**The Dissenting Opinion of the Members of the Constitutional Court of Georgia**

**Zaza Tavadze and Tamaz Tsabutashvili**

Regarding the Judgment N2/5/560 dated October 28 of the Second Board of the Constitutional Court of Georgia

1. We express respect towards our colleagues – the members of the Second Board of the Constitutional Court of Georgia, at the same time based on article 47 of the organic law of Georgia “On the Constitutional Court of Georgia” and article 7 of the law of Georgia “On Constitutional Legal Proceedings” we express our dissenting opinion regarding the Judgment N2/5/560 dated October 28 of the Second Board of the Constitutional Court of Georgia in the part which did not uphold the Constitutional Claim N560 in the part disputing the constitutionality of subparagraphs “c” and “d” of paragraph 1 of article 9 of the Law of Georgia “Freedom Charter” with respect to article 14 and paragraph 1 of article 29 of the Constitution of Georgia.
2. The disputed provisions prohibit persons, who held certain positions in the Communist Party of the former USSR and Leninist Young Communist League between February 25, 1921 and April 9, 1991, to hold number of state offices, which constitutes a restriction of the right of a citizen to be appointed at a public service protected by paragraph 1 of article 29 of the Constitution of Georgia. We also share the position expressed in the Judgment by the Court, according to which the disputed provisions establish the interference of high intensity in the right to equality protected by article 14 of the Constitution of Georgia and therefore create the basis to assess them using strict scrutiny test.
3. The rights protected by articles 14 and 29 of the Constitution of Georgia are not absolute and limiting them is allowed only if the proportionality test is fulfilled. We fully share the opinion expressed by the Second Board of the Constitutional Court of Georgia in the Judgment N2/5/560 dated October 28, according to which the protection of national security and safety, as well as overpowering the communist totalitarian ideology constitutes valuable legitimate aims. For achieving these aims restricting the right to be appointed at a public service and right to equality is allowed; however it can be done only through using the proportionate measures for restricting the right.
4. According to the case-law of the Constitutional Court “the benchmark of limitation of constitutional rights [...] is the principle of proportionality. This principle represents a mechanism for restraining the legislator in restricting human rights and therefore, is an element of constitutional control. The principle of proportionality requires the restrictive regulation must be a reasonable and necessary means for achieving public (legitimate) aim. At the same time, the intensity of the restriction must be proportionate to the aim pursued. It is impermissible to pursue a legitimate aim at the expense of increased restriction of human rights" (Judgement of the Constitutional Court of Georgia No.3/1/512 dated June 26, 2012 on the case of “Citizen of Denmark Heike Kronqvist v. The Parliament of Georgia, II-60). We consider that with respect to the article 14 and the first paragraph of article 29 of the Constitution the severity of restriction established by the disputed provision and its proportionality with respect to the legitimate aims indicated by the Respondent is inadequately assessed in the court judgment.
5. Primarily it needs to be mentioned that the restriction prescribed by the disputed provisions carries blanket character, prohibiting all who held specific party position from being appointed at an office, regardless to the character of their activities. At the same time the restriction is characterized with high intensity since it prohibits the Claimant and persons in similar situation from holding specific offices unconditionally and permanently. Therefore such restriction needs to have strictly grounded connection with the legitimate aim. When establishing such limitation the State is obliged to substantiate that working at the Communist Party in the past in itself causes real threats for the state security and avoiding these threats is possible only by isolating persons in similar situation as the Claimant from state offices (prescribed by the law).
6. When assessing the mentioned issue the Constitutional Court of Georgia should have taken into consideration a number of circumstances that exclude the proportionality of restriction prescribed by the disputed provisions. Primarily it needs to be mentioned that the restriction established by the disputed provisions are derived from the status of a person, indicating towards the criterion, changing of which or influencing it is impossible. The legislator distinguishes the circle of persons, who held certain office in the Communist Party in the past and deprives them from the right to hold state office. Holding a certain office in the past is absolutely unchangeable (even more stable than, for instance, sex, colour of skin or religious belonging), therefore, the persons in the similar situation as the Claimant have absolutely no possibility to transform themselves in any way, as a result of which they would reinstate in right to hold state office. Holding mentioned state offices become unreachable for the persons in the similar situation as the Claimant despite their actions, education they may receive or the degree of democratic values they may base their thoughts and actions.
7. In the instant case restriction of the right is not related to specific threat existent today, but to the activities performed by persons in the past on specific party offices. It is inhumane to consider a person carrying threat during his/her whole life merely for the office he/she held in the past. The attitude of a human and democratic state towards even the most dangerous criminals should be directed at restoring, resocialising them and after serving the punishment seeing them as complete members of the society. Such is the approach of the law of Georgia “On Public Service” towards the persons convicting a crime in the past; specifically after the criminal record is cancelled they are allowed to be appointed at certain offices in public service. According to the current legislation a person, who has committed particularly serious crime against the State (for instance violation of the territorial integrity of Georgia, crime referred to by article 308 of the Criminal Code of Georgia, espionage, crime referred to by article 314 of the same code, conspiracy or rebellion intended to change the constitutional order of Georgia through violence, crime referred to by article 315, etc.), after serving the punishment and once the record is cancelled or removed, may hold any public office. While according to the disputed provisions, persons, towards whom no criminal act is confirmed, have their right to hold a number of state offices restricted for their whole life. Considering this it is absolutely unreasonable why the members of the Communist Party in the past should be seen as more dangerous than those who committed particularly serious crimes.
8. Being a member of the Communist Party or holding a party office in the past does not itself suggest that a person carries a threat. When restricting the right to hold a state office it is essential to identify what the threats of holding an office by this person at the moment of limitation are. Merely being a member of a certain organisation in the past cannot confirm existence of these threats. The Respondent could not indicate any argument that would demonstrate what the connection between permanent prohibition for the Claimant and persons in the similar situation to hold an office and protection of national security and state safety was.
9. It is also notable that prior to adopting the disputed law from 1991 till 2011 the law did not establish restriction on holding a public office for the persons who held relevant offices in the Communist Party. The Respondent could not state a specific fact, which would demonstrate the negative outcome faced by appointing such persons to a state office and would substantiate the mentioned threats.
10. The Judgment N2/5/560 shares the argument of the Respondent according to which prohibiting the Claimant and persons in similar situation from holding certain state offices is adequate and necessary measure to achieve legitimate aim of overpowering communist totalitarian ideology. Pursuant to the Judgment of the Court sharing this line of argumentation is based on the wrong assumption that since persons in similar situation as the Claimant worked at the Communist Party in the past, they *a priori* represent the creators of communist totalitarian regime and its ideology or the supporters thereof and will continue to be such for their whole life. The Judgment correctly underlines that by the way of permanent limitation to hold state office prescribed by the disputed provisions is more similar to repressive measure carrying elements of punishment, rather than the way of preventing the threats. Persecution, using the measures similar to punishment and punishing people based on their doubtful past, the position held in the past or their thoughts is the very characteristics of totalitarian ideology. These are the methods used by the communist regime to fight against its political opponents and sustained its single-party rule. The aim and target of the modern democratic state is not being called differently than the communist regime but rather to be contextually different with its values, actions and ideologies from the totalitarian regimes. Using repressive measures against a person due to his/her status without assessing the real threats stemming from his/her activities and fighting against ideology by employing such method is not a valid way of building a democratic state. Isolating persons hypothetically related to the former totalitarian regime is not essential for the existence of democratic society; instead it has to be creator of democratic values and condemning the methods characteristic to the governance of totalitarian regimes. In the instant case using restriction similar to punishment by the legislator based on offices held in the past and views carried in the past not only does not serve overpowering soviet totalitarian ideology, but can in certain way be considered as an expression of such ideology.
11. Unfortunately the Judgment N2/5/560 of the Court does not emphasise the issues mentioned above. Contrary to this it is mentioned that the proportionality of the disputed provisions is substantiated by the possibility of the Claimant and persons in similar situation to conduct activities on other offices in the public service or in private sector. The constitutional right to hold state office requires basing any restriction of holding such office on a solid constitutional ground. At the same time the restriction should strictly follow the principle of proportionality and other constitutional standards. Similar requirement is envisaged by the constitutional right to equality, which entails to conduct any unequal treatment in a way justified and conforming to constitutional standards. Derived from above mentioned the limitation established by the disputed provisions should be assessed autonomously. We consider that the possibility to work in private sector or hold other public offices cannot be used either to substantiate the proportionality and constitutionality of unequal treatment to persons, or to limit the right to hold a state office. It is unacceptable to legitimise the State to restrict the right to hold a state office and the right to equality in violation of the principle of proportionality and justify this action by indicating towards the possibility to work in private sector or hold other public offices.
12. Based on all above mentioned we consider that the restriction established by the disputed provisions is an undue method for fighting against the communist ideology and is far from the democratic society. At the same time this restriction is of blanket character, is not oriented towards eliminating threats the State faces and therefore is not logically related to the legitimate aims indicated by the Respondent – protection of national security and safety. Justifying the restriction established by the disputed provisions with regards of article 14 and paragraph 1 of article 29 of the Constitution of Georgia strips the essence from the mentioned constitutional provisions and turns them into inefficient measures to protect the right. The disputed provisions provide for the blanket, without assessment of specific threats, prohibition when the legitimate aim, achieving of which would strictly necessitate using such restriction, is not clear. Such an approach does not only devoid the content of these two rights, but generally casts doubt over the efficiency of constitutional revision and strips the essence from the proportionality test, creating it inefficient and illusionary measure to protect human rights.
13. We agree with the view expressed in the Judgment, according to which blanket prohibition to hold a state office violates the right to dignity and contradicts paragraph 1 of article 17 of the Constitution of Georgia. Stemming from the Judgment N2/5/560 of the Constitutional Court the State considers persons in a similar situation to the Claimant analogous to the communist totalitarian ideology and restricts their right to hold state offices. Such persons fall under the restriction because the State has no objective possibility or relevant will to identify persons participating in the activities of the communist regime and thus uses wide category of restriction. Derived from this with the disputed provisions the State considers persons as objects lacking legal subjectivity and uses them as a means to achieve legitimate aim of protecting national security and overpowering communist totalitarian ideology.
14. Based on the Judgment N2/5/560 of the Court the disputed provisions establish such restriction of the right to equality and the right to hold public office, which causes violation of the right to dignity due to its intensity. The Judgment established that restriction on the right to hold public office in the way the disputed provisions do violates the honour and dignity of a human. Therefore, it is unimaginable the prohibition on holding a public office violating human honour and dignity to be suitable, valid and necessary measure for restricting paragraph 1 of article 29 of the Constitution of Georgia. At the same time, we cannot share the opinion expressed in the Judgment N2/5/560 of the Constitutional Court, that article 14 of the Constitution of Georgia does not prohibit distinguishing persons from other, substantially equal persons and using the measure, which the Court declared to be violating the human honour and dignity, only towards them.
15. Based on all above mentioned we consider that subparagraphs “c” and “d” of paragraph 1 of article 9 of the Law of Georgia “Freedom Charter” contradict right to equality guaranteed by article 14 of the Constitution of Georgia and the right to hold a public office guaranteed by paragraph 1 of article 29 of the Constitution of Georgia.

**Members of the Board:**

**Zaza Tavadze**

**Tamaz Tsabutashvili**