CITIZENS OF GEORGIA –VALERIAN GELBAKHIANI, MAMUKA NIKOLEISHVILI AND ALEXANDRE SILAGADZE VERSUS THE PARLIAMENT OF GEORGIA

N1/4/557,571,576 Batumi, 13 November, 2014

Composition of the Board:

Konstantine Vardzelashvili – Chairman of the sitting;
Ketevan Eremadze – Member, Judge Rapporteur;
Maia Kopaleishvili – Member.

Secretary of the Sitting:

Lili Skhirtladze

Title of the Case:

Citizens of Georgia – Valerian Gelbakhiani, Mamuka Nikoleishvili and Alexandre Silagadze versus the Parliament of Georgia.

Subject of the dispute:

a) On the Constitutional claim N557 – Constitutionality of the normative content of part 3 of Article 329 of Criminal procedure Code of Georgia, prohibiting the use of maximum 9 month pretrial detention term for defendant before pretrial sitting and possibility of hearings of the case by the jury, stipulated by the same Code on the criminal prosecution cases started before enactment of the Code, with respect to Article 14 and paragraphs 1, 2 and 5 of Article 42 of the Constitution of Georgia.

b) On the constitutional claims N571 and N576 – Constitutionality of the normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia (dated of October 9, 2009), prohibiting application of maximal 9 month pretrial detention term for defendant before pretrial sitting and possibility of hearing of the cases by the jury, stipulated by the same Code on the criminal cases started before enactment of the Code, with respect to Article 14 and the second sentence of paragraph 5 of the Article 42 of the Constitution.

Participants to the case:

Claimant – Valerian Gelbakhiani. Representative of Mamuka Nikolaishvili and Alexandre Silagadze – Gocha Svanidze. Representative of the Parliament of Georgia - Zurab Macharadze.

I

Descriptive part

1. Citizen Valeri Gelbakhiani on July 19, 2013 lodged constitutional claim with the Constitutional Court (registration N557).

2. The First Board of the Constitutional Court admitted the Constitutional claim N. 557 for consideration on the merits by the Recording Notice N1/6/557 of December 20, 2013 in the part of the Constitutional claim concerning constitutionality of the part of the normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia (dated on October 9, 2009), which prohibits the use of maximum 9 month pretrial detention term for defendant before pretrial sitting and possibility of hearings of the case by the jury, stipulated by the same Code, on the criminal prosecution cases started before enactment of the Code, with respect to Article 14 and paragraphs 2 and 5 of Article 42 of the Constitution.

3. On January 20, 2014, the citizen Mamuka Nikoleishvili lodged constitutional claim (registration N. 571) with the Constitutional Court.

4. The First Board of the Constitutional Court by the Recording Notice N. 1/3/571 of June 12, 2014 admitted the Constitutional claim N. 557 for consideration on the merits by the Recording Notice N1/6/557 of December 20, 2013 in the part of the Constitutional claim concerning constitutionality of the normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia, (dated October 9, 2009), which prohibits the use of maximum 9 month pretrial detention term for defendant before pretrial sitting and possibility of hearings of the case by the jury, stipulated by the same Code on the criminal prosecution cases launched before enactment of the Code, in respect to Article 14 and the second sentence of the paragraph 5 of Article 42 of the Constitution.

5. On February 14, 2014, citizen Alexandre Silagadze lodged Constitutional claim (registration N.576) with the Constitutional Court.

6. The First Board of the Constitutional Court by the Recording Notice N. 1/4/576 of June 12, 2014 admitted the Constitutional claim N. 557 for consideration on the merits by the Recording Notice N1/6/557 of December 20, 2013 in the part of the Constitutional claim concerning constitutionality of the normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia (dated October, 9, 2009), which prohibits the use of maximum 9 months pretrial detention term for defendant before pretrial sitting and possibility of hearings of the case by the jury, stipulated by the same Code on the criminal prosecution cases started before enactment of the Code, in respect to Article 14 and the second sentence of paragraph 5 of Article 42 of the Constitution. By the same Recording Notice, the court combined the Constitutional claims N.557, N.551 and N.576 into one case.

7. The sitting of the court for consideration on the merits of the case was held on August 6, 2014.

8. The grounds for lodging the constitutional claim N.557 with the constitutional court of Georgia are: subparagraph “v” of the first paragraph of Article 89 of the Constitution of Georgia; subparagraph “e” of the first paragraph of Article 19, paragraph 5 of Article 25, Article 31 and subparagraph “a” of the first paragraph of Article 39 of the Organic Law of Georgia on the Constitutional Court, Articles 10, 12, 15 and 16 of the Law of Georgia On the Constitutional Legal

Proceedings. The grounds for lodging the constitutional claims N.571 and N. 576 with the constitutional court of Georgia are: Constitution of Georgia, Article 42, subparagraph "v" of the first paragraph of Article 89 of the constitution of Georgia; subparagraph "a" of the first paragraph of Article 39 of the Organic Law of Georgia On the Constitutional Court of Georgia; and Paragraph 2 of Article 1 of the Law of Georgia On the Constitutional Legal Proceedings.

9. In all three constitutional claims, the claimants demand to declare as unconstitutional the legal content of part 3 of Article 329 of the Criminal Procedure Code, which prohibits the use of maximum 9 months pretrial detention term for defendant before pretrial sitting on the criminal prosecution cases started before enactment of the Code. The author of the Constitutional claim N.557 also demands to declare as unconstitutional the legal content of the contested norm, which prohibits consideration of the case with participation of Juries, stipulated by the Criminal Procedure Code of October 9, 2009, on criminal prosecution cases, started before this Code entered into legal force.

10. In accordance with part 3 of Article 329 of the criminal procedures code, on the criminal prosecution cases, started before this Code became effective, the criminal proceedings continue in compliance with the rule prescribed by the Criminal Procedure Code of February 20, 1998, except for the cases of applying to diversion stipulated by Articles 1681 and 1682 of the same Code. This norm is a transitional norm, regulating the issue of effectiveness in time frames of the criminal procedures code, which establishes that the criminal prosecution cases started enactment of this Code are regulated in accordance with the Criminal Procedure Code of February 20, 1998.

11. The materials to the case show that as from January, 2007, Claimant Valeri Gelbakhiani is prosecuted based on the charges foreseen in Article 315 of the Criminal Code. It is indicated in the claim, that the General Prosecutor's Office conducts criminal case against Mamuka Nikoleishvili based on the charges foreseen in Articles 182, 332 and 342 of the Criminal Code. It is mentioned in the constitutional claim, that as from December 2004, Alexandre Silagadze is prosecuted based on the charges as foreseen in Articles 182, 192, 218, 220 and 332 of the Criminal Code.

12. The Claimants state that according to part 4 of Article 75 of the Criminal procedure Code of Georgia of February 20, 1998 (in force till October 1, 2010), permissible period for convicting the defendant is 12 months. According to part 5 of the same Article, the period during which the defendant was hiding from the investigation and the search was declared against him/her, is excluded from the 12 month period. The Claimant explains that part 8 of Article 169 of the Criminal Procedure Code of October 9, 2009 regulates the mentioned issue differently. In particular, for one criminal case the person could be recognized as the defendant before the start of pretrial sitting for period not exceeding 9 months, as well as the legal norm does not foresee the possibility of suspension of running of the period in case of searching of the accused.

13. The Claimant also mentions in his constitutional claims N.571 and 576 that as opposed to the Criminal Code of February 20, 1998, the Criminal Procedure Code of 9 October 2009, permits rendering the judgment of conviction for the accused without his presence and gives the possibility to the accused to defend himself in the court through his/her representative. However, according to the Criminal Procedure Code of February 20, 1998, while the accused is hiding, the prosecution is suspended, and therefore, there is no such possibility provided.

14. In the constitutional claim N557, the Claimant indicates that part 3 of Article 329 of the Criminal Procedures Code contradicts with the right of equality before law, guaranteed by Article 14 of the Constitution. The Claimant claims, that the legislator made differentiation between persons. In particular, the persons against whom prosecution was launched before the new Criminal Procedure Code entered into legal force, are deprived of the possibility to enjoy advantages as determined by law, as opposed to those persons against whom the prosecution was launched after the Criminal Procedures Code of 2009 entered into legal force.

15. The claimant points out in the constitutional clam N. 557, that according to the first paragraph of Article 42 of the Constitution of Georgia, everyone has the right to apply to a court for the protection of his/her rights and freedoms. The claimant mentions, that the new Criminal Procedure Code contains the norms restricting the term of being a defendant. Accordingly, the claimant contends that the improved procedures for legal proceedings do not apply to him, the procedures are not fair, because of which the right to fair trial is infringed. Also, as the claimant explains, his rights to fair trial are also infringed because he does not enjoy the possibility of his case to be considered by participation of Jury, as stipulated by the Criminal Procedure Code of 2009.

16. At the sitting for the consideration of case on the merits, the author of the Constitutional Claim N.557 indicated that consideration of the case by a Jury, in current circumstances, is the only way of effective realization of the right to fair trial. Accordingly, restriction of such right by the disputed norm directly violates the right guaranteed by the first paragraph of Article 42 of the Constitution of Georgia.

17. According to paragraph 2 of Article 42 of the Constitution of Georgia, everyone shall be tried only by a court under jurisdiction of which his/her case is. The claimant indicates that the jurisdiction implies the use of applicable legislation and the scope of its application. If a new Criminal Procedure Code was applied to his case, the term of trial by a jury and the term of accusation would be restricted by 9 months. The disputed norm deprives him of this possibility, because of which, in his opinion, the requirement of paragraph 2 of Article 42 of the Constitution is violated.

18. According to the claimants, the disputed norm also contradicts with paragraph 5 of Article 42 under which “No one shall be held responsible on ac-

count of an action, which did not constitute a criminal offence at the time it was committed. The law that neither mitigate nor abrogate responsibility shall have no retroactive force." The claimant believes that the Criminal Procedure Code of 2009 improves the state of a defendant and mitigates his/her responsibility as well as gives rise to the possibility of release from responsibility. According to claimants, paragraph 5 of Article 42 of the Constitution of Georgia states, that any law that mitigates or abrogates responsibility shall have retroactive force. Accordingly, the disputed norm that prohibits the application of such law retroactively is unconstitutional.

19. At the sitting for consideration of the case on the merits, the author of the constitutional claim N.557 stated that the rule of application of the law in time stipulated by paragraph 5 of Article 42 of the Constitution should apply to any law. According to the claimant, as the constitutional provision uses the word "law", it automatically applies to both, substantive and procedural legislation. Also, according to the claimant, the fact of bringing charges against somebody is accompanied by preventive measure. Consequently, as the claimant asserts, the application of retroactive force of the law applies equally to both substantive and procedural laws.

20. At the sitting for consideration of the case on the merits, the representative of the claimants (A. Silagadze and M. Nikolaishvili) also added that as according to the Criminal Procedure Code of Georgia of 1998 during the hiding a person is deprived of possibility to defend himself in the court through his representative, it leads to infringement of the principle of the right to fair trial.

21. At the sitting for consideration of the case on the merits, the Respondent did not agree with the claim requirement and explained, that application of the Criminal Procedure Code of Georgia of 2009 towards the Claimants was not suspended even after adoption/enactment of the Criminal Procedure Code of 2009. Also, as according to the disputed norms, there was no suspension in time towards legal state of the claimants, there is "false" retroactivity in place, which is not protected by paragraph 5 of Article 42 of the Constitution of Georgia.

22. Simultaneously, the Respondent also mentioned that the principle of retroactive application of the legal norm mitigating or abrogating the responsibility, guaranteed by paragraph 5 of Article 42 of the Constitution of Georgia does not apply to procedural legislation. According to the respondent, only substantive norm mitigating or abrogating the legal responsibility/penalty could be applied retroactively and it does not apply to the Criminal Procedure Code and accordingly to the disputed norm.

23. According to the representative of the Parliament of Georgia, adoption of the disputed norm was stipulated by security reasons. According to him, reducing 12 months of accusation term, stipulated by the Criminal procedure Code of Georgia of 1998 down to 9 months would endanger the effective investigation and consequently would damage the important public interests. The representative of the parliament applied to the same logic during discussing the purposes of

non-application of the norm foreseeing consideration of the cases of a defendant by participation of juries before October 1, 2010.

24. Also, according to the Parliament's representative, despite the fact that, based on the Criminal Procedure Code of 1998, the disputed norm excludes the possibility of consideration of cases of defendants by Juries, it cannot be considered, as an infringement of the right to fair trial. The right to fair trial could be equally observed in both instance: during consideration of the case by Juries and during consideration of the case by a Judge alone. According to the Respondent, the will of legislator allowing certain types of cases to be considered by the Jury is discretion of the State and it cannot be considered as its obligation.

25. According to the Respondent, the disputed norm does not interfere with the right of equality before guaranteed by Article 14 of the Constitution of Georgia, as on the basis of the Criminal Procedure Code of Georgia of 1998 and Criminal Procedure Code of Georgia of 2009, the defendants are not considered as substantively equal persons. In the opinion of the Respondent, difference between the mentioned groups of persons is related to the time of starting criminal prosecution and thus, related to the different criminal procedures.

II
Motivational part

1. Within the frames of the present claim, the Constitutional Court should decide the matter whether or not the impugned normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia contradicts with the requirements stipulated by Article 14 and paragraphs 1, 4 and 5 of Article 42 of the Constitution of Georgia. For these purposes, both the disputed norm should be analyzed and respective provision of the Constitution should be interpreted.

2. According to part 3 of Article 329 of the Criminal Procedure Code of Georgia: the criminal process on the criminal prosecution cases, before this Code took effect, continue in accordance with the rule determined by the Criminal Procedure Code of Georgia of 1998, except for the cases applying to diversion stipulated by Articles 1681 and 1682 of the same Code. The mentioned norm belongs to transitional provisions, regulates the issue of operation of the Criminal Procedure Code in time and establishes that the criminal prosecution cases, started before Criminal Procedure Code of 9 October, 2009 took effect, were regulated by the Criminal Procedure Code of 20 February, 1998.

3. The Claimants appeal against the concrete normative content of the disputed norm. In particular, before Criminal Procedure Code of 9 October, 2009 took effect (on October 1 2010), the term of being a defendant on the criminal prosecution cases was 12 months, in accordance with part 4 of Article 75 of the Criminal Procedure Code of 1998. Also, part 5 of the same article stipulated, that the period during which the defendant was hiding from the investigation and was under search or was escaping investigation (or was protected by immunity), is excluded from 12 month period. However, the maximum term of

being a defendant for persons prosecuted after Criminal Procedure Code of 9 October, 2009 took effect, amounts to 9 months in compliance with part 8 of Article 169 of the same Code. Besides, the Code does not foresee the possibility of suspension of this period based on the above-mentioned grounds. The claimants think, that the disputed norm, by prohibiting the application of maximum 9 pretrial detention term for defendants on the criminal prosecution cases started before 1st of October, 2010, gives rise to discrimination towards them (claimants), because much heavier burden before is imposed upon a part (defendants before the effective date of Criminal Procedure Code of 2009) of substantively equal persons, (persons who are under criminal prosecution). The Claimants also believe, that in case of application of 9 month term of being a defendant towards them, they would be released from criminal responsibility because due to expiry of this term, the criminal prosecution against them should be dropped. Consequently, non-application of the law retroactively abrogating responsibility, according to them, infringes part 5 of Article 42 of the Constitution. In addition, the Criminal Procedure Code of 2009 unlike the Criminal Procedure Code of 1998 gives possibility to some defendants, including claimant Gelbakhiani, to be adjudicated with participation of Jury. Consequently, claimant Gelbakhiani believes, that the disputed norm, from this normative point of view, also violates he right of equality before law and the right to fair trial.

Constitutionality of the disputed norm in respect of Article 14 of the Constitution of Georgia

4. The Constitutional Court of Georgia has repeatedly interpreted the essence and purpose of the right of equality before law. “The idea of equality is one of the fundaments of value-chain system, for the purpose and spirit of its implementation, constitutions of the states were created. Equality before the law is not merely the right, but also concept, principle upon which the rule-of-law based state and democratic values are built”. (Decision of the Constitutional Court of Georgia N.1/1/539 dated 11 April, 2013 on the case “Citizen Besik Adamia versus the Parliament of Georgia”, II, I; Decision of the Constitutional Court of Georgia N 1/3/534 on the case “Citizen of Georgia Tristan Mamagulashvili versus the Parliament of Georgia”, II, 2). The norm establishing fundamental right of equality before the law – is a universal constitutional norm, principle guaranteeing application of equal conditions during legal protection of persons. The level of equality before the law – is an objective measurement of democracy in the country as well as assessment of supremacy of human rights. Accordingly, this principle is a foundation as well as the purpose of the democratic and rule of law based state” (Decision of the Constitutional Court of Georgia N 1/1/492 of 27 December, 2010 on the case “Political Unions: “Akhali Memarjveneebi” and “Sakartvelos Konservatiuli Partia” versus the Parliament of Georgia”, II, 1; Decision of the Constitutional Court of Georgia N.1/3/534 on the case “Citizen of Georgia Tristan Mamagulashvili versus the Parliament of Georgia”, II, 2).

5. The main essence, purpose and challenge of the democratic and rule-

of-law based state is to guarantee the freedom of a human being – i.e. guarantee the possibility of free self-realization through entire realization of fundamental rights and freedoms. Also, the State should be guarantor of the whole society, each person, as "the idea of freedom will be depreciated if it does not bear the same content and does not be equally accessible for everybody. Recognition of any right will be dwindled, if the equal accessibility is not guaranteed. It is crucial for people to know, that they are equally treated" (Decision of the Constitutional Court of Georgia N.1/3/534 dated of 11 June, 2013 on the case "Citizen Tristan Mamagulashvili versus the Parliament of Georgia", II, 3). "The idea of equality serves to provision of equal possibilities, i.e. guaranteeing the equal possibilities to self-realization of human beings in any domain" (Decision of the Constitutional Court of Georgia N.1/1/493 of 27 December, 2010 on the case "Political Unions: "Akhali Memarjveneebi" and "Sakartvelos Konservatiuli Partia" versus the Parliament of Georgia", II, 1).

6. Equality in freedom is decisive for the preservation of ideas of freedom as well as equality itself. Article 14 of the Constitution of Georgia clearly refers to such relationship between the freedom of a human being and equality, according to which "Everyone is free by birth and is equal before law regardless of race, colour, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence." "In this norm equality before the law is mentioned together with freedom of a human being, which point to importance of equality for freedom of human being – as the human rights belong to any person equally, they should be accessible for them. Only in this case freedom can be perceived completely" (Decision of the Constitutional Court of Georgia N.1/539 dated of 11 April, 2013 on the case "Citizen Besik Adamia versus the Parliament of Georgia, II, 3; Decision of the Constitutional Court N.1/3/534 dated of 11 June, 2013 on the case "Citizen of Tristan Mamagulashvili versus the Parliament of Georgia", II, 4).

7. The main point and the purpose of Article 14 of the Constitution of Georgia is as follows: "the State shall treat equally the persons being in analogous, similar, essentially equal situations and does not allow treatment of substantively equal persons in a differentiated way and *vice versa*", (Decision of the Constitutional Court N.2/1-392 dated 31 March, 2008 on the case "Citizen of Georgia Shota Beridze and others versus the Parliament of Georgia", II, 2; Decision of the Constitutional Court of Georgia N.1/1/493 dated 27 December, 2010 on the case "Political unions: "Akhali Memarjveneebi" and "Sakartvelos Konservatiuli Partia" (Conservative party of Georgia) versus the Parliament of Georgia", II,2; Decision of the Constitutional Court of Georgia N.1/1/477 dated 22 December, 2011 on the case "Public Defender of Georgia versus the Parliament of Georgia", II,68).

8. On the same time, any different treatment does not necessarily leads to discrimination. In particular cases, even in quite similar circumstances it is necessary and even inevitable to apply differentiated treatment. It is often un-

avoidable. Consequently, differentiation is not uncommon in different domains of social relationships, "however any such case should be well-substantiated" (Decision of the Constitutional Court of Georgia N.1/1/493, dated 27 December, 2010 on the case "Akhali Memarjveneebi" and "Sakartvelos Konservatiuli Partia" (Conservative party of Georgia) versus the Parliament of Georgia", II,8).

9. The constitutional court of Georgia took the following approach for the assessment of the discriminatory nature of differentiated treatment: "In differentiated treatment, we should make distinction between discriminatory differentiation and differentiation conditioned by objective circumstances. Different treatment should not be end in itself. There is discrimination when there is failure to explain the reasons of discrimination, when discrimination lacks reasonable grounds. Consequently, discrimination is only end in itself, unjustified differentiation, uncorroborated application of law to the circle of concrete persons through different approach. Therefore, the right of equality prohibits not a differentiated approach in general, but only unjustified and self-purposful differentiation" (Decision of the Constitutional Court N 1/1/493 on the case "Akhali Memarjveneebi" and "Sakartvelos Konservatiuli Partia" (Conservative party of Georgia) versus the Parliament of Georgia", II,3; the Decision of the Constitutional Court of Georgia N.1/1/539 on the case "Citizen of Georgia Besic Adamia versus the Parliament of Georgia", II,7).

10. The Constitutional Court of Georgia clearly stated its position with respect to the scopes of Article 14 of the Constitution. With the purpose of comprehensive interpretation of the sphere protected by Article 14 of the Constitution of Georgia, the Constitutional Court of Georgia proceeded from the essence of the right of equality before law and considered inadmissible to interpret literally. The court did not bind itself with its grammatical interpretation and increased its main essence, range in connection with the importance of idea of equality before law. In particular, the Court mentioned, that historically in the constitutions used to provide the list of those characteristics, according to which the groups of persons were united in compliance with their personal, physical features, cultural signs and social belongings. These characteristics were enlisted in the constitutions as there was huge experience of discrimination of human beings on that basis and there was fear of its persistence. "Article 14 of the Constitution of Georgia, as well as constitutions of other States and international documents related to human rights, provide the list of particular characteristics referring to legislator and indicate the grounds in respect of which unequal treatment should not be used. The characteristics mentioned in the list emanate from the human being's identification factor, and are based on the respect of their dignity and has its historical premises. Differentiation based on the mentioned characteristics concerns to the cases of upmost risk and requires legislator's special attention. This is caused by non-admissibility of any kind hierarchy in the social status of persons. Existence of this list points to preferential restriction of differentiation cases of persons connected to these characteristics. However, this does not

exclude existence of other unjustified cases of discrimination and the necessity of their prohibition by the constitution. The Constitution prohibits any case of unequal treatment of the substantively equal persons without rational and objective justification" (Decision of the Constitution of Georgia N.2/473, II, 1. dated of 18 March, 2011). The Court mentioned that consideration as exhaustive of the characteristics enlisted in Article 14 would lead to recognition that discrimination by any other characteristic except for those on the list - is not discriminatory and is not protected by the Constitution. Definitely, such approach would not be correct; as if any characteristic is not mentioned in Article 14 of the Constitution, it does not exclude groundlessness of differentiation. Differentiation, during the exercise of constitutional rights, could not be done only based on the enlisted characteristics or even based on these characteristics. "the right of equality differs from other constitutional rights, as it does not protect any determined sphere of life… the equality principle requires equal treatment in all spheres protected by human rights and lawful interests… prohibition of discrimination requires from the State, that any regulation determined by the State meets the requirements of core essence of equality – to treat equals equally – and vise versa. Consequently, any norm being in conflict with the core essence of equality should be the matter of discussions at the Constitutional Court" (Decision N.1/1/493 dated 27 December, 2010 on the case "Akhali Memarjveneebi" and "Sakartvelos Konservatiuli Partia" (Conservative party of Georgia) versus the Parliament of Georgia", II, 4; Decision of the Constitutional Court N.1/1/539, dated 11 April, 2013 on the case "Citizen of Georgia Besik Adamia versus the Parliament of Georgia, II, 4: Decision of the Constitutional Court N.1/3/534 dated 11 June, 2013 on the case "Citizen Tristan Mamagulashvili versus the Parliament of Georgia, II, 5).

11. Within the frames of the mentioned dispute, for assessment of constitutionality of the contested norm with respect to Article 14 of the Constitution of Georgia, for the purposes of the claim requirements, it should be determined the following: whether the defendant against who criminal prosecution started before Criminal Procedure Code of 9 October, 2009 (October 1, 2010) entered into effect and the defendant against who criminal prosecution started after the mentioned Code entered into effect are substantively equal.

12. The Respondent – representative of the Parliament of Georgia, during consideration of the case on the merit, mentioned that the persons against whom criminal prosecution started before Criminal Procedure Code of 9 October, 2009 (1st of October, 2010) entered into effect and the persons, against whom criminal prosecution started after the mentioned Code entered into effect, could not be considered as substantively equal, for despite the fact, that they committed the same crime, the Criminal procedure Codes of 1998 and 2009 respectively determine different rules and procedures which causes differences between the subjects of the process and consequently, impossibility of their treatment equally. Therefore, as these persons are not substantively equal, application of different regulations against them is not discrimination.

13. The Constitutional Court cannot agree with the mentioned suggestion of the respondent. Despite the fact, that the procedural norms, applicable to concrete subject of the procedure, could differ from one another, the persons having identical procedural status, shall be treated substantively equally. The defendants could not be treated differently just because they were accused in intervals of one year, one month or one day. Their consideration as substantively equal is caused by their essentially identical procedural statement – they are accused and also could be accused for commitment of the same crime. Neither time factor nor different procedural rules effective in different times cannot cause distinction between the accused, as far as essential resemblance or distinction is determined by their status in the procedure and not their treatment.

14. In the criminal procedure awarding of the status of defendant serves to legitimization of the investigative agency to carry out investigation activity on the one hand, and provision of this person with adequate procedural guarantees on the other hand. Recognition of the person as accused is the basis for criminal prosecution, which finally leads to rendering justice. The essence and aim of the criminal prosecution is not altering based on the time-frame of its conduct or the procedural norm valid by that time. It is possible, that the legislator proposes different systems of prosecution in different periods of time. However, the essence, such as identification of a person committed criminal action and rendering justice upon him, remains unchanged. Consequently, the interest of the person to enjoy adequate defensive mechanisms during criminal prosecution remains unchanged. In this regard, the interest of any person accused in commitment of any crime is identical and only the fact that they committed crime in different intervals of time could not lead to considering them as unequal.

15. If we assume, that application of different rules towards the persons enjoying the same procedural status, causes their essential distinction, in this case, assessment of their treatment would remain beyond the ambit of Article 14 of the Constitution and different treatment of persons with identical status could be justified, leading to unrestrictedly authorization of the legislator to determine radically different intensity intervention forms towards them. Consequently, intervention with so high intensity into the freedom of a human being, determined legally by the criminal procedural rules will artificially remain beyond the ambit of Article 14 of the Constitution.

16. Stemming from the abovementioned, the given persons are substantively equal, against whom the legislator established different regulations based on the time of initiation of criminal prosecution.

17. The Constitutional Court of Georgia mentioned in several cases, that stemming from peculiarities of the right of equality, during assessment of constitutionality of the norms establishing differentiation, the Court cannot have identical, similar approach to them. Article 14 of the Constitution guarantees protection of human beings from unjustified differentiated treatment in different domains of public life. However, at the same time, all cases of differentiated

treatment (with any characteristic, in any right) cannot have the same weight. "Stemming from the nature of the right of equality before the law, when intervention with the right occurs, the margins of appreciation of the State are different, especially depending on the sphere of the public life and type of characteristics, with which persons are differentiated. Therefore, the scale of assessment of reasonability of different treatment is also different… Historically the assessments and assessment instruments of "natural", "reasonable" and "indispensable" vary in this sphere. However, in any case, the principle of equality gives freedom to the legislator to restrict this principle as long as differentiated treatment could be objectively substantiated (Decision of the Constitutional Court of Georgia N.1/1/493 dated 27 December, 2010 on the case Akhali Memarjveneebi" and "Sakartvelos Konservatiuli Partia" (Conservative party of Georgia) versus the Parliament of Georgia", II,5).

18. Due to the abovementioned, during the assessment whether differentiated treatment is discriminatory, the Court applies to different instruments (tests). In particular, the constitutionality of the norm with respect to Article 14 of the Constitution is assessed by the Court by the "strict scrutiny test" or "rational differentiation test". The preconditions and grounds of their application are different. Any differentiation requires thorough and careful approach. However, assessment whether differentiation is discriminatory should be carried out with special strictness, when discrimination is based on those characteristics, historically discrimination was often revealed and in order to avoid it, the legislator enshrined these characteristics in the constitution. The Constitutional Court of Georgia provisionally named these characteristics "classical characteristics" and to assess the discriminatory nature of differentiation in this sphere, introduced "strict scrutiny" test. In this case, it is absolutely necessary, that differentiated treatment is clearly justified by the demonstration of compelling interest of the State and with the object of achieving this goal, justification of adequacy of chosen regulation with this very same goal. The necessity of application of the "strict test" the court defines also in accordance with the extent of the intensity of differentiation. However, the criteria for assessing intensity of differentiation are different in any concrete case, stemming from the nature of differentiation and sphere of regulation. However, in any case it is crucial to deliberate: how much different are the circumstances substantively equal persons found themselves in, i.e. how much equal persons are restricted from enjoying equal possibilities in concrete public circumstances due to differentiation. If the intensity of differentiation is high, the court applies to "strict test", and if the intensity indicator is law – to "rational differentiation test" when assessing constitutionality of the norm, it is sufficient to justify reasonability of differentiated treatment, including circumstances when it is clear feasibility, inevitability and necessity of differentiation, as well as rational and realistic relationship between the objective cause of differentiation and the result of its application.

19. During assessing the intensity of differentiation, the following cir-

cumstances are important, such as: at what extend are capable the differentiated persons to decrease the degree of differentiation by themselves. It is obvious, that such circumstances definitely cannot exclude discrimination of differentiation and guarantee equality before the law. The state cannot be released from the obligation to treat persons groundlessly differently whether a person is capable or not to change the factual circumstances himself. Consequently, the possibility of diminishing/ elimination of differentiation cannot guarantee the non discrimination of differentiation and could be used only during assessing intensity of differentiation.

20. In this particular case, despite the fact that differentiated treatment of substantively equal persons is not based on the "classical characteristics", the Court considers that the contested norm should be assessed according to the "strict test", as the norm puts the substantively equal persons in significantly different positions. In particular, over the persons against whom criminal prosecution started before Criminal Procedure Code of 2009 became effective, is applied the 12 month pretrial detention term, which does not include the period of hiding of the defendant, what practically could lead to indefinite accusation and criminal prosecution period. On the other hand, maximum 9 month pretrial detention term is applied to persons against whom criminal prosecution started after 1st of October 2010 after expiry of which criminal prosecution is dropped or the case is sent to the court for consideration. Consequently, it is obvious, that the disputed norm treats distinctly differently substantively equal persons.

21. During assessment of the constitutionality of the norm by "strict test", the legitimate purpose of adoption of this norm should primarily be determined. According to the respondent, in this concrete case, the legitimate purpose of adoption of this norm is promotion, guarantee of objective investigation, avoidance of groundless release persons from responsibility.

22. It is absolutely obvious, that comprehensive and effective as well as impartial investigation is important basis and pre-requisite which leads to impartial justice. Generally the main goal the legal system and justice serves to determination of objective truth on the case. In order to achieve this goal, crucial task of the authorities is to create adequate legislation, transparent, effective and just procedures. Accordingly, the mentioned interest definitely is legitimate purpose. During protection of this purpose, interference with the right could be justified, if this interference is admissible, unavoidable and proportional.

23. First of all, it is necessary to make clear, whether the legitimate purpose can be achieved by means of selected regulation, i.e. whether this regulation is really oriented towards protection and guaranteeing of the legitimate purpose. Activity restricting the right should be valid possibility of achieving of legitimate purpose, it should irrevocably, definitely have the possibility to guarantee concrete purposes, interests, otherwise, it would harm both, public and private interests.

24. With a view to solving this dispute correctly, the court is obliged to

consider the current reality by the time the Criminal procedure Code of 2009 (first October of 2010) came to effect. By this time 3 main groups of defendant could be identified: a) persons in hiding against whom criminal prosecution started before Criminal procedure Code of 2009 came into effect, meaning that investigation and 12 month pretrial detention term was suspended against them. If there was not the disputed norm, 9 month pretrial detention term would be applied to the mentioned persons, as it is stipulated by the Criminal Procedure Code of 2009, which would include the period of hiding. Accordingly, if the period between charges were brought and the effective date of the new Code would amount to 9 months, the criminal prosecution should be ceased automatically. Consequently criminal prosecution could be ceased without conducting investigative actions. Simultaneously, investigating authorities would not have reasonable time and grounds to undertake decision whether to cease the case or not. Consequently, the person, against whom the charges are brought based on the legitimate grounds, automatically would be released from responsibility without disproof of these grounds. Consequently, the above-mentioned legitimate purpose would be threatened.

b) Persons in hiding towards whom criminal prosecution started before the Criminal Procedure Code of 2009 came into effect (meaning that the investigation and accusation 12 month period was suspended), however as from the moment of bringing charges against them and entering into effect of the Code 2009, 9 months were not passed. If the Criminal Procedure Code of 2009 applies to those persons, the period the person was hiding would not be included in the period of being a defendant and investigative authorities would have the rest of 9 month period before they would be obliged to send the case to the court or drop it. This period could be any: 8 months or even one month. In any case this period would be less than 9 months and in many cases could be not reasonable time (1 or 2 months) for investigatory actions and consequently for conducting of comprehensive investigation.

25. Obviously, in the abovementioned case the disputed norm is a valid mean for achieving the goal due to the following suggestions: as before the Criminal Procedure Code of 2009 became effective, criminal prosecution cases were regulated in accordance with the Criminal Procedure Code of 1998, which excluded the termination of prosecution in circumstances when investigation was not conducted or was conducted partially due to initially unforeseen time - frame (due to decrease of time-frame- termination of the case). Persons, who were prosecuted before the Criminal procedure Code became effective, should not be released from responsibility automatically only because the regulations of New Criminal Procedure Code of 2010 had to apply identically with the persons prosecuted after 2010. Despite the fact, that these persons are substantively equal, based on the necessity of their equal treatment, either necessity or possibility of protection of mentioned legitimate goals should not be ignored. In case of non existence of the contested norm, as we already mentioned, the

interest of investigation would be threatened and the persons would be released from responsibility without reason – their release would not be based neither because of failure to finding him/her guilty, nor due to expiration of limitation period. In new normative circumstances, the case would be terminated due to application of reduced time-frames, when investigation was not conducted or was conducted completely.

26. However, applicability of this concrete rule to this right does not mean that it is indispensible and proportional. During assessing the constitutionality of the norm, the court further shall analyze whether this mean of interference into the right is less restrictive mean and whether it was possible to achieve the same goal through less intensive interference into right?

27. Neither legitimate goal could justify interference with the right stricter than it is necessary and sufficient for achievement of this goal. The constitutional court mentioned several times, that burden of State responsibility and together with the degree of democracy is measured in accordance with finding fail balance between the opposing sides. The constitutional court mentioned in several decisions that the state shall find a reasonable balance during balancing private and public interests. Only thus the right could be enjoyed and concrete public interests achieved. In democratic society the goal cannot be achieved at the expense of infringement of any right. Neither interest could be satisfied owning to offence of another interest. "In the democratic state correlation between private and public interests is expected to be just" (Decision of the Constitutional Court N.1/2/384 dated of 2 July, 2007 on the case "citizens of Georgia: Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili verses the Parliament of Georgia", II, 19). The human rights could be restricted as much as it is necessary in democratic society.

28. Consequently, it equally important to achieve legitimate goal as well as assure equal treatment to substantively equal persons. In current case, even the norm assures achievement of legitimate goal, it imposes comparatively heavier burden upon a part of substantively equal persons. In particular, if after 1 October, 2010 the maximum pretrial detention term for defendants is 9 months and after expiration of this period the case is ceased or pretrial sitting is scheduled, the persons who were accused after 1 October, 2010, in accordance with the Criminal Procedure Code of 1998, could be prosecuted indefinitely (if person in hiding will not appear in the investigating body), or during much more lasting period. Consequently, application of the disputed norm will clearly lead towards possibility of application of indefinite or protracted (more than 9 months) criminal prosecution.

29. Within the frame of the given dispute, the Constitutional Court does not need to assess the constitutionality of the timeframes of being a defendant as stipulated by the Criminal Procedure Codes of 1998 and 2009, as well as to analyze which of them assures or excludes protection of defendants as well as concrete public interests. Stemming from the claim, the court shall decide the

constitutionality of application of different timeframes for being a defendant to the persons accused in different times.

30. Generally, it should be mentioned, that the persons hiding from the investigation are aware that hiding results in suspension of time-limit. Practically, they undertake decision to prolong prosecution time-frame. Also, escaping from criminal prosecution during long period of time or indefinitely is up to them. Also it shall be taken into consideration, that by hiding, they are preventing (at least not facilitating) conduct of objective, timely and effective investigation. Consequently, there is not an objective basis to allege, that hiding from investigation could be considered as the basis of getting some privileges. One cannot justify the claim of the person hiding from investigation to be released from responsibility without the conduct of investigation and exclusion of his guilt through mechanical application upon him of diminished time-frames due to changing of legislation. However, maintenance of long/indefinite accusation timeframes towards part of persons when towards others is applicable 9 month time-frame despite the fact of hiding from investigation cannot be justifies either.

31. Could legislator achieve the mentioned legitimate goal, without jeopardizing concrete interests of private persons? It is obvious, that constitutional court cannot restrict the legislator by offering him concrete ways of decision of the case. However, the constitutional court shall analyze all possible means of achievement of legitimate goal, because the court is obliged to recognize the norm unconstitutional, if this norm is not the least restrictive within all alternative means of achieving of legitimate right.

32. It is noteworthy that the claimant mentioned the following example as a less restrictive mean for achievement of legitimate goal: If 9 moth pretrial detention term stipulated by the Criminal Procedure Code of 2009 would apply to the persons of this category, by including of hiding period (in case person continues hiding), but the running of time would start not from the moment of bringing him/her charges incrimination but from the moment of enactment of the Criminal Procedure Code of 2009– this would exclude the automatic termination of prosecution and accordingly, the negative results of the failure to conduct of investigation, on the one hand and on the other hand – the substantively equal persons would be treated not in identical but essentially in equal circumstances. Also, the prosecution authorities would have enough time for investigation.

33. As 9 month investigation period is considered sufficient by the legislator, there is no reason to consider this period as insufficient for carrying out appropriate activities towards the accused before the first of October, 2010 if there would be the equal opportunity to use this timeframe fully. This timeframe (as any other time-frame) is not either sufficient or reasonable for any person in equal circumstances or it is not. It should be mentioned, that this approach was not doubted by the respondent either. In this view he could not argue even a small threat of infringement or impossibility of achievement of legitimate goal in case of equal application to all persons of the mentioned category.

34. It is true, that persons who were hiding for a long period of time, after the Criminal Procedure Code of 2009 became effective, stipulating 9 month running-time, their prosecution period would be longer in comparison with the persons charged in accordance with the new Code, however this approach definitely would not make impossible the protection of legitimate goal due to groundless and unforeseeable termination of objective investigation on the one hand and interference in the human right more intensively, than it is necessary for protection of legitimate goal on the other hand.

35. Consequently, in some cases, the disputed norm, by the moment of its entering into force, could be really the only way for protection of legitimate goal. However, within the frames of blanket approach, when the period of being a defendant amounts to 12 months, without including the period person is in hiding, is applicable to persons when the legitimate goal can be achieved through less interference with the right, the disputed norm consequently does not meet requirements of the Constitution and shall be recognized unconstitutional with respect to Article 14 of the Constitution of Georgia.

36. At the same time, the constitutional court deemed it expedient, based on paragraph 3 Article 25 of the organic law of Georgia on the Constitutional Court, to postpone execution of the present decision in the part of recognition invalid of the normative content of paragraph 3 of Article 329 of the Criminal Procedure Code which prohibits application of maximum 9 month pretrial detention term before pretrial sitting, stipulated by the same Code on the criminal prosecution cases started before this Code entered into effect. It should be stressed, that the proof of infringement of the right of equality before law in this concrete case does not oblige the investigation authorities to terminate automatically prosecution of accused persons in hiding (or who were in hiding before the Code of 2009 came into effect), based on the Criminal Procedure Code of 1998 as it would threaten the objective investigation and administration of justice. We underline again, that termination of criminal prosecution without exclusion of grounds for accusation or non-proof, only based on the missing of reduced time-frames as stipulated by the changed legislation, cannot be a person's right and consequently ground for such claim. Due to abovementioned, with the object of proper execution of the constitutional court's decision, adoption of additional legal regulation is required, which would not only exclude but assure the achievement of legitimate goal of conduct of comprehensive and objective investigates on and on the other hand guarantees for treatment of substantively equal persons equally, i.e. will not lead to interference with the right more intensively, than it is objectively required in order to protect the mentioned interest.

37. As for assessment of constitutionality of normative content of the disputed norm with respect to Article 14 of the Constitution of Georgia, which deprives the defendants before Criminal Procedure Code of 2009 came into effect of possibility to be considered their case by participation of jury, the Constitutional Court considers it expedient to apply "strict scrutiny test" during assessment of

differentiation in discrimination. In particular, there is also decisive the high intensity differentiation, when the part of substantively equal persons have the possibility to enjoy the right of considering their case by participation of jury and the other part is absolutely deprived of this right.

38. Independent of whether the possibility of consideration of a case by participation of jury is absolutely necessary component of fair criminal litigation, (violation of which would itself violate the right to fair trial), it is essential that this possibility is accessible only for the part of substantively equal persons, when the other part is deprived of this possibility. Due to the fact, that equality before law means treatment of substantively equal persons equally in any domains of public interactions, sharply different access to any possibility, privilege, good and even access for only the part of substantively equal persons, leads to high intensity of differentiation.

39. During assessment whether the norm is discriminatory by "strict test", first of all, the legitimate goal of such differentiation should be determined. The representative of the Parliament of Georgia justified adoption of the disputed norm by the interest to avoid institutional and procedural tangling during consideration of criminal case. As he asserted, the procedures, rules stipulated by the Criminal Procedure Codes of 1998 and 2009 are different. Consequently, the continuation of the prosecution started based on the Criminal Procedure Code of 1998, in accordance with the requirements of the Criminal Procedure Code of 2009, could be objectively difficult due to non-identicalness of past and foreseeable procedures.

40. It is obvious, that the Codes of 1998 and 2009 differ from each other in many rules and procedures as well as from institutional regulation point of view. Any legislative change or adoption of a new law aims to regulate specific relationship differently or introduce legal norms regulating new relationships.

41. The Constitutional Court agrees with the arguments of the respondent that implementation of institute of jury in the Criminal Procedure Code would cause introduction of certain changes. It is obvious, that introduction of the institute of jury into the Criminal Procedure Code of 1998, without modification of the mentioned legal act, definitely would result in contradictions and consequently would require introduction of several technical changes. For example, the Criminal Procedure Code of 20 February, 1998 does not stipulate the phase equivalent to pretrial sitting. Consequently, the phase of criminal proceedings during which juries could be selected, eligibility of evidences could be assessed, is not foreseen (It is expedient that the juries are involved in this phase). Definitely, without regulation of the mentioned issues, introduction of the institute of juries into the Criminal Procedure Code of 1998 would be impossible.

42. However, only the fact, that consideration of the case by participation of juries based on the Criminal Procedure Code of 1998 would certainly require introduction of changes into several norms of the same legal act, cannot be considered as an argument for restriction of constitutional right. The respondent failed to corroborate neither impossibility of amendment of the Code, nor that it

would essentially change the concept of the Criminal Procedure Code of 1998 and would cause insurmountable obstacles during implementation of justice.

43. Due to the abovementioned, the normative content of the disputed norm, prohibiting consideration of the cases of persons, charged before Criminal Procedure Code of 2009 came into effect, with participation of jury, contradicts with the requirements of Article 14 of the Constitution of Georgia.

Issue of constitutionality of the disputed norm with respect to paragraph 5 of Article 42 of the Constitution of Georgia

44. According to the claimants, the disputed norm contradicts with paragraph 5 of Article 42 of the Constitution of Georgia, as it prohibits the possibility of application retroactively of the norm mitigating/abrogating responsibility. In particular, as it was already mentioned, the Criminal Procedure Code of Georgia of 9 October, 2009, stipulated maximum 9 months pretrial detention term, upon expiry of which prosecution should be stopped or the case transferred to the court. However, according to the Criminal Procedure Code of Georgia of 1998, a person's accusation period amounts to 12 months without including the period, when a person was in hiding. According to the claimants, the Criminal Procedure Code of 2009 not only decreases perceptibly the period of accusation, but releases the person from responsibility upon expiration of 9 months. According to them in case of application of this regulation, prosecution would be stopped. The claimant Valeri Gelbakhiani additionally considers that part 31 of Article 330 of the Criminal Procedure Code of 2009 as opposed to Criminal Procedure Code of 1998, stipulates consideration of cases of this category with participation of juries, consequently improving the state of these persons and should apply to persons, whose prosecution started before first of October, 2010. Therefore, according to the claimants, based on paragraph 5 of Article 42 of the Constitution of Georgia, regulations of Criminal Procedure Code of 2009 should apply to them, what is ruled out by the disputed norm.

45. The Constitutional Court, while assessing constitutionality of the disputed norm with respect to paragraph 5 of Article 42 of the Constitution, first of all should ascertain the following: a) whether paragraph 5 of Article 42 of the Constitution of Georgia foresees the obligation of legislator to give retroactive force to the norm stipulating mitigation/abrogation of responsibility; b) whether the disputed norm is related to prohibition/assumption of application of the norm retroactively within the frames of paragraph 5 of Article 42 of the Constitution of Georgia.

46. According to paragraph 5 of Article 42 of the Constitution of Georgia, "No one is responsible for an action which did not constitute a criminal offence at the time it was committed. The law that does not mitigate or abrogate responsibility has no retroactive force".

47. The mentioned provision of the Constitution of Georgia asserts the principle of legitimacy. The mentioned principle, while assuring the safeguard

function of justice, is the most important foundation for practical realization of the rule-of-law based state and thus, it is an essential component that determines rule of law based state. Consequently, its content, range and frames should be perceived in the light of guaranteeing practical capacity of the rule of law based state.

48. The principle of legitimacy (Nullum crimen, nulla poena sine lege) assures safeguard functions of law through unconditional binding of the authorities through the measures as follows: to impose responsibility for action, responsibility for this action shall be stipulated by the law in force as unlawful action when the action has been committed. Consequently, this principle prohibits charging person for an action, which was not considered unlawful during its commitment. Exactly from this emanates the obligation to protect the main rule of effectiveness of the law in time – the law, determining responsibility or aggravated responsibility shall not apply to relationship occurred before adoption of this law and which, consequently that time were not be considered as offence and punishable action at all, or stipulated less grave responsibility. "Expression of this principle is prohibition of applying the law retroactively, which is one of main determining circumstances of effectiveness of the law in time. The mentioned paragraph of the Constitution determines that the law does not have retroactive force on the one hand, and on the other hand – determines those exceptions when the law can be applied retroactively. In particular, the first sentence of this paragraph of the Constitution states that the person could not be responsible for an action, which was considered as an offence after the person committed it. Consequently, according to the Constitution, the object of assessment cannot be a dry fact, but the action considered as criminal offence normatively. Hereby the Constitution protects a citizen from negative influence". (Decision of the Constitutional Court of Georgia dated of 13 May, 2009, on the case N1/1/428,447,459, Ombudsman of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania against the Parliament of Georgia", II,1).

49. Both sentences of paragraph 5 of Article 42 of the Constitution of Georgia are organically interconnected and their main message is as follows: "offence, which is the basis of the responsibility and the responsibility itself for this offence, as a integrated effort carried out by the State should be in compliance with the legislation in force during the moment of commitment of offence" (Decision N. 1/1/428,447,459 of the Constitutional Court of Georgia dated of 13 May, 2009 on the case "Ombudsman of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania against the Parliament of Georgia", II,3). Consequently, both sentences of paragraph 5 of Article 42 of the Constitution of Georgia first of all guarantees prohibition of applying the law retroactively. "principle of prohibition of applying the law retroactively means prohibition of applying retroactively of the law determining responsibility "Ombudsman of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania against the Parliament of Georgia", II, 4).

50. The main purpose of operation of the principle of the law in time through this rule is assurance of legal certainty of the law that stems from the principle of legal security and finally determines mainly its realization. Legislation should provide clear information to person, during committing of any concrete action whether this action is considered unlawful or not and what kind of legal consequences are expected. Accordingly, a person should have the possibility to foresee whether he infringes the law or not with a view to overcome negative consequences emanating from offence. Also, on the other hand, a person should have clear understanding, in case of infringement of the law how grave will be responsibility, and how heavy is responsibility determined by the State. It is absolutely necessary in order to forecast relationships between the state and the person, as well as in order to avoid any arbitrary rule from State. "Paragraph 5 of Article 42 of the Constitution of Georgia assures a person to know in advance preliminarily determined, publicly accessible and non-individualized legal rules with a view to have possibility to foresee which actions are considered unlawful and act accordingly. This is the most important guarantee against arbitrary prosecution and accusation.

Prohibition of retroactive force restricts the freedom of legislator to adopt such law, which will make a person responsible for an action, which was not considered as an offence in time of its commitment. Consequently, the Constitution recognizes that the mentioned principle has an absolute character and its infringement is inadmissible. Infringement of this principle would endanger not only constitutional rights of a person, but also would threaten the order of values, legal security, which is the basis of protection of constitutional rights itself. The normative order of values is a mean of determination of behavior of an individual citizen. Within such order, people have a reasonable expectation that the State will act in accordance with the law and action committed by a person sill be assessed within the frames of present normative reality" ("Ombudsman of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania against the Parliament of Georgia", II, 1).

51. Therefore the main message of paragraph 5 of Article 42 of the Constitution is prohibition of retroactivity of a law. This is constitutional protection guarantee from negative outcomes, i.e. a person should not be punished for an action not considered as an offense during its commitment, as well as not be punished more severely than he had a legal expectation. The offender, including a person committed the gravest crime shall be guaranteed from being punished more severely than it was known/or should be known in time of commitment of the crime. Everyone has a right to know in advance for what, how and how intensively he/she is responsible for an action. A person cannot permanently have a fear, that the authorities will be authorized to make more severe responsibility for the action committed before and consequently aggravate his responsibility by applying the law retroactively. In case of allowing such possibility, punishment and generally responsibility will go beyond its purposes and will become a

potential tool for revenge. As a result, justice and law will lose its main function. Law is needed for justice and order and if it is transformed into the instrument of the authorities to manipulate with people, the law itself will become the main source of a problem, for eradication of which it is created.

52. Respectively, due to above-mentioned, through solving the issue by means of the operation of law in time serves to the assurance of principle of legality, supremacy of the law, legal certainty and security.

53. Meantime the second sentence of paragraph 5 of Article 42 of the Constitution of Georgia, together with general rule of prohibition of application of a law retroactively, foresees the possibility of application of the law retroactively as well. "Within the scope of paragraph 5 of Article 42, the legislator can give the law retroactive force, if it mitigates or abrogates the responsibility. By this prescription, the Constitution expresses humane treatment and stimulates positive actions. New normative reality replaces the old one and consequently strengthens guarantees of protection of offender" (Decision of the Constitutional Court of Georgia on the case N 1/1/428,447,459 on the case "Ombudsman of Georgia, citizen of Georgia Elguja Sabauri and citizen of Russian Federation Zviad Mania against the Parliament of Georgia", II, 3).

54. Within the frames of the present litigation, the Constitutional Court shall answer the question as follows: whether this provision only determines the possibility of application of the law, having mitigative/abrogative force retroactively or imposes some duty upon the legislator in this direction.

55. The Claimant Valeri Gelbakhiani considers, that this constitutional prescription establishes unconditional obligation for applying retroactively any law having mitigative/abrogative force. However, the representative of Mamuka Nikolaishvili and Aleksandre Silagadze – Gocha Svanidze considers incorrect to read it as an unconditional obligation. According to him, the mentioned constitutional norm establishes concrete frames, within which the law shall be applied retroactively.

56. It should be mentioned, that according to the representative of the Respondent, Constitution of Georgia binds the legislator by an obligation to apply any mitigating/abrogative law retroactively and this obligation stems from the second sentence of paragraph 5 of Articles 42 of the Constitution. Despite the position of the Respondent that the disputed norm does not contradict the mentioned provision of the constitution, his arguments are based on the allegation as follows: in this regard the constitution applies directly to material criminal law – to the obligation of application of mitigative-abrogative law retroactively and it does not apply to the procedural norms.

57. Despite, the main message of the mentioned constitutional norm is to regulate prohibition of application of a law retroactively; constitutional basis for the possibility to awarding retroactive force to mitigative/abrogative norm has been created by the mentioned constitutional norm, because, as we already mentioned, there is a positive note thereof. In particular, second sentence of para-

graph 5 of Article 42, generally prohibiting application of the law retroactively, determines exception from the general rule. It determines by the same norm that prohibition is not absolute and refers to constitutional scopes of application of a law retroactively.

58. Definitely, the issue cannot be solved based on the following principle: if the law determining or aggravating responsibility cannot be applied retroactively, then the law mitigating or abrogating responsibility should be applied retroactively necessarily. Despite both norms are related to operation of the law in time, they are essentially different regulations, which neither determine each other nor emanate from each other. Their goals, their destinations are different and consequently the constitutional basis and scopes of constitutional protection.

59. During interpretation of the second sentence of paragraph 5 of Article 42 of the Constitution of Georgia, as well as during interpretation of any constitutional provision, the mentioned provision should be analyzed in perspective of its accordance with the system of constitutional values, what means comprehension on scopes, scale of the norm in accordance with the basic principles of the constitution and assuring its legal capacity.

60. The Constitutional Court of Georgia, based on the already firmly established practice does not discuss direct compliance of the disputed norm with the constitutional principles, but considers it obligatory to use its resource with the object of correct interpretation of the constitution and adequate protection of human rights. The court has mentioned this repeatedly in its decisions. In particular: "during solving of the concrete dispute the constitutional court is obliged to analyze and assess the contested norm in context of main principles of the constitution with a view to avoid keeping away of the norm from the order of values stipulated by the constitution. Only then comprehensive interpretation of any norm promoting to correct assessment of the constitutionality of the contested norm could be achieved" (Decision N 1/3/407 of the Constitutional Court of Georgia on the case "Young Lawyers Association of Georgia and citizen of Georgia – Ekaterine Lomtatidze versus the Parliament of Georgia", II, 1). Also in the Decision N 2/2-389 of 22 October, 2007 it is mentioned as follows: "the constitutional court of Georgia during examining constitutionality of the disputed norm is not restricted by only concrete norms of the constitution. Although constitutional principles do not establish fundamental rights, however the impugned normative act shall be examined with respect to fundamental principles of the constitution, towards separate norms of the constitution and discussion shall be conducted in common context. The constitutional court shall determine whether the contested norm is in the frame of constitutional-legal order, which is determined by the constitution" (Decision of the constitutional court of Georgia N.2/2-389, dated on 26 October, 2006 "Citizen Maia Antadze and others versus the Parliament of Georgia and the President of Georgia", II, 3).

61. As we already mentioned, prohibition of application of the law determining or aggravating responsibility retroactively proceeds from the principle

of just state and serves to certainty of law and assurance of legal security. On the contrary, the possibility of application of mitigative/abrogative law retroactively, not only does not serve, but even logically is not related to certainty and foreseeability of the law, because during non application of the law in such circumstances, and application of the law (graver law) in force during commitment of action, the person is familiar with the criminality of action as well as with concrete responsibility proceeding from it. However, despite the absence of relationship to certainty of the law, application of mitigative/abrogative law retroactively still serves the principle of legitimate state, as it serves to realization of its (legitimate State) two main goals, such as: a) protection of a person from unjustified interference with his/her rights (when interference with a right is carried out without real necessity, without purpose or it is heavier and more intense than it is mandatory in democratic and legitimate state with the object of protection of legitimate interest) and b) promotion of humanity of justice in general.

62. In rule of law based state, the government is restricted by unconventional obligation to interfere into a person's freedom (in any right) only when it is absolutely necessary and as much as it is objectively necessary. That is how constitutional order of any rule of law based state looks. Obviously, the state is specially limited by this obligation during setting and applying of legislation regulating responsibility. Such legislation is characterized with appropriateness of intensive interference into a person's freedom. That's way it is also appropriate that the State is extremely cautious in this process, because justice will lose its function if people are punished without appropriate and indispensable grounds.

63. It is also obvious, that the function of humanity of justice cannot be ignored either, as it promotes not only justice itself, but also progressive development of the public. Consequently, achievement of humanity of justice and its development through it is a permanent goal, promotion and assurance of which is state's obligation, however, obviously till the point when it comes in conflict with justice and other goals and main function of the law.

64. When public and consequently the state decides that a concrete action is not dangerous any more for which people should be punished or responsibility for such action is inadequately, excessively severe and excessively restricts a person's freedom in order to achieve a legitimate goal, when the action is decriminalized or responsibility for it is mitigated, charging of person with more severe penalty for the same action committed earlier becomes groundless. People shall enjoy the positive outcomes of progressive humane understanding of development of society and law. An individual should be responsible for really publicly dangerous action, although in frames and in accordance with rules objectively necessary and sufficient to achieve the goal.

65. It is obvious that such general approach does not mean *per se* absolute and indisputable obligation of retroactive application of law mitigating or abrogating responsibility.

66. During retroactive application of the law regulating responsibility, it should be considered, to what extent it is directly connected to the function of humanity and the purpose of necessity for adequate interference into a person's freedom, in order to avoid groundless release of person from responsibility which also contradicts with the requirements of justice. Exactly coexistence of functions of justice/law and their equal protection determines possible scopes and content of application of mitigating law retroactively.

67. Stemming from such commitment, possibility of retroactive application of the law mitigating/abrogating responsibility could be connected only to delinquency and the law regulating sanctioning of this action. Consequently, within the frames of the present dispute, law (norms) abrogating criminality and punishability of an action or mitigating punishment are meant. It is obvious, that "crime" and "punishment" does not comprise only the norms of material legislation. Simultaneously, it should be confined by those commitments, which determine the essence of the principle of retroactive application of the law mitigating responsibility. Therefore this will not concern to any law improving legal state of a person, but only to norms, which despite the fact they are in the material criminal code or not, definitely have influence on mitigation/abrogation of responsibility only through above-mentioned purposes.

68. It is typical, that international approach to these issues is similar. The obligation of application of the law mitigating/abrogating responsibility retroactively is clearly stipulated by paragraph 1 of Article 15 of International Covenant on Civil and Political Rights.

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby". Consequently, this norm regulates the rule of prohibition of application of the law retroactively as well as ground and frames of obligation of its application retroactively.

69. According to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".

70. As we can see European Convention for the Protection of Human Rights and Fundamental Freedoms unlike International Covenant on Civil and Political Rights, does not contain direct obligation of retroactive application of the law mitigating responsibility. Even more, there is no provision similar to the provision stipulated by the second sentence of paragraph 5 of Article 42 of the

Constitution of Georgia, which determines exceptional grounds for prohibition of application of law retroactively.

71. Stemming from the above-mentioned, based on the principles of rule of law based state and constitutional order generally, second sentence of paragraph 5 of Article 42 of the Constitution of Georgia establishes the grounds for application of the law mitigating/abrogating responsibility retroactively. Obviously, it does not imply such strict and absolute restriction on the authorities as in case of prohibition of application of law determining or aggravating responsibility retroactively, but definitely restricts the state with a view to avoiding interference with freedom of human beings when it is not/not any more necessary or more severe than it is necessary to achieve a legitimate goal. The Constitutional Court of Georgia mentioned several times, that Constitution should be interpreted broadly, in favor of human rights till the point when it starts contradicting the same Constitution, because the Constitutional Court is not authorized to interpret the Constitution against its content. However, in this concrete case, interpretation of the Constitution not only does not contradict paragraph 5 of Article 42 of the Constitution, on the contrary - grounds for such possibility are directly stipulated in this norm, and grounds for its correct interpretation are established by the Constitutional order. Simultaneously, with the object of application of this provision correctly in any concrete cases, the scopes of the constitutional principle should be determined.

72. Within the frames of the present dispute, the constitutional court does not need to determine exhaustively the criteria, based on which the norms would be identified, application of which retroactively is necessary in accordance with the constitution. During resolving he present dispute, the constitutional court shall determine, whether the normative content of the disputed norm is related to mitigation or abrogation of responsibility in the light of abovementioned goals.

73. Generally, it should be mentioned, that connection of procedural legislation with retroactivity is excluded in its foundation, because it regulates procedures, which despite of when a crime was committed, occur in time and is continuous and dynamic. The purpose of these procedures is to establish sufficient and effective mechanisms, instruments which will guarantee confirmation or denial of crime during its commitment.

74. The current interrelations should be regulated by the law effective during interrelations occurred, including the case, when after commitment of a concrete crime, the Procedure Code has changed, if investigative actions were carried out after the new Procedure Code came into effect. It is logical to apply to these interrelations a new code, new regulations, i.e. concrete investigational activities should be conducted in accordance with the rules and procedures effective at the moment of their conduct. Such effectiveness of the law normally is not related to its application retroactively, as the law should be applied not to the completed interrelations, as this would cause changing of already occurred results, but to the current interrelations. That's way in accordance with the Crimi-

nal Code of Georgia: “Criminality and punishability of an action is determined by the criminal law, effective during commitment of crime” (Article 2, part 1). And in accordance with the Criminal procedure Code: “in the criminal procedure, the procedural norm, which is effective during investigation and court hearing should be applied” (Article 2, part 1).

75. Obviously, the Constitutional Court during assessment of constitutionality of norm does not confine itself to legal definitions. However, in this concrete case, these legal norms concern the expedience of effectiveness of rules in time frames.

76. As for not application of the effective criminal procedure code upon the current procedural activity (i.e. when the effective criminal procedural code does not apply to suspects/accused persons, when criminal case occurred before adoption of the Code, but criminal prosecution and application of concrete procedural measures coincide in time with effectiveness of the new criminal procedure code, in which falls the present case). Consequently, relationship between such effectiveness of the law with non application retroactively of law having mitigate/abrogative force and, consequently relationship with paragraph 5 of Article 42 of the Constitution of Georgia occurs only in case, when concrete procedural norms, in their essence, are related to mitigation/abrogation of criminality of action. Therefore, the court in any concrete case shall assess whether the norm leads to abrogation of criminality/punishability or mitigation of responsibility for the constitutional purposes. Only, in case of such clear relationship, the norm could be assessed within the frames of paragraph 5 of Article 42 of the Constitution.

77. Within the frames of the current case, the regulations stipulated by the disputed norm cannot be considered as norms causing abrogation of criminality/punishability or mitigation of sentence. Changing of essence of the norms determining time-frames of criminal prosecution and consideration of case with participation of juries does not indicate that the committed crime is less dangerous for the society, thus, the response of the state is different.

78. The norms regulating time-frames of criminal prosecution and consideration of the case with participation of juries are regulatory norms ordering procedural issues during administering justice on the criminal case. In particular, these norms determine, how criminal case should be conducted, who shall adjudge the guilt and within which time-frames the appropriate bodies are authorized to carry out criminal prosecution. These norms do not determine the extent and frames of responsibility. In particular these norms neither are related with composition of criminal action. Additionally, they determine not the size and character of sentence, but the procedures, according to which adjudication shall be carried out.

79. There is no logical and direct relationship between consideration of case by juries and decriminalization or mitigation of sentence. It cannot be proved either that there is higher probability for a person to be released from

responsibility during considering the case with participation of juries than without them. Introduction of possibility of consideration of case by participation of juries by legislator, serves to introduction of alternative institute apart from a professional judge. With participation of juries, the court administers justice and determines, whether or not a person committed offence. In this case the sentence is determined in accordance with the offence, frames of which are stipulated by law. Consequently, the decision undertaken with the participation of juries, essentially, is not related to the decriminalization of action as well as cannot lead to decrease of responsibility measure stipulated by law.

80. Also, the normative content of the disputed norm, regulating the rule of operation in time of the norm ordering period of accusation, is not related to those goals to which serves the constitutional principle of application retroactively of the law having mitigating/abrogating force. In case of application of the reduced period of accusation (9 months), stipulated by the Criminal Procedure Code of 2009, against the claimants, the possibility of termination of their criminal prosecution, as generally, institutionally, as well as from the point of view of its goals, does not have anything to do with the general goals of abrogation of criminality/punishability or mitigation of sentence.

81. By determination of criminal prosecution time-frames, the legislator aims to put in limited frames the stages of criminal case in order to avoid prosecution indefinitely. Termination of criminal prosecution against such person does not mean that the action committed by him/her is not publicly dangerous any more. This action still remains publicly dangerous and punishable, however the concrete persons are released from responsibility due to the fact that the authorized bodies failed to collect standard facts, stipulated by the legislation, proving their guilt and consequently to move to the next stage.

82. Due to the abovementioned, the disputed norm, with its essence does not concern to abrogation of criminality/punishability and mitigation of sentence and consequently does not contradicts paragraph 5 of Article 42 of the Constitution of Georgia.

The issue of constitutionality of the normative content of the disputed norm with respect to paragraph 1 of Article 42 of the Constitution of Georgia, which prohibits consideration of criminal prosecution cases started before the first of October, 2010 with participation of juries

83. The Claimant Valeri Gelbakhiani also requests to recognize the disputed norm unconstitutional with respect to Article 42 of the Constitution of Georgia. According to him, the disputed norm deprives him of the possibility to have his case considered with participation of juries and consequently his right to fair trial is infringed. The claimant stated that he does not trust the court, as he does not expect to receive an impartial decision. He considers that consideration of his case by juries would give him better chance to defend his own interests as well as to enjoy effectively the right to fair trial. According to him “when there is no confidence between justice and people, one should seek such institution that

will be trusted more and this confidence vote should be expressed in existence of this type of courts".

84. In order to determine, whether or not the disputed norm infringes the right to fair trial, first of all it shall be decided whether access to the jury court is protected by the right to fair trial. Even, by the Recording Notice of 20 December, 2013 N1/6/557, the Constitutional Court admitted the claim with a view to deciding the constitutionality of the disputed norm with respect to the mentioned constitutional provision, however as the Jury Court is a novation in the Georgian Justice system and it never was discussed by the constitutional court, we consider it necessary to make additional explanations.

85. According to paragraph 1 of Article 42 of the Constitution of Georgia, "every person has the right to appeal to the court for protection of his rights and freedoms". This norm has a fundamental meaning for functioning democratic and rule of law based state. It is one of the most important constitutional guarantees of protection of human rights. This is an instrumental right, which on the one hand is the mean of protection of other rights and interests, and on the other hand - the most important mean to balance different powers". (Decision of the Constitutional Court of Georgia N1/3/421,422 dated 10 November, 2019 on the case: " Georgian citizens - Giorgi kipiani and Avtandil Ungiadze versus the Parliament of Georgia", II, 1). The court also mentioned, that "the right to fair trial... ensures effective realization of constitutional right and protection from unjustifiable interference with the right" (Decision of the Constitutional Court of Georgia N1/1/403,427 dated 19 December, 2008 on the case "Canadian citizen Husein Ali and Georgian citizen Elene Kirakosian vesus the Parliament of Georgia", II,1).

86. As the main function of the rule of law based state is assurance of proper realization of rights and freedoms of person, the right to fair trial - as some measurement of assurance of the principle of rule of law based state implies the possibility to protect all goods at court, which in its essence is the right. "The main guarantee of enjoying any right entirely is exactly the right to protect it at the court. If there is no possibility to avoid violation of right or restitution of violated right, the legal leverage, enjoyment of right would be itself up in the air" (Decision N1/466 of the Constitutional Court of Georgia dated 28 June, 2010 on the case "Ombudsman of Georgia versus the Parliament of Georgia", II,14).

87. The Constitutional Court mentioned several times, that in order to guarantee comprehensive protection of human rights, the right to fair trial shall assure an individual at least with the following: "the right to apply to the fair court, to request public hearing of his/her case, to express his/her suggestions and protect himself personally or by advocate, to have hearings held in reasonable, restricted time-frames and to have his/her case considered by independent, impartial court" (Decision of the Constitutional Court of Georgia N. 1/3/393,397 dated 15 December, 2006 on the case "Onise Mebonia and Vakhtang Masurashvili against the parliament of Georgia", II,1).

88. Consequently, the right to fair trial consists of several legal components, unity of which shall assure the real possibility of a person to protect and restore his/her rights adequately on the one hand and to protect a person from arbitrariness during interference with the person's rights/freedoms by the State, on the other hand. Therefore, assurance by sufficient procedural means of any legal component of the right to fair trial, both in formal and material means, is a constitutional obligation of the State. "The guarantees of the right to fair trial provided by the legislation, shall make people feel that they are able to protect their rights/ legitimate interests at the court, as well as shall cause a perception by public about impartiality of court. The transparent, adequate and sufficient procedures assure the legitimacy of court decisions, their recognition by public what is crucially important for increase and strengthening public trust towards the court and towards the authorities as well", (Decision of the Constitutional Court of Georgia N.3/2/574 on the case "Georgian citizen Giorgi Ugulava versus the Parliament of Georgia, dated 23 May, 2014, II, 59).

89. It is worth mentioning that the Constitutional Court has underlined several times that it is the obligation of authorities to assure adequacy of justice system with a view to comprehensive conduction of justice and consequently to guarantee effective use of the right to fair trial. "Effective and comprehensive enjoyment of rights guaranteed by the Article 42 - are both: foundation and the aim of determination of court authority by the Constitution. In this light, Article 42 of the Constitution requires from the State to guarantee determination of court authority competences in the way that it would guarantee adequate protection of constitutional rights through the judiciary. Access to the court and requirement of effective means of protection through it should coincide with the competence of the court to react adequately on the violation of the right. Otherwise, enjoyment of the right itself would be threatened. …. Accordingly, the authority of the judiciary should be the effective possibility for realization of Article 42, simultaneously, constitutional guarantee of full enjoyment of the right to access to the court" (Constitutional Courts decision N1/466 dated 28 June, 2010 on the case "Ombudsman of Georgia versus the Parliament of Georgia", II, 22).

90. While stressing the institutional guarantees, the functions conducted within the frames of justice are of crucial importance, as they are indispensable for protection of concrete right. So the existence of necessary, adequate, effective and sufficient functions aiming to protection of human rights are the starting point for determination of the fair court's frames. Consequently, how and based on which mechanisms these functions will be allocated, it should be very important during discussion of the scopes of the fair court, taking into consideration to what extent the existing court system meets the requirements of the goals of impartial administration of justice.

91. Any state has wide margins of appreciation concerning arrangement of judicial system. The main requirement by which any democratic and rule of based state is limited - is guaranteeing that the court system meets its main chal-

lenge – to assure impartial justice. To reach this goal, the court shall be equipped with all necessary, adequate and sufficient means. It is obvious that there is not a single model of court authority system, which assures effective, independent, qualified and fair justice. The state, on any stage of its development, can carry our reform of the judicial system in order to strengthen and increase its independence, accessibility, trust. During this process the court structure, formation rule, determination of competences and jurisdiction, etc. may be modified. In this light, Juries Court can be considered as a stage of the reform.

92. The main idea of administration of justice with the participation of juries and its goal serves to increase of democracy in authorities generally and in this light establishment/strengthening of democracy component in the court authority. Public's trust to the authorities is normally increased by participation of the public in any sphere and level of governance.

93. More inclusion of public and accordingly introduction of more independence component into court authority sharply oppose the necessity of equipment of justice with more competencies and qualifications. It is obvious, that both arguments are very important for administration of fair justice. The authorities of democratic and rule of law based state are unconventionally restricted by the obligation to assure as an independent, as well as qualified and competent court. However, there are broad margins of appreciation by which legal instruments and within which system could be achieved this goal.

94. According to paragraph 5 of Article 82 of the Constitution of Georgia (constitutional law of Georgia N.3272-ისთ, dated 6 February, 2004), "The cases shall be considered by juries before the courts of general jurisdiction in accordance with a procedure and in cases prescribed by law". Simultaneously, stemming from the content of the same constitutional norm, it is obvious, that the state authority determines the rule and cases of application of this institute. Obviously, it does not mean that authorities have unlimited possibilities, they are restricted by the constitutional order and by the fundamental rights first of all. Therefore the legislator is still obliged to bring the law regulating these issues in full compliance with the constitutional requirements concerning enjoinment of just court, but also not to cause any unjustified violation of any other right.

95. As Jury court is the part of the court system stipulated by the Constitution of Georgia, it falls under protection of Article 42 of the Constitution dealing with just court guarantees. As the aim of court authority competences is adequate and comprehensive protection of human rights, the function of constitutional system dealing with justice shall respond to the requirements of comprehensive enjoyment the right of just court. Consequently, competence of all bodies administering justice, the instruments necessary to carry out their activities as well as frames of accessibility to the court, potentially are subject to assessment against the first paragraph of Article 42 of the Constitution.

96. For correct comprehension of the frames of the just court, it should

be stressed that absence of access to consideration of the case by juries does not necessarily and always lead to violation of the right to fair trial. According to the Constitution of Georgia, Juries court does not perform unique (having no alternative) function within the justice system. It is not unconventionally necessary for full protection of the rights. It would principally incorrect to argue that the principle of fair trial is violated while the case is considered without juries if a person is guaranteed with all other legal components of fair trial. It is also groundless to stress that consideration of the case by jury's participation in all cases assures better protection of the right and consequently it is an integral component of the administration of justice in absence of which the right to fair trial is violated.

97. In accordance with Georgian legislation, consideration of case by juries before court (within the applicable frames) is an equal alternative to consideration of the case without juries. In particular, within the frames of competences determined for juries, the common courts consider the same issues with and without participation of juries and have the possibility to take the same decision. The circumstances, that the accused has a choice to have his/her case considered by juries or by regular rule of court, only underlines that these are instruments of essentially equal competences and legal possibilities.

98. Due to the abovementioned, juries' court is an alternative form of administration of justice within the frames of competences of common jurisdiction courts, which should respond to all necessary requirements of enjoyment of the right to fair trial.

99. Effective protection of the right as well as fair administration cannot be assured either by juries or by a judge if they are not equipped with necessary, effective and sufficient guarantees for protection of the rights, such as institutional and personal independence and impartiality guarantees, as well as all necessary procedures of legal proceedings. Accordingly, any system, including juries' court shall respond to all requirements and challenges administration of justice shall serve to.

100. At the same time, when legislation offers the possibility of considering case by juries before court as well as administration of justice without juries as an alternative, it authorizes a person to make a choice and decide which way he/she considers more effective and correct for obtaining impartial decision and administration of fair justice. The possibility of such choice increases his/her trust to the court, as he/she decides himself/herself which could shall consider his/her case. Definitely, he/she chooses the court she/he considers more professional, effective, independent etc.

101. The Constitutional Court stressed several times, that fair administration of justice requires not only equipment of court by all necessary, sufficient and adequate procedures, bur also perception of impartiality of court by the contestants as well. Perception of fairness of the court, first of all, is assured and determined by institutional and personal independence, impartiality of court

(judges), as well as well-grounded decision. In this light, trust of contestants and generally of the public to the court institution is very important. This is guaranteed by other factors as well. One of such factors is the possibility of person to choose the institution he/she considers more foreseeable and convincing, what consequently increases the person's trust to the institution.

102. Despite the fact, that for comprehensive protection of the right, the juries' court is not un-alternative, unconventionally necessary mechanism, during assurance of accessibility of juries' court, the legislator is restricted by constitutional order and fundamental right, including the obligation to protect the equality right before the law. However, when the legislation offers the choice to one category to decide which institution they trust more, deprive the same category of this right definitely leads to violation of their rights.

103. The Constitutional Court already determined, that the disputed norm with this legal content contradicts with Article 14 of the Constitution of Georgia. Unconstitutionality of the norm was caused by the fact that the Respondent could not substantiate the absolute necessity of treating equally of substantively equal persons. There is not objective justification why some persons can enjoy the right to consider their case by juries before court and the others cannot, only because they committed their crime in different time. Especially, when consideration of the case by court coincides in time, when there is already the legislator's will to apply the right of enjoyment of juries' institution to similar category of crimes and concrete circle.

104. As a result the court determined that deprivation of the part of essentially equal persons of the right to access to the juries' court was unfair and groundless. Consequently, discrimination of differentiation from the point of view of equal accessibility to the court has been established, which in this case amounts to violation of the right to fair trial for those (discriminated) persons.

Constitutionality of the disputed norm with respect to paragraph 2 of Article 42 of the Constitution of Georgia

105. The Claimant Valeri Gelbakhiani in his constitutional claim also requires as follows: a) to recognize unconstitutional those normative content of paragraph 3 of Article 329 of the Criminal Procedure Code which prohibits the use of maximum 9-month accusation period before court hearings, stipulated by this Code to the criminal prosecution cases started before the first of October, 2010 with respect to paragraph 2 and 3 of Article 42 of the Constitution of Georgia b) to recognize as unconstitutional the normative content of the disputed norm which prohibits consideration of criminal cases by juries before court on the criminal prosecution cases, started before the first of October, 2010 with respect to paragraph 2 of Article 42 of the Constitution of Georgia

106. The first paragraph of Article 42 of the Constitution of Georgia determines the right to fair trial, and paragraph 2 of the same Article protects one of the important components of the fair trial, in particular - administration of

justice in accordance with the rules of jurisdiction. In the present decision, in the light of goals of the present case, the court explained the importance and frames of the right to fair trial. Also, in order to enjoy this right it is equally important, legal proceedings to be held in accordance with the rules of jurisdiction. Also, the case shall be considered by an authorized and competent court in accordance with the constitution and law.

107. It should be mentioned, that during consideration of the case, the problematic issues of the norm had been specified and became clear. In particular, position of Valeri Gelbakhiani towards unconstitutionality of the norm has been clearly framed by claiming that due to deprivation of the right of having a case considered by juries before the court, the right of equality before the law (Article 14 of the Constitution) and right to fair trial (the first paragraph of Article 42 of the Constitution) as well as paragraph 5 of Article 42 of the Constitution has been violated. Therefore, his arguments concerned only to violation of the mentioned provisions of the Constitution. This circumstance made for the court clear and persuasive those motives/reasons, which in the opinion of the claimant, caused unconstitutionality of the norm. The court was not provided by the party by any argument concerning problematic character and as a result – violation of rights by this reason of the disputed norm, neither in connection with paragraph 2 of Article 42 of the constitution, nor in connection with the first paragraph of Article 42 of the Constitution relative to normative content of the disputed norm, concerning prohibition of application of 9 month accusation period based on the Criminal Procedure Code of 1998. In particular, the claimant did not specify any evidence, which could show clearly enough that 12 month criminal prosecution period could cause intervention or threaten to intervene the right guaranteed by paragraphs 1 and 2 of Article 42 of the Constitution, as well as prohibition of the access to have a case considered by juries court is somehow connected to the right assured by paragraph 2 of Article 42 of the Constitution and to the risks of unconstitutional restriction of his right, which would give the possibility to the court to assess the constitutionality of the disputed norm in this light.

108. Stemming from the above-mentioned, the Constitutional Court of Georgia decides, that the claim of claimant Valeri Gelbakhiani shall not be satisfied in the frames of assessment of the constitutionality of the disputed norm and its recognition as unconstitutional in the part concerning: a) constitutionality of the normative content of part 3 of Article 329 of the Criminal Procedural Code, prohibiting possibility of the use of maximum 9 month pretrial detention term for defendants before pretrial sittings on the cases started before the first of October, 2010 stipulated by this Code with respect to paragraphs 1 and 2 of Article 42 of the Constitution; b) constitutionality of the normative content of part 3 of Article 329 of the Criminal Procedure Code prohibiting consideration of the case by juries before court, stipulated by this Code on the cases started before the first of October, 2010 with respect to paragraph 2 of Article 42 of the Constitution of Georgia.

II

Resolutive Part

Having been guided by subparagraph paragraphs 1 and 2 of Article 89 of the Constitution of Georgia, subparagraph "e" of paragraph of Article 19, paragraph 2 of Article 21, paragraphs 2 and 3 of Article 25, subparagraph "a" of the first paragraph of Article 39, paragraphs: 2, 4, 7, and 8 of Article 43 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 the Constitutional Legal Proceedings",

THE CONSTITUTIONAL COURT OF GEORGIA
RULES:

1. To uphold partially Constitutional Claim N. 557 (Citizen of Georgia Valeri Gelbakhiani versus the Parliament of Georgia). To recognize as unconstitutional the following:

a) Normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia of 9th October, 2009 with respect to Article 14 of the Constitution of Georgia, prohibiting possibility of application of maximum 9 month pretrial detention term before pretrial sitting on the cases started before the first of October, 2010.

b) Normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia of 9th October, 2009 with respect to Article 14 and the first paragraph of Article 42 of the Constitution of Georgia, prohibiting consideration of the case by juries before court, stipulated by the same Code on the cases started before the first of October.

2. Not to uphold Constitutional Claim N. 557 (Citizen Valeri Gelbakhiani versus the Parliament of Georgia) in the part concerning:

a) Constitutionality of the normative content of part 3 of Article 329 of the Criminal Procedure Code of 9th October, 2009 with respect to paragraphs 1, 2 and 5 of Article 42 of the Constitution of Georgia concerning prohibition of application of 9 month pretrial detention term on the criminal prosecution cases started before this Code became effective.

b) Constitutionality of the normative content of paragraph 3 of Article 329 of the Criminal Procedure Code of 9th October with respect to paragraphs 2 and 5 of Article 42 of the Constitution of Georgia prohibiting consideration of the cases, started before this Code became effective by juries before court.

3. To uphold partially Constitutional Claim N.571 (Citizen of Georgia Mamuka Nikolaishvili versus the Parliament of Georgia). To recognize as unconstitutional normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia of 9th October, 2009 with respect to Article 14 of the Constitution of Georgia, prohibiting possibility of application of maximum 9 month pretrial detention term for defendants before pretrial sitting on the criminal prosecution cases, which started before this Code came into effect.

4. Not to be upheld the Constitutional Claim N. 571 (Citizen of Georgia Mamuka Nikolaishvili versus the Parliament of Georgia) in the part of the constitutional claim concerning constitutionality of normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia with respect to second sentence of paragraph 5 of Article 42 of the Constitution of Georgia, prohibiting possibility of application of maximum 9 month pretrial detention term for defendants before pretrial sitting on the criminal prosecution cases, which started before this Code came into effect.

5. To uphold partially Constitutional Claim N. 576 (Citizen of Georgia Alexandre Silagadze versus the parliament of Georgia). To recognize as unconstitutional normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia of 9th October, 2009 with respect to Article 14 of the Constitution of Georgia, prohibiting possibility of application of maximum 9 month pretrial detention term for defendants before pretrial sitting on the criminal prosecution cases, which started before this Code came into effect.

6. Not to be upheld Constitutional Claim N. 576 (Citizen of Georgia Alexandre Silagadze versus the Parliament of Georgia) in the part of the constitutional claim concerning constitutionality of normative content of part 3 of Article 329 of the Criminal Procedure Code of Georgia with respect to second sentence of paragraph 5 of Article 42 of the Constitution of Georgia, prohibits the possibility of the use of maximum 9 month pretrial detention term for defendants before pretrial sittings on the criminal prosecution cases started before this Code came into effect.

7. The normative content of part 3 of Article 329 of the Criminal Procedure Code of 9th October, 2009, prohibiting consideration of the case by juries before court, stipulated by this Code on the cases started before the Code became effective, shall be legally invalid from the moment of promulgation of this judgment.

8. To postpone execution of the decision of the Constitutional Court of Georgia till the first of May, 2015 in the part of recognition of part 3 of Article 329 of the Criminal Procedure Code of Georgia as legally invalid from the moment of promulgation of this judgment, which prohibits consideration of the cases started before this Code became effective by juries before court.

9. To postpone the execution of the decision of the Constitutional Court till the first of May, 2015 in the part concerning recognition as legally invalid of part 3 of Article 329 of the Criminal Procedure Code of Georgia of 9th October 2009, which prohibits application of maximum 9 month pretrial detention term for defendants before pretrial sitting on the criminal prosecution cases, started before this Code came into effect.

10. The judgment shall come into force from the moment of its public delivery at the hearing of the Constitutional Court.

11. The judgment is final and not subject to appeal or revision.

12. Copies of the present judgment shall be sent to the parties to the case, the president of Georgia, the government of Georgia and the supreme court of Georgia;

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

Members of the Board:

Konstantine Vardzelashvili
Ketevan Eremadze
Maia Kopaleishvili