
**CITIZENS OF GEORGIA – DAVID KANDELAKI,
NATALIA DVALI, ZURAB DAVITASHVILI, EMZAR
GOGUADZE, GIORGI MELADZE
AND MAMUKA PACHUASHVIL
VERSUS THE PARLIAMENT OF GEORGIA**

N1/2/569

Batumi, 11 April 2014

Composition of the Board:

1. Konstantin Vardzelashvili – Chariman of the sitting; Judge Rapporteur;
2. Ketevan Eremadze – Member;
3. Maia Kopaleishvili – Member.

Secretary of the Sitting:

Darejan Chaligava

Title of the Dispute:

Citizens of Georgia – David Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili versus the Parliament of Georgia.

Subject of the Dispute:

Constitutionality of paragraph 3 of Article 2 of the law of Georgia (N833-6b) “On Amendments to the law of Georgia “On Public Broadcasting” (the authority of the board of trustees as defined by Article 24 of the law of Georgia “On Public Broadcasting” provided for by paragraph 4 of Article 1 of this law starts from the moment of electing no less than 7 members of the board of trustees by the Parliament of Georgia) (Wording dated on 20 November 2013) with respect to the first paragraph of Article 29 of the constitution of Georgia.

Participants to the case:

Claimant - Giorgi Meladze and representative of the Claimant Taniel Chochishvili; representatives of the Parliament of Georgia – Tamar Kordzaia and Zurab Matcharadze; specialists – Lasha Tughushi and Zviad Koridze.

I

Descriptive Part

1. On 11 December 2013, a constitutional claim (registration N569) was lodged with the constitutional court of Georgia by citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Fachuashvili. On 12 December 2013, the constitutional claim was referred to the First Board of the Constitutional Court for its consideration.

In order to decide about the admissibility of the constitutional claim for the consideration on the merits, an administering sitting of the First Board of the constitutional court was held in the form of oral hearing on 6 February 2014.

2. On 19 February 2014, by the Recording Notice N1/1/569, the First Board of the Constitutional Court of Georgia admitted the constitutional claim for consideration on the merits on the part, which dealt with constitutionality of paragraph 3 of Article 2 of the law of Georgia (N833-რს) “On Amendments to the law of Georgia “On Public Broadcasting” (the authority of the board of trustees as defined by Article 24 of the law of Georgia “On Public Broadcasting” provided for by paragraph 4 of Article 1 of this law starts from the moment of electing no less than 7 members of the board of trustees by the Parliament of Georgia) (Wording dated on 20 November 2013) with respect to the first paragraph of Article 29 of the constitution of Georgia.

3. The sitting of the First Board of the Constitutional Court of Georgia was held with an oral hearing on 26 February 2014.

4. The grounds for filing the constitutional claim N569 are: subparagraph “f” of the first paragraph of Article 89 of the constitution of Georgia; subparagraph “e” of the first paragraph of Article 1 and subparagraph “a” of the first paragraph of Article 39 of the organic law of Georgia “On the Constitutional Court of Georgia”; paragraph 2 of Article 1 and paragraph 1 of Article 10 of the law of Georgia “On the Constitutional Legal Proceedings”.

5. Following the changes added to the law of Georgia “On Public Broadcasting” on 12 July and 20 November 2013, a new rule for composition of the board of trustees of the Public Broadcaster was laid down. In particular, under the rule, the board of trustees is composed of 9 members – trustees, two trustees are elected by the Parliament of Georgia by the majority of the number of the members of the Parliament on the current nominal list upon the submission of the Public Defender of Georgia; three trustees – upon the submission of the parliamentary majority (in case of presence of the parliamentary majority – parliamentary factions); three trustees upon the submission of no less than one fourth of the members of the Parliament not belonging to the Parliamentary majority; and one trustee – upon the submission of the Supreme Council of the Autonomous republic of Adjara. No later than 10 calendar days from the moment of entry into legal force of the given changes, the Chairman of the Parliament of Georgia shall announce about holding a competition for election of members of the new board of trustees. Before the start of the authority of a new board of trustees, an acting board of trustees are limited to adopt any decision, save for recommendations.

6. According to the disputed norm, the authority of a new board of trustees starts on the moment of election of no less than 7 members of the board of trustees by the Parliament of Georgia, after which the authority of acting board of trustees is terminated.

7. Under the first paragraph of Article 29 of the Constitution of Georgia,

“every citizen of Georgia shall have the right to hold any state position if he/she meets the requirements established by legislation”.

8. The Claimant asserts that the first paragraph of Article 29 of the Constitution of Georgia extends protection of an individual’s right to hold any position, freely perform official duties assigned to him/her and not to be dismissed without justification. Besides, the Claimant explains that the given provision of the constitution refers to the state officials, as well as those persons, who are financed from the state budget.

9. The Claimant, at the sitting for consideration of the case on the merits, additionally noted that the given constitutional rule refer to all those positions that function by the state funding, are created by the legislation, exert the public authority and enjoy high public interest. As the Claimant clarified, the differentiation between the constitutional definition of the public service and the definition indicated in the law of Georgia “On Public Service” should be made. Considering the fact that the constitution of Georgia is a normative act that was legally entered into force before the law of Georgia “On Public Service”, therefore, the latter cannot interpret the definition provided in the constitution of Georgia. All of this, in the opinion of the Claimant, fully makes the public broadcaster as an entity subject to protection of the first paragraph of Article 29 of the constitution of Georgia.

10. As the Claimant asserts, pre-term dismissal of members of the board of trustees, without any motivation, amounts to the breach of the first paragraph of Article 29 of the constitution of Georgia. The right to hold the public position, under the interpretation provided by the Claimant, implies the prohibition of discrimination based on political affiliation in the process of taking the given post. In the mentioned case, the disputed norm accords the right to the Parliament of Georgia to compose the board of trustees of the public broadcaster based on political affiliation, which is inadmissible and in the long run, may lead to introduction of “ideological corruption” in the country.

11. The Claimant also noted that although the State does not have a constitutional obligation to set up the public broadcaster, but if it does, then it is obliged to respect its independence within the scopes of the rights foreseen by the constitution. As the Claimant clarifies, interference exercised as a result of the legislative changes added by the Parliament of Georgia is unjustified, as it gives rise to disruption of “tradition of sustainability” within the board of trustees. The given factor represents one of the most important elements in the process of ensuring the independence of the Public Broadcaster, without which, the broadcaster would turn into non-functioning institute. As the Claimant asserts, non-interference with the activities of a trustee within the timeframe as defined by the law constitutes one of key elements of the safeguards on independence of the public broadcaster, which is unconditionally breached by the disputed norm through pre-term dismissal of members of the board of trustees.

12. As the Claimant declares, a new rule for composition of the board

of trustees of the public broadcaster is basically acceptable. The problem is caused by the process of transition. Namely, after moving to the new system, the authority of acting members of the board of trustees are terminated ahead of time, and new members will be directly obliged before the political team of the incumbent Parliament. According to the interpretation provided by the Claimant, the main principle of existence of the public broadcaster is stability, tradition and sustainability. Only these factors can be its guarantee for quality and success indicator. Political intervention will lead to instability and endanger the exercise of this principle.

13. In order to shore up its arguments, the Claimant additionally referred to different international agreements, resolutions and recommendations of the Council of Europe, opinions of the special representative of the Organization for Security and Cooperation in Europe (OSCE) on media issues, as well as to recommendations of British non-governmental organization “Article 19”.

14. On the basis of the aforementioned argumentations, in the opinion of the Claimant, the disputed norm should be deemed as unconstitutional with respect to the first paragraph of Article 29 of the constitution of Georgia.

15. The Respondent indicated that the public broadcaster is not an institution ensured by the constitution of Georgia and its existence depends upon the free will of the State. The State has a positive obligation to ensure free media environment and the space for dissemination of impartial information in the country, however, it is up to the State how to achieve it. Respectively, given that the public broadcaster as well as its governing bodies are not the institutions foreseen by the constitution of Georgia, they must be placed under the sphere of protection of freedom of labor – as guaranteed by the first paragraph of Article 30 of the constitution of Georgia. Nevertheless, the Respondent does not deny that the State is empowered to establish higher standards, as opposed to those provided for by the labor laws, to persons working at the structure created by the State.

16. The Respondent also indicated that changes added at the legislative level is conditioned by the necessity of the reform, which in its way, intended to bring the law in compliance with the constitution. In particular, after the presidential elections of 2013, the constitutional changes came into legal force, under which, *inter alia*, the President of Georgia exerts direct powers conferred upon him/her only by the constitution. Therefore, the old rule, which envisioned active participation of the President in the process of composition of the board of trustees of the public broadcaster, was modified and the president of Georgia was deprived of the given power conferred upon him/her by the law.

17. The Respondent also noted that introduction of new rule for composition of the board of trustees of the public broadcaster was conditioned by ineffectiveness of the board of trustees elected by the old rule. In particular, as representatives of the parliament of Georgia declared, in the course of existence of the board of trustees composed of 15 members, the public broadcaster did not

take any positive steps towards its development. On the contrary, in the recent years, the public broadcaster was constantly facing the management crisis, which triggered the parliament of Georgia to carry out an immediate reform.

18. As the Respondent asserts, while passing the disputed norm, the legislature was guided by the main aim – to ensure formation of the board of trustees of pluralistic public broadcaster, where all groups of the society would be presented in maximum diversity. Namely, the intention of the legislature in the disputed norm is to ensure that the board of trustees of the public broadcaster is maximally transparent and free from the domination of single political subject. The old rule, as the representatives of the Parliament of Georgia stated, failed to ensure it, and the new rule is clearly better and justifies the aim sought.

19. The Respondent also mentioned that the new rule of election of the board of trustees of the public broadcaster is different from the old one, because it lays down more representative form of composition of the board of trustees. Therefore, it is impossible to merge members of the board of trustees elected by a new rule into acting members of the board of trustees. Change added to the law “On Public Broadcasting” foresees such unique rule of quota-setting that is aimed to create the pluralistic environment and demonstrate diversity in the board of trustees of the public broadcaster. The aforementioned would rule out the selection of such way by the legislator that would lead to uniting newly elected trustees with the old ones in the board of trustees.

20. Stemming from all the aforementioned, the Respondent believes that the disputed norm is in compliance with the constitution of Georgia.

21. At the sitting for consideration of the case on merits, the Respondent made a motion before the constitutional court to invite independent experts Lasha Tughushi and Zviad Koridze as the specialists to the case. As the Respondent explained, the given persons have in-depth and exhaustive knowledge in media issues. Besides, they were involved in the making of the reform from the very beginning and thus are capable to provide the court with the required information. The constitutional court of Georgia satisfied their motion.

22. Lasha Tughushi declared at the sitting for consideration of the case on merits, that he does not consider the members of the board of trustees of the public broadcaster as official persons. In his opinion, such legal logics is a huge non-sense and to view the case through this prism shall lead to inaccurate perception of the public broadcaster as a special media institution.

23. According to the specialist’s interpretation, the previous rule for composition of the board of trustees of the public broadcaster was not good and needed to be reformed. Lasha Tughushi stressed those main reasons underlying the legislative changes added to the law “On Public Broadcasting”. Primarily, it is to ensure higher standard of financial transparency. In particular, the legislative changes introduce the rule that implies the obligation of the public broadcaster to publish the findings of the audit and conduct of the audit by international auditor. The novation in question is conditioned by the yours-long crisis practice existing

in the public broadcaster, which was manifested by accumulation of the debt in the amount of millions of GEL toward the state budget. In the viewpoint of the specialist, the new rule constitutes a significant step taken towards the financial transparency and will facilitate addressing the existing problems.

24. Lasha Tughushi considered enhancement of the transparency of the selection procedure of members of the board of trustees of the public broadcaster as the second most important characteristics of the reform. He also indicated that four candidates elected by the new rule had undergone the complex selection process comprised of several phases. They had to participate in online debates in live streaming, where they openly demonstrated their own concepts with regard to development of the public broadcaster. Besides, they spoke before the parliament of Georgia and were subject to hearings at the parliamentary committees. Thus, the public attention towards the selecting competition of candidates for the board of trustees of the public broadcaster was high, which, in the opinion of Lasha Tughushi, makes the transparency of the process irreversible.

25. While speaking about the third factor of significance of the reform, the specialist indicated that the new rule for formation of the board of trustees set out much higher requirements with regard to the competency of candidates that it was practiced under the previously applicable rule. For example, unlike previously existing requirements, it is now required for candidates to have 10 year working experience in the relevant area, instead of 5 years. 5 year experience out of which they should have in journalisms, human rights protection, finances, electronic communication, arts, writing, or scientific-teaching fields. The given novelty, in the opinion of Lasha Tghushi, makes it impossible to integrate members of a new board of trustees with members of the acting board of trustees.

26. The Specialist also underlined the positive sides that entailed introduction of the substantially new system of formation of the board of trustees. Lasha Tughushi noted that stemming from the existing reality in Georgia, exclusion of the executive government from the process of formation of the board of trustees of the public broadcaster was a right measure. In his opinion, since development of the democratic system in our country is still in the making and the executive government wields the levers for potential interference with activities of the public broadcaster, entrusting the parliament with the full authority to compose the board of trustees is tremendously reasonable way. Also, it is important to have the public defender involved in the process in terms of assigning the priorities for human rights, which was positively assessed by the OSCE representative as well. In the opinion of Lasha Tughushi, participation of the ombudsman in the process of composition of the board of trustees would be a step forward towards the European integration of Georgia. As he also declared, the new rule is important in terms of regional development because of two reasons. The first, Integration of Adjara's television takes place into the public broadcaster, which will make its operation more effective and will anchor European principle "One State, one public broadcaster". On the other hand, the supreme council of the autonomous

republic of Adjara steps in the composition of the board of trustees, which will have the possibility to protect its own interests at central level.

27. Stemming from the aforementioned, Lasha Tughushi thinks that the most optimal solution from the existing situation is to terminate the term of the authority of the acting board of trustees ahead of time, because practically simultaneous operation of the two different systems are less likely. In the opinion of the specialist, the new rule and tasks outlined under this rule are clearly progressive and while evaluating its proportionality, it will outweigh the legitimate interest of the claimants. Besides, this rule is necessary to be immediately enacted. He provided the example of Slovakia, where while implementing the reform of the public broadcaster, the authority of members of the board of trustees were terminated before the term.

28. At the sitting for consideration of the case on merits, Zviad Kordize indicated that in his opinion, the given case should not be a subject of the constitutional dispute. In 1995, upon elaboration of the constitution of Georgia as well as upon amendments added to the constitution in 2004, 2006 and 2010, the legislature did not envisage the public broadcaster in the constitution. Respectively, the norms that related to the state institutions regulated by the constitution, for example, to the Public Defender, General Auditor and others, are irrelevant in reference to the public broadcaster. The Public Broadcaster is not a state body, public democratic institute, which are assigned absolutely different status by the law. As Zviad Koridze explained, the aforementioned rules out the possibility of the dispute of trustees as official persons before the constitutional court.

29. The Specialist also spoke about the reform carried out at the Public Broadcaster. In his statement, a new system offers such model of diversification that contains less risk of exerting political influence upon the board of trustees. Zviad Koridze cited the opinion of OSCE Special Representative on Freedom of the Media, Dunja Mijatović, in which it is underlined that “Diversification is especially important when creating oversight bodies of the public broadcaster in the countries, where there is not stable democracy, where there is always the risk of one political party gaining the simple majority”. As the specialists indicate, the manifestation of precisely such tendencies took place in 2008-2012 years at the Parliament of Georgia and similar attempts are discernable in present composition of the parliament elected in 2012.

30. Zviad Koridze gave the examples of several countries about political pressure exerted upon the public broadcaster. As he stated, the United Kingdom, such a highly developed country repeatedly faced the similar crisis. More controversial political pressure was exerted upon the public broadcasters of Poland and Slovakia, where the authoritarian regimes easily managed to gain influences over the public broadcaster. Therefore, the political institutions are always accompanied by analogous risks. They always want to secure the right to influence independent institutions of similar type. As the specialist clarified, the public broadcaster as a democratic institution starts truly functioning when

it is not susceptible to political crisis. The moment when the public broadcaster is affected by political crisis, then there is in place the matrix implying that such public broadcaster is political supplement, its substantial tool.

31. The Specialist also spoke about the factors triggering the reform. In his opinion, in the first place, the old rule of composition of the board of trustees was not admissible, as the executive government acted in an enclosed circle and through its domination managed to gain influence over the board of trustees of the public broadcaster. Besides, after the board of trustees lost the quorum required to make a decision in 2013, it resulted to necessity of election of new trustees, it is natural, and stemming from the existing situation, application of the new rule should be occurred. Timely formation of a new board of trustees is also conditioned by the fact that the public broadcaster with its existing incapable board, cannot approve the budget, which gives rise to the funding of the television of Adjara from the Reserve Funds of the Government. The aforementioned contradicts the essence of the reform and makes the television of Adjara dependent to the central government.

32. Zviad Koridze also provided the constitutional court with information about the 1999 recommendation of the Committee of Ministers of the Council of Europe, under which, the supervision board of the public broadcaster does not constitute an inviolable body and it is subject to dissolution, if it is not pluralistic and does not reflect the interests of all the groups of the public. In his opinion, there is the legitimate aim of democratic development of the society defined by the disputed norm, which will outweigh the interests of the Claimants.

33. Stemming from the all the aforementioned, the specialist Zviad Koridze considers that the constitutional court should not satisfy the constitutional claim.

II

Motivational Part

1. According to the first paragraph of Article 29 of the constitution of Georgia, “Every citizen of Georgia shall have the right to hold any state position if he/she meets the requirements established by legislation”, and the second paragraph of the same Article stipulates that “The conditions of public office shall be determined by law”. These norms of the constitution fortifies the right of a citizen of Georgia, to hold both elective and appointive positions and determines the constitutional grounds for the exercise of public office. Besides, the given provision of the constitution contains not only the guarantees for holding specific positions, but also the guarantees for unhindered exercise of official duties and for ungrounded dismissal from the office.

2. Hence, Article 29 of the constitution obligates the State to establish reasonable conditions of public office activities and not to restrict in an unjustified manner the right of a citizen to participate in the state governance, to exercise the function of public importance.

3. According to the interpretation of the constitutional court, “public office” is a constitutional term, which must be construed through its autonomous constitutional meaning, bearing in mind its nature and its constitutional and legal significance” (Recording Notice N1/1/569 of 19 February 2014 of the constitutional court of Georgia on the case “Citizens of Georgia – David Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili versus the Parliament of Georgia”, II-25). For the purposes of Article 29 of the constitution, the public office is a professional activity at the state and local self-government bodies, at the institutions created with a view to exercise of other public functions.

4. It should be stressed that for the purposes of the constitution, it would be incorrect in principle to consider only state-political officials and civil servants determined by the law in the notion “Public office”. Such narrow interpretation of the constitutional term would leave other persons exercising the public functions beyond the constitutional and legal guarantees, would leave significant segment of activities of public nature without adequate constitutional regulation, which, because of different reasons, does not belong to civil service under the applicable legislation. By doing so, discretion of the national authorities in the process of appointment (election) of the persons executing tasks of public nature and adoption of the norms regulating the activities of civil service would have been unjustifiably enlarged, which would contradict with the aims of Article 29 of the constitution.

5. Activities at public office, in its essence, represents special, specific segment of labor relations. Its specificity is primarily conditioned by the fact that in this case, an employer is the State. Labor remuneration is paid from the State budget and, as the aggregate of labor relations funded by the State, in a certain way is the state resource, and every citizen should have equal access to it.

6. The State public officials exercise and promote activities of public nature. In the process of exercising public governance, they within the scopes of their competence prepare, take decisions or/and control their execution, and thus, they serve the public interests. Persons who are oriented on implementation of the public aims and who are performing the public functions, independently of the fact, whether or not they represent civil servants or the public-political officials as defined by the law, with a view to efficiently and fully carrying out their public functions, they are necessary to enjoy the constitutional safeguards envisaged in Article 29 of the constitution of Georgia.

7. By honoring the right to hold any state position, the constitution of Georgia strives, on the one hand, to ensure equal access for citizens of Georgia to the public office in line with reasonable and constitutional requirements, and on the other hand, to protect the public servant from unjustified interference in his/her activities, as to enable him/her to properly perform the obligations and duties imposed upon him/her by the constitution and law.

8. As it was noted above, activities of the public state officials serve the

implementation of the state functions and important public interests. Stemming from the diversified nature of the state functions and public interests, there are diverse type of public offices and therefore, the conditions and rule of holding the public office and dismissal from the public office.

9. The status of this or that public office is conditioned by the nature, its essence of respective activities. In particular, it is important to ascertain if the given office belongs to legislative, executive, judicial authority, or is other constitutional body, or it does not have directly defined constitutional status. While defining the constitutional status of the public office, one should also take into account the character of functions to be implemented. Naturally, qualification requirements needed for the public officials with different statuses and constitutional guarantees for non-interference with their activities vary. For example, pursuant to different functions and constitutional-legal roles of judge, public defender, member of the parliament and member of the government (minister), the given subjects should be considered as the public officials equipped with separate safeguards.

10. This is exactly why, in order to assess the interference with the right protected by Article 29 of the constitution of Georgia, it is significant to determine the constitutional and legal status of the claimants, their scope of activities with due regard to specificity and purposes, to establish whether or not they represent the subjects protected by Article 29 of the constitution and whether or not there was interference with their right.

11. The constitutional court of Georgia, in its Recording Notice N1/1/569 of 19 February, 2014 construed the legal nature of the board of trustees and deemed its members as persons protected by Article 29 of the constitution of Georgia. However, at the sitting for consideration of the case on merits, the Respondent – representative of the parliament of Georgia, cast doubt on this issue. The Respondent believes that the disputed norm, presumably, might be linked with Article 30 of the constitution of Georgia. Nevertheless the fact that the given issue was decided by the constitutional court at the stage of admitting the case for consideration on the merits, the court found it expedient to examine the arguments provided by the Respondent.

12. The constitutional court explains that the right to exercise labor activities is also protected by the first paragraph of Article 30 of the constitution of Georgia, under which “labor shall be free”. The basic purpose of Article 30 as well as Article 29 of the constitution is to ensure the possibility of persons to be employed under the procedure defined by the law, to hold this or that positions in compliance with their own capacity, skills, qualification, capabilities and perform their labor activities without hindrance. At the same time, there is difference in principle between these two Articles, which defines the scope of their activities.

13. The content of the rights provided for by Articles 29 and 30 of the constitution of Georgia, their scopes differ. A person’s scope of activity and specificity

of his/her work depend on the given provisions of the constitution of Georgia, under protection of which this or that legal relationship falls. Simultaneously, it should be mentioned that in order to settle the given constitutional dispute, the constitutional court does not face the need to provide exhaustive interpretation of the scopes of these Articles. Also, it is not excluded that in some cases, the normative act may be simultaneously linked with the right as guaranteed by the both abovementioned Articles of the constitution.

14. As it was mentioned, Article 29 of the constitution of Georgia is linked to the constitutional right of an individual to implement activity in the public sphere, to hold any state position, to exercise this or that power regulated by the state institutions. In this sense, Article 29 of the constitution establishes the special requirements different from those of Article 30, and its scope of application is confined to the state office, public sphere, it is not connected to the private sector. Conversely, Article 30 of the constitution lays down constitutional-legal standards for protecting labor relations that were arisen from the private sector. Therefore, in order to define which Article of the constitution extends its protection to the rights of a trustee, it is necessary to ascertain implementation of what kind of functions (public or private) the board of trustees are supposed to serve and what role is imposed upon trustees in the process of implementation of these tasks.

15. Pursuant to the Georgian legislation, the public broadcaster is the legal entity of public law, established on the basis of the state property and funded by the state, that is an independent body and accountable for the public.

16. The main function of the public broadcaster is to deliver various programmes to the public, which are free from political and commercial influences, informing about thoughts prevailing in the public in terms of pluralism, ethnic, cultural, linguistic, religion, age and gender diversity, and providing timely and comprehensive information to the audience about the developments in the occupied territories of Georgia and etc.

17. The public broadcaster is the state-funded functioning organization, at the same time, it is the institution that is independent from both individuals and the state, oriented on public interests and accountable before the public at large. The State participation in creating and functioning the public broadcaster serves only these purposes and is limited to achieve this task only.

18. Member of the board of trustees is a person who is entrusted by the public, his/her assignment is to ensure that obligations of the public broadcaster as defined by the law are duly implemented. One of the main functions of the board of trustees is to ensure that the public-funded public broadcaster is free from the governmental, political and commercial influences, and functions in line with the public interests and is accountable before the public at large. Trustees in exercising the given activities, execute the legislation, carry out the control how the legislation is observed, they take decisions within the scopes of their competence and, thus, they serve to the protection of the important public interests.

19. In addition, the analysis of the functions of the board of trustees that are determined by the law shows that the trustees provide management and administration of the legal entity of public law - the public broadcaster in compliance with relevant laws. According to the law, the board of trustees sets out programme priorities of the public broadcaster; it approves the statute upon submission of the director general of the public broadcaster; with due guarantee for editorial independence of its structural units, the board of trustees, upon the submission of the director general, is entitled to add changes to the statute and budget of the public broadcaster; it approves the budget of the broadcaster and its implementation report; it hears quarterly reports on implementation of activities; it gives its consent to the director general in concluding such transactions the amount of which is more than 1% of the total budget of the public broadcaster and defines the terms, quantity and conditions of labor remuneration of the director general; upon submission of the director general, it adopts the staff list and staff salaries, wage-fund, including, bonus fund and lays down general conditions of labor contracts for employees of the public broadcaster.

20. It is also significant to be noted that a member of the board of trustees is elected by the parliament of Georgia (before the recent amendments, a trustee was elected by the parliament upon submission of the president of Georgia). Public-type of functions of members of the board of trustees are assigned by the decision of the parliament of Georgia. Therefore, in the process of implementation of the given activities, the parliament of Georgia cannot be discussed as private employer for the purposes of Article 30 of the constitution of Georgia. Hence, the rule as defined by the law about election of a member of the board of trustees, as well as the condition that a member of the board of trustees performs his/her legal obligation based on the decision of the parliament of Georgia brings activities of the member of the board of trustees into the ambit of Article 29 of the constitution of Georgia, and at the same time, excludes its reference to Article 30 of the constitution of Georgia.

21. The constitutional court of Georgia believes that the opinions of the respondent and specialists invited to the case are wrong in regard that Article 29 of the constitution of Georgia extends its protection only to state political officials and civil servants and that bringing members of the board into the circle protected by Article 29 of the constitution of Georgia, considering them as state officials would diminish the quality of their independence and exposes the public broadcaster to the danger of turning into the state television.

22. As it was mentioned above, the claimants contest constitutionality of paragraph 3 of Article 2 of the law of Georgia (N833-სს) “On Amendments to the law of Georgia “On Public Broadcasting” (the authority of the board of trustees as defined by Article 24 of the law of Georgia “On Public Broadcasting” provided for by paragraph 4 of Article 1 of this law starts from the moment of electing no less than 7 members of the board of trustees by the Parliament of Georgia) (Wording of 20 November 2013).

23. Pursuant to the disputed norm, enactment of the powers of a new board of trustees elected on the basis of the rule provided for by the amendments added to the law of Georgia “On Public Broadcaster” of 12 July 2013 and 20 November 2013 starts on the moment of election of no less than 7 members of the board of trustees by the Parliament of Georgia. Acknowledgment of the powers of the newly elected board of trustees will automatically result in pre-term termination of the powers of acting board of trustees. This opinion is shared by the Respondent – representative of the parliament of Georgia.

24. Consequently, the disputed norm constitutes the legal ground for pre-term termination of the powers of the claimants. As a result of application of the disputed norm, acting members of the board of trustees will be unable to exercise their official powers. Thus, the disputed norm amounts to interference with the claimant’s rights protected by Article 29 of the constitution of Georgia and requires the constitutional and legal scrutiny.

25. After establishing the interference with constitutional right about activities on the public office, it is important to define the constitutional and legal scopes and grounds of the interference.

26. As the constitutional court of Georgia construed, the principle of rule of law based state “brings the actions of the state authorities including legislative authorities, into strict constitutional and legal frames” (Decision N2/2-389 of 26 October 2007 of the constitutional court of Georgia on the case “A citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and the President of Georgia”, II-18). Constitutional and legal restriction of the legislative authorities means that any legislative act should be in compliance with the requirements of the constitution in terms of formal as well as substantive constitutionality. In the given case, the law that defines the conditions of the state office, should be in conformity with the requirements of Article 29 of the constitution of Georgia in formal as well as substantive contents.

27. Constitutional standards to protect the applicable rights of this or that state office may be emanate from its constitutional status. Besides, necessity for high constitutional standard may be linked with the peculiarities of implemented activities, as the defined type of state office, through its content and purpose requires special constitutional protection. In case of absence of such guarantees, constitutional and legal guarantees of certain state offices would acquire fictitious character.

28. Requirement to ensure independence of the actions of the public official stems from the interest of efficacy of the activities on the one hand, and from the constitutional rights of an individual to carry out his/her activities on the occupied position without any interference, on the other hand.

29. Nevertheless the fact whether or not the constitution of Georgia directly established concrete timeframes for the exercise of activities of a person when holding a state position, in case of pre-term termination of his/her authority, the legislature should corroborate the public interest that conditioned the necessity

to restrict the right. Restriction of the timeframe of authority on the case under consideration should be assessed in light of the constitutional guarantee of independence of a trustee, which emanates from the first sentence of paragraph 2 of Article 24 of the constitution of Georgia. The given constitutional norm enshrines the freedom of media, its independence, prohibits any actions that restricts the activities of media unjustifiably. Therefore, the good protected by the constitution is not only the right to freedom of expression of the public broadcaster, but also independence of its governing body.

30. The board of trustees of the public broadcaster, under the rule prescribed by law, exercises managerial and administrative functions. Besides, the board of trustees is directly obliged to ensure editorial, governing and financial independence of the public broadcaster. So special status and safeguards of member of the board of trustees serve to the protection of independence of the public broadcaster. Independence of trustees is one of the elements defining the essence of the board of trustees of the public broadcaster. Stemming from this, restriction of the right to carry out the activities of trustees shall be assessed by applying strict constitutional standards.

31. Stability is a necessary condition for independence of the activities of the state officials, whereas the exercise of the authority in defined or undefined term is one of the essential component of stability and independence of the activity. In this sense, the term of office for this or that post requires different constitutional-legal assessment by the constitution and law. For example, the term of office for the public defender of Georgia is 5 years under the constitution of Georgia, whereas a judge, whose term of office was set to be 10 years before the constitutional amendments, now is appointed for the term of life. In such case, special constitutional-legal importance is attached to holding the position till the end of the term. Pre-term dismissal of a state official must be checked through strict constitutional-legal standard in relation with those norms that define the terms and scopes of the authority.

32. The constitutional court of Georgia also construes this or that constitutional provision through the use of constitutional principles. “Although constitutional principles do not form the basic rights, but impugned normative act is also subject to scrutiny in relation to founding principles of the constitution, in connection with separate norms of the constitution and in this regard, the discussions should be held in one single context. The constitutional court should establish the compatibility of the impugned act with the constitutional-legal order, which the constitution lays down” (Decision N2/2-389 of the constitutional court of Georgia of 26 October 2007 on the case: “A citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and President of Georgia”, II-16). For the case under the consideration, the court submits that the standards of Article 29 of the constitution of Georgia also should be interpreted in relation to the constitutional principle of legal trust.

33. Appointment on the state position with defined or undefined term of

office engenders legitimate expectation to a citizen that he/she will carry out his/her activities within the term of office – for definite term or for the term of life. Consequently, restriction of the right to exercise the activities within the term of office as defined by the law is permissible only in case of presence of important public interest, so that not to restrict unjustifiably and uncorroboratedly legitimate expectations of the state official persons and not to undermine the trust towards the legislature.

34. The requirement of the constitution of Georgia is that the state position, given its specificity and diversity, is stable and independent structural entity, by means of which it will be possible to carry out functions discharged by the law and constitution without any hindrance. In this regard, it should be ascertained in the case under consideration, if there is or not legitimate public goal, for achievement of which the right to exercise their functions were restricted to trustees before the expiry of the term of their office and how fairly the balance was struck between the rights of persons and the public interests.

35. In the process of determining the legitimate aim of the disputed norm, it is important to take into consideration the peculiarities of legal relations regulated by the disputed norm. As it was mentioned, the norm envisions pre-term termination of the powers of the acting board of trustees of the public broadcaster and recognition of the powers of the board of trustees elected under the new rule.

36. On 12 July 2013 and on 20 November 2013, before the amendments to the law of Georgia “On Broadcasting”, the president of Georgia and the parliament of Georgia participated in election of members of the board of trustees of the public broadcaster. Particularly, out of candidates selected through open competition, the president of Georgia submitted to the parliament of Georgia at least 3 candidates for 1 opening position of a trustee. The parliament of Georgia gave its consent to the president of Georgia on appointment of a trustee by secret ballot.

37. As a result of changes added to the law of Georgia “On Broadcasting” made on 12 July 2013 and on 20 November 2013, the rule for composition of the board of trustees of the public broadcaster was anew developed. Under the new rule, the board of trustees is composed of 9 members. The parliament of Georgia by the majority of the total number of the members of the Parliament of Georgia, upon submission of the public defender, elects two trustees, three trustees are elected upon submission of the parliamentary majority (in case of absence of the parliamentary majority), three trustees are elected upon submission of not less than one quarter of the members of the parliament that do not belong to the parliamentary majority, and one trustee is elected upon the supreme council of the autonomous republic of Adjara.

38. Together with formation of the board of trustees of the public broadcaster, qualification requirements were also changed. According to paragraph 3 of Article 25 of the law of Georgia “On Broadcasting” (the wording of 23 December

2004), the candidate for the trustee shall be a person having public recognition and confidence and higher education and at least 5 years of working experience (the old rule). Pursuant to paragraph 3 of Article 24 of the law of Georgia “On Broadcasting” (the redaction of 12 July 2013), a candidate for trustee shall be a citizen of Georgia having public recognition and confidence. He/she shall have a master’s or equivalent degree and at least 10 years of work experience, including at least five years of work experience in journalistic, human rights, finances, electronic communications, arts, writing and/or academic fields (new rule). Accordingly, under the new rule, qualification requirements for a candidate for trustee became stricter. As opposed to the old rule, trustees are required to have a master’s or equivalent degree and at least 10 years of working experience, besides, no less than 5 years of experience in the specific area.

39. The disputed norm defines that the powers of members of newly elected board of trustees starts upon election of 7 members. The term of powers of part of the members of the board of trustees as prescribed by the law expires in 2015, another part – in 2017. So, under the disputed norm, recognition of the powers of newly elected board of trustees of the public broadcaster should take place and accordingly, implementation of new rule on the composition of the board of trustees of the public broadcaster should take place before the expiry of the terms of office of the acting board of trustees.

40. Pursuant to the position provided by the parliament of Georgia, the new rule on composition of the board of trustees aims to enhance efficiency and representation of the board of trustees – governing body of the public broadcaster and election of the members of the board of trustees with participation of more subjects. The Respondent thinks that the new rule creates the opportunity to present different public interests of wider spectrum in the board of trustees and secures more public engagement in the process of composition of the board of trustees. Therefore, legitimacy of the board of trustees increases, and accountability before the public enhances. This will facilitate transparency and efficiency of governance of the public broadcaster.

41. The constitutional court indicates that introduction of more representational, efficient and transparent model for governing the public broadcaster is an important legitimate public aim. Besides, it is evident that the disputed norm represents one of the means to reach this aim. Nevertheless, we should also assess how proportionate is the measure applied to reach the legitimate aim and how weighty is this legitimate aim in comparison with the constitutional good, restriction of which occurs.

42. As the constitutional court clarifies, the requirement of the principle of proportionality is that “legislative regulation restricting the right should represent useful and necessary means to achieve the valuable public (legitimate) aim. At the same time, intensity of restriction of the right should be proportionate to the public aim sought. It is inadmissible to achieve legitimate aim at the expense of over-restriction of the human right” (Decision N3/1/512 of 26 June 2012 of the

constitutional court of Georgia on the case “Citizen of Denmark Heike Kronquist versus the Parliament of Georgia”, II-60).

43. Pre-term termination of the powers of members of the board of trustees of the public broadcaster is linked with and conditions recognition of the powers of the newly elected board of trustees. In particular, the disputed norm, on the one hand, terminates acting board of trustees, and on the other hand, recognition of the new board of trustees and start implementation of the new rule. Thus, the measure defined by the disputed norm is a useful means to achieve the legitimate aim.

44. Any measure restricting an individual’s right should represent necessary, less restrictive means in order to achieve the legitimate aim. Therefore, in every specific case, the State should corroborate that there is no possibility to achieve the legitimate aim by applying other lesser restrictive measures. In the case under consideration, we should determine whether or not the parliament of Georgia could reform the governance of the public broadcaster, to ensure pluralism of the board of trustees and public engagement without pre-term termination of the powers of members of the board of trustees.

45. It is worth noting that the new rule as prescribed by the law does not lead to formation of such board of trustees that would be substantively different, in terms of competences, from the acting board of trustees. Significant difference occurs only in the rule of formation of the board. Under a new regulation, functions of trustees are not very much different to the extent that could make it impossible to perform activities of acting and newly elected board of trustees in one entity. Acting members of the board of trustees were elected by the parliament of Georgia and enjoy the high legitimacy. It should be noted that the respondents did not put doubts on this issue either. Only that circumstance that under the new rule, other subjects submit candidates for trustees to the parliament of Georgia, is not sufficient evidence to prove that it is impossible to have co-habitation of members of the board of trustees elected by the new and old rules. This circumstance does not exclude the possibility to exercise full powers of acting members of the board of trustees in the renewed format of the board of trustees.

46. The constitutional court of Georgia does not share the opinion held by the respondent that pre-term termination of the powers of acting members of the board of trustees of the public broadcaster is necessary because under the new rule, the board of trustees is composed of 9 members and not 15 members and without pre-term termination of the powers of acting members of the board of trustees, it would be impossible to make appropriate distribution of quotas (parliamentary majority, minority, public defender and etc.) of subjects submitting candidates to the board of trustees elected by the new rule. The Parliament of Georgia, while formulating any normative act, is restrained with requirement to respect basic rights and the principles of proportionality and the circumstance that the exercise of the powers of acting members of the board of trustees is incompatible with quotas defined by the new rule, is not

of use to prove the necessity of a measure foreseen by the disputed norm. The Parliament of Georgia has the possibility to determine the number and quotas of members of the board of trustees in such a way to, on the one hand, achieve the legitimate aim pursued and on the other hand, not to restrict the rights of the claimants guaranteed by the constitution.

47. The court also does not share the arguments provided by the respondent that as a result of the changes added to the constitution of Georgia, the president of Georgia is no longer empowered to submit candidates to the parliament of Georgia and necessity for pre-term termination of the powers of acting members of the board of trustees is conditioned precisely by this circumstance. The given circumstance may be of use as the constitutional-legal ground to change into the rule for election of trustee and not as the constitutional-legal ground for pre-term termination of the powers of already elected trustee. The change in presidential powers as foreseen by the constitution of Georgia does not diminish the legitimacy of legal measures carried out in the past by the president of Georgia within the powers conferred by the constitution and law. Naturally, it is impermissible, by indicating the given ground, to put into question the issue of legitimacy of the officials and to put pre-term termination of those powers on the agenda, who are appointed on the position directly by the president of Georgia or on the basis of his submission by the respective authorized body.

48. The constitutional court of Georgia also does not share the opinion held by the Lasha Tughushi, the specialist invited to the case that joint work of the old and new members of the board of trustees with differing interests and experience in the board of trustees is impossible. Different opinions on this or that issues are not hurdle in a collegiate body in terms of joint activities, in the collegiate body there are frequently groups with differing opinions. One of characteristic elements of the collegiate body, among other things, is joint decision making by different interest groups. Precisely cooperation among persons with different opinions and interests creates the ground for pluralism and multilateral public engagement.

49. It is noteworthy that the respondent does not associate termination of the powers of members of the board of trustees with the qualification requirements determined by the new rule towards members of the board of trustees. Moreover, the respondent does not question the competence of acting members of the board of trustees, their compatibility with different, new qualification requirements and their abilities to carry out the functions of trustees defined by the new rule.

50. Stemming from the abovementioned, the parliament of Georgia failed to clearly show to the constitutional court of Georgia that the reforming of the public broadcaster, ensuring pluralism of the board of trustees and public engagement was impossible to be carried out by participation of acting members of the board of trustees. Therefore, the regulation defined by the disputed norm, termination of the powers of acting trustees of the public broadcaster does not represent the ultimately necessary means to reach the aim.

51. The constitutional court repeatedly construed that while restricting constitutional right, the legislature is obliged to protect the reasonable balance between private and public interests. The constitutional court is obliged, within its competence, to draw a line at the time of conflict between private and public interests, which demonstrates the constitutional balance between those interests. In the case under consideration, it is clear that on the one hand, interest of non-interference in the activities of the members of the board of trustees - the state officials performing the public functions, and on the other hand, the legitimate aim to create the model of the public broadcaster that is more representative, efficient and transparent. Additionally, it should be noted that in the given case, the interest of the claimants is also connected with the public interest to ensure independence of the public broadcaster, its board of trustees.

52. Within the scopes of the given dispute, the constitutional court generally does not assess how better is new model of composition of the board of trustees as compared with the old model, as this issue was not the subject of the dispute and nor the parties to the case did have any diverging views on this issue. The Parties agree that new rule of election of the board of trustees establishes higher standard in terms of both qualification requirements of the trustees and the process of composition of the board in terms of the degree of participation of groups with different interests. It should also be noted that the parties did not contest conformity of both new and old rules for election of the board of trustees with the requirements of the constitution. Simultaneously, the constitutional court believes that with a view to better reflecting the interests of different groups of the society, for example, minorities, it is not excluded that the given rule may undergo certain improvements and changes.

53. The court also indicates that only better model of the public broadcaster, with increased qualification requirements for members of the board of trustees and with more participation in its composition, is not sufficient ground to restrict the term of powers of acting members of the board of trustees. Upon assessment of constitutionality of the restriction foreseen by the disputed norm, we should take into account an interest of member of the board of trustees, - subject who carries the constitutional right, also that public interest is linked with non-interference with activities of this or that state official. So, for instance, the public defender, general auditor of the office of the state audit and members of independent regulatory bodies belong to the category of the state officials, for who non-interference in their activities, their independence are secured by the necessary condition that is defined by the law and this is the term of office. For pre-term termination of the powers of the given state officials, it is necessary to have predominant public interest that is in line with the constitutional requirements. Increase of the qualification requirements of a judge or improvement of activities of the institute of the public defender, in itself, may not be deemed as sufficient ground for pre-term termination of the powers of those state officials. Such decision of the legislature may be justified only at the time of presence of

the important public interest, when pre-term termination of the powers of such state officials is necessary, effective and less restrictive means to achieve the legitimate aim. Otherwise, this could turn into permanent, irreversible character, which would lose sense not only the appointment of persons to certain public offices, but also put the institutional independence of those bodies into question.

54. The element that defines the essence of certain state office is the degree of its independence from executive or/and legislative branches of the authorities. The interest ensuring their independence may be restricted in special case by the legitimate aim entailing improvement of the public office. Such special case would take place, when applicable norms are full of omissions so that the aim and purpose of this or that state position contradicts and their change is urgent necessity.

55. In the case under consideration, the respondent should prove why existing model for election of members of the board of trustees does not ensure the aim, achievement of which this specific state position was created and in what the urgent necessity to early terminate the powers of acting members of the board of trustees is expressed. As it was already indicated the respondent did not present arguments which would have demonstrated that restriction foreseen by the disputed norm – pre-term termination of the powers of members of the board of trustees, is vitally necessary for performing the function by the public broadcaster as determined by the law. He failed to corroborate that there are special circumstances, which justify pre-term termination of the powers of members of the board of trustees.

56. The respondent failed to substantiate that pre-term termination of the powers of the board of trustees, is vitally necessary for independence of the public broadcaster, its impartiality and for implementation of the functions as defined by the law. Only the circumstance that new model for composition of the board of trustees is better as compared with the existing one, may not be sufficient argument which could justify restriction of the right of acting members of the board of trustees – persons protected by Article 29 of the constitution, as in the given case, the important public interest is put in danger. Such important public interest is ensuring independence of individual members of the board of trustees and institutional independence of the board of trustees.

57. Stemming from the abovementioned, the constitutional court holds that, since the disputed norm does not represent the less restrictive and proportionate means to interfere with the right of the claimants, it contradicts with the first paragraph of Article 29 of the constitution of Georgia.

III

Resolutive Part

Having been guided by subparagraph “f” of the first paragraph and paragraph 2 of Article 89 of the constitution of Georgia; subparagraph “e” of the first paragraph of Article 19, paragraph 2 of Article 21, paragraph 1 of Article 23,

paragraphs 1, 2 and 3 of Article 25, paragraph 5 of Article 27, subparagraph “a” of the first paragraph of Article 39, paragraphs 2, 4, 7, 8 of Article 43, Article 45 of the organic law of Georgia “On the Constitutional Court of Georgia”; paragraphs 1 and 2 of Article 7, Articles 30, 31, 32 and 33 of the law of Georgia “On the Constitutional Legal Proceedings”,

The Constitutional Court of Georgia

RULES:

1. To uphold the constitutional claim N569 (citizens of Georgia Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili versus the Parliament of Georgia) and to recognize as unconstitutional paragraph 3 of Article 2 of the law of Georgia (N833-რს) “On Amendments to the law of Georgia “On Public Broadcasting” (the authority of the board of trustees as defined by Article 24 of the law of Georgia “On Public Broadcasting” provided for by paragraph 4 of Article 1 of this law starts from the moment of electing no less than 7 members of the board of trustees by the Parliament of Georgia) (Wording dated on 20 November 2013) with respect to the first paragraph of Article 29 of the constitution of Georgia.

2. To declare the unconstitutional norm as invalidated from the moment of promulgation of the present decision;

3. The present decision shall take legal effect from the moment of its public delivery at the sitting of the constitutional court;

4. The present decision shall be final and shall not be subject to appeal or revision;

5. Copies of the present decision shall be sent to the parties to the case, the president of Georgia, the government of Georgia and the supreme court of Georgia;

6. The present decision shall be published in “the Legislative Herald of Georgia” within a period of 15 days.

Members of the Board:

Konstantine Vardzelashvili

Ketevan Eremadze

Maia Kopaleishvili