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# RETROACTIVE APPLICATION OF CRIMINAL LAW – COMMENTARRY ON THE JUDGMENT OF THE CONSTITUTIONAL COURT OF GEORGIA

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## ABSTRACT

This article is a comment on the judgment delivered by the First Board of the Constitutional Court of Georgia on 13 May 2009 concerning the constitutionality of Article 3.1 of the Criminal Code of Georgia. The author presents his views on the constitutional aspects of the application of the said provision. Also, the article discusses the interpretation of the scope and contents of Article 42.5 of the Constitution, attempts to determine the interaction between the respective constitutional and criminal law provisions, analyse aspects related to the retroactive application of criminal law and address important issues from theoretical and practical perspectives. The Article is intended for specialists as well as broader groups of readers.

Retroactive application of criminal law is directly linked to the protective function of law. It reminds us that guarantee of physical security of a person is an important function of criminal law. Criminal law serves as a safeguard against arbitrary retribution/punishment of criminals. The protective function, derived from the fundamental principle of criminal law – *nullum crimen sine lege* (no punishment without law), is usually set forth in respective provisions of national legal orders. In case of Georgia, this principle is enshrined in Article 2.1 of the Criminal Code of Georgia which reads as follows: "[a]n act shall be defined as criminal and punishable by the criminal law being in force at the time of its commission".

The essence and rationale of the provision mentioned above are clear and self-explanatory enough not to necessitate further comments. It is worth noting that the fundamental nature of the principle enunciated is acknowledged and confirmed by Article 42.5 of the Constitution of Georgia, under which:

"[n]o one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed."

Likewise, Article 7.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, states that

"[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

Similar provisions are set out in the Universal Declaration of Human Rights (Article 11.2) and the International Covenant on Civil and Political Rights (Article 15.1).

Apart from the norms governing the retroactive application of criminal law in the actual Criminal Code of Georgia (Article 3.1-2), there were similar provisions in the previous Criminal Code of Georgia (as of 30 December 1960) as well. Article 7.2-3 of the Criminal Code of 1960 was formulated in the following way:

"2. [t]he law abrogating or mitigating a penalty shall have a retroactive effect, *i.e.* shall apply to an act which was committed before the law's enactment.

3. A law which introduces or aggravates a penalty shall have no retroactive effect".

Article 3.1 of the Criminal Code of Georgia (as of 3 July 2007) stipulates:

"Criminal law abrogating criminality of an act or mitigating a penalty shall have a retroactive effect. Criminal law introducing criminality of an act or aggravating a penalty shall have no retroactive effect."

It is worth mentioning that the wording of Article 3.1 of the actual Criminal Code of Georgia underwent significant changes from its enactment on 22 July 1999 until its enforcement on 1 June 2000. The provision was initially formulated in the following manner:

"A criminal law which abrogates criminality of an act, mitigates a penalty or improves the situation of an offender in any other way shall be applied retroactively. No criminal law, which introduces criminality of an act, aggravates a penalty or deteriorates the situation of an offender in any other way, shall be applied retroactively."

The abovementioned provision was amended on 5 May 2000, again on 30 May 2000[1], and acquired the present wording which omits the reference to any improvement and deterioration of the situation of an offender by a new criminal law.

On 30 May 2007, 13 February 2008 and 24 July 2008, the Public Defender and two citizens of Georgia lodged constitutional claims with the Constitutional Court of Georgia requesting the declaration of Article 3.1 of the Criminal Code of Georgia as unconstitutional. These constitutional

[1] See the Law of Georgia of 5 May 2000 "On the Amendment of the Criminal Code of Georgia", *Sakartvelos Sakanonmdeblo Matsne,* #41(48), 1999, section 209; the Law of Georgia of 30 May 2000 "On the Amendment of Certain Legislative Acts of Georgia", *Sakartvelos Sakanonmdeblo Matsne,* #41(48), 1999, Section. 209.

claims were based on the following considerations: the impugned provision gives a retroactive effect to new criminal laws which deteriorate the legal status of those having committed certain criminal acts before the enforcement of those laws. The aggravation was manifested in the extension of statutory limitations and intensification of the requirements to be met by convicts in order to be released on probation. In the claimants' view, the impugned provision fails to comply with Article 42.5 of the Constitution of Georgia prohibiting the retroactive application of a criminal law unless it mitigates or abrogates criminal responsibility. The claimants argued that the application of the new statutory limitations and the imposition of penalties on them fail to comply with Article 42.5 of the Constitution of Georgia. According to the claimants, the constitutional provision prohibits, in absolute terms, the retroactive application of an aggravating new law when it is related to criminal responsibility. The claimants maintained that the concept of responsibility should be construed broadly in this instance and cover not only the criminalisation of an act and aggravating a penalty but also any situation related to the manifestation of responsibility and its consequences in any other form. In a different case, almost similar observations were made by claimants who were subjected to the application of a new law by the Court of Appeals with regard to the new requirements set for a release on probation. In the latter case, the actual deprivation of liberty was pronounced and the convicts failed to be eligible for a release on probation based on the new provision.

During the consideration of the merits, the applicants' representatives adduced arguments before the Constitutional Court of Georgia to consolidate their respective claims: the representatives of the Public Defender of Georgia claim that in the given case, Article 42.5 is aimed at the respective provisions of substantive criminal law and not at the criminal procedure norms. Criminal responsibility and its scopes are defined by substantive law only and not by procedure law. In the representatives' opinion, "responsibility" referred to in the said article of the Constitution implies not only the criminalisation of an act and the determination of a sanction, but also other concepts related to the exoneration of a person from responsibility. The constitutional provision, therefore, has a broader meaning than the impugned provision which only confines the retroactive application to a crime and a penalty.

The representatives of the Public Defender further maintained that Article 42.5 is concerned not only with the prohibition of retroactive application of those laws criminalising an act or increasing a penalty, but also of those deteriorating an offender's situation in some other way. Precisely, this latter issue is left open by the impugned provision of the Criminal Code. The representatives argued that by virtue of the amendment of the initial wording of the provision in question and by deleting the reference to "otherwise deteriorating the situation", the legislature implied that any law, unless criminalising an act or aggravating a penalty, can be applied retroactively and hence the impugned provision runs counter to the spirit of Article 42.5 of the Constitution. Based on the aforementioned reasoning, the claimants' representatives cited statutory limitations within the sphere of application of the constitutional provision. They suggested that the Criminal Code should offer the corresponding interpretation not allowing of holding person responsible when statutory limitations were extended before the expiry of previous terms under the obsolete legislation.

Furthermore, the representatives of claimant E. Sabauri observed that the actual wording of the

impugned provision allowed the Court of Appeal to extend it to the provisions of the Second Part of the Criminal Code only. Thus, due to application of the new wording of Article 63 of the Criminal Code of Georgia, the defendant's situation worsened in terms of the requirements for a release on probation. The representatives argued that the above-mentioned approach failed to meet the standards of Article 42.5 of the Constitution as release on probation also falls within the notion of responsibility covered by the constitutional provision. Accordingly, the comprehensive safeguard guaranteed by the Constitution against the retroactive application of aggravated responsibility is substantially limited by the Criminal Code. The impugned norm, therefore, is defective and incompatible with the Constitution within the teleological meaning of the Basic Law and its case law produced by the courts of general jurisdiction.

The representatives of the Parliament of Georgia (respondent) objected to the claim of the constitutional claimants with respect to the declaration of unconstitutionality of the impugned provision. The respondent's representatives referred to Article 71 of the Criminal Code of Georgia governing the exoneration from criminal responsibility on account of the expiry of statutory limitations. Such exoneration cannot take place where the statutory limitations are extended before the expiry of the previous terms. Hence, the discussion about the retroactive application of a new law introducing new terms becomes moot. A new law may extend the statutory limitations for a particular offence after the expiry of previous terms. The application of new statutory limitations in this case would amount to allowing an aggravating law to have a retroactive effect and to the violation of the Constitution and the impugned provision. The respondent's representative observed that no such application was established in the claimant's case.

The respondent's representatives further observed that the Constitutional Court could only review an actual impugned provision and not what was omitted therein. Stemming from the above observations, the representatives of the Parliament of Georgia (respondent) concluded that there was no legal ground for the Constitutional Court to pronounce itself on the unconstitutionality of Article 3.1 of the Criminal Code of Georgia.

Prof. Otar Gamkrelidze, acting before the Court as a specialist, submitted that the impugned provision is more limited than the second sentence of Article 42.5 of the Constitution of Georgia. The concept of "responsibility" given in the Constitution is broad and implies the criminality of an act as well as a penalty and other measures altering the legal status of an offender. The wording of the Constitution "mitigates or abrogates responsibility" denotes not only the decriminalisation of an act or mitigation of a penalty, but other instances of invalidation of responsibility as well. It effectively covers statutory limitations and provisions governing probation. Accordingly, the new laws governing the above-mentioned concepts should not be applied retroactively to the detriment of an offender.

Prof. Gamkrelidze further argues that Article 3.1 of the Criminal Code limits the constitutional principle by having referred to "the criminalisation of an act" and "penalty" only. He believes that those latter concepts do not relate to the laws governing either statutory limitations or release on probation. Statutory limitations cannot be linked to the "criminalisation of an act". Similarly, the

concept of probation is not related to a "penalty" as the object of the former is an individual and the latter represents a measure against a criminal act. The impugned provision does not allow any different interpretation. In the specialist's opinion, judges are encouraged to construe the impugned provision literally in light of the legislative amendment discussed above.

Based on the abovementioned submissions, Prof. Gamkrelidze concluded that Article 3.1 of the Criminal Code fails to comply with Article 42.5 of the Constitution and invited the Court to declare it unconstitutional.

On 13 May 2009, the Constitutional Court passed a judgment on the constitutionality of Article 3.1 of the Criminal Code of Georgia. The arguments of the Board of the Constitutional Court can be summed up in the following way: criminal responsibility, referred to by Article 42.5 of the Constitution, and the notions mentioned in the impugned provision, namely, "criminalisation of an act" and a "penalty" are interdependent. Therefore, where the Constitution guarantees the safeguards against the retroactive application of criminal responsibility, it also implies both criminalisation and penalty in various forms of their existence. Where the Constitution is concerned with exoneration from responsibility, the legislature implies to prohibit responsibility. Therefore, exoneration from responsibility due to the expiry of statutory limitations should be implied within the broader meaning of exoneration from responsibility referred to in Article 42.5 of the Constitution. The wording "abrogates criminality of an act", given in Article 3.1 of the Criminal Code, should be construed extensively. Moreover, the Constitutional Court concluded that as the impugned provision allows broader interpretation, its literal interpretation (amounting to giving retroactive effect to new laws to the detriment of an offender in instances not mentioned therein) should be deemed legitimate.

It follows from the above discussion that the application of the new extended statutory limitations i.e. the retroactive effect of a new law is permissible only where the terms were extended before the expiry of the earlier limitations. The wording ("introduces criminality of an act") of the second sentence of the impugned provision, within a broader meaning, should be construed as prohibiting the application of new terms to those offences the previous limitations of which already expired under obsolete legislation.

Moreover, the Board of the Constitutional Court examined the retroactive application of stricter law governing probation and found the following: where probation is sentenced along with an actual penalty, the two concepts are interrelated; probation in such cases guarantees that it can effectively replace the actual imposition of a penalty. The imposition of probation instead of a penalty implies more advantages than a mere mitigation of a penalty. The Legislature thereby enabled a perpetrator to avoid an actual penalty. It is also noteworthy that probation, which falls within the category of indirect penalties, has a subsidiary nature and cannot exist independently from a penalty. Probation, therefore, can be considered as some sort of satellite of a penalty and cannot be assessed separately. Thus, the exclusion of the possibility of probation in relation to a certain crime after it is committed amounts to indirect aggravation of a penalty. While probation is not formally a penalty, it still influences the latter. Where an individual is deprived of the possibility to

enjoy the mitigation of the penalty available at the time of the commission of a crime, this amounts to aggravation of penalty although the sanction itself as a normative reality may remain the same.

It is striking that the judgment of the Constitutional Court entails individual opinions of three judges. *Inter alia*, in her dissenting opinion, Ms. Justice Eremadze points out the failure to establish clear position concerning the genuine implication of the impugned provision as manifested in contradictory approaches taken by the first instance and Appeals Courts when applying Article 3.1 to different concepts of substantive criminal law. According to Ms. Justice Eremadze, it may entail the violation of the right in practice due to the failure to comply with the requirements of foreseeability and clarity of legislation. She also observes that the impugned provision does not allow a unified, sufficiently clear and binding interpretation and fails to impart accurate guidelines to those competent to apply the norm and that leaves room for arbitrary practice. According to one version of methodological interpretation of the impugned provision, Article 3.1 of the Criminal Code of Georgia is in compliance with the Constitution. Hence, the impugned provision does not meet the requirements of accessibility and foreseeability. Ms. Justice Eremadze thus summed up the problems raised by the impugned provision which she considered to be unconstitutional.

With due respect to the judgment delivered by the First Board of the Constitutional Court of Georgia, I shall endeavour to present my position concerning the issue at stake and analyse the considerations discussed above.

When it comes to the review of constitutionality of the norms of substantive law, the accurate contents and scopes of the relevant constitutional provision must be analysed in the first place as well as the standards it sets out for substantive law. This is particularly true where provisions of criminal legislation are examined in Chapter Two of the Constitution of Georgia. The said section of the Basic Law provides for the fundamental catalogue of human rights, the basic constitutional safeguard for all of us.

Article 42.5 of the Constitution of Georgia sets forth a guarantee against the application of a criminal sanction on account of an act which was not criminalised at the time of commission. This guarantee is reinforced by the prohibition of retroactive application of law save the two exceptions. The Constitutional provision is clearly related to the norms of criminal law and serves as a basis for Article 3.1 as well. The scopes of Article 42.5 should be analysed in this context.

The first sentence of the provision does not raise serious concerns. The wording - "[n]o one shall be held responsible on account of an action, which did not constitute a criminal offence at the time it was committed" should be construed literally without any further restrictive interpretation. Accordingly, the principle of *nullum crimen sine lege* is preserved in case of any legislative amendment. The question remains if the second sentence of Article 42.5 should be interpreted literally too.

This enquiry, in my opinion, is to be answered in the negative. Otherwise, it may cause unjustifiable ramifications. There can be new norms adopted in criminal law field which at some point are bound to be applied to the acts committed before their enactment although they are neither abrogating nor mitigating responsibility. It certainly does not fall within the category of retroactive application.

Article 62.2 of the Criminal Code of Georgia stipulates that where the non-custodial sentences are changed, replaced and summed up, a sentence may be calculated by days. Article 43.2 of the previous Criminal Code of Georgia (as of 30 December 1960) governing similar issues did not provide for the rule of calculating days while replacing a custodial sentence with a non-custodial one. Clearly, the said provision of the actual Criminal Code, which neither abrogates responsibility nor mitigates, should apply to individuals who committed a crime before the enforcement of the new Code, *i.e.* 1 June 2000. If interpreted literally, such "retroactivity" cannot be deemed in compliance with Article 42.5 of the Constitution of Georgia. This position is consolidated by the fact that new norms of the Code of Criminal Procedure always apply retroactively whether they improve or deteriorate procedural status of a person.[2]

Accordingly, it is logical to conclude that Article 42.5 of the Constitution of Georgia is only related to the criminal norms which determine responsibility of providing sanctions, exonerating from sanctions or mitigating/aggravating punishment. The constitutional provision, therefore, should be interpreted restrictively. The provision applies to the norms of criminal law lying in the basis of criminal responsibility, its degree and scopes, exoneration from criminal sanctions, their aggravation and mitigation.

Likewise, Articles 2.1 and 3.1 of the Criminal Code of Georgia apply to the various concepts of criminal law and must be in accord with Article 42.5 of the Constitution of Georgia.

When analysing the guarantees afforded by Article 42.5 of the Constitution of Georgia, the following considerations should be borne in mind: the Article is aimed at establishing a minimal standard in order to protect an offender from excessive and ungrounded punishment. The standard is binding on State authorities and entitles an offender to legitimate expectations.

Article 42.5 of the Constitution guarantees two safeguards which are minimal binding standards in criminal law: the impermissibility of imposition of punishment for an act not criminalised at the time when it was committed and the safeguard against imposition of punishment stricter than provided by law in force when the crime was committed. These safeguards may only be related to an actual penalty clearly defined by law, its degree and scopes, and other benefits and privileges afforded by law for an offender at the time of the commission of a crime. These benefits and privileges are inevitable and by no means potential rights. The exercise of potential rights is dependent on various factors that cannot be assured to take place in advance. Thus, potential rights can or can not originate and accordingly can or can not be exercised in the future." Moreover, if an offender already acquired an actual right on legal benefit, which can only be exercised in future, legislative amendment adopted to his/her detriment cannot have an adverse retroactive effect on his/her situation and the offender will retain the privilege concerned.

Here is an illustrative example. Article 79 of the Criminal Code of Georgia sets forth terms for annulment of criminal record in terms of various crimes. Criminal record as a legal consequence is related to penalising of an act. When the term expires in relation to a particular convict, he/she

[2] See, Article 3 of the Code of Criminal Procedure of Georgia.

is entitled to be deemed as having no criminal record. If legislation is amended and the terms are extended with regard to that particular crime, the new terms cannot apply to an individual whose record is already annulled in accordance with previous terms. However, it is also possible that the terms for annulment of criminal record are extended through legislative amendment for certain category of crimes before the term is expired with regard to an offender. In the latter case, new terms will apply as an offender cannot have a legitimate expectation for the preservation of requirements conditioning the acquisition of a potential right. This would amount to an unjustified and excessive burden on the authorities, and will never be compatible with Article 42.5. It is also noteworthy that if State authorities apply more self-constraining initiatives on their own than established by the minimal constitutional standard, and realise such an initiative through legislative amendment or broader interpretation of relevant norms in legal practice, it will be the State's discretion. Any such self-constraining endeavours which reflect criminal law policy would be in absolute compliance with the general spirit of the Constitution aimed at liberalising legal system.

Having discussed protective function of Article 42.5 of the Constitution of Georgia and the scopes of application, it is essential to analyse if article 3.1 of the Criminal Code of Georgia is in compliance with the former and if it hampers the exercise of the said protective function. As mentioned earlier, the first safeguard is against punishing an offender for an act not penalised at the time of its commission. This mandatory requirement is secured by Article 2.1 and second sentence of Article 3.1 of Criminal Code which stipulates that criminal law that criminalises an act cannot be applied retroactively. This means, an individual is protected against criminal repression under any circumstances by both the constitutional and criminal law provisions. The discussion should now turn to the enquiry of whether the impugned provision ensures the right guaranteed by the constitutional provision. The constitutional guarantee is reiterated in the second sentence of Article 3.1 of the Criminal Code stipulating that no law aggravating a penalty must have a retroactive effect. The application of any criminal repression that is stricter and not provided for by actual legislation is thereby excluded in case of legislative amendments aggravating a penalty. An individual can only have a legitimate expectation for immunity against repression as described above but the immunity cannot be as broad and comprehensive as imagined by the claimants' representatives, the specialist and the authors of separate opinions. The notion of "responsibility" referred to in Article 42.5 of the Constitution is interpreted more broadly in these observations than stemming from its genuine implication. And its genuine implication is the protective function *i.e.* to cover legal responsibility in all branches of law, its grounds, degree and scopes, and the concepts of criminal law such as "criminality of an act", "penalisation of an act" and a "penalty". In the context of criminal law, the constitutional term "responsibility" certainly covers other issues as well than merely specify penalties and their degrees. These additional issues can be related *inter alia* to exoneration from criminal responsibility or from a particular penalty. The omission of these concepts in Article 3.1 of the Criminal Code does not mean that the scopes of Article 42.5 of the Constitution are narrowed down in the realm of criminal law.

The contents of Article 3.1 of the Criminal Code cannot be examined without reference to Article 2.1. They must be read and analysed in conjunction. The term "penalisation of an act" in Article 2 covers criminal responsibility and all other issues related to a penalty which can be linked with

Article 42.5 of the Constitution and Article 3.1 of the Criminal Code. However, it must be borne in mind to invoke the respective provisions in appropriate context.

The following examples can further clarify the position discussed above. Article 42.6 of the Criminal Code (as of 19 June 2001) stated that a fine as a complementary penalty could only be levied where it was provided for by a relevant Article of the Second Part of the Criminal Code. Under the actual wording of Article 42, a fine as a complementary penalty can be levied where it is not provided for by a relevant Article of the Second Part of the Criminal Code. There is no doubt that the second wording cannot apply to those having committed a crime before the enforcement of the amendment. This would directly amount to the violation of Article 42.5 and the impugned provision as well. Another example is: Article 72 of the Criminal Code determines the preconditions for early release. A court of general jurisdiction must be satisfied that it is not necessary to serve the rest of the sentence. Moreover, a convict must have served a statutory portion of the sentence which is not less than half in case of less serious crimes. Let us assume that this term is extended through legislative amendment to three fifths of sentence. This would clearly be deterioration of situation. Should the new provision be applied retrospectively in such a case? The answer is rather simple, - it depends. If a convict had already enjoyed early release on parole, no retroactivity is allowed. However, in those cases, where a convict is still serving a sentence before the enforcement of a new law, retroactivity is allowed as there is no acquisition yet of the unconditional right to early release on parole. The right in the latter case is secured after various requirements are met and after the court is satisfied that the objectives of a punishment are attained with regard to the convict.

A similar approach should be taken towards retroactivity where the application of extended statutory limitation under new legislation is at stake, or where stricter and more restrictive preconditions are set for probation than previously. If statutory limitation under previous legislation has already expired and an offender thereby actually acquired the right to be exonerated from responsibility, also if the probation was already served based on preferential conditions under previous legislation, the application of new legislation in such cases must be impermissible. On the contrary, where statutory limitation is extended through a new law and preconditions for the annulment of probation are made stricter before the expiry of more liberal terms under previous legislation or there was no probation served on the basis of more preferential older provisions, new terms and requirements will apply. This cannot be deemed to be genuine retroactive effect. There is no safeguard either in Article 42.5 of the Constitution or in Article 3.1 of the Criminal Code. The two norms, as mentioned above, only provide for minimal mandatory standard below which law-enforcement cannot go. Only such standard is firmly guaranteed in any case of legislative changes and it implies that- a) no one can be punished for an action not criminalised at the time when it was committed; b) no one can be punished more strictly than it was determined at the time of the commission of a respective crime.

The analysis above gives rise to the following question: Does the above position contradict Article 2.1 of the Criminal Code under which criminality of an act and its punishment must be determined by law in force at the time the act was committed? If the said provision is interpreted literally, indeed certain contradiction will arise. However, this would be due to incorrect understanding of

the provision. Legislative changes to the benefit of an offender would not apply retrospectively unless they were manifested directly in the abrogation of criminality or mitigating a penalty. Hence, despite the absence of any reference to this effect in Article 3.1, advantageous amendment shall apply retroactively. It is an established judicial practice and it has never caused misunderstanding and controversies. Naturally, an individual cannot be denied the enjoyment of benefits afforded in good faith by the State as an indispensable and inevitable right.

The State is restrained by the Constitution and current legislation in terms of limitations of individual rights and freedoms. Restriction cannot be unjustified and excessive. The Constitution provides for a lower threshold beyond which the State cannot act to the detriment of an individual. Article 42.5 of the Constitution and Article 3.1 of the Criminal Code provide for such a threshold in the realm of substantive criminal life. Once the rationale of these articles and their interrelation are duly analysed, they cannot be deemed contradictory. Hence, there can be no legal ground to declare the impugned provision unconstitutional.

During the consideration of the merits of the case before the Constitutional Court, some participants raised the issue of the initial wording of Article 3.1 of the Criminal Code. It was argued that the wording gives retroactive effect to laws that otherwise improve an offender's situation and prohibit retroactive application of laws that deteriorate the situation other than criminalisation of an act and aggravate a penalty. The preservation of such wording and its enforcement would allegedly prevent the problems in judicial practice and unconstitutional decisions.

I distance myself from the above considerations as they contradict the fact that the initial wording of the impugned provision has never been applied. The reference to other improvement and deterioration of offender's situation was deleted from the original wording of the impugned provision before the enforcement of the then new Criminal Code of Georgia *i.e.* before 1 June 2000. Moreover, even in case of the application of the initial wording of Article 3.1 of the Criminal Code, the courts of general jurisdiction would have delivered similar decisions, which pressed the claimants to appeal to the Constitutional Court.

In the light of the reasons offered above, I find myself unable to agree with the positions taken by the members of the Constitutional Court in their respective opinions about the unconstitutionality of the impugned provision. I also disagree with the viewpoint that in case of the norm's proper interpretation by the courts of general jurisdiction, no decision would be taken that casts doubt on the irreversibility of retroactive application of aggravating laws which may in turn render criminal prosecution "ever-lasting". In my opinion, there is no legal ground for such assumptions. The observation of Prof. Gamkrelidze is noteworthy in this context. The specialist maintained that the courts of general jurisdiction had interpreted the impugned provision within its genuine meaning. However, according to the specialist, the provision narrows down the scope of application of Article 42.5 thus contradicting it. In light of the above discussion, I oppose the viewpoint expressed by the specialist too.

Some of the considerations given in the motivational part of the judgment rendered by the First Board of the Constitutional Court may be controversial from the point of view of legal doctrine.

They, however, do not substantially influence the right solution found by the Court and, therefore, are not discussed in the actual Article.

## CONCLUSION

Finally, I would like to point out one central aspect that the issues at stake do not fall within the constitutionality realm but pertain to criminal law policy. They raise problems in different spheres of social life, marking their effect on legal system, its operation, and ought to be solved at certain stage of development. External factors such as country's commitments to international instruments are also relevant in this context. The Constitution is constrained *vis-à-vis* an individual and so is criminal law policy. The constraints, however, cannot go beyond certain standards being universally recognised and reinforced in international instruments. The State, due to certain considerations, may not afford offenders the benefits going beyond constitutional minimal standards. It does not mean that a court of general jurisdiction is in breach of the Constitution as it is impossible to violate nonexistent rights and obligations.

Criminal law policy granting, through legislative initiative or judicial practice, an individual more benefits and safeguards than relevant constitutional provisions (as in the case of the constraining standards of Article 42.5) is certainly most desirable and welcome. Similar advantages or legal benefits are accordingly reflected in the outcomes of criminal justice administered at national level. The above discussion is based on the assumption that State is a living mechanism with its internal logic and interrelated concepts are to be construed in their entirety.