CITIZENS OF GEORGIA – IRAKLI KEMOKLIDZE AND DAVID KHARADZE VERSUS THE PARLIAMENT OF GEORGIA

N2/4/532,533 Batumi, 8 October 2014

Composition of the Board:

Zaza Tavadze – Chairman of the sitting;
Otar Sitchinava – Member;
Lali Papiashvili – Member, Judge Rapporteur;
Tamaz Tsabutashvili – Member.

Secretary of the Sitting:

Darejan Chaligava

Title of the Case:

Citizens of Georgia – Irakli Kemoklidze and David Kharadze versus the Parliament of Georgia.

Subject of the Dispute:

1) With regard to Constitutional Claim N532:

a) Constitutionality of the word "mental retardation" of paragraph 5 of Article 12 of the Civil Code of Georgia; the words "a letter of intent made by a person declared legally incompetent by a court" of the first paragraph of Article 58; Article 1290, and the first paragraph of Article 1293 of the same Code; constitutionality of the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81, and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia with respect to Articles 14 and 16 of the Constitution of Georgia.

b) Constitutionality of the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81 and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia with respect to the first paragraph of Article 42 of the Constitution of Georgia.

c) Constitutionality of the words "or mental retardation" of subparagraph "e" of paragraph 1 of Article 1120 of the Civil Code of Georgia with respect to Article 14 and the first paragraph of Article 36 of the Constitution of Georgia.

2) With regard to Constitutional Claim N533:

a) Constitutionality of the words "or mental retardation" of paragraph 5 of Article 12, the words "a letter of intent made by a person declared legally incompetent by a court" of the first paragraph of Article 58, Article 1290, the first paragraph of Article 1293; constitutionality of the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81, paragraph 2 of Article 327 of the Civil Procedure Code of Georgia; constitutionality of the

words “and in private legal relations” of subparagraph “h” of Article 5 of the law of Georgia “On Psychiatric Care” with respect to Articles 14 and 16 of the Constitution of Georgia.

b) Constitutionality of the words “as well as citizens declared legally incompetent” of paragraph 5 of Article 81, paragraph 2 of Article 327 of the Civil Procedure Code of Georgia with respect to the first paragraph of Article 42 of the Constitution of Georgia.

c) Constitutionality of the words “mental illness” of subparagraph “e” of paragraph 1 of Article 1120 of the Civil Code of Georgia with respect to Article 14 and the first paragraph of Article 36 of the Constitution of Georgia.

d) Constitutionality of subparagraph “c” of the first paragraph of Article 17 of the law of Georgia “On Psychiatric Care” with respect to the first paragraph and second paragraph of Article 18 of the Constitution of Georgia.

e) Constitutionality of the word “incapable” of subparagraph “c” of the first paragraph of Article 5 of the law of Georgia “On Psychiatric Care” with respect to Article 16, Article 24 and the first paragraph of Article 41 of the Constitution of Georgia.

f) Constitutionality of paragraph 3 of Article 15 of the law of Georgia “On Psychiatric Care” with respect to the first and second paragraphs of Article 17 of the Constitution of Georgia.

g) Constitutionality of the word “legally incompetent” of the first paragraph of Article 10 and the words “if he/she is incapable” of paragraph 2 of Article 14 (the wording dated on 27 July 2006) of the law of Georgia “On Psychiatric Care” with respect to Article 16 of the Constitution of Georgia.

Participants to the case:

Representative of the Claimants – Vakhtang Menabde. Representatives of the Parliament of Georgia – Tamar Khintibidze and Irma Todua. Specialist – Manana Eliashvili. Witness – Akaki Tkemaladze, associate of the Levan Samkharauli National Forensic Bureau.

I
Descriptive Part

1. On 27 June 2012, a constitutional claim (registration N532) was lodged with the constitutional court of Georgia by a citizen of Georgia Irakli Kemoklidze. On 2 July 2012, the constitutional claim was referred to the Second Board of the Constitutional Court with a view to deciding about admissibility of the case for the consideration on the merits.

2. On 27 June 2012, a constitutional claim (registration N533) was lodged with the constitutional court of Georgia by a citizen of Georgia David Kharadze. On 2 July 2012, the constitutional claim was referred to the Second Board of the constitutional court with a view to deciding admissibility of the case for the consideration on the merits and joining it with the constitutional claim N532.

3. By the Recording Notice N2/3/532,533 of the 1st of March 2013 of the constitutional court of Georgia, the constitutional claims were admitted for the consideration on the merits.

4. The grounds for lodging the constitutional claim N532 with the constitutional court of Georgia are: the first paragraph of Article 42 and subparagraph "f" of the first paragraph of Article 89 of the constitution of Georgia; subparagraph "e" of the first paragraph of Article 19, subparagraph "a" of the first paragraph 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 the Constitutional Legal Proceedings".

5. The grounds for lodging the constitutional claim N533 with the constitutional court of Georgia are: the first paragraph of Article 42 and subparagraph "f" of the first paragraph of Article 89 of the constitution of Georgia; subparagraph "e" of the first paragraph of Article 19, subparagraph "a" of the first paragraph 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 the Constitutional Legal Proceedings".

6. In the constitutional claims N532 and N533, the Claimant contests a number of provisions of the Civil Code of Georgia and Civil Procedure Code of Georgia, which regulate the procedures related to declaration of a person legally incompetent by a court, rights and obligations of a guardian and custodian and issues pertaining to a person who is declared legally incompetent. In particular, pursuant to the disputed norms, a guardian designated by a guardianship and custodianship authority shall represent the ward without any special authorization before third persons, including in courts. Besides, a guardian shall enter into all the necessary transactions in the name and on behalf of the ward. According to the disputed norms, marriage shall not be allowed to a person who has been declared by a court legally incapable due to mental illness or mental retardation by the rule prescribed by the Civil Code of Georgia.

7. In the constitutional claim N533, the Claimant additionally contests a number of norms of the law of Georgia "On Psychiatric Care", which regulate the procedures related to hospitalization and treatment of a patient recognized as incapable in psychiatric institution and, which define his/her rights and obligations.

8. The Claimant believes that on the basis of the disputed norms, persons with mental illness and mental retardations are completely prohibited to enjoy civil rights. In his assertion, the legislation does not envisage the circumstance that persons with mental retardation and mental illness, truly are incapable to make decisions in relation to certain issues, but they do not fully lose their capacity to properly perceive and clearly express their will in relation to specific civil relations.

9. In the opinion of the Claimant, the legislation did not envisage the circumstance that there are substantial difference between persons with mental retardation and mental illness. For example, in case of high degree of mental

retardation or lasting schizophrenia, a person is possible to be deprived of the possibility to make a decision. Therefore, in this case, total substitution of the ward's will by a guardian's will is justified. However, in case of other categories of mental retardation and mental illness, persons are possible to retain the capacity to make decisions on separate issues. The disputed norms does not foresee such difference, and completely deprives any person with any degrees of mental retardation and mental illness, without giving due regard to individual circumstances, of the possibility to independently make a decision, which contradicts the constitution of Georgia.

10. It is indicated in the constitutional claims that Article 14 of the constitution of Georgia prohibits discrimination based on disability due to mental retardation and mental illness. The disputed norms establish differentiated treatment, on the one hand, between adults not having legal capacity dues to mental retardation and mental illness and persons with other disabilities and on the other hand, between persons with mental retardation and mental illness having the status of legal incapacity and the persons who have mental retardation or mental illness, but they have not been declared as legally incompetent by a court.

11. Besides, at the sitting of the consideration of the case on the merits, the Claimant clarified that the types to be compared together with abovementioned couples, also represent capable and incapable persons who may be substantively equal in relation to certain kind of transactions. Therefore, the disputed norms establish differentiated treatment on the ground of two characteristics: restriction of the capacity due to mental retardation and mental illness and the status of legally incompetent person. As the Claimant refers, according to the disputed norms, by granting the status of legal incompetence, a person is forbidden to independently make a decision in all areas of the life, which amounts to unjustified interference with the right protected by Article 14 of the constitution of Georgia. Moreover, the Claimant thinks that if differentiation occurs only in the area and with regard to the issues, where an individual is truly deprived of the possibility to make a decision, which should be defined by a court on a specific case-by-case basis.

12. In the Claimant's assertion, the disputed norms also contradict Article 16 of the constitution of Georgia, under which, an individual has the right to independently make a decision related to all the areas of his/her own life. In the opinion of the Claimant, complete exclusion of person recognized incapable from decision-making process and substitution of his/her will at the will of his/her guardian contradicts the right of personal development. In the viewpoint of the Claimant, the decision on the ward should be made in compliance with the interests of the ward. The disputed norms share these principles, however, nevertheless, in the disputed norms it is unclear what is implied under the interests of the ward. The disputed norms allow a guardian to subjectively define the interests of the ward against the will and desire of the ward. Stemming from this, the Claimant thinks that the disputed norms contradict Articles 16 of the constitution of Georgia.

13. In the Claimant's assertion, on the basis of the disputed norms, a person does not have the possibility to enjoy the right to apply to court as guaranteed in the first paragraph of Article 42 of the constitution of Georgia. According to applicable wording of the disputed norms, if a person who is declared legally incompetent recuperates or his/her health improves significantly, the person has the right to apply to court to reinstate his/her legal capacity. Only a guardian, family member and member of psychiatric-treatment institution have the right to apply to court. In the opinion of the Claimant, on the basis of the disputed norms, aforementioned subjects are possible to abuse their rights and do not allow a person to reinstate his/her legal capacity. It is unclear for the Claimant, in case if a person recuperates or his/her health improves significantly, why he/she should not have the right to apply to court on his/her own and demand reinstatement of the legal capacity. Stemming from this, in the Claimant's assertion, the disputed norms contradict the first paragraph of Article 42 of the constitution of Georgia.

14. It is indicated in the constitutional claim that on the basis of subparagraph "e" of the first paragraph of Article 1120 of the Civil Code of Georgia, a person is deprived of the right to marry. As the Claimant refers, in general, substitution of the will of persons with mental retardation and mental illness occurs by the will of a guardian, although the right to marry is a personal right and stemming from its legal nature, a guardian may not demonstrate the will necessary for give rise to marriage. In the opinion of the Claimant, persons who want to marry, may better define whether they want or not to found a family, and complete deprivation of the given right of a person with mental retardation or mental illness violates the right to marry guaranteed by the first paragraph of Article 36 of the constitution of Georgia.

15. The Claimant thinks that on the basis of the first paragraph of Article 10 of the law of Georgia "On Psychiatric Care", an incapable person is deprived of the possibility to participate in decision-making process related to his/her psychiatric treatment, which violates his/her right to free development of his/her personality. In the Claimant's assertion, the disputed norm fully rules out participation of the person indecision-making process, whereas in an individual case, a person is possible to have been aware of the essence of psychiatric treatment and show his/her free will with regard to it. In the Claimant's opinion, analogous restriction is imposed with regard to paragraph 2 of Article 14 of the disputed law, under which, in place of incapable person, his/her legal representative makes a decision to choose psychiatric institution for outpatient examination and at any time terminate psychiatric examination or/and treatment of incapable person. Stemming from this, the disputed norms, in the opinion of the Claimant, contradict Article 16 of the constitution of Georgia.

16. The Claimant refers that in case of inpatient psychiatric care, a person is hospitalized in inpatient institution and he/she is restricted the possibility to have communication with the outer world, in particular, he/she is not allowed to send and receive a letter, use telephone and other communication means and etc.

In the opinion of the Claimant, we have to make distinction between the cases of voluntary and involuntary inpatient care. In the case of involuntary care, restriction of certain rights to a person constitutes proportionate and adequate measure, because delay in providing care may pose a threat to the person's life or/and health. Simultaneously, in case of such care, there is an obligation to exercise the court control as established by Article 18 of the constitution of Georgia. In the Claimant's assertion, on the ground of subparagraph "c" of the first paragraph of Article 17 of the law of Georgia "On Psychiatric Care", the consent of incapable person or his/her participation in any form into decision-making process is not necessary for his/her hospitalization. Therefore, deprivation of freedom for incapable person against his/her will occurs even in the case if he has sufficient capacity to make a decision in this regard. Besides, the dispute norm permits participation of an incapable person in the process of making decisions on similar issues, in particular, pursuant to paragraph 3 of Article 17, a patient voluntarily hospitalized may be discharged at the request of his/her legal representative, however when making the decision, participation of the patient is necessary taking into consideration his/her mental state. Therefore, if a patient can make a decision to terminate psychiatric care, it is unclear why he may not have the possibility with due regard to his/her psychical condition, to express his/her will about his/her voluntary hospitalization. Stemming from this, the Claimant thinks that the disputed norm violates the right to freedom as guaranteed in Article 18 of the constitution of Georgia.

17. The Claimant refers that according to subparagraph "c" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care", in case a patient has legal capacity, the information about psychiatric care is provided to the representative of the patient, and in case of its absence - to his/her relative. In the Claimant's assertion, the disputed norm does not differentiate between those incapable persons who, taking into consideration their mental state, may adequately realize the given information. Furthermore, the Claimant indicates that according to subparagraph "e" of the first paragraph of Article of the disputed law, the decision about psychiatric treatment of incapable person is made by the legal representative, however, the incapable person participates in the decision-making process pertaining to treatment. As a result, it is illogical if a person is not provided with the information about the illness, how to participate in the process of making decision about the treatment. In the opinion of the Claimant, it is required that complete and objective information about the illness should be provided to an incapable person enabling him/her to make a decision on possible provision of psychiatric care. The disputed norm does not foresee the similar possibility and it thus contradicts Article 16 of the constitution of Georgia.

18. The Claimant also considers that the disputed norm contradicts the first paragraph of Article 24 of the constitution of Georgia, under which an individual's right to receive information is safeguarded, as well as it contradicts the first paragraph of Article 42 of the constitution of Georgia, under which, every

citizen of Georgia shall have the right to become acquainted, in accordance with a procedure prescribed by law, with the information about him/her stored in state institutions. The Claimant points out that in case of state-run psychiatric institution, the disputed norm has relation with the first paragraph of Article 41 of the constitution of Georgia, and in case of private psychiatric institution – with the first paragraph of Article 41 of the Constitution of Georgia. Stemming from the abovementioned, the Claimant assumes that the disputed norm contradicts Article 16, the first paragraphs of Article 24 and 41 respectively.

19. The Claimant submits that pursuant to subparagraph "a" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care", a patient shall have the right to enjoy humane attitude, which rules out any actions violating his/her dignity. In line with subparagraph "i" of paragraph 2 of Article 15 of the same Law, a patient shall have the rights to enjoy the rights as prescribed by Article 5 of this Law. The Claimant points out that on the basis of paragraph 3 of Article 15 of the disputed law, a doctor has the right in exceptional cases, to restrict the rights, including the personal right to be protected from degrading treatment, of the patient as guaranteed by Article 5 of the same Law for security purposes. The absolute right to be protected from degrading treatment as guaranteed in Article 17 of the constitution of Georgia is not subject to restriction. Respectively, paragraph 3 of Article 15 of the law of Georgia "On Psychiatric Care", in the part, which deals with subparagraph "i" of paragraph 2 of the same Article and subparagraph "a" of Article 5 comes in contradiction with the first and second paragraphs of Article 17 of the constitution of Georgia.

20. At the stage of consideration of the case on the merits, the Respondent recognized the part of the claim requirement, which deals with the constitutionality of the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81 and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia with respect to the first paragraph of Article 42 of the constitution of Georgia. The Respondent indicated that if a person recuperates, he/she should have the right to apply to court to defend his/her rights and legitimate interests without his/her legal representative.

21. The Respondent declared that he does not agree with the position held by the Claimant in the remaining parts of the claim requirement and there is no ground to uphold the constitutional claims.

22. In the Respondent's assertion, persons, who have been declared legally incompetent by a court decision, substantively differ from the persons who have not received such status. Since the court grants legal status, this factor in itself distinguishes the subjects holding the status of legal incapacity from other persons. Therefore, as the Respondent stated that the disputed norms do not treat substantively equal persons unequally and the applicable wording is in full conformity with Article 14 of the constitution of Georgia.

23. The Respondent explains that the disputed norms also are in compliance with Article 16 of the constitution of Georgia, since the given right is

linked with a person's capacity to independently make decisions in all spheres of life. Although in the case, if a person cannot independently make a decision, a guardian is designated for him/her for the very reason of providing assistance to him/her at the time of decision-making. In the opinion of the Respondent, the given norms do not have restrictive nature, because their aim is to allow legally incompetent person with the help of the guardian to develop his/her personality as he/she wishes.

24. According to the Respondent, subparagraph "c" of the first paragraph of Article 17 of the law of Georgia "On Psychiatric Care", under which a person recognized incapable is hospitalized at the request and by the informed consent of his/her legal representative, does not have relationship with Article 18 of the constitution of Georgia. Hospitalization of the person against his/her will shall not be considered as the restriction of freedom. According to explanation provided by representatives of the Parliament of Georgia, the restriction of freedom without his/her will could occur, if a patient is capable to realize the need for medical treatment. But in case, when a subject lacks for the capacity to show his/her will, the decision is made by his/her legal representative in his/her stead, who is obliged to take care of his/her health.

25. The Respondent indicates that the appealed norm makes interference with the right to marry as guaranteed in the first paragraph of Article 36 of the constitution of Georgia, although the restriction serves the legitimate purpose. In the Respondent's assertion, marriage is a complex component of civil and legal contract, which is always connected with the property relations, and a person declared legally incompetent is deprived of the capacity to fully understand and realize the given circumstances. The Respondent also indicates that at the time of marriage, persons declared legally incompetent substantively differ from those persons, who at the time of registering their marriage, were legally competent, but their recognition of being legally incompetent took place after the marriage. The major difference between the groups of persons to be compared is in their capacity to show their healthy will at the moment of marriage. Stemming from this, they do not represent substantively equal persons; therefore, unequal treatment of substantively equal persons is not at hand.

26. In addition, the Respondent thinks that subparagraph "c" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care" is in full compliance with Articles 24 and 41 of the constitution of Georgia. In the opinion of representatives of the Parliament of Georgia, although the disputed norm restricts the right of a person recognized legally incapable to become personally acquaint with the information about his/her own health condition. However, the complete information is provided to his/her legal representative. Stemming from this, the disputed norms do not contradict with aforementioned constitutional provisions.

27. Representatives of the Parliament of Georgia at the sitting for consideration of the case on the merits indicated that the law of Georgia "On Psychiatric Care" gives the possibility to a person declared legally incapable to independently

make a decision in case if a psychiatrist deems that he/she is capable to understand the situations. Subparagraph "e" of Article 5 of the given law is directly linked with Article 16 of this Law, therefore, if a patient is declared as incapable and under the age of 16, the legal representative should give his/her consent on the treatment and at the moment of making decision, the participation of the patient is necessary taking into consideration his/her age and mental state.

28. As the Respondent clarifies, on the basis of paragraph 3 of Article 15 of the law of Georgia "On Psychiatric Care", a doctor is authorized to restrict the rights of the patient and apply compulsory type of measures, which is caused by the severe condition of the patient. However, compulsory measures do not imply inhumane treatment prohibited by Article 17 of the constitution of Georgia.

29. According to the specialist invited to the case and the witness, illnesses united under the groups of mental retardation and mental illness are characterized by the general limitation of psychic activity, decline in intellectual functions and impairment of cognitive processes. Besides, in cases of individual pathologies, there can be present increased inspiration and behavior disorder. In case of mental retardation, a person may be easily put under the influenced of another person. Whereas in the case of existence of separate forms of mental illness, there is also possible to present mental disorders, deliria, hallucinations, the state of derangement of consciousness and etc.

30. Besides, as the invited specialist and witness clarify, mental retardation appertains to the class of incurable diseases. However, it is possible to stop progression of the disease as a result of treatment. In case of diseases united under the group of mental illness, it is possible that a patient recuperates or his/her health condition significantly improves in the form of remission. However, such diseases have chronic characteristics and can be persist for the long period of time.

31. The invited Specialist – Manana Eliashvili declared that at the early stage of separate pathologies of mental illness, a person is capable to enter into complex property transactions in specific spheres, but in certain spheres, he/she may have the limited capacity to make a decision. Some persons, who meet the criteria for declaring a person legally incompetent, may have the capacity to enter into simple transactions. In the opinion of the Specialist, at the time of mental retardation and mental illness, a patient may understand the necessity to undertake treatment only in individual case. At the time of mild mental retardation, in certain cases, a person can make conscious decision on creating a family, whereas at certain cases – cannot. In the opinion of the Witness, if there is the ground to declare a person legally incompetent, then he/she has not the capacity to make relevant decision on marriage.

32. The Specialist additional explains that there are two mechanisms for legal restriction of the capacity: total and functional. In case of total restriction, a person is fully deprived of independent realization of the civil rights. In case of functional restriction, a person is restricted to undertake independent activ-

ity only in those spheres, in which she/he has restricted capacity. The Georgian legislation foresees total (complete) restriction of the legal capacity.

33. In the Specialist's assertion, despite the fact that the methods required to examine functional restriction have not been introduced in Georgian psychiatric practice, the reason for non-application of similar mechanism is in existing legislation and not the absence of technical readiness. As a result of relevant researches of functional models, the differentiation of persons with disabilities is possible not only among the groups of people, but also in relation to each social function. Apart from dementia and mental retardation, at the time of the majority of diseases, the capacity is not restricted fully but - fragmentally.

34. As the associate of Levan Samkharauli Forensic National Bureau, Akaki Tkemaladze - the witness invited to the sitting stated, in practice it would be difficult to carry out gradation in relation to transactions concluded by legally incompetent persons. Such difficulty is associated with dynamic nature of the illness. The patient's state is possible to change abruptly. Therefore, existence of functional model may give rise to certain practical problems.

35. The Specialist also shares the given opinion and further clarifies that introduction of functional restriction, despite its advanced nature, may give rise to certain challenges. In particular, mental illness types of diseases are characterized by rapid changes and fibrillations. Accordingly, if today's mental state of the patient is detectable, it is impossible to determine further forecast.

36. On the basis of the first paragraph of Article 14^1 of the law of Georgia "On the Constitutional Legal Proceedings", ltd. "Free University" filed *Amicus Curiae* written brief, which is accompanied by the study prepared by the students of Washburn School of Law Legal with regard to the case under consideration.

37. The *Amicus Curiae* written brief meticulously explores the issue of compliance of the appealed disputed norms with respect to the constitutional provisions. In connection with Article 14 of the constitution of Georgia, the *Amicus Curiae* thinks that the disputed norms provide differentiated treatment among persons based on the characteristics of legal incapacity, which emanates from the factors portraying the identity of an individual, is related with his/her dignity and such treatment has its historic grounds. Consequently, based on the existing case-law of the constitutional court of Georgia, it is necessary to assess the restrictions set forth by the disputed norms through the application of strict test the same way as it occurs in the case of differentiation based on any characteristics that are specified in Article 14 of the constitution of Georgia. Besides, In the opinion of the *Amicus Curiae*, there is the less restrictive means, which the State may apply; in particular, as opposed to the disputed norms, it is possible to differentiate persons according to what extent the restriction is provided and, in reality, what actions a person is capable to do. Accordingly, existing wording of the disputed norms is of discriminatory nature and contradicts with Article 14 of the constitution of Georgia.

38. The *Amicus Curiae* indicates that on the ground of the disputed norms,

by complete transfer of the rights of persons with disabilities to a guardian, a person is deprived of the possibility to enjoy the given rights. Nevertheless the fact that applicable legislation imposes an obligation upon the guardian to act in compliance with the interests of the ward, this may not be the guarantor that each decision made by the guardian will be directed towards protection of the interests of the ward. Besides, by the complete transfer of the rights of the ward to the guardian/custodian, the right to autonomy and the right to personal self-determination of an individual are neglected. Further, simplicity of the regulation and establishment of similar rules for all by the State may not serve for legitimate aim, which would justify interference with the right. Stemming from this, the disputed norms do not conform to Article 16 of the constitution of Georgia.

39. In the opinion of the *Amicus Curiae*, the appealed provisions of the law of Georgia "On Psychiatric Care" are imprecise and are possible to be understood in such a way that may lead the restriction of all the rights of a hospitalized person, including the right to humane treatment, which make the patient to be treated like an object. Therefore, in contradiction of Article 17 of the constitution of Georgia, the disputed norms make it possible to turn person with disability from a subject of law into an object of law. Stemming from this, the appealed provisions contradict Article 17 of the constitution of Georgia.

40. The *Amicus Curiae* also believes that according to the disputed norms, the decision to compulsorily place a person in inpatient psychiatric institution is made without his/her consent, despite the fact that he may have sufficient capacity to take decision independently with regard to the given matter. Therefore, the right to free movement and the right of personal liberty enshrined in Article 18 of the Constitution of Georgia is restricted. Nevertheless the fact that the mentioned right is not of absolute character, it is necessary to make differentiation among persons with disability based on their abilities and capacities, because the restriction of liberty of people with different abilities could not be justified. Consequently, the disputed norms contradict the first and second paragraphs of Article 18 of the constitution.

41. The *Amicus Curiae* pays its attention to the circumstance that under applicable laws, the regulations are equal for all persons with disabilities. Although these persons themselves are not the same. Therefore, the right to marry might be restricted for the persons who in fact are unable to realize their actions and are unable to show their free will in this domain. However, the disputed norms rule out the possibility to establish to what extent a person is capable to realize his/her own actions and to make a decision about the marriage on a case-by-case basis. Stemming from this, existing wording of the disputed norms also contradict the firs paragraph of Article 36 of the constitution of Georgia.

42. The *Amicus Curiae* also refers that under the applicable laws, legally incompetent person is possible to restore the status of legal capacity only through the court. Besides, according to the appealed norm, a person declared as legally incompetent does not have the right to apply to the court with the given claim.

In the opinion of the *Amicus Curiae*, granting this right to the circle of persons defined in the disputed norm will not ensure adequate protection of the rights of legally incompetent person, and moreover, it could be even abused, which would inflict harm to legally incompetent person. Stemming from this, it is vitally important that a person declared legally incompetent have the right to apply to court and the disputed norm contradicts with the right to fair trial as guaranteed by the first paragraph of Article 42 of the constitution of Georgia.

43. The *Amicus Curiae* also thinks that legally incompetent person should be able to participate in the judicial proceedings, to personally appear before the court and to present his/her own opinions to it, for it is precisely the court that takes a decision about this individual. Therefore, the disputed norm also opposes with the first paragraph of Article 42 of the constitution of Georgia.

44. In order to shore up its own argumentation, the *Amicus Curiae* additionally resort to the case-law of the European Court of Human Rights and the Constitutional Court of Georgia, also legislation and case-law of different countries with respect to the contested issues.

II
Motivational Part

1. The constitutional claims N532 and N533 deal with the constitutionality of legislative norms restricting individual rights of person declared as legally incompetent, as well as persons hospitalized in psychiatric care institutions with respect to Articles 14, 16, 17, 18, 24, 36, 41 and 42 of the constitution of Georgia. The requirements raised in each constitutional claim are in conformity with one another or are considerably intertwined. Therefore, the Constitutional Court will consider the claim requirements jointly.

2. Besides, resolving the present constitutional dispute requires determining compliance of the disputed norms with substantively different constitutional rights. Stemming from the aforementioned, the Constitutional Court shall assess constitutionality of the disputed norms in reference to each constitutional right separately.

Constitutionality of the disputed norms with respect to Article 16 of the Constitution of Georgia

(The words “mental retardation” and “mental illness” of paragraph 5 of Article 12 of the Civil Code of Georgia, the words “a letter of intent made by a person declared legally incompetent by a court” of the first paragraph of Article 58 of Civil Code of Georgia, Article 1290, the first paragraph of Article1293 of the same Code; the paragraph 5 of Article 81 and the second paragraph of Article 327 of the Civil Procedure Code of Georgia; the words “and in private legal relations” of subparagraph “h” of Article 5 of the law of Georgia “On Psychiatric Care”, the word “incapable” of the first paragraph of Article 10 and the words “if he/she is incapable” of paragraph 2 of Article 14 of the law of Georgia “On Psychiatric Care”).

Sphere protected by Article 16 of the constitution of Georgia

3. According to Article 16 of the constitution of Georgia, "everyone has the right to free development of his/her personality". The given right protects the autonomy of an individual, freedom of a person to govern his/her own inner world at his/her discretion, his personal mental or physical sphere without interference from others, based on his/her personal decision, to establish and develop relations with other persons and outer world. Article 16 of the constitution of Georgia extends its protection to person's right to control how he/she presents him/herself in a society and the freedom to implement actions necessary for personal development and realization. For autonomy of an individual, for his/her free and full-fledged development, special importance is attached not only to freedom to independently define the relations with outer world, but also to physical and social identity of an individual, inviolability of his/her intimate life.

4. It is practically impossible to provide precise and exhaustive interpretation of the right to free development of his/her personality. It is composed of a number of different legal components that are protected by various norms of the constitution.

5. Simultaneously, important segment of natural freedoms necessary for free development of an individual remains beyond the ambit of the concrete rights regulated by the constitution. Article 16 of the constitution engenders the constitutional safeguards for the relations that fail to fit into the other norms of the constitution, although they constitute the component necessary for free development of an individual (Decision N2/1/536 of 4 February 2014 of the Constitutional Court of Georgia on the case "Citizens of Georgia – Levan Asatiani and other versus the Ministry of Labor, Health and Social Affairs", II-57).

6. In reference to Article 16 of the constitution of Georgia, the part of disputed norms are materially interrelated and creates the single system of regulation. With this in mind, the constitutional court of Georgia, with a view to assess the constitutionality, divides the disputed norms into two groups. The disputed norms compiled in the first group are about declaration of a person as legally incompetent, guardianship and absence of demonstration of the civil-legal will of a person declared legally incompetent, whilst the disputed norms from the second group deal with replacing the will of a person declared legally incompetent to choose psychiatric treatment, a doctor and medical institution and cease medical treatment by the will of a guardian.

Declaring a person as legally incompetent and Guardianship

7. A part of the disputed norms, notably, paragraph 5 of Article 12, the first paragraph of Article 58, Article 1290, the first paragraph of Article 1293 of the Civil Code of Georgia, also subparagraph "h" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care" regulates systemically closely-linked relations and establish the single regime for interference with a person's right.

Therefore, the constitutional court shall assess the issue of constitutionality of the aforementioned disputed norms jointly.

8. Paragraph 5 of Article 12 of the Civil Code of Georgia, due to "mental retardation" and "mental illness", restricts freedom of persons, by their own will and action, to fully obtain and exercise their civil rights and obligations. Pursuant to Article 1290 of the same Code, a person declared as legally incompetent is also deprived of the right to represent himself/herself before third persons. A person declared as legally incompetent is unable to enter into transactions, because his/her will is void. It is a guardian who enters into transaction in his/her name as it is defined in Articles 58 and 1293 of the Civil Code of Georgia.

9. Legal regime established by the abovementioned norms of the Civil Code of Georgia, as well as each disputed norm amount to the interference with personal autonomy of an individual, with the right to free development of his/her personality. The disputed regulation substantively alters the legal status of an individual and gives rise to grave legal and practical consequences. An individual formally, for indeterminate length of time is deemed as being incompetent to have the capacity to enter into civil-legal transactions, thus he/she virtually becomes fully dependent on his/her guardian and is deprived of the right to independently participate in all spheres of civil life, including in such spheres that are directly linked with his/her daily life, existence and development. He/she is unable to conclude even such trifle transactions as the purchase of food, household items or travel tickets, he/she is restricted to choose accommodation; he/she is also restricted to enjoy the rights to travel, work and etc. His/her will is replaced by the will of his/her guardian, who enters into all necessary transactions in the name of his/her ward.

10. The disputed norms declare persons being in the same state as the Claimant (hereinafter referred to as "The Claimant class") as persons without civil will with regard to any civil-legal relations regardless of the difficulty of perception of its content and existing risks. The Constitutional court shall assess the constitutionality of precisely this legal regulation. The task of the court is not to exhaustively define all those relations within of which the will expressed by the Claimant class should be deemed as genuine.

11. Despite the fact that Article 16 of the constitution of Georgia does not directly refer to the possibility of restricting the right to free development of personality, it does not belong to the group of absolute rights. Interference with the given right is permissible if a regulation restricting the right constitutes proportionate means to achieve a legitimate aim.

12. Incompetence is not absolute category. Declaration of a person as legally incompetent, in itself, does not contradict the requirements of the constitution, because in the first place, it is directed towards protection of legitimate rights and interests of these persons. Simultaneously, restriction of cognitive capacities, among them grave restriction, may not represent self-sufficient reason for fully restricting the legal competence of a person.

13. Absolute and blanket deprivation of legal competence amounts to interference with the right in high intensity, which implies deprivation of autonomy of an individual in virtually all spheres. An individual is fully deprived of the right to act freely and independently. Moreover, deprivation of legal competence occurs for indeterminate period of time. Consequently, interference with the right of an individual in such intensity should be conditioned by presence of exceedingly important legitimate aim and must represent the least restricting means for achieving this aim.

14. The court shares the position held by the Defendant that by interfering with the right guaranteed by Article 16 of the constitution of Georgia, the State aims to protect valuable legitimate interest. The aim of declaring a person as legally incompetent, in the first place, is to protect the rights and interests of a person with mental retardation.

15. It is ascertained from the evidences furnished by experts of respective sphere to the court that illnesses that create preconditions for declaring a person as legally incompetent are characterized of decline in intellectual functions and mental disorders. The aforementioned symptoms deprive a diseased person of the capacity, in different degrees, "to become aware of importance of his/her actions and take charge of them".

16. Civil-legal transactions, conclusion of which is deprived of persons declared as legally incompetent, alongside with civil rights, give rise to obligations. Stemming from the aforementioned, there is a risk that persons with restricted mental abilities, under the circumstances of independent actions, because of restricted mental abilities, shall enter into transactions irrelevant to their own interests. In a number of cases, such unconscious actions undertaken by a person with mental disabilities may inflict considerably material damage upon him. Similar circumstance may be created not only by unfair actions by counteragent, but also by actions by a person with mental disabilities that are incompatible with his/her own interests.

17. In order to assess constitutionality of the disputed norms, the court must determine to what extent the interference with the right to free development of personality guaranteed by Article 16 of the constitution of Georgia, under the motive of the care for the rights and interests of persons declared as legally incompetent, is proportionate. In the process of assessing proportionality of restriction established by the disputed norms, the constitutional court shall discuss about the form, nature and intensity of interference with the right.

18. According to the first paragraph of Article 58 of the Civil Code of Georgia, any display of the will of a minor or a person declared legally incompetent by the court is void. Stemming from the given norm, any transaction concluded by a person declared as legally incompetent is unconditionally deemed as void and nil and does not give rise to legal consequences. At the same time, invalidity of transaction can be requested by legitimate representative of a person declared as legally incompetent as well as the other party to the transaction, even under

those circumstances when not that conclusion of this transaction is detrimental, but it might be useful and helpful for person declared as legally incompetent. Additionally, legitimate representative of a person declared as legally incompetent – guardian is not equipped with the right to approve and by doing this, to redress the fault of display of the will with regard to such circumstances that are in conformity with the interests of person declared as legally incompetent.

19. Completely different regulation is established towards the persons with limited legal capacity. In particular, pursuant to the first paragraph of Article 63 of the Civil Code of Georgia, if a minor makes a bilateral transaction (contract) without the required consent of his/her legal representative, then the validity of the transaction depends on whether the representative subsequently approves a benefit by the transaction. Therefore, the transaction made by a minor with limited legal capacity constitutes vacillatingly invalid transaction and depends on two circumstances: (1) benefit gained by a minor or/and (2) beforehand and subsequent consent of a guardian – legal representative of a minor. In this case, legal representative has the possibility to defend the interests of person with limited legal capacity, according to his/her interest give or not to give the consent about the validity of the transactions. At the same time, the right of other party to the transaction to demand the invalidity of the transaction is also restricted.

20. Chapter 4 (Article 72-89) of Book 2 of the Civil Code of Georgia determines the institute for transactions made by mistake. Voidable transactions are transactions made by deceit, by mistake and by the use of duress. Voidable transaction *a priori* shall not be deemed void; rather its validity depends on demand for its avoidance from the part of person subject to deceit, mistake or duress. As it is explicitly ascertained from the examples provided, in contractual relations, unquestionable avoidance of the transaction does not represent the sole mechanism for protecting the interests of the weakest side, moreover, in such cases, with a view to protecting Kontrahent, as a rule, only the weak party is entitled to demand avoidance of the transaction, and not both Kontrahent.

21. Such restriction of the right of a person that is guaranteed by the first paragraph of Article 58 of the Civil Code of Georgia goes beyond the ambit of the purposes to protect a person declared legally capable. In the conditions of existing regulation, unlike a custodian of a person without legal capacity, a guardian is not allowed to adjust the transactions made by a person declared legally incompetent to his interests and the disputed norms leave the possibility for the other party to the transaction to demand the invalidity of the transactions, including, those suitable for him/her made by a person who is declared legally incompetent, even then, when at the time of entering into the transaction, he/she was aware or must have been aware of legal incapability of a person. Stemming from the aforementioned, the disputed norms predominantly restrict the right of the Claimants.

22. The Constitutional court deems it admissible, with a view to protecting legally capable Kontrahent, to create a certain legal remedies, however the

regulation that is determined by the first paragraph of Article 58 of the Civil Code of Georgia constitutes disproportionate means to restrict the right and contradicts Article 16 of the constitution of Georgia.

23. Any restriction for exercising the rights of persons with mental retardations should conform to constitutional standards for protection of human rights and fundamental freedoms and should not rest upon the fact of mental illness of a person.

24. The Claimant indicates that in certain domains, in relation to simple transactions, persons declared legally incompetent, objectively, can independently exercise their own civil rights without any assistance of third persons. The Claimant believes that in certain cases, the will expressed by a person without legal capacity should be considered as valid and it should not be invalid or invalidated by a guardian. Stemming from the aforementioned, the court should consider the possibility of existence of such civil-legal relations within the scopes of which persons without legal capacity would be enabled to exercise their rights independently.

25. According to the evidences provided by experts invited to the case, diseases engendering preconditions for declaring legal incapacity cause decline of different intellectual abilities to a different intensity and degrees. Not only the degree of disability caused by diseases varies, but those social spheres, where a person's abilities are limited, differ too. Furthermore, one and the same pathology is possible to cause retardation of various forms and degree in different persons.

26. Disability caused by this or that psychical diseases, when exercising separate rights and duties to fully realize importance of his/her action or guide it, does not always imply that a person is not capable to make conscious decisions in all areas of social life and carry out actions that may entail legal consequences, in particular, small household transactions aimed at satisfying personal reasonable needs, which do not infringe legitimate rights and interest of other persons. Likewise, experts think that persons with mild diseases can fully express their will informatively and freely while making simple transactions. Applicable legislation, upon deciding the issue of legal capacity does not take into account the possibility of differentiating civil-legal consequences emanating from the degree of a disease (except for cases of alcoholic and drug addiction). The legislation only makes distinction between legal capacity and incapacity. The legislation does not foresee adjacent conditions towards persons declared legally incompetent due to "mental retardation" and "mental illness". Consequently, even in the case when a person, regardless of his psychical disease, retains the ability to make a conscious decision in separate areas of social life, which are directed towards satisfaction of his/her personal needs, corresponds his interests and does infringe rights-interests of anybody, the legislation does not provide any possibility for differentiated approach with regard to demonstration of person's will, which would be proportionate to the degree of actual decline in his intellectual and voluntary abilities. The court underscores that the right to free development of

personality, as a natural freedom is fundamental to such an extent that interference with it under the motive of taking care of a person should be used only in the case, when such interference is extremely necessary measure for protecting interests of the person. Stemming from the personal autonomy, an individual has the full right, if she/he is conscious of it to a certain extent, to perform even such actions that are inconsistent to the vision of ordinary members of the society. Upon realizing the right of personal autonomy, it is impossible to exclude the taking of unintended decisions that are incompatible with his/her own interests. Even the persons with high degree of intellectual abilities make such "mistakes".

27. Further, psychical health condition of every person with mental disability is unique and it is impossible to precisely and fully determine individual needs for restriction of legal capacity by the legislation. In such cases, with a view to strike the balance between the interests to take care of person and his/her personal autonomy, it is necessary to restrict the right to free development of personality insomuch that there is objective need for such restriction, based on the degree of mental disability. Besides, it is necessary that the laws provide clear definition of criteria for declaring a person legally incapable. Legislative regulation of declaring legal incapacity should be distinguished by sufficient clarity as to reflect the needs of a person and to create the possibility to institute restriction that is adjusted to these needs. At the same time, the law should give clear directions to subjects participating in taking decisions about declaration of legal incapacity, be it the court, psychiatric institution or any other entity, in order to secure the possibility to exactly determine the degree of mental retardation, when a person must be declared legally incapable as well as its scope. It is noteworthy that the disputed norms do not minimize the effect of restricting the rights; they establish blanket restriction and do not allow the possibility to take into consideration the individual conditions of this or that person.

28. Legal protection of adult persons with mental retardation and mental disorder should rest upon: 1. The principle of flexibility of legal regulation, which together with other issues foresees the use of such legal instruments that ensure that for the sake of protecting a person's rights and property interests, due regard is given to the degree of a person's legal incapacity in specific legal situation and existence of respective legal regulation on legal incapacity of different degrees and different states; 2. The principle to maintain legal capacity as much as possible, which implies, to what extent it is possible to existence of different degrees of legal incapacity and possibility for change in degree of legal incompetence in the course of time. 3. The principle of proportionality between protection measures and the degree of legal capacity, in accordance with which, when restricting legal capacity, specific circumstance for restricting legal capacity and specific needs of the respective person should be taken into consideration. The interference with a person's rights and freedoms is permissible only to the minimum extent that is necessary to achieve the end. The protection measures should not be regarded as full loss of legal capacity for a person, whilst where it

is possible, an adult person should have the right to enter into everyday household transactions with legal importance.

29. Mental disabilities in persons, who are subject to being declared as legally incompetent, are represented in wide gradation and fragmentation. Despite the aforementioned circumstance, the disputed norms apply in a blanket manner to all persons with mental disabilities of all degrees, who are partially deprived of ability "realize importance of their own actions" as a result of which, the disputed norms create the possibility that personal autonomy of certain persons might be restricted to higher degree and intensity than it is necessary for protection of their own rights. Full restriction of legal capacity may be justified by presence of extremely grave and irreversible problems arising from mental health, but with a view to addressing possible negative consequences of one disabled skill of a person, it is unjustified to restrict other skills that are not disabled. This amounts to disproportionate interference with the right to free development of personality.

30. The court holds that in case of dynamically evolving illness, full restriction of legal capacity is possible and this intends to fully exclude negative consequences that are barely or completely unforeseeable. In such case, when disease triggering mental disability is evolving dynamically, the restriction to make independent risky transactions might be considered as proportionate measure for interference with the right. However, the regulation, which unconditionally applies to all types including small transactions of daily life, represents the disproportionate means for interference with the right.

31. In the process of assessing the constitutionality of the norms regulating legal incapacity, it is also important to pay attention to the procedures through the use of which person declared legally incapable are distanced from legal relations. In the case under consideration, a guardian who participates in legal relations in the name of his/her ward replaces the will of a person declared legally incapable.

32. When assessing the proportionality of interference with the right to free development of personality, it is worth to be noted two issues in the context of replacement of the will of a person declared legally incapable: 1. Measure for replacing the will is applied toward all persons who are declared legally incapable; 2. The form of replacement measure is used which implies full replacement and disregard of the will of a person who is declared legally incapable.

33. The state is obliged, in case of need, should ensure protection of interests of persons with disabilities through undertaking positive actions. Provision of persons with mental disability with a guardian is one of embodiments of this obligation.

34. Besides, as the constitutional court held, mental disability is represented in a person declared as legally incompetent in wide variety and fragmentation. In certain cases, it is vital important for a person with disability to appoint a guardian. However, there are cases, when a person has proper ability to formulate his/her own will and this will be adequately reflected and taken into account in the process of making decisions in his/her name. Presumption of fairness of a

guardian cannot overweigh negligence of expressing the free will of a person, in case if a person is not deprived of such ability.

35. The right to free development of his/her own personality implies human right to dispose his own life according to his/her wishes, even if in the opinion of majority of the society or average sober-minded person, these wishes are improper and unadvisable. Opinions on form and substance of relationship between one's own inner-world and outer word is so individual that it is impossible to have full compatibility of such opinions, even among people that are standing either socially or biologically close to one another. Therefore, according to Article 1290 of the Civil Code of Georgia, acting guardian, no matter how fair she/he acts or stands biologically or socially closer to his/her ward, he will not ever become full-fledged replacement of his/her will.

36. As a result of examination of legal practice of foreign countries by the constitutional court, it was revealed that respective regulations of a majority part of the countries, under the condition of guardianship, properly reflect the will of a ward when making transactions in his/her name. Similar regulations determine the provision of the will of a ward while making transactions, even provision of the possibility for a person with disability, who is under the control of his/her guardian, to enter into transaction, the support of a guardian in the process of formulating the will of a ward and assisting to make a decision and etc. The given practice indicates that reflection of the will of a person with disability in the actions carried out in his/her name is possible even in the cases of presence of disability in expressively grave forms.

37. In the process of restricting legal capacity of a person, modern international legal standards also requires the necessity to envisage the will and individual mental abilities of the person (for instance, Recommendation N818 (1977) of 8 October 1977 of the Parliamentary Assembly of the Council of Europe; Recommendation R(83)2 of 8 February 1983 of the committee of ministers of the council of Europe; Recommendation R(99)4 of 23 February 1999; Recommendation Rec(2004)10 of 24 February 2004; Recommendation CM/Rec (2011)4).

38. The court take into account difference of persons with so called "mental retardation" and "mental illness", but, simultaneously, indicates the importance of individual autonomy and independence, including making decisions based on free choice. The court underlines that persons of the given category must be considered as subject of rights and not as merely patients.

39. In the process of determining specific methods for protection of the rights of persons with mental disability, the legislature should elaborate the optimal mechanism that will enable the court, when declaring a persons as legally incapable, to give due regard to the degree of dissolution/damage of his/her will and intellectual ability in specific spheres of social life and thus, to ensure to the maximum possible extent protection of rights and freedoms of a person.

40. Legal capacity is individualized process. Respectively, the purpose of the legislature should be to give assistance to legally incapable persons in making

decision, and not full replacement of their will in all spheres. Responsibilities of guardians should be strictly confined to those issues in which a person does not have the possibility to formulate his/her will, and legally incapable persons should have the possibility to take decisions within the scopes of their abilities that are not disabled, including when it is needed, on the consent of his/her guardian. Additionally, all necessary modifications should be developed, which does not give rise, in every specific case, to insurmountable and unjustified difficulties in enjoyment of the rights and freedoms of a person.

41. The legislation should establish those legal actions, which, stemming from their special personal nature, are impermissible to be implemented by representative. Also, the legislation should determine which decisions of guardian require specific approval from the court or from other authorized entity.

42. At the time of mental disorder and mental retardation, a person may be fully deprived, as a last resort, of legal capacity, when he/she does not have the ability to make an independent decision in any spheres of his/her life. In other case, when a person retains the ability to make a decision in separate sphere, restriction of the right should be applied to such person in less intensity.

43. The disputed norms of the civil code of Georgia provide full and unconditional replacement of the will of person declared as legally incapable under those circumstances, when legally incapable persons can enter into simple transactions independently. At the same time, in certain cases, when a person does not have sufficient mental ability to independently make this or that transaction, there is practical possibility that the will of a person with disability should be reflected in respective dosage and form when entering into transactions in his/her name.

44. Existing approach towards the issue pertaining to legal capacity of adult persons does not represent the proportionate means to achieve legitimate aim. In case of maintenance of legal capacity in full extent, the legislation does not provide the possibility of adequate protection of the rights of a respective person, as well as in case of restriction of legal capacity in full extent amounts to exaggerated and disproportionate interference with the right of a person.

45. Bearing in mind all the aforementioned, the normative content of the word “mental retardation” of paragraph 5 of Article 12 of the Civil Code of Georgia, which foresees declaration of person with “mental retardation” as legally incapable without due regard to his/her individual mental abilities and the normative content of the words “or mental illness” of the same paragraph, which envisions declaration of a person with “mental illness” without due regard to his/her individual mental abilities, the words “a letter of intent made by a person declared as legally incompetent” of the first paragraph of Article 58 of the same Code, the normative content of Article 1290, which deals with persons declared as legally incompetent, the normative content of the first paragraph of Article 1293, which deals with persons declared as legally incompetent by the court, the words “and private legal relations” of subparagraph “h” of the first paragraph of Article 5 of the law of Georgia “On Psychiatric Care”, on the one

hand, provides more than necessary restriction of legal capacity of persons with mental disability, and on the other hand, exceedingly provides replacement of the intent of persons declared as legally incompetent with the intent of a guardian. Thus, the given norms amount to unjustified interference with the right to free development of personality and are unconstitutional with respect to Article 16 of the constitution of Georgia.

Voluntariness of commencement and termination of treatment, freedom to choose doctor and treatment institutions

46. The first paragraph of Article 10 of the law of Georgia "On Psychiatric Care" and paragraph 2 of Article 14 of the same law restricts the right of person declared as legally incompetent to voluntarily choose psychiatric institution, doctor and make a decision on his/her own about his own treatment and medical examination.

47. As it was already mentioned, the right to free development of his/her own personality encompasses the freedom of a person to dispose at his discretion his own physical and mental spheres, regardless of such decision will bring positive or negative outcomes for him/her. The given right contains the freedom of a person to be subject of this or that measure of medical treatment, including take medical means, choose healing doctor and medical institution. Therefore, the aforementioned norms amount to interference with the right to free development of personality as guaranteed in Article 16 of the constitution of Georgia.

48. As it was indicated above, the right guaranteed by Article 16 of the constitution is not absolute. Its restriction is permissible in order to achieve legitimate aims, if such restriction is proportionate with such legitimate aims.

49. The purpose of the disputed norms of the law of Georgia "On Psychiatric Care" to ensure optimal management of the process of treatment of a person declared as legally incompetent. A person with mental disability, in a range of cases, may be lack the ability to take optimal decisions regarding his/her own health. Under the circumstances of improper management of the treatment, a person with disability through his own unconscious actions may inflict damage upon safety of third persons and other interests. The disputed norms also intend to prevent such cases.

50. It is noteworthy that modern international law is oriented on the maximum provision of the intent of patients of persons having cognitive defect or persons with other disabilities and establishes different mechanisms through which it reduced to the minimum possible extent the possibility of interference with the right to personal autonomy. Analogous approach is shared by the laws of many countries and takes into account the obligation to consider the opinion of a person with regard to his forced placement in medical institution and more frequently, with regard to the issue about medical treatment.

51. Psychiatric disorder may affect the ability of a person to announce his/her consent about treatment. In case of illness in grave forms, at the initial stage

of medical treatment, a person may not have the ability to give informed consent; however, as a result of medical treatment, he may regain this ability. Therefore, a person of majority age has the ability declare free and conscious consent about interference in his health; such interference should be carried out only based on his consent. In case of illness in grave forms, when a person of majority age is not able to announce free and conscious consent, the interference could be carried out regardless of it, if it serves to an immediate wellbeing of this person.

52. Protective measure should not automatically deprive of respective person of the right to express his/her opinion about any interference with the sphere safeguarding his/her own health. In separate cases, a person may want to refuse the use of certain medical manipulations and on the contrary, may want to use more intensive treatment, which may facilitate his/her rapid recovery.

53. Assessment of proportionality of interference with the right guaranteed by Article 16 of the constitution by the disputed norms, in a certain extent, is connected with declaration of a person as legally incompetent and with issues related to replacement of the intent of a ward by the intent of his/her guardian. When considering these issues, the court held that persons, who are subject to being declared as legally incompetent, strongly differ in degree and form of mental disability. Under the conditions, when there is no mental disability in high degree, a person retains certain abilities of consciousness, even in limited extent and even only in certain spheres of social life. The circumstance that a person declared legally incompetent is fully excluded from the process of making a decision about his health, gives rise to negligence of the abilities that are not disabled. Therefore, the disputed norms, stemming from its blanket nature, amounts to disproportionate interference with the right to free development of his/her own personality.

54. Two factors conditions disproportionate interference with the right to free development of personality: 1. The norm does not provide gradation of persons subject to medical treatment according to degree and form of their mental disability; 2. A person's participation or provision of his/her intent in the process of making decision about his/her own health is absolutely and unconditionally excluded.

55. Stemming from the aforementioned, the court holds that the word "without legal capacity" of the first paragraph of Article 10 of the law of Georgia "On Psychiatric Care" and the words: "in case of legal incapacity" of the second paragraph of Article 14 of the same law establish unjustified interference with the right to free development of personality and is unconstitutional with respect to Article 16 of the constitution of Georgia.

Procedure to recover legal competence of a person

56. The Claimant thinks that paragraph 5 of Article 81 and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia contradicts Article 16 of the constitution of Georgia and is unconstitutional.

57. Under the regulation established by the given disputed norms, a person is deprived of the possibility to demand independently restoration of legal competence in case of his health recovery. He/she also is unable, due to his/her status of legal incompetence, to participate in the procedures related to recovery of legal competence instituted on the initiative of other person. The disputed norms establish restriction of the right to apply to the court.

58. Regulation of the right to free development of personality does not pertain to the immediate sphere of regulation of the disputed norms. The constitutional court repeatedly indicates that Article 42 of the constitution of Georgia is instrumental right, which ensures the protection of rights and legitimate interests through the court (Decision N1/2/434 of 27 August 2009 of the constitutional court of Georgia on the case "The Public Defender versus the Parliament of Georgia", II-I). Therefore, the right to fair trial as an instrumental right, is a constitutional legal guarantee for protection of other rights including the right to free development of personality.

59. Obviously, immediate result of restricting the right to fair trial may be the restriction of the right to free development of personality, priority rights, freedom, right of equality and any other rights. However, this does not mean that the norms restricting the right to fair trial, in terms of constitutionality, simultaneously amount to interference with all those rights, for protection of which a person faces the need to apply to the court. Respectively, restriction established by the disputed norms, under which, persons do not have the right to apply to the court demanding the recovery of legal competence, does not represent the interference with the right to free development of personality of the claimant guaranteed by Article 16 of the constitution and the issue of its constitutionality will be assessed only with respect to Article 42 of the constitution of Georgia.

60. Besides, paragraph 2 of Article 327 of the Civil Procedure Code of Georgia establishes that decision about recover of legal competence of a person is taken by the court on the basis of the statement of a guardian, psychiatric medical institution, family member, and conclusion of judicial psychiatric expertise. Therefore, there is possibility that recovery of legal capacity of a person declared as legally incompetent upon presence of respective ground may be requested by other person – a guardian, family member or psychiatric treatment institution. This circumstance does not mean that constitutional right of a person to dispose his/her own inner world, his/her personal mental and physical sphere at his/her discretion, is violated. Moreover, according to the disputed norms, person's legal competence is recovered on the basis of a statement of abovementioned persons. Therefore, the norm serves to the aim that a person, whose health condition improved and there is no ground for declaration of his legal incompetence, should be recovered in those rights that were restricted as a result of declaration of his legal incompetence. At the same time, recover of legal competence occurs only if improvement of health condition of a person is confirmed by the opinion made by legal psychiatric expertise and the court takes final decision on the issue. Tak-

ing into account the aforementioned, the rule established by the disputed norms cannot be assessed as breach of the right to free development of personality of the claimants.

61. Stemming from all the aforementioned, paragraph 5 of Article 81 and paragraph 5 of Article 327 of the Civil Procedure Code of Georgia contradict with Article 16 of the constitution of Georgia.

Constitutionality of the disputed norms with respect to Article 36 of the Constitution of Georgia

(Subparagraph "e" of the first paragraph of Article 1120 of the Civil Code of Georgia)

62. According to the first paragraph of Article 36 of the constitution of Georgia, "Marriage shall be based upon equality of rights and free will of spouses". Therefore, the constitution recognizes the freedom of a person to enter into marriage voluntarily with a partner of his/her choice. Under the interpretation of the constitutional court, "the good guaranteed by the first paragraph of Article 36 of the constitution is not similar to marriage of persons or co-habitation without marriage. Here it deals with the form of marriage that is legally established and recognized" (Decision 2/2/425 of 23 June 2008 of the constitutional court of Georgia on the case "A citizen of Georgia Salome Tsereteli-Stivens versus the Parliament of Georgia", II-7).

63. At the same time, the right to marry as guaranteed by the first paragraph of Article 36 of the constitution has an autonomous constitutional content and it is not confined with definition existing in the legislation on this institute. Constitutional and legal weight of marriage is much wider and contains large spectrum of various relations. Marriage represents voluntary and conscious union, which aims to engender important legal, social and personal consequences. This is the possibility of persons to give the status to their relations, establish legally binding union and gain the social acknowledgement of their relationship. Social recognition of the couple's union and their integration into the community is a central component of the institute of marriage. Primary objective of marriage is to found a family and thus, realization of the right to marry represents the means to found socially recognized family. Marriage as an important personal and, at the same time, public act, serves to integration of newly founded family into the society. The most important condition of marriage is recognition of relationship of the couple from the society and the state. It is inadmissible to create hurdles for persons desiring to enter into marriage through the interference that is disproportionate and unacceptable for democratic society. Any restriction, through which the State prevents legal or social recognition of marriage, should be based on important constitutional-legal ground.

64. The Claimants believe that subparagraph "e" of the first paragraph of Article 1120 of the Civil Code of Georgia is unconstitutional and contradicts with the right to marry as guaranteed by the first paragraph of Article 36 of the

constitution of Georgia. According to the mentioned disputed norm, marriage is not allowed between those persons, at least one of whom has been declared by a court to be a person without legal capacity by reason of mental illness or mental retardation.

65. Pursuant to the first paragraph of Article 1106 of the Civil Code of Georgia, marriage is the voluntary union of a woman and a man for the purpose of creating a family, which is registered with an authorized agency. Georgian legislation links marriage with certain legal consequences. For instance, under the Civil Code of Georgia, by the procedure defined by law, marriage give rise to certain property rights and personal non-property rights and obligations. In particular, marriage engenders co-properties of spouses, obligations to subsist each other and legal guarantees of inheritance. The guarantees established by the Georgian legislation might also be linked with marriage (for instance, spouses are protected from give testimonies against each other, tax concessions and so forth).

66. Marriage is not only civil and legal transaction, conclusion of which is related to acquisition of a range of property and personal non-property rights and obligations. Marriage is complicated social institute and is not limited only to legal consequences set forth by the law. Right to marry, in the first place, is connected with realization/protection of the natural and fundamental right to "found a family". This is a person's right to gain legal status and social recognition of the relationship. Marriage under the procedure established by law is a legal means for persons to obtain the legitimation of their relationship from society and the state through marriage.

67. The right to marry established by the Civil Code of Georgia defines both normative and legal construct of marriage and ensures regulation of its accompanying consequences.

68. Stemming from the disputed norms, upon assessment of the restriction, the constitutional court give due regard to those legal and social consequences that is connected with registration of marriage.

69. The disputed norm does not restrict factual co-habitation of persons. The disputed norm only prohibits institutionalization of such co-habitation. The State does not recognize factual co-habitation of person declared as legally incompetent and his/her partner as voluntary union of persons, which is directed to found a family.

70. In the process of realization of human rights in democratic society, conflict of interests is not unusual thing. Constitutional order intends to properly balance contrasting interests so that protection of one good does not occur at the expense of disproportionate interference of other good.

71. As it was indicated above, in the case under consideration, the State does not legally and socially recognize the union of person. A person declared as legally incompetent is deprived of the possibility to found a family and obtain legal and social status of his/her personal relations. Therefore, the state impedes integration of persons with mental disability into the society. Such regulation

contributes to stigmatizing persons with disabilities – who belong to socially vulnerable groups.

72. The respondent refers to two legitimate aims to restrict the right to marry of persons declared as legally incompetent: protection of person without legal capacity from involuntary marriage and safeguard of his property interests.

73. Protection from involuntary marriage constitutes an important element of the freedom of marriage guaranteed by Article 36 of the constitution of Georgia. Recognition of voluntary nature of marriage is expression of the respect of person's autonomy. According to Article 36 of the constitution, the marriage is voluntary; if it is based upon expression of free and conscious will of a person. Freedom to express the will implies unforced expression of own wish of a person. And consciousness contains the ability of a person to properly perceive and analyze act of marriage and its accompanying personal, social and legal consequences.

74. Therefore, if a person due to his/her mental disability cannot freely and consciously express his/her will to enter into marriage, the marriage cannot be in compliance with the right of a person to be protected from involuntary marriage and deprivation of personal autonomy. Thus, it is obvious that legitimate aim of the disputed norms is to protect a person with mental disability from involuntary marriage.

75. The court also shares the position held by the Respondent that the disputed norm aims to protect property interest of person declared as legally incompetent from a spouse acting in his/her self-interest. There cannot be excluded cases in social life when persons acting in their self-interest abuse mental disabilities of a person in order to receive the property-related benefits. Therefore, the legislature provides protection of valuable interest.

76. While restricting constitutional right, not only legitimate aims should be present, but also interference with the right should be proportionate to the legitimate aims.

77. In the case under consideration, applicability of the means used is not questioned. Regulation established by the disputed norms prohibits marriage of legally incompetent persons and respectively, excludes those risks that might exist in achieving legitimate aims. In particular, by complete prohibition of persons declared as legally incompetent, legally incompetent persons are protected from involuntary marriage and from embezzlement of their property through the means of the marriage of convenience.

78. Together with suitability, restrictive measure should be the means necessary to achieve the legitimate aim. In particular, there should not be the reasonable means that are less restrictive measure to achieve the same legitimate aim. Proportionality of the effect restricting the norm with legitimate aims requires individualization of the interference with the right and maximum adjustment to the needs. The norm that unconditionally and fully restricts the right, could

with difficult justify the standard of constitutionality. At the same time, adjustment to the needs of regulation restricting the rights is related to a wide range of challenges. Such challenges are undoubtedly present when dealing with persons with mental disability. In the social, media and legal viewpoint, it is difficult to determine where the limits of proportionality between persons with mental disability and the freedom of marriage are drawn.

79. International practice shows that the state apply to mechanisms less and less restricting the personal autonomy of persons with mental disability, including with regard to freedom of marriage, as an important expression of personal autonomy. In particular, persons with disability are given the possibility to realize the right to marry by the consent and under the supervision of guardian or competent state agency. Besides, in separate case, the authority of a guardian with regard to giving his/her consent over the marriage of his/her ward is restricted only by property-related aspect and his competence does not extend to the relations of non-property nature.

80. The analysis of substantive and procedural norms regulating the declaration of legal incompetence demonstrates that declaration of person as legally incompetent occurs in the case, when he/she is deprived of the ability to perceive the importance of his/her own actions.

81. Diseases that represent the ground for declaring a person as legally incompetent are distinguished by a wide range of varieties of disabilities both in terms of degree, fragmentation and dynamics. In such conditions, it is clear that ability to perceive and analyze cannot be similarly declined in all persons subject to declaration as legally incompetent, rather it differs based on different spheres of social life and complexity of decision to be made.

82. Marriage is a civil transaction of unique nature, which unlike other transactions includes components of personal non-property relations. Therefore, perception of importance of marriage requires different social abilities, than it is necessary to realize transactions of purely property nature.

83. The constitutional court holds that in the case under consideration, various segments of restriction of the right to marry require various constitutional and legal assessments.

84. The constitutional court takes into account that by the disputed regulation, the State aspires to achieve an important legitimate aim – protection of property interests and personal autonomy of an individual. The court deems such regulation admissible that restricts property consequences of marriage of persons without legal capacity and serves to the protection of the rights of persons with mental disability. However the restriction should represent the proportionate means to achieve this legitimate aim and does not give rise to negligence of mental and social abilities of a person that are not disabled. In the case under consideration, it is established that there is reasonable possibility to protect property rights of a person with mental disability through less restrictive measures. Among them, establishment of the consent of a guardian or competent agency,

confinement of the marriage only to social and personal outcomes, obligatory nature of marriage contract and etc.

85. Abilities to perceive property and non-property consequences of marriage may be differ in individual cases. Property consequences of marriage that are associated with recognition of certain property obligations, requires different forecast as opposed to non-property social consequences of marriage.

86. It should be noted the circumstance that marriage is not only civil transaction that gives rise to property consequences only. Except for property consequences, marriage also engenders significant personal non-property rights. In particular, spouses gain the possibility to use each other's surnames, origins of offspring of married spouses are established in a simpler way and etc.

87. At the same time, marriage is an important social institute, which gives appropriate status to relationship of persons. As it was indicated above, marriage through procedure determined by law has a legitimation function of relations between persons and significantly are associated with recognition of their marriage and co-habitation from the part of the society.

88. Therefore, not only property consequences of marriage are restricted to persons declared as legally incompetent, but also the right to gain personal non-property rights as a result of their marriage is restricted. Also, social recognition of person declared as legally incompetent and his/her partner does not occur. The State does not legitimize the union of such persons.

89. The legislation does not prohibit factual co-habitation of persons without legal capacity and giving birth to children. At the same time, having a child is accompanied with property and personal non-property obligations, be it alimony, upbringing and be it obligation to create decent conditions and so forth. It is noteworthy that the legislature itself, in such inescapable cases, imposes certain family-legal obligations upon persons declared as legally incompetent.

90. Analysis of both international practice and evidences presented to the case demonstrate that decision to enter into marriage with other person, to co-habit with him/her and family relations are much more individual and far more psycho-social, and are preconditioned by emotional factors. As a result of hearing the specialists invited to the case, it was ascertained that while declaring a person as legally incompetent, such factors are not examined. As it was indicated above, declaration of a person as legally incompetent occurs in case when he/she has lost his ability, due to his/her "mental illness" or "mental retardation" to "realize importance of his/her actions". Analysis of neither legislation nor practice does not give the possibility to conclude that in the process of declaring legal incompetence, a person's social abilities to perceive accompanying social non-property consequences of marriage are examined.

91. Conscious intent to found a family together with other person may possibly exist without realizing property-related consequences. The disputed regulation does not foresee the probability that due to "mental illness" or "mental retardation", certain category of persons declared as legally incompetent may

not have lost the ability to perceive importance of marriage as social act, and realize those personal and social consequences that marriage entails. Under the disputed norms, a person's abilities are examined, according to the area of social life, that concerns the decision to be made and therefore, unrestricted abilities of persons declared as legally incompetent are totally ignored.

92. Stemming from all the aforementioned, the constitutional court of Georgia submits that restriction of the right to marry for persons declared as legally incompetent is disproportionate and, respectively, is unconstitutional. Thus, the constitutional claims have to be satisfied in this part of the claim requirement and declared as unconstitutional the normative contents of the words "mental illness", "or mental retardation" of subparagraph "e" of the first paragraph of Article 1120 of the Civil Code of Georgia, which without due regard of individual mental abilities, prohibits marriage of persons declared as legally incompetent with respect to the first paragraph of Article 36 of the constitution of Georgia.

Constitutionality of the disputed norms with respect to Article 14 of the constitution of Georgia

(The words "mental retardation" and "or mental illness" of paragraph 5 of Article 12 of the Civil Code, the words "a letter of intent made by a person declared legally incompetent by a court" of the first paragraph of Article 58; subparagraph "e" of the first paragraph of Article 1190, Article 1290, the first paragraph of Article 1293 of the Civil Code of Georgia; paragraph 5 of Article 81 and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia; the words "and in private legal relations" of subparagraph "h" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care", the words "legally incompetent" of the first paragraph of Article 10 and the words "in the case of legal incapacity" of the second paragraph of Article 14 of the same law).

The sphere protected by Article 14 of the Constitution of Georgia

93. According to Article 14 of the constitution of Georgia, "Everyone is free by birth and is equal before law regardless of race, color, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence". Purpose of Article 14 of the constitution of Georgia is to "not allow unequal treatment of substantively equals and the other way round" (Decision N2/1/473 of 18 March 2011 of the constitutional court of Georgia on the case "Citizen of Georgia Bichiko Chonkadze and others versus the Ministry of Energy of Georgia", II-1). As the Constitutional court of Georgia construes, "the degree to secure equality before the law is an objective criterion for assessing the degree of rule of law constrained in favor of democracy and human rights in the country. Therefore, this principle represents as a basis for democratic and rule-of-law based state as well as - its purpose" (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "Political Union of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-4).

94. Besides, any differentiation of legal regulation by the legislature should be carried out in compliance with those requirement of the constitution that emanate from the universal principle of equality, under which, a differentiated approach is permissible in certain instances, if this differentiation is justified objectively, well-founded, and in other instances, it serves to the constitutionally important goals, and the means employed to achieve these goals are proportionate to these very goals. The given principle ensures protection of human rights and freedoms from discrimination and prohibits introduction of such distinction between persons pertaining to one and the same category, which does not have objective and reasonable justification.

95. Under the practice established by the constitutional court of Georgia, in order to hold discussions within the scopes of Article 14 of the constitution, in the first place, it should be ascertained whether persons (groups of people) to be compared really are substantively equal. To this end, it is necessary that the given persons be placed in the category that be similar by this or that content, are placed in analogous circumstances and be substantively equal in terms of specific circumstances or legal relations.

96. The Claimants stated three groups of persons, with regard to who, in their opinion, persons declared as legally incompetent, are in equal condition, and simultaneously, are subject to differentiated treatment. In particular, the groups of such persons are: 1. Persons with physical disability; 2. Legally capable persons within those abilities which persons declared as legal incapable also possess; 3. Those persons, who regardless of complying with the requirements of the law for being declared as legally incompetent are not declared as such.

97. While defining substantive equality "persons should belong to comparable categories; they must be placed in similar category, analogous circumstances through this or that content, they must be substantively equal in specific circumstances or relations; one and the same persons with respect to certain relations, circumstances may be considered as substantively equal, and with respect to others – not" (Decision 1/1/493 of 27 December 2010 of the constitution of Georgia on the case "Political Unions of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II-2).

98. In the first place, it must be noted that for the purposes of the disputed norms, persons with physical disabilities and any other persons, towards who there is no ground to declare legally incompetent, represent one and the same comparable group. There is no difference between them in terms of the ability to make a decision; they are in one and the same legal regime according to the disputed norms. The sphere of regulation of the disputed norms is to create different regimes of expression of their civil legal intent for persons based on their mental abilities. In this regard, the constitutional court cannot see any difference, between persons with physical disabilities and any such persons towards whom there is no ground for declaring as legally incompetent, which would produce

the need for separation of these two groups and their individual comparison with persons without legal capacity.

Differentiation caused by the norms regulating legal capacity

(Paragraph 5 of Article 12, the first paragraph of Article 58, Article 1290, the first paragraph of Article 1293 of the Civil Code of Georgia; subparagraph "h" of the first paragraph of Article 5, the first paragraph of Article 10, paragraph 2 of Article 14 of the law of Georgia "On Psychiatric Care")

99. Legal incapacity foreseen by the disputed norms is connected with validity of a letter of intent and independent acquisition and exercise of civil rights and freedoms. Therefore, the regime of legal incapacity established by the disputed norms contains a wide spectrum of relations – making of daily household civil transaction, entering into entrepreneurial relations and etc.

100. The constitutional court considers that persons declared as legally incapable and other minors who do not have mental disabilities, have equal needs in daily life to make small civil and legal transactions and in the part of making those civil legal transactions, the content of which persons legally declared as incapable have the ability to perceive and become conscious, these persons are substantively equal in relation to other adult persons with legal capacity.

101. Simultaneously, persons declared legally incompetent by the court and persons who are not declared as legally incompetent, but comply with the preconditions necessary for declaration, are persons being in substantively equal conditions and must be assessed as substantively equal subjects.

102. After definition of substantively equal persons, the constitutional court should determine whether there is unequal treatment at hand. In the case under consideration, it is evident that persons declared as legally incompetent and other minor persons towards who there is not ground for declaring them as legally incompetent, occurs differentiated treatment, because legally incompetent persons unlike legally competent ones, do not have the possibility to independently acquire civil rights and obligations, to independently participate in civil legal relationships, to make decisions about their own medical treatment and etc.

103. At the same time, it must be ascertained whether there is differentiated treatment between on the on hand, persons declared as legally incompetent by the court and on the other hand, such persons who, due to "mental illness" and "mental retardation" are unable to perceive importance of their actions, however, they were not declared as legally incompetent. The disputed norm associates the status of legal incompetence with the decision of the court and, respectively, establishes differentiation of these two groups of persons, as persons who were not declared as legally incompetent, can independently acquire civil rights and obligations, unlike those persons who were declared as legally incompetent by the court.

104. In the case under consideration, the circumstance is not contested that declaration of person's legal incapacity should take place by the court deci-

sion. Moreover, representative of the claimants at the sitting of consideration of the case on merits indicated: "it is necessary to have judicial review at the legal proceedings on declaring legal incompetence, in order to ensure adequate realization of rights, because the court is the best evaluator of not medical evidences, but of what legal consequences will be produced with regard to a specific person even in case of restriction of his/her one right. Stemming from this, the court should be an agency that will legally formalize the declaration of legal incompetence of a person". Therefore, within the scopes of the dispute under consideration, constitutionality of such differentiation cannot be assessed. On the other hand, the disputed norms do not establish differentiated treatment between persons declared as legally incompetent and persons who, truly, are not declared as legally incompetent. The constitutional court construes that upon constitutional legal examination of this or that normative act, regulation arising from the act is assessed. Enforcement process of the normative acts are linked with a number of legal and factual difficulties. Differentiated treatment which is conditioned by enactment of this or that normative act in different period of time towards different groups of persons must not be considered as differentiation emanating directly from the normative act, if the norm itself does not give the ground for this.

105. In the case under consideration, the disputed norms establish that in case of presence of respective grounds, a person is declared as legally incompetent. Possibly, there may be persons who have mental disabilities, but they were not declared as legally incompetent due to any reasons, despite the fact that towards them there is legal ground established by the disputed norms to declare them as legally incompetent. This does not mean that the disputed norm differentiates persons. The differentiated treatment is caused by factual circumstance that certain procedures provided for by the law were not applied towards certain persons. In the case under consideration, the disputed norm equally is extended to all persons towards whom there is medical opinion about their "mental illness" and "mental retardation", under which, persons are unable to "perceive importance of their actions", respectively, in this light, the disputed norm does not establish unequal treatment.

106. The constitutional court established that there is differentiation of substantively equal subjects. Therefore, it should be determined whether or not differentiated treatment conforms to constitutional and legal standards for restricting the right of equality. Differentiation of substantively equal persons should not be "end in itself and unjustified", otherwise it will acquire the forms of discrimination prohibited by Article 14 of the constitution (Decision N1/1/493 of 27 December 2010 of the constitutional court of Georgia on the case "Political Union of Citizens: "The New Rights" and "The Conservative Party of Georgia" versus the Parliament of Georgia", II, 5).

107. According to the case-law of the constitutional court, while assessing the disputed norms, two types of tests for "rational differentiation" and "strict

scrutiny" are applied. The issue about which of them, the court should be guided by, is decided through giving regard to intensity of the interference and the characteristic of differentiation.

108. As the constitutional court construes, "the standards to assess constitutionality of interference with the sphere guaranteed by the right of equality are not homogeneous. The norm, which establishes differentiation is connected with classical, specific signs or/and is characterized by high intensity, are subject to constitutional scrutiny within the scopes of "strict test" through the use of the principle of proportionality (Decision N2/1/473 of 18 March 2011 of the constitutional court of Georgia on the case "A citizen of Georgia Bichiko Chonkadze and other versus the Ministry of Energy of Georgia", II-6). Stemming from the aforementioned, the constitutional court should establish: a) whether or not differentiation is linked with classical, specific signs; b) whether or not differentiated is characterized of high intensity.

109. "Classical" specific signs of discrimination are directly spelled out in Article 14 of the constitution. This especially protects the group of those persons against whom the risk of discrimination is historically very high.

110. Under the disputed norms, the ground for differentiation of persons is declaration of person's legal incapacity by the court. Therefore, differentiated treatment is connected with the legal status of a person.

111. The claimant indicates that unequal treatment takes place by the characteristics of "disability". At the sitting of consideration of the case on merits, representative of the Claimant announced that this characteristic of discrimination is not stated in Article 14 of the constitution, however, the constitutional court should consider it as classical characteristic of discrimination, because bearing in mind its contents, persons with disabilities are in need to have special safeguards from discrimination.

112. The constitutional court of Georgia explains that disability, as possible differentiated characteristic, is not foreseen in the list of Article 14 of the constitution and it cannot be considered as classical differentiated characteristic defined by Article 14 of the constitution.

113. The Claimant also indicates that differentiation occurs through "social belonging" as foreseen by Article 14 of the constitution of Georgia. As the constitutional court of Georgia clarifies, "in order that law differentiates persons based on their social belonging, it is required to exist specific social group during its adoption or in the period of its application, membership of which is associated with differentiation. Possibility to consider this or that circle of persons as being a social group should be assessed on case-by-case basis. Criteria to establish existence of social group are not explicit and exhaustive, however, in order to create a general picture, conditionally, it is possible to indicate some of them: 1. Members of group should be characterized by common, permanently persisting nature, which might be developed due to person's choice or unforeseen circumstances (factors). Its change does not depend on members of the group or it is

so fundamental to their personality that demand for its change is unjustified. 2. A circle of persons could be considered as social group, members of which are closely connected based on similar image, behaviors or/and interests. At the same time, in both cases, members of the group should have such nature (characteristics) that will enable outsiders identify them as members of specific social group. Though, the constitutional court does not rule out presence of the circle of such persons who without complying with these criteria, may be considered as social group" (Decision of 18 March 2011 of the constitutional court of Georgia on the case "A citizen of Georgia Bitchiko Tchonkadze and other versus the Ministry of Energy of Georgia", II-10).

114. Persons declared as legally incompetent represent social group the common characteristic of which is the declaration of their legal incapacity by the court dues to certain mental disability. Legal incapacity is conditioned by the factor independently of them – presence of mental disability and its change does not depend on legally incompetent persons themselves. Persons with mental disability belong to vulnerable group towards which the need for protection from discriminatory treatment is high. While regulating such sphere, the legislature is obliged to show special attention in order to avoid the risk of breach of the rights of persons. Due to mental disability, to give the legal status to a person and subsequently, differentiating through this legal status requires especially strict constitutional-legal scrutiny, because there is differentiation of persons because of their social belonging – the classical characteristic foreseen in Article 14 of the constitution of Georgia.

115. When assessing differentiation within the scopes of "Strict text", it is necessary to establish to what extent unequal treatment by the state is necessary and whether or not there is compelling state interest.

116. The issue of effects restricting the disputed norms and proportionality with legitimate aims was considered in detail in the respective part of the present decision of the constitution of Georgia, while discussing the constitutionality of disputed norms with respect to Article 16 of the constitution.

117. Legitimate aim of restriction related to declaration of a person as legally incompetent represents the care over this person and protection of his/her interests. The reason, which places legally incapable persons in differentiated treatment in relation to persons with legal capacity, is their unrestricted abilities. Due to other disabilities, they are also restricted the possibility to realize their unrestricted abilities in a number of legal relations. Justification of such differentiation stemming from the strict scrutiny test, could be permissible in the case, if identification of unrestricted abilities of persons with pathologies of "mental illness" and "mental retardation" and adjustment of restriction to them would be unaccomplished task for the State. Likewise, it is important that good protected by restriction be superior to the interest violated as a result of interference with the right.

118. Evidence given by the expert (M. Eliashvili) to the court shows that

separation of unrestricted and restricted abilities are related to certain difficulties. However, this is not impossible and similar practice is applied and approved in many countries.

119. Furthermore, the latest international trends show that giving more autonomy to persons with mental disability, at the expense of reducing care measures catered for them, is more beneficial for these persons, than intensive restriction of legal capacity.

120. Bearing in mind the aforementioned, the constitutional court finds less convincing to claim that differentiation established by the disputed norms is absolutely necessary or/and there is insurmountable, compelling public interest for such interference with the right.

121. Stemming from all the aforementioned, the constitutional court of Georgia holds that the normative meaning of the words "mental retardation" of paragraph 5 of Article 12 of the civil code of Georgia, by which it foresees declaration of "mentally retarded" person as being legally incompetent without giving due regard to his/her individual mental abilities and the normative meaning of the words "or mental illness" of the same paragraph which foresees declaration of "mentally ill" person as legally incompetent without giving due regard to his/her individual mental abilities, the words "a letter of intent made by a person declared legally incompetent by a court" of the first paragraph of Article 58; the normative meaning of Article 1290, which deals with persons declared legally incompetent by a court, the normative meaning of the first paragraph of Article 1293 of the civil code, which deals with persons declared legally incompetent by a court; the words "and private legal relations" of subparagraph "h" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care" contradict with Article 14 of the constitution of Georgia.

Differentiation when enjoying the right to apply to a court

(The words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81 of the Civil Procedure Code of Georgia and paragraph 2 of Article 327 of the Same Code)

122. The Claimants believes that the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81 of the Civil Procedure Code of Georgia and paragraph 2 of Article 327 of the same Code are discriminatory and contradict with Article 14 of the constitution of Georgia.

123. The given disputed norms are problematic for the claimants, insomuch that unlike legally capable persons, legally incompetent person is restricted to enjoy the right to apply to a court with the request to restore his/her legal capacity. Consequently, the constitutional court, while examining the constitutionality of the disputed norm with Article 14 of the constitution, should establish to what extent regulation defined by paragraph 5 of Article 81 and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia make differentiation, under which do not give the possibility to persons declared legally incompetent to start on their own and carry out the procedure of recovery of legal capacity.

124. The relation established by the disputed norms deals with the procedure for recovery of legal capacity for persons declared legally incompetent. According to the Georgian laws, in case of recuperation or significant improvement of health of person declared legally incompetent, the court declares him/her as legally competent. The procedure established by the disputed norms, under which, the procedure of recovery of person's legal capacity is performed in case of person's recuperation. Therefore, considering the specificity of the procedure, the regulation established by the disputed norms does not apply to legally capable persons. Therefore, in the process of recovery of person's legal capacity, legally competent persons do not participate for the purpose of realization their own legitimate interests (they represent legally incompetent persons in this relation) and with respect to persons declared legally incompetent, in this regard, they are not given any privilege. Stemming from all the aforementioned, in the part of the procedure on recovery of legal capacity, the disputed norm does not exert differentiated treatment towards legally capable adult persons and persons declared legally incompetent by a court. Therefore, the normative meaning of the words "as well as persons declared legally incompetent" of paragraph 5 of Article 81 of the Civil Procedure Code of Georgia, which is connected with legal proceedings on recovery of legal capacity of a person declared legally incompetent and paragraph 2 of Article 327 of the same Code do not contradict with Article 14 of the constitution of Georgia.

Differentiation in realization of the right to marry

(Subparagraph "e" of the first paragraph of Article 1120 of the Civil Code of Georgia)

125. The claimant believe that subparagraph "e" of the first paragraph of Article 1120 of the Civil Code of Georgia, which restricts the right to marry for persons declared legally incompetent, establishes unjustified differentiation between, on the one hand, persons declared legally incompetent and on the other hand, adult persons.

126. The constitutional court should assess the issue of substantive equality of the given persons in the context of relations regulated by the disputed norm, with due regard to specificity of this relationship. The most important element of marriage is voluntary nature. In the process of entering into marriage, huge importance is given to expression of the genuine will of persons wishing to get married. Therefore, in the legal relation regulated by the disputed norm, we should take into account the circumstance as to what extent a person can formulate and express his/her own will. Without true will, there is no marriage as an act, which is associated with a number of legal, personal and social consequences. Legal and social importance of marriage is in detail discussed in respective part of the present decision.

127. Therefore, it is important to establish whether or not legally capable and legally incapable persons are substantively equal in the process of express-

ing their own will for marriage. As it was repeatedly indicated above, persons declared legally incompetent have lost to certain degree the ability "to perceive importance of their actions and manage them". At the same time, marriage as on the one hand complex and difficult civil transaction and on the other hand, important personal and social results-bearing act requires forecast and regard of important factors.

128. The constitutional court of Georgia established in the respective part of the decision that decision about getting married with other person, about co-habitation with him/her and about family relation is very individual and is predominantly conditioned by psycho-social, emotional factors.

129. As a result of analysis of the evidences submitted to the case, the constitutional court concludes that taking in mind individual mental abilities of persons with mental disabilities, there is possibility that certain category of persons declared legally incompetent make realize personal, legal and social consequences of marriage. The constitutional court also established that when declaring legally incompetent, such factors are not studied. As it was already indicated, declaration of persons legally incompetent takes place in the case when he/she, due to "mental illness" or "mental retardation", is deprived of the ability to "perceive importance of his/her actions". Analysis of neither legislation nor practice provides the possibility to conclude that person's social abilities to perceive social, non-property consequences accompanying the marriage, are checked in the process of declaring legal incompetence.

130. Considering all the aforementioned, in the context of realization of the right to marry, persons declared legally incompetent and legally competent persons represent substantively equal subjects within the scopes of unrestricted abilities of persons declared legally incompetent to the extent that they can make conscious of consequences of marriage.

131. At the same time, subparagraph "e" of the first paragraph of Article 1120 of the Civil Code of Georgia, without due regard to individual mental abilities of persons declared legally incompetent, distinguishes the group of persons from other legally capable persons, prohibits marriage of all persons declared legally incompetent and, thus, establishes differentiated treatment in the process of enjoying the right to marry.

132. As it was mentioned above, the constitutional court shall assess differentiated treatment through the use of "strict scrutiny" test in the case, if there is differentiation with classical sign foreseen in Article 14 of the constitution or/ and differentiation is characterized by especially high intensity.

133. The constitutional court has already established that persons declared legally incompetent represent social group, the common characteristic of which is the declaration of legal incompetence by a court due to certain mental disability. Simultaneously, legal incompetence is conditioned by the factor independently of those persons – presence of mental disability and its change does not depend on persons declared as legally incompetent. Therefore, there is differentiation based

on classical, social characteristic as provided for by Article 14 of the constitution and there is precondition for "strict scrutiny" test.

134. Within the framework of "Strict Scrutiny" test, assessment of differentiation occurs by the use of the principle of proportionality and it establishes to what extent unequal treatment is necessary and whether or not there is insurmountable, compelling public interest.

135. In the case under consideration, differentiation of persons declared legally incompetent and adult persons with legal competence is caused by the interest of protection of property rights and protection from involuntary marriage.

136. Persons with legal capacity, unlike persons declared legally incompetent, have ability to fully realize the gist f marriage, its property and personal non-property, social consequences. Persons declared legally incompetent, considering their mental disability, could be deprived of the ability to figure out certain aspects of marriage and in certain cases, they need the help in the process of formulating their will and making a decision. Stemming from this, in terms of realization of the right to marry, it is impossible to fully develop these two subjects. Differentiation is inescapable within the mental ability of persons declared legally incompetent. At the same time, unequal treatment should represent narrowly targeted measure targeted at insurmountable public interest and it should not give rise to negligence of unrestricted mental abilities of persons declared legally incompetent. Distancing persons declared legally incompetent from the process of realizing the right to marry should take place with due regard to individual mental abilities of the persons, so that avoid unequal treatment more than it is necessary for achieving this public goal.

137. It is established in the respective chapter of this decision by the constitutional court that the right to marry of persons declared legally incompetent is restricted disproportionately and there is reasonable possibility to restrict this right by less restrictive means. Similarly, the State had reasonable possibility, through the use of less intensive restriction of the right of equality of persons declared legally incompetent, to protect the given legitimate goals. In particular, by establishing the consent of a guardian or other competent agency it is possible to protect reasonable balance between the right to marry of legally incompetent person and the interest to protect his/her property rights. According to the disputed norms, abilities of persons are not checked according to the sphere of social life, which the decision to be made is about and thus, unrestricted mental abilities of person declared legally incompetent are ignored. Stemming from this, the disputed regulation disproportionately restricts constitutional right of equality.

138. Therefore, the normative meaning of the words "mental illness" and "or mental retardation" of the first paragraph of Article 1120 of the Civil Code of Georgia, which prohibits, without taking into account of individual mental ability, the marriage of person declared legally incompetent, contradicts with Article 14 of the constitution of Georgia.

Constitutionality of the disputed norms with respect to Article 42 of the constitution of Georgia

(the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81 and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia)

139. The claimants demand recognition of the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81 and paragraph 2 of Article 327 of the Civil Procedure Code of Georgia as unconstitutional with respect to the first paragraph of Article 42 of the constitution of Georgia.

140. According to the regulation defined by paragraph 2 of Article 327 of the Civil Procedure Code of Georgia, persons declared legally incompetent do not have the right to apply to a court with a view to recover their legal capacity. And paragraph 5 of Article 81 of the Civil Procedure Code of Georgia deprives them of the possibility to represent their own selves before the court in the process of legal proceedings related to the issue of legal capacity. The Respondent admits the claim in the given part of claim requirement. However, according to the second sentence of paragraph 5 of Article 13 of the law of Georgia "On Constitutional Legal Proceedings", acknowledgement of the claim by the respondent does not give rise to termination of the case at the constitutional court. Therefore, the constitutional court shall assess the constitutionality of the given norms.

141. Restrictions imposed by paragraph 5 of Article 81 of the Civil Procedure Code of Georgia contested by the claimants, in general, deal with the possibility of a person to participate in civil legal proceedings and therefore, restricts persons declared legally incompetent to starts the procedure of recovery of legal capacity and to participate in it, because the Claimants find is problematic to restrict the right to fair trial for a person declared legally incompetent in the process of recovery his/her legal capacity; the constitutional court will assess the normative meaning of the paragraph 5 of Article 81 of the Civil Procedure Code of Georgia, which deals with legal proceeding about recovery of legal capacity of a person.

142. Basic rights imply the necessity for their adequate protection, including, with respect to legally incompetent persons. The right to judicial protection belongs to such rights, which is of universal character and, simultaneously, is procedural guarantee towards all other constitutional rights and freedoms.

143. According to the first paragraph of Article 42 of the constitution, "Everyone has the right to apply to a court for the protection of his/her rights and freedoms".

144. The right to apply to a court imposes upon judicial authorities the function of institutional guarantee for protecting from arbitrariness. At the same time, the given right includes not only the right to apply to a court, but also procedural guarantees, which enable full realization of this right and ensure effective recovery of a person in rights through the court, including, an individual's right to independently apply to a court and be directly present at legal proceeding, which

concerns to him/her. The constitutional court, in the first place, should clarify whether or not the disputed norms interfere with the right to fair trial. Paragraph 2 of Article 327 of the Civil Procedure Code exhaustively determines the circle of persons, who have the right, with a view to recovering legal capacity of a person, to apply to a court. This list does not contain a person declared legally incompetent. Paragraph 5 of Article 327 of the Civil Procedure Code deprives a person declared legally incompetent of the possibility to independently without legal representative initiate any civil legal proceedings, including, legal proceedings about recovery of his/her legal capacity and participate in it. Stemming from aforementioned, the both disputed norms have restrictive effect. Besides, in order to assess the interference with the right protected by the first paragraph of Article 42 of the constitution, the court should also clarify whether or not applying to a court with a view to recovery of legal capacity constitutes "applying to a court in order to defend the rights". The purpose of applying to a court by a person legally incompetent is to recover the possibility of independent exercise of civil rights and obligations. Therefore, restriction of independent initiation of procedure to recover legal capacity of a person or/and his/her personal participation in it constitutes the interference with the rights guaranteed by the first paragraph of Article 42 of the constitution.

145. According to the established practice of the constitutional court, the right to apply to a court and the right to participate in the legal proceedings as foreseen in the first paragraph of Article 42 of the constitution are not absolute rights and the restriction of these rights are possible, in certain cases, to be justified not only with respect to persons declared legally incompetent, but also with respect to whose with legal capacity, however, any restriction should serve the legitimate aim and respond to the requirements of proportionality.

146. The court takes into account that in separate case, person declared legally incompetent could be deprived of the possibility to express his/her own views or give instructions to his/her legal representative. Simultaneously, due to decline in cognitive ability, appointment of a guardian to a person does not unconditionally mean his disability to express his/her own views about his/her condition and come into conflict with the intent of his/her guardian. When conflict of such interests can significantly influence upon legal condition of a person, the circumstance acquires essential importance that the right to apply to a court and the right to be personally heard by the court, or upon necessity through representative chosen by him should be ensured for a person being under the guardianship. "Mental illness" or "mental retardation" may cause modification to or partial restriction of enjoyment of the right to apply to a court, but such measures should not violate the gist of the right to access to a court and to fair trial.

147. Within the framework of the case under consideration, the legitimate aim of the contested norms restricting the rights predominantly represent the protection of interests of a person declared legally incompetent in order that he/she through his/her unconscious actions inflict the damage to his/her own interests,

paragraph 2 of Article 327 and paragraph 5 of Article 81 of the Civil Procedure Code of Georgia are exceptions in this regard. The legal proceeding instituted with a view to recovering legal capacity is not adversarial and person does not need to defend his/her interest at the expense of legal fight with other. Furthermore, in the case of unsuccessful completion of once initiated legal proceedings of recovery of legal capacity, the possibility to anew initiate the same process is not eliminated. Therefore, protection of the interests of a person declared legally incompetent cannot be considered as being legitimate aim for these norms.

148. Besides, the purpose of the given norms could represent provision of well-functioning judicial system. As a result of establishment of such restriction, the court may be protected from the legal proceedings initiated without grounds and arguments. And exclusion from immediate participation of interested person in the legal proceeding, as a rule, serves to the interests of rapid and effective justice. As the constitutional court construes, "cost-effectiveness of legal proceeding and avoidance of artificial overload of the court is of paramount importance for ensuring the degree of justice. Therefore, the right to fair trial may be restricted by the abovementioned legitimate aims. However, for assessment of proportionality of the interference should be taken into account as intensity of interference, as well as importance of either right or legal interests, possibility of protection of which is restricted" (Decision N3/1/574 of 2014 of the constitutional court of Georgia on the case "Citizen of Georgia Giorgi Ugulava versus the Parliament of Georgia", II-69).

149. As it was indicated, in order to satisfy the standard of constitutionality, the norm restricting the right not only has to serve to achievement of the legitimate aim, but also its restrictive action should be proportionate to the protected good.

150. Legally incompetent person in consideration of the issue about recovery of person's legal capacity plays double role: on the one hand, he/she is interested person and, on the other hand, main object of legal proceeding. At the same time, because the opinion of expert do not have predetermined force for the court and should be assessed together with other evidences in the aggregate, for adoption of a decision about recovery of legal capacity, special importance is attached to the participation of person declared legally incompetent in the legal proceedings. Among them in order to enable the court to create its own opinion about psychical state, gravity and nature of illness, possible consequences of the illness of the claimant, a social life, health, and property interests of a person. Also, in order to determine what kind of actions a person can become conscious of or/and what kind of abilities to manage he/she has or does not have and etc.

151. Since a person declared legally incompetent does not have the right to apply to a court demanding the recovery of his/her legal capacity, he/she becomes fully dependent upon the intent of interested persons, which in one case may be a guardian or family member, and in case of placement at the psychiatric institution, representative of respective medical institution. Therefore, there is a risk of arbitrariness and manipulation with the right, abuse of the right by

guardians, avoidance of which could not be ensured by existing mechanism for re-examination of the issue of legal capacity.

152. Persons declared legally incompetent, crucial importance is attached to the initiation of the procedures for recovery of legal capacity and the right to participation in it. The aforementioned would give them the possibility, in case of recovery, to rapidly restore their legal capacity, which would protect them from abuse of power from a guardian, family members or third persons. Therefore, existing mechanism for recovery of legal capacity does not represent sufficient alternative to apply to a court demanding re-examination of legal capacity on the initiative of legally incompetent person. It does not meet either modern international legal trend about according the right to personally and directly apply to a court demanding recovery of their legal capacity of persons declared legally incompetent.

153. Legally incompetent person's right to have access to a court must not depend on the intent of a guardian, family member or/and psychiatric treatment medical institution. Access to a court should be ensured for them, which implies not only to apply to a court, but also the possibility to submit his/her own arguments before the court.

154. Bearing in mind the aforementioned, in order to achieve the legitimate aim for efficient functioning of judicial system, the restriction of the right to access to a court by a person declared legally incompetent constitutes disproportionate interference with the right. Consequently, the normative meaning of the words "as well as persons declared legally incompetent" of paragraph 5 of Article 81 of the Civil Procedure Code of Georgia, which is linked with legal proceedings about recovery of legal capacity of a person declared legally incompetent and paragraph 2 of Article 327 of the same Code are unconstitutional with respect to the first paragraph of Article 42 of the constitution of Georgia.

Constitutionality of the disputed norms with respect to Articles 16, 24 and 41 of the constitution of Georgia

(The word "is legally incapable" of subparagraph "c" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care")

155. The claimant David Kharadze contests constitutionality of the word "is legally incapable" of subparagraph "c" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care" in relation to Article 16, the first paragraph of Article 24 and the first paragraph of Article 41 of the constitution of Georgia.

156. As the Claimant states, restriction to gain information about one's own health established by the disputed norm does not conform to Articles 16, 24, and 41 of the constitution of Georgia. According to the claim requirement, the right to access to information about one's own health and intended medical treatment emanates from Article 16 of the constitution of Georgia, however, with respect to the given right, the rights protected by Article 24 and 41 of the constitution represent special constitutional regulation. In particular, the Claimant considers

that the right to request his/her own personal information about from private medical institution is protected by Article 24 of the constitution of Georgia, and the constitutional guarantee to request analogous information from the state-run medical treatment institutions is Article 41 of the constitution of Georgia.

157. Within the framework of the case under consideration, it is important, in the context of the right to access the data about person's health stored in medical institutions, to establish the scopes and interdependence of the spheres protected by the constitutional rights provided for by Articles 16, 24 and 41 of the constitution of Georgia.

158. Article 24 of the constitution of Georgia protects universal right allowing a person to freely receive and impart information, express and disseminate his/her own opinion orally, in written or through other means.

159. According to the established practice of the constitutional court of Georgia, the first paragraph of Article 24 of the constitution protects "to freely impart and receive information by universally accessible sources" (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", II-4). It can be inferred from the given interpretation that Article 24 of the constitution makes sure not the right to proactively receive the information from the protected sources, but rather it protects individuals from negative interference during free exchange of information. Freedom of expression may include the right to proactively request information only in the case if the information is of public importance and is essential for the freedom of expression. Personal information about one person, as a rule, does not have such character.

160. The constitutional court, in the process of identification of the sphere of freedom of expression protected and guaranteed by Article 24 of the constitution of Georgia, attaches big importance to the content and specificity of legal relation regulated by the disputed norms. In a range of cases, it is possible this or that legal relation imply exchange of information, however, this does not mean that all such cases is related to the freedom of expression and should be assessed with respect to Article 24 of the constitution. In frequent cases, the regulation, with its contents, is directed not towards expression of freedom, but rather towards regulation of substantively different legal relation.

161. In the case under consideration, the disputed norm regulates the specific sphere of medical service existing in the domain of health – relations engendered in the process of providing psychiatric medical assistance. The disputed law deals with the forms and conditions for providing psychiatric care to persons with psychiatric disorders. In this case, exchange of information between patient and institutions of psychiatric care, be it the health condition of a patient, diagnosis made, history of medical services provided or so forth represents component of provision of psychiatric care and not imparting of information among subjects within the freedom of expression. Stemming from all the aforementioned, the constitutional court of Georgia believes that the disputed part of subparagraph

"c" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care" does not contradict with Article 24 of the constitution of Georgia.

162. The claimant also demands examination of the disputed norm in relation to the first paragraph of Article 41 of the constitution of Georgia. According to the first paragraph of Article 41 of the constitution of Georgia, every citizen of Georgia shall have the right to become acquainted, in accordance with a procedure prescribed by law, with the information about him/her stored in state institutions as well as official documents existing there unless they contain state, professional or commercial secret. Stemming from the aforementioned, the first paragraph of Article 41 of the constitution protects the right of an individual to have access to certain category of information, which is stored and protected in state institutions. Therefore, the disputed norm should be assessed in relation to the given constitutional right, first of all, there should be information existing "in state institution". Consequently, within the scopes of the case under consideration, it is important to construe whether or not psychiatric institutions are also implied in "state institutions" defined by Article 41 of the constitution.

163. For the purposes of Article 41 of the constitution, organizational entities exercising state authority are regarded, as a rule, as "state institution" (Decision N2/3/406,408 of 30 October 2008 of the constitutional court of Georgia on the case "The Public Defender of Georgia and the Georgian Young Lawyers' Association" versus the Parliament of Georgia", II-22). According to the law of Georgia "On Psychiatric Care", a psychiatric institution is medical institution or department of medical institution holding respective license, the activity of which aims to provide psychiatric care to a person. Medical treatment institution, which aims to provide psychiatric care, may not be regarded as an agency exercising public authority. This assessment is not changed by the circumstance that some psychiatric institutions are possible to be in possession of the State. Stemming from the aforementioned, the disputed norm does not contradict with the first paragraph of Article 41 of the constitution of Georgia.

164. The Claimant considers the disputed norm also unconstitutional with respect to Article 16 of the constitution of Georgia. Article 16 of the constitution of Georgia recognizes the right to free development of one's personality. As it was already indicated above, basic components of this right are inner sphere of a person and disposition free from interference from outsiders, independent actions necessary for free development. The possibility to have access to one's personal data, including medical records is an important component of this right.

165. Stemming from Article 16 of the constitution, a person has the right to independently make decision on such important issues as health and treatment. Besides, access to personal data about health and treatment is especially important for making decision about the issues related to health and treatment. The right to give informed consent on treatment, interference with which is also disputable in the case under consideration, cannot be exercised effectively, if a

person does not have complete information about both his/her health condition, and measures employed for his/her treatment and medical history.

166. Therefore, persons of the mentioned category regularly and sufficiently should be informed about their treatment as to enable them to make decision about reasons, timeframes, and termination or continuation of treatment. At the same time, access to the information about one's own health and history of treatment plays an important role in realization of other constitutional rights. For instance, receiving complete information about medical treatment constitutes necessary precondition for realization of the right to apply to a court for the purpose of protection of patient's rights.

167. Therefore, in the case under consideration, the right to have access to personal data about one's own health is certain embodiment of the right to self-disposition of outer expression of personality as well as personal sphere protected by Article 16 of the constitution.

168. Stemming from all the aforementioned, the word "is legally incapable" of the subparagraph "c" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care", which restricts the right of the Claimant to have access to the information about his/her own health, amounts to interference with the right to free development of personality enshrined in Article 16 of the constitution of Georgia.

169. As it was already mentioned above, the right to free development of personality is not absolute right and its restriction is permissible to reach legitimate public interest through the use of proportionate means.

170. As the Respondent explained, even if information about his/her health is communicated to a legally incapable person, he/she is deprived of the possibility to make adequate assessments. Information about a person's health is personal data and the State is obliged to protect such information from unjustified breach and dissemination. In case when a person is deprived of the ability to perceive the essence of information and consequences of its dissemination, handover of such information to him/her contains a risk that a person through his/her unconscious actions could impart his/her personal information to the detriment of himself/herself. Stemming from the aforementioned, prohibition of giving certain category of information, including the information about him/her for a person with mental disability serves to the legitimate aim of protecting personal data of this very person.

171. It was repeatedly noted that restriction of the right to free development of personality should take place through adherence to the principle of proportionality. The right must not be restricted more than it is necessary for reaching the legitimate aim.

172. In the case under consideration, the constitutional court of Georgia established that illnesses, which are the ground for declaration of a person as legally incompetent, deprive a person, in various degrees, of the ability to perceive the importance of his/her own actions or other events. The disputed norm does not

foresee the possibility to assess individual mental abilities of legally incapable persons and provides blanket restriction of their right to receive information about their own health. Stemming from diverse nature of disabilities of persons declared legally incompetent, blanket restriction established by the disputed norm may not be assessed as being the least restrictive measure to reach the legitimate aim. Therefore, established restriction is disproportionate.

173. Stemming from all the aforementioned, the constitutional court of Georgia submits that the normative meaning of the words "is legally incapable" of subparagraph "c" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care", which deals with persons declared legally incompetent by the court, is unconstitutional with respect to Article 16 of the constitution of Georgia.

Constitutionality of the disputed norms with respect to the first and second paragraphs of Article 17 of the constitution of Georgia

(Paragraph 3 of Article 15 of the law of Georgia "On Psychiatric Care")

174. The Claimant David Kharadze considers that paragraph 3 of Article 5 of the law of Georgia "On Psychiatric Care" contradicts with the right to dignity and the right to protect from inhuman, degrading treatment guaranteed by the first and second paragraphs of Article 17 of the constitution of Georgia. The disputed norm gives the right to a doctor, in separate cases, to restrict the right of patient hospitalized at medical institution, including, the right to be protected from inhuman and degrading treatment.

175. According to the first paragraph of Article 17 of the constitution of Georgia, "Honor and dignity of an individual is inviolable". Honor and dignity is an essential attribute of social identity of an individual, which define moral state of a person in the surrounding society. It belongs to the category of rights that are inherent (Decision N1/2/384 of 2 July 2007 of the constitutional court of Georgia on the case "Citizens of Georgia – David Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili versus the Parliament of Georgia", II-5).

176. Dignity should not be perceived as subjective good, which is individual for all persons stemming from their subjective viewpoints. "An individual has dignity because he/she is a human being and in this case, public opinion on him/her or his/her subjective assessment does not matter. Respect of dignity of an individual implies personal dignity of every person, deprivation and restriction of which is impermissible …" (Decision N2/2/389 of 26 October 2007 of the constitutional court of Georgia on the case "Citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and the President of Georgia", II-30).

177. The second paragraph of Article 17 of the constitution of Georgia protects every individual from grave forms of interference with physical and psychical inviolability, such as: torture, inhuman, cruel treatment, degrading treatment and the use of punishment. The constitution of Georgia shares the firm and universal decision of international community about prohibition of torture.

178. Stemming from the universal nature of the right protected by paragraph

2 of Article 17 of the constitution, it is noteworthy that separate forms of treatment prohibited by paragraph 2 of Article 17 of the constitution are prohibited by a number of international legal acts, including, by universal declaration of Human rights (Article 5); International Covenant on Civil and Political Rights (Article 7); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; European Convention on Human Rights and Fundamental Freedoms (Article 3) and others.

179. It is important that within the case under consideration to provide interpretation of the content of inhuman and degrading treatment prohibited by Article 17 of the constitution of Georgia.

180. Treatment should attain to certain gravity in order to assess it as inhuman treatment. Gravity of treatment should be defined stemming from individual instances. While assessing, we have to take into account character and context of treatment, methods, length of its implementation, and its physical and psychical effects upon a person. In certain cases, it should be noted sex, age, health condition of a person and his/her general physical and psychical state.

181. Treatment is inhuman and degrading, which instills fear in victim, acute pain, and humiliation or feeling of subjugation or such action, which inflicts physical and moral breakdown of a person and compels him/her to act against his will.

182. The State is obliged to restrain not only from the use of inhuman and degrading treatment towards a person, but also ensure protection of this right from interference from third persons.

183. In the case under consideration, the disputed norm gives a doctor the right "in exceptional case, for the purpose of safety" to restrict the rights of a patient, including the right to such human treatment, which excludes any violation of his/her dignity.

184. The court shall not share the argument of the Respondent that the right to human treatment defined by the disputed norms has an autonomy character stemming from the purposes of the law of Georgia "On Psychiatric Care". Article 5 of the given law, by means of analogous terminology of constitutional provisions laying down the rights, reflects the rights of a hospitalized patient, including, the right to human treatment. And the disputed norm explicitly refers to the possibility of restriction of this right in case of presence of certain instances. Therefore, stemming from the literal and systemic interpretation of the meaning of the norm, it is evident that the disputed norm leaves the possibility in case of existence of certain conditions, to restrict the right of hospitalized patient to be treated humanely without the breach of his/her honor and dignity.

185. The constitutional court indicates that action, in order to reach the margin of inhuman and degrading treatment, should exceed the feeling of the pain, discomfort, spiritual suffering and shame, which an individual is inescapably exposed to at the time of punishment and other legitimate treatment restricting the freedom, including, at the time of forced hospitalization at psychiatric

institution. Simultaneously, humiliation and awkwardness accompanying the restriction of freedom should not go beyond minimal margins. It is obvious that the disputed norm does not imply such inescapable case. The latter even is not regarded as inhuman and degrading treatment and therefore, is not regulated by the disputed norm.

186. The right to protect from inhuman and degrading treatment guaranteed by Article 17 of the constitution, by its meaning is absolute right and interference with it, regardless of the fact it is carried out to reach legitimate aim, is impermissible in anytime and in any circumstances. On the contrary, the disputed norm gives a doctor the right, "in exceptional cases, for the purpose of safety" to restrict the right of hospitalized patient for human treatment. The normative meaning of paragraph 3 of Article 15 of the law of Georgia "On Psychiatric Care", which deals with subparagraph "a" of the first paragraph of Article 5 of the same law is unconstitutional with respect to the first and second paragraphs of Article 17 of the constitution of Georgia.

Constitutionality of the disputed norms with respect to the first and second paragraphs of Article 18 of the constitution of Georgia

(Subparagraph "c" of the first paragraph of Article 17 of the law of Georgia "On Psychiatric care")

187. The claimant contests constitutionality of subparagraph "c" of the first paragraph of Article 17 of the law of Georgia "On Psychiatric Care" with respect to the first and the second paragraphs of Article 18 of the constitution of Georgia. According to the disputed norm, legally incapable "patient is hospitalized for voluntary treatment … at the request and informed consent of legal representative of a patient".

188. Article 18 of the constitution of Georgia recognizes the liberty of an individual, which implies "physical liberty, his/her right to free physical movement according to his/her will, be present or not to be present in any place" (Decision N2/1/415 of 6 April 2009 of the constitutional court of Georgia on the case "The Public Defender of Georgia versus the Parliament of Georgia", II-2). Therefore, the interference with the right of liberty recognized by the constitution of Georgia occurs in the case, when liberty of physical movement of an individual is restricted.

189. The right of liberty, which foresees inviolability of the right of every citizen, establishes that for the purpose of forced treatment, a persons' liberty might be restricted only on the basis of the court decision.

190 Analogous requirements are foreseen in numerous international legal acts, which rest upon the supremacy of the law, humanism, justice and universal principles of equality.

191. In order to ascertain whether or not the contested norm gives rise to interference with the right of liberty guaranteed by the first paragraph of Article 18 of the constitution of Georgia, it should be clarified whether or not his right

to physical movement is restricted against the will of a person declared legally incompetent. Also, the length of restriction of liberty, means and frequency of supervision, contact with outer word and intensity of supervision and etc. should be taken into account.

192. In the cases established by the disputed norm, liberty of movement is restricted to a patient, while being hospitalized at psychiatric care institution. He/she does not have the right to leave the premises of the institution save to exceptional cases. According to the law of Georgia "On Psychiatric Care", a person is given the possibility to leave the institution only for a short period of time, this exception is allowed with due regard to his/her psychical state and without discharging from the institution. The right to communicate with outer world, including correspondence, meeting with third persons and other possibilities exists only under the circumstance of a wide range of regulations. Furthermore, communication and other rights may be additionally restricted in case of presence of certain conditions by the decision of a doctor.

193. Hospitalization is not limited with specific timeframe and depends on recuperation of a patient. Therefore, timeframe for stay of person at the institution depends on exhaustion of medical evidences or on the intent of legal representative. It is revealed from the evidence provided by the expert before the court that length of hospitalized treatment, as a rule, event for the period of several hours, goes beyond hospitalization of a person at medical institution. Furthermore, symptoms of pathologies of "mentally ill" class, predominantly lasts for long periods of time, for month and years.

194. At the same time, under the disputed norm, legal representative of legally incapable person is granted the possibility to make decision not only on placement of a patient at psychiatric care at the medical institution, but also on selection of psychiatric institution and a doctor as well as termination of medical treatment.

195. While assessing the constitutionality of the disputed norm, it is of utmost importance to ascertain to what extent it is regarded as "voluntary" hospitalization of a person at medical institution at the request or consent of legal representative of a person, instead of his/her own.

196. In the case, when a person through his/her own will is in defined place, even for indefinite period of time, there will not be the interference with his/her right of liberty, even in the conditions, when placement of definite location are secured by other persons, if he/she has the right to leave the given territory by his/her own decision. Therefore, the circumstance is decisive, whether or not consent of a guardian should be regarded as the will of hospitalized person.

197. In order that placement of a person in definite location, for the purposes of Article 18 of the constitution, should not be considered as the interference with the basic right of liberty, it is essentially important that a person should express his/her will about such placement clearly and without force. In this case, there should be informed consent of a person so that a person should

be aware of legal and factual consequences of such measure. Besides, we can see from the evidences submitted by the experts in the case under consideration that consciousness of persons with pathologies of "mental illness" class, in some cases, is largely disturbed and they cannot perceive the reality surrounding them. Therefore, in separate case, it would be difficult to clearly assess the intent expressed, without force and consciously conveyed by patients with grave illnesses. On the other hand, it is absolutely possible, that a person with pathologies of "mental illness" class to have the sufficient ability to demonstrate his/her intent in full compliance with the abovementioned standards.

198. It is key to be mentioned that the interference with the right protected by Article 18 of the constitution, in all cases, carries high intensity. It is impermissible to exclude such restrictive actions from the sphere protecting this right, which raise even smallest doubt of interference with the right. Besides, such case, when a person proactively or passively expresses his/her will to be placed in defined location cannot be considered as interference with the right of liberty. It is not allowed to consider expression of will by a person as being implied or conveyed by a third person, even if the latter is his/her legal representative.

199. In the given case, when interference with the right of liberty of an individual is exercised in such a high intensity, the sole consent of a guardian for hospitalization of a person at psychiatric institution, for the purposes of the first paragraph of Article 18 of the constitution of Georgia, cannot be regarded as the intent of a person hospitalized at psychiatric institution, regardless of the fact that a patient is deprived of the ability to convey his/her intent in appropriate standards.

200. Upon implementation or establishment of measures protecting the interests of a legally incapable adult person, the interests and wellbeing of this person should be given decisive importance. Therefore, the liberty of an individual could be restricted only due to the special reasons and aims, through strict adherence to formal procedural guarantees. Among these important reasons there is, first of all, protection of the given individual and society. In particular, treatment of an individual or/and improvement of his/her health condition, and for this reason his ambulatory and medical treatment, also the avoidance of self-mutilation and harming health of others and exerting control and supervision for these reasons.

201. With a view to treat legally incompetent person at psychiatric institution, hospitalization without conscious and informed consent should be accompanied by re-examination of the decision about hospitalization. Absence of respective legal guarantees implies/gives rise to prohibited interference of the State with the sphere of an individual liberty, which could be restricted only for the constitutionally important purposes and only in the cases strictly prescribed by the law.

202. Persons with psychical disorders may be vulnerable even if they have the ability to convey their consent. However, they, who have such ability, are much graver situation and in this case, protection of their right is of special importance.

203. Stemming from all the aforementioned, the constitutional court concludes that hospitalization of a person at psychiatric institution considering its form, degree of interference and length, explicitly amounts to interference with the right of liberty guaranteed by the first paragraph of Article 18 of the constitution of Georgia.

204. The right protected by the first paragraph of Article 18 of the constitution of Georgia, by its nature, is not absolute and its restriction is permissible according to the constitutional standards established by the same Article. According to paragraph 2 of Article 18 of the constitution of Georgia, "Deprivation of liberty or other restriction of personal liberty without a court decision shall be impermissible". Non-judicial entities or other official persons are not authorized to make similar decision (Decision N1/3/393,397 of 15 December 2006 of the constitutional court of Georgia on the case "Citizens of Georgia – Vakhtang Masurashvili and Onise Mebonia versus the Parliament of Georgia").

205. Under the conditions, when a person is deprived of the ability to fully or partially perceive the importance of restriction applied against him/her and its future consequences, it is of paramount importance to have the court control over restriction of the right of liberty. Furthermore, while a person does not have the right to independently make decision about leaving the institution, it creates unjustified risk that under the circumstances of absence of control from the part of neutral subject, a guardian or medical institution abuse the powers conferred upon them.

206. Constitutional-legal requirements which are laid down for interference with the right of liberty, are regulated by Article 18 of the constitution of Georgia. It establishes that deprivation of liberty or other restriction of personal liberty is impermissible without the court decision. Therefore, it is constitutional standard that restriction of liberty is necessarily subject to the judicial control. At the same time, Article 18 of the constitution defines the procedure for judicial control and establishes that everyone arrested or otherwise restricted in his/her liberty shall be brought before a competent court not later than 48 hours. Stemming from the mentioned, paragraph 3 of Article 18 of the constitution of Georgia allows the possibility that in presence of certain conditions, liberty of a person can be restricted for a period of 48 hours without court decision.

207. In the case under consideration, the constitutional court of Georgia held that hospitalization at the medical institution foreseen by the disputed norm could last for a certain period of time, for months of years. Stemming from this, restriction of the right of liberty established by the disputed norm considerably exceeds the permissible 48-hour time limit established by paragraph 3 of Article 18 of the constitution of Georgia, within period of which a person is permissible to be restricted in his/her liberty without the court decision. The given requirement of the constitution with regard to restriction of the right of liberty is imperative towards a body making decision and limited timeframe. The given constitutional legal standard enshrined by Article 18 of the constitution about protection of the

right of liberty of an individual does not allow a person the possibility to restrict this procedural guarantee.

208. Stemming from all the aforementioned, the constitutional court of Georgia holds that subparagraph "c" of the first paragraph of Article 17 of the law of Georgia "On Psychiatric Care" establishing interference with the right of liberty of an individual declared as legally incapable without the court decision is unconstitutional with respect to the first and second paragraphs of Article 18 of the constitution of Georgia.

II
Resolutive Part

Having been guided by 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, paragraphs 2 and 3 of Article 25, subparagraph "a" of paragraph 1 of Article 39, paragraphs 2, 4, 7 and 8 of Article 43 of the organic law of Georgia "On the Constitutional Court of Georgia"; paragraphs 1 and 2 of Article7, paragraph 4 of Article 24, Articles, 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 partially the Constitutional Claim N532 (A citizen of Georgia Irakli Kemoklidze versus the Parliament of Georgia).

To recognize as unconstitutional:

a) With respect to Articles 14 and 16 of the constitution of Georgia:

a.a) The normative meaning of the word "mental illness" of paragraph 5 of Article 12 of the Civil Code of Georgia, which foresees declaration of a "mentally ill" person as legally incompetent without considering his/her individual mental abilities;

a.b) the words "a person declared legally incompetent by the court" of the first part of Article 58 of the Civil Code of Georgia;

a.c) the normative content of Article 1290 of the same Code, which deals with representing the rights and interests of a ward by a guardian of a person declared as legally incompetent by the court in relations with third persons, including at the court;

a.d) the normative content of the first part of Article 1293 of the same code, which deals with the power of a guardian who shall be a legal representative of a ward and shall enter into all the necessary transactions in the name and on behalf of the ward.

b) With respect to the first paragraph of Article 42 of the constitution of Georgia:

b.a) the normative content of paragraph 2 of Article 327 of the Civil Procedure Code of Georgia, which deals with forbidding a legally incompetent person

to apply to a court for declaring him/herself as legally competent;

b.b) the normative content of the words "as well as declared legally incompetent" of paragraph 5 of Article 81 of the same Code, which deals with legal proceeding about recovery of legal competence of person declared as legally incompetence;

c) the normative content of the words "or mental retardation" of subparagraph "e" of the first part of Article 1120 of the Civil Code of Georgia, which foresees prohibition of marriage of a person declared legally incompetent without due regard to his/her individual mental abilities with respect to Article 14 and the first paragraph of Article 36 of the constitution of Georgia.

2. Not to uphold the constitutional claim N532 (A citizen of Georgia Irakli Kemoklidze versus the Parliament of Georgia) in the part of the claim requirement, which concerns:

With respect to Articles 14 and 16 of the constitution of Georgia:

a) Constitutionality of the words "as well as citizens declared legally incompetent" of paragraph 5 of Article 81 of the Civil Procedure Code of Georgia.

b) Constitutionality of paragraph 2 of Article 327 of the same Code.

3. To uphold partially the constitutional claim N533 (Citizen of Georgia David Kharadze versus the Parliament of Georgia). To recognize as unconstitutional:

a) With respect to Articles 14 and 16 of the constitution of Georgia:

a.a) the normative content of the words "or mental illness" of paragraph 5 of Article 12 of the Civil Code of Georgia, which foresees declaration of "mentally ill" person legally incompetent without considering his/her individual mental abilities;

a.b) the words "a person declared legally incompetent by the court" of the first paragraph of Article 58 of the same Code;

a.c) the normative content of Article 1290 of the same Code, which deals with representing the rights and interests of a ward by a guardian of a person declared as legally incompetent by the court in relations with third persons, including at the court;

a.d.) The normative content of the thirst part of Article 1293 of the same Code, which deals with the power of a guardian who shall be a legal representative of a ward and shall enter into all the necessary transactions in the name and on behalf of the ward.

a.e) the normative content of the words "and in private legal relations" of subparagraph "h" of the first paragraph of Article 5 of the law of Georgia "On Psychiatric Care", which restricts the right of a person declared legally incompetent by the court to participate in private legal relations.

b) With respect to the first paragraph of Article 42 of the constitution of Georgia:

b.a) the normative content of the paragraph 2 of Article 327 of the Civil procedure Code of Georgia, which prohibits the right of a person declared legally incompetent to apply to a court about recovery his/her legal competence;

b.b) the normative content of the words “as well as citizens declared legally incompetent” of paragraph 5 of Article 81 of the same Code, which deals with legal proceedings about recovery of legal competence of a person declared legally incompetent;

c) Subparagraph “c” of the first paragraph of Article 17 of the law of Georgia “On Psychiatric Care” with respect to the first and second paragraphs of Article 18 of the constitution of Georgia.

d) the normative content of the words “legally incompetent” of subparagraph “c” of the first paragraph of Article 5 of the law of Georgia “On Psychiatric Care”, which prohibits the right of persons declared legally incompetent by the court to receive the full, objective, timely and comprehensive information about their illness and intended psychiatric assistance with respect to Article 16 of the constitution of Georgia.

e) the normative content of paragraph 3 of Article 15 of the law of Georgia “On Psychiatric Care”, which deals foresees restriction of the right provided for by subparagraph “a” of the first paragraph of Article 5 of the same law with respect to the first and second paragraphs of Article 17 of the constitution of Georgia.

f) With respect to Article 16 of the constitution of Georgia:

f.a) the word “legally incapable” of the first paragraph of Article 10 of the law of Georgia “On Psychiatric Care”;

f.b) the words “in the case of legal incompetence” of the second paragraph of Article 14 of the same law (the wording of 27 July 2006).

g) The normative content of the words “mental illness” of subparagraph “e” of the first paragraph of Article 1120 of the Civil Code of Georgia, which foresees prohibition of marriage of a person declared legally incompetent without considering his/her individual mental abilities with respect to the first paragraph of Article 36 and Article 14 of the constitution of Georgia.

4. Not to uphold the constitutional claim N533 (Citizen of Georgia Davit Kharadze versus the Parliament of Georgia) in the part of the claim requirement, which deals with:

a) With respect to Articles 14 and 16 of the constitution of Georgia:

a.a) Constitutionality of the words “as well as citizens declared legally incompetent” of paragraph 5 of Article 81 of the Civil procedure Code of Georgia;

a.b.) Constitutionality of paragraph 2 of Article 327 of the same Code.

b) Constitutionality of the word “legally incompetent” of subparagraph “c” of the first paragraph of Article 5 of the law of Georgia “On Psychiatric Care” with respect to the first paragraphs of Article 24 and 41 of the constitution of Georgia.

5. Unconstitutional norms shall be legally invalid from the moment of the public promulgation of the present decision:

a) The normative content of paragraph 2 of Article 327 of the Civil Procedure Code of Georgia, which deals with prohibition of the right of a person declared legally incompetent to apply to a court about declaring him/herself as legally competent;

b) The normative content of the words “as well as citizens declared legally incompetent” of paragraph 5 of Article 81 of the same Code, which deals with legal proceedings about recovery of legal competence of a person declared legally incompetent.

c) the normative content of the words “and in private legal relations” of subparagraph “h” of the first paragraph of Article 5 of the law of Georgia “On Psychiatric Care”, which restricts the right of a person declared legally incompetent by the court to participate in private legal relations.

d) Subparagraph “s” of the first paragraph of Article 17 of the law of Georgia “On Psychiatric Care”.

e) the normative content of the word “legally incompetent” of subparagraph “c” of the first paragraph of Article 5 of the law of Georgia “On Psychiatric Care”, which prohibits the right of persons declared legally incompetent by the court to receive the full, objective, timely and comprehensive information about their illness and intended psychiatric assistance.

f) The normative content of paragraph 3 of Article 15 of the law of Georgia “On Psychiatric Care” which foresees the restriction of the right provided for by subparagraph “a” of the first paragraph of Article 5 of the same Law.

6. The unconstitutional norms shall be legally invalid from the first of April 2015:

a) the normative content of the word “mental retardation” of paragraph 5 of Article 12 of the Civil Code of Georgia, which foresees declaration of “mentally retarded” person legally incompetent without considering his/her individual mental abilities;

b) the normative content of the words “mental illness” of paragraph 5 of Article 12 of the Civil Code of Georgia, which foresees declaration of “mentally ill” person legally incompetent without considering his/her individual mental abilities;

c.a) the words: “a person declared legally incompetent by the court” of the first paragraph of Article 58 of the Civil Code of Georgia;

c.b) The normative content of Article 1290 of the same Code, which deals with representing the rights and interests of a ward by a guardian of a person declared as legally incompetent by the court in relations with third persons, including at the court;

c.c.) The normative content of the first paragraph of Article 1293 of the same Code, which deals with the power of a guardian who shall be a legal representative of a ward and shall enter into all the necessary transactions in the name and on behalf of the ward.

d) The word “legally incompetent” of the first paragraph of Article 10 of the law of Georgia “On Psychiatric Care”.

e) The normative contents of the words “mental illness” and “or mental retardation” of subparagraph “e” of the first paragraph of Article 1120 of the Civil Code of Georgia, which foresees prohibition of marriage of a person declared legally incompetent without considering his/her individual mental abilities.

7. The present decision shall come into force from the moment of its public delivery at the hearing of the Constitutional Court.

2. The present decision is final and not subject to appeal or revision.

3. Copies of the decision of the Constitutional Court of Georgia shall be sent to the parties, the President of Georgia, the Government of Georgia and the Supreme Court of Georgia.

4. The Decision of the Constitutional Court of Georgia shall be promulgated in the "Legislative Herald of Georgia" within 15 days.

Member of the Board:

Zaza Tavadze
Otar Sitchinava
Lali Papiashvili
Tamaz Tsabutashvili