

The Guarantees of the Independence of the Constitutional Court

Together with the representative and executive Branches, judicial authority is the independent and fully legitimate branch within the governmental system, organized on the basis of the classical principle of the separation of powers. Georgian Constitution dedicates a separate chapter to the judicial power, which declares the independence of the judicial power. “The judiciary shall be independent and exercised exclusively by courts. A court shall adopt a judgment in the name of Georgia.”¹ According to the Constitution, the judicial body of the constitutional review is the Constitutional Court of Georgia.²

Despite of its relatively short period of existence – 14 years of exercising its’ powers -, the Constitutional Court of Georgia is a major institution within the separation of powers system, which ensures the constitutional balance and the protection of the constitutionally recognized human rights and freedoms as well as the development of the stabile government in the country. Of course, there is much more time needed, thus there is much more to be done in order to improve its’ efficiency. This cannot be achieved without the proper development of the legal culture and the traditions in the country.

This very important democratic institution of the constitutional control was established by the Georgian Constitution on the 24th of August in 1995. The fundamental principles of its formation, functioning and the legal status are established in the Constitution. These fundamental issues were further elaborated in the organic “Law on the Constitutional Legal Proceedings” on the 21st of March 1996 and by the rules of the Constitutional Court. According to these acts, the activity of the Constitutional Court of Georgia shall be conducted according to the principles of legality, collegiality and publicity, equality of parties, adversarial nature of the proceedings, as well as the independence, immunity and consistency of the members of the Constitutional Court. Generally, constitutional courts are not political institutions, but they have to be involved in political proceedings according to their competences. This often leads to the involuntary involvement in the political battles and speculations. Notably, the Constitutional Court of Georgia has been moved on the 5th of July 2007 from the capital city (Tbilisi) to Batumi. This change of the location shall be considered as a positive step in the process of the strengthening of the court’s independence. By relocating it from the capital city, the court has moved away

¹ Constitution of Georgia, Article 82

² Constitution of Georgia, Article 83, paragraph 1

from the political center of the country, which considerably **aids its noninvolvement** in the political battles

The independence of the Court as an Institution

a) The competences of the Constitutional Court of Georgia and its' limits

An important issue about the independence of the court is its limits. Legislative government establishes the judicial branch by the laws, stipulating the judiciary system, its' authority, legislative guarantees of the judicial activity. Therefore, it establishes the legal basis for the performance of the judicial power.

There is a chapter in the Georgian Constitution, which separately regulates the competence of the Constitutional Court and the bodies, who are empowered to submit the constitutional complaint or the application.

According to Article 89 of the Georgian Constitution: “ 1. The Constitutional Court of Georgia on the basis of a constitutional claim or a submission of the President of Georgia, the Government, not less than one fifth of the members of the Parliament, a court, the higher representative bodies the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara, representative organs of the self-government – the City Council (Sakrebulo), the High Council of Justice, the Public Defender or a citizen in accordance with a procedure established by the Organic Law:

- adjudicates upon the constitutionality of a Constitutional Agreement, law, normative acts of the President and the Government, the normative acts of the higher state bodies of the Autonomous Republic Abkhazia and the Autonomous Republic of Ajara;
- considers dispute on competence between state bodies;
- considers constitutionality of formation and activity of political associations of citizens;
- considers dispute on constitutionality of provisions on referenda and elections as well as dispute on constitutionality of elections (referenda) in past or in the future on the basis of these provisions;
- considers constitutionality of international treaties and agreements;
- considers, on the basis of a claim of a person, constitutionality of normative acts in relation to fundamental human rights and freedoms enshrined in Chapter Two of the Constitution;
- considers dispute on violation of the Constitutional Law of Georgia on the Status of the Autonomous Republic of Ajara;
- On the basis of the action brought by representative bodies of the self-government – the City Council (Sakrebulo), the question of constitutionality of normative acts is discussed in relation to the regulations defined by Chapter 7¹ of the Constitution;

- On the basis of submission made by the High Council of Justice the question of compatibility of normative acts with Articles 82, 84, 86, 86¹, 87 and 90 of the Constitution shall be discussed;
- exercises other powers determined by the Constitution and the Organic Law of Georgia.”

The question about who may be the initiator of the constitutional complaint with regard to specific competence of the court, with a few exceptions, is entrusted to the legislator. Therefore, efficiency of the constitutional control by the Court somewhat depends on the will of the legislator. In case the legislation does not enable the broad number of bodies to apply to the constitutional court, the essence of the authority for the constitutional control may be weakened and become false. Consequently, establishment of this issue on the constitutional level would provide a stronger guarantee for the independence and efficiency of the Court.

Notably, there was a constitutional reform conducted in 2010 in Georgia. During this reform, the Constitutional Commission has been actively discussing the issue of enhancing the powers of the Constitutional Court. According to the opinion of some members of the Commission, the constitutional court should have been empowered to review decisions of the ordinary courts in terms of constitutional rights and conduct the so called “real control.” (so called German model). With the argument that it could overload the court, which might discredit it in the public view, the Commission at this stage (therefore, the Parliament) has restrained itself to support such amendments. However, active discussions of the Commission about this issue reveal that the powers of the Constitutional Court might be extended in the nearest future. This might further enhance the efficiency of constitutional control and the independence of the constitutional court.

b) The Execution of the Decision of the Constitutional Court as the Guarantee of Independence

An important issue in order to identify the independence and effectiveness of the Constitutional Courts is whether the execution of their decisions are dependent on other branches of the government. The Constitution of Georgia ensures the implementation of the decisions of the Constitutional Court of Georgia made in the framework of the norm review proceedings. A normative act or a part thereof recognized as unconstitutional by the Court shall cease to have legal effect from the moment of the promulgation of the respective judgment of the Constitutional Court.³

³ Constitution of Georgia, Article 89, paragraph 2

Therefore, in order to implement the decision of the Constitutional Court it is not necessary to apply the execution mechanisms by other branches of the government, which is an important guarantee for the independence of the Court.

The Constitution does not specify the issues concerning the execution of the decision made within the other competencies of the Court (with the exception of the norm review proceedings).

With respect to the Organic Law of Georgia on the Constitutional Court of Georgia the judgment of the Constitutional Court shall be obligatory executed. However, it is noteworthy that the Constitutional Court does not have a legal bases to keep an eye on the execution of the judgment and in case of the necessity to make its compulsory execution. During the period of its existence there has not been such a case when the Parliament or other body entitled to adopt the normative act, which was annulled by the Court, neglected the execution of the Court decision. However, the tendency was observed in past that the above mentioned bodies sometimes were trying to escape the execution of the decision with regard to the content indirectly. In order to prevent the above mentioned, by the initiative of the Constitutional Court of Georgia in 2008 the amendment has been introduced in the Organic Law of Georgia on the Constitutional Court of Georgia, according to which, if the body entitled to adopt the normative act issues the new norm in different wording but of the same content, as the one that had been annulled by the decision of the Constitutional Court, the Court does not consider the merits of the case and acknowledges the given act as annulled by the simplified proceedings⁴.

Independence of the Judges

The independence and impartiality of the judges are two important guarantees of the Court's independence.

a) Appointment Procedure of the Justice

The Constitutional Court of Georgia consists of nine judges – the members of the Constitutional Court. The composition of justices presents a balance of all three branches of power. Three members of the Constitutional Court are appointed by the President of Georgia, three members are elected by the Parliament of Georgia by not less than three fifths of the number of members of the Parliament on the current nominal list, three members are appointed by the Supreme Court of Georgia. However, after the appointment the judge cannot be associated with any branch of the government. They do not have the right to be a member of a political party. Since the members of the Constitutional Court are appointed by the different branches of the government, in some

⁴ Organic law of Georgia on "Constitutional Court of Georgia", Article 25, paragraph 4¹

circumstances, danger can arise if the appointment procedure of the Court member is delayed artificially and consequently the total number of the members of the Court cannot be presented. We have not had such practice yet, but some countries **have experienced this..** Under such circumstances the Constitution of Georgia specifies the guarantees which prevent the Court from danger during the implementation of its power.

Namely, the Plenum of the Constitutional Court is authorized to adopt a judgment, if the sitting is attended by not less than six members⁵ (and not nine) and a board (collegium) if its sitting is attended by at least three members⁶ (not four). Moreover, if the composition of the board does not include **a great enough number of judges**, one of the members from the second Board can be assigned temporarily to consider that case. The risk that either of branches of the government will delay the appointment of a judge and therefore paralyze the functioning of the Constitutional Court has been minimized by the above mentioned legal regulations.

b) Tenure of Justice

The term of office of a member of the Constitutional Court is 10 years. Furthermore, a person who has previously held this position cannot be a member of the Constitutional Court. Non-renewal of the term of office is one of the main guarantees of a judge's independence. During the appointment procedure a judge is informed that his/her term of office will be expired after 10 years **and that renewal is impossible. Therefore, throughout a judge's tenure, he should not seek to make compromises with the different branches of government in respect to the renewal of term.** *Conflict of Interests*

In the legislation of several countries there is established strict professional requirements for a member of the Constitutional Court. The Constitution of Georgia does not set up any special requirements in this regard. A member of the Constitutional Court may be a citizen of Georgia who has reached the age of 30 and has a high legal education⁷. When deciding on nomination of the members of the Constitutional Court of Georgia, the President of Georgia, the Parliament of Georgia and the Supreme Court of Georgia take into account the professional experience of a candidate, which shall be appropriate for the high status of a member of the Constitutional Court⁸.

The incompatibility of judicial office is the guarantee of the impartiality and independence of the judicial authority. The office of a member of the Constitutional

⁵ Organic law of Georgia on "Constitutional Court of Georgia", Article 44

Law of Georgia on "Constitutional Legal Proceedings", Article 24, paragraph 2

⁶ Law of Georgia on "Constitutional Legal Proceedings", Article 24, paragraph 4

⁷ Constitution of Georgia, Article 88, paragraph 4

Organic law of Georgia on "Constitutional Court of Georgia", Article 7, paragraph 1

⁸ Organic law of Georgia on "Constitutional Court of Georgia", Article 7, paragraph 2

Court is incompatible with any other post and remunerable activity, with the exception of scientific and pedagogical activity.

A member of the Constitutional Court shall not be a member of a political party or engage in political activity. A member of the Constitutional Court has to resign from other posts and/or cease the activity prohibited by the Article from the day when he/she takes the oath⁹.

c) Impermissibility of Interference into the Activity of a Judge and Disciplinary Persecution, Immunity of a Judge.

The statement of a law that provides non-interference into the activity of a judge of the Constitutional Court of Georgia is an important guarantee of the independence of a judge.¹⁰ While carrying out his/her duties the judge evaluates the circumstances by faith and makes decisions only in correspondence to the Constitution of Georgia.

According to the Constitution of Georgia, High School of Justice was formed in order to appoint judges of Common Courts, dismiss them from office as well as fulfill other tasks.¹¹ The same institution decides over the issue of imposing disciplinary responsibility on a judge. However, the issue of imposing disciplinary responsibility on a judge of the Constitutional Court is beyond the competence of the High School of Justice. Accordingly, at the Constitutional level the higher standards of independence and inviolability of judges of the Constitutional Court are provided rather than of judges of the Common Courts.

The most important guarantee of independence is inviolability and immunity of a judge. According to the Constitution and legislation of Georgia, a judge of the Constitutional Court of Georgia is independent. His/her persecution, detention or arrest, the search of his/her apartment, car, workplace or his/her person shall be impermissible without the consent of the Constitutional Court.

This immunity provides that while carrying out his/her duties the judge will not be restrained by the self-will of any branch of the government. Even when there is a doubt of hypothetical offense of the judge, proceeding from the interest of society, his/her immunity can be restricted only by the consent of the Constitutional Court.¹²

The immunity of the member of the Constitutional Court foresees higher degree of protection compared to the immunity of a member of the Supreme Court. Persecution of the Chairman or member of the Supreme Court, his/her detention or arrest, the search of his/her apartment, car,

⁹ Organic law of Georgia on "Constitutional Court of Georgia", Article 17

¹⁰ Organic law of Georgia on "Constitutional Court of Georgia", article 1, paragraph 4

¹¹ Constitution of Georgia, article 86¹ paragraph 1

¹² Constitution of Georgia, article 88, paragraph 5, Organic Law of Georgia, article 15.

workplace or his/her person shall be permissible only with the consent of the Parliament¹³ (legislative branch of the government). The higher degree of immunity of the member of the Constitutional Court underlines the significant role of the Constitutional Court in the system of separation of power.

It is also remarkable that the decision of dismissing of a member of the Constitutional Court from office can be made only by the Constitutional Court of Georgia¹⁴. The other branches of the government may not interfere into this decision.

Though the Constitutional Court of Georgia is a collegial body and consequently decisions on the case are made by the majority and not unilaterally, the legislator provides the possibility for the judge to state his/her opinion by implementing the institute of the concurring and dissenting opinion. The above-mentioned institute is to be considered positive in the improving independence and more **overwhelming** development of the legal and judicial theory and practice.

Material Guarantees

According to the legislation, in order to establish independence of a member of the Constitutional Court the State is obliged to create proper working and living conditions for him/her as well as provide her/his and his/her family's safety.¹⁵ On the 25 of June 1996 in order to ensure the given obligation the law of Georgia on Social Protection Guarantees of the Members of the Constitutional Court entered into force. The law regulates providing proper salary, additions, business trip salary, pension and other social guarantees for the judge while performing his/her office. In this regard, it should be noted that reduction of the salary of the judge, during the whole period of his office is impermissible.¹⁶

One of the guarantees of the independence of the Constitutional Court, as the institution, is performed by the legislative regulation of the budget. It is significant that according to the Organic Law, reduction of amount of expenditure of the Constitutional Court in comparison to the previous year, without its consent is impermissible.¹⁷ It is noteworthy that such practice has never occurred including recent years, even during the period of the so-called financial crisis. The only exception was the year of 2008 when the Constitutional Court by its initiative agreed to transfer of the specific amount of money from its budget to the State budget in order to assist the population affected during the Russian-Georgian war.

¹³ Constitution of Georgia, article 90, paragraph 4

¹⁴ Organic law of Georgia on "Constitutional Court of Georgia", article 16

¹⁵ Organic law of Georgia on "Constitutional Court of Georgia", article 4

¹⁶ Law of Georgia on Social Protection Guarantees of the Members of the Constitutional Court, article 8

¹⁷ Organic law of Georgia on "Constitutional Court of Georgia", article 3, paragraph 2; Budget Code of Georgia, article 42

The expenditures of the Constitutional Court of Georgia, on the basis of submission of the President of the Constitutional Court, are foreseen in the State budget as a separate item.¹⁸ Financing of the court is defined by the separate organizational code in the State budget.

Proceeding from the above-mentioned, legislation and practice of Georgia gives sufficient independence/impartiality of the Constitutional Court of Georgia and its members, which gives opportunity to the latter to wholly perform the balancing function during the separation of power. However, it must not create the illusion of self-calmness and perfection. Raising its authority and effectiveness of the Court is dependent on overall development of political and legal culture and traditions.

¹⁸ Law of Georgia on Social Protection Guarantees of the Members of the Constitutional Court, article 1