
**CITIZENS OF GEORGIA – ALEXANDRE BARAMIDZE,
LASHA TUGHUSHI, VAKHTANG KHMALADZE
AND VAKHTANG MAISAIA VERSUS THE PARLIAMENT
OF GEORGIA**

N2/2/516,542

Batumi, 14 May 2013

Composition of the Board:

1. ZazaTavadze – Chairman of the sitting, Judge Rapporteur;
2. OtarSitchinava – Member;
3. LaliPapiashvili – Member;
4. Tama Tsabutashvili – Member.

Secretary of the sitting: DarejanChaligava

Title of the Dispute: Citizens of Georgia – Alexandre Baramidze, Lasha Tughushi, Vakhtang Khmaladze and Vakhtang Maisaia versus the Parliament of Georgia.

Subject of the Dispute: a) on the constitutional claim N516 – constitutionality of the words “also collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia” of the first part of Article 314 of the Criminal Code of Georgia with respect to paragraphs 1 and 4 of Article 24 and paragraph 5 of Article 42 of the constitution of Georgia. b) On the constitutional claim N542 – constitutionality of the words “collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia” of the first part of Article 314 of the Criminal Code of Georgia with respect to the first paragraph of Article 24 of the constitution of Georgia.

Participants to the case: Vladimer Sanikidze, representative of the Claimants – Vakhtang Khmaladze and Lasha Tughushi. Kakha Kukava, representative of the Claimant – Vakhtang Maisaia. Representative of the Parliament of Georgia – Tamar Khintbidze; Specialist – Besarion Bokhashvili, expert of the Council of Europe, the European Union, the UNDP, the Office of the UN High Commissioner for Human Right, the UNICEF, the German Technical Assistance and Cooperation Fund, expert on human rights of the German Fund for International Cooperation on International Legal Issues; local representative on law education of judges, prosecutors and lawyers of the Council of Europe in Georgia, lecturer and associated professor of the high council of justice, law school of the Caucasus, education and trainings fund of the Young Georgian Lawyers Association.

I

Descriptive Part

1. On 05 August 2011, a constitutional claim (registration N516) was lodged with the constitutional court of Georgia by citizens of Georgia – Alexandre Baramidze, Lasha Tughushi and Vakhtang Khmaladze. On 19 August 2011, the constitutional claim was referred to the Second Board of the Constitutional Court with a view to deciding about the admissibility of the case for the consideration on the merits.

2. On 19 November 2012, by the Recording Notice N2/1/516, the Second Board of the constitutional court of Georgia admitted the constitutional claim N516 for consideration on the merits on the part, which dealt with constitutionality of the words “also collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia” of the first part of Article 314 of the Criminal Code of Georgia with respect to paragraphs 1 and 4 of Article 24 and paragraph 5 of Article 42 of the constitution of Georgia.

3. On 18 September 2012, a constitutional claim (registration N542) was lodged with the constitutional court of Georgia by citizen of Georgia Vakhtang Maisaia. On 18 September 2012, the constitutional claim was referred to the Second Board of the Constitutional Court with a view to deciding about the admissibility of the case for the consideration on the merits.

4. On 19 November 2012, by the Recording Notice N2/1/515, the Second Board of the constitutional court of Georgia admitted the constitutional claim N542 for the consideration on the merit on the part, which dealt with constitutionality of the words: “collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia” with respect to the first paragraph of Article 24 of the constitution of Georgia. Under the state Recording Notice N542, the constitutional claim was combined with the constitutional claim N516 into the single case.

5. The sitting of consideration of the case on the merits was held with an oral hearing on 18 December 2012.

6. The grounds for filing the constitutional claim N516 are the first paragraph of Article 42 and subparagraph “f” of the first paragraph of Article 89 of the constitution of Georgia; subparagraph “e” of the first paragraph of Article 19, subparagraph “a” of the first paragraph of Article 39 of the organic law of Georgia “On the Constitutional Court of Georgia”; paragraph 2 of Article 1, paragraph 1 of Article 10, subparagraph “a” of the first paragraph of Article 12, Articles 15 and 16 of the law of Georgia “On the Constitutional Legal Proceedings”.

7. The grounds for filing the constitutional claim N542 are subparagraph “f” of the first paragraph of Article 89 of the constitution of Georgia; subpara-

graph “e” of the first paragraph of Article 19, subparagraph “a” of the first paragraph of Article 39 of the organic law of Georgia “On the Constitutional Court of Georgia”; Articles 15 and 16 of the law of Georgia “On the Constitutional Legal Proceedings”.

8. Pursuant to the part indicated as disputed of Article 314 of the Criminal Code of Georgia, collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia shall be punishable under criminal law.

9. On the constitutional claim N516, the Claimant believes that the words “also collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia” of the first part of Article 314 of the Criminal Code of Georgia have the vague content and a person does not have the possibility to foresee in advance, as to what act is prohibited by the law for him. The term “other information” mentioned in the disputed norm is deemed as problematic by the Claimants. In their opinion, the content of the given term is of a wide character and provides the possibility of diverse interpretations, as opposed to the first part of the same norm, which declares the transfer of the information containing the state secret as punishable, and in its turn, the notion of the state secret is defined by the law of Georgia “On State Secrets”. Accordingly, the term “other information” implies any information, which is not the state secret. Among them, public information, personal thoughts and opinions. Stemming from this, the Claimants deem that on the basis of the disputed norm, a person is possible to be punished for the action, which represents his freedom of expression guaranteed by the constitution.

10. The Claimants assert that the term “to the detriment of the interests of Georgia” is also vague. It is unclear for them, how disclosure or loss of “other information” may cause damage the interests of Georgia, if this information is not “State secret”, as it is clarified by the law of Georgia “On State Secrets”. In the case if the information is not secret, its disclosure or loss can not cause damage to the interests of Georgia. Accordingly, in their opinion, the appealed provision declares such action, formulation of which is wrong in terms of the content, as being a crime.

11. The Claimant also indicates that the circumstance qualifying for the crime foreseen by the disputed norm is the transfer of information to a foreign organization by commission of the latter. The disputed norm does not clarify a foreign organization. Accordingly, it implies any organization, among them, entrepreneurial and non-entrepreneurial legal entity of private law, which is located in a foreign country and may be deemed as “a foreign organization” for the purposes of this element of compilation of the crime. Stemming from this, compilation of the crime foreseen by the disputed norm implies transfer of any type of

information to any organization, which is detrimental to the interests of Georgia, however, vagueness of the mentioned terms cannot comply with the criterion of foreseeability of the law, which is secured by paragraph 5 of Article 42 of the constitution of Georgia.

12. The Claimant at the sitting for consideration of the case on the merits additionally noted that on the ground of paragraph 5 of Article 42 of the constitution, the legislator is obliged to formulate any norm so that a person directly or with the help of a lawyer, can precisely understand what action is prohibited. The given requirement is especially important in case of qualification of an action as a criminal offense. Accordingly, the provisions of the Criminal Code must be distinctly and unambiguously formulated. In the case of the disputed norm, a person is prohibited not only collection and dissemination of open information, but formulation, analysis and corroboration of his own opinions, despite the fact that he does not think and neither has the desire to act to the detriment of the country. Punishment by criminal law of such action explicitly contradicts the constitution and the disputed norm must be recognized as unconstitutional.

13. It is also unclear for the Claimant what the term “to the detriment of the interests of Georgia” implies. In the opinion of the Claimant, transfer of open information to a foreign organization is theoretically possible to sustain damage to the country, however, it is not qualified as a criminal offence, because it is unimaginable to exhaustively define such cases and obligate a person to bring his/her action in compliance with such prohibition. By the operation of the disputed norm, a person is virtually prohibited to think, because the information produced by him may be deemed as being detrimental to the country and be thus punished. Stemming from this, the disputed norm fails to comply with the requirements of the constitution.

14. As the Claimant asserts, both collection and transfer of other information by commission of the intelligence of a foreign country or a foreign organization is punishable by the disputed norm. In the opinion of the Claimant, in relation to transfer of information, the disputed norm is possible to have certain justification, however in the conditions of the applicable wording, collection of the information is considered as already completed crime, which prohibits a person to enjoy the freedom of expression guaranteed by the constitution. Accordingly, the disputed norm contradicts with paragraphs 1 and 4 of Article 24 of the constitution of Georgia.

15. As the Claimant explains, he may not formulate the disputed norm in such a way, which shall be in compliance with the constitution. In case if the purpose of the State is to declare any other action, except for collection and transfer of the secret information, as punishable and it fails to formulate the respective norm distinctively, clearly and consistent with the requirements of the constitution, such action shall not at all be declared as punishable.

16. Stemming from all the aforementioned, the Claimant considers that the disputed norm should be recognized as unconstitutional with respect to paragraphs 1 and 4 of Article 24 and paragraph 5 of Article 42 of the constitution of Georgia.

17. The Claimant, in order to shore up his argumentation, additionally provides the case-law of the European Court of Human Rights and the practice of the constitutional court with respect to the disputed issues.

18. On the constitutional claim N542, the Claimant believes that the disputed norm restricts the freedom of expression guaranteed by the constitution of Georgia. On the basis of the disputed norm, it is possible that any activity, which is carried out within the scopes of the sphere protected by the freedom of expression, shall be deemed as espionage and the criminal liability shall be imposed upon a person.

19. The terms – “other information” and “to the detriment of the interests of Georgia” defined by the disputed norm is problematic for the Claimant. In his opinion, the mentioned terms are unclear and vague. Accordingly, it is necessary to specify their definition.

20. At the sitting for consideration of the case on the merits, the Claimant further mentioned that the term “other information” implies absolutely all the information that an individual can say orally or can state in writing. Simultaneously, the human right to collect and impart information, including provide it to an organization of a foreign country, is protected by Article 24 of the constitution. Accordingly, if the legislator wants to protect certain type of information, it is obliged to attribute the mentioned information to the category of the secret information and to introduce respective amendments to the legislation. Otherwise, any legislative norm, which declares collection and transfer of open information as punishable, shall come into contradiction with Article 24 of the constitution. The Claimant believes that in the conditions of existing constitutional order, only collection or transfer of the secret information can be declared as punishable, and if the State wants to determine a different standard, it is obliged to change Articles 24 itself of the constitution and to restrict the freedom of expression. Stemming from the aforementioned, the term “other information” should be recognized as unconstitutional.

21. The Claimant also refers that the term “to the detriment of Georgia” represents an outdated notion typical to the Soviet law and must not be applied in the modern law. The mentioned term entirely carries political content, accordingly, it is impossible for the law-enforcer to establish about what type of action is detrimental to the interests of Georgia and qualify it for criminal offense. Accordingly, the mentioned term also contradicts the freedom of expression enshrined by the constitution.

22. The Claimant also indicates that it is required to specify the term “a foreign organization” determined by the disputed norm, since it represents a gen-

eral term and it may suppose any organization, which is registered abroad and not only those organizations that are immediately connected with the intelligence. Accordingly, the legislation must introduce the notion of connected organization, in order to make only collection or transfer of the information by commission of the intelligence or organization connected therewith punishable.

23. Stemming from all the aforementioned, the Claimant believes that the disputed norm contradicts with the first paragraph of Article 24 of the constitution of Georgia.

24. According to clarification provided by the Respondent – the Parliament of Georgia, the disputed norm is vague and a person may not bring his own action in compliance with the requirements of this norm. The Respondent shares the argumentation provided by the Claimant that the term “other information” defined by the disputed norm provides the possibility of wide interpretation, accordingly, it is impossible to determine as to receipt and dissemination of what type of information is prohibited (punishable) and what type of information – permissible. Besides, the disputed norm fails to comply with the requirements of paragraph 5 of Article 42 of the constitution. It needs to be elaborated and it is planned to add the legislative changes thereto, as to bring it in conformity with the constitution. The Respondent also agreed with the Claimant that the term “a foreign organization” defined by the disputed norm is vague and needs to be specified.

25. The Respondent pointed out that on the ground of the disputed norm, a person shall be punished in case if he wanted his action to be detrimental to the country, no matter whether such outcome was effected or not in reality. Stemming from this, the disputed norm is problematic, because a person may fail to determine as to transfer of what type of information he shall be held criminally responsible. The disputed norm fails to give a clear reference what category of information a person is prohibited to collect or transfer, and respectively, he may be also punished in the event of collection and transfer of open information, which is less plausible to bring damage to the country.

26. In the opinion of the Respondent, the disputed norm must be formulated in such a way that it should become clear and distinct collection and transfer of what type of information is an action subject to punishment. In addition, the term “to the detriment of the interests of Georgia” defined by the disputed norm is vague and it is needed to be clearly formulated, as in every specific case, a person shall be conscious about the fact that he does not realize the freedom of expression, but commits a crime to the detriment of the interests of Georgia. Stemming from this, the Respondent thinks that the disputed norm should be elaborated and be brought in conformity with Article 24 and paragraph 5 of Article 42 of the constitution of Georgia.

27. Besarion Bokhashvili, expert of the Council of Europe, the European Union, the UNDP, the Office of the UN High Commissioner for Human Right,

the UNICEF, the German Technical Assistance and Cooperation Fund, expert on human rights of the German Fund for International Cooperation on International Legal Issues; local representative on law education of judges, prosecutors and lawyers of the Council of Europe in Georgia, lecturer and associated professor of the high council of justice, law school of the Caucasus, education and trainings fund of the Young Georgian Lawyers Association – the specialist invited to the case declared that in order to assess the restriction of freedom of expression, the European Court of Human Rights applies the test comprised of 3 steps. Pursuant to the mentioned test, restriction should satisfy the following criteria: 1) restriction should be foreseen by the legislation in force; 2) it should serve a specific legitimate purpose; 3) restriction should be necessary in a democratic society or proportionate to the purpose which the executive authorities pursue to achieve. The criterion of restriction defined by the law implies that the law should be accessible, clear and certain. The law is certain if it does not grant the state bodies unlimited or very wide discretion for interference with the freedom of expression, or the law is formulated in such a way that any citizen with average IQ (Intelligence Quotient) has the possibility to read and understand what the legislator wanted to say.

28. In the opinion of the Specialist, the term “to the detriment of the interests of Georgia” defined by the disputed norm implies much more subjective moment than objective one. The European Court of Human Rights on the case “Rogan v. the United Kingdom” discussed about how general was the Report on with regard to specific national security interests. The court paid huge attention to fact that the national court (House of Lords) in a specific case had interpreted that what the national security represents. Accordingly, the court was content with it and stated that the national security is very normally and properly formulated. In the case of the disputed norm, it is not explained what the term “to the detriment of the interests of Georgia” implies, thus, the Specialist thinks that it should be more clearly formulated in the legislation or interpreted by the court.

29. The Specialist indicated that the term “other information” defined by the disputed norm supposes any information, which is public and is available for anyone. In the opinion of the Specialist, any information relating to any problematic, among them, analytical survey or analysis may be considered as being detrimental to the State interests. Respectively, in order to exclude increased threat for arbitrariness, it is important to specify and clarify by the disputed norm, provision of what type of information can be deemed as an action envisaged by Article 314 of the Criminal Code of Georgia.

30. On the basis of the first paragraph of Article 141 of the law of Georgia “On the Constitutional Legal Proceedings”, on the constitutional claim N516, non-entrepreneurial non-commercial legal entity “Article 42 of the Constitution” submitted the Amicus Curiae brief in writing form.

31. In the Amicus Curiae written brief, the practice of the European Court of Human Rights, the Supreme Courts of the USA and Canada with respect to the disputed matters are surveyed. The Amicus Curiae, based on the given practices, thinks that beforehand foreseeability of the norm represents an obligatory requirement delivered towards the criminal law. The law must give any citizen the possibility to evaluate what kind of actions is prohibited and in what cases he/she should expect imposition of the criminal liability. Otherwise, considering this or that action as being a crime and enactment of sanction shall fall under the discretion of executive or judicial authorities, and this will amount to violation of the principle of legality, under which a crime can be only determined by the law.

32. The Amicus Curiae written brief on the case was also submitted by Ltd “the Free University”, which is accompanied by the research prepared by the Washburn School of Law on the disputed issue. The Amicus Curiae written brief provides the survey of the legislations and the judicial practice of the USA, Germany and Israel, also the practice of the European Court of Human Rights with respect to the disputed issues. Besides, the Amicus Curiae submitted the analysis and opinions of the disputed norm with regard to its constitutionality.

33. The Amicus Curiae refers that the term “to the detriment of the interests of Georgia” defined by the disputed norm represents an element of objective set of the crime, and as for subjective element, the Amicus Curiae thinks that espionage, as a crime, implies a direct intention. Accordingly, a subject of the crime is conscious about factual circumstances of its action, possible damage to the interests of Georgia and wants this consequence or takes into account the inevitability of reaching to such outcome. The motive and purpose of an action may be different and they do not influence upon qualification.

34. In the opinion of the Amicus Curiae, the circumstance that “to the detriment of the interests of Georgia” is a part of the objective set of the crime means that the specific information, which it deals with, substantially may cause damage to the interests of Georgia. Under the conditions of such interpretation, the term “other information” defined by the disputed norm does not any longer look as open and mostly senseless term, as it is asserted by the Claimant. The criminal court will have to ascertain whether or not a specific information, which the defendant obtained, collected or transferred to a foreign organization, may have cause the damage to the interests of Georgia. In case if information does not have this nature, automatically, the set of crime cannot exist.

35. The Amicus Curiae noted that in order that a charge of espionage was brought against a person, he should understand that he acts “to the detriment of the interests of Georgia”, that is, this element should be part of by his intention. This interpretation is confirmed by Part 2 of Article 11 of the Criminal Code of

Georgia, under which, “other qualifying mark of the crime of aforethought shall fall within a person’s responsibility only in case this mark was part of the intention of this person”. Stemming from this, not only the information should be qualitatively potentially detrimental, but also a person should have the knowledge that the information obtained by him is detrimental. In case if it failed to prove that a defendant had the mentioned knowledge, this mark of the crime (information must be transferred to the detriment of the interests of Georgia) cannot be brought against him as a charge and respectively, an action cannot be qualified as a crime envisaged by Article 314. Thus, a person must work to the detriment of the interests of Georgia and he/she must have the knowledge about it.

36. According to the explanation provided by the Amicus Curiae, the method typical to espionage as a crime, is a cooperation with foreign power, to place it into preferential position and thus cause the damage to the interests of Georgia. Given that the domain of the issues that are regulated by the States through the relations with other States or through relations with entities emerged at international level is more and more expanding, it will be exceedingly difficult to exhaustively define the sphere of interests, where the States may be put in unfavorable condition due to disclosure of this type of information. Considering this, it might not be appropriate that the crime of espionage be only confined to the sphere of interests related to the defense and do not extend to other interests such as economic development, international relations, accession to international organization, which may not necessarily be of combat or defense nature. Accordingly, it would be preferable if the disputed norm will be specified through defining the nature of information.

37. The Amicus Curiae thinks that information must be specially secured by the State and not-accessible for the public. The information may meet these criteria even if it is not classified as the secret information and did not pass through any official procedure of classification. In the opinion of the Amicus Curiae, dissemination of the information available at public sources even may be detrimental and useful for external subjects, which can influence upon the interests of the State. However, simultaneously, the same information may receive the state protection and is not available (in the type, as it is disseminated by a specific person) for the public. This is the reason because of which the crime of espionage must not be confined only to dissemination of the secret information.

38. The Amicus Curiae indicated that in case if information is public and accessible and nothing is changed in it, imposition of the legislative barrier on its dissemination through the crime of espionage does not make any sense and fails to meet requirements of the test of proportionality. Under the applicable wording, the disputed norm of Article 314 causes criminalization of such case, when a person transfers the information that is against the State, but is publicly available.

39. Stemming from the abovementioned, the Amicus Curiae consider that the disputed norm contradicts with the freedom of expression guaranteed by Article 314 of the constitution of Georgia.

II

Motivational Part

1. In the constitutional claims N516 and N542, constitutionality of the words “also collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia” of the first part of Article 314 of the Criminal Code of Georgia with respect to paragraphs 1 and 4 of Article 24 of the constitution of Georgia is contested. In the constitutional claim N516, the Claimant also demands to examine the constitutionality of the disputed norm with respect to paragraph 5 of Article 42 of the constitution of Georgia. The given constitutional provisions protect two very important and different from each another values. Accordingly, the constitutional court will assess the issue of conformity of the disputed norm separately and individually.

Constitutionality of the disputed norm with respect to paragraphs 1 and 4 of Article 24 of the constitution of Georgia

2. Freedom of expression of an individual is enshrined in Article 24 of the constitution of Georgia, it protects human right to receive and impart information and express his/her opinion. There are a number of important interpretations with regard to contents and scopes of the given constitutional right in the practice of the constitutional court of Georgia. The constitutional court on the case “Citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and the President of Georgia” indicated that “the first paragraph of Article 24 of the constitution protects freedom of information, its free dissemination and receipt through publicly available sources, from the carriers of information, which are useful for obtaining and imparting information. Without free information it is impossible to formulate a free idea. This is a norm, which prohibits to set “information filters” for a society, a human mind, which is typical of undemocratic regimes” (Decision N2/2-389 of 26 October 2007 of the constitutional court of Georgia on the case “Citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and the President of Georgia’, II-14). The constitutional court in its subsequent decisions repeatedly indicated and underlined special importance of the freedom of expression: “The right of freedom of expression is one of the necessary preconditions for existence of democratic society, its full-fledged development. Free, unimpeded dissemination of information secures diversity of opinions, promotes public and informed discussions on issues that are important for a society, it makes possible engagement of each member of the society in public life” (Decision N1/1/468 of 11 April 2012 of the constitutional court of

Georgia on the case “The Public Defender of Georgia versus the Parliament of Georgia”, II-26).

3. Freedom of expression is a concomitant, inseparable element for existence of an individual. Article 24 of the constitution has broad and multifaceted content. Collection and dissemination of information not only orally and in writing, but also by any other means falls under its protection. “...a free society is comprised of free individuals, who live in the free informational sphere, think freely, hold independent opinions and participate in the democratic processes, which implies exchange of ideas and debates A democratic process is driven by a force, spiritual influence, which is typical for a thought. The constitution protects the process of expression and dissemination of a thought, its contents and forms...” (Decision N2/2-389 of 26 October 2007 of the constitutional court of Georgia on the case “Citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and the President of Georgia”, II-13).

4. Pursuant to the disputed words of the first part of Article 314 of the Criminal Code of Georgia, collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia shall be punishable. It is doubtless that the disputed norm restricts collection and dissemination of information, however, only in case, when the given action is carried out by commission of the intelligence of a foreign country or a foreign organization. Stemming from this, in order to find out where or not restriction of the right protected by the first paragraph of Article 24 of the constitution is in place, it should be defined: whether or not generally, such action, which implies collection and transfer of information by commission of others falls in the sphere protected by Article 24 of the constitution. Acting by commission of others has a broad content and it is possible to imply labour relations and obligations related thereto, and also a simple request, demand or other. Considering the abovementioned, it should be ascertained whether or not an action by a person by the first paragraph of Article 24 of the constitution, in the conditions, when he carries out collection and transfer of information not at his own initiative, but within the assignment made by other.

5. In this sense, the decision of the constitutional court of Georgia is important on the case “Maia Natadze and others versus the Parliament of Georgia and the President of Georgia”. In the given case, the Claimants were represented by professors of university, who contested the normative act, on the ground of which, their dismissal from the work had been exercised. They thought that by dismissing from the work, since they, as university professors, will not be able to express their certain opinions and exchange of information in a university classroom, their freedom of expression was restricted. The court indicated that “good protected by Article 24 of the constitution is not the right to participate in the activities or hold

a certain post in the body of legal entity of public law” (Decision N2/2-389 of 26 October 2007 of the constitutional court of Georgia on the case “Citizen of Georgia Maia Natadze and others versus the Parliament of Georgia and the President of Georgia”, II-16). Stemming from the mentioned interpretation, a person’s right to hold any post or to enter into any types of labor relations with other person may not be considered as protected by Article 24 of the constitution, despite the fact that holding a position, entry of labor or other relations, stemming from the specificity of activities, no matter if it supposes in itself to collect or impart information, express an idea and share it with others. Accordingly, neither the right of cooperation with a foreign organization or/and with the intelligence of a foreign country may not be seen as the good protected by the freedom of expression. The right protected by Article 24 of the constitution does not suppose in itself the guarantee that a subject of the right to establish a labor or any other forms of relations with certain persons, receive remuneration in return of provision of the information and etc.

6. However, a different case is when collection and transfer of information is an accompanying process of labor or any other types of relations and is carried out within its scopes. Article 24 of the constitution particularly protects the possibility to impart an opinion and information by different means, “among them press, television, other means for dissemination of information and opinion” (Decision N2/482,483,487,502 of 18 April 2011 of the constitution of Georgia on the case). Journalism, research, scientific, pedagogic and any such activities which implied to receive and impart information, in itself, may be related to an action undertaken by certain commission and assignment. A journalist as well as researcher may receive commissions and assignments and may prepare articles for various televisions, newspapers, scientific or informational agencies. Accordingly, it will be against the essence of the right of expression of freedom, if activities of journalist, researcher, teacher or/and other persons are not deemed as protected by Article 24 of the constitution, when he/she receives, processes or/and imparts information by the commission of others. The purpose of Article 24 of the constitution is to provide human freedom, at his own discretion, to undertake dissemination of information and opinion in the process of communication with the public or/and the State. Stemming from the given purpose, for instance, a journalist working by commission of other needs, within his/her scopes of activity, to be protected to the same extent as his/her colleague, who undertakes analogous action at his own initiative. Accordingly, receipt and dissemination of information both at one’s own initiative and by commission of other person is protected by Article 24 of the constitution. Stemming from the aforementioned, restriction determined by the disputed norm amounts to the interference with the right protected by Article 24 of the constitution.

7. The freedom of expression is not an absolute right and it may be subject to restriction in order to achieve the legitimate purpose provided for by the constitution, by applying the means proportionate to achieve the purpose. The legislator is obliged, while establishing the norms restricting the rights, to observe reasonable balance between the purpose pursued and the restricted right, as not to allow that human right being restricted much more than this is necessary for existence of a democratic society. Otherwise, existence of the constitutional rights would acquire only formal, declaratory nature. Democratic state should respect the freedom of expression of an individual; its restriction should be grounded, required and necessary for existence of a democratic society itself, and for peaceful cohabitation of people. It is doubtless that there is an authority to interfere with the freedom of expression; however this can be done, provided that the principle of proportionality is strictly respected.

8. Simultaneously, while regulating the freedom of expression, the legislator is obliged to take into account the influence of the norm defining the responsibility upon an individual's right. The right protected by Article 24 of the constitution of Georgia undergoes "biting effect", if person, in fear of possible sanction, is compelled to abstain from enjoying the right fully and self-restriction is reflected in the normatively unrestricted part of the freedom of expression. Under the influence of "biting effect", the impacts of the norm over realization of the freedom of expression is possible to go beyond the sphere regulating it and to virtually restrict the relations regulation of which the legislation did not have as an intention. Such regulation of the sphere of freedom of expression is possible to cause unjustified closure of the society, self-restriction of freedom of its action, force people to undertake self-censorship in the part of the sphere protected by the freedom of expression, which is not necessary to be restricted, which in itself amounts to disproportionate restriction of this right.

9. In order to assess the constitutionality of the disputed norm, in the first place, it should be ascertain, on its ground, in what case and under what preconditions the criminal liability shall be in place. Pursuant to the disputed words of the first part of Article 314 of the Criminal Code of Georgia, the crime is "collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia". Interpretation of the content of the mentioned norm must be done based on its content and purpose by providing its systemic reading alongside with other norms of the criminal code.

10. In the constitutional claim N516, the Claimant indicates that the disputed norm is constructed in such a way that the prohibited action provided in it is possible to be committed without due caution and circumspection, despite the fact that the disputed norm does not directly refer anything about this. The

constitutional court holds that reading of the disputed norm with such meaning rests upon inaccurate perception of the general part of the criminal code by the Claimant. Under Articles 9 and 10 of the criminal code, a crime can be aforethought and without due caution and circumspection. Besides, according to part 4 of Article 10, “The action committed without due caution and circumspection shall be deemed to be offense only in case it is referred to in the relevant article of this Code”. Article 314 of the criminal code does not refer that commission of “espionage” can be possible without due caution and circumspection. Accordingly, an action defined by the disputed norm shall be punishable only in case if it was perpetrated with aforethought.

11. Under Article 9 of the criminal code, “Crime of aforethought shall be the action that is perpetrated with direct or indirect intention”. For existence of direct or indirect intention it is necessary that a person be aware of the illegitimacy of his/her action and foresaw possibility for the arrival of the illegal consequences. Direct intention differs from indirect intention by a person’s voluntary attitude towards illegal consequence. In particular, if a person, while perpetrating a crime, wished the arrival of illegal consequence or foresaw the inevitability of the realization of such consequence, the intention is direct. And if a person wished the consequence, but he consciously allowed or negligently treated its arrival, then intention is indirect. A range of actions envisaged by the criminal code (for example: robbery, espionage) are qualified as completed crime, the arrival of specific illegal consequence is not necessary. Each criminal norm has its object of protection. Accordingly, perpetration of a crime always causes the violation of legal good, protection of which criminalization of a specific action serves. The criteria defining the intentional crime laid down in Article 9 of the criminal code of Georgia (consciousness of criminality of an action and wish for the arrival of the consequence or negligent attitude towards it) is useful when defining the content of any intentional crime, including such crime as espionage (an action defined by Article 314 of the criminal code).

12. The disputed words of the first part of Article 314 of the criminal code of Georgia in order to describe a criminal action employ three cumulative elements: 1. there should be the fact of collection or/and transfer of information; 2. the mentioned should be done by commission of the intelligence of a foreign country or a foreign organization; 3. an action must be to the detriment of the interests of Georgia. Considering all the aforementioned, on the ground of the disputed norm, the criminal liability shall be imposed upon a person only in case if he is aware of carrying out an action defined by the disputed norms of the first part of Article 314 of the criminal code, in particular, he consciously acts by commission of the intelligence of a foreign country or a foreign organization, collects or/and transfers information and, at the same time, is conscious that this action is

detrimental to the interests of Georgia. Besides, a person must have direct or indirect intention of the arrival of illegal consequence. In case, if a subjective attitude of a person towards an action committed lacks any of the mentioned components, the criminal liability shall not be imposed upon him on the ground of the disputed norm.

13. The first part of Article 314 of the criminal code of Georgia, on the one hand declares collecting, keeping of the object, document, information or any other data containing the state secret of Georgia or transferring thereof to a foreign country, foreign organization or their representative, or extortion or transfer of other information by commission of the surveillance of a foreign state or a foreign organization to the detriment of the interests of Georgia as being a punishable action. And on the other hand, the impugned words of the same part of Article 314, the prohibition defined thereby deals with “other information” that is, the information, which does not contain the state secret of Georgia, collection and transfer. Accordingly, the constitutional court shares the position held by the Claimant that in the words “other information” indicated in the disputed norm is thought that wide spectrum of the information, which does not represent the state secret.

14. Stemming from abovementioned, since the disputed norm regulates the liability for collection and transfer of such information, which may be publicly available, including from public sources, it is evident that an object of the protection by the disputed norm is not specific type of information. It is doubtless that restriction defined by the law is related not to the character of information, but the subject, upon whose assignment, this information is collected or/and transferred. Respectively, the disputed words of the first part of Article 314 of the criminal code of Georgia associates punishment of a person with cooperation with the intelligence of a foreign country and a foreign organization to the detriment of the interests of Georgia, and not with the secret nature of information itself transferred thereto. Stemming from the mentioned, the disputed norm may be compatible with the constitution in case if by assignment of the intelligence of a foreign country or a foreign organization, without giving due regard to the character of information, its collection and transfer violates the legitimate constitutional purposes indicated in Article 24 of the constitution.

15. The disputed norm establishes the criminal liability in the case of action undertaken by commission of both the intelligence of a foreign country and a foreign organization. The legitimate purpose of prohibition of provision of information by commission of the intelligence of a foreign country compared to provision of information by commission of a foreign organization may be radically different. Accordingly, the constitutional court will assess the issue of constitutionality of collection or/and transfer of information by commission of the intelligence of a foreign country and a foreign organization separately.

16. An action of the intelligence of a foreign country, as a rule, poses the danger to the state security. The special services of a foreign country, in itself, represents certain instrument of a specific state to exert influence upon another state. This is confirmed by the functions of the intelligence and the methods or means to execute these functions. The primary task of the mentioned special services is to study the state in its interest, which, in itself, implies obtaining information relating to this State. In the modern conditions, maximum efficiency of the intelligence of a foreign country is defined by the criteria, which implies exhaustive and complex study of the state in the sphere of its interest as well as its exploration in the light of political economic situation, also elaboration of technical data about it. Besides, the sphere of interest of the special service of a foreign country is not limited to abovementioned dimensions for functioning of the state. A subject of the interest of the intelligence of a foreign country encompasses relatively wide spectrum and in this context it may imply activities cultural or any other spheres. Diversity modern methods of activities of the intelligence services and a wide area for actions make reference to complex nature of the problem.

17. In order to perform the mentioned tasks, they may use any types of information, including such that is accessible from open sources. By commission of the intelligence of a foreign country, collection and transfer of information about Georgia, in itself implies assisting and facilitating them in their activities. The intelligence of a foreign country as such, aims at gaining the advantage over the State in its sphere of interest and this occurs at the expense of the interests of the state that is an object of exploration. The state whose special services work effectively, take benefit from the mentioned activity, and the State against which this activity is directed – takes the damage. Accordingly, the damage inflicted upon the State is reflected in creating the danger to its interests. Considering the aforementioned, it emanates from the security interest of the Georgian state that Georgia must be protected from the studies of information, any fact, object or data about Georgia undertaken by the secret service of other country. Protection from becoming an object of surveillance by the special services of a foreign country is an important constituent element of the security concept of any state. Accordingly, when the legislator prohibits collection or/and transfer of information about Georgia by commission of the intelligence of a foreign country, it acts within the scopes of the legitimate aim to protect the state security.

18. Under the disputed norm, an action shall be deemed as punishable not transfer in itself of certain information to the foreign intelligence, but rather in case, when this action is detrimental to the interests of Georgia. As it was indicated above, in general, the interest of the state is to be protected from the surveillance of a foreign country. Accordingly, transfer of any such information to the intelligence of a foreign country can be deemed as being detrimental to the

interests of Georgia, which deals with Georgia. To what extent this or that related to Georgia, must be decided in every specific case. Stemming from the above-mentioned, it is explicit that the disputed norm imposes a punishment for transfer of information by commission of the intelligence of a foreign country only in the conditions, when the relation of information with the Georgian state transforms a committed action into being detrimental to Georgia. Measures against being an object of surveillance of the foreign intelligence, undoubtedly, represent an important means for achieving the legitimate aim of the state security.

19. Existence of the legitimate purpose is not always sufficient to justify the restriction of the freedom of expression. Stemming from the requirements of the principle of proportionality, the restriction should not cause restriction of the right of a person with higher degree, which is entirely necessary for existence of a democratic society. It should be scrutinized, how necessary it is for the provision of the state security to restrict freedom of expression in this form, and to find out if there is less restrictive means of the right of an individual, by application of which it would be possible to achieve the same purpose. As it was mentioned above, a subject of the interest of the special services of a foreign country might be any type of information, and the fact of cooperation with them against Georgia is in itself detrimental to the state, despite the open or secret content of the information transferred thereof. Accordingly, narrowing of the content of the disputed norm would only reduce its efficiency and would create additional opportunities to persons acting by commission of the intelligence of a foreign country. Under the conditions, when the fact of cooperation with the intelligence of a foreign country poses the threat in itself to the state security, transfer of harmless, at one glance, information to the intelligence may cause considerable damage to the state interests. Respectively, the disputed norm in the context of prohibition of collection and transfer of information by commission of the intelligence of a foreign country represent necessary means to achieve the legitimate aim.

20. Stemming from the nature of the right of freedom of expression guaranteed by Article 24 of the constitution of Georgia, it should be scrutinized, whether or not prohibition in the form defined by the disputed norm regarding collection and transfer of information by commission of the intelligence of a foreign country has “biting effect” with respect to the part of freedom of expression, which does not fall within the sphere of regulation of the disputed norm. The mentioned effect of the disputed norm was caused by its vague character or other circumstance.

21. The disputed words of the first part of Article 314 of the criminal code of Georgia explicitly defines that collection and transfer of information about Georgia by commission of the intelligence of a foreign country is punishable. As it was already mentioned, the disputed norm with respect to the nature of information is formulated as much as possible and, respectively, includes any informa-

tion, which is connected with Georgia. At the same time, the terms “commission”, “the intelligence of a foreign country”, “collection and transfer” is sufficiently clearly formulated and is clear for any rationally minded person what can be supposed under the given terms. An action defined by the disputed norm is punishable only in case if it is perpetrated intentionally, respectively, it is doubtless that it is obvious for a person, who acts within the scopes of the right protected by Article 24 of the constitution, as to what action is punishable within the context of collection and transfer of information by commission of the intelligence of a foreign country. Besides, there is no threat that a person shall presume under the prohibition of cooperation with the intelligence of a foreign country, the prohibition of an action by commission of any other subject, save to the intelligence, or restriction of any such action, which is in real criminalized by the disputed norm.

22. Stemming from the abovementioned, the constitutional court concludes that the disputed norm in the part establishing the liability for collection and transfer of information by commission of the intelligence of a foreign country is formulated with sufficient clarity, it represents the proportionate means for restricting the right and at the same time, does not have “biting effect” upon realization of the freedom of expression. The disputed words of the first part of Article 314 of the criminal code of Georgia, in the part prohibiting activities by commission of the intelligence of a foreign country does not compel persons, while realizing their freedom of expression, in the fear of the criminal liability, to restrict themselves more than it is determined by the disputed norm. Stemming from the abovementioned, in the part that qualifies collection and transfer of information by commission of the intelligence of a foreign country to the detriment of the interests of Georgia as a crime, the disputed words of the first part of Article 314 of the criminal code of Georgia do not contradict with the first paragraph and paragraph 4 of Article 24 of the constitution of Georgia.

23. The issue of constitutionality of prohibition of collection and transfer of other information to the detriment of the interests of Georgia by commission of a foreign organization should be established independently from examination of the constitutionality of the criminal liability for collection and transfer of information by commission of the intelligence of a foreign country. Unlike the intelligence of a foreign country, cooperation with any foreign organization and transfer of information about Georgia to them cannot be considered as an action directed against the state security. Respectively, the words “to the detriment of the interests of Georgia” indicated in the disputed norm with respect to a foreign organization have different importance. On the grounds of the disputed words of the first part of Article 314 of the criminal code, a person can be punished for collection and transfer of information by commission of the organization only, cooperation with which is detrimental to the interests of Georgia.

24. At the same time, the important circumstance should be underlined that in the term “foreign organization” cannot be supposed such organization that are linked with the intelligence of a foreign country, and action on its instructions and the latter uses it as a disguise. Transfer of information by commission of such organization virtually means the transfer of information to the intelligence of a foreign country. Accordingly, in the case of collection and transfer of information premeditatedly by a person upon their instruction, he/she carried out an action analogous to the one commissioned directly by the intelligence. The person shall be punished for such action even in case, if the term “foreign organization” was not at all indicated in the disputed norm. Accordingly, by referring “foreign organization”, the disputed norm establishes the criminal liability of a person for collection and transfer of such information, which is not connected with the intelligence of a foreign country, however, despite this, the fact of cooperation of this person itself might be detrimental to the interests of the State.

25. It is worth to be underscored that the role of such non-state actors that terrorist organizations, secessionist movements of non-recognized states, private foreign military companies and other entities, which poses the threat to the state security no less than the rival states might pose to one another, are significantly enhanced in the modern world. The constitutional court does not rule out that cooperation with certain foreign organizations may constitute exactly the same threat as the cooperation with the foreign intelligence and imposition of punishment for collection and transfer of information by commission of certain types of foreign organizations can be considered in conformity to Article 24 of the constitution, however, for determination of the content of “foreign organization” in the disputed norm, the legislator does not set out specific characteristics and employs the term “to the detriment of the interests of Georgia”. By adopting the disputed norm, the legislator brings the issue with regard to cooperation with which foreign organization and in what conditions shall be declared as punishable, for a subject of interpretation by law-enforcer and persons operating in the sphere of realizing the freedom of expression.

26. The constitutional court of Georgia does not exclude that imposition of the criminal liability against a person on the basis of the disputed norm, in every specific case, might be executed in compliance with the constitution. However, it is not sufficient for considering the disputed norm as constitutional. As it was mentioned above, while establishing the liability in the sphere of freedom of expression, it should necessarily comply with such standard of certainty which excludes “biting effect” with respect to the freedom of expression left outside the regulation that defines the responsibility. The disputed norm upon presence of certain preconditions (causing detriment to the interests of Georgia) establishes the criminal liability for relations with wide group of persons (foreign organiza-

tions). However, the legislator leaves the issue about collection and transfer of information by commission of which foreign organization shall be punishable, for interpretation, in the hope and fate of the law-enforcer, on one hand, and to the possible subjects of the norm, on other hand. A person acting within the scopes of the freedom of expression may consider cooperation of more numerous number of foreign organizations as being harmful to the state interests as it is envisaged by the disputed norm. It is possible that a person shall refuse to maintain relations with a range of foreign organizations in the fear that this might be detrimental to the State. Stemming from the abovementioned, the disputed norm has “biting effect” on the freedom of expression, because in reality it has considerably more effect for restriction of the right that this is envisaged by the disputed norm, which the legislator wanted to restrict and which is necessary for existence of a democratic society. Stemming from the aforementioned, the restriction with regard to collection and transfer of information by commission of a foreign organization prescribed by the disputed norm is disproportionate. Accordingly, the words “or foreign organizations” of the first part of Article 314 of the criminal code of Georgia contradicts with paragraph 1 and 4 of Article 24 of the constitution of Georgia.

Constitutionality of the disputed norm with respect to paragraph 5 of Article 42 of the constitution of Georgia

27. In the constitutional claim N516, the Claimant also contests constitutionality of the words “also collection or transfer of other information by commission of the intelligence of a foreign state or a foreign organization to the detriment of the interest of Georgia” of the first part of Article 314 of the criminal code with respect to paragraph 5 of Article 42 of the constitution of Georgia.

28. Paragraph 5 of Article 42 of the constitution of Georgia enshrines the constitutional standards for determination of a person’s action as a crime and establishment of respective responsibility. Under the mentioned provision “No one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed. The law that neither mitigate nor abrogate responsibility shall have no retroactive force”. The second sentence of paragraph 5 of Article 42 of the constitution of Georgia regulates the constitutional principle of prohibition of application of the law retroactively, with respect to which, the Claimant does not demand to scrutinize the constitutionality of the disputed norm. Stemming from the mentioned, within the scopes of the disputed under consideration, the constitutional court will discuss the issue of conformity of the disputed norm with respect to the first sentence of paragraph 5 of Article 42 of the constitution of Georgia.

29. According to the interpretation made by the constitutional court, the first sentence of paragraph 5 of Article 42 of the constitution of Georgia “deter-

mines the grounds for a person to be held responsible, sets out the guarantee that any crime and criminal offence should be distinctly determined in the criminal law” (Decision N3/2/416 of 11 July 2011 of the constitutional court of Georgia on the case “The Public Defender of Georgia versus the Parliament of Georgia”, II-38). The first sentence of paragraph 5 of Article 42 of the constitution not only defines the necessity of existence of appropriate law for imposition of the responsibility, but also establishes the degree standards for the law defining the responsibility. While imposing the responsibility, the legislator is bound by the principle of certainty. Stemming from the practice of the constitutional court of Georgia, “the constitutional court, in assessing constitutionality of the disputed norms, is not restricted by specific norms of the constitution only. Although the constitutional principles do not lay down the basic rights, but the appealed normative act is also subject to scrutiny with respect to the fundamental principles of the constitution, in connection with individual norms of the constitution and in this sense, the deliberations should be conducted in the united context. The constitutional court should establish who the appealed act is compatible with the constitutional order which is established by the constitution” (Decision N2/2-389 of 26 October 2007 of the constitutional court of Georgia on the case “Citizen of Georgia Maia Natadze and other versus the Parliament of Georgia and the President of Georgia”, II-16). The principle of certainty of the norm emanates from the principle of rule-of-law based state provided in the constitution of Georgia, it is linked with paragraph 5 of Article 42 of the constitution and represents a part of the right protected by this sphere. Accordingly, the disputed norm shall be compatible with paragraph 5 of Article 42 of the constitution only in case if it complies with requirements of the constitutional principle of certainty.

30. Foreseeable and unambiguous legislation, on the one hand, ensures protection of a person from arbitrariness of the law-enforcer, and on the other hand, it establishes the guarantee that a person will receive a district notification from the State in order to manage to perceive the norm correctly, and define which action is prohibited by the law and which action may entail the legal responsibility. A person should have the possibility to foresee marks of the prohibited action in his own action and direct his behavior in compliance with the rules prescribed by the legislation.

31. The constitutional court interpreted that “the law may be deemed as uncertain, when all methods of interpretation has been tested, but its real content is still unclear, or the gist is clear, but the scopes of its action are still unclear” (Decision N1/1/428,477,459 of 13 May 2009 of the constitutional court of Georgia on the case “The Public Defender of Georgia, citizen of Georgia ElgujaSabauri and citizen of the Russian Federation Zviad Mania the Parliament of Georgia”, II-19). In terms of foreseeability of the criminal law determining a crime, it is

important to be able to establish the real content and scopes of each element of it, in order that an addressee will correctly perceive the law and carry out his action in accordance with its requirements, besides, in order to be protected from the arbitrariness of the law-enforcer. “Precision, unequivocalness of the content of the norm is necessary. The norm should be sufficiently certain according to not only its content, but also its subject, purpose and scales of regulation” (Decision N2/3/406,408 of 30 October 2008 of the constitutional court of Georgia on the case “The Public Defender of Georgia and the Young Georgian Lawyers Association versus the Parliament of Georgia”, II-36).

32. The Claimants in order to emphasize the contradiction of the disputed norm with paragraph 5 of Article 42 of the constitution, refer that the term “other information” has indefinitely farfetched content and it presumes such information, collection and transfer of which may not be detrimental to the state interests of Georgia. Therefore, in their opinion, it is not expedient to make such action punishable by law.

33. As it was already mentioned, any information, which is not the state secret shall be deemed as “other information”. Accordingly, the problem of foreseeability of the norm in this part does not arise. It is sufficiently clearly defined as to collection and transfer of what type of information, the legislator wishes to prevent. The argumentation provided by the Claimant is directed not towards the issues of foreseeability of the norm, but towards expediency to declare collection and transfer of any information as punishable by law. Paragraph 5 of Article 42 of the constitution of Georgia defines the degree criteria of the law establishing the responsibility and not the fact against which action it is permissible to impose the liability. Since paragraph 5 of Article 42 of the constitution of Georgia does not regulate the issue of constitutionality of expediency of the punishment for collection and transfer of other information, it is impossible to assess the given issue with respect to the mentioned constitutional norm.

34. The Claimants also indicate that the contents of the term “to the detriment of the interests of Georgia” and “foreign organization” are vague for them. In their opinion, the given terms are of undefined nature and provide the possibility to make arbitrary interpretation in the process of applying them. The Claimant believes that vagueness of the norm reaches to the degree that it becomes unclear for a person, exercise of what type of action is prohibited by the law and, respectively, he might be punished so that he was entirely unaware of the fact of having perpetrated a criminal crime by him. It must be indicated with regard to the given issue, that the crime of aforethought is defined by the disputed norm and under the conditions of applicable legislation, perpetration of this action without due caution and circumspection is not punishable. If a person fails to perceive the circumstances established by the disputed norm and does not have his subjective

attitude towards the action carried out by him, there shall not be subjective set of the crime present and the criminal liability envisaged by the disputed norm shall not be awarded. Stemming from the abovementioned, it is impossible for a person to prove that the disputed norm contradicts paragraph 5 of Article 42 of the constitution based on the argument that he might be punished even in case, when he was unaware that he perpetrated a crime defined by the disputed norm of the first part of Article 314 of the criminal code.

35. Notwithstanding the abovementioned, the fact that espionage is punishable only in case if it is perpetrated intentionally, is not in itself sufficient for proving foreseeability of the norm. “The first sentence of paragraph 5 of Article 42 of the constitution of Georgia ensures the possibility of a person in accordance with the beforehand established, publicly available and not-individualized legal rules to foresee what actions are criminal offences and thus direct his behavior accordingly, which is the significant guarantee against arbitrary prosecution and charges” (Decision N1/1/428,447,459 of 13 May 2009 of the constitutional court of Georgia on the case “The Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of the Russian Federation Zviad Mania versus the Parliament of Georgia”, II-1). In the given case, the fact of cooperation with the intelligence of a foreign country and a foreign organization to the detriment of the interests of Georgia is defined as a precondition for punishment of a person. As it has been already mentioned above, transfer of information about Georgia to the intelligence of a foreign country, in any case, is detrimental to the interests of Georgia. Respectively, within the context of cooperation with the foreign intelligence, it is sufficiently clearly defined in the disputed norm, what actions is criminalized by the legislator and in this regard, there is no problem of foreseeability.

36. Within the context of punishment for collection and transfer of information by commission of a foreign organization, the content of the disputed norm is not explicitly and clearly defined. The law-enforcer and a person acting in the sphere of expression, in every specific case, should define about espionage performed by commission of which organization shall be detrimental to the interests of Georgia. The given rule provides very wide possibility for interpretation and in every specific case, decision of the issue of criminal punishment for an action shall considerably depend upon individual evaluation of the law-enforcer. Deeming cooperation with this or that organization as being detrimental to the interests of Georgia may be based upon numerous factors, but the disputed norm makes no reference as to how such organizations must be defined. Stemming from the general nature of the norm, the scopes of assessment is so wide that on the basis of the disputed norm, while establishing the criminal liability for one and the same action, in the conditions of fair interpretation of the disputed norm, there shall be high probability that different courts will arrive to different conclusions (one part

may consider that a specific action is punishable by the disputed norm, another may not). The norm establishing the responsibility may provide the possibility to be interpreted, construed by the court and the possibility to establish conformity of the reservation made by the law with a specific situation. Although it is impossible that the law shall envisage each aspect of all those cases or situations, which take place in the future, but the legislator while defining the criminal legislation is obliged to adopt a norm which reduces as much as possible the possibility of establishing different legal consequence by the court within the scopes of its interpretation. The disputed norm does not provide the possibility, in every specific case, to decide with sufficient precision about whether collection and transfer of information by commission of this or that organization is punishable or not.

37. Adoption of a decision about declaring an action as punishable is an exclusive authority of the legislator. Accordingly, he should apply this authority so that not permit the law-enforcer, on the ground of the judicial practice, to create himself the set of criminally punishable action. In the given case, in the context of defining the criminal punishment of collection and transfer of information by commission of a foreign organization to the detriment of the interests of Georgia, the disputed norm can be interpreted so widely that it gives the possibility to the court applying the norm, at its own discretion, to define under the conditions of existence of normative restraints, cooperation with which foreign organization shall be “detrimental to the interests of Georgia”. Stemming from the abovementioned, on the basis of such general norm, imposition of the criminal punishment violates the provision of paragraph 5 of Article 42 of the constitution of Georgia, under which, a person shall be held responsible by the law only. Accordingly, the words “or foreign organization” of the first part of Article 314 of the criminal code of Georgia must be recognized as unconstitutional with respect to paragraph 5 of Article 42 of the constitution of Georgia.

III

Resolutive Part

Having been guided by subparagraph “f” of the first paragraph and paragraph 2 of Article 89 of the constitution of Georgia; subparagraph “e” of the first paragraph of Article 19, paragraphs 2 of 8 of Article 21, paragraphs 2, 4, 7 and 8 of Article 43, the first paragraph of Article 45 of the organic law of Georgia “On the Constitutional Court of Georgia”; the first and second paragraphs of Article 7, paragraph 4 of Article 24, Articles, Articles 30, 31, 32 and 33 of the law of Georgia “On the Constitutional Legal Proceedings”,

The Constitutional Court of Georgia

r u l e s :

9. To uphold partially the Constitutional Claim N516 (citizens of Georgia – Alexander Baramidze, Lasha Tughushi and Vakhtang Khmaladze versus the

Parliament of Georgia) and to recognize as unconstitutional the words “or foreign organization” of the first part of Article 314 of the Criminal Code of Georgia with respect to paragraphs 1 and 4 of Article 24 and paragraph 5 of Article 42 of the constitution of Georgia.

10. To uphold partially the Constitutional Claim N542 (citizen of Georgia – Vakhtang Maisaia versus the Parliament of Georgia) and to recognize as unconstitutional the words “or foreign organization” of the first part of Article 314 of the Criminal Code of Georgia with respect to the first paragraphs of Article 24 of the constitution of Georgia.

11. Not to uphold the Constitutional Claim N516 (citizens of Georgia – Alexander Baramidze, Lasha Tughushi and Vakhtang Khmaladze versus the Parliament of Georgia) in the part, which deals with the words “also collection and transfer of other information by commission of the intelligence of a foreign country to the detriment of the interests of Georgia” of the first part of Article 314 of the Criminal Code of Georgia with respect to paragraphs and 4 of Article 24 and paragraph 5 of Article 42 of the constitution of Georgia.

12. Not to uphold the Constitutional Claim N542 (citizen of Georgia – Vakhtang Maisaia versus the Parliament of Georgia) in the part which deals with the words “collection and transfer of other information by commission of the intelligence of a foreign country to the detriment of the interests of Georgia” of the first part of Article 314 of the Criminal Code of Georgia with respect to the first paragraphs of Article 24 of the constitution of Georgia.

13. The unconstitutional norms shall be legally invalid from the moment of promulgation of this judgment.

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

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

16. Copies of the Judgment of the Constitutional Court of Georgia shall be sent to the parties, the President of Georgia, the Supreme Court of Georgia and the Government of Georgia.

17. The Judgment of the Constitutional Court of Georgia shall be promulgated in the “Legislative Herald of Georgia” within 15 days.

Members of the Board: Zaza Tavadze,
Otar Sitchinava,
Lali Papiashvili,
Tamaz Tsabutashvili.