**№ 3/1/608,609 Batumi, September 29, 2015**

**Composition of the Plenum:**

Giorgi Papuashvili – Chairman of the Hearing, Judge Rapporteur;

Ketevan Eremadze – Member;

Konstantine Vardzelashvili–Member;

Zaza Tavadze – Member;

Maia Kopaleishvili – Member;

Otar Sichinava – Member;

Lali Papiashvili – Member;

Tamaz Tsabutashvili – Member.

**Secretary of the Hearing:** Darejan Tsaligava

**Title of the Case:** Constitutional Submission of the Supreme Court of Georgia on constitutionality of the fourth section of article 306 of the Criminal Procedure Code of Georgia and Constitutional Submission of the Supreme Court of Georgia on constitutionality of subparagraph "g" of article 297 of the Criminal Procedure Code of Georgia.

**Subject of the Dispute: a.** Constitutionality of normative content of the fourth section of article 306 of the Criminal Procedure Code of Georgia which precludes the possibility of the court to rule beyond the scope of the cassation appeal in cases when the law adopted after commission of an act abrogates its criminalisation with respect to the third paragraph of article 40 of the Constitution of Georgia.

**b.** Constitutionality of normative content of subparagraph "g" of article 297 of the Criminal Procedure Code of Georgia which precludes the possibility of the court of appeal to rule beyond the scope of the appeal in cases when there is double jeopardy for the same crimes with respect to the fourth paragraph of article 42 of the Constitution of Georgia.

**I**

**Descriptive Part**

1. On September 17, 2014 two constitutional submissions were lodged to the Constitutional Court of Georgia by the Supreme Court of Georgia (Judges - Maia Oshkhareli, Paata Silagadze and Giorgi Shavliashvili). The submissions were registered as N608 and N609. Preliminary session of the Plenum of the Constitutional Court without oral hearing was held on December 24, 2014 for ruling on admission of the N608 and N609 constitutional submissions for consideration on merits. Pursuant to the Recording Notices N3/6/609 and №3/5/608 of the Constitutional Court the Constitutional submissions were declared admissible for consideration on merits.
2. The legal basis indicated in №608 and №609 submissions for lodging the constitutional submissions are: paragraph 2 of article 19 of the organic law of Georgia “On the Constitutional Court of Georgia” and paragraph 3 of article 7 of the Law of Georgia “On Constitutional Legal Proceedings”.
3. According to the constitutional submission N608 the fourth section of article 306 of the Criminal Procedure Code is disputed. According to the provision the scope of review on cassation is limited with cassation claim and its counter claim. According to the third paragraph of article 40 of the Constitution of Georgia "a decision to issue criminal charge against accused, bill of indictment, and judgement of conviction shall be based only on incontrovertible evidences. Any suspicion that cannot be proved as provided by law shall be resolved in favour of the accused".
4. According to the Constitutional Submission N609 subparagraph "g" of article 297 of the Criminal Procedure Code is disputed. According to the disputed provision the scope of review on appeal is limited with appeal and its response. The fourth paragraph of article 42 of the Constitution of Georgia prescribes that "no one shall be tried twice for the same offence".
5. According to the Submission N608 on September 15, 2014 the Supreme Court stayed the proceeding on cassation claim of convicted Ilia Jakeli. Ilia Jakeli as a person previously convicted for intentional serious crime was convicted by the judgment of December, 18, 2013 of Tbilisi City Court for commission of the crime prescribed by subparagraph "b" of the second section of article 2381 of the Criminal Code of Georgia. The version of article 2381 the Criminal Code of Georgia in force at the moment of commission of the crime prescribed criminal responsibility for carrying melee weapon by the person who was under age of 21, had criminal record or was sanctioned administratively for consumption of drugs. The second section of the article was prohibiting commission of the act prescribed in the first section by the person who had criminal record for commission of intentional serious crime.
6. As a result of the amendments adopted on December 11, 2013 article 2381 of the Criminal Code was reformulated. The new formulation criminalises carrying melee weapon by a person who is sanctioned administratively twice for carrying melee weapon or sanctioned administratively for consumption of drugs. In relation to the mentioned amendment the Supreme Court of Georgia issued an important definition on June 13, 2014. According to the definition, since amended version of the first section of article 2381 of the Criminal Code indicates that only person who was previously sanctioned administratively can be a subject of this crime and the second section prohibits commission of the act prescribed by the first section by a person who has criminal record, the subject of the second section should also be administratively sanctioned person and in absence of this element the person should not be convicted for the crime prescribed by the second section of the article 2381. Hereby, According to the law in force at the moment of proceeding of Ilia Jakeli's case in the Supreme Court the mandatory elements of the crimes he was accused of was not presented and his conviction had no legal basis. However, by the cassation claim the convicted was requesting reduction of the sentence and not release from the responsibility based on the law adopted after commission of the act.
7. The constitutional submission №609 indicates that on September 15, 2014 the Supreme Court stayed the proceeding on cassation claim of the prosecutor on a criminal case against Beka Avakishvili. By the Judgment of Rustavi City Court of December 2, 2013 Beka Avakishvili was convicted for commission of the crime prescribed by article 273 of the Criminal Code of Georgia and was sentenced with the imprisonment for 1 year. Article 273 criminalises illegal consumption of narcotic substances without doctor's prescription, committed by an individual who has previously been administratively sanctioned for the similar act. At the same time Beka Avakishvili was convicted for commission of crimes prescribed by the subparagraphs "a", "b" and "d" of the second section of article 260 and article 273 by the judgment of Rustavi City Court of November 5, 2013. The convicted appealed the Judgment of December 2, 2013 in the sentence part and requested change of imprisonment with fine, as well as use of principle of absorption with respect to unity of convictions. Both of the judgments of the Rustavi City Court were based the conviction on declaration of December 26, 2012 on imposition of administrative sanction. The Court of appeals considered that in the present case adoption of two judgment of conviction against the same person based on the same legal ground constituted double jeopardy. The judgment of the court of appeals indicate that although the court went beyond the issues disputed in the appellate claim, by this it avoided violation of constitutional principle prohibiting double jeopardy. The prosecutor appealed the mentioned judgment and demanded delivery of judgment of conviction.
8. The author of the constitutional submissions N608 and N609 considers that based on the disputed provision the court of appeals and the court of cassation are obliged to limit the scope of review of the case with the issues disputed in the appellate and cassation claims and in this process they are not allowed to exceed the issues disputed in the claims. The author of the constitutional submissions claims that the disputed provisions have imperative nature and do not leave any opportunity to the court to take into consideration important legal or procedural breaches during the hearing on the case. Therefore, based on the disputed provision the court of appeals and the court of cassation cannot exceed issues disputed in the claim even in case when it might result in violation of constitutional principles such as prohibition of conviction of innocent individual and double jeopardy of an individual for the same offence.
9. According to the constitutional submissions №608 and №609 the disputed provisions strengthen the principle of equality and adversariality in the criminal proceeding. However, the current version of the disputed provisions, in absence of allowing some exemptions from the restriction, assumes unconstitutional character and does not ensure the protection of the fair balance between realisation of the principle of adversariality and fundamental rights of the human (convicted).
10. According to the constitutional submission N608 the disputed provision contradicts with the third paragraph of article 40 of the Constitution of Georgia, according to which the court judgement of conviction shall be based only on incontrovertible evidences. The author of the constitutional submission indicates that in cases when the unity of such evidences is not presented on criminal case the court assessment should not be limited only to the issues indicated by the party because risks of conviction of an innocent person increases unjustifiably. The boundaries established by the disputed provision are so strict that its circumvention is unimaginable even in case when the judge determines that an act committed by the accused does not constitute crime.
11. According to the constitutional submission N609 the court is not allowed to exceed the issues disputed in the appellate claim even in cases when it results in double jeopardy of an individual for the same crime. Therefore, the Supreme Court of Georgia considers that normative content of the disputed provision which restricts the possibility of the court to rule outside the scope of the appellate claim in cases when double jeopardy for the same crimes is presented contradicts the fourth paragraph of article 42 of the Constitution of Georgia.
12. In order to substantiate its argumentation the author of the constitutional submissions №608 and №609 additionally indicates on the case law of the European Court of Human Rights and the courts of other counties related to the disputed issues.
13. On July 21, 2015 the representative of the Parliament of Georgia addressed the Constitutional Court with the written statement. According to the statement the provision disputed with the №608 and №609 constitutional submissions constitutes typical expression of the principle of adversarial process between the parties, which is originated from the third paragraph of article 85 of the Constitution of Georgia and constitutes general foundation of every principle of the criminal proceeding. The representative of the Parliament considers that article 85 of the Constitution protects not only procedural equality of the parties, but also aims to ensure delivery of the judgment based on the evidences obtained as a result of adversarial process. The state is obliged to create procedural basis in order to arm defence and prosecution parties with equal possibilities to protect their opinions before the court, while judge serves as an unbiased arbiter and is free from elements of defence and prosecution.
14. Since the parties are equipped with the possibility to fully present and protect their opinions, refusal of the party to exercise his/her right does not imply violation of that right; therefore the court should not have the authority to ensure exercise of the right against the party's will. If the court exceeds the boundaries of the appellate and cassation claims it would significantly violate the balance based on the principle of adversariality. This will turn the judge into the defence or prosecution party instead of the arbiter which is not compatible with the essence of the Constitution. At the same time the written opinion of the Parliament of Georgia indicates that during assessment of constitutionality with respect to the third paragraph of article 40 and the fifth paragraph of article 42 of the Constitution the Constitutional Court should interpret the disputed provisions in the context of constitutional principles, it should take requirement of the third paragraph of article 85 of the Constitution into special consideration in order to ensure that as a result of interpretation these provisions will not entirely be separated from the order of values enshrined in the entire Constitution.
15. In response to the questions of the Constitutional Court of Georgia the Venice Commission prepared *amicus curiae* regarding the rule of binding the court with the scope of appeal (*non ultra petita*). In response to the question when the courts of higher instance are authorised to go beyond the scope of appeal, the *curiae* of the Venice Commission states that number of European states, as well as United States of America, Canada, Chile, South Africa and other states, recognise the rule binding the higher instance courts with the factual and legal issues posed by the parties. This rule is actively represented in the countries of continental legal system, including the countries where inquisitorial model of criminal proceeding is applied. Despite this it is frequent that in relevant countries the law or practice establishes exceptions from the mentioned rule, serving the protection of fundamental rights and interests of justice established by the constitutions or international human rights law.
16. The second question addressed the authority or the obligation of the courts to go beyond the scope of appeal by its own initiative for the purpose of protecting the principles of prohibition of double jeopardy, deciding any suspicion in favour of the defendant, prohibiting punishment without the law or using the less severe law. The *amicus curiae* opinion indicates that the abovementioned principles are constitutionally protected in many countries and, therefore bind the courts, despite the circumstance whether the party or the attorney refer to protection of these principles or not. Even if the Constitution of a state does not prescribe such principles, they are contained by the regional and international legal documents, they gradually acquire the status of customary international law and therefore the international society is obliged to protect them. The *amicus curiae* underlines that in majority of states the courts are authorised in some instances are even obliged to protect these fundamental principles on their own initiative.
17. In relation to the №608 and №609 submissions the *amicus curiae* opinion was presented also by the researches of law school of the Ilia State University - Giorgi Meladze, Giorgi Giorgadze and Giorgi Noniashvili. Based on the analysis of the case law of the Constitutional Court of Georgia, comparison of the models of criminal law process of the countries of continental Europe and the United State of America as well as review of the case-law of the European Court of Human Rights the *amicus curiae* opinion indicates that the principle of adversariality enshrined in the third paragraph of article 85 of the Constitution of Georgia should be interpreted in the light of articles 40 and 42 of the Constitution, because this principle is not absolute and exemptions from it are allowed if they are based on reasonable grounds. At the same time, restrictions derived from the adversarial principle should not violate the right of accused to familiarise himself/herself with the essence of the accusation against him and have adequate time and possibility to defend himself/herself from it. Therefore, the *amicus curiae* concludes that absolute restriction of the court of appeal and the court of cassation with the claims indicated by the appellant or cassator contradicts with the right protected under articles 40 and 42.
18. The Association of Law Firms and its representative also addressed the Court with *amicus curiae* opinion in relation to the №608 and №609 constitutional submissions. According to the mentioned opinions the disputed provisions serve realisation of principle of adversariality and the essence of this principle is protection of rights of accused through equalisation of the possibilities of the parties. Since the state has greater opportunities compared to an accused, achieving absolute equality between the parties is impossible, which might lead to the necessity to arm defence party with additional guarantees. The mentioned does not violate the principle of adversariality. Therefore, the opinion indicates that exceeding boundaries of the claim by the judge in favour of the prosecution party violates the principle of adversariality and equality between the parties, because an accused will not have an adequate opportunity to prepare defence. However, allowing the same in order to protect constitutional right of an accused does not violate the principle of adversariality, it rather creates guarantee for protecting the right of an accused to a fair trial. Therefore, the principle of adversariality prescribed by the third paragraph of article 85 of the Constitution should not be interpreted in detriment to other constitutional rights of the accused and the judicial initiative for protection of other constitutional guarantees should not be excluded.

**II**

**Reasoning part**

1. In the present dispute the Constitutional Court should decide on constitutionality of the provisions of the Criminal Procedure Code of Georgia which deprives the Court of Appeals and the Court of Cassation of the opportunity to go beyond the issues disputed in cases when it is required for implementation of the constitutional principles on retroactive application of the law repealing the responsibility of the law and prohibition of double jeopardy of an individual.
2. The Supreme Court of Georgia as the author of the N608 constitutional submission demands determination of constitutionality of the fourth section of article 306 of the Criminal Procedure Code of Georgia with respect to the third paragraph of article 40 of the Constitution of Georgia. According to the opinion of the author of the constitutional submission the disputed provision restricts the court with the boundaries of the cassation claim, and therefore if the party does not submit suitable claim the disputed provision restricts the court from releasing individual from responsibility even in cases when the court determines that according to the new law an act committed by the convicted individual does not constitute crime any more.
3. Therefore, the constitutional problem identified in the submission relates to the principle of retroactive application of new law repealing responsibility which is protected under the second sentence of the fifth paragraph of article 42 of the Constitution and not under the third paragraph of the article 40.
4. According to subparagraph "d" of paragraph 5 of article 16 of the law of Georgia "On Constitutional Legal Proceedings" the court submitting the constitutional submission is obliged to indicate the constitutional provision which according to the opinion of the author of the submission is violated by the normative act. According to the case-law of the Constitutional Court of Georgia the constitutional submission is not declared admissible for consideration on merits if the constitutionality of the disputed provision could not be assessed with respect to the constitutional provision indicated by the author (See the Ruling N1/6/115 of the Constitutional Court of Georgia of September 22, 1999 on the case of "The Constitutional Submission of Khashuri District Court"; Ruling N1/6/115 of the Constitutional Court of Georgia of April 1, 1999 on the case of "The Constitutional Submission of Tchiatura City Court"). However, by taking importance of the submissions of the general court for constitutional order and the law regulating relevant competence of the Constitutional Court into consideration the Constitutional Court finds it necessary to establish a new approach.
5. According to the second paragraph of article 19 of the organic law of Georgia "On the Constitutional Court of Georgia" the general court makes constitutional submission to the Constitutional Court if during proceeding of a case before it the court finds that normative act which should be used for adjudication of the case might be incompatible with the Constitution. Therefore the institute of constitutional submission serves as a guarantee of the utmost importance for ensuring the supremacy of the Constitution. This mechanism enables the general court to avoid application of the normative act constitutionality of which is questionable. At the same time, possibility to make a constitutional submission to the court equips the consideration of constitutional requirements and ensuring the protection thereof with real and practical force in the process of administration of justice and the work of general courts.
6. The institute of constitutional submission clearly demonstrates that it does not serve protecting the interests of its author; rather it is oriented at objective interest to protect constitutional requirements and regulations in the Rule of Law state. The aim of making a constitutional submission by the adjudicating court is protecting the constitutional guarantees of the parties of litigation and the institutions. An obvious demonstration of this is proceeding for hearing on constitutional submission of the Constitutional Court, which is conducted in the absence of the author of the submission and the body adopting the disputed normative act (paragraph 1 of article 42 of the organic law of Georgia “On the Constitutional Court”). The general court, which is the author of a constitutional submission is also not authorised to refuse the hearing of the submission or demand to stop the hearing (paragraph 4 of article 13 of the law of Georgia “On Constitutional legal Proceedings”). These procedural provisions indicate that within the institution of constitutional submission the general courts operate with the aim of protecting public interests and are not independent participants of the trial with their private interest. The concept of constitutional submission is collaboration between the two systems of the court to protect constitutional values, where general courts identify problems derived from the specific trial and initiate constitutional proceeding, while the Constitutional Court ensures the assessment of constitutionality of the disputed normative act and in case there is unconformity with the Constitution invalidates the unconstitutional provision.
7. When the author of constitutional submission – the adjudicating court considers that legal provision it has to apply to decide the criminal case does not correspond the Constitution and for this reason stays the proceeding until the Constitutional Court decides on the constitutionality of the applicable normative act, the Constitutional Court cannot leave the problem raised in the submission without assessment due to formally incorrect identification of the constitutional provision. Otherwise the constitutionality of the applicable normative act will stay doubtful, since the decision regarding the constitutionality can be adopted only by the Constitutional Court. At the same time hearing the case in the general court will be stalled in vain, which itself will create additional risk of violating the right. Therefore refusing to consider the submission admissible due to incorrect indication of a constitutional provision will not only hinder deciding the case by a general court, but will also make the institution of constitutional submission substantially inefficient. This would increase the risk of violating the Constitution unjustly not merely in the specific case within which a general court addressed the Constitutional Court, but in all proceedings where same provision needs to be applied for deciding legal issue and thus would postpone resolving constitutional problem for an indefinite time.
8. Bearing in mind the relevance of constitutional submission of general courts the Constitutional Court considers that it is sufficient for the submission to clearly define constitutional problem, resolving of which the author of the submission desires. The Constitutional Court will follow the opinion of the author of the submission, regarding the specific inconformity of applying the disputed normative act with respect to the Constitution. Therefore the constitutionality of the disputed provision/provisions shall be assessed with the constitutional provision responding the disputed issue identified by the author of the submission.
9. The Constitutional Court generally does not preclude the possibility to assess the disputed provision with respect to paragraph 3 of article 40 of the Constitution of Georgia, however derived from the character of the problem indicated in the instant case, considering the above mentioned argumentation (approach), the Constitutional Court shall assess the constitutionality of section 4 of article 306 of the Criminal Procedure Code of Georgia with respect to the second sentence of paragraph 5 of article 42 of the Constitution of Georgia.
10. Article 306 of the Criminal Procedure Code of Georgia regulates the proceedings for hearing the cassation appeal of a convicted person that was deemed admissible. Section 4 of this article prescribes, that cassation appeal shall be reviewed within the scope of the appeal and the response. There is only one exception from this rule given in article 309 (Cassation appeal as grounds to re-examine judgements entered with respect to other convicts in the same case), which obliges the court to review the case with respect to convicted persons who have not made the cassation appeal, if, based on the appeal of a convicted person, the cassation court, annuls or alters the judgement in the convicted person's favour, on the grounds that the criminal law was applied in violation of the law and this legal mistake also affects other persons convicted in the same case. There is no other exception given in this article or any other article of the law allowing the Court to go beyond the scope of cassation appeal when deciding a case during the hearing or afterwards. The disputed provision clearly obliges the court not to exceed the scope of the demands of authors of cassation appeal or response.
11. The disputed provision named in the Constitutional Submission N609 has identical structure and purpose. Article 297 of the Criminal Procedure Code of Georgia establishes that the court of appeal hears the appeal according to the rules similar to the one applicable on the main hearing in the court of the first instance, although it also establishes the differences of the appeals hearing from the first instance hearing. The disputed subparagraph “g” of article 297 prescribes one such major difference - the appeal shall be reviewed within the scope of the appeal and the response. The Criminal Procedure Code of Georgia allows for one exception in this case as well, when the court of appeal is authorised to go beyond the scope of claims of the party: according to article 299 if an appeal filed by a convicted person is satisfied in full or in part, the court of appeal shall, under this judgement, review the case with respect to other persons convicted in the same case who have not filed an appeal. In any other case the court of appeal is obliged to be bound and to encase the hearing with the scope of the appeal and the response.
12. According to the authors of the Constitutional Submission N609 the disputed provisions enhance the principles of adversarial process and equality. The Representative of the Respondent also argues that the disputed provisions are the expression of the principle of adversarial process, which was established by the new Criminal Procedure Code and which stem from paragraph 3 of article 85 of the Constitution of Georgia. Therefore the Representative of the Respondent argues that the disputed provisions and relevant constitutional provisions should be defined according to the requirements of article 85 of the Constitution. The purpose of the disputed provisions is defined by the aim of protecting the principle of adversarial process by the *amici curiae* of the Association of Law Firms of Georgia and researchers of Ilia State University.
13. Within the scope of the current dispute the Constitutional Court should assess the constitutionality of section 4 of article 306 of the Criminal Procedure Code of Georgia with respect to the second sentence of paragraph 5 of article 42 of the Constitution of Georgia and the constitutionality of subparagraph “g” of article 297 of the Criminal Procedure Code of Georgia with respect to paragraph 5 of article 42 of the Constitution of Georgia. Since the Constitution is one whole document where the provisions and principles should be defined in connection with each other for the aim of better protecting human rights, when analysing the constitutionality of the disputed provisions it should first be determined what are the obligations of the State established by paragraph 3 of article 85 of the Constitution of Georgia with regards to ensuring the principle of adversarial process and what is the relevance of this regulation for the constitutionality of the disputed provisions within the scope of this instant dispute.
14. Pursuant to paragraph 3 of article 85 of the Constitution of Georgia, “legal proceedings shall be conducted on the basis of equality of parties and adversarial process”. When reasoning on this provision, the adversarial model of criminal procedure should first be distinguished as a model of legal proceeding established throughout the history and the principle of adversarial process as one of the elements of the right to a fair trial.
15. The adversarial model of criminal procedure is characterised by a specific system of conducting procedural actions and specific separation of roles between the participants of the procedure. Unlike from the inquisitorial process, where the Judge is equipped with authorities to explore the circumstances of the case pursuant to own initiative, the fundamental characteristic of the adversarial process is entrusting the function to prove the truth at the trial to the initiatives of the parties in the condition of neutrality of the Judge. In the mentioned model the expectation of neutrality and passive role of the Judge exists. The adversarial process is based on the belief that parties who are substantially ready and interested provide the court with sufficient information and arguments, while the main task of the Judge is to provide the parties with such possibilities. Unlike the inquisitorial system, in the adversarial model according to the general rule the parties decide what evidences and arguments shall be presented to the court and what issues they will debate upon.
16. As for the principle of adversarial process it is a component of the right to a fair trial and is a part of both, inquisitorial and adversarial criminal process. The clear example of this is that all participant states of the European Convention on Human Rights are required to ensure the principle of adversarial process as a principle protected by the Convention, regardless their choice at the national level between the adversarial or inquisitorial model of criminal procedure.
17. The principle of adversarial process can be expressed in different guarantees of the fair trial. The Constitutional Court has considered oral hearing to be an important guarantee for protecting the adversarial principle: “given that oral hearing of the case envisages direct participation of the parties in consideration of the case, leads to their possibility to present evidences, express their opinions, defend themselves personally or by means of defence counsel, it thereby represents an important guarantee for adversarial process adequate enjoyment of the right of defence, and in the end, ensures possibility of the parties to better protect their interests, have impact on decision of the case and contribute to the adoption of correct and fair decision on the case” (Judgment of the Plenum of the Constitutional Court of Georgia No.3/1/574 dated May 23, 2014 on the case of “Citizen of Georgia Giorgi Ugualava v. the Parliament of Georgia”, II-61). In the mentioned case the Constitutional Court clearly indicated that the concept of adversarial trial is created by the possibility of the parties to provide evidences, new factual circumstances, especially in the event when the court elaborates on the facts, the ability to express arguments, state positions regarding the evidences presented by themselves as well as by the opposing party and the issues related to the case, in order to convince the court that their arguments are correct and influence adoption of correct and fair decision on the case (Judgment of the Plenum of the Constitutional Court of Georgia No.3/1/574 dated May 23, 2014 on the case of “Citizen of Georgia Giorgi Ugualava v. the Parliament of Georgia”, II-75).
18. The main aim of the principle of adversarial process in criminal as well is in other type of procedure is to ensure the party of the procedure with possibility to familiarise, express opinion and if it is in their interest rebut all evidences and arguments, on which the court might base its reasoning; also convince the court in the accuracy of his/her position, provide the court with relevant evidences and arguments, which should be responded by the court in its reasoned judgment in the event of both upholding or denying the request of the party. Derived from this aim it is clear that the principle of adversarial process is also related to other guarantees of the right to fair trial – the right to receive information regarding the evidences of the opposing party, right to have sufficient time and possibility to prepare defence and the right of the defence party to interrogate witnesses through a defendant or by oneself and call for own witnesses and interrogate them in equal conditions, the right to obtain reasoned court judgment, etc. The relationship between the principle of adversarial process and specific guarantees of the right to a fair trial is indicated in the *amicus curiae* opinionprovided by the Association of Law Firms of Georgia.
19. It is clear that paragraph 3 of article 85 of the Constitution of Georgia refers to strongly interrelated principles of equality and adversarial process rather than the adversarial model of criminal procedure. The requirement of equality ensures that the parties do not face differential treatment compared to each other and that one of them is not in disadvantaged condition. The equality is a necessary condition of adversarial principle, since the rights stemming from the adversarial principle – the right of expressing position, rebutting or being responded on all important circumstances for deciding the case should be equally entitled to all parties. The principles of equality and adversarial process are declared in article 85 of the Constitution together with all other principles of the hearing – the publicity of the judgment, conducting the trial in state language and ensuring the translator and concerns not only criminal justice, but legal procedures of the court branch generally. Therefore article 85 and specifically paragraph 3 thereof do not give basis to conclude that the mentioned constitutional provision demands the establishment of adversarial model of criminal procedure in Georgia.
20. Considering the requirements of paragraph 3 of article 85 of the Constitution of Georgia it is baseless to argue that executing the constitutional principles, such as applying the retroactive force of the law repealing criminal liability or releasing a person from double jeopardy, by the own initiative of the court when the claimant does not demand such actions, *per se,* violate the adversarial principle. This principle together with other procedural guarantees is the measure and tool of ensuring the fair hearing and adopting “correct and fair” judgment. The legal duty binding the judge not to use and neglect the fundamental and imperative constitutional principles in the case on the grounds that the parties do not refer to them excludes the aims of fair court hearing and the adoption of fair judgment. Therefore it is first of all baseless to argue that a rule excluding the achievement of an aim can be justified by the measure for achieving the goal, in this instance protection of adversarial principle.
21. At the same time limiting the initiative of the judge in the process of establishing facts and legal issues and brining the requests of the parties forward is an inherent element of adversarial model of the procedure and not the requirement of the adversarial principle. As mentioned, the adversarial principle envisages equipping parties with equal possibilities to provide evidences and arguments beneficial for their positions and influence the judgment this way; however it does not in any way liberate the judge from inherent duty to consider and correctly use the fundamental principles of law independently from the party’s ability to duly defend own interests and whether he/she indicates the court towards the necessity of using relevant rules and principles.
22. According to the *amicus curiae* prepared by the Venice Commission for the Constitutional Court of Georgia (CDL-AD(2015016)) binding the court competences by the demands of the parties (*non ultra petita*) is not unique characteristic of an adversarial model and similar rule is applied in certain countries with inquisitorial model. At the same time, existence of adversarial model does not exclude the existence of exceptions of limitations of the courts with the scope of party requests. Even in the adversarial model the courts independently from the parties raise and decide issues by their own initiative, which are relevant for deciding the case or which they see significant to eliminate the injustices identified in the case. Despite the characteristics of the adversarial or inquisitorial models there might be number of issues that the judge deciding on a criminal case should evaluate by its own initiative and regardless the demands of the parties. Such an issue is also which law should be applied by the court. When necessary the court should not allow the application of annulled or amended legal provision and should correct the mistakes made by the lower instance courts. Deciding certain issues by the court’s own initiative and correcting the mistakes might cause problems regarding to the right of the parties, particularly those of the defence, to be informed regarding the existing charge or evidences and the right of a party to provide the court with its opinion regarding all issues of the case. However allowing the court’s initiative for specific issues, which are not related to the subject of the dispute, does not itself create such problems and therefore referring to them are beyond the subject of the dispute.
23. Derived from above mentioned the requirement of paragraph 3 of article 85 of the Constitution of Georgia regarding the equal and adversarial procedure does not require judges to be bound unexceptionally and in a blanket manner with the scope of the demands of the applicants, when the constitutional principle of using abrogating law or prohibiting double jeopardy might be violated. At the same time, analysis of the procedural legislation of the countries that use adversarial model of criminal procedure evidences that the exception of binding the court with the scope of party requests exist in such countries as well and they do not threaten functioning of the adversarial model of criminal procedure.
24. **Conformity of section 4 of article 306 of the Criminal Procedure Code of Georgia with respect to the second sentence of paragraph 5 of article 42 of the Constitution of Georgia**
25. According to the second sentence of paragraph 5 of article 42 of the Constitution of Georgia “no law shall have retroactive force unless it reduces or abrogates responsibility.” The second sentence of paragraph 5 of article 42 of the Constitution of Georgia envisages the fundamental principle of prohibition of retroactive force of law (see Judgment of the Constitutional Court of Georgia No.2/2/516,542 dated May 14, 2013 on the case of “Citizens of Georgia Aleksandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaia v. the Parliament of Georgia”, II-28, 29). “Prohibition of the retroactivity restricts the freedom of a legislator to introduce such law that would impose responsibility to a person for an action which was not punishable at the moment of its commission. By this, the Constitution recognises that the mentioned principle has an absolute character and its violation is inadmissible ... There is only one exception from this absolute constitutional requirement – within the scope of protection of paragraph 5 of Article 43, the legislator may award the law retroactive force, if it abrogates or mitigates the responsibility provided for by the law that was applicable at the time the criminal offence was committed” (Judgment of the Constitutional Court of Georgia No.1/1/428,447,459 dated May 13, 2009 on the case of “The Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of the Russian Federation v. the Parliament of Georgia”, II-1, 3).
26. At the same time regarding the constitutional provision of retroactive use of law reducing or abrogating responsibility the Constitutional Court of Georgia has stated: “second sentence of paragraph 5 of Article 42 of the Constitution of Georgia establishes the grounds for application of the law mitigating/abrogating responsibility retroactively. Obviously, it does not imply such strict and absolute restriction on the authorities as in case of prohibition of application of law determining or aggravating responsibility retroactively, but definitely restricts the state with a view to avoiding interference with freedom of human beings when it is not/not any more necessary or more severe than it is necessary to achieve a legitimate aim” (Judgment of the Constitutional Court of Georgia No.1/4/557,571,576 dated November 13, 2014 on the case of “The Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili and Aleksandre Silagadze v. the Parliament of Georgia”, II-71).
27. “When the action is decriminalised or responsibility for it is mitigated, charging a person with more severe penalty for the same action committed earlier becomes groundless. People shall enjoy the positive outcomes of progressive humane understanding of development of society and law. An individual should be responsible for really publicly dangerous action, although in frames and in accordance with rules objectively necessary and sufficient to achieve the goal” (Judgment of the Constitutional Court of Georgia No.1/4/557,571,576 dated November 13, 2014 on the case of “The Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili and Aleksandre Silagadze v. the Parliament of Georgia”, II-64).
28. As stated by the Constitutional Court of Georgia “the obligation of application of the law mitigating/abrogating responsibility retroactively is clearly stipulated by paragraph 1 of Article 15 of International Covenant on Civil and Political Rights. Specifically “... If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby”. Consequently, this norm regulates the rule of prohibition of application of the law retroactively as well as ground and frames of obligation of its application retroactively” (Judgment of the Constitutional Court of Georgia No.1/4/557,571,576 dated November 13, 2014 on the case of “The Citizens of Georgia Valerian Gelbakhiani, Mamuka Nikolaishvili and Aleksandre Silagadze v. the Parliament of Georgia”, II-68). Application of mitigating law adopted after the commission of crime is also followed by the International Criminal Court, European Court of Justice, European Court of Human Rights and it is considered that this rule is the part of common constitutional tradition of the members of European Union (European Court of Human Rights Judgment on the case of Scoppola v. Italy (No.2) (Application No.10249/03), para. 105).
29. Within the scope of the current dispute the Constitutional Court should decide whether the disputed provision mentioned in the constitutional submission, which demands the cassation appeal to be reviewed within the scope of the appeal and its response, is in conformity with the second sentence of paragraph 5 of article 42 of the Constitution of Georgia.
30. As mentioned above the disputed provision establishes the revision of cassation appeal within the scope of party requests without any exceptions (apart from the instance when there are several convicted persons, which was discussed above). The disputed provision does not give discretion to the court of cassation to go beyond the requests of the cassation appeal or response in any instances. The above mentioned provides that without ignoring the direct wording of the disputed provision the court of cassation does not have the authority to assess if the crime, for which the applicant is charged, has been abrogated and in case the answer is positive free a person from the responsibility. Therefore when at the moment of cassation hearing the law reducing or abrogating the responsibility is in force and the party does not request being liberated from the responsibility based on that, the court of cassation does not have the authority to protect the fundamental constitutional guarantee – it cannot free a convicted person based on its own initiative from the responsibility, that is not grounded on the law any more. Therefore, the disputed provision contradicts the requirement of the second sentence of paragraph 5 of article 42 of the Constitution of Georgia, the law abrogating the responsibility to be used retroactively.
31. According to the interpretation of the Constitutional Court for the purposes of the second sentence of paragraph 5 of article 42 of the Constitution of Georgia the legislator can refuse using mitigating law in the special case, when despite amendment of the law, using the law applicable at the moment of commission of the crime is objectively necessary for achieving the aim of imposing the responsibility for certain offence. However the exception from the rule of using the law abrogating the responsibility retroactively does not allow the possibility to argue constitutionality of the disputed provision in the instant case due to the following reasons.
32. The disputed provision establishes blanket prohibition of the possibility of the court to use new and less severe law, when the party does not directly request it. According to the disputed provision using or not using the less severe law is not dependent on how far the specific offence has retained the threat for the public and therefore how far the necessity of using the severe law applicable at the moment of commission of the act towards the offender still exists. The disputed procedural provision decides the application of less severe law without discussing the content of the offence, based on the procedural circumstance that is completely unrelated to the goals of responsibility, such as the relevant request of a party. At the same time, on the one hand, the disputed procedural provision might eliminate using mitigating law towards the crimes of different severity, while on the other hand, might cause application of different law towards the analogous situations or the offences of analogous severity and thus establish ununiform practice of application of the law. This confirms once more that application of mitigating law by the influence of the disputed provision is not decided based on what is objectively necessary and sufficient responsibility for the specific offence and how necessary is application of more severe law against the offence. Punishment of a person more or less severely is dependent only on procedural circumstance, which, due to the blanket character of the provision, completely excludes reasoning on the applicable law and forces the court to act completely ignoring the constitutional requirement of applying the mitigating law retroactively.
33. It should also be mentioned that the second sentence of paragraph 5 of article 42 of the Constitution of Georgia, as a prohibition of using more severe law retroactively, as well as requirement of applying the less severe law retroactively provide for imperative constitutional requirement, which is not subject to any other limitation, apart from the exception discussed above and which is not relevant in the instant case.
34. Therefore the Constitutional Court of Georgia considers that the disputed provision violates the standard established by the second sentence of paragraph 5 of article 42 of the Constitution of Georgia regarding the application of the law reducing or abrogating the responsibility retroactively and is unconstitutional with respect to it.
35. **Conformity of subparagraph “g” of article 297 of the Criminal Procedure Code of Georgia with respect to paragraph 4 of article 42 of the Constitution of Georgia**
36. Paragraph 4 of article 42 of the Constitution of Georgia envisages the principle of prohibition of double jeopardy and states: “No one shall be tried twice for the same offence.” This constitutional statement is the embodiment of the universally recognised principle *ne bis in idem*, declared in international and national human rights documents, including in the International Covenant on Civil and Political Rights of 1966 (article 14, paragraph 7) and in the Protocol 7 of the European Convention on Human Rights and Fundamental Freedoms (article 4).
37. The mentioned principle on the one hand protects an individual from being once more prosecuted and punished for same action and on the other hand serves the goal of binding state institutions with the final judgments in criminal justice. This principle obliges the state bodies to conduct suitable prosecution, since the state bodies are not entitled to charge a person with additional or more severe accusation for the action the person was already convicted of. Therefore paragraph 4 of article 42 of the Constitution of Georgia establishes an important guarantee for protecting individuals from the arbitrariness of the state, since it ensures that if a person has already been convicted and served his sentence or was acquitted for a specific action, he/she should be free from fear that the state will prosecute him/her again for the same action.
38. It needs to be underlined that the exception from prohibition of double jeopardy are the events when the proceeding can be reopened based on newly found or newly discovered evidences or when serious errors of proceedings emerge, which could have influenced the results of the proceeding and creates the basis for reopening the case based on clear, foreseeable and previously adopted law. However apart from these exceptions the prohibition of double jeopardy is an absolute and imperative constitutional obligation. Convicting a person for the same action again is unequivocal disregard of a persons’ freedom and it strips the essence from the fundamental principles of the rule of law state, such as foreseeability of the law and prohibition of imposing responsibility or punishment without the law. If a person can be held responsible several times for the same action and the state is not limited in this regard, the imperative requirement that a person should be aware in prior what punishment he/she might face for specific action and control his/her conduct accordingly will become inherently pointless. Therefore double jeopardy is unacceptable and severe violation of the Constitution and its fundamental principles, which cannot be subject to justification with the reason of achieving any legitimate aim.
39. In the instant case the Constitutional Court does not face the necessity of exhaustively define the protected content of paragraph 4 of article 42 of the Constitution of Georgia. In the case at hand the Constitutional Court of Georgia should decide whether the disputed provision indicated in the constitutional submission N609, establishing the limitation of reviewing the appeal within the scope of the appeal and its response, is in conformity with paragraph 4 of article 42 of the Constitution of Georgia.
40. As mentioned during the analysis of subparagraph “g” of article 297 of the Criminal Procedure Code of Georgia, this provision does not provide for an exception when the court of appeal is authorised to go beyond the request of the applicant during the revision (apart from the instance when it has to decide the issue regarding other convicted persons in the same case). The direct content of the provision does not allow the court of appeal for the possibility to assess the disputed judgment of the first instance court with its own initiative and without the request of the parties, whether it violates the fundamental constitutional principle of prohibition of double jeopardy and in case such violation is found, annul or ammend the judgment appealed for other reasons. Therefore the disputed provision creates procedural order where the court has not authority to protect the fundamental and unconditional constitutional principle of prohibition of double jeopardy.
41. Maintaining the force of the conviction of double jeopardy based on the disputed provision is violation of this principle and therefore the disputed provision contradicts paragraph 4 of article 42 of the Constitution of Georgia.

**III**

**Ruling part**

Based on subparagraph “f” of the paragraph 1 and paragraph 2 of article 89 of the Constitution of Georgia, paragraph 2 of article 19, paragraph 1 of article 21, paragraph 1 of article 23, paragraphs 1, 2 and 3 of article 25, paragraph 5 of article 27, article 42, paragraphs 2, 4, 7 and 8 of article 43, paragraphs 1 and 2 of article 44 of the organic law of Georgia “On The Constitutional Court of Georgia”, paragraph 2 of article 24, articles 30, 31, 32 and 33 of the Law of Georgia “On Constitutional Legal Proceedings”

**THE CONSTITUTIONAL COURT**

**RULES:**

1. The normative content of section 4 of article 306 of the Criminal Procedure Code of Georgia, indicated in the Constitutional Submission N608 of the Supreme Court of Georgia which precludes possibility of the court to rule beyond the scope of the cassation appeal in cases when the law adopted after commission of an act abrogates its criminalisation shall be declared unconstitutional with respect to the second sentence of paragraph 5 of article 42 of the Constitution of Georgia.

2. The normative content of subparagraph “g” of article 297 of the Criminal Procedure Code of Georgia, indicated in the Constitutional Submission N609 of the Supreme Court of Georgia which precludes possibility of the court of appeal to rule beyond the scope of the appeal in cases when there is double jeopardy for the same crimes shall be declared unconstitutional with respect to paragraph 4 of article 42 of the Constitution of Georgia.

3. The unconstitutional provisions shall be declared invalid from the moment of publishing this Judgment in the courtroom of the Constitutional Court.

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

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

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

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

**Composition of the Plenum:**

**Giorgi Papuashvili**

**Konstantine Vardzelashvili**

**Ketevan Eremadze**

**Maia Kopaleishvili**

**Zaza Tavadze**

**Otar Sichinava**

**Lali Papiashvili**

**Tamaz Tsabutashvili**