle (article 23), special police control (article 24) and other measures as a result of which the police might obtain information relevant for the criminal case. Similarly, according to paragraph 2 of article 5 of the law of Georgia "On Operative-Investigatory Activity" disclosure of data about Operative-Investigatory Activity by an individual to whom the data became known in relation of his/her official or other capacity results in imposition of criminal responsibility for divulgence of state secrecy. If gathering evidences is related to illegal disclosure of information to the third person by the secret employee conducting operative-investigatory activity, the hearsay of this person presented before the court will be considered as admissible evidence. At the same time breach of law will not become ground for declaring operative-investigatory measure unlawful and thus, will not result in inadmissibility of the evidence obtained by it based on paragraph 2 of article 6 of the law of Georgia "On Operative-Investigatory Activity", even though criminal responsibility might be imposed on the individual for divulgence of state secrecy and/or for commission of official misconduct.
18. The Criminal Procedure Code does not prohibit gathering and presenting information relevant for establishing circumstances of the case by the person who does not have status of the party and acts on its own initiative before the court.
19. The current version of the article 72 of the CPC does not directly prohibit the possibility to use information obtained by private individual as a result of commission of crime prescribed by the Criminal Code of Georgia as evidence on the criminal case (for example as a result of unlawful surveillance, unlawful interference in private life, unauthorised use of computer of other person). Although the first section of article 78 of the CPC implies questioning of an individual who obtained information as a witness even in cases when the court establishes that the information was unlawfully obtained it does not preclude the use of such information as evidence if the mentioned act of witness was conducted without the will and/or commission of the parties. When information is reliable and relevant declaring such information as inadmissible is related to additional difficulties. Use of obtained information as evidence is not excluded by circumstance that the private person who obtained it will be prosecuted for the committed crime.
20. The mentioned situation equally applies to information which could have been obtained by investigative agencies through conducting investigative/procedural measures prescribed by the CPC as well as to information collection of which is not possible for the parties through employing legal instruments. At the same time it is not relevant whether private person was prosecuted or not for violation of the law, for instance for violating privacy of communication, secrecy of adoption, for coercion and/or blackmail, if it is allowed to use information relevant for criminal case collected by him/her through unlawful means as evidence against accused. The situation is different in cases when investigative agencies conduct evidence gathering through private individuals. If the law enables the possibility to use information collected through violation of fundamental human rights as evidence during criminal proceeding it will promote violation of legal requirements by private individuals and create the opportunity for the parties of the proceeding to manipulate with the mentioned possibility.
21. Although the CPC does not prescribe direct prohibition, evidence gathering through severe violation of fundamental human rights is incompatible with the essence of the state based on the Rule of Law, including but not limited to the cases when collection of information is conducted by private individual as a result of encouragement from the state representatives.
22. Legitimacy of the court judgment or/and any other summarising decision substantially depends on admissibility and reliability of the evidences used by the body responsible on administration of criminal proceeding for reasoning the decision. Therefore, in cases when admitting information unlawfully obtained by the private individuals as evidence would substantially harm rights of the accused use of such information as evidence is intolerable.
23. The Claimant party also indicates that based on the disputed provision evidence obtained in essential breach of the European Convention on Human Rights and Fundamental Freedoms might be declared admissible. According to the second sentence of the first paragraph of article 7 of the law of Georgia "On Normative Acts" the European Convention on Human Rights and Fundamental Freedoms (hereinafter - the Convention) constitutes normative act of Georgia (ratified by the Parliament of Georgia based on the Resolution N1940-IIs of May 12, 1999). The legal relationships involving evidence gathering very often falls within the ambit of the human rights guaranteed by the Convention. For example the European Court of Human Rights prohibits the use of evidence obtained as a result of incitement by the State agents (Judgment of the European Court of Human Rights of October 26, 2006 on the case of *Khudobin v. Russia,* application №59696/00, paragraphs 133-135). Because the use of evidence obtained as a result of incitement may result in the fairness of the trial being undermined (Judgment of the European Court of Human Rights of December 15, 2005 on the case of *Vanyan v. Russia,* Application №53203/99, paragraph 47). The European Court establishes strict standard on admissibility of anonymous testimony in the criminal proceeding (for instance see Judgement of European Court of Human Rights of December 15, 2011, on the case of *Al-Khawaja and Tahery v. The United Kingdom*, paragraph 46). Therefore, the Constitutional Court does not exclude the possibility of violation of standards prescribed by the Convention in the process of evidence gathering on the criminal case, regardless the fact whether these standards are prescribed by the Criminal Procedure Code of Georgia or not.
24. According to the second sentence of the second paragraph of article 6 of the Constitution of Georgia a treaty or international agreement of Georgia, unless it comes into conflict with the Constitution or the Constitutional Agreement of Georgia, shall take precedence over domestic normative acts. Therefore according to the Constitution of Georgia if the CPC does not contain or does not fully express standard established by international treaties, including the Convention the investigative agencies are bound with the requirements of the Convention unless these requirements contradict with the Constitution of Georgia. At the same time the above mentioned does not preclude assessment of constitutionality of the rules prescribed by the Criminal Procedure Code. The rules of admissibility of evidences established by the Criminal Procedure Code have independent existence; thus, create need for autonomous constitutional-legal assessment.
25. Based on the above mentioned, the Georgian legislation in force, international treaties of Georgia and the Constitution of Georgia contain rules on evidence gathering which are not covered by the CPC, and the first section of article 72 of the CPC creates the possibility for declaring evidences obtained in breach of the mentioned acts admissible on a criminal case.
26. As was already indicated, recognition of unlawfully obtained evidences to be forceless might often cause invalidation of incontrovertible evidences. The Constitutional Court does not preclude the possibility of establishing exceptional rules for some cases in which unlawfully obtained evidence might be declared valid. However, the mentioned should not cause unjustifiable restriction of constitutional rights of the participant of the proceeding and/or third parties. In the process of determining exceptional cases the promotion of arbitrariness from the state agencies and purposeful and intentional violation of the law by the prosecuting party during evidence gathering, and conviction of the accused based on such evidences shall be excluded.
27. In the present dispute the rule prescribed by the first section of article 72 of the CPC operates without exception. The mentioned provision is applied generally and does not indicate to any condition which would underline exceptional nature of allowing legal force of the evidences acquired in breach of the law. Allowing legal force of evidences obtained in breach of the law in all cases without exceptions and limitations encourages arbitrariness of the state agencies responsible for evidence gathering and contains irreparable risks of violation of fundamental rights and freedoms of an individual. Such approach involves risks of violation of human rights and freedoms in the process of evidence gathering and contradicts with paragraph 7 of article 42 of the Constitution of Georgia.
28. Based on above mentioned, the Constitutional Court of Georgia declares that the wording “this Code" of the first section of article 72 of the Criminal Procedure Code of Georgia is unconstitutional with respect to paragraph 7 of Article 42 of the Constitution of Georgia.

**Constitutionality of the wording "by this code" of the second section of article 72 of the Criminal Procedure Code of Georgia with respect to paragraph 7 of Article 42 of the Constitution of Georgia**

1. The Claimant considers that the wording "by this Code" of the second section of article 72 of the CPC is unconstitutional, because it implies admissibility of evidences which are obtained not based on the Criminal Procedure Code but based on other normative act, but reasonable doubt about its possible replacement, essential change of its characteristics or disappearance of the existing trace on it is not negated.
2. Within the scope of the present dispute it is important to determine the regulatory scope of the second section of article 72 of the CPC and the evidences inadmissibility of which is established by this provision. According to the mentioned disputed provision "evidence is also inadmissible if it is obtained according to the rules prescribed by this code, but reasonable doubt about its possible replacement, essential change in its characteristics or disappearance of the existing trace on it is not negated". This rule of admissibility of evidences relates to the authenticity of evidence and ensures exclusion of unauthentic evidence from the criminal proceeding.
3. The Court has already indicated to the necessity of declaring evidence inadmissible in cases when it is obtained in violation of the CPC and/or any other special laws. The Court declared the disputed wording of the first section of article 72 of the CPC, which related inadmissibility of evidences only to the essential breach of requirements of the CPC, unconstitutional. Therefore, the rules prescribed by the second section of article 72 of the CPC regulate only evidences which are obtained in accordance to both the CPC and any other laws regulating evidence gathering but in relation of these evidences reasonable doubt exists on their authenticity. The mentioned provision refers to the evidences which are "obtained according to the rules prescribed by this Code" and extends the rule prescribed by the second section of article 72 of the CPC on each of the evidences which are obtained pursuant to the rules prescribed by the Criminal Procedure Code. Therefore regulatory scope of the provision does not extend on evidences obtained in violation of the rules not prescribed by the Criminal Procedure Code. According to article 72 of the CPC if evidence relevant for criminal case is obtained pursuant to any other legislative acts it should be in compliance with the requirements of the Criminal Procedure Code as well. For example if information obtained based on the law of Georgia "On police" is presented before the court, its compliance with the requirements of the Criminal Procedure Code should also be checked. If as a result of assessment of the evidence the court determines that the requirements of the Criminal Procedure Code are not violated, thus evidence will be considered as obtained in accordance with the requirements of the Code and the second section of article 72 of the CPC will apply to it, which declares evidence inadmissible if reasonable doubt about its possible replacement, essential change of its characteristics or disappearance of the existing trace on it is not negated.
4. The Court cannot uphold the position of the Claimant party according to which in cases when evidence is obtained pursuant to other normative acts, for example the law of Georgia "On police" the requirements of the second section of article 72 do not apply to it. The analysis of the Criminal Procedure Code clarifies that all evidences which are not obtained in accordance to the Criminal Procedure Code constitute evidence obtained in violation of this code. Therefore, application of the second section of article 72 of the Criminal Procedure Code also extends to the evidences obtained pursuant to other laws, if in the process of obtaining the evidence the requirements of the Criminal Procedure Code are not violated.
5. Based on all above mentioned the Constitutional Court declares that the Constitutional Claim N579 shall not be upheld in the part disputing the constitutionality of the wording "by this code" of the second section of article 72 of the Criminal Procedure Code of Georgia with respect to paragraph 7 of Article 42 of the Constitution of Georgia.

**III**

**Ruling Part**

Based on subparagraph “f” of the paragraph 1 and paragraph 2 of article 89 of the Constitution of Georgia, subparagraph “e” of paragraph 1 of article 19, paragraphs 2 and 8 of article 21, paragraphs 2, 4, 7 and 8 of article 43, paragraph 1 of article 45 of the organic law of Georgia “On The Constitutional Court of Georgia”, paragraphs 1 and 2 of article 7, paragraph 4 of article 24 articles 30, 31, 32 and 33 of the Law of Georgia “On Constitutional Legal Proceedings”

**THE CONSTITUTIONAL COURT**

**RULES:**

1. The constitutional claim N579 (Citizen of Georgia Maia Robakidze v. the Parliament of Georgia) shall be partially upheld and the wording “this Code" of the first section of article 72 of the Criminal Procedure Code of Georgia shall be declared unconstitutional with respect to paragraph 7 of Article 42 of the Constitution of Georgia.

2. The constitutional claim N579 (Citizen of Georgia Maia Robakidze v. the Parliament of Georgia) shall not be upheld in a part disputing the constitutionality of the wording "by this Code" of the second section of article 72 of the Criminal Procedure Code of Georgia with respect to paragraph 7 of Article 42 of the Constitution of Georgia.

3. The unconstitutional provision shall be declared invalid from the moment of publishing this Judgment.

4. This judgment is in force from the moment of its public announcement on the hearing of the Constitutional Court.

5. The judgment is final and is not subject to appeal or review.

6. A copy of the judgment shall be sent to: the parties, the President, the Government and the Supreme Court of Georgia.

7. The judgment shall be published in the “Legislative Herald of Georgia” within the period of 15 days.

**Composition of the board:**

Zaza Tavadze

Otar Sichinava

Lali Papiashvili

Tamaz Tsabutashvili