CITIZEN OF GEORGIA GIORGI UGULAVA
V. THE PARLIAMENT OF GEORGIA

N3/1/574 Batumi, May 23, 2014

Composition of the Plenum:

Giorgi Papuashvili – Chairman of the Hearing;
Konstantine Vardzelashvili–Member;
Ketevan Eremadze – Member, Judge Rapporteur;
Maia Kopaleishvili – Member;
Zaza Tavadze – Member;
Otar Sichinava – Member;
Lali Papiashvili – Member;
Tamaz Tsabutashvili – Member.

Secretary of the Hearing:

Darejan Tsaligava

Title of the Case:

Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia.

Subject of the Dispute:

a) Constitutionality of Article 159 of the Criminal Procedure Code of Georgia with respect to the paragraphs1 and 2 of Article 29 of the Constitution of Georgia; b) Constitutionality of the second sentence of section 1 of Article 160 of the Criminal Procedure Code of Georgia with respect to paragraphs1 and 3 of Article 42 of the Constitution of Georgia.

Participants of the Hearing:

Claimant – Giorgi Ugulava, representatives of the Claimant – Beka Basilaia and Tinatin Siradze; Representatives of the Parliament of Georgia–Tamar Meskhia and Bachana Surmava; Experts – Mamuka Jgenti, Mamuka Abuladze and Ian Mikallefi; Witness – Irakli Abesadze.

I
Descriptive Part

1. On February 11, 2014 Constitutional Claim (Registration No. 574) was lodged to the Constitutional Court of Georgia by citizen of Georgia Giorgi Ugulava.

2. The Plenum of the Constitutional Court of Georgia, based on the proposition of the Chairman of the Constitutional Court, decided that the case in its essence may raise an unusual and particularly significant legal problem related to interpretation and/or application of the Constitution of Georgia and

with the Recording Notice No. 3/1/574 dated February 18, 2014 admitted the case for consideration by the Plenum. Preliminary session of the Plenum of the Constitutional Court on the issue of admissibility of the Constitutional Claim was held with oral hearing on February 25, 2014.With the recording notice No. 3/2/574 dated February 27, 2014 the Plenum of the Constitutional Court found Constitutional Claim No. 574 admissible for consideration on the merits. Hearings on the merits were held on 10th and 11th of April, 2014.

3. Constitutional Claim indicates following provisions as legal basis for submission of the Claim: sub-section "f" of paragraph1 of Article 89 of the Constitution of Georgia; sub-section "e" of paragraph1 of Article 19, section 5 of Article 25 and sub-section "a" of paragraph1 of Article 39 of the Organic Law of Georgia on the Constitutional Court; paragraph2 of Article 1, Articles 15 and 16 of the Law of Georgia on the Constitutional Legal Proceedings.

4. The Claimant requests to find Article 159 and second sentence of section 1 of Article 160 of the Criminal Procedure Code of Georgia unconstitutional.

5. Pursuant to Article 159 of the Criminal Procedure Code of Georgia, "The defendant maybe dismissed from the office (workplace) if there is a probable cause that by holding the office (staying at the workplace) he/she will hinder investigation, compensation of the damage caused by the crime or the defendant will continue to be engaged in criminal activity." Pursuant to section 1 of Article 160 of the same Code, after the decision on dismissal of the accused from the office (workplace), the prosecutor, depending on the place of investigation, shall submit written motion to the court, which, if sufficient ground exists, shall issue the order authorising the above-mentioned measure. The court shall be authorised to consider the motion without oral hearing.

6. Constitutional Claim notes, that in 2010 The Claimant Giorgi Ugulava was elected as a Mayor of the capital of Georgia – Tbilisi for 4 year term. Since December 18, 2013 the Claimant is under criminal prosecution. On December21, 2013 Prosecutor General's office submitted a motion to Tbilisi City Court requesting to dismiss Giorgi Ugulava from the office until the summarizing decision on the case was rendered. As the Claimant states, in view of the high public interest towards the issue he several times indicated his wish and readiness to have the motion on his dismissal from the office discussed at the oral hearing where he would have a chance to rebut the arguments of the Prosecution. The court did not take these circumstances into account, considered the motion without oral hearing and on December22, 2013 issued an order dismissing the accused Giorgi Ugulava from the office until the decision on the merits was rendered.

7. The Claimant requests to find Article 159 of the Criminal Procedure Code of Georgia unconstitutional with respect to paragraphs 1 and 2 of Article 29 of the Constitution of Georgia. He considers that its normative content, which allows for dismissal from the office (workplace) of persons elected as a result of secret ballot in the universal, equal and direct elections of local self-government, is unconstitutional.

8. Pursuant to paragraphs 1 and 2 of Article 29 of the Constitution of Georgia, „1. Every citizen of Georgia shall have the right to hold any public office if they meet the requirements established by law. 2. The requirements for public service shall be defined by Law."

9. The Claimant argues that the normative content of Article 159 of the Criminal Procedure Code of Georgia, which allows for dismissal of the Mayor of Tbilisi from the office, infringes his constitutionally protected right to perform authorities conferred upon him for the period of 4 years by Tbilisi electorate as a result of based on universal, equal, and direct elections through secret ballot, as well as his right to be protected from unfounded, groundless and frivolous dismissal. Besides, Claimant's representatives draw attention to the importance of the interest that the Claimant has with respect to uninterrupted performance of the authorities conferred upon him by the electorate during the term of his election. In light of this, apart from the interest of an individual, the given case concerns interests of the electorate of the corresponding self-governing unit, to have the issues of local importance managed by the representative directly elected by them.

10. At the hearing on the merits the Claimant pointed out that the Criminal Procedure Code of Georgia envisions the possibility of dismissal of the accused person from the office (workplace) until rendering the summarizing court decision, which is related to long time frames. At the same time, the term of the office of the Mayor of Tbilisi, as an elected official, is specifically fixed, which means that in case of his dismissal from the office as a temporary measure, given the objective reality, he/she will literally be dismissed from the office since by the time of completion of the hearing of the case in the court due to expiry of the relevant term, it will be impossible to restore him to the office. The Claimant also notes that even for the remaining period of the office, in case of acquittal provisions regulating the process of restoration to the office are non-existent.

11. At the same time, the Claimant argues that when considering motion on dismissal of the accused person from the office, the argumentativeness of the prosecution is not being assessed, and consequently, it is impossible for the necessity of the dismissal to be duly substantiated. Thereby, as a result of the operation of the disputed provision, dismissal of such a high official as is the directly elected Mayor of the City may be based solely on the supposition of the crime. Therefore, the Claimant contends that it should be impermissible to limit the elected official of local self-government to freely execute his/her functions until the summarizing decision of the court.

12. At the hearing Claimant's representatives pointed out that dismissal of an official from the office as envisioned by the disputed norm is not a less constraining measure in comparison with other preventive measures of the Criminal Procedure Code (for example, bail, personal bail, etc.), since upon dismissal from the office one is limited in his right to labour, right to free development and other rights. As regards detention as a preventive measure, the Claimant emphasises

that in the course of investigation as well as hearings at the court, the accused has a right to request abolishment of the detention or its substitution by a lighter measure. Therefore, the legislation allows for substitution of the detention by a less limiting preventive measure or its abolishment altogether, even within one week from ordering the detention. The accused dismissed from the office has no such possibility.

13. Besides, the Claimant noted that the maximum term of the detention is 9 months. Dismissal from the office works till issuance of the summarizing decision on the case, the time frames for which are not set by the procedural legislation. Herewith, detention of the Claimant would not automatically result in suspension of his official duties since the corresponding provisions of the Law of Georgia on Public Service do not apply towards the Claimant and there are no other provisions in the legislation which would regulate the issue of suspension/non-suspension of the office of the Mayor in case of his/her detention. Consequently, pursuant to the Claimant, Claimant's dismissal from the office may even be considered as a harsher measure than detention.

14. The Claimant also noted at the hearing that in general, dismissal of the accused from the office when due grounds exist is acceptable for him, however in the given case, the court should not be deciding on the dismissal of the Mayor of the City unilaterally. The Claimant states that along with development of democratic state the organs of local self-government are considered as an independent branch. Therefore, since the source of legitimacy of the Mayor of the City is the residents of the specific city, and given that his activities are separated from the central government, decision on his dismissal from the office should be taken with participation of the organs of local self-government.

15. The Claimant points out that the authority and activities of the Mayor of the City are determined by the Organic Law, which, according to the Law of Georgia on Normative Acts stands at a higher level of hierarchy in comparison with the Criminal Procedure Code of Georgia. Consequently, the disputed provision, which allows for dismissal of the official elected on the basis of the Organic Law, should be found unconstitutional.

16. The Claimant also notes that it is incomprehensible why the Mayor of the City should not have the same means of protection, as for example, the Member of Parliament has, given that the source of legitimacy of both subjects is the electorate. Therefore, in light of the fact that the authority of the Mayor of the City is being limited by the Criminal Procedure Code, such a decision is issued by the court unilaterally and no institutions of local self-government take part in the decision-making process – the disputed norm is unconstitutional and contradicts Article 29 of the Constitution of Georgia.

17. The Claimant argues that Article 159 of the Criminal Procedure Code of Georgia also contradicts the principle of foreseeability. As its name suggests, the norm only regulates the grounds for dismissal of the accused from the office (workplace), and does not entail categories of those accused towards whom this

procedural action may be used. Article 159 of the Criminal Procedure Code of Georgia does not explicitly define circle of people towards whom this authority-limiting norm may be used. At the same time, pursuant to section 3 of Article 10 of the Criminal Procedure Code, ”Order of the Court on removal of the accused from the office (workplace) shall be binding upon director of relevant institution, enterprise and organisation. After receiving the order, he/she is obliged to enforce it without delay and inform the court of its enforcement. ”Consequently, the Claimant contends, that dismissal may only be used towards the employee of such enterprise (institution), which has a manager, since the legislator obliges the manager to enforce the decision on dismissal of the accused. Pursuant to the Claimant, any other interpretation of the law is impossible, since in that case the very person dismissed from the office would be obliged to enforce the decision on his dismissal himself.

18. The Claimant also notes that pursuant to Article 162 of the Criminal Procedure Code, the issue of dismissal of certain public official (their removal from the execution of official duties) is regulated by special legislation. The given provision provides that the issue of dismissal of the Member of Georgian Parliament, MPs of the highest representative organs of the Autonomous Republics of Abkhazia and Ajara, Public Defender of Georgia, Judge and General Auditor, shall be decided pursuant to the rule established by the legislation of Georgia. At the same time, Article 162 of the Criminal Procedure Code of Georgia does not contain exhaustive list of people whose dismissal shall be regulated by special legislation. For example, the norm does not envision members of the Board of the National Bank of Georgia. The Claimant asserts that structural placement of Article 162 of the Criminal Procedure Code of Georgia with those norms which determine grounds for dismissal of the accused from the office, rule for the issuance and execution of the order, is a ground for the common courts to interpret Article 159 of the Criminal Procedural Code of Georgia in such a way, as if on its basis it is possible to dismiss any accused from the office, other than the persons noted in Article 162. In Claimant’s case that is precisely how the court interpreted Article 159 of the Criminal Procedure Code.

19. The Claimant considers that the Constitutional Court must assess the disputed norm within the framework of the legal order established by the Constitution and taking into account the founding principles of the Constitution. It also refers to those provisions of the Constitution which provide for the principles of democratic state and separation of powers.

20. Constitutional Claim states that pursuant to the order of the Tbilisi City Court dated December22 2013, prior to the summarizing decision of the Court, “ensuring of enforcement” of the order on dismissal of the Mayor of Tbilisi, Giorgi Ugulava from the office has been entrusted to the Prosecutor of the department of the Prosecutor General’s office. According to the Claimant, as a result of interpretation of the disputed provision, the court is authorised to impose upon the organs of the prosecution, which form part of the executive

government, to execute orders of the court, which contradicts the constitutional principle of separation of powers.

21. At the hearing on the merits The Claimant noted that in the given case, it is necessary to widely interpret Article 5 of the Constitution, pursuant to which state authority shall be exercised under the principle of separation of powers, on the one hand, and on the other hand, 2nd sentence of paragraph 1 of Article 101^1, pursuant to which executive bodies of local self-government and the Mayor shall be accountable to representative bodies of local self-government. In Claimant's case, election of the Mayor of the City took place on the basis of the principle of separation of powers, while his dismissal from the office was in contradiction of this principle since the court unilaterally decided on this matter and entrusted the executive organ – Prosecutor's office - to enforce the decision.

22. The Claimant also requests to find the 2nd sentence of section 1 of Article 160 of the Criminal Procedure Code of Georgia unconstitutional with respect to paragraphs 1 and 3 of Article 42 of the Constitution of Georgia.

23. Pursuant to paragraph 1 of Article 42 of the Constitution of Georgia, "everyone shall have the right to apply to the court for protection of his/her rights and freedoms."

24. The Claimant argues that the right to fair trial consolidated in paragraph1 of Article 42 of the Constitution of Georgia envisions not only access to justice, but also ensures full legal protection of the person. In order to ensure fair consideration of the specific case and rendering of the objective decision, this right entails following minimum opportunities: right of a person to address the court, to request fair public hearing, express his/her opinions and protect his/her interests personally or by means of defence counsel.

25. The Claimant notes that the 2nd sentence of section1 of Article 160 of the Criminal Procedure Code of Georgia, which provides for the possibility of deciding on the motion for dismissal of the accused from the office (workplace) without oral hearing on the matter, is a norm which limits rights of the accused. Literal as well as contextual interpretation of the provision only suggests that its end purpose is to give to the judge full discretion to consider the motion on dismissal from the office either without oral hearing, or with oral hearing and participation of the parties. The Claimant asserts that as per the established practice, the courts decide on the motion on dismissal of the accused from the office without oral hearing. The Claimant states that the disputed norm does not refer to the legitimate purpose of the limitation of the right and, therefore, no proportionality can be observed between the intended purpose and the prescribed limitation.

26. Pursuant to the Claimant, the disputed norm infringes his right to adversarial justice, which is protected under paragraph3 of Article 85 of the Constitution. According to this provision, „Legal proceedings shall be conducted on the basis of equality and competition of the parties."

27. Pursuant to paragraph 3 of Article 42 of the Constitution of Georgia "The right to a defence shall be guaranteed."

28. The Claimant notes that the right to defence includes opportunity to present one's own position personally and opportunity to have defence counsel. Without a person's right to defence and public hearing it is impossible to have an effective impact on the procedure and the outcome. Consequently, the Claimant contends that the disputed norm also infringes his right to defence.

29. The Claimant points out that in the given case the disputed norm is of general character and does not envision its application only in those circumstances where it would be permissible to conduct legal proceedings related to usage of procedural mechanisms limiting his right without oral hearing and without his participation.

30. In support of its arguments the Claimant brings in the case-law of the Constitutional Court of Georgia and of the European Court of Human Rights.

31. The Respondent rejected the Claim and pointed out that the basic right envisioned by Article 29 of the Constitution of Georgia is not absolute. Termination of official authorities is related to multitude of factors envisioned by legislation. The State is authorised to set a limit to public authority and use this method to intervene into the fundamental right of an individual. This is justified when such intervention is envisioned on the one hand by the Constitution and laws, and on the other hand, compulsory actions of the State to terminate a person's office if he/she has breached the law.

32. The Respondent contends that dismissal of the person from the office as prescribed by the disputed norm is a less limiting procedural action in comparison with preventive measures envisioned by Article 199 of the Criminal Procedure Code, since it is used only when the actions of the accused are committed during his/her term of the office. In this case the purpose of the disputed norm is investigation of the crime, reimbursement of the harm caused as a result of the crime and prevention of the criminal action. At the same time, this measure is not a form of liability since it is of temporary nature and is used prior to issuance of the summarizing decision on the case.

33. Representatives of the Respondent indicate that in comparison with the preventive measures of the Criminal Procedure Code, the measure envisioned by the disputed provision is the most reasonable and proportionate for achieving legitimate purposes. The Respondent explains that imprisonment of a person is a much stricter measure since in this case not only is the accused suspended from the office, but his freedom is also being limited. The Respondent also noted that in this case the Claimant remains to be the Mayor of Tbilisi, although his authority is suspended until the summarizing decision is rendered. As regards other preventive measures, such as bail or personal bail, these measures cannot achieve the legitimate purposes which are protected by the disputed provision. For example, the person who has been ordered bail still has access to those evidences which may be important for investigation.

34. Besides, in the Respondent's opinion the Mayor of the City should not be entitled to the same means of protection as are the Members of the Parliament. Immunity of the member of the city assembly and of the Mayor is not determined by the Constitution and consequently the will of the legislature is clear that these persons should not be equated to those persons whose immunity is guaranteed by the Constitution.

35. At the oral hearing of the case the Respondent's representative noted that since dismissal of the accused is not a preventive measure prescribed by Article 199 of the Criminal Procedure Code, the rules for the alternation of the preventive measures prescribed by Article 206 of the same Code should not be applicable to the accused. Consequently, the only occasion when a person may be restored to the office is the acquittal by the court. In this case, if the term of the office of the person has not expired, he will be automatically restored to the office and there is no need for any institution to issue a separate act for this purpose.

36. The Respondent also disagrees with unconstitutionality of the second sentence of section 1 of Article 160 of the Criminal Procedure Code with respect to paragraphs 1 and 3 of Article 42 of the Constitution. According to the Respondent's definition, court's discretion to hold or not to hold oral hearing for consideration of a specific motion is conditioned by the fact that the Court may already have investigated factual circumstances in the course of consideration of another motion, and yet another investigation may hinder effective and timely execution of justice. The Respondent also notes that the accused has a right to present his opinions and evidences to the court and use his right to oral hearing upon appeal of the order.

37. According to the explanations provided by the invited expert, Mamuka Jgenti, suspension of the office of a person on the basis of Article 159 of the Criminal Procedure Code, in its essence, is equal to his dismissal. In his opinion, in deciding on dismissal of the elected official from the office, the organs of local self-government should actively be engaged. Moreover, pursuant to the European standards, when the issue concerns an elected official, dismissal from the office is considered to be a stricter measure than one's detention.

38. Expert Mamuka Abuladze who is the president of the National Association of Local Self-Government of Georgia, and co-chair of the Conference on Local Self-Government of the Eastern Partnership of the European Union, stated that when the issue relates to dismissal of the directly elected Mayor of the City, the procedures should be much more straightforward and persuasive than it is prescribed by the disputed provision. He noted that dismissal of the directly elected Mayor should only take place if the Mayor is found guilty.

39. Expert Ian Mikallefi, who held the post of the president of the Local Self-Government House of Local and Regional Government Congress of the European Council, and used to be co-reporter of the monitoring committee of the European Council Congress in Georgia, indicated that the dismissal of an elected official should in no case be used unless it is explicitly provided for by the law. In

his opinion, no single European country has a legislation which would authorise the court to dismiss an elected official from the office for the sole reason that charges have been brought against him/her. Pursuant to the European standards, a person who is elected in the office is an expression of the sovereignty of the nation and his/her dismissal from the office should be possible only in exceptional circumstances. Thereby, the fate of political authority, which the elected official has, is to be decided by those people who elected him. The expert also indicated that the court can use other means to achieve the legitimate purposes. For example, the court may order to take certain documents from the institution, so that the accused may not decide to destroy them. The court may also forbid the accused to communicate with witnesses if it can be reasonably established that the accused may exercise pressure on them.

40. As witness of the case, acting Deputy Mayor Irakli Abesadze noted, certain problems were created at the City Hall with respect to the execution of the court order. In his view, Article 159 of the Criminal Procedure Code should not extend to the Mayor of Tbilisi. In light of the specificity of the disputed norm, it is impossible to have a supervisor to dismiss the Mayor of Tbilisi given that the Mayor has no supervisor. Witness indicated that the disputed norm is not self-enforceable and pursuant to section 2 of Article 160 of the Criminal Procedure Code, enforcement of the dismissal of a person from the office should be entrusted to the head of the institution where the accused is employed. In view of the fact that within the framework of the existing legislation the Mayor has no manager/supervisor, the witness deems that Article 159 of the Criminal Procedure Code relates to those persons who are appointed to the office pursuant to the Law of Georgia on Public Service and Organic Law of Georgia on Labour Code of Georgia, in the circumstances when the official has a supervisory body who is entitled to enforce the order.

II

Reasoning Part

1. In the given dispute the Constitutional Court must decide whether those provisions of the Criminal Procedure Code of Georgia are constitutional which provide for extension of the procedural action of dismissal of the accused from the office to those persons who have been elected to the local self-government office as a result of universal, equal, and direct elections through secret ballot, whereby decision on this matter is made by the court, which has full discretion to decide on the matter without oral hearing.

2. The Claimant requests to find the provision allowing for dismissal of the accused from the office (Article 159 of the CPC) unconstitutional with respect to paragraphs1 and 2 of Article 29 of the Constitution of Georgia, and to find the provision authorising the court to decide on this matter without oral hearing (second sentence of section 1 of Article 160 of the CPC) unconstitutional with respect to paragraphs1 and 3 of Article 42 of Constitution of Georgia.

Constitutionality of Article 159 of the Criminal Procedure Code of Georgia with respect to paragraphs 1 and 2 of Article 29 of Constitution of Georgia

3. Pursuant to Article 159 of the Criminal Procedure Code of Georgia, „The defendant maybe dismissed from the office (workplace) if there is a probable cause that by holding the office (staying at the workplace) he/she will hinder investigation, compensation of the damage caused by the crime or the defendant will continue to be engaged in criminal activity." On the basis of this provision Mayor of Tbilisi has been dismissed from the office prior to the adoption of the summarizing decision on the case, due to which the Claimant requests to find Article 159 of the CPC unconstitutional with respect to sections 1 and 2 of Article 29 of the Constitution of Georgia. However, as has been noted, in view of the main essence of the disputed norm, Constitutional Court should assess constitutionality of the normative content of the norm which provides for extension of the procedural action of dismissal of the accused from the office to those persons who have been elected to the local self-government office as a result of universal, equal, and direct election through secret ballot.

4. In order to assess constitutionality of the disputed provision, Constitutional Court should analyse the essence and scope of the respective provisions of the Constitution as well as the essence of the disputed norm.

5. Since the dispute relates to a specific issue – dismissal of the Mayor of Tbilisi elected on the basis of universal, equal, and direct election through secret ballot, Constitutional Court must take into consideration Constitutional guarantees for the establishment and development of local self-government. Without taking this context into consideration, it would be impossible to correctly rule on the dispute.

6. The issue derives from fundamental constitutional principles since ensuring existence of the real local self- governance is an important foundation for a democratic and rule of law based state.

7. Pursuant to the established practice of the Constitutional Court of Georgia, the Court does not assess conformity of the disputed provision to the principles of the Constitution itself, rather considers it mandatory to use their resource in each specific case for correct interpretation of the constitution and adequate protection of human rights. Constitutional Court noted this several times in its judgments. In particular: "When deciding particular disputes, the Constitutional Court is obliged to analyse the constitutional provision separately as well as in the whole context of the Constitution, so that these provisions through interpretation are in line with the value order given in the Constitution. Only through this way can the constitutional provision be interpreted coherently, ensuring right constitutional review of a disputed provision" (Judgment of the Constitutional Court of Georgia No.1/3/407 dated December 26, 2007, Young Lawyers' Association of Georgia and Citizen of Georgia – Ekaterine Lomtatidze v. the Parliament of Georgia, II, 1). Judgment No.2/2-389 dated October 26, 2007

notes following: "The Constitutional Court, while assessing constitutionality of the disputed provision is not limited by specific constitutional provisions. It is true that the constitutional principle does not provide for specific rights, but the disputed provisions are also subject to assessment in respect to constitutional principles, together with specific constitutional provisions and from this perspective examination should be undertaken in the whole context. The Constitutional Court should establish, whether and to what extent the disputed provision is compatible with the constitutional legal order defined by the Constitution" (Judgment of the Constitutional Court of Georgia No.2/2-389 dated October 26, 2006, Citizen of Georgia Maia Natadze and others v. the Parliament and President of Georgia, II, 3).

8. In this respect, Constitutional Court most frequently refers to the principles of democratic state and rule of law, and their significance: „The principles of democracy and rule of law are the most important ones among the constitutional principles. … The constitutional order is founded on these principles. Apart from this, they oblige the state to be bound by the Constitution, which means that no branch of a government has the right to act only on the basis of expediency, a political necessity or other ground. A Government should act on the basis of the Constitution and the laws. Only in this way can just legal order be produced, without which there is no chance for democratic state under the rule of law." (Judgment of the Constitutional Court of Georgia No. 1/3/407 dated 26 December, 2007, Young Lawyers' Association of Georgia and Citizen of Georgia – Ekaterine Lomtatidze v. the Parliament of Georgia, II, 2).

9. Democracy, which literally means governance of people, naturally entails peoples' right to take part in the formation of the government, as well as execution of governance. Article 5 of the Constitution of Georgia enshrines the idea of public sovereignty. Namely: "People shall be the source of state authority in Georgia… People exercise their power through a referendum, other forms of direct democracy, and their representatives."Democracy is realized in the first place by public sovereignty, since peoples' participation in execution of the authority is the main essence of democracy, its foundation and purpose.

10. Therefore, right of the citizens to take part in conducting state affairs, represents a fundamental democratic principle. Thus, the idea of public sovereignty which serves to ensure participation of people in the execution of authority and therefore to the realization of direct and immediate democracy, should be exercised at all levels. Certainly, this also means people's access to local government by this mean. People should have guaranteed possibility to solve their problems, individually or by virtue of their representatives, defend their interests, ensure realisation of their rights. In this respect, direct and immediate participation in execution of authority is also effective on a local level. Therefore, local organs of government and people's real access to them are the foundation of a democratic state.

11. Consequently, institutional protection and strengthening of local self-

government is an inalterable contribution to the development of democracy. In this respect it is important to keep in mind requirements of the European Charter of Local Self-Government (Strasbourg, 15.10.1985, ratified by the Parliament of Georgia on 26 October, 2004 by ordinance No. 515-IIs) one component of which is ensuring adequate degree of independence of the organs of local self-government and their equipment with efficient and sufficient guarantees.

12. Universal, direct and equal elections, as a result of which, on the one hand, citizens may themselves be elected and this way carry out governance themselves, and on the other hand, elect their representatives and transfer to them the mandate of their governance, is a necessary guarantee for the citizens to build democracy in their country. Elections are the instrument for people to have access to governance. Elections "bring democracy into action"(Judgment of the Constitutional Court of Georgia No. 1/1/493 dated 27 December, 2010, Political unions of citizens: "Akhali Memarjveneebi" and "Conservative Party of Georgia" v. the Parliament of Georgia, II, 8).

13. In deciding matters of local importance, governance close to the citizens is first of all achieved by obtaining legitimacy directly from the people. Such legitimacy of governance by itself requires more independence, so that possibility of uninterrupted governance delegated by voters' is guaranteed. Representatives of government elected by people not only perform their rights, they are, in the first place, carriers of the mandate of the people, act in their name and should use their official authority in the interests of the electorate. This function is levied upon them by the democratic state. It is the requirement of democracy that the will of people is not ignored, mandate granted by them is not vanished.

14. Consequently, suspension/termination of authority of the officials elected by the people entails suspension/termination of the mandate of the people themselves, and is the roughest intervention into the autonomy of self-governance. For this reason, it should only be possible for clearly expressed very important legitimate aims, violation of which will in the first place infringe interests of the voters, and in extreme circumstances, when this is the only and necessary way. Furthermore, intervention should be conducted based on foreseeable, clear and strictly regulated procedure which would be based on fair balance of interests.

15. Paragraph4 of Article 2 of the Constitution of Georgia laid the ground for local self-government – opportunity of citizens to participate in governance at the local level. Constitution also wrote out institutional guarantees realization of which entails limitation of government authority by corresponding constitutional obligations. Namely: Paragraph 2 of Article 101^1 of the Constitution of Georgia defined the issue of legitimacy of local self-government - citizens of Georgia registered within the self-governing unit area elect a local self-government representative body Sakrebulo by direct, universal, equal suffrage through secret ballot. Given such a high legitimacy, the Constitution has set requirements to ensure corresponding and adequate competency, high level of autonomy and

independence. In particular, pursuant to Paragraph 1 of Article 101^1 the State has been limited by the obligation to define the establishment, procedure and activity of representative and executive bodies of local self-government by organic law. Same provision includes an important guarantee for independence of local self-government - executive bodies of local self-government shall be accountable only to representative bodies of local self-government. Apart from prescribing accountability of local self-government, this provision also ensures independence of local self-government from central government. Provisions of Article 101^2 of the Constitution of Georgia serve the same purpose. It is noteworthy that representative organs of local self-government units – Sakrebulos, have been granted a right to lodge claim to the Constitutional Court and request declaring normative act unconstitutional with respect to Chapter 7^1 of the Constitution, which is an important step towards ensuring independence of organs of local self-government from central authorities and is an indication of the aspiration of the Constitution to equip local self-government with more institutional guarantees of independence.

16. At the same time, the Constitution does not contain detailed order and procedure for the immunity of the elected officials of the local self-government, their inviolability or prosecution, as it does for a number of other officials. But this does not in itself mean that any intervention of government in their authority is permissible or justified, or that the elected officials of local self-government have identical constitutional guarantees as other public officers. "Constitutional standards of protection of rights of a certain public official may derive from their Constitutional status. At the same time, necessity for a high Constitutional standard may be related to the specificity of the work to be carried out. Certain governmental positions, in view of their essence and purpose, require special Constitutional protection. In case of lack of such protection the constitutional guarantees of certain government positions would become fictitious." (Judgment of the Constitutional Court of Georgia No. 1/2/569 dated 11 April, 2014, Citizens of Georgia Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili v. the Parliament of Georgia, II, 27).

17. In the given case as well, uninterrupted performance of duties by the elected officials of local self-government, issues of their independence and immunity, within the scope of the Constitutional order – institutional guarantees of local self-government envisioned by the Constitution, most importantly for realisation of principles of democracy, popular sovereignty and separation of powers, require a different quality of protection, since, in this case, in parallel with interest of a private person protected by Article 29 of the Constitution, it is important to protect interests of the voters and the authorities delegated by them from unfounded and frivolous limitation.

18. Pursuant to section 1 of Article 29 of the Constitution of Georgia, "Every citizen of Georgia shall have the right to hold any public office if they meet the requirements established by law." paragraph 2 states that "The require-

ments for public service shall be defined by Law." Pursuant to the interpretation of the Constitutional Court of Georgia, "these provisions of the constitution consolidate right of a Georgian citizen to hold elected as well as appointed office and set constitutional grounds for execution of public service. At the same time, this provision of the Constitution includes not only holding of a specific public office, but also the guarantee of uninterrupted execution of official duties and protection from unfounded dismissal from the office." (Judgement of the Constitutional Court of Georgia No. 1/2/569 dated 11 April, 2014, Citizens of Georgia Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili v. the Parliament of Georgia, II, 1). Therefore, Article 29 of the Constitution obliges the State to set reasonable terms for service in the public office and to not unjustifiably limit right of a citizen to take part in governance of the country and perform function of public importance. "...by protecting the right to hold public office, Constitution of Georgia strives, on the one hand, to ensure equal access of citizens to public office in accordance with reasonable and constitutional requirements, and, on the one hand, to protect the public servant from unjustified intervention into his authority, so that he/she can duly perform duties conferred upon him/her by Constitution and the law." (Judgement of the Constitutional Court of Georgia No. 1/2/569 dated 11 April, 2014, Citizens of Georgia Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili v. the Parliament of Georgia, II, 7).

19. Thereby, Article 29 of the Constitution protects right of a citizen to have free access to public office and also includes constitutional guarantees of the person employed in public office – not to be unjustifiably dismissed from the office and be protected from any external intervention.

20. For these purposes, within the scope of paragraph 2 of Article 29 of the Constitution of Georgia, the law which defines terms of public service must be in compliance with Constitutional standards. Pursuant to the interpretation of the Constitutional Court, the principle of rule of law „ sets strict constitutional limits on the state authority" (Decision of the Constitutional Court of Georgia No.2/2-389 dated October 26, 2007, Citizen of Georgia Maia Natadze and others v. the Parliament and President of Georgia, II-18). Constitutional law limitation of the legislative authority means that any statutory act must be in compliance with the requirements of the Constitution, both, in formal-legal as well as material-legal sense. In the given case, the law which allows for dismissal of the Mayor of Tbilisi must in its formal as well as material content be in compliance with requirements of Article 29 of the Constitution.

21. In order to assess constitutionality of the intervention into the right, we must, in the first place, analyse the confronting interests – legitimate purpose envisioned by the disputed provision as well as interests, which are being limited by the disputed norms.

22. The disputed norm allows for intervention into the right of the Claim-

ant guaranteed by Article 29, namely, it limits Claimant's right to uninterruptedly perform his authorities, conferred upon him by voters of Tbilisi as a result of universal, direct and equal elections, for the period of 4 years. However, in the given case, the value protected by the Constitution is not limited to a private interest, rather is related to such important public interest as is realization of the will of the voters. The right of the Claimant protected by Article 29 of the Constitution of Georgia is further strengthened by the fact that the Claimant, as an elected official, performs his authorities on the basis of the will of the voters. It is impermissible to ignore the interests of the voters of the corresponding self-governing unit to carry out activities of local importance by means of a representative directly elected by them.

23. At the same time, it is true that having governmental mandate from the people, such a high legitimacy, undoubtedly requires careful approach and raises the necessity of examining legitimacy of intervention into the process of expression of will by the voters. However, no single office, including an elected office, can in itself be the absolute guarantee from intervention and limitation of execution of public authority. Guarantees of independence and immunity of public officials differ depending on the source of legitimacy of their office, constitutional status, competency and scope of liability, which means that depending on this the preconditions and procedure for intervention into the right should also vary. However, even the authority of the official with highest legitimacy may be subject to intervention if there are real and objectively tangible threats which will inevitably occur if the person is to remain in the office.

24. Consequently, we must analyse, what is the legitimate purpose of adoption of the disputed provision and whether it is a significant interest to permit intervention into the right provided the principle of proportionality is observed.

25. Legitimate aims of the disputed provision are evident from the norm itself. These are: to ensure effective conduct of investigation, to prevent obstruction of compensation of the damage caused as a result of the offense and to avert the accused from committing a new offense.

26. It is indubitable that effective fight against crime and due execution of justice is one of the primary tasks of the State. Unhindered investigation of criminal cases, ensuring compensation of damage caused as a result of the offense and prevention of future crimes are public interests of utmost importance. For this reason, obviously, the above-mentioned aims are legitimate aims envisioned by the Constitution, for the achievement of which the right of execution of public authority may be limited.

27. It should be noted that the indicated legitimate aims are valid with respect to all public officials (elected as well as appointed public officials). It is true that persons who have been elected by people in a democratic way enjoy particular legitimacy, however, it is in the interests of democratic system itself to protect the authority conferred by democratic means by the people from unlawful abuse.

28. Within the framework of the present dispute the Constitutional Court must assess, whether the disputed norm keeps a proportional balance between the above-noted constitutional interests. „...difficulty of the conflict of values ... lies in the fact that lawful interests are confronting each-other... there is one solution for this dilemma in a democratic society – achieving a fair balance. When confrontation of interests is inevitable, the necessity requires to harmonise and fairly balance them." (Judgment of the Constitutional Court of Georgia No.1/1/477 dated 22 December, 2011, Public Defender of Georgia v. the Parliament of Georgia, II, 45).

29. The burden of State responsibility as well as the level of democracy is measured by how well it manages to fairly balance the confronting interests. The Constitutional Court of Georgia has noted in several of its Judgments that the State, when protecting and securing the rights, should reasonably balance private and public interests; only by doing so it is possible to exercise the rights and achieve specific public purposes. In a democratic society no purpose or interest may exist the counterweight of which would be infringement of a certain right. No interest should be achieved by infringing another interest. "It is a legitimate expectation of Rule of law that private and public interests shall be fairly balanced." (Judgement of the Constitutional Court of Georgia No. 1/2/384 dated 2 July, 2007, Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia, II, 19). Besides, human rights may be limited only to the extent necessary in a democratic society. Legal ground and scale of assessment as to when, how and to what intensity may a State intervene in the freedom of an individual so that it would be considered as a necessary intervention in a democratic society, is prescribed by the Constitution, in the first place, by main constitutional principles and constitutional provisions regulating the specific rights. They give acceptable frame for determining the relationship between private and public interests.

30. According to the established practice of the Constitutional Court: „ The disputed norm should be in conformity with principles of proportionality and clarity, which are in direct association with the principle of rule of law based state. Exactly the principle of proportionality determines material scopes for the legislator during the restriction of basic rights. If a norm is not compatible with these principles, it will allow the possibility of arbitrariness. And arbitrariness of the State in the sphere of human freedom automatically means the violation of human dignity, as a supreme principle of the constitutional order as well as rule of law based State and other constitutional principles, and unconstitutional infringement of the basic right of human freedom." (Judgment of the Constitutional Court of Georgia No.2/1/415 dated April 6, 2009, Public Defender of Georgia v. the Parliament of Georgia, II, 13). "The principle of proportionality requires the restrictive regulation must be a reasonable and necessary means for achieving (legitimate) public aim. At the same time, the intensity of the restriction must be proportionate to the aim pursued. It is impermissible to pursue a legitimate

aim at the expense of increased restriction of human rights." (Judgment of the Constitutional Court of Georgia No.3/1/512 dated June 26, 2012, Citizen of Denmark Heike Cronqvist v. the Parliament of Georgia, II, 65). "The more the State intervention into human freedom, the higher the requirements for justification of the intervention" (Judgment of the Constitutional Court of Georgia No. 1/2/384 dated 2 July, 2007, Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. the Parliament of Georgia, II, 19).

31. The Claimant submits that the normative meaning of Article 159 of the CPC which envisions possibility of dismissal of the Mayor from the office (prior to the summarizing decision on the case) is unconstitutional since the norm leads to intensive, excessively strict, unnecessary for the achievement of the legitimate purposes and disproportionate intervention into the Claimant's right. Neither does it satisfy the requirement of foreseeability of the law and turns the existing procedure for dismissal of a public official contrary to the constitutional legal order.

32. It is noteworthy that the Claimant does not question necessity of achieving the legitimate aims, consequently, dismissal of the accused from the office in general, provided corresponding grounds exist, is acceptable for him, as well as is participation of the court in this process. However, the Claimant considers that the existing regulation for dismissal of the Mayor does not entail sufficient guarantees which would exclude the possibility of disproportionate intervention into the right of the elected Mayor guaranteed under Article 29 of the Constitution and infringement of his/her right. Namely, as the Claimant puts it: ,,the institute of dismissal of the accused from the office itself, is certainly not unconstitutional … there are sufficient grounds for a person to be dismissed from the office, however, the procedure of dismissal in whole is unconstitutional."

33. The Respondent asserts constitutionality of the disputed provision based on two main arguments. Namely, it asserts that the provision is constitutional since it leads to temporary limitation of the right of the Mayor rather than his/her final dismissal from the office. Besides, dismissal of the accused from the office is a lighter, less intensive intervention into the right in comparison with detention as a preventive measure, and for this reason the Respondent considers that existence of the norm is necessary since if dismissal from the office is not to be available the judge would have to use detention. The Respondent argues that an alternative to dismissal from the office can only be detention, since other preventive measures are not sufficient for achieving legitimate purposes of dismissal. The Respondent asserts that the fact that dismissal from the office is a less intensive intrusion into the right than is detention and is of temporary character is an indication of its constitutionality.

34. In the given case intensity of the intervention is essential for assessing the proportionality of limitation of the right. Pursuant to section 1 of Article 161 of CPC, " The judge shall have the authority to issue the order dismissing the defendant from the office (workplace), before summarizing decision on the

case is rendered". This provision contains a general reference on the duration for which this measure may be used – dismissal of the accused takes place before summarizing decision on the case is rendered. The Respondent refers to this fact in arguing that the Mayor is not dismissed from the office, rather this measure is limited in time, which diminishes intensity of intervention into the right and leads to a less restrictive intervention.

35. The Constitutional Court notes that rendering summarizing decision on the case may objectively require long time. In order to determine the term during which a person may be dismissed from the office, it is necessary to determine the time frames set by the Criminal Procedure Code of Georgia related to rendering the summarizing decision.

36. It is noteworthy that contrary to the Criminal Procedure Code of 1998, currently existing code contains no clear definition of a summarizing decision. On the other hand, a number of provisions of the currently standing Criminal Procedure Code refer to various types of the summarizing decision. For example, pursuant to sub-section "d" of Article 57: "the victim has the right to receive a free copy of the ordinance (order) on termination of criminal prosecution and/or investigation, judgement or other type of summarizing decision of the court". It is clear that the provision considers ordinance (order) on termination of criminal prosecution and/or investigation and judgement to be summarizing decision of the court as well as refers to other types of acts of the court which may represent summarizing decision of the court. It is therefore clear that for the purposes of the Procedural Code summarizing decision may entail judgement as well as other acts issued in relation to the case. In the process of deciding on this matter Constitutional Court sees no necessity to exhaustively define which acts may fall under the term "summarizing decision" mentioned in Article 161 of Criminal Procedure Code of Georgia. However, it is clear and unambiguous that this term includes judgment along with other procedural acts.

37. It should be taken into consideration that the time frame for rendering some summarizing decision may be determinable, but that is not the case with respect to the Judgment. Criminal Procedure Code does not prescribe a specific time frame for consideration of a criminal case on merits and rendering of a judgement. The legislator has partially regulated this issue and limited the time frames between first appearance of the convicted person at the court, preliminary hearing, and hearing on the merits of the case. Furthermore, section 8 of Article 169 of the Criminal Procedure Code states that per one instance of crime, prior to commencement of a preliminary hearing, a person may have status of accused for no more than 9 months, however this norm only limits the period for commencement of a preliminary hearing and does not regulate issues related to the hearing on the merits. Within 14 days after completion of the preliminary hearing (it is possible to extend this time in circumstances determined by law) hearing on the merits shall commence, maximum duration of which is not defined by law. The same is the case with respect to the term of issuance of the judge-

ment. Consequently, depending on the complexity of the case, multitude of the evidences to be considered and other objective circumstances, consideration of the merits of the case may last for a number of years until the final judgement is rendered. As a result, dismissal from the office may last for long, undefined period of time, including until expiration of the term of the office.

38. Authority of the Mayor is limited by certain term, and the longer his dismissal from the office the higher the intensity of intervention into his right will be, since it may not be reverted – recovery of the missed time will be objectively impossible. Naturally, disproportionality of intervention into the right is even more evident if the summarizing decision is rendered after expiration of the term of the office of the Mayor, since in that case not only recovery of the missed period will be impossible, rather there is no objective possibility of restitution to the office – his term of the office is strictly fixed. Periodicity of elections serves an important legitimate aim and citizens' right to periodic elections may not be questioned. Consequently, in such a case, usage of the mean prescribed by Article 159 of the CPC will lead not to temporary intrusion into the Mayor's official authority, rather to his final dismissal from the office.

39. It is noteworthy that the legislation does not provide for annulment of this procedural action in cases when the ground for dismissal of the person pursuant to Article 159 of the CPC no longer exists. CPC does not provide for periodic control of execution of this measure when at different stages of legal proceedings the body in charge of conduct of the proceedings would in its own initiative or with the request of the parties have opportunity to consider alteration or annulment of this measure. Consequently, upon issuance of the order on dismissal of the accused by the court, until the summarizing decision is rendered, there are no grounds or mechanism for re-assessment of the necessity of usage of this procedural mechanism. This means that the measure will be used until the summarizing decision is rendered even in those cases when in reality it may no longer be necessary. Therefore, limitation of the right will take place even in circumstances when there is no necessity of protection of those legitimate interests which the measure was aiming at.

40. According to section 2 of Article 161 of the CPC, "Court order relating to the accused's dismissal from the office (workplace) or its refusal to do so may be appealed in accordance with the rules established by Article 207 of the Code." It is true that the Article 207 refers to the procedure for usage, alteration or annulment of the order related to preventive measures; but it also will be used for the purposes and within the scope of measures envisioned in Articles 159-161. Since these provisions concern only possibility and procedure for dismissal from the office, Article 207 is used only within the framework of the appeal of the order on dismissal or refusal of dismissal from the office. Therefore, since there is no possibility for annulment or alteration of this measure, the procedure for appeal prescribed by Article 207does not serve as a ground for the request for periodic revision, alteration or annulment of the order on dismissal from the

office (workplace). The Respondent also acknowledged at the hearing on the merits that "the existing criminal procedural legislation does not directly refer to the procedure for alternation of the disputed procedural action." Therefore, given that there is real probability that intervention into the right may last without due basis or necessity for it, there is a risk of the unjustified limitation of the right which at the outset contradicts the principle of proportionality and turns the measure limiting a person's right unconstitutional.

41. At the same time, the Respondent asserts that the procedural action of dismissal from the office as prescribed by Article 159 of the CPC is a less restrictive alternative of a person's right than a preventive measure of detention, and for this reason it should be considered as constitutional.

42. Constitutional Court cannot share this view. Contrary to the preventive measure of detention, dismissal of the accused from the office (Article 159 of the CPC) is placed in the Chapter on "other procedural actions"; it is not within the list of the preventive measures and therefore does not form a preventive measure. The court is not limited to use these measures cumulatively or separately. At the same time, the purposes and grounds for usage of these measures differ to some extent. However, dismissal of the accused from the office and detention, both are coercive measures of the criminal procedure and their primary purpose is to ensure due conduct of criminal proceedings and prevention of existing threats. Consequently, both measures can in certain circumstances (when the legitimate purposes for their usage are identical) be considered as alternative measures for achieving similar legitimate aims. In this respect, the measure of dismissal from the office may indeed be considered as a less restrictive mean in comparison with detention, though this fact alone does not make it compatible with the Constitution. Material content of this measure, its term and procedure should in any case satisfy those constitutional legal standards which determine the acceptable confines for limiting human rights.

43. Based all the above mentioned, the normative part of Article 159 which provides power for dismissal of the elected Mayor from the office until rendering of the summarizing decision causes unjustified intense intervention into Mayor's constitutional right guaranteed by the Article 29. In particular, pursuant to the disputed provision, restriction of the right for a certain period of time may factually be equated to dismissal from the office since rendering of the summarizing decision is not limited by any time frame. Besides, there are no legal instruments for abolishment of this measure in case of elimination of the grounds based on which it was enacted, which means that the measure may stay active irrespective of whether there still is a necessity for it. Such an impact of the application of Article 159 would even in Respondent's opinion result in disproportionate intervention into the right.

44. Therefore, the order for dismissal of the Mayor prescribed by the disputed norm cannot be considered as the least limiting and proportionate measure. It entails the risk of infringement of the right of Mayor to execute of-

ficial authority and consequently the risk of disregard of the mandate and will of his voters.

45. As already noted, the Claimant also considers that the disputed norm does not satisfy the requirements of the "quality of the law". Namely, in Claimant's opinion, it is unpredictable due to the following circumstances: the norm defines the ground for dismissal from the office (workplace) so that it does not refer to the category of the public officials towards whom such limitation may be used. As a result, if it is to be considered within the context of other provisions of the Criminal Procedure Code, the order of usage of the disputed norm becomes all unclear; namely, it is unclear how the court order is to be executed in cases when the court will order dismissal of the head/manager of the institution. In Claimant's words „Regulation of any act is a unified system and in this case we should not consider the disputed provision in isolation. We should consider it in the whole context of the corresponding provisions and as a result of this procedure we come to the conclusion that enforcement of the court's order in accordance with the existing legislation is impossible... the State should exercise criminal justice on the basis of broad analysis of the rule of law and such possibility should be given by the existing procedural norms.".

46.As a result of joint interpretation of articles 159 and 162 of the CPC both, Tbilisi City Court and Court of Appeals have established application of the disputed norm towards the Mayor of Tbilisi. Examination of the lawfulness of the decision of the court is beyond the scope of the competence of the Constitutional Court; for this reason the Constitutional Court admitted disputed norm for consideration on the merits with this meaning, assessed its constitutionality and found its non-compliance with Article 29 of the Constitution of Georgia.

47. Constitutional Court also indicates that the legislation is defective with respect to the enforcement of the court order and it does not contain sufficiently clear, legible references.

48. Pursuant to section 2 of Article 160 of the CPC: "Court order on the accused's dismissal from the office (workplace) shall indicate: the identity of the person to be dismissed, his/her position (workplace), the ground for his/her dismissal, the request concerning accused's dismissal which shall be sent to the head of relevant institution, enterprise or organization." As per section 3 of the same article: "Court order on the accused's removal from the office (workplace) shall be binding upon the director of the relevant institution, enterprise or organization. He/she is obliged to enforce the order upon its receipt immediately and inform the court on it."

49. Pursuant to the named provisions, when sufficient grounds prescribed by the law are in place, the court makes the order on using the above-mentioned measure which "is sent to the director of the institution, enterprise or organization", who is obliged to enforce the order immediately upon its receipt and inform the court upon it. It is clear that it indicated on the head of the institute, enterprise or organization where the accused who is being dismissed is employed. Pursuant

to section 1 of Article 22 the Law of Georgia "On the Capital of Georgia – Tbilisi", Mayor of Tbilisi is the highest official of the City and head its government. It is certainly impossible to identify an official, who for the purposes of the indicated norm, would be head of the institution where the Mayor is employed. Therefore, when applying Article 159 of the Criminal Procedure Code towards the Mayor of Tbilisi the possibility of enforcement of sections 2 and 3 of Article 160 of the same Code becomes obscure.

50. No clear answer to this issue is provided in the Decision No.10/a/6915 of the criminal board of the Tbilisi City Court dated December 22, 2013, which was the basis for dismissal of the Claimant from the office. It was clear from the applicable norms that the decision of the court would require enforcement and the respective enforcing subject due to which it requested Mayor's office to immediately provide information regarding enforcement and obliged the prosecutor's office to organize the enforcement. Search for the subjects of enforcement was a legitimate duty of the court in view of the essence and purpose of the applicable norms. However, given that in practice the order implied dismissal of the person whose obligation under the law was also enforcement of the corresponding order, the Claimant had a legitimate question- what should he have done for due enforcement of the order - to which no answer is found in the order of the court. Neither did the Decision No.1g/791-13 of the investigation board of the Tbilisi Court of Appeals dated December 26, 2013 shed light on the issue. The Court of Appeals noted that "the decision of the court, upon its entering into force, is binding for the accused as well as any other person."

51. Certainly it is undisputed that these decisions of the court, like any other decision of the court, are mandatory for performance. It is also undisputed that the Mayor is considered to be dismissed from the office until the summarizing decision on the merits is adopted. However, questions of the Claimant were related specifically to the procedure for enforcement – who, when and how should act in order to avoid negative legal consequences of undue enforcement of the order. Neither the lawn or the above-mentioned orders of the court give clear and unambiguous answer to this question.

52. It must be noted that statutory regulation of the indicated matters is not only the matter of discretion, view or expediency of the legislator. Institutional regulation of dismissal of public officials elected by universal and direct elections should be clear, understandable and based on strictly and precisely regulated procedures.

53. However, such deficiencies of the law related to enforcement of the order do not by themselves trigger infringement of the constitutional right of the Claimant. From the moment of announcement of the respective order by the court, Claimant, as an accused, is deemed to be dismissed from the office and therefore, has no authority to issue a new act for the purposes of enforcement of the order of the court. He has been given sufficiently clear, mandatory for enforcement information that he has been dismissed from the office. Therefore, despite

the fact that certain obscurity may exist with respect to enforcement of the court order, it has no relation with the constitutional right of the Claimant himself. As already noted above, infringement of Article 29 of the Constitution in this case is caused by the fact that the existing order of dismissal from the office results in unjustified intervention into Claimant's right since it is a disproportionate mean of achieving the legitimate aim.

Constitutionality of second sentence of section 1 of Article 160of the Criminal Procedure Code of Georgia with respect to paragraph 1 and 3 of Article 42 of the Constitution of Georgia

54. Pursuant to section 1 of Article 160 of the Criminal Procedure Code of Georgia, after deciding on dismissal of the accused from the office (workplace), the prosecutor, depending on the place of investigation, shall submit written motion to the court, which, if sufficient ground exists, shall issue the order authorizing the above-mentioned measure. The court shall be authorized to consider the motion without oral hearing. The Claimant considers that the possibility of adoption of the mentioned order without oral hearing is unconstitutional.

55. Constitutional Court has to establish whether the regulation prescribed by the disputed provision leads to infringement of the fundamental right of fair trial. In Claimant's opinion, second sentence of section1 of Article 160 of the CPC infringes following components of the right to fair trial: 1) oral/public hearing of the case; 2) adversarial nature of the procedure; 3) right to defence. Consequently, in Claimant's opinion, the disputed norm contradicts paragraphs1 and 3 of Article 42 of the Constitution.

56. Pursuant to paragraph 1 of Article 42 of the Constitution „everyone shall have the right to apply to the court for protection of his/her rights and freedoms."This provision is of fundamental importance for democratic state and rule of law. It is one of the most important guarantees of protection of human rights. Constitutional Court several times emphasized its significance. Namely: „Right to access to justice is the most significant constitutional guarantee for protection of individual's rights and freedoms and for ensuring the principles of rule of law and separation of powers. It is an instrumental right which, on the one hand, serves as means of protection of other rights and interests and, on the other hand, is a significant part of architecture of checks and balances of branches of government." (Judgment of the Constitutional Court of Georgia No.1/3/421, 422 dated November 10, 2009, Citizens of Georgia – Giorgi Kipiani and Avtandil Ungiadze v. the Parliament of Georgia, II, 1). The court also noted that "right to a fair trial … ensures effective realisation of constitutional rights and protection from unjustified intervention into the rights." (Judgment of the Constitutional Court of Georgia No.1/1/403, 427 dated December 19, 2008, Citizen of Canada Hussein Ali and Citizen of Georgia Elene Kirakosian v. the Parliament of Georgia, II, 1).

57. Since the main function of the state based on the rule of law is to

ensure due realization of human rights and freedoms, the right to fair trial, as a certain denominator for the execution of the principle of rule of law, entails the possibility to defend in court all those values, which by their essence represent a right. "The most important guarantee for securing the full enjoyment of this or that right is exactly the possibility to protect it at a court. If there will not be the possibility to avoid the breach of a right or restoration of a breached right, the legal arm, enjoyment itself of the right will be questioned" (Judgment of the Constitutional Court of Georgia No.1/466 dated June 28, 2010, Public Defender of Georgia v. the Parliament of Georgia, II, 14).

58. Constitutional Court indicated several times that in order for the right to fair trial to ensure a person's full legal protection, it should include following minimum possibilities: „ rights of a person to apply a court, to demand fair public hearing of its case, express his opinions and defend himself in person or through legal assistance, have one's case heard in reasonable time frame and a case be considered independent and impartial tribunal" (Judgment of the Constitutional Court of Georgia No.1/3/393,397 dated December 15, 2006, Citizens of Georgia Onise Mebonia and Vakhtang Masurashvili v. the Parliament of Georgia", II, 1).

59. Thereby, right to fair trial is composed of several legal components, the totality of which must ensure, on the one hand, real possibility of people to fully and adequately protect and restore their rights, and, on the other hand, protect a person from arbitrariness of the state in case of state's intervention into an individual's rights and freedoms. Consequently, it is constitutional duty of the State to provide sufficient substantive and procedural guarantee for each legal component of the right to fair trial. Statutory guarantees of the right to fair trial should grant to people the feeling that they will be able to protect their rights and freedoms in the court, and should engender perception of fairness of the court within the society. Transparent, full-fledged, adequate and sufficient procedures ensure legitimacy of court's decisions, their recognition by the society, which is of great significance for raising and strengthening public's trust towards the judiciary and government in general.

60. Consideration of the case with oral hearing is an important legal component of the right to fair trial. As per the established precedents of the Constitutional Court „ The opportunity of a person, to have public hearing and present opinion on the cases related to his/her right as well as the opportunity to appeal legal acts concerning his/her right is protected by the right to a fair trial. Therefore, any regulation which restricts mentioned opportunity of the person constitutes interference into the right to a fair trial" (Judgment of the Constitutional Court of Georgia No.2/2/558 dated February 27, 2014, Citizen of Georgia Ilia Chanturaia v. the Parliament of Georgia, II, 5).

61. Given that oral hearing of the case envisages direct participation of the parties in consideration of the case, leads to their possibility to present evidences, express their opinions, defend themselves personally or by means of defence counsel, it thereby represents an important guarantee for adversarial process,

adequate enjoyment of the right of defence, and in the end, ensures possibility of the parties to better protect their interests, have impact on decision of the case and contribute to the adoption of correct and fair decision on the case. „ The oral hearing, on the one hand, supports the parties to substantiate their legal demands, while, on the other hand, allows the judge to deliver objective, fair and reasoned judgment as a result of thorough investigation of the case." (Judgment of the Constitutional Court of Georgia No.2/2/558 dated February 27, 2014, Citizen of Georgia Ilia Chanturaia v. the Parliament of Georgia, II, 35).

62. Fair hearing can hardly be achieved by secret and one-sided investigation of the facts. Oral hearing helps to thoroughly inform the court around factual circumstances of the case. At the same time, interaction with the respondent is also advantageous to the court since it has opportunity to seek answers to all questions and therefore clarify obscure circumstances of the case. For this reason, the right to oral hearing is an important tool for enjoyment of the right to fair trial and thereby for better protection of the right. "The Court notes that the right of individual to present his/her opinion during hearing supports adoption of reasoned ruling, increases possibility of effective realisation of right to appeal and decreases possibility of existence of appeal grounds prescribed by the law, which are unreasonableness or/and illegality of the ruling" (Judgment of the Constitutional Court of Georgia No. 2/2/558 dated 27 February, 2014, Citizen of Georgia Ilia Chanturaia v.the Parliament of Georgia, II, 41).

63. Besides, public, oral hearing of the case, while ruling out "secret justice" which could involve legitimate doubts with respect to irregular, arbitrary usage of substantive and procedural rules, pales away both, the temptation of the State to abuse its authority as well as the suspicion of such arbitrariness. Consequently, oral hearing of the case strengthens trust of the parties and of the society towards judiciary and ultimately leads to better transparency and legitimacy of court decisions, diminishes probability of a mistake.

64. Despite the significance of the right to fair trial, it is not an absolute right. "Right of access to justice may not be understood in an absolute manner, without procedural legal order, which is an important guarantee of protection of the right." (Judgment of the Constitutional Court of Georgia No.1/3/161 dated April 30, 2003, Citizens of Georgia Olga Sumbatashvili and Igor Kharpov v. the Parliament of Georgia). Constitutional Court has noted several times in its Judgments that the right of access to justice "may be limited under certain condition, which would be justified by a legitimate public interest of a democratic society".(Judgment of the Constitutional Court of Georgia No. 1/466 dated 28 June, 2010, Public Defender of Georgia v. Parliament of Georgia, II, 15). „The limitations should serve a legal purpose and reasonable proportionality should be observed between the set limitation and the purpose to be achieved … These preconditions shall be met in order the limitations applied not to restrict the access left to the individual to such an extent that the very essence of the right is impaired" (Judgment of the Constitutional Court of Georgia No. 1/3/393, 397

dated 15 December, 2006, Citizens of Georgia Onise Mebonia and Vakhtang Masurashvili v. the Parliament of Georgia", II, 1)".

65. Right to fair trial may be limited, including by means of the consideration of the case without oral hearing, however even in this case the mandatory conditions must be adhered to: that such limitation serves a legitimate aim and a proportional balance is observed between public and private interests. As Constitutional Court noted in its Judgments, the fact that oral hearing of the case is an important legal component of the right to fair trial, consideration/resolution of the case without oral hearing does not in itself and always lead to infringement of the right to fair trial.

66. Enjoyment of the right to fair trial is not an end in itself; it is only a possibility of protection of other rights. Consequently, its legal components should also be used in those circumstances and to that extent that is objectively necessary for protection/prevention of infringement of a certain right. Thereby, availability of each legal component ultimately serves the effective enjoyment of the right to fair trial and consequently, the protection of the specific right, and neither the usage of these legal components should be end in itself. They should be guaranteed when it may objectively impact decision of the court.

67. The disputed provision of section 1 of Article 160 of the CPC envisions the power, discretion of the court to consider the motion on dismissal of the accused from the office without oral hearing. Therefore, the disputed provision equips the court with authority to itself decide whether this issue should be considered with or without oral hearing. Although the norm not only does not exclude, but rather directly provides for the judge's authority to decide these matters with oral hearing, to the equal measure it provides for the possibility of consideration of the case without oral hearing, and thereby leads to intervention into the right to fair trial. Consequently, the legitimate aim of the restriction must be assessed and the proportionality of intervention into the right protected under Article 42 of the Constitution must be established.

68. The Respondent named speedy justice, avoidance of the delay in consideration of cases and procedural economy as legitimate aims for the adoption of the disputed provision. As the Respondent has put it "the judge is independent in his/her activities. He/she assesses factual circumstances and renders a decision in accordance with the Constitution of Georgia, universally recognized principles of international law, other laws and on the basis of his/her inner convictions. It is for the purposes of ensuring such independence and protection of justice from such unjustified delay and inefficiency that the judge is granted the above-noted discretion".

69. Generally, speedy justice – consideration of the case within reasonable, limited time frames – is legal component of the right to fair trial. At the same time, procedural efficiency and avoidance of artificial backlog of courts is vital for ensuring quality of justice. Therefore, the right to fair trial may be restricted in the interest of above-mentioned legitimate aims. However, for the assessment

of the proportionality of intervention, we should take into account its intensity as well as the significance of the right and legal interest possibility of protection of which is being limited.

70. In the given case the value to be protected is unhindered enjoyment of the right protected under Article 29 of the Constitution, prevention of its unjustified and disproportionate limitation. Effective protection of this right and the interest of complete enjoyment of the right to fair trial confront the legitimate aims of speedy justice and procedural economy.

71. Whether the legislator managed to strike a fair balance between these interests should be assessed on the basis of the principle of proportionality.

72. Consideration of the motion of the prosecutor and temporary dismissal of the person from the office without oral hearing, similar to decision on any other matter without oral hearing, requires less time and, as a general rule, represents an acceptable and good way of achieving the legitimate purpose – speedy justice. „Obviously, simplicity of the procedure supports speediness and effectiveness of justice." (Judgment of the Constitutional Court of Georgia No.2/2/558 dated February 27, 2014, Citizen of Georgia Ilia Chanturaia v. the Parliament of Georgia, II-30).

73. At the same time, it should be determined whether the decision on this matter without oral hearing is the least restrictive and proportionate measure. To answer this question correctly it is necessary to take into account the essence of the legal proceedings envisioned by the disputed norm.

74. The most important issue when considering limitation of the right to oral hearing is – what is the competency of the court deciding on the matter in a particular case, namely, qualitatively, what issue does the court have to study/assess/investigate. In this respect the decisive factor is whether the court is considering only legal issues or also conducts assessment/investigation of facts (factual circumstances).

75. When the Court has to establish facts, there is a higher interest to conduct oral hearing where parties will have possibility to present evidences, new factual circumstances, express opinions, put forward their positions with respect to the evidences presented by them as well as by the opposing party and circumstances related to the case, within the framework of the adversarial process, and ultimately to convince the court of the legitimacy of their arguments and consequently to have an impact on the resolution of the case, contribute to rendering correct and fair decision, which is equally important for the protection of rights or prevention of violation of rights of specific individuals, as well as delivery of fair and impartial justice. In one of its cases Constitutional Court specifically referred to the necessity of such decision of the case. Namely: „The protection standard of the right to an oral hearing sufficiently depends on the content of the proceedings. In cases where the proceedings related to the establishment of formal-legal issues, the legal interest on oral hearing is lower. In such cases, the principle *jura novit curia* ("The Court knows the Law") is applicable and refer-

ence to legal circumstances by the parties has only auxiliary functions. Approach is different in the case when the court has to decide not only formal-legal issues, but also needs to assess factual circumstances as well. Holding an oral hearing and listening to opinions of the parties has special importance in the cases which involve a need to investigate factual circumstances as well. (Judgment of the Constitutional Court of Georgia No.2/2/558 dated February 27, 2014, Citizen of Georgia Ilia Chanturaia v. the Parliament of Georgia, II, 42).

76. Generally, the necessity of oral hearing is present at the court of first instance since mostly factual circumstances are established at this stage. However, the decisive factor is not which instance court is considering the case, rather which issues are being decided in the particular case. If the Court of Appeals is authorized to consider not only legal issues but also factual circumstances, or if the higher instance court is considering the case as the court of first instance, the necessity to conduct oral hearing remains. Likewise, if the court of first instance is only deciding on the issue of legal qualification – correctness of application of the law by a certain administrative body/official, when there is no need to assess factual circumstances and consequently, there is high likelihood that the party will not be able to have an influence on consideration/decision of the case, there is no unconditional necessity to hold oral hearing on the case. "European Court of Human Rights does not consider the presence of an offender at the appeal proceedings as important as his presence at the first instance trial. If the appellate instance court merely examines questions of law, it is not necessary to hold an oral hearing with participation of a defendant. The distinction shall be drawn between this case and when an appellate court examines questions of both fact and law. To ascertain whether a person is entitled to attend the hearing, the European Court will assess whether an appellate court needs presence of defendant in order to ascertain the facts"(Judgment of the Constitutional Court of Georgia No.1/3/393,397 dated December 15, 2006, Citizens of Georgia Onise Mebonia and Vakhtang Masurashvili v. the Parliament of Georgia").

77. In view of all the above mentioned, there is a necessity to consider the case with oral hearing when participation of the person in the process may have an impact on the decision of the issue. In particular, when factual circumstances are assessed (or re-assessed), also, when the person may present new facts and circumstances which have not yet been assessed and when his/her immediate participation in the process, in view of certain circumstances (which are to be assessed individually in each particular case), may potentially raise probability of impact on the decision.

78. Upon deciding on dismissal of the person from the office on the basis of Article 159 of the CPC, the court must assess with the standard of a probable cause whether there is objective ground for assertion of following circumstances: 1) obstruction of investigation if the accused remains in the office; 2) obstruction of compensation of the damage caused as a result of the offense; or 3) continuation of criminal activities by the accused.

79. It is noteworthy that assessment of a particular circumstance under the standard of a probable cause, in itself, requires assessment of unity of facts and information for their (i.e. circumstances) determination. Section 11 of Article 3 of the CPC clarifies the definition of a probable cause: „probable cause – a unity of information or facts that in corroboration with all the circumstances of a given criminal case would be sufficient for an objective person to conclude that a person has probably committed a crime; an evidentiary standard for conducting investigative activities and/or imposing preventive measures directly prescribed by this Code."

80. Therefore, in this case the judge, based on the facts and information, should assess to what extent there is a probable cause that the accused will hinder investigation, compensation of the damage caused by the offense or will continue criminal activities. I.e. the court has to assess the unity of facts and information which would give an objective person possibility to conclude that there are grounds for dismissal of the accused from the office as envisioned by the disputed provision. Clarification of these circumstances themselves, in its essence, leads to the necessity of assessment of factual circumstances. It is the unity of specific circumstances that may indicate whether the accused as a result of staying in the office, may hinder investigation, compensation of the damage caused as a result of the offense or whether he/she will continue criminal activities.

81. The materials presented by the Claimant obviate that the prosecutor's motion refers to a line of factual circumstances as a result of assessment of which the judge decided to dismiss the Claimant from the office (until delivery of the summarizing decision). The same is indicated by the court. Namely, Order No. 10a/6915 of the Tbilisi City Court dated 22 December, 2013 states: "thereby, there are sufficient factual and procedural grounds to dismiss the convicted Giorgi Ugulava from the office of the Mayor of Tbilisi until the final judgment on the merits is issued, since there is a probable cause that by remaining in the office the accused will hinder investigation and gathering of evidences on the case."

82. In Respondent's view, the discretion to consider the case without oral hearing relates only to those cases when the court does not have to assess factual circumstances or when the evidences necessary for decision on the dismissal from the office have already been assessed within the framework of the oral hearing.

83. Constitutional Court cannot share Respondent's viewpoint that since the norm prescribes possibility, discretion of the court, this in itself means that it can only consider the case without hearing when this will not lead to the threat of violation of the constitutional right, i.e. only when it will not face the necessity of assessment of those factual circumstances or new evidences which have not been discussed before.

84. As already noted, analysis of Article 159 of CPC allows to conclude that when deciding upon this measure the court specifically needs to assess factual circumstances. If we assume that within the scope of application of Article

159 of CPC the subject of assessment could also be formal-legal issues, this still does not give us ground to assert that the judge will conduct the session without oral hearing only in such circumstances (upon considering legal procedures), since neither the disputed provision nor the systematic interpretation of the law in general, prescribe such obligation upon a judge. The relevant provisions do not constraint a judge by statutory regulation to use the possibility of deciding on a matter without oral hearing only when assessing legal, rather than factual circumstances. Consequently, the disputed provision does not exclude the possibility that a judge may assess factual circumstances without oral hearing, and such application of the law by him/her will not be considered to be unlawful, since there is no legal ground for this. Consequently, appeal of such decision to the higher instance will be likewise groundless and futile since neither does the Court of Appeals have a statutory provision to refer to in order to establish unlawfulness of the decision of the court of first instance. Even more so, it itself has no statutory obligation to consider factual issues with oral hearing, which is evidenced by section 5 of Article 207. The orders made in the case of Giorgi Ugulava attest the same. On the one hand, the judge notes that it is considering factual circumstances, and on the other hand, the Court of Appeal does not elaborate when the matter can be decided without oral hearing, or vice-versa. In particular, Order No. 1c/791-13 of the Court of Appeals dated 26 December, 2013 states: "investigative collegium of the Court of Appeals ... emphasizes that it is the discretion of the court to decide whether it shall consider the motion on dismissal of the accused from the office without oral hearing or with participation of the parties at the oral hearing. The issue is to be decided solely by the judge and based on the material presented he/she decides on its reasonability pursuant to section 1 of Article 160 of the Criminal Procedure Code, at which point the court is limited in time frames and the issue requires resolution in the shortest time frames pursuant to the established rules." It can be stated that the Court of Appeals justifies deciding within discretion under Article 160 to consider the case without oral hearing solely by the necessity of resolution of the issue within the shortest time frames. It is true that the court also notes that it decides on reasonableness of consideration of the case without oral hearing also based on the presented materials, however, there is no single reference to the criteria which would lead the court, on the basis of the presented materials, to the decision to consider the case with or without oral hearing.

85. As already noted, The Respondent considers that the disputed provision allows for conduct of the session without oral hearing also when the court has to decide the issue on the basis of evidences already assessed within the framework of the oral hearing, i.e. when the court does not face the necessity of assessment of new factual circumstances. Otherwise, the disputed norm provides for obligation to consider the issue with oral hearing. For the same reason, the Respondent defined that in the present case as well, given that the court had already considered factual circumstances within the framework of the oral hearing

when deciding upon ordering detention as a preliminary measure, there was no necessity to hold oral hearing to decide on the issue of dismissal from the office, since assessment of this issue was based on the same evidences.

86. The disputed provision, as opposed to the Claimant's case, may also be used independently from the need of ordering the preventive measure, which means that the judge will have to assess specific factual circumstances for the first time. Consequently, in such cases it will be inevitable to consider and decide on the matter with oral hearing.

87. Besides, even when the procedural action envisioned by Article 159 of the CPC is used in parallel with or after one of the preventive measures, the fact that the issue of preventive measure is decided with oral hearing does not in itself result in and ensure consideration of all those factual circumstances which would later be the basis for examination-assessment of the grounds under Article 159. Since the nature, purposes and therefore the grounds for using preventive measures and procedural action under Article 159 vary, the prosecution may strengthen its request for dismissal from the office with other, new, additional evidences, which by itself requires that the accused be given due opportunity to take part in consideration of new factual circumstances. At the same time, even in cases when the prosecution bases is arguments related to preventive measures and dismissal of a person from the office based on Article 159 on the same evidences, one may not exclude the possibility that the accused might present new factual circumstances with respect to the same evidences of the prosecution which have been assessed by the court when deciding the issue of granting a preventive measure.

88. It should be noted that the law does not prescribe an obligation to inform the accused that the prosecutor has addressed the court with a motion to apply Article 159 of the CPC. This means that the accused may not even have possibility to present written evidences, not to mention his/her right to participate in oral hearing.

89. Therefore, decision on the issue of the procedural action provided for by Article 159 of the CPC is based on the assessment/establishment of factual circumstances. The disputed provision of section 1 of Article 160, not only fails to exclude the possibility, but rather directly provides for the probability that the judge will consider factual circumstances without oral hearing. Besides, as already noted, Respondent's assertion that within his/her discretion the judge will only consider the issue without oral hearing if it is to base its order on the same evidences as the ones he/she has already assessed in the course of oral hearing when deciding on the usage of preventive measure, is groundless. The most important factor is that neither the disputed provision nor the rest of legislation obliges the judge to consider the opportunity envisioned by the disputed provision without oral hearing only in those cases when it has to assess only formal-legal issues or make a decision based on the already considered evidences. Besides, even when deciding the issue based on the same evidences, one must

not exclude that the accused may present new circumstances and therefore have an impact the decision.

90. As has already been noted, in general, speedy adjudication and avoidance of delay in consideration of cases, procedural economy, as well as prevention of artificial overload of the court, which in the end has a negative effect on the quality of justice, are legitimate aims of outmost importance, since protection of each of them also serves the purpose of effective enjoyment of the right to fair trial. However, the necessity of protection of these interests may not justify consideration of cases without oral hearing, if it results in infringement of rights of individuals, in the impossibility of protection of the rights. Protection of the aims of fast and effective adjudication is illogical if its outcome is impossibility of full enjoyment of the right to fair trial. In view of all the above mentioned, the disputed provision causes disproportional interference into the right and consequently, infringement of the right to fair trial guaranteed by paragraph 1 of Article 42 of the Constitution of Georgia.

91. Neither does the possibility of appeal on such decision of the court ensure constitutionality of the disputed norm. In general, the mechanism of appeal of the decision of the court of first instance to the court of higher instance aims at rectifying the mistakes, incorrect application of the law made at the first instance and in this way avoidance of infringement of the right. This does not in itself mean allowance, all the more justification, of legally stipulated possibility of infringement of the right at the first instance. In the given case the possibility of appeal on the decision of the court on dismissal from the office neither excludes nor justifies the legally stipulated probability of the infringement of the right. All the more, as already noted in such cases neither the Court of Appeals is constrained by statute to consider factual circumstances of the case with oral hearing.

92. The Claimant also requests to find second sentence of section 1 of Article 160 of the CPC unconstitutional with respect to section 3 of Article 42 of the Constitution of Georgia, pursuant to which: “The right to a defence shall be guaranteed.”

93. In Claimant’s opinion, since based on the disputed provision it is possible to consider/decide on the issue of dismissal of a person from the office without oral hearing, the accused has no possibility to protect himself either personally or by means of the defence counsel. The issue is decided so that the person has no possibility to present or defend his/her own position, consequently to influence the decision of the court, and to prevent possibility of unjustified limitation and infringement of his/her right. All of this leads to not only infringement of the right to fair trial and the right to defence, but also violation of the right for protection of which the legislator does not equip him/her with corresponding and sufficient effective legal mechanisms.

94. Pursuant to the case law of the Constitutional Court of Georgia, „the essence of the right to defence is that the person, towards whom certain proce-

dural actions are directed, should have the possibility to effectively influence the procedure and its outcome." (Judgment of the Constitutional Court of Georgia No. 1/2/503, 513 dated 11 April, 2013, Citizens of Georgia – Levan Izoria and Davit-Mikheil Shubladze v. the Parliament of Georgia, II-55). "Under article 42.3 of the Constitution of Georgia, a person who is being imposed deprivation of liberty, shall be entitled to express his opinion or have a legal counsel for his defence, which is mostly not feasible, when the case is tried without oral hearing, or with deliberations in the courtroom. It is true, that there are cases, when it is not necessary to hold an oral hearing. It is also possible, that deliberations in the courtroom do not violate right to defence, when for example, a party to the litigation, who is being imposed deprivation of liberty for demonstration of disrespect for court is present in the courtroom together with his legal counsel. However, the following precondition shall be considered: guaranteeing right to defence requires not merely having a legal counsel in physical sense, but also being provided with adequate facilities to prepare one's defence. Therefore, the legislator shall provide minimal, reasonably sufficient time for a person to have adequate possibility to defend himself in persons or through legal assistance. (Judgment of the Constitutional Court of Georgia No.1/3/393,397 dated December 15, 2006, Citizens of Georgia Onise Mebonia and Vakhtang Masurashvili v. the Parliament of Georgia", II). In the same case Constitutional Court referred to the position of the European Court of Human Rights: "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive" (Judgment dated 13 May, 1980, Artico v. Italy, paragraph 33.)" (Judgment of the Constitutional Court of Georgia No. 1/3/393,397 dated December 15, 2006, Citizens of Georgia Onise Mebonia and Vakhtang Masurashvili v. the Parliament of Georgia").

95. Constitutional Court has already found in the present case that decision on the issue of dismissal of the accused from the office requires oral hearing since: on the one hand, the person is imposed a certain coercive measure which results in intense intervention in his/her right protected by Article 29. On the other hand, to decide on the issue of using of this measure the court has to rely on investigation and examination of factual circumstances. All of this requires the person to be equipped with adequate, effective, sufficient legal means to have influence on such decision, which cannot be achieved by consideration of the case without oral hearing. Enjoyment of the right to defence is the essential legal mechanism which makes oral hearing of the case even more effective in terms of ensuring protection of the right. Naturally, in certain cases it is possible to enjoy right to defence within the proceeding conducted without oral hearing of the case. I.e. consideration of the case without oral hearing does not in itself and always entail infringement of one's right to defence. However, when oral hearing of the case is necessary for full protection of the right, consideration of

the case without oral hearing infringes not only paragraph 1 of Article 42 of the Constitution of Georgia, but also the right to defence guaranteed by the paragraph 3, as an essential legal component of the right to fair trial. In such case, as has already been noted, consideration of the case without oral hearing leads to infringement of the right due to the fact that a person is deprived of the right to present evidences, assert his/her position personally or by means of defence counsel and the opportunity to defend oneself.

96. In view of all the above mentioned, second sentence of section 1 of Article 160 contradicts paragraph 3 of Article 42 of the Constitution of Georgia.

III
Ruling Part

Based on Article 89(1)(f) and Article 89(2) of the Constitution of Georgia; Article 19(1)(e), paragraph 1 of Article 212, paragraph 1 of Article 23, paragraphs 1, 2 and 3 of Article 25, paragraph 5 of Article 27, Article 39(1)(a), paragraphs 2,3,7 and 8 of Article 43, paragraphs 1 and 2 of Article 44 of the Organic Law of Georgia "On the Constitutional Court of Georgia", paragraph 2 of Article 24, Articles 30, 31, 32 and 33 of the Law of Georgia "On Constitutional Legal Proceedings",

THE CONSTITUTIONAL COURT OF GEORGIA
RULES:

1. Constitutional Claim No. 574 (Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia) shall be upheld.

2. Following acts shall be found unconstitutional: a)with respect to paragraphs 1 and 2 of Article 29 of the Constitution of Georgia - that normative part of Article 159 of the Criminal Procedure Code of Georgia which provides for dismissal from the office (workplace) of the officials of local self-government elected as a result of universal, equal and direct elections through secret ballot; b) second sentence of section 1 of Article 160 of the Criminal Procedure Code of Georgia with respect to paragraph s 1 and 3 of Article 42 of the Constitution of Georgia.

3. Normative part of Article 159 of the Criminal Procedure Code of Georgia which provides for dismissal from the office (workplace) of the officials of local self-government elected as a result of universal, equal and direct elections through secret ballot, as well as second sentence of section 1 of Article 160 of the Criminal Procedure Code of Georgia shall be declared invalid from the moment of public announcement of this judgment.

4. The present judgment shall be in force from the moment of its public announcement at the hearing of the Constitutional Court.

5. The present judgment is final and shall not subject to appeal or revision.

6. Copies of the present judgment shall be sent to the parties, the President of Georgia, the Government of Georgia and the Supreme Court of Georgia.

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

Members of the Plenum:

Giorgi Papuashvili
Konstantine Vardzelashvili
Ketevan Eremadze
Maia Kopaleishvili
Zaza Tavadze
Otar Sichinava
Lali Papiashvili
Tamaz Tsabutashvili