

# LANDMARK JUDGMENTS OF THE CONSTITUTIONAL JUSTICE ADOPTED BY THE CONSTITUTIONAL COURT OF GEORGIA IN 2017

*This document is based on the Information on Constitutional Justice prepared pursuant to article 12, paragraph 2 of the Organic Law of Georgia “On the Constitutional Court of Georgia”<sup>1</sup>*

## ABSTRACT

The Organic Law of Georgia “On the Constitutional Court of Georgia” article 12, paragraph 2 prescribes the duty of the President of the Constitutional Court of Georgia to annually present information to the President of Georgia, Parliament of Georgia and the Supreme Court of Georgia regarding the state of constitutional justice in Georgia. The President of the Court has fulfilled this duty for the first time in the past several years in 2018 and delivered the document to the relevant institutions and also published it on the webpage, assessing the state of constitutional justice in Georgia during 2017. The present document is based on this very extensive report and shortly provides the information submitted by the Court.

The Constitutional Court is the guarantor of the supremacy of the Constitution and protection of constitutional rights and freedoms of individual. For assessing the condition of constitutional justice in the country the discussion and analysis over the case-law of the Constitutional Court is significant. The present document aims at summarising the landmark acts adopted by the Court during 2017 and assess their relevance for the development of the constitutional justice. The article focuses on several relevant judgments adopted in 2017 having major impact on legal development in Georgia and which are important to be a subject of wider discussions. At the same time, the Court has adopted several rulings during 2017 for invalidating the provisions overruling its judgments, which stresses the necessity of reflecting Court practice into the law. This article pays particular attention to these rulings, in order to inform interested audience and relevant state institutions of the problems and challenges in implementing the standards established by the Constitutional Court of Georgia.

## INTRODUCTION

The Constitutional Court is the guarantor of supremacy of the Constitution and protection of constitutional rights and freedoms of individual. Therefore it has a crucial role in everyday life of a democratic state guided by recognition and protection of fundamental human rights. Interference and restriction of fundamental human rights in the process of governance, is

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<sup>1</sup> The present paper was drafted through processing the document created by the Constitutional Court of Georgia and does not reflect the views of the Journal or of the Author. The paper was prepared by the Editor of the Journal, Irine Urushadze. Full copy of the Document submitted by the Court is accessible here: <http://www.constcourt.ge/en/ajax/downloadFile/3714> [Last accessed on June 20, 2018].

often an unavoidable, inevitable reality. However, interference in fundamental rights should take place in the manner and according to the due standards set forth in the Constitution. Each branch of the government is obligated to respect and protect the Constitution of Georgia. Due compliance with the Constitution is an important precondition of democratic development of the country with the right values. The Constitutional Court of Georgia is the guarantor of the system of constitutional values; it interprets constitutional principles and provisions, in order the ever changing and developing legal processes to come within the constitutional order and the human rights to be protected.

The dynamic process of interpretation of the Constitution of Georgia by the Constitutional Court poses various legal challenges; the case law of the Constitutional Court is developing year by year; the scopes and the meaning of fundamental rights are reconsidered and important constitutional standards are set, in order the comprehensive and irreversible protection of human rights to be possible. Protection of supremacy of the Constitution requires coordinated operation of all branches of the government.

The present document provides the summary and the analysis of the activities undertaken by the Constitutional Court of Georgia in 2017. It also describes the important directions of strengthening of constitutional justice that were identified in the process of constitutional adjudication. The document is also annexed with the statistical overview of the Court's activities.<sup>2</sup>

The last year of 2017 was significant and productive for the Constitutional Court of Georgia from the perspective of its main activities, which is implementation of constitutional review, as well as, of the activities undertaken at the international level. Firstly, it should be noted, that the number of constitutional complaints filed with the Constitutional Court has significantly increased, which to a certain extent shows the rising of awareness about constitutional review and of the trust of public in it. There were 423 constitutional complaints and referrals registered in the Court throughout the last year, which substantially exceeds the number of complaints registered in the previous years. Trend of increasing number of complaints makes it particularly important, that the Constitutional Court be able to carry out adjudication in timely and effective manner.

In 2017, the Constitutional Court managed to finalise the proceedings with regards to 115 constitutional complaints. In view of the number of completed cases and adopted judgements, 2017 was an unprecedented. However, at the end of the year, there were still 471 constitutional complaints pending before the Constitutional Court and provision of timely and competent adjudication in these cases poses important challenge to the Court. In view of the role and function of constitutional review, the Constitutional Court is oriented at provision of the most effective and rapid adjudication, which will positively influence the degree of human rights protection in the country.

International activities that took place during the last year are worth mentioning, including the XVII Congress of the European Constitutional Courts on “the Role of Constitutional Courts in Upholding and Applying of Constitutional Principles”. The Constitutional Court of Georgia, as the chair of the Conference of European Constitutional Courts, hosted the

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<sup>2</sup> The overview is given after the works presented in the Journal in the form of an Annex.

Congress. Delegates from the constitutional courts and similar institutions from over 40 countries participated in the Congress together with the invited representatives of the legislative, executive and judicial branches of the government and diplomatic corps. This Congress was an important event for the Constitutional Court of Georgia, as it provided the platform for the fruitful cooperation between the judges of the Constitutional Court of Georgia and representatives of constitutional courts of various European countries. The awareness and role of the Constitutional Court of Georgia has increased further at the international level.

## OVERVIEW OF THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF GEORGIA

### *I. Rulings – Provisions Overruling the Judgments*

The Constitutional Court is a judicial body implementing constitutional review and its judgements are binding for every branch of government. In certain sense, judgements of the Constitutional Court are self-enforcing, as the provision declared unconstitutional is invalidated without carrying out any additional measures for its implementation. Moreover, full enforcement of judgements of the Constitutional Court also includes actual implementation of legal standards stated in it and their incorporation in the legislation. In this regard, every branch of government is obliged to adhere in practice to the constitutional requirements under a respective constitutional provision, as it was interpreted in the judgement of the Constitutional Court of Georgia. Enforcement of judgements of the Constitutional Court may depend in certain cases on the drafting of legal acts, which should offer a new regulation of the respective relationships. Judgements of the Constitutional Court have crucial role in the law-making process for novel regulation of legal relationships, which would be in compliance with constitutional principles, as the judgements contain authoritative interpretations of the Constitution, as a whole, as well as its individual provisions and principles.

According to the Organic Law of Georgia “On Constitutional Court of Georgia”, it is prohibited to adopt legal act, which contains provisions with the same content, as those provisions already declared unconstitutional. Despite this stipulation, it is often the case, that the authority, adopting a legal act, fails to take into account the standards provided in the judgement of the Constitutional Court and the regulation of legal relationships is not compatible with the requirements of constitutional provisions, as the Court interpreted them. It could also be the case that the Court invalidated the disputed provision, but in spite of this, there still remain the rules of behaviour in the legislation with analogous contents and causing analogous legal problems.

At the same time, the Constitutional Court has power to invalidate the provision overruling its judgement in a simplified procedure, without consideration on merits. Under article 25 paragraph 4<sup>1</sup> of the Organic Law of Georgia on the Constitutional Court of Georgia, “If the Constitutional Court ascertains at the preliminary session, that the disputed normative legal act or the part thereof contains rules of the same content as those that had already been

declared unconstitutional, [...] it will adopt a ruling on non-admissibility of the case for consideration on merits and on invalidation of a disputed act or part thereof.”

The Constitutional Court of Georgia has decided on approximately ten cases, where the complaint requested invalidating the provisions overruling judgments of the Court. In six cases the Court considered the normative acts or the normative substance thereof envisaging the content overruling the judgment of the Constitutional Court.

Such was the case for the constitutional referral N885 of the Bolnisi District Court, where the Grand Chamber of the Constitutional Court of Georgia considered article 260, paragraph 1 of the Criminal Code of Georgia to have the normative content similar to the provisions declared unconstitutional in the Judgment №1/4/592 of the Constitutional Court of Georgia “Beka Tsikarishvili v. the Parliament of Georgia”, specifically, the disputed provision allowed the sentence of imprisonment for purchase and storage of narcotic substance – raw marijuana for the purpose of personal consumption.

On July 13, 2017 the First Chamber of the Constitutional Court of Georgia upheld the claim of the citizens of Georgia Gocha Gabodze and Levan Berianidze (Constitutional Complaint №878) and invalidated Paragraph 24(a) of the Appendix №1 of the Order №241/5 of the Minister of Labour, Health and Social Protection of December 5, 2000 “On Determination of Restrictions on Donation of Blood and Its Components”, preventing men who have sexual intercourse with men (hereinafter “msm group”) from donation of blood and its components, depriving men, who had even one sexual intercourse with men, of the right to donate blood and its components forever, throughout their lifetime, regardless of whether that intercourse entailed the high risk of acquisition of blood-borne viruses. The Constitutional Court declared that the disputed provision had the content similar to the rule declared unconstitutional under the Judgement №2/1/536 of the Constitutional Court of Georgia of 4 February, 2014 and led to analogous legal outcomes.

On 13 October, 2017, the Constitutional Court of Georgia adopted a ruling on the case of “Citizens of Georgia – Emzar Paksadze and Tamar Sadradze v. The Parliament of Georgia” (constitutional complaints №1219 and №1236) and invalidated the part of the disputed provision without consideration on merits, since the disputed provision had the identical content to the rule found unconstitutional under the Judgement №2/2/558 of the Constitutional Court of Georgia of February 27, 2014. Specifically, when the restriction of the right to fair trial is related to imposition of liability for certain disciplinary offence, for transgression, in order to prevent or afterwards remedy arbitrariness or error of a judge, it is necessary, that a person, who was imposed the liability, enjoy the minimal procedural guarantees protected under the right to fair trial, which implies right to appeal against a judgement, *inter alia*.

On October 13, 2017 the Constitutional Court of Georgia adopted a ruling on the case of “Non-Commercial Entity ‘Human Rights Education and Monitoring Centre (EMC)’ and Non-Commercial Entity ‘Ertoba 2013’ v. the Government of Georgia” (Constitutional Complaint №1241), where the Court elaborated on the regulations of the Government of Georgia, which prescribed that the reports/conclusions and recommendations prepared as part of the inspection of workplace conditions within the state-implemented programs of 2015,

2016 and 2017 to be non-public information. In this case the Constitutional Court primarily determined, that the documentation prepared as a result of inspection of working conditions presented public information stored in state institutions for the purposes of Article 41 of the Constitution of Georgia. The Constitutional Court explained the standards set forth in the Judgement №1/4/757 of the Constitutional Court of Georgia of March 27, 2017 and stated that in a given case violation of formal criteria of access to the public information led to finding of the disputed provision unconstitutional. Specifically, possibility of access to public information was restricted by a subordinate normative act, instead of law, whereas, no law delegated relevant power to the Government. Therefore, the disputed provisions were declared overruling and the Court invalidated them without hearing on the merits.

On 16 November, 2017 the Second Chamber of the Constitutional Court of Georgia adopted the ruling in the case of “Citizens of Georgia – Ivane Petriashvili and Irakli Ulumbelashvili v. the Parliament of Georgia” (constitutional complaint №1218), where 2nd sentence of Article 37(1) of the Law of Georgia “On Special Penitentiary Service” was declared unconstitutional without hearing on merits, since they provided for the limit of

The disputed rule provided for the entitlement of an official in case of unlawful dismissal to require recognition of their dismissal as unlawful and respective salary. However, the rule contained similar restriction of right to compensation of damages of a person unlawfully dismissed from the Special Penitentiary Service, which is public service, to the provisions declared unconstitutional by the Judgment N2/3/630 of the Constitutional Court of Georgia adopted on July 31, 2015.

On 16 November, 2017, the Constitutional Court of Georgia adopted a ruling on the case of “Non-Commercial Entity Political Union ‘United National Movement’ v. The Parliament of Georgia” (Constitutional Complaint №1214), where pursuant to the disputed provisions an increased sum for the State Fees was prescribed for the legal entities compared to individuals. The Constitutional Court declared the disputed provisions as overruling the Judgement №2/6/623 of the Constitutional Court of Georgia of December 29, 2016 “LLC ‘Unison Insurance Company’ v. the Parliament of Georgia” and did not consider the difference in proceedings to be considered as an essential dissimilarity, due to which it would be necessary to undertake additional review of the constitutionality of the disputed rules in the format of consideration on merits.

It is noteworthy, that in several cases the Court did not agree with the complainants that there were overruling provisions in the case and adopted such cases for consideration on merits. For instance, on December 29, 2017 the Constitutional Court of Georgia adopted the recording notice in the case of “The Public Defender of Georgia, Citizens of Georgia – Avtandil Baramidze, Givi Mitaishvili, Nugzar Solomonidze and Others (Total of 326 Constitutional Complaints) v. the Parliament of Georgia”., where the Court rejected the claim of the complainants with regard to invalidation of the disputed provisions under article 25, paragraph 4<sup>1</sup> of the Organic Law of Georgia “On Constitutional Court of Georgia”. The Claimants consider the whole range of provisions regulating the actions of secret surveillance to be unconstitutional. The Grand Chamber of the Constitutional Court of Georgia interpreted the standards set forth in the Judgement N1/1/625,640 in its recording notice of 29 December, 2017 and indicated, that pursuant to the mentioned Judgment, the declaration of the

challenged provisions unconstitutional in the previous judgement was caused by the totality of several factors and through comparing the existing regulations with the invalidated ones, the Court decided that there were no overruling provisions in the case, therefore admitting the case for adjudication in the format of consideration on merits.

## *II. Judgments*

2017 has been unprecedented year in view of the amount and volume of judgements adopted by the Constitutional Court. The judgements of the court of 2017 dealt with many aspects of interpretation and application of Constitution of Georgia. New constitutional legal standards were constructed and established. Below are given summaries of several landmark judgments, which may have special impact on the development of the constitutional law in Georgia.

### **CITIZEN OF GEORGIA KAKHA KUKAVA V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N600)**

On May 17, 2017 the Grand Chamber of the Constitutional Court of Georgia adopted the judgement on the case of Citizen of Georgia Kakha Kukava v. the Parliament of Georgia, where articles 134(1), 134(2), 143(8) and words of article 167(1) of the Election Code of Georgia were challenged with regard to the first sentence of article 28(1), article 29(1) and article 29(2) of the Constitution of Georgia. Under the disputed provisions, person was not allowed to participate in the elections of members of the municipal assembly, mayor/head of executive body of local government, unless s/he had permanently resided on the territory of Georgia for two years prior to elections.

The Constitutional Court primarily elaborated on the separation of scopes of article 28 and article 29 of the Constitution. According to the Court's reasoning, if elections is required by the Constitution of Georgia as a procedure for taking the office, then the right to hold that position is protected under article 28 of the Constitution, whereas if the Constitution of Georgia does not require elections for taking the office and holding elections is required by the ordinary legislation, the issue of constitutionality of access to such office, should be reviewed with regard to the right of holding public office. Providing this interpretation, the Constitutional Court overruled the approach established by the Judgement of April 14, 2016 in the case of "Citizens of Georgia – Salome Kinkladze, Nino Kvetenadze, Nino Odisharia, Dachi JaneliZe, Tamar Khitarishvili and Salome Sebiskveradze v. the Parliament of Georgia", according to which right of mayor/head of executive body of local government to take the public office, was considered to fall, *inter alia*, under the scope of article 28 of the Constitution.

Reviewing the constitutionality of requirements towards the candidate of member of municipal assembly, the Constitutional Court noted that introducing requirements for taking

the elective office is not incompatible with democratic governance. At the same time, the Court considered it unacceptable to introduce requirements, which are not provided by the Constitution for the elections, which should be held according to the Constitution and the legitimate aim of restriction of this right cannot be ensuring selection of the best candidate and/or the candidate who is objectively the most fit for the elective position. The Constitutional Court explained, that exception can be introduced, when the aim of the requirements prescribed by the law is to prevent risks are entailed by electing a certain person in an office. The elections of the municipal assembly are provided by the Constitution of Georgia. However, the Constitution does not provide for the special requirements for members of the municipal assembly, which were provided in the disputed rules. Moreover, the respondent party did not point out any danger, prevention of which was served by the disputed rules and it could not be discerned from the essence of the disputed regulations either. Therefore the Court considered that the disputed provisions were not compatible with the right of elections enshrined in article 28 of the Constitution.

Reviewing the requirements for the candidate of mayor/head of executive body of local government, the Constitutional Court paid particular attention to the fact, that the disputed rule imposed the obligation on the candidates not to live in a specific self-governing unit, but to live generally on the territory of Georgia. The Court declared that the restriction provided in the challenged provisions cannot serve as guarantee of involvement of a person in a political life of the State, or an unconditional and unparalleled means for achieving this goal. Meeting the requirement set forth in the disputed provisions cannot in itself ensure involvement of that person in the political life of the state. Moreover, the restriction is not tailored in a way to ensure knowledge of necessities of a specific self-governing unit. In view of this, the Constitutional Court decided, that the disputed rules did not comply with the right to hold public office under the Constitution of Georgia.

#### **LLC “BROADCASTING COMPANY RUSTAVI 2” AND LLC “TELEVISION COMPANY SAKARTVELO” V. THE PARLIAMENT OF GEORGIA**

On December 29 2017, the Grand Chamber of the Constitutional Court of Georgia adopted the judgement in the case of “LLC ‘Broadcasting Company Rustavi 2’ and LLC ‘Television Company Sakartvelo’ v. the Parliament of Georgia”, where the subject of the dispute in this case was constitutionality of articles 54 and 55 of the Civil Code of Georgia with regard to article 16 and paragraphs 1 and 2 of article 21 of the Constitution. The complainant stated, that article 54 of the Civil Code of Georgia, which provides for voidness of contracts contrary to “norms of morals” and “public order”, contradicts the right to property and right to free development of personality.

In view of the respondent, the use of broad legal terms like “norms of morals” in civil law is caused by objective reasons. Disproportionality of the price of a deal, under the disputed provision, is not an independent premise for invalidity of a deal and presence of other preconditions is also required

Reviewing this dispute, in the first place, the Constitutional Court identified the claim raised in the complaint and pointed out, that the complainant alleged unconstitutionality of

determination of content and scope of property rights based on the rules of general character and referred to incompatibility of such regulations with the principles of legal security and certainty. Hence, this Judgement is seminal as far as the Court considered and evaluated whether Constitution allows for regulation of contractual relationships on the basis of general rules. Furthermore, the Constitutional Court reviewed the rules regulating civil law relations with regard to the standard of legal certainty.

Elaborating on the issue of certainty of the disputed provisions, the Constitutional Court differentiated between standards of certainty applicable to the rules prescribing liability, rules of public law and rules of civil law. The Court pointed out that setting forth the grounds of invalidity of contracts the State does not impose any type of liability or prohibition, violation of which would be responded with sanction. On the contrary, the rules determining the voidness of contracts apply to those cases, where the State refuses to interfere in the relations between individuals and to coerce one party to carry out certain activities in favour of the other party. Therefore the requirement of the degree of certainty applicable to the rules regulating civil law cannot be as strict, as the criteria that should be met by the rules prescribing legal liability. The Constitutional Court also emphasised the importance of flexibility of the rules of civil law and the risks associated with introducing rigid legislation to regulate this area.

The Constitutional Court interpreted, that the law of contracts applies to wide area of relations, substance and scope of which entirely depend on the acts and will of individuals. In view of ever-developing social and economic relations it is impossible to determine in advance, what type of contract will be concluded by parties; it is also impossible to identify in advance and exhaustively those contracts enforcement of which conflicts with public interests. The Court interpreted that the goal of general rules is to regulate civil law relations as comprehensively as possible and to establish fundamental principles of civil circulation, which would provide for legal solution for any type of contractual relations. As in certain cases, solution for contractual relation without its direct, specific regulation is inevitable necessity. The Constitutional Court pointed out that in absence of general rules it would be necessary to either regulate any civil law relation in a maximally detailed manner, that would impede full operation of dynamically developing civil circulation, or to use analogy of statutes and/or law reducing the degree of legal certainty even more. Therefore the Constitutional Court of Georgia did not share the position of the complainant, asserting that general nature and vagueness of the content of disputed provisions constituted self-sufficient ground for finding it unconstitutional.

The Constitutional Court of Georgia did not share the argument of complainants, according to which, the disputed rule grants unreviewable discretion to a judge allowing them to give the rule any content desirable to them. According to the interpretation of the Constitutional Court of Georgia, applying the disputed rule, the measure of evaluation used by a judge cannot be their personal conviction about appropriateness of behaviour and/or how judges themselves would behave in respective cases. Judges should evaluate whether the deal itself, its content, is acceptable in view of the established morals of the public and general requirements of public order. The Court indicated that the disputed rule can be interpreted not according to the subjective views of a judge, but systemically, in the context of other rules and legal



principles, while the appropriateness of each interpretation made by a judge can be objectively checked and reviewed by the courts of upper instances.

The Constitutional Court took into account the established case law of the Supreme Court of Georgia; namely, it referred to the judgement (Case №სს-664-635-2016) of the Grand Chamber of the Supreme Court of Georgia of March 2, 2017, according to which solely the price of a deal cannot serve as ground of voidness of a deal under article 54 of the Civil Code.

According to the Judgement of the Constitutional Court of Georgia, the judgement of the Supreme Court of Georgia is mandatory for the courts of all instances. No court is empowered to interpret article 54 of the Civil Code differently from the interpretation of the Grand Chamber of the Supreme Court and to declare a deal void based solely on the inadequacy of its price. Thus the Constitutional Court of Georgia declared that there is no lawful way of applying article 54 of the Civil Code of Georgia with the normative content challenged by the complainant.

In view of all the above-mentioned, the Constitutional Court did not uphold the constitutional complaint №679.

#### **CITIZEN OF GEORGIA OLEG LATSABIDZE V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N626)**

On October 17, 2017 the Constitutional Court adopted a judgement on the case of “Citizen of Georgia, Oleg Latsabidze v. the Parliament of Georgia”, where the subject of dispute was the constitutionality of the words “dismisses from the position” of paragraph 1 and paragraph 4 of the article 60 of the Code of Local Self-Government (the version in force on February 6, 2015) with paragraphs 1 and 2 of article 29 of the Constitution of Georgia. The complainant considered problematic the rule provided in the disputed provisions, which authorised a head of executive body of local government/mayor to dismiss without provision of reasons a head of a structural unit of the municipal Office, on the other hand, and on the other hand, envisaging that the powers of a head of structural unit of a municipal office would automatically terminate from the moment of election (taking of office) of a new head of executive body of local government/mayor.

The Constitutional Court pointed out, that public offices differ from each other in view of their nature. Therefore the constitutional standards should also differ depending on whether a given position has political or professional nature. Based on the relevant legislation, the Court decided, that a head of the structural unit of a municipal office is a career official. Moreover, the main requirement for professional position is official’s qualification, experience, personal skills and so forth. Therefore, for efficient functioning of the local self-government it is crucial to employ and maintain professional (career) personnel. Therefore, a rule, which allows for automatic termination of office of a respective official without review or evaluation of their qualifications, experience or other skills from the moment of taking of office by a new head of executive body of local government or mayor, constitutes an unjustified interference in the right to work in a public office enshrined in the Constitution.

The Constitutional Court did not share the argument of the respondent party with regard to the necessity of possibility to substitute the personnel after each election. The Court declared that the presence of democracy implies in the first place government by the people, implementation of public powers by the people directly or through their elected representatives. At the same time, having a democratic state does not imply substitution of all public officials with the new personnel and members of the political group of newly elected public official after each election. Not only this is not required by democracy, but also it is at conflict with democracy as a matter of principle.

In view of the above-mentioned, the Constitutional Court upheld the constitutional complaint №626.

#### **THE CITIZEN OF GEORGIA NODAR DVALI V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N550)**

On October 17, 2017 the Grand Chamber of the Constitutional Court adopted a judgement on the case of “Citizen of Georgia, Nodar Dvali v. the Parliament of Georgia” and partially upheld the claims raised in the complaint, which envisaged declaring article 185 and article 312(2) of the Civil Code of Georgia unconstitutional with regard to paragraphs 1 and 2 of article 21 of the Constitution of Georgia.

The disputed provisions provided the rules protecting the conscientious buyer in case of transfer of a property by a person who is incorrectly registered as owner in the public register. More specifically, according to article 185 of the Civil Code, in view of the interests of acquirer, the transferor is considered to be the owner, if s/he is registered as such in the public register, unless the acquirer knew that the transferor was not the owner. Moreover, article 312(2) of the Civil Code, states that in favour of a person, who acquires property from the person incorrectly registered as owner in the public register, entry of the register is presumed to be correct, except for the cases, when the complaint is pending against the entry, or the acquirer knew that the entry was inaccurate.

The Constitutional Court of Georgia primarily identified the claim raised in the complaint and explained that article 185 of the Civil Code of Georgia deals exclusively with the cases of transfer of property right on the immovable property, while article 312 has a broader scope and applies to the rights registered in the public register in general.

The Constitutional Court reviewed the constitutionality of the disputed provisions based on the principle of proportionality and pointed out that the disputed provisions served achievement of the valuable legitimate aim, which is insurance of stability, ease and low cost of civil circulation. However, in addition to the public interests of stability and ease, in this case there is a conflict between the interests of two private individuals. The right of ownership on the real estate of an original owner is opposed to the interests of a conscientious acquirer. Therefore, both conscientious parties have legal claim on the disputed property. The Court examined whether such a balance between the restricted right and the legal good secured as a result of this restriction was reached.

The Constitutional Court interpreted that obliging the conscientious acquirer to check every circumstance excluding the right of a registered owner in the process of acquisition of immovable property would make the existence of the public registry meaningless and also have significant chilling effect on the process of acquisition of property. In case of presence of such regulation, it would be necessary to collect and examine the whole chain of transactions and related documents, which is related to additional costs and time. Lack of such safeguards for protection of conscientious acquirer, as are provided in the disputed provisions would also increase the costs and complicate to certain extent concluding deals on real estate. At the same time in case of total lack of safeguards for conscientious acquirer, the original owner would have less incentive to demand the correction of entry in case of incorrect registration of his or her property on another person's name and to bring the respective complaint, which would complicate the identification and eradication of incorrect entries present in the public register. Therefore the Court stated that the regulation, which privileges the conscientious acquirer vis-a-vis the owner of a property, does not disturb the fair balance between the private and public interests.

The Constitutional Court also noted, that the regulation should not incentivise reckless attitude of the acquirer towards the correctness of records of the public register. The legislator should not establish such system, in which the acquirer can ignore the information available to him raising questions about the correctness of the entries of the register. In view of the Court, if the acquirer is informed about the ongoing dispute regarding the correctness of an entry in the public registry, they should verify the right of the person, who transfers the property to them, or bear the risk generated by the inaccuracy of the entries of the public register. The Court also interpreted what the complaint brought against the entry in the register should imply and declared that it can be: a) administrative dispute on making incorrect entry in the register; or b) civil dispute about the ownership of a real estate.

The Constitutional Court interpreted that the regulation provided in article 185 of the Civil Code of Georgia is different from that provided in article 312(2). Article 185 of the Civil Code of Georgia sets forth the knowledge by the acquirer that the person, who transfers the property is not an owner, as the only obstruction to transfer of ownership to the acquirer. Hence, the awareness about the pending complaint against the entry of the register does not prevent considering the acquirer as conscientious and transfer of ownership to him. The Constitutional Court decided that article 185 could be applied independently and there was a risk to consider a person as conscientious even if they knew about the pending complaint against the entry of the register.

Article 185 of the Civil Code of Georgia led to loss of ownership by the owner in more cases, than it was objectively necessary to achieve a legitimate goal. Therefore, the Constitutional Court found unconstitutional its normative content, according to which, "person who transfers the property to another is presumed to be the owner, if s/he is registered as such in the public registry" even when, there is a complaint pending against the entry of the register and this fact is known to the acquirer.

## CITIZEN OF GEORGIA OMAR JORBENADZE V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N659)

The Grand Chamber of the Constitutional Court of Georgia upheld the constitutional complaint of the citizen of Georgia, Omar Jorbenadze versus the Parliament of Georgia on February 15, 2017. The disputed rule challenged by the complainant provided for appointment of the judges of the appellate and district/city courts for three years prior to their lifetime appointment as judges. Only upon expiration of this term would the High Council of Justice adopt a decision on lifetime appointment of a judge.

The Constitutional Court stated in its Judgement, that appointment of a judge for the defined period was related to examination of those skills and features of a person, which would be difficult to explore without the analysis of the practical work of a judge. However, there are candidates for judgeship, who already have three-year experience as a judge. Therefore it is possible to evaluate the work they have done as judges and to ascertain in this way if the candidate meets the high standards applicable to the office of a judge. Moreover, the Constitutional Court also indicated that for the purposes of lifetime appointment of candidates of judgeship, who have no less than three-year experience of serving as judges and the candidates, who do not have such experience, are substantially unequal.

The Constitutional Court did not rule out, that in certain cases, if a long period has passed since serving as a judge or if there are other objective circumstances, it may be difficult or impossible to evaluate the past work of a candidate. Moreover, undertaking of evaluation of the past work of a candidate for judgeship requires due legislative regulation. Therefore the Constitutional Court decided, that the legislator should be given a reasonable time, in order to fulfil its constitutional obligation and draft the legislative regulation, which would protect constitutional rights of a person, on the one hand and would avoid damage to the public interest, namely exclude the risk, that unfit candidates would be appointed as judges for their lifetime, on the other hand. In view of this the disputed provision was declared invalid effective from July 1, 2017.

### JUDGEMENTS ADOPTED WITH REGARD TO THE DRUG OFFENCES

The Judgement №1/4/592 of the Constitutional Court of Georgia of October 24, 2015 was the first case, where the Court had to adjudicate the issue of constitutionality of punishment applicable for a drug crime. In this case, the Court upheld the complaint of a citizen of Georgia, Beka Tsikarishvili and declared the normative content of the disputed provision, which allowed sentencing to imprisonment for purchase and storage of up to 70 grams of the narcotic drug - dry marijuana for personal consumption purposes unconstitutional. It is noteworthy, that from adoption of this Judgement till present, the Constitutional Court has reviewed five more constitutional complaints and has upheld all the five of them with final decisions, characterised by a similar structure and reasoning, as well as distinct features. In this respect, particular attention should be given to the Judgement №1/13/732 of the Constitutional Court of Georgia of November 30, 2017, where in contrast to other cases, the Court did not consider the constitutionality of statutory sentence for a certain crime, but considered the constitutionality of imposition of criminal liability for a specific action –

consumption of marijuana. The Judgement adopted with regard to the constitutional complaint №725 is also worth noting separately, as the Court considered that manifestly disproportional punishment for the crime provided in the disputed provision was not imprisonment, as the type of punishment, but the degree of punishment – imprisonment from 6 to 12 years.

In addition to the named judgements, the Constitutional Court adopted number of rulings, which declared unconstitutional those sentences for drug offences, which constituted the overruling provisions of the judgements of the Constitutional Court of Georgia. Some of the important standards, which the Constitutional Court set forth in these judgements, will be discussed below.

According to the interpretation of the Court, “the Constitutional Court is obliged to review the sentencing policy in that extreme case, when it causes a violation of a human right”.<sup>3</sup> The Constitutional Court ruled, that manifestly disproportional sentences contradict the clause of article 17(2) of the Constitution of Georgia, according to which inhuman, cruel or degrading punishment is prohibited.<sup>4</sup>

According to the established practice of the Constitutional Court, the constitutional review of punishments is based on the following criteria: 1) manifest disproportionality between gravity of offence and the sentence provided for it is reviewed – the sentence set forth in the legislation for a given act should be reasonable and proportional to the damages that were caused or may be caused by the crime to individuals/society. The sentence will be considered as manifestly disproportional, inhuman and cruel punishment if its duration is sharply, grossly disproportional to the degree of wrongfulness and dangers that might be entailed by an action; 2) the law should allow a judge to take into account specific circumstances of a case, the damages caused by an action, degree of culpability, etc. in sentencing, in order to exclude imposition of disproportional sentences without consideration of all the relevant factors/circumstances in practice.<sup>5</sup>

Reviewing the nature of drug offences, the Constitutional Court declared that “it is meaningless and thus unjustified to sentence a person to criminal punishment of imprisonment for an action, which can only cause damage to his or her health”.<sup>6</sup> “Punishment of a person for merely harming their own health is the form of paternalism demonstrated by the state, which is not compatible with free society”.<sup>7</sup>

In the case of “Citizens of Georgia, Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. the Parliament of Georgia” (constitutional complaints: №701, №722, №725) the normative content of a provision of the Criminal Code envisaging the possibility of using a sentence of imprisonment for illegal sowing, growing or cultivation of cannabis (plant) in large amounts was disputed. Pursuant to the constitutional complaints №701, №722 and

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<sup>3</sup> See *Citizen of Georgia Beka Tsikarishvili v. the Parliament of Georgia* Judgement №1/4/592, the Constitutional Court of Georgia, October 24, 2015. II-34.

<sup>4</sup> *ibid.* II-25.

<sup>5</sup> *ibid.* II-38.

<sup>6</sup> *ibid.* II-84.

<sup>7</sup> *Citizen of Georgia, Givi Shanidze v. the Parliament of Georgia* Judgement №1/13/732, the Constitutional Court of Georgia, November 30, 2017. II-50.

№725, the claimants were found to have respectively 150.73 grams, 63.73 grams and 265.49 grams of cannabis. In view of this, in the abovementioned case the Court reviewed the sentencing to imprisonment, as type and degree of punishment for sowing, growing and cultivation of the above-mentioned amounts of cannabis for personal consumption purposes.

The Constitutional Court drew a distinction between the danger entailed by sowing, growing and cultivation of certain amount of cannabis (plant) to the owner of the plant, on the one hand and the danger, which these actions may cause for other people, on the other hand. Based on the testimonies of witnesses and specialists, the Court decided that the use of products of cannabis could involve potential risks for human health. Moreover, it was ascertained, that the danger, which the consumption of products of cannabis may cause for its consumer is lighter compared with the harm caused by consumption of other, so-called hard narcotic drugs. The Court reiterated the standard already established by it and declared that it is purposeless and therefore, unjustified to sentence a person to imprisonment, as criminal punishment for an act, which can only cause danger for their health.

The Constitutional Court evaluated separately the inherent dangers of distribution associated with the disputed amounts of cannabis. It ruled that 63.73 grams (the constitutional complaint №722) and 150.72 grams (constitutional complaint №701) of cannabis cannot be considered to be the amount, which involves the inherent risk of its distribution. In view of all the above-mentioned, the Court considered that sentencing to imprisonment, as a punishment for the acts of sowing and growing of these amounts of cannabis constituted manifestly disproportional punishment and therefore contradicted article 17(2) of the Constitution of Georgia.

The Court indicated that sowing and growing of 265.49 grams of cannabis lead to high risks of its distribution. As the sentence prescribed for growing of the mentioned amount of cannabis served the protection of health of others, the Court found it constitutional to sentence a person to imprisonment as type of punishment for the mentioned act. However, based on the comparison with sanctions prescribed for other more serious crimes, stated in the Criminal Code of Georgia, the Court arrived at the conclusion, that the given length of the prescribed punishment for growing of 265.59 grams of cannabis – imprisonment from 6 to 12 years was manifestly disproportional punishment and was incompatible with article 17(2) of the Constitution of Georgia.

In the case of “Citizen of Georgia, Givi Shanidze v. the Parliament of Georgia“ (Constitutional Complaint №732) the subject matter of the dispute was the constitutionality of the normative content of article 273 of the Criminal Code of Georgia, which provided for liability for consumption of narcotic drug, marijuana with regard to article 16 of the Constitution of Georgia. The Constitutional Court had to evaluate in this case constitutionality of criminalization of the act of consumption of narcotic drug – marijuana

The Constitutional Court noted that taken separately, the fact of consumption of marijuana, in view of the nature of this act, is involving little danger to public interest, as there is not even theoretical chance of distribution of narcotic drug.

The Constitutional Court decided that the disputed provision prescribed criminal liability for repeated consumption of marijuana in a blanket manner and without any exceptions,

regardless of place and situation of consumption, the person, committing an act and realism of danger for public order. In view of all the above-mentioned, the Constitutional Court considered that the disputed provision was incompatible with the right to free development of personality enshrined in article 16 of the Constitution of Georgia.

**CITIZENS OF GEORGIA, NADIA KHURTSIDZE, DIMITRI LOMIDZE AND TARIEL CHOCHISHVILI V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINTS N650, N699)**

On January 27, 2016 the First Chamber of the Constitutional Court of Georgia adopted a judgement on the case of “Citizens of Georgia, Nadia Khurtsidze, Dimitri Lomidze and Tariel Chochishvili v. the Parliament of Georgia” The subject of dispute in the above-mentioned case was the constitutionality of paragraphs 1 and 4 of article 136 of the Criminal Procedure Code of Georgia with regard to article 40(3) and paragraphs 1 and 3 of article 42 of the Constitution of Georgia.

The complainants asserted, that the disputed provision restricted the possibility of defense party at the criminal trial, to apply to the court with the motion to subpoena the information stored in the computer system or on the device of storage of computer data or documents, whereas this right is granted to the prosecution, which violates the enforcement of principles of equality of arms and adversarial procedure.

The Constitutional Court primarily emphasised the necessity to provide the defense party with real and adequate opportunity to rebut the arguments of prosecution within the adversarial trial, which includes examination of the evidence submitted by the prosecution and right to argue about them, as well as the right to obtain the evidence. The legislation should not put the other party at the disadvantageous position and should allow them to effectively realise their right of defense.

The Court referred to the rapid technological progress nowadays and to the growing trend of storage of any information (written documents, video and audio records, public or confidential information) in electronic archives in state institutions, by natural and legal persons. The Court determined that the disputed rule restricted access of the defense party to the wide range of information that was important to the criminal proceedings, without consideration of dangers for third parties and for constitutionally protected interests.

The Constitutional Court upheld constitutional complaints N650 and N699 and declared the normative content of the disputed provisions, which excluded the opportunity of the defense party to apply to the court with the motion to issue a ruling of subpoena of a document or information stored in the computer system or on the device for storage of computer data unconstitutional with regard to article 40(3) and paragraphs 1 and 3 of article 42 of the Constitution of Georgia.

## CITIZEN OF GEORGIA, OMAR JORBENADZE V. THE PARLIAMENT OF GEORGIA (CONSTITUTIONAL COMPLAINT N658)

On November 16, 2017 the Constitutional Court of Georgia adopted a judgement in the case of “Citizen of Georgia, Omar Jorbenadze v. the Parliament of Georgia”, which challenged the constitutionality of the Law of Georgia “On Disciplinary Liability of Judges of the Common Courts of Georgia and Disciplinary Proceedings” with regard to article 29 of the Constitution of Georgia.

The Constitutional Court interpreted, that the conditions of taking and holding of the office of judge should be in compliance with the requirements of article 29 of the Constitution. This entails obligation of the State to not only adhere to the principle of proportionality in restriction of the right to hold a public office, but also to adhere to all the formal requirements as they are stipulated in the Constitution.

Based on the analysis of relevant rules of the disputed legal act, the Court ascertained, that the disciplinary proceedings might end up in any outcome, including the dismissal of a judge from the occupied position. Therefore, any procedure set forth in the disputed Law, which is related to disciplinary proceedings, presents a procedure stipulated for dismissal of a judge from the occupied position and their regulation in the form of an ordinary law contradicts the formal requirement established by the Constitution of Georgia.

In view of all the above-mentioned, the Constitutional Court declared unconstitutional the Chapters II, III and V of the disputed Law, which prescribed procedures of disciplinary proceedings. The Court decided that these rules did not comply with article 29 of the Constitution from the formal perspective.

The Constitutional Court took into account that in case of invalidation of the disputed provisions upon publication of the Judgement of the Constitutional Court it would be impossible to carry out disciplinary proceedings against judges, which the complainant did not apply for and was not the goal of declaration of the disputed provisions unconstitutional by the Constitutional Court either. Therefore, the Constitutional Court decided that the legislator should be given a reasonable time, so that it could regulate the procedure for dismissal of a judge according to the requirements of the Constitution. In view of this, the disputed provisions were invalidated effective from May 1, 2018.

## MAJOR TRENDS OF STRENGTHENING CONSTITUTIONAL JUSTICE

The Constitutional Court deems it important to identify in this document the significant accomplishments and challenges related to the work of the Court, which influence the protection of constitutional justice to a certain extent. Their identification and analysis are important preconditions of improvement of the quality of protection of constitutional supremacy.



## COOPERATION BETWEEN THE CONSTITUTIONAL COURT AND COMMON COURTS

The productive cooperation between the Constitutional Court and common courts is of vital importance for due protection and realisation of constitutional values and fundamental human rights. The common courts administer justice and ensure implementation of constitutional legal standards established by the Constitutional Court in specific cases, whereas the Constitutional Court invalidates the unconstitutional laws, ensuring thereby the legislative realm in compliance with the Constitution and thus the ability for the common courts to administer justice in line with the Constitution.

Mechanism of constitutional referral presents a crucial guarantee for administration of justice in line with the Constitution by the common courts. The mechanism of constitutional referral allows a judge of the common court to avoid application of presumably unconstitutional normative legal act. In recent years, the frequency of submission of constitutional referrals from common courts to the Constitutional Court has clearly increased and 2017 was no exception to this trend.

Application of the standards and interpretations provided in the judgements of the Constitutional Court by common courts in the process of adjudication over specific cases is also worth of noting. The common courts directly interpret provisions of laws in the process of adjudication; therefore it is important that interpretation and application of a provision is in compliance with the order established by the Constitution of Georgia. In this respect whole range of decisions of the Supreme Court of Georgia are noteworthy, where reasoning and legal conclusion are based on the interpretations made by the Constitutional Court. The Supreme Court of Georgia based its reasoning on the standards established by the Constitutional Court of Georgia in its judgement №3/1/531 and interpreted accordingly the time-related limits of realisation of the right of access to court in its ruling №სს-475-443-2017 of June 23, 2017.<sup>8</sup> An example of the same trend is the ruling №სს-871-838-2016 of the Supreme Court of Georgia of April 28, 2017, where the Supreme Court used the concept of social function of right to property interpreted in the judgement N2/1/370,382,390,402,405 of the Constitutional Court for determining the scope of the enjoyment of the right to property and based the final decision on the standard provided in the afore-mentioned judgement.<sup>9</sup> The above examples demonstrate that the common courts actively use the interpretations of the Constitutional Court and try to interpret the applicable provisions in line with the constitutional standards.

## RELATION OF THE CONSTITUTIONAL COURT WITH THE PARLIAMENT OF GEORGIA

In the majority of cases reviewed and decided last year, the respondent was the legislative body of Georgia – the Parliament. Despite the fact, that the Constitution binds each branch of government to adhere to the requirements of the Constitution in their actions, in view of the

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<sup>8</sup> *Citizens of Israel – Tamaz Janashvili, Nana Janashvili and Irma Janashvili v. the Parliament of Georgia* Judgement №3/1/531, the Constitutional Court of Georgia, November 5, 2013.

<sup>9</sup> *Citizens of Georgia, Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others and the Public Defender of Georgia v. the Parliament of Georgia* Judgement №2/1/370,382,390,402,405, the Constitutional Court of Georgia, May 18, 2007.

nature and scale of legislative process it is impossible to rule out the risk of violation of fundamental rights. The effective mechanism to respond to this risk is implementation of constitutional review by the Constitutional Court.

Regulation of any sphere by the legislator should fully comply with the strictures of the Constitution of Georgia. It is the case law of the Constitutional Court through which the Constitution is interpreted and constitutional standards are determined. Therefore, taking into account legal acts adopted by the Constitutional Court significantly determines the protection of constitutional supremacy in the law-making process.

There were cases identified in the practice of the Constitutional Court, when the legislator failed to consider the standards established by the Constitutional Court in the process of elaboration of legislation to regulate certain relations. The number of cases decided with simplified procedure due to provisions overruling the judgments of the Constitutional Court of Georgia was significant in 2017, when the Court adopted rulings on six such cases. In the instances, where the established constitutional standards clearly demonstrate the unconstitutionality of a provision, the legislator should itself correct such provision instead of awaiting the Constitutional Court to invalidate the provision without hearing on merits.

None of these cases, where the Court invalidated provisions without hearing on merits, were related to adoption of a regulation with the contents similar to the rule declared unconstitutional in the period following the pronouncement of judgement. Instead the regulations with the similar content to the rules declared unconstitutional by the Constitutional Court still remained in the legislation and the responsible authority did not take any measures to eliminate the shortcomings.

It is also noteworthy, that from the perspective of incorporation of standards of the judgements of the Constitutional Court into the legislation, the situation is significantly different with regard to those judgements, enforcement of which was postponed by the Constitutional Court. The Constitutional Court postpones the enforcement of judgement, when immediate invalidation of a disputed rule may lead to the material damage of private or public interests. The goal of postponement of its judgement by the Constitutional Court is not to leave a legal relationship which, in view of their nature, constantly needs legal regulation, without such regulation and the Court gives certain time to the respondent party, so that it is able within this period to regulate legal relationships in line with the Constitution of Georgia.

In this respect, the judgement adopted on the constitutional complaint N659 by the Constitutional Court of Georgia is noteworthy as it postponed the invalidation of the disputed rules and within the transitional period the Parliament of Georgia prepared new regulations. In the constitutional complaint N659 the complainant challenged those provisions of the Organic Law of Georgia on Common Courts, according to which the judges of appellate and district (city) courts should be appointed for three years and after passing of this period, the High Council of Justice would consider the issue of their lifetime appointment. The Constitutional Court pointed out, that in case of those persons, who already had three-year experience of serving as a judge and it was objectively possible to study his/her work, additional requirement to serve for the time defined by the disputed rule constituted a redundant and unjustified barrier. Despite the fact, that the disputed rule was declared

unconstitutional, the Constitutional Court considered that appraisal of the past work of the candidate for judgeship required legislative regulation of the respective procedure, for which the legislator should be given a reasonable time to elaborate the solution in line with the Constitution. In view of this, the Constitutional Court postponed the enforcement of its judgement until July 1, 2017. It is noteworthy that on June 16, 2017, the Parliament of Georgia made whole range of amendments to the Organic Law of Georgia “on Common Courts”. The goal of amendments, among others, was regulation of the procedure of appointment of judges in appellate and district (city) courts in view of the standard established in the judgement of Constitutional Court.

After postponement of enforcement of judgement, the Parliament of Georgia adopted legislative amendments on numerous occasions in the past. Among others, the legislation regulating the institution of incapacity has qualitatively changed. In the process of elaboration of legislation, taking into account the standards established in the legal acts of the Constitutional Court will clearly have a positive effect on protection of constitutional justice; it will create a fertile ground for effective realisation of fundamental human rights. The legislator is obliged to regulate any single legal relationship in line with the Constitution, to regard the standards established by the Constitutional Court and to enforce its judgements.