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REGARDING A DECISION OF THE SECOND BOARD OF THE SUPREME COURT OF GEORGIA

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On April 6, 2009, the Second Board of the Supreme Court of Georgia took (N2/1/1415) another decision on the grounds of the Public Defender's Constitutional complaint. Members of Parliament (MPs) were defendants in the lawsuit. The disputed issue was the compatibility of paragraph "f", part 1, article 142 of the Criminal Code of Practice of Georgia with article 18 of the Constitution of Georgia. It should be noted that it was not the first complaint regarding article 142 filed in the Supreme Court. With the January 29, 2003 (2/3/182, 185, 191) decision, the Second Board of the Supreme Court abrogated part 2 of article 142 due to incompatibility with article 18 of the Constitution. By doing so, article 142 seemed to fully fit requirements of the Constitutional framework. Several years later, however, the constitutionality of the article became disputable again. The fact of the matter is that the December 29, 2006 Law amended part 1, article 142 by adding to it paragraph "f" which said: "A person may go into hiding". It was precisely these words that the claimant considered unconstitutional, more specifically, incompatible with article 18. This time, however, the Second Board of the Constitutional Court did not satisfy the claim by the above mentioned April 6, 2009 decision.

As already said, the subject of dispute in both above mentioned decisions of the Second Board of the Constitutional Court is one and the same article of the Criminal Code of Practice. Before going into details of the April 6, 2009 decision I would like to briefly touch upon the January 29, 2003 decision of the Constitutional Court. This decision invalidated part 2, article 142 of the Criminal Code of Practice of Georgia, which said that a suspect could be detained "if there is other evidence providing the ground to suspect a person of committing a crime. This person may be detained only if he/she has tried to flee or he/she has no permanent residence or his/her identity is not established".

This norm in part 2 of article 142 became disputable at that time because it could, in practice, encourage arbitrariness and breach of human rights. The Constitutional Board, therefore, emphasized in its January 29, 2003 decision that "provisions of the Criminal Code of Practice of Georgia must be clear-cut and understandable in order to avoid ambiguous interpretation". The righteousness

of these words is proved by the first part of article 142 which clearly provides for instances when a suspect may be detained : a) a person is caught red-handed or immediately after committing a misdemeanor; b) eye-witnesses, including victims, directly point to a person as to the perpetrator of the crime; c) a clear trace of a crime is found on or near a person or on his/her clothes; d) A person ran away after committing a crime but was later identified by the victim; e) ruling (decision) is made on conducting the search of a person".

What was the reason behind providing this exact list of instances in the Law when the second part of article 142 contained such a vague provision as "if there is other evidence..." and this very phrase allowed for arbitrariness in practice and undermined the Constitutional guarantee of protecting freedom of a person?! It was precisely for this consideration that the Second Board of the Constitutional Court abrogated part 2 of article 142 by its January 29, 2003 decision. In this regard, the April 6, 2009 decision of the Second Board of the Constitutional Court, which is a key topic of our discussion, is very interesting. The decision reads: "46. The opinion of the Board also fully complies with another view formulated in N2/3/182, 185, 191 January 29, 2003 decision that "the Constitution of Georgia does not recognize the possibility of detaining a person on the grounds of "other evidence". This evidence may become a cause for suspicion but not for deprivation of a person's liberty" (see April 6, 2009 decision, p.22).

While the Board agrees with the January 29, 2003 decision of the Constitutional Court in this part, it is unclear why it did not satisfy the Public Defender's complaint about the incompatibility of paragraph `f`, part 1 of article 142 with article 18 of the Constitution? In his complaint Public Defender claimed that "by its content, the disputed norm repeats the content of part 2, article 142 of Criminal Code of Practice which was recognized as unconstitutional. Under part 2 of article 142, a person may be detained on the grounds of other evidence if he/she "has tried to flee…"

Thus, at times of taking the January 29, 2003 decision the subject of dispute was the wording that a person could be detained on the basis "of other evidence" when "he/she tried to flee". As regards the April 6, 2006 decision, the subject of dispute was the words in paragraph "f": "a person may go into hiding".

Considering the content of the phrase "person may go into hiding" one can see that this phrase provides more room for arbitrariness in investigation practice than "when he/she has tried to flee". "Has tried to flee" is more specific in its sense than "a person may go into hiding". Here the word "may" provides an ample room for arbitrariness. "May" is a very abstract notion and provides an ample possibility for a biased handling of the issue.

One can arrive at the similar conclusion when comparing "person may go into hiding" with the subject of dispute of the Constitutional Court's January 29, 2003 decision, i.e. "if there is other evidence", from a different angle. The meaning of this phrase is as broad and unspecific as that of the phrase "a person may go into hiding". The word "other", in this respect, is no different from "may". It is therefore unclear what was the view held by the Constitutional Courts' Second Board when it, on the one hand, recognized that "The opinion of the Board fully complies also with another view formulated in N2/3/182, 185, 191 January 29, 2003 decision that "the Constitution of Georgia

does not recognize the possibility of detaining a person on the grounds of "other evidence". Such evidence may become a cause for suspicion but not deprivation of a person's liberty", while on the other hand, it did not consider the wording "a person may go into hiding " unconstitutional. If the detention of a person on the basis of "other evidence" "may become a cause for suspicion and not deprivation of a person's liberty " why then the same cannot be true for the wording "a person may go into hiding"? Why cannot these words also become "a cause for suspicion and not for the deprivation of a person's liberty"? How come that in assessing the constitutionality of paragraph "f", part 1, article 142 of the Criminal Code of Practice of Georgia the Constitutional Court's Board overlooked other paragraphs of part 1 of article 142 where, as already said, the instances for the detention of a suspect are formulated precisely, unambiguously and explicitly! How come a person having read the first part of this article overlooked a clear difference of paragraph "f" with other paragraphs?

Most importantly, in its decision the Constitutional Board disregarded a rather essential issue raised in the Constitutional complaint and did not make it a subject of special consideration. Our discussion has clearly proved the conclusion that was made in the Constitutional complaint: "by its content, the disputed norm repeats the content of part 2, article 142 of the Criminal Code of Practice which was recognized as unconstitutional" (see the Constitutional complaint, p.5)

In its decision, the Constitutional Board did not provide direct, decisive answer on that issue. It did not try to substantiate whether the subject of the January 29, 2003 decision substantially differed from the subject under its consideration. Moreover, in its consideration the Board clearly contradicts itself. As we have noted above "the opinion of the Board fully complies" with the view stated in the January 29, 2003 decision that "the Constitution of Georgia does not recognize the possibility of detention of a person on the grounds of "other evidence" and that this evidence may become a cause for suspicion and not for the deprivation of a person's liberty" (see April 6, 2009 decision, p.22). Thus, the Board agreed with the January 20, 2003 decision of the Constitutional Court that the wording "other evidence" of part 2, article 142 of the Code of Practice contradicted article 18 of the Constitution and that "other evidence" might only serve as the ground for suspicion.

But mere suspicion cannot serve as a ground to detain a person as a suspect. That is why the Constitutional Board believes "there must be a well-founded and reasonable suspicion" that a person has committed a crime. In this part the Board agrees with the constitutional complaint which repeatedly notes that a person cannot be detained unless a suspicion about his/her involvement in crime is "well-founded". The disputed decision reads that "suspicion is a subjective attitude and the interference in a person's freedom cannot be based on the suspicion which rests on a subjective attitude alone". Consequently, the Board concludes that "the suspicion must be well-founded" (see the decision, p.15).

Let us now look at the assessment of the disputed norm, i.e. paragraph "f", part 1 of article 142 – "a person may go into hiding". In assessing this norm the Board spares no efforts to evade the essence of the issue. In its deliberation the Board limits itself only to general phrases without even mentioning the question as to what extent this norm facilitates the establishment of "a well-founded

suspicion". The decision reads: "22. If the disputed norm allows the detention of a person in breach of the requirements which have been emphasized above, it does not serve the legitimate purpose, is not subject to the **commensurate test** and infringes upon the inviolability of a fundamental right" (p. 16).

At a glance it seems from the text that the disputed norm - "a person may go into hiding" - gives rise to a "well-founded suspicion". The norm must not allow the detention of a person in the absence of "well-founded" suspicion, as noted in the decision. This is what should be implied in the following wording that the disputed norm must not allow the detention of a person "in breach of the requirements emphasized above". It was exactly the "well-founded suspicion" that was discussed above.

But quite an opposite statement appears lower in the decision that "it is beyond the capacity of the legislation to provide an exhaustive list of the instances and the evidences which may serve as grounds for suspicion. How any evidence provides grounds for a reasonable suspicion should be established on a case by case basis. What is important is that the legislator sets out general criteria which serve as basis for consideration and assessment of each particular case" (See decision, p.22).

One can conclude that as the identification of the exhaustive list of instances of "reasonable suspicion" is beyond the capacity of legislator and legislator establishes "general criteria" alone, it is up to a police officer or any other authorized officer to define whether a particular case can be qualified as "reasonable suspicion". Any other conclusion cannot be drawn from this opinion of the Board. This is where the essence of the disputed issue lies. If this is so, then why the Board agreed with the January 29, 2003 decision which invalidated the wording of part 2, article 142 of the Criminal Code of Practice - "if there is no other evidence". The Constitutional Courts' Board declared that wording null and void then because it might encourage arbitrariness and breach of Constitutional rights of a person in investigation practice. We have provided above a detailed analysis that there is no essential difference between the disputed norm "a person may go into hiding" and the norm invalidated under the January 29, 2003 decision of the Second Board of the Constitutional Court.

Let us revisit the quote from the decision under consideration: "it is beyond the capacity of the legislation to provide an exhaustive list of the instances and the evidences which may serve as grounds for suspicion". The Board reiterates this opinion somewhere else in the decision. The page 19 reads: "the Board does not share the view that the Criminal Code of Practice envisages a specific list of instances of reasonable grounds for suspicion and that in other instances grounds for reasonable and well-founded suspicion cannot emerge. "Suspicion" is not a category which is exhaustively definable by the legislator and whether it emerges or not depends on a set of objective and subjective circumstances in a particular case".

By doing so, the Board seems to try to convince us that while recognizing the Constitutional principle of "well-founded suspicion", it is concerned about the fact that "well-founded suspicion" is such a phenomenon that cannot be specified exhaustively by the legislator in the law as it is impossible or unattainable to do so.

First, who has demanded that the legislator identify altogether and specify in the Code all the instances of ”reasonable suspicions” that might emerge in life. I have never read or heard about such an opinion anywhere. ”Exhaustive list” implies an absolutely different idea. For example, it is well-known that the Criminal Code provides the exhaustive list of crimes. Consequently, no action can be regarded as crime, which is not included in the Code. But this does not necessarily mean that no action can emerge in future, which may need to be included in the Code and qualified as a crime. Under the technical progress of modern times, the social life develops and advances at such a high speed that such a possibility cannot be ruled out.

Similar approach should also be exercised to instances of “reasonable (well-founded) suspicion” and the opinion adopted that the Criminal Code of Practice must provide an exhaustive list of such cases. Although, it does not mean that the legislator may not overlook some instances of ”well-founded suspicion”. But the legislation can be supplemented over time and further improved. Such an approach to the issue stems from the Constitutional requirements of the protection of freedom of a person; if we ignore the need of an exhaustive list of cases of ”reasonable suspicion” in the Criminal Code of Practice, we will endanger the Constitutional principle of the freedom of a person. Who can be guaranteed that a police officer or an investigative service officer will not make a mistake and regard a mere suspicion as “well-founded suspicion”? Nor should it be ruled out that the absence of exhaustive list of instances of ”reasonable suspicion” in the law may be abused by an investigative service officer. This may especially be the case in Georgia where the level of legal life is rather low for the time being.

Second, let alone all the above said, I would like to draw the reader’s attention to one important issue. It is noted in the Constitutional complaint that ”a well-founded suspicion “is needed to detain a person. The complaint relies on article 5 of the European Convention on Human Rights and Fundamental Freedoms which also states that ”the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority” is only possible when there is ”well-founded suspicion“ of wrongdoing.

The Constitutional Board itself agrees with the idea. In a decision under consideration, the Board, notes that “suspicion must be well-founded” and ”there must be well-founded and reasonable suspicion that a person who is detained has committed the mentioned crime” (see the decision, p.15).

At the same time the Board declares in the decision that “the Board does not share the view that the Criminal Code of Practice envisages a specific list of instances of reasonable grounds for suspicion and that in other instances grounds for reasonable and well-founded suspicion cannot emerge” (see the decision, p.19)

Let us take a look at the first sentence of part 3, article 18 of the Constitution of Georgia, which says: “An arrest of an individual shall be permissible by a specially authorized official in the cases determined by law”. The Constitution refers to the law which serves as a basis for the detention of a person. It is primarily article 142 of the Criminal Code of Practice that is implied here. Normally, the Constitution regulates an issue in general terms and each issue is further specified and detailed

in a special legislation. Should the Constitution comprehensively reflect all aspects of life, there would be no need for special legislation. In other words, if article 42 had not had an exhaustive list of cases for the detention of a person, which were not provided in article 18 of the Constitution, article 142 would have lost any sense and article 18 of the Constitution would have been enough to detain a person. Article 18 of the Constitution makes a general reference to the law and says that detention of a person is possible "in cases determined by the law". Consequently, the law, in this particular case article 142 of Criminal Code of Practice, shall list those cases when a person may be detained although the list of the cases that makes detention of a person possible must be exhaustive. Otherwise, the reference in article 18 of the Constitution would make no sense, as already mentioned above.

I would like to draw a reader's attention to another essential issue. To prove the constitutionality of the disputed norm the Board, on the one hand, should have underlined and substantiated in its decision an essential difference between this norm and that norm ("other evidence") which it abrogated by the January 29, 2003 decision, while on the other hand, it should have identified essential features in common with other paragraphs of part 1 of article 142. We have discussed in detail above that there is no essential difference between the disputed norm ("a person may go into hiding") and the norm abrogated by the Constitutional Court ("if there is other evidence"). We will not therefore carry on the discussion on this matter. I will only briefly touch upon the difference between paragraph "f", part 1 of article 142 and other paragraphs of this part.

According to paragraph "f" a person can be detained as suspect if "he/she may go into hiding ". Let us now compare these words with paragraph "a", part I of article 142 "a person is caught red-handed or immediately after committing a misdemeanor". Can anyone claim that this text does not show a "well-founded suspicion" that a person has committed a crime? No, of course. But this cannot be said about paragraph "f" – "a person may go into hiding". This text is very abstract and lacks precision. We do not know what he/she has done and why he/she is trying to go into hiding. Moreover, the intention to hide is dubious as well, not clear from the text. He/she "may" hide but how can it be confirmed that he/she intends to hide?

Let us proceed further. We will see the same situation if we compare content of paragraphs "f" and "b" of article 142. For example, the paragraph "b" has the following content: " eye-witnesses, including victims, directly point to a person as to the perpetrator of the crime".` This text is as clear and differs from the text of paragraph "f" in terms of precision of the provision as sky differs from the earth. I will therefore say nothing about this difference. The same holds true for subsequent paragraphs the contents of which are as follows: "c) a clear trace of a crime is found on or near a person or on his/her clothes; d) A person ran away after committing a crime but was later identified by the victim; e) ruling (decision) is made on conducting the search of a person". As can be seen paragraph "f" is somewhat artificially inserted in this list and it is clear that it does not fit there. Nevertheless, as said above, the Board keeps silent on this issue.

Instead, the Constitutional Board in its decision analyzes paragraph "f", part 1, article 142 of the Code of Practice in connection with such paragraphs that have nothing to do with the identification

of the genuine content of the disputed norm. For illustration purposes I'll quote some examples. The 17th page of the decision reads: " the content of the disputed norm makes it clear that a person who is being detained is suspected of `committing a crime` and not of doing something else. In this regard, other norms of the Criminal Code of Practice further specify the requirements, which should also be envisaged in detaining a person".

Then the decision refers to part 1, article 141 of the Code of Practice which, as put, "further narrows the circle of crimes and permits the detention in case of such a crime for which the law envisions the deprivation of liberty as punishment ". Part 2, article 12 of the Code of Practice is also referred to in the decision, which in the Board's opinion "imperatively demands that a detained person be immediately informed about the crime which he/she is suspected of having committed". Then the decision refers to article 145 which deals with some other rights of the detainee. On the 18th page, the Constitutional Board reiterates what it already said above and explains at length that a general provision for the detention in part 1 of article 141 is the case when "there is enough ground to suspect a person of committing such a crime that is punishable by the deprivation of liberty under the law. The Board puts emphasis on part 23 of article 44 of the Code of Practice which defines the term "suspect". According to this definition the suspect is a person about whom "there is the ground for a reasonable suspicion that he/she has committed a crime envisaged by Criminal Code of Practice of Georgia".

But the decision says nothing about what these articles have in common with the constitutionality of the disputed norm. The impression one can finally get from this consideration of the Board is that it is impossible to substantiate the constitutionality of the disputed norm. Although a reasonable, well-founded suspicion must serve as the ground for detention. But since the law does not and cannot provide an exhaustive list of reasonable and well-founded suspicion, as the Board tries to maintain, the suspicion should be defined by a police officer on case by case basis. With this the April 6, 2009 decision of the Constitutional Court directly contradicts the January 29, 2003 decision of the same Court which we have already discussed in detail above. But the fact that these two decisions of the Constitutional Court are conflicting ones, naturally gives rise to a new issue which is underlined in the Constitutional complaint and therefore cannot be avoided.

The mentioned complaint reads: according to paragraph 4, article 25 of the Organic law on the Constitutional Court of Georgia: "After the Constitutional Court recognizes a normative act or a part thereof as unconstitutional it shall be impermissible to adopt/enact such a legal act, which contains the norms analogous to those declared unconstitutional". It is precisely this norm that was violated by Parliament of Georgia when it amended the Criminal Code of Practice of Georgia by the December 29, 2006 law, adding paragraph "f" to part 1 of article 42 - "a person may go into hiding". This violation by the parliament of Georgia is unfortunately not an exception. I'll quote another case characteristic for the operation of our Parliament in recent years: the July 21, 1997 decision of the Constitutional Court of Georgia invalidated article 34 of Criminal Code of Georgia adopted in 1960, which envisaged "confiscation of property" as an additional measure of punishment. But by the December 25, 2005 law, a new type of punishment - "deprivation of property" - was added to the system of punishments (see paragraph "i", article 40 of Criminal Code). By doing so, the

parliament actually reinstated article 34 of the Criminal Code of Georgia which was abrogated by the Constitutional Court back in 1997. Shortly afterwards, this amendment was appealed by a group of citizens in the Constitutional Court. But by the July 2, 2007 decision the Constitutional Court did not satisfy the appeal. By the power of law the decision of the Constitutional Court is final and not subject to appeal. Parliament, too, is restricted by law and has no right to reinstate the norm abrogated by the Constitutional Court. As can be seen, however, what is prescribed in the law is ignored in the life. But does anyone care? Speaking out loud alone will not put things to right. It requires more deliberation to break this vicious circle.