

CASE NOTES OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

In the Volume 2, 2019 the Journal of Constitutional Law will once again provide its audience with short summaries of the Judgements rendered by the Constitutional Court of Georgia recently. Three cases discussed below have been adopted since September till December period and are rather significant. The case notes go through the case facts and party arguments briefly and provides the argumentation as well as the final decision taken by the Court. We hope these three cases will be interesting for our readers worldwide and we will see further deliberations regarding the practice of the Constitutional Court of Georgia.

BADRI BEZHANIDZE V. PARLIAMENT OF GEORGIA

On September 20, 2019, the Second Chamber of the Constitutional Court of Georgia rendered a judgement on the case “Badri Bezhanidze v. Parliament of Georgia” (Constitutional Claim №1365). The subject of the dispute was the constitutionality of Article 2 of Law №5196-ᄁᄁ of July 4, 2007 "On Amendments and Additions to the Criminal Code of Georgia" in terms of Article 11 (1) and the second sentence of Article 31 (9) of the Constitution of Georgia.

Based on the aforementioned legislative act, the notion of repeated crime was newly defined, according to which repeated crime should mean the commission by a previously convicted person of the crime provided for by the same article of the Criminal Code of Georgia. Prior to the aforementioned legislative amendment, qualification of repeated act was carried out without prior conviction for the previously committed crime. The disputed norm stated that its force did not extend to actions committed before the entry into force of the amending law, unless the person had committed the last act after the entry into force of the law.

According to the claimant, he was convicted in two episodes of murder. The conviction was based on criminal law that was in force at the time of the commitment of the crime, and although the claimant had not previously been convicted of murder, his action was qualified as repeated murder and he was sentenced to life imprisonment.

The claimant pointed out, that in the light of the changes made to the disputed law, his action would not qualify as a repeated crime, because he was not previously convicted for the same action. Such a qualification would, in itself, result in the imposition of a less severe sentence, as existence of repeated crime is in any case an aggravating circumstance of the offence and requires a more severe sentence than it does in case of cumulative crimes. Thus, the claimant was

of the opinion that the impugned provision was contrary to the constitutional rights of retroactive force of the law reducing or abrogating responsibility and equality before the law.

According to the respondent, the legitimate aims of the restriction established by the impugned norm were to impose adequate sentence for the danger arising from the action and to prevent the retroactive force of the law aggravating responsibility.

The Constitutional Court of Georgia has defined, that the second sentence of Article 31 (9) of the Constitution of Georgia stipulates the obligation to use the law reducing responsibility in cases where the adoption of a new law is dictated by the humanity of society or the absence of need for the penalty before the change. According to the Constitutional Court, repeated crime with a number of offences was defined as an aggravating circumstance and usually resulted in the imposition of a more severe sentence, than qualification of cumulative crimes. In addition, according to the position of the Parliament of Georgia, the notion of repeated crime was defined as a result of the amendments responded more adequately to the public and social challenges and there was no need for the use of more severe penalties. Therefore, the disputed provision prohibited retroactive use of the law reducing responsibility and restricted the right protected by the second sentence of Article 31 (9) of the Constitution of Georgia.

The Constitutional Court noted that restricting the right to retroactive use of the law reducing responsibility for the purpose of severely punishing perpetrators of crimes in the past ran counter to the very essence of the same right. Therefore, adequately sentencing a person, imposing severe liability on him may not be a legitimate aim that could justify a restriction on the constitutional right to use the law reducing or abrogating responsibility retroactively.

The Constitutional Court stated that preventing the retroactive use of the law aggravating responsibility is extremely important goodness. The Court did not exclude that in some cases, qualification of cumulative crimes would lead to more severe sentence compared to repeated crimes, however according to Article 3 (1) of the Criminal Code of Georgia, any new norm of the criminal code was applicable to the past relations in so far as it reduces or abrogates responsibility. Thus, risk of aggravating responsibility under the impugned law was excluded and there was no causal link between the disputed provision and legitimate aim mentioned by the respondent. Based on the above, the Constitutional Court held that the impugned provision was contrary to the right guaranteed by the second sentence of Article 31 (9) of the Constitution of Georgia and declared it unconstitutional.

In discussing the constitutionality of the disputed provision with regard to the right to equality, the Court noted that there was no differentiation between non-convicted persons, who committed the same crime two or more times before and after the entry into force of the disputed law. In such a case, the norm did not treat persons unequally, instead it constituted different treatments on the acts depending on the period of its commitment rather than by whom they were committed. Thus, it could not be regarded as different treatment of persons.

The Constitutional Court held that the impugned norm treated unequally, on the one hand, the non-convicted persons, who had committed two or more offences under one article or part of the article of the Criminal Code before the entry into force of the impugned law and no longer committed the offence under the same article after the entry into force of the impugned law and, on the other hand, persons, who had committed the same offence and committed it again after the entry into force of the disputed law. According to the impugned law, the offence committed by the first category of persons should be qualified as a repeated crime, and the second category of persons, who had committed one or more offences under same article and committed the same offence after the entry into force of the new law, would fall under the new law and their actions would qualify as cumulative crimes instead of repeated crime, which could lead to a less severe sentencing. According to the Constitutional Court, considering that in the present case reducing responsibility was a consequence of committing an additional offence, it was clear that such a distinction had no logical explanation and that it was contrary to the constitutional right to equality before the law.

ZURAB SVANIDZE V. THE PARLIAMENT OF GEORGIA

On November 14, 2019 the Second Chamber of the Constitutional Court of Georgia adopted the judgment in the case of “Zurab Svanidze v. The Parliament of Georgia” (constitutional complaint №879). The complainant challenged the provisions, which determine that if any duly held auction (consisting of the first and two repeat auctions) fails and the property is not sold, such property shall be discharged from the attachment effected in favour of the creditor carrying out the compulsory sale.¹ No enforcement proceeding involving the same claim in favour of the same creditor shall be conducted with respect to such property.

In view of the complainant, in case of discharging the property from attachment effected in favour of the creditor carrying out the compulsory sale and returning it to the debtor, the creditor would no longer have the opportunity to effectively enforce a court decision in his favour. Complainant assumed that this regulation was incompatible with the right to a fair trial enshrined in Article 31(1) of the Constitution of Georgia.

The respondent explained, that after the impossibility of sale of the property at three auctions, lifting the attachment from the property served the interests of other creditors involved in enforcement proceedings and ensuring timely and effective enforcement of the court’s decision. The respondent indicated that by holding three auctions, the State applied all reasonable measures of realization of the property. Therefore, conducting additional auctions would only delay the enforcement process and increase the administrative costs required to conduct the auction.

The Constitutional Court of Georgia did not accept the respondent’s argument that the restriction of the right of the creditor carrying out compulsory sale was justified by the interests of other creditors. Particularly, the Court explained that creditors of the same order had an equal constitutional interest in satisfying their claims. Moreover, it has not been demonstrated that the creditor who has continued enforcement on the property discharged from the attachment, had a higher interest. Thus, by referring to the protection of the other creditors’ interests, the respondent actually restricted the property interests of one person in favour of another, who had the same position. The Constitutional Court held that in case of the same property interests, the protection of one person’s interests would not be a legitimate aim of limiting the interests of another.

The Constitutional Court did not share the respondent’s argument with regard to ensuring timely and effective enforcement by the limitation set by the disputed provision. According to the Court, the inability to sell the property at three auctions did not indicate that it had no value. Specifically, the value of the property is determined by its market price and not by the fact

¹ The subject of the dispute fully: constitutionality with regards to Article 42(1) of the Constitution of Georgia (version in force until December 16, 2018) of the first and second sentences of first paragraph of Article 75(8) of the law of Georgia on Enforcement Proceedings.

whether it could be sold at auction or not. The disputed regulation spread to the property with the market value of GEL 5000 or more. Moreover, the Court indicated that there were many factors affecting the sale of the property through auction. The interest in the item, the market demand for it and/or the likelihood of its sale may vary according to specific time periods or other factors. Thus, the impossibility of sale of the item at the auction in an established manner did not necessarily indicate that the property had no value. Furthermore, the property might not be sold because of its high market value. Accordingly, the Court held that releasing the property from attachment and returning it to the debtor not only did not serve timely and effective enforcement of the judgment in favour of the creditor but also deterred the enforcement of the judgment.

The Constitutional Court also assessed whether the disputed regulation constituted proportional means of achieving the legitimate aim of sparing administrative resources. The Court pointed out that it was possible to create an enforcement model that would equally ensure the interest of sparing administrative resources and the enforcement of a judgment in favour of the creditor. For example, the Court considered that in case the sale of the property at the auction was impossible, it would be possible to transfer the property in kind to the creditor. Thus, there was another, less restrictive way of sparing administrative resources. The Court also noted that after passing some time since the auction failed, market interest in alienating the property could increase. Consequently, if the auction failed three times, the possibility of alienation should not be excluded forever.

Thus, the Constitutional Court considered that disputed provision disproportionately restricted the right to a fair trial (Article 31 (1) of the Constitution of Georgia) and declared it unconstitutional.

**LLC “STEREO+”, LUCA SEVERINI, LASHA ZILPIMIANI, ROBERT KHAKHALEVI V.
THE PARLIAMENT OF GEORGIA AND THE MINISTER OF JUSTICE OF GEORGIA**

On 17 December 2019, the Second Chamber of the Constitutional Court of Georgia rendered a decision on the Case of “LLC ‘Stereo+’, Luca Severini, Lasha Zilpimiani, Robert Khakhalevi v. the Parliament of Georgia and the Minister of Justice of Georgia” (the Constitutional Complaint №1311). The complainant contested constitutionality of the regulations governing the procedure for acquiring title to property purchased at compulsory auction. Pursuant to the disputed regulations, any person *inter alia* a legal person registered in an offshore zone could acquire shares or stocks of a licence holder and/or authorised person in the field of broadcasting, in case of compulsory auction. At the same time, according to the Georgian legislation, ownership of the aforementioned shares or stocks of a licence holder and/or authorised person in the field of broadcasting by a person registered in the offshore zone would result in revocation of the broadcasting license and/or authorisation.

Simultaneously, on the basis of impugned regulations, acquisition of the ownership interest or shares of an authorised person in the field of electronic communications was allowed without prior notification to the Georgian National Communications Commission (thereafter, the Commission). Under such circumstances, authorised person may, involuntarily, become an authorised person with significant market power over the relevant segment of the service market. This, in accordance with the Georgian legislation, would result an imposition of one or several specific obligations in the field of electronic communications to an authorised person with significant market power in the relevant segment of the service market. In the light of all the foregoing, the complainant party indicated that the contested regulations disproportionately restricted the right to property and freedom of expression, thereby, contradicted the requirements of the Constitution of Georgia.

The respondents – the representatives of the Parliament of Georgia and Minister of justice of Georgia indicated that the disputed provisions served legitimate aims such as satisfying the creditors' lawful claims in a timely and effective manner, as well as the protection of the proprietary interests of the legal persons registered in the offshore zone wanting to acquire property by means of compulsory public auction.

The Constitutional Court of Georgia has clarified the importance of broadcasting licenses or authorisations and indicated that the broadcasting license/authorisation is a prerequisite for doing business in this area and has high economic value. On the basis of the contested regulations, the acquisition of share/stocks of a license holder/authorised person in the field of broadcasting by an entity registered in an offshore zone may cause the revocation of the company's license and/or authorisation. As a result, it would no longer be authorised to carry on broadcasting activities. It would in itself reduce the value of the company and result significant financial losses for its partners/shareholders and deprive them from ability to impart information through broadcasting. In this regard, the Constitutional Court of Georgia held that the impugned provi-

sions restricted applicant Company's and its partners' right to property and freedom of expression.

The Constitutional Court of Georgia shared respondents' position and indicated that the creation of proper legal guarantees for the acquisition of property by the auctioneer and the satisfaction of the creditors' recognised claims are valuable constitutional interests and to achieve such legitimate aims it was allowed to restrict complainants' right to property and freedom of expression.

The Constitutional Court of Georgia, further acknowledged that even in the case of restrictions on the acquisition of ownership of a license holder/authorised company in the field of broadcasting by person registered in the offshore zone, creditors still had a real opportunity to satisfy their claims by selling the mentioned property. In particular, shares/stocks of license holder or an authorised broadcasting company, itself, given the nature of the said property, did not belong to such a category of property, which proprietorship interest solely (significantly) comes from a legal entity registered in an offshore zone. In contrast, there might exist an unlimited number of other potential buyers who are interested in acquiring such property.

In connection with the ownership interest of legal entities registered in the offshore zone regarding the license holder/authorised entity's stocks/shares, the Constitutional Court of Georgia referred that the acquisition interest could not be related to the economic benefits derived from the broadcasting activities, as far as acquisition of shares/stocks by a person registered in an offshore zone would cause the Company the loss of the right to operate in the broadcasting field. At the same time, the Constitutional Court of Georgia held that the desire to purchase share/stocks of the company may be related to the interest of acquiring other property of the company and/or earning profits from other areas of business that do not require a broadcasting license/authorisation. Nevertheless, mentioned interest are not valid to the extent to justify such intense restriction of broadcasting company's and its partners'/shareholders' rights. Due to all the foregoing, the Constitutional Court of Georgia concluded that such model of balancing the opposing interests did not meet the requirements of the Constitution of Georgia, the interests of the creditors to satisfy their legal claims and proprietary interests of the legal persons registered in the offshore zone to acquire shares/stocks of the broadcasting company could not outweigh the broadcasting company's and its partners' interests. Respectively, the Constitutional Court of Georgia held that the impugned regulations violated freedom of expression and the right to property.

Furthermore, the Constitutional Court of Georgia indicated that under the terms of the contested normative content, which allowed acquisition of the ownership interest or shares of an authorised person in the field of electronic communications without prior notification to the Commission, authorised person may, involuntarily, become an authorised person with significant market power over the relevant segment of the service market. All above-mentioned led to imposition of numerous specific obligations in this field. The Constitutional Court of Georgia considered that imposing such burden on the company was a restriction of the ownership rights. At the

same time, this burden was not considered as severe to cause the restriction of the freedom of expression.

The Constitutional Court of Georgia stated that it was possible to regulate the process of selling the property at a compulsory public auction in such way to exclude the realisation of the shares/interests of company without the control of the Commission. Particularly, it was possible to secure the participation of the Commission in the process of selling of shares/stocks of the authorised person in the field of electronic communication prior to the sale of the shares/stocks. The Constitutional Court of Georgia emphasised the importance of establishing the system of compulsory auction in such manner that the sole parties excluded from the list of potential purchasers of the property at compulsory auction were those, whose purchase of this property led to breach of healthy competition and turned this company into authorised person with significant market power over the relevant segment of the service market.

In such circumstances, the need to protect the interests of the creditors and the interest of the potential acquirer could not outweigh the interest of the authorised company and its partners to carry on their business without interruption. Accordingly, the impugned provision unjustly established the balance of interests and unnecessarily restricted the company's and its' partners property right.

In the light of all the foregoing, the Constitutional Court of Georgia held that the normative content of the contested regulations, which permitted selling of shares/interests of the authorised person in the field electronic communications at the compulsory auction without the prior notification to the Commission did not contradict the freedom of expression guaranteed by Article 17 of the Constitution of Georgia, but violated the right to property enshrined in Article 19 of the Constitution of Georgia.