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**POLITICAL UNION OF CITIZENS “FREE GEORGIA”  
AND “NEW RIGHTS”  
V. THE PARLIAMENT OF GEORGIA**

N2/3/591

Batumi, May 23, 2016

***Composition of the Board:***

Zaza Tavadze – Chairman of the Hearing, Judge Rapporteur;  
Otar Sichinava – Member;  
Lali Papiashvili – Member;  
Tamaz Tsabutashvili - Member.

***Secretary of the Hearing:***

Darejan Chaligava

***Title of the Case:***

Political Union of Citizens “Free Georgia” and “New Rights” v. the Parliament of Georgia.

***Subject of the Dispute:***

Constitutionality of paragraph 5 of article 51 of the organic law of Georgia “Election Code of Georgia” with respect to article 14 of the Constitution of Georgia.

***Participants of the Hearing:***

The Representative of the Claimant – Kakha Kukava; the Representatives of the Respondent – the Parliament of Georgia – Zurab Matcharadze and Tamar Meskhia.

**I**

**Descriptive Part**

1. On May 2, 2014 Political Unions of Citizens – “Free Georgia” and “New Rights” addressed the Constitutional Court of Georgia with a constitutional claim (registration N591). On May 5, 2014 the Constitutional Claim was assigned to the Second Board of the Constitutional Court of Georgia.

2. On July 24, 2014 a preliminary session of the Second Board of the Constitutional Court without oral hearing was held for ruling on admission of the case for consideration on merits. With the Recording Notice (N2/5/591) of July 24, 2014 the Second Board of the Constitutional Court admitted the constitutional claim for consideration on merits in the part of the claim which was regarding the constitutionality of the first sentence of paragraph 5 of article 51 of the organic law of Georgia “Election Code of Georgia” with respect to article 14 of the Constitution of Georgia.

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3. Court session on merits with oral hearing was held on May 20, 2015.

4. Legal basis for submission of the claim according to it is subparagraph “f” of paragraph 1 of article 89 of the Constitution of Georgia, subparagraph “e” of paragraph 1 of article 19, subparagraph “a” of paragraph 1 of article 39 of the organic law of Georgia “On the Constitutional Court of Georgia”, articles 15 and 16 of the Law of Georgia “On Constitutional Legal Proceedings”.

5. Pursuant to the first sentence of paragraph 5 of article 51 of the organic law of Georgia “Election Code of Georgia” “during the election campaign in their respective coverage areas, the Public Broadcaster, Ajara TV and Radio of the Public Broadcaster, and any community broadcaster shall broadcast in every hour, for not more 60 seconds, free of charge and without discrimination, the pre-election advertisements presented to them by each qualified electoral subject.”

6. Pursuant to article 14 of the Constitution of Georgia, “Everyone is born free and is equal before the law regardless of race, colour of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property or social status, place of residence.”

7. It is indicated in the constitutional claim that the disputed provision is illegitimate and poses electoral subjects in unequal conditions, since it grants the right to use free broadcasting time only to the qualified electoral subjects and not all political parties or unions participating in the elections. Hence the disputed provision contradicts with article 14 of the Constitution of Georgia.

8. On the hearing on merits the Claimant Party additionally indicated that in the given situation the comparable groups of persons are, on the one hand, qualified electoral subjects with regards to those political parties, which could not receive 4 and 3 percent respectively in the last parliamentary or local self-government proportional elections and, on the other hand, qualified electoral subjects with regards to those political parties, which were united in the electoral bloc and are second or next in line of the bloc in the elections mentioned above. In the view of the Claimant the comparable groups of persons are treated differently based on political and property grounds.

9. The Claimant also indicated that it is particularly unclear, what legitimate aim is pursued by differentiating the electoral subjects based on their order of priority in the bloc. Specifically, it is objectively impossible to establish precisely based on the votes received in the elections, what amount of votes a political party united in a bloc has received, which grants completely unfair and unjustified advantage to the first number of an electoral bloc, when in the absence of the bloc the latter could have demonstrated the lowest support of the voters.

10. As indicated by the Claimant party broadcasting time is the most important asset to any broadcaster, while selling it for advertising purposes – is significant source of income, especially in the event of private broadcasters, which is relevantly reflected on the price of advertising time. Thus free advertising time is extremely relevant benefit for the qualified electoral subjects, since within the pre-election campaign the expenditures are mainly related to purchasing the very

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advertising time and granting such time for free to only a part of electoral subjects poses them in significantly differentiated condition compared to other subjects.

11. The Claimant party also indicated that a non-qualified, ordinary electoral subject for the purposes of pre-election campaign and the free advertising time within it is a subject, which is registered by the Central Election Commission. For its part the Election Code of Georgia prescribes as a mandatory criterion for registration evidencing the support of voters, with at least 25 000 signatures (this number should not be higher than 1 percent of the overall number of voters). In the view of the Claimant party the sole fact of registration of an electoral subject should be sufficient for granting free advertising time, just as for using other possibilities created by the legislator during the pre-election campaign process. The will of the legislator to differentiate the electoral subjects with specific grounds should happen before their registration, from the moment the subject is on the electoral ballot paper, the legislator should ensure their equality, including with respect to the free advertising time.

12. The rule established by the disputed provision for allocating free advertising time, in the view of the Claimant, affects the formation of the will of the voters as well, since the pre-election political advertising significantly defines their final choice; when using other possibilities during pre-election campaign, such as meeting with the voters, placement of posters or participating in political debates, have much less ability to influence the voter and does not reduce the level of differentiation which is created by granting free advertising time only to the qualified electoral subjects.

13. Based on all above mentioned, the Claimant party considers that the first sentence of paragraph 5 of article 51 of the organic law of Georgia “Election Code of Georgia” contradicts with article 14 of the Constitution of Georgia.

14. Pursuant to the position of the Respondent party, the special significance of participating in electoral process does not simultaneously exclude the State from the possibility of differential treatment. The differentiation between the electoral subjects does not only relate to using free advertising time and it follows the whole Election Code. However in the current instance, for the purposes of the disputed regulation, the legitimate aim pursued by the differentiation between the qualified and unqualified electoral subjects from the State is, on the one hand, supporting political pluralism and giving the competitive electoral subjects the possibility of direct contact with the voters, while, on the other hand, supporting the formation of will of the voters. Although finally the voter makes a decision independently and will make a choice only in favour of the candidate, which is dignified and adequate to his/her demands in his/her opinion; however pursuant to the Respondent party, the duty of the State to assist the voter in this process, both for formation of his/her will and for expressing it and adequately reflecting it through creation of such supportive guarantees persists.

15. The Respondent party also stated that for the purposes of the disputed provision the differentiation between the electoral subjects is not based on either

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political or property grounds, but is dependent on the amount of voter support received in the last parliamentary or local self-government proportional elections, as for the political entities united in blocs during these elections – their order of priority in the bloc, which has nothing to do with political views or property state of the electoral subject.

16. According to the position of the Respondent party the differential treatment established by the disputed provision is not intensive either. Specifically, the main goal of the pre-election political advertisement is informing the voters regarding the main directions of pre-election programme. Free advertising time is not the sole resource for achieving this goal for an electoral subject. Specifically, as indicated by the Respondent, an electoral subject is capable of privately meeting a voter, placing posters, holding press-conferences and participating in political debates, etc. Additional possibility of receiving free advertising time, including for the newly created political parties is created by paragraph 8 of article 51 of the Election Code of Georgia, which allows the broadcasters to declare as a qualified electoral subject the political party that, according to the public opinion poll conducted throughout the territory of Georgia, has gained not less than 4% of votes in not less than 5 public opinion polls conducted during the election year or in the public opinion poll conducted a month before the elections.

17. The Respondent party additionally indicated towards the broadcasting time, as an objectively exhaustible resource and stated that the limited nature of this time was considered for formation of the disputed provision. In the view of the Respondent, the legislator has a wide margin of appreciation when defining and allocating the free advertising time. Specifically, its goal is, on the one hand, not to allow overload of the broadcasters in a way that would significantly hinder their operations due to allocation of free advertisements and, on the other hand, to ensure that allocating this resources is performed in a way, that a voter has the possibility of direct reach to those political subjects, that truly have their support and have real chances of success. Pursuant to the Respondent party, the limited nature of the resource takes special significance considering the legal status and contextual duties of the public broadcaster prescribed by the law of Georgia “On Broadcasting”. Specifically, the latter is a legal entity of public law acting with public funding, independently from the government and is accountable towards the society, intended to provide the public with diverse programmes that are free from political and commercial influence and reflect the interests of the public.

18. The Respondent party also stated that granting the right to use free advertising time equally to all registered electoral subjects would, on the one hand, become unfair weight to the broadcaster with regards to effectively distributing its own broadcasting time, and, on the other hand, would cause the voter to lose interest towards pre-election advertisements, which would significantly reduce their viewing and would contradict the legitimate aim for achievement of which the legislator adopted the institution of pre-election advertisement generally.

19. Based on all above mentioned the Respondent party considers that

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the disputed provision in the current case is fully compatible with article 14 of the Constitution of Georgia, therefore the constitutional claim N591 should not be upheld.

## II Reasoning Part

1. The right to equality before the law is guaranteed by article 14 of the Constitution of Georgia, according to which: “Everyone is born free and is equal before the law regardless of race, colour of skin, language, sex, religion, political or other opinions, national, ethnic and social affiliation, origin, property or social status, place of residence.” The mentioned provision establishes the fundamental constitutional principle of equality before the law. Its goal is not to allow unequal treatment of substantially equal persons and *vice versa*.

2. Pursuant to the case-law of the Constitutional Court of Georgia the scope of the right guaranteed by article 14 of the Constitution of Georgia is not limited by prohibiting discrimination based on the grounds indicated within it. “The Constitution prohibits each case of treating unequally equals before the law (and *vice versa*) without reasonable and objective justification thereto. However, in view of the nature of the legal relationship the degree of protection of the right to equality before the law differs and its scope shall be determined case by case” (Judgement of the Constitutional Court of Georgia N2/1/473 dated March 18, 2011 on the case of “Citizen of Georgia – Bitchiko Tchonkadze and others v. The Minister of Energy of Georgia”, II-1).

3. Regardless of its universal character the equality before the law does not entail absolute equalisation. “For the sake of understanding the essence of Article 14, it is of principle importance to make distinction of equality before the law from equalisation. Within the scopes of this principle, the major aim and function of the state shall not be full equalisation of individuals, as this would come in contradiction with the idea of equality itself, the content of the rights. The idea of equality serves the assurance of equality of possibility, that is, to provide guarantee of equal possibilities for self-realisation of individuals in this or that area” (Judgement of the Constitutional Court of Georgia N1/1/493 dated December 27, 2010 on the case of “Political Associations of Citizens “the New Rightists” and “The Conservative Party of Georgia” v. The Parliament of Georgia”, II-1).

4. Thus, the “right to equality does not imply putting all the people in the same conditions despite their character and capabilities. The only obligation that follows from it is to create such a legislative realm that will provide equal opportunities for those, who are essentially equal in particular relationships and to create the opposite for those who are unequal” (Judgement of the Constitutional Court of Georgia N2/1/473 dated March 18, 2011 on the case of “Citizen of Georgia – Bitchiko Tchonkadze and others v. The Minister of Energy of Georgia”, II-2).

5. The disputed provision establishes the rule of allocating free political

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advertisement to the electoral subjects during the pre-election campaign. Specifically “during the election campaign in their respective coverage areas, the Public Broadcaster, Ajara TV and Radio of the Public Broadcaster, and any community broadcaster shall broadcast in every hour, for not more 60 seconds, free of charge and without discrimination, the pre-election advertisements presented to them by each qualified electoral subject”. Pursuant to paragraph 4 of article 51 of the Election Code of Georgia, for the purposes of broadcasting free pre-election advertisement, a qualified electoral subject shall be an electoral subject (party, electoral bloc, etc.) affiliated party of which independently or through being the first member in the list of the electoral bloc ran in the previous parliamentary election and received not less than 4% of votes or received not less than 3% of votes throughout the country in the previous election for local self-government held under the proportional system.

6. The Claimant party considers that leaving those political subjects without the possibility to use free political advertisement, which did not receive the abovementioned amount of votes during the last parliamentary or local self-government elections, contradicts the right to equality before the law. Similar result is received when a political subject, which was united in the electoral bloc during the last parliamentary or local self-government elections and gathered sufficient amount of votes, but was not the first member in the list of the bloc cannot use free political advertisement. In such occasion, pursuant to the Claimant, it is objectively impossible to establish with certainty, what amount of support each subject united in the bloc received from the voters.

7. Based on the above mentioned it is evident that the legislator entitles only a part of electoral subjects with the right to use free political advertisement, which puts them in differential condition with regards to those subjects, which are not entitled to using such right. Additionally, based on the constitutional claim, we should assess as comparable groups, on the one hand, subjects considered qualified pursuant to paragraph 4 of article 51 of the Election Code of Georgia, and, on the other hand, subjects, who did not receive the necessary amount of votes during the last parliamentary or local self-government elections (independently or through electoral bloc) or participated in the last elections as members of the bloc, but were not the first in the list thereof. It should also be mentioned that the Claimants are political parties and they dispute the differentiation between the parties. Therefore, within the current dispute it is only relevant to assess the content of the disputed provision, which establishes differential treatment between the parties (or electoral blocs). The Court shall not assess whether it is justified to differentiate voter’s initiative groups or other electoral candidates prescribed by the disputed provision.

8. When assessing the conformity of the disputed provisions with respect to article 14 of the Constitution of Georgia, it should be established whether the comparable groups are substantially equal with regards to the specific legal relationship. At the same time, “when discussing Article 14 of the Constitution, the

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issue of essential equality of people should be assessed not in general, but with respect to a specific legal relationship. Discourse on discriminatory treatment is possible only if the persons can be considered as essentially equal subjects with respect to a specific legal relationship” (Judgement of the Constitutional Court of Georgia N2/1/536 dated February 4, 2014 on the case of “Citizens of Georgia Levan Asatiani, Irakli Vatcharadze, Levan Berianidze, Beka Buchashvili and Gocha Gabodze v. the Ministry of Labour, Health and Social Affairs of Georgia”, II-17).

9. The disputed provision regulates electoral process and grants certain electoral subjects with the right to use free television advertisement. Free television advertisement is a resource, which electoral subjects use for delivering their political messages to the society. Based on the mentioned, by the disputed provision, the State supports political subjects to deliver information regarding their plans and tasks to the society and, as a result, succeed in the elections. “The equality in general is an integral part of the essence of the election right. In the electoral process, the State has an obligation to introduce the conditions that secure equality. In this process, its main function is to not restrict anyone or put in advantageous position without reasonable justification” (Judgement of the Constitutional Court of Georgia N1/1/539 dated April 11, 2013 on the case of “Citizen of Georgia Besik Adamia v. the Parliament of Georgia”, II-7). Based on the mentioned, all electoral subjects have equal right and interest to have equal electoral environment during the pre-election process. Electoral subject registered with the aim to participate in the election, equally to other subjects, has interest to perform pre-election campaign and within it use all the resource that the existing Election Code grants and which will ensure relationship/efficient interaction between the electoral subject and the voter. One of such measures is indisputably free pre-election advertisement. Therefore, all electoral subjects should be viewed as substantially equal within the relationship established by the disputed provision.

10. Based on the above mentioned the Court considers that the differentiated persons within the legal relationship at hand are substantially equal subjects. While the regulation prescribed by the disputed provision is infringement within the right protected by article 14 of the Constitution of Georgia.

11. The scope of reasonableness of differential treatment can be different in each individual case. “In specific instance it can entail the necessity to argue the existence of legitimate public aims... in other instances the need and the requirement of restriction has to be tangible. Sometimes the reality of maximal differentiation can be sufficient” (Judgement of the Constitutional Court of Georgia N1/1/493 dated December 27, 2010 on the case of “Political Associations of Citizens “The New Rightists” and “The Conservative Party of Georgia” v. the Parliament of Georgia”, II-5).

12. “According to the established case-law while assessing the disputed provisions the Court uses strict scrutiny or rational differentiation test. The issue,

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which of them the Court should use, is decided based on various factors, including the intensity of interference and the grounds for differentiation. Specifically if the grounds for differentiation is one of those indicated in article 14 of the Constitution or the disputed provision interferes within the right at a high intensity – the Court shall use the strict scrutiny test” (Judgement of the Constitutional Court of Georgia N2/4/603 dated October 28, 2015 on the case of “The Public Defender of Georgia v. the Government of Georgia”, II-8). Based on the above mentioned, in order to decide the case it is relevant to establish whether the differentiation provided by the disputed provision is based on any of the grounds enumerated in article 14 of the Constitution of Georgia and/or whether it is of high intensity.

13. The Claimant considers that the grounds for differentiation between the qualified and unqualified electoral subjects for the purposes of free advertising time are political views and property status. Both are the “classic” grounds of differentiation, which, pursuant to the Claimant, creates the basis of employing the strict scrutiny test.

14. The Constitutional Court of Georgia cannot share the position of the Claimant party regarding the grounds for differentiation. The political view, values and plans of the electoral subject, of course, significantly determine the support of the voters and, therefore, the results of the elections, however pursuant to the disputed provision using free advertisement time in the broadcasters listed within it is linked not with the political views of a certain electoral subject, but the rate of support from the voters, which is established by such relevant and credible criterion, as the amount of votes received in the elections. The mentioned criteria should be considered as the grounds for differentiation between the qualified and ordinary electoral subject.

15. The differential treatment established by the disputed provision is not based on the property status either, as indicated by the Claimant party. The differentiation between the comparable subjects, as mentioned above, is related to the support of voters received in the last parliamentary or local self-government elections held with proportionate system and has nothing to do with their property status. Furthermore, a specific electoral subject can have the highest indicator of financial resources; however for the purposes of free advertisement time, it might not be a qualified subject at all, since it might not have the sufficient support based on the results of last elections.

16. As for those electoral subjects, which were united in the electoral bloc during the last parliamentary or local self-government elections held with proportionate system, in this instance the grounds for differentiation is their order of priority in the electoral bloc. Pursuant to the disputed provision a political party is considered a qualified electoral subject only if it was the first on the list of the electoral bloc.

17. Since the differentiation prescribed by the disputed provision is not based on any classic grounds envisaged in article 14 of the Constitution of Georgia, the use of strict scrutiny test by the Constitutional Court is dependent on the



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intensity of differentiation. Pursuant to the case-law of the Constitutional Court of Georgia, when assessing the intensity of differentiation it is decisive, how far “the substantially equal persons are in substantially different conditions, how much the differentiation distances them from equal opportunities of participation in a specific social relationships” (Judgement of the Constitutional Court of Georgia N1/3/534 dated June 11, 2013, II-25). Political advertisement at the television broadcaster is one of the most important resources during the pre-election campaign period, considering both, its functional burden and the costs associated with it. As the analysis of the election declarations of the electoral subjects (of the last elections) and the conditions of broadcasting of such advertisements by the public broadcaster demonstrates, the largest portion of the expenditures of the electoral subjects is related to purchasing the broadcasting time for the pre-election political advertisement. This is true also for those electoral subjects, which are considered as qualified electoral subjects for the purposes of the disputed provision. At the same time, the price of broadcasting the political advertisement on the public broadcaster during the pre-election period is rather considerable. Based on the above mentioned, it is evident that the free advertising time granted to the latter subjects is a significant economy and, therefore, the disputed provision notably distances the qualified and ordinary subjects from each other by creating different starting points for them in the process of campaign.

18. When assessing the constitutionality of the provision within the strict scrutiny test it is necessary to primarily establish, whether the disputed provision serves the legitimate aim. “In non-existence of the legitimate aim any infringement within the human right carries arbitrary character and the restriction is unjustified and unconstitutional in its foundation without further assessing the provision” (Judgement of the Constitutional Court of Georgia N1/3/534 dated June 11, 2013 on the case of “Citizen of Georgia Tristan Mamagulashvili v. the Parliament of Georgia”, II-27).

19. As mentioned above, the disputed provision allows one part of the electoral subjects to use free advertisement time during the pre-election campaign process on Public Broadcaster, Ajara TV and Radio of the Public Broadcaster, and any community broadcaster. Funding political subjects directly or indirectly is an established practice of many countries. It is indisputable that these subjects require significant resources for due functioning, both during the period between the elections and directly in the pre-election process; however receiving financial resources should not become the decisive factor for the existence of the mentioned subjects in the political arena. Thus the State takes on the obligation to provide direct or indirect financial support of such subjects, which, in sum, is directed at ensuring competitive political environment and democratic governance.

20. Free broadcasting time is one of the indirect ways of subsidising the political subjects by the State for supporting political pluralism. By granting such resource for free to the electoral subjects the State facilitates them to deliver their political messages to the society and succeed in the elections. Although within

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current rapid technological progress television and radio media outlets are surely not the only tool to communicate with the voters for the electoral subjects, they still maintain their significant role for the purposes of such communication. Advertising time is considered as the most straight and simple way for direct communication with the electorate, with the possibility to be done so without any involvement from the media-outlets themselves and without their interpretation of political messages; however advertisement is linked with not so insignificant financial means. Creating the opportunity to receive free advertising time from the State makes such direct interaction possible between, on the one hand, wide mass of voters and, on the other hand, the electoral subjects, which, as a result supports the diversity of political environment in the state election process and, thus, the possibility of voters to make informed and real choice. Therefore, state funding of the political parties, including, through free advertising time, is made through supporting parties for enhancing political pluralism in the country.

21. Allocating free advertising time actually supports political pluralism and the existence of diverse political spectre in the pre-election campaign, at the same time, it affects the process of forming free and real will of the voters, since these latter have the possibility to have direct reach to the election subjects through media.

22. Political pluralism is the most significant factor for the existence of the democratic society, within which the diversity of thoughts, views and values is ensured, where specific groups have the possibility and the freedom to express their political views and actively participate in the political processes. The link between the democracy and the pluralism is of an existential relevance, since it is the very requirement of the democracy that each person, with his/her different views or values to be able to communicate with the government, participate in the process of governance on central or regional level. Pluralism within itself excludes the dominance of the views and values of only one group for the price of silence of the others. However in order the political pluralism to be ensured, it is necessary to create such an environment in the country, which, primarily, enables its existence. For the achievement of the mentioned legitimate aim one of the significant steps is financial support to the political subjects from the State. Thus in the process of pre-election campaign granting the possibility to the electoral subjects to broadcast free pre-election advertisement serves the achievement of an important legitimate aim of the democratic society.

23. The existence of the relevant legitimate aim from the legislator does not entail that the interference within the right is justified. In the situation of the existence of the legitimate aim, it is necessary for the legislator to select proportionate means for the interference within the right for the achievement of such aim. For this the disputed regulation should be allowed, necessary and proportionate means for the achievement of the legitimate aim. "Since any legal order is aimed at interrelating objectives and means, this obliges the State to employ such means that will guarantee the attainment of the objective with the

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due respect to the principle of proportionality” (Judgement of the Constitutional Court of Georgia N1/1/493 dated December 27, 2010 on the case of “LTD “Rus-senergoservice”, LTD “Patara Kakhi”, JSC “Gorgota”, Givi Abalaki’s Individual Company “Farmer” and LTD “Energia” v. the Parliament of Georgia and the Ministry of Energy of Georgia”, II-29).

24. When assessing the proportionality of the restriction prescribed by the disputed provision, it should primarily be mentioned that the broadcasting time is a limited resource. The State does not have the opportunity to equip all electoral subjects with the right to use broadcasting time in unlimited and desirable for them manner. Both Public and Community Broadcasters, pursuant to the direct indication of the law of Georgia “On Broadcasting” are not oriented at receiving winnings, furthermore, the Public Broadcaster is created and acts based on the public funding. Pursuant to the first paragraph of article 64 of the mentioned law, the duration of a commercial advertisement placed in the Public Broadcaster shall not exceed 30 minutes within a 24-hour period. This very nature of the Public Broadcaster conditions much stricter regulatory policy for planning its broadcasting time compared to that of the private broadcasters. Apart from the limits on advertising time, article 16 of the law of Georgia “On Broadcasting” prescribes in details the content-wise requirements, simultaneous analysis of which clarifies the duty of the Public Broadcaster to consider the demands of the pluralist society and ensure programmes that are diverse and fit for different segments of the society in its air. Thus, in the event the broadcaster is obligated to allocate the free advertising time in the amount indicated in the disputed provision, equally to all political subjects registered for the elections, we could receive the contrary and unjustified result. In the circumstances when the overall amount of the voters according to the data of the Central Election Commission reaches 3.5 million and the signatures required for registration to participate in the elections should not exceed 1% of the overall amount of voters, the possible amount of potential electoral subjects will be completely disproportionate to the allocated air-time. Based on the above mentioned, for the purposes of the use of broadcasting time, the need to use certain restrictions exists naturally. Therefore, in the given situation it should be assessed, how efficiently the State allocates limited advertising time between the electoral subjects aimed for the purposes of free pre-election advertising.

25. As already mentioned, granting electoral subjects the right to use free political advertisement during the pre-election campaign serves supporting the political pluralism. At the same time with regards to the financial support from the State to the political subjects, such goals must be separated from each other, on the one hand, for the period between the elections and, on the other hand, for the pre-election period. If during the period between the elections the State ensures supporting the political spectre in the whole country, during the pre-election period the State resource, due to its limited nature, is aimed at supporting pluralism within the representative body.

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26. At the same time, it is noteworthy, that the enforcement of political pluralism and democracy can be substantially influenced not by the formal multiplicity of the political parties, but by such subjects, which have real public support. Therefore it has to be considered as a logical and efficient step, to direct the limited resource by the State during the pre-election period towards those political forces, which have real ability of succeeding in the elections and, thus, influencing the state governance. Supporting such political force during the pre-election period, which does not have real ability to be elected in the state body, cannot be considered as an equal instrument towards other political force with regards of efficiency.

27. The will of the Constitution to equip with authority of governance of the state those political parties, which have the support of significant part of the population, is even more clearly outlined with regards to the Parliamentary elections. Pursuant to the second paragraph of article 50 of the Constitution of Georgia “MP seats, as a result of an election held under the proportional system, shall be distributed only among political associations and electoral blocks that have obtained at least 5% of votes from those participating in the elections.” Based on the mentioned, the source of political pluralism between the political forces represented in the Parliament can only be those electoral subjects that overcome the electoral barrier of 5 percent. Granting such electoral subjects the right to use free political advertisement during the pre-election campaign, which have low perspective of overcoming the mentioned barrier, can in a way be considered as an ineffective use of the State resources, since the Constitution of Georgia does not allow the subjects, who received less than 5% of the votes, to obtain parliamentary mandate. Therefore the State cannot achieve the goal of supporting parliamentary pluralism through supporting such electoral subjects. Thus it is natural that the State is entitled to create such system of allocating free advertisement time, within which the time will be given only to those subjects, which have real chances to successfully overcome the mentioned threshold. In turn the voters this way have good opportunity to realistically assess the presented political spectre, which have real potential of participating in the state governance.

28. It should also be mentioned that before holding the elections it is impossible to precisely assess and objectively establish, which electoral subject has the real ability to overcome the 5 percent threshold. Democracy demands that the support of the parties is established according to the results of the elections and not by prior assessment of their support by certain entities. The electoral system established by the Constitution of Georgia considers the indicator of the support of political subjects is the results demonstrated in the elections. Based on the mentioned, the use of the results demonstrated in the last elections by the State for the indicator of potential support of the electoral subjects must be considered as reasonable and objective criterion. The approach, according to which a political subject, which could not receive respectively 3 or 4 percent of support in the last

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elections, is not considered such political force, which has the real opportunity to overcome the 5 percent threshold, should also be considered as a reasonable approach. Demonstrating slightly lower result in the last elections, of course, does not exclude the possibility to receive high support in the specific elections by the political entity, including even winning the elections. However the most important data reflecting the support of the political entity – the results of the last elections, does not objectively indicate towards such support, therefore, there is no objective evidence regarding the similar political subjects, that their chances of overcoming 5 percent threshold is real.

29. Based on all abovementioned, for the purposes of free political advertisement during the pre-election campaign the disputed provision, which causes differential treatment between, on the one hand, the qualified electoral subjects and, on the other hand, those electoral subjects, affiliated parties of which did not receive sufficient support of the voters or did not participate in it at all, is justified and serves achievement of such legitimate aim, as is the support of political pluralism from the State. The rule established by the disputed provision should also be considered as allowed, necessary and proportionate measure for achievement of the mentioned aim. The State should have the opportunity, within the scope of such limited resources, as the air-time of broadcasters is, to allocate free pre-election advertisement time in the way, which allows all those electoral subjects that are realistically competitive, to have the resource to succeed and to communicate directly with the electorate; and to support the diversity of political spectre, variety of ideas in the state governance this way, which, as a result will ensure democratic governance. Since the air-time is a limited resource, granting some advertisement time to unqualified electoral subjects naturally entails reducing the time used by the qualified subjects, which makes the measure employed by the State less efficient for the achievement of the goal of parliamentary pluralism.

30. Unlike the above mentioned, the differentiation prescribed by the disputed provision cannot be justified with regards to those political subjects that were united in the electoral bloc in the last parliamentary or local self-government proportional elections, which received relevant support, but are not the first in list of this bloc. The subjects united in the bloc, which received high support in the last elections, cannot in all cases be considered such political force, the potential to succeed of which is not indicated by objective data. In such an instance, on the one hand, the success achieved on the last elections is demonstrated and, on the other hand, it is impossible to objectively establish the share of each subject united in the bloc in this success. Therefore it is impossible to assess, which political party should be considered competitive, with the realistic opportunity to receive successful outcome in the elections and which is not. It is possible that in case of independently participating in the elections the party, which hypothetically held 10<sup>th</sup> number in the bloc, receives higher support than the first number. Thus in the process of pre-election campaign, for the purposes of free advertisement time the differentiation based on the order of priority in

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the electoral bloc cannot be considered justified and in conformity with article 14 of the Constitution of Georgia.

31. The mentioned differential treatment is particularly problematic with regards to the member parties of such electoral blocs, which received not just 3 or 4 percent in the last elections, but achieved significant success (for instance, received 20-25 percent of votes) or even won in the elections. In such circumstances, pursuant to the current legislation, the political party that won in the last elections is not factually considered as a qualified electoral subject for the purposes of receiving free advertisement time. The State is entitled to establish such regulation, which excludes artificial creation or division of electoral blocs for the goal of receiving increased free advertisement time. At the same time the State has the opportunity to adopt the rule, which in certain circumstances will not recognise each political party as a qualified electoral subject based on the votes of the electoral bloc received in the last elections and will provide the rule of distributing the advertisement time between the parties united in the electoral bloc or will allow the members of the bloc to themselves agree on the rule of distribution of the advertisement time allotted to the electoral bloc. Each of these regulations, obviously will be subject to the assessment of constitutionality by the Constitutional Court of Georgia, however the existing rule, which totally excludes the members (with the exception of the first one) of the electoral bloc (including those, which received high support on the last elections) from the subjects entitled to using free advertisement time, violates the right to equality of the electoral subjects and contradicts with article 14 of the Constitution of Georgia.

### **III**

#### **Ruling part**

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

#### **THE CONSTITUTIONAL COURT**

##### **RULES:**

1. The constitutional claim N591 (The Political Unions of Citizens “Free Georgia” and “New Rights” v. the Parliament of Georgia) shall be upheld partially and the normative content of the first sentence of paragraph 5 of article 51 of the organic law of Georgia “Election Code of Georgia”, which (without consideration of the amount of votes received on the last parliamentary or local self-government elections) applies the right prescribed by this provision to the electoral subject only in the event, if the party united in it was the first number

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in the list of the electoral bloc shall be declared unconstitutional with respect to article 14 of the Constitution of Georgia.

2. The constitutional claim N591 (The Political Union of Citizens “Free Georgia” and “New Rights” v. the Parliament of Georgia) shall not be upheld in part of the claim, which addressed the constitutionality of the normative content of the first sentence of paragraph 5 of article 51 of the organic law of Georgia “Election Code of Georgia”, which did not apply the right prescribed by this provision to the unqualified electoral subject, with the exception to the circumstance envisaged by the first paragraph of the Ruling Part of this Judgment, with respect to article 14 of the Constitution of Georgia.

3. Unconstitutional provisions shall be declared legally invalid at the moment of publication of 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 parties, the President, the Government and the Supreme Court of Georgia.

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

***Composition of the board:***

Zaza Tavadze

Otar Sichinava

Lali Papiashvili

Tamaz Tsabutashvili