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CONSIDERATIONS REGARDING THE JUDGEMENT OF THE CONSTITUTIONAL COURT OF GEORGIA – RESPONSE TO DAVID SULAKVELIDZE'S COMMENTARRY

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The substance and the scope of the legal force of the Constitutional Court's judgment are defined by the Constitution of Georgia (Article 89.2) and legislation regarding the Constitutional Court (Article 25.1 and Article 43.8 of the Organic Law of the Constitutional Court of Georgia).

However, in practice, the judgment is effective only if the result of its enforcement is adequate to the substance of the judgment. From this point of view, for the purpose of the effectiveness of the Constitutional Court's judgments, it is important to first read them correctly and then to think about their enforcement. Naturally, the resolution of this issue is not dependent solely on the enforcer's ability and skills. It is dependent on whether the judgment itself allows for correct interpretation. Every judgment is valuable in two respects. Of course, it is essential that the position of the court be correct as the constitutionality of the norm must be resolved correctly. However, it is of no less importance for the grounds underlying the court's position to be adequately justified. The position given in the judgment and the relevant arguments should be clear and unambiguous and there should be clear indications of the grounds or the reasons as to why the impugned provision is constitutional, or why it is not.

To what extent a judgment satisfies these criteria and is thus effective – and having knowledge of this fact – is important for the court. The court itself should have the ability to see the problems of the enforcement of its judgments so that it may predict and resolve similar issues in the future. If the court will not be ready to receive opinions on its judgments, including critical ones, then it will not be able to develop and contribute to the development of the law.

In general, in every sphere, development is conditioned by the existence of diverse opinions, the exchange of views, and criticism. In terms of the effectiveness of the judgments of the Constitutional

Court, it is important to have discussions about them. Naturally, the best path is to do this is to receive opinions and assessments from lawyers, scholars and members of society at large in order to analyse the problems associated with the enforcement of the judgments.

From this perspective, the comments of Georgian Supreme Court Judge David Sulakvelidze regarding the ruling of the Constitutional Court of Georgia N1/1/428, dated 13 May 2009, are crucial. The article "On Retroactive Application of Criminal Law in Georgia: Constitutionality of a Provision in Force" analyses the various parts of judgment, as well as dissenting opinions and provides the author's alternative position.

The mentioned judgment of the Constitutional Court concerns the constitutionality of Article 3.1 of the Criminal Code of Georgia. The complexity of the issue is evident from the fact that there are three central dissenting opinions on the judgment – not to mention numerous conflicting opinions of scholars and lawyers on the issue. Sulakvelidze's additional, alternative position illustrates the problems of the impugned provision.

I confirm my respect towards Sulakvelidze. His article is valuable and interesting. It enables me to again assess and check the correctness of my position. However, in the article below, I think it is necessary to draw attention to various issues regarding the judgment, as well as dissenting opinions criticised by Sulakvelidze. I will try to make some arguments and grounds for my judgment clearer, without claiming that our views agree with those of the author.

1. In the first place, it is necessary to comment on the author's differentiation of issues of criminal policy and issues of constitutional review of a provision. On the one hand, he mentions that state and criminal policies are bound by the Constitution, but at the same time he asserts, "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 policy. They raise problems in different spheres of social life, marking their effect on the legal system, its operation, and ought to be solved at a certain stage of development."

Thus, according to Sulakvelidze, the normative regulations of issues of criminal policy -including those regarding statutes of limitations and requirements for release on parole and specifically those concerned with change of legislation and operation in time- are not subject to constitutional review. This view questions the decision of the Constitutional Court to review the provision, and if the court had agreed with it, it should have never examined the case on its merits.

I cannot agree with this approach. Decisions of the political branch affecting this or that sphere is a manifestation of a specific policy. The state's policy in any sphere (in criminal law or in other branches of law, as well as economic, financial, social policy) is a result of range of internal and external, as well as historical and pragmatic considerations. Therefore, specific needs, necessities and motivations lie behind those motivations. If we allow for this to happen, there will be a temptation to take a range of issues out of the protected area of the Constitution for political purposes and necessity, which would logically raise the risk of the adoption of decisions amounting to human rights violations. But this does not mean that the state's policy in any sphere, including in criminal law, can go beyond the boundaries set by the Constitution. It is unnecessary, even uncomfortable to argue this point. If we allow for

this to happen, there will be a temptation to take a range of issues out of the protected area of the Constitution for political purposes and necessity, which would raise the risk of human rights violations.

Naturally, the presumption of the state's good will and of constitutional action operates, but the very existence of constitutional review is an acknowledgement of the fact that each and every authority can violate the constitution. This institution is created exactly for preventing and resolving unintended errors or the temptation to abuse authority.

As every political decision should be within the boundaries set by the Constitution, similarly every issue, including those involving criminal policy, concerning human rights, is subject to review by the Constitutional Court. Naturally, at the same time, the Court's judgments should not involve it in political process. The Court should not make political judgments and violate the principle of the separation of powers.

> "Judicial branch has indeed an important role for realisation of the principle of separation of powers – it, on the one hand, is a means for an individual to protect himself from state's arbitrariness, and on the other hand, is an additional instrument for different branches to ensure that each other's activities are within their respective spheres of competence and in line with the requirements of the Constitution and laws. However, it is evident that achievement of this is impossible if the judiciary will not make use of its powers as well as if it will go beyond them. Therefore it is necessary to draw a clear line for the powers and obligations of judiciary stemming from the principle of separation of powers. The principle of separation of powers necessitates on the one hand, independence of the branches of authority from each other and clear line between their spheres of competence. Within the scope of this requirement, naturally the judiciary cannot substitute legislative or executive branches, resolve issues within there competence, substitute its' own decision with those of political branches in cases of identified illegality. Judicial branch does not have authority to impose its opinion on the state regarding issues of ... policy. Obligation of the judicial branch is to examine constitutionality of decisions of political branches, which is different in principle from resolving the disputed issue on its own. Judiciary examines and acknowledges.... violation of the Constitution, on the grounds of which relevant competent body has obligation to resolve the issue in line with the constitutional requirements. Therefore, the competences of judicial branch are limited to resolving issue of law and not of politics, which itself stems from the principle of separation of powers" (Dissenting Opinion of members of the Constitutional Court of Georgia - Mr. Besarion Zoidze and Ms. Ketevan Eremadze on the Judgment of the First Chamber of the Constitutioal Court N1/2/434 27th August, 2009).

It is undisputed that these discussed issues pertain to criminal policy, but it is also unquestioned that they are within the constitutionally protected area. This is not challenged by the author of the article as well. While interpreting Article 42.5 of the Constitution, he sees the issues of statutes of limitations and of the requirements for release on parole within the protected area of the Constitution. Moreover, the article is intended to assess the constitutionality of these issues, arguing for the constitutionality of the provision. In the face of this, he does not make clear exactly

on what he bases his opinion that these issues pertain to criminal policy and are not subject to constitutional review. His article is evidence to the rejection of this opinion.

It should not necessitate proving, that any activity of the state, including those that are politically justified, profitable and effective, should have basis in law and be restrained by the constitution. Regular and unconditional adherence to this requirement results in stability, a sense of fairness in society, and trust towards the state.

2. According to Mr. Sulakvelidze, dissenting opinion that argues for the unconstitutionality of the provision does not have any reasonable grounds. To challenge any opinion it is important to analyze its main arguments and defeat them with counterarguments; however, this is not done in the article. My dissent provides justification of the view that there are reasonable grounds that Article 3.1 of the Criminal Code of Georgia can be interpreted in more than one way, including the one that is inconsistent with the Constitution.

2.1 As the rationale of the court's opinion regarding the constitutionality of the provision is based on extensive interpretation of the penalty, criminality, and punishable nature of dissent, I emphasised the potential interpretive scope of these words. We analyzed how comprehensively and exhaustively they regulate the substance of criminal responsibility as mentioned in the Constitution and therefore, whether the obligation to interpret them extensively is unambiguous (as it is provided in the judgment).

With this purpose I interpreted concepts of crime, criminality, criminalizing, penalty, release on parole, and responsibility, and made legislators' unambiguous will evident regarding the non-equivalence of crime and criminality, penalty and responsibility, penalty and release on parole.

It is noteworthy that the author of the article does not have any serious argument regarding the reasons why these concepts cannot be interpreted the way they are provided in our dissent. In my opinion, any word or concept mentioned in the law has specific and independent meaning. Within the requirement of the foresight of the law, it is unacceptable that the regulation of identical relations in the same law is described with different words and concepts or vice versa - different relations are regulated with the same words or concepts. It is possible that the relations implied in different words or concepts may include or complement each other, but in any case, when there are no differences between them, the introduction of different names is not reasonable at all.

On the basis of the aforementioned, I think that it is very risky to argue that different terms have identical contents. If we allow for such a possibility, this will contribute to terminological chaos, which will confuse as the persons with respect to which these provisions should apply also the ones applying the law, and will create grounds for different applications of the law. In this case, a probability of error rises.

Besides this, making the terms and concepts identical implies that the relations regulated by them are equivalent. Allowing this would make the contents and substance of these relations obscure, and question trust towards the traditional meaning behind the terms. These will create additional problems regarding the foresight of the law.

The interpretation of these terms gave me a reason to disagree with the position of the Court as stated in the judgment that the impugned provision has identical contents with Article 42.5 of the constitution. In my opinion, applying the law the impugned provision would not create an obligation to interpret and apply the law in such way. This is not indicated by the provision itself, and furthermore its correct interpretation leads us to opposite result.

2.2 According to the author of the article, the "absence of specific terms in the second sentence of Article 3.1 of the Criminal Code of Georgia does not mean that the scope of the application of Article 42.5 of the Constitution in criminal law is narrowed down." He mentions for the attention of the dissenting authors that Article 3.1 of the Criminal Code should not be read independently of Article 2.1 of the same code. They should be read together, which in his opinion resolves the problem. As the terms in art.2 state, the punitive quality includes criminal responsibility and all the issues pertaining to that penalty that can be associated with Article 42.5 of the Constitution and Article 3.1 of the Criminal Code.

The author of the article is right in that articles 2 and 3 of the Criminal Code should be read together, but exactly reading of these provisions together raises additional problems regarding the foresight of the impugned provisions.

In the Criminal Code of Georgia, the presumption of prohibition of retroactivity is given in Article 2, whereas exceptional cases of allowed retroactivity are stated in Article 3.

It is important to make clear the protected area of article 2, and in a given case an issue whether general rule of application of criminal law in time applies to statutes of limitations and to release on parole.

The rules determined by Article 2 of the Criminal Code of Georgia, with the use of terms punishability (in dissent an interpretation of this term is given) includes not only provisions regulating punishability and penalty, but also applies to statutes of limitations and to requirements for release on parole. Specifically regarding these institutions, Article 2 establishes that the application of the provisions regulating statutes of limitations and release on parole, the presumption of prohibition of retroactivity is in force. This means that the person applying the law should apply the law that was active when the crime was committed.

Article 3 of the Criminal Code of Georgia, judging from its title "Retroactivity of Criminal Law", concerns exceptions from the general rule (Article 2) prohibiting retroactivity. In this provision, apart from second sentence of the first subparagraph, legislators within the discretion set by the Constitution determined to which act that mitigates responsibility should be given retroactive force.

In the first sentence of Article 3, legislators establish two cases in which a criminal act should have a retroactive force. This is applicable if the law decriminalises an activity or mitigates a penalty. Therefore, as a result of reading Article 2 and the first sentence of Article 3.1 together, apart from the mentioned two cases, criminal law (including those aggravating statues of limitations or requirements for release on parole) does not have retroactive force. Naturally we are not concerned with other cases of acceptable retroactivity, which are determined in other parts of Article 3.

On the basis of the above mentioned, although the primary function of the first sentence is to determine exceptions, we can state that there are two rules in this provision – when the law has retroactive force and when it does not. Generally, there is no other resolution of the issue; either the law should have a retroactive force or it should not.

As there are two alternatives regarding the retroactivity of various issues, in our opinion, the legislator had a choice to determine only those cases when the law could have a retroactive force, as an exception from the general rule of prohibition, as a result of which for other cases the prohibition would have applied automatically. Exactly this is the constitutional requirement for the legislator. The legislator should have determined only those cases, when the law could have a retroactive force. In this case in the Criminal Code we would have a determined regulation for resolution of retroactivity issue for the law. On the basis of this, it is logical that the first sentence be sufficient for the relations within the scope of Article 3 for the resolution of retroactivity issues, as the answer is given on both questions – when should an act have retroactive force e and when it should not.

This normative order is challenged by the second sentence of Article 3.1. Here, the legislation specifies two cases in which the law should not have a retroactive force, specifically in cases when the law criminalises a behaviour or aggravates a penalty. Therefore, this provision directly indicates not on those cases allowing for retroactivity, as is proposed by the title, but instead on cases of prohibition of retroactivity. At the same time, it provides for specific cases of prohibited retroactive application of the law. Such a formulation of the provision, naturally, does not enable to prove that apart from these two cases the law does not have retroactive force. However, a systemic analysis of the provision not only does not exclude it, but on the contrary, it gives reasonable grounds for exactly such an interpretation.

For the cases given in the second sentence of Article 3.1, the prohibition of retroactive application of law is also determined in Article 2 and the first sentence of Article 3.1, with the difference that the scope of prohibition of the second sentence of Article 3.1 is narrower. It concerns only cases of criminalization and aggravation of penalty. Therefore, for other laws aggravating responsibility, including those of increasing terms of statutes of limitations or making requirements for release on parole stricter, it does not contain a prohibition of retroactive application.

At first glance, the wording of this sentence is not contradictory to the constitutional provisions, as the Constitution also prohibits retroactive application of the law aggravating penalty or criminalizing behaviour. It seems also that the problem should not be that the impugned provision does not comprehensively regulate the scope of constitutional prohibition of retroactive application of law because as we already have mentioned, the law aggravating responsibility (including those of statues of limitations and requirements for parole) includes Article 2 and the first sentence of Article 3.1. Therefore, without the necessity of repetition of the issues in second sentence of Article 3.1, adequate regulation of the constitutionally of the protected sphere is given in the Criminal Code.

But in the face of this, it is absolutely unclear what motivation is behind the second sentence. If it says nothing additionally and only partly repeats the issues which are already regulated by the

Criminal Code, then its existence is unnecessary. In this case, for the resolution of the issues of retroactivity the person applying the law is not bound by its scope. This raises the issue that the only function of this norm is to narrow down the scope of prohibition of retroactive application of law. Otherwise, its existence in the provision determining exceptions does not have any justification.

"When there is an exception form a general rule, there is not resource for application of general rule on those cases. If general rule is applied on exceptions, then there will not be an exception. Therefore, it is logical that when the legislator introduces exceptions, this at the same time means that it expresses the will that general rule be not applied on those cases" (Dissenting Opinion of the Member of the Constitutional Court Ms. Ketevan Eremadze on the Judgment of the Constitutional Court of Georgia N1/1/428, 447, 459 13 May 2009).

On the basis of this, we can state that the second sentence of Article 3.1 establishes two rules – the first determines the cases when a law does not have a retroactive force, and the second, according to article's title, its aim and function, implies that in other cases a law has a retroactive force. Therefore, by specifying concrete cases of prohibited retroactive application of law, it automatically excludes other cases from the scope of prohibition. Thus the provisions out of the scope of the second sentence of Article 3.1 are beyond the scope of prohibition.

It is necessary to consider the following as well: Despite the fact that Article 42.5 of the Constitution establishes two rules – when a law can have a retroactive force and when not, the main function of it is to emphasise general rule of prohibition of retroactive application of law. In the face of this, significance of the second sentence of Article 2.1 raises. When in the Criminal Code exists simultaneously with general rule of prohibition of retroactive application of law a specific provision for prohibition, legislatures will and motivation for this becomes clear.

Therefore, the fact that the prohibition of the retroactive force of a law is associated to two specific cases enables us to interpret the provision reasonably so that it is an intention of a legislature to reject the scope of prohibition determined by the Constitution. In any case, the structure, function, and title of Article 3 give sufficient grounds for such an interpretation. The result of this is that the law that increases statutes of limitations and aggravates requirements for release on parole can be given retroactive force. Such a reading of the provision is contradictory to the Constitution.

In the face of this, that there is no unambiguous will of the legislature regarding the scope of prohibition of retroactive application of law, a judge applying the law does not have a clear directive how he or she should act. If the judge concludes that the second sentence only repeats Article 2 and it does not have independent meaning, then any law that aggravates responsibility should not be applied in a retroactive manner. However, if he concludes that second sentence of Article 3.1 does have a specific and independent meaning (plausibility of such an interpretation was argued above) then as was mentioned a judge can read the provision in conflict with the Constitution but in line with the law.

It should be mentioned that these arguments may seem frail, unconvincing and incorrect, but for arguing against such an interpretation, at least more convincing counter-arguments should be

provided. Instead, in the article the author just writes that reading Article 2.1 and Article 3.1 of the Criminal Code of Georgia together is sufficient to conclude that criminal law cannot be applied in a retroactive manner, within the scope identical to the one guaranteed by the Constitution. However the article does not answer the main question –why and how is this achievable? What gives grounds for reading the provision only in such a manner that is in line with the Constitution?

It is noteworthy that the author substantiates his position by specific examples. However, these examples are not proving the point he is making, instead they only demonstrate that the Constitution as well as the impugned provision protect only issues of genuine retroactivity, which we ourselves do not deny.

3. According to Mr. Sulakvelidze, the constitutional guarantees regarding the retroactive force of the law regulating criminal responsibility can only apply to the real penalty directly and clearly provided by the law, to its scope and severity and also to privileges related to the punishment, which was enshrined as a right of a the convicted in law when the crime was committed and not as a conditional right, acquirement of which is dependent on other not foreseeable factors and circumstances, on the basis of which the right may be acquired and may not. At the same time, is as a result of realisation of conditions stated in the law, the person who committed the crime has acquired a right for certain type of legal privilege, a new law worsening his conditions cannot restrict it.

On the basis of the above mentioned, Mr. Sulakvelidze is of the opinion that, if a new law increases the terms of statutes of limitations or makes more severe requirements for release on parole before the expiration of shorter statutes of limitations of the old law or before the person was subjected to release on parole pursuant to the provision of the previous law, the provisions of the new law would apply. According to him, this cannot be viewed as genuine retroactivity, is not protected by Article 42.5 of the Constitution and neither by Article 3.1 of the Criminal Code.

It is noteworthy that the judgment of the Constitutional Court and my dissenting opinion indicate clearly that Article 42.5 of the Constitution applies only to the issues of genuine retroactivity of the law regulating responsibility. False retroactivity is not an object of constitutional protection and therefore, it is not assessable in this respect. Thus it is of material importance to correctly draw line between genuine and not genuine retroactivity, so that the scope of constitutional protection be not artificially narrowed or on the contrary extended. This issue is extensively analyzed in the Judgment, with which I completely agree and thus will not discuss it again now. I will emphasise only the following: In our opinion, in this respect, identical approach to statues of limitations and to requirements for release on parole (as is given in the article) is not correct. On the basis of expiration of the term of statutory limitations abrogating from responsibility the reason behind is that unrebuttable evidence and therefore, impossibility of establishing fault, the issues is decided in favour of suspect for the purpose of prevention of punishing the innocent.

Existence of statutory limitations is on the one hand acknowledgement of the fact that it is impractical to deliver objective justice and fair trial after lapse of certain time, because testimonies of witness are less convincing and evidences are less conclusive. The purpose of this is to ensure,

that a court not be obliged to render a decision on the basis of evidence, which because of lapse of time are not faultless. By this the legislator rejects suspicious justice, and decides the issue in favour of the individual and relieves him form responsibility. This then gives a person the right not to be tried after lapse of the term given in statutes of limitations. This is acknowledgement of the fact that a criminal act has lost its feature of assessment, which is necessary to make a person responsible for it and secondly, criminal act which was qualified as criminal not as a result of factual reality but instead as of normative one, loses its force towards the individual.

If not for these circumstances, relief of responsibility because of statues of limitations would be unreasonable. When the obligation to conduct criminal prosecution is annulled, the change in the legal status of a subject should be viewed as his right.

In such cases, the application of genuine retroactivity regarding the person already relieved from the responsibility ignores foresight of the law and, what is more important, questions outcome of the law. The person relieved from criminal responsibility be tried and punished. However, "when legislation increases the statutory of limitations before the expiration of the term of previous statutes of limitations, this case cannot be viewed as violation of the Constitution.... it is true that in this case, person's rights are negatively affected by the fact that criminal prosecution is prolonged, but this normative reality is justified by legal security. Legislator by this emphasises the fact, that for the prosecution of person previous terms of statutes of limitations were not sufficient. As fair trial demands determined statues of limitations, it is impossible to free person from responsibility only on the ground that the previous law determined other terms. Until the terms of statutes of limitation is expired, the person does not have right to be freed from criminal responsibility. He cannot have legal expectation, that the state will not exercise prosecution within the time frame of limitations. Before the expiration of the term of statues of limitations, continuation of the term does not violate person's liberty to foresee legal results of his criminal act. In respect of foreseeing legal results, situation before continuation of the term and after it are identical. Therefore before the expiration, it cannot violate legitimate expectations of an individual" (Judgment of the Constitutional Court of Georgia N1/1/428, 447, 459 2009 13 May).

As to the requirements for release on parole, although the opinion of the court regarding the resolution of the constitutional issues is different from my one, our positions are identical in the respect that parole affects person's punishability. Existence of release on parole ensures that traditional type of punishment may not be applied. When person is subjected to such conditional punishment instead of real one, this indirectly is more than mitigation of a penalty. Legislation written by this normative rule gives opportunity to an individual to avoid being subjected to penalty. Therefore, "when the opportunity of mitigation of a penalty is annulled, which the individual had when he committed the crime, this amounts to aggravation of the penalty, despite the fact, that penalty abstractly may stay the same" (Judgment of the Constitutional Court of Georgia N1/1/428, 447, 459 2009 13 May).

For example in accordance with the sentence of 11 September 2006, adopted by the Chamber of Criminal Cases of Tbilisi Court of Appeals, Kazbegi District Court was not entitled to suspend the punishment in question for a probationary period: "The reasoning of the judge concerning the

retroactive application of Articles 63-64 of the Criminal Code is not founded since the said provisions are of general nature, whereas Article 3 of the Criminal Code refer to those provisions of the Special Part of the Code, which either mitigate or aggravate a punishment." The Supreme Court of Georgia did not admit the case and stated: "As regards the punishment imposed on the convict, it is fair and the Chamber of Cassation agrees with the reasoning and findings of the Court of Appeals on this head of the sentence as well" (Ruling No. 1013ap of the Supreme Court of Georgia, adopted on 14 January 2007). By virtue of the inadmissibility ruling, the Supreme Court made the point that the position of the Court of Appeals, inter alia, on the possibility of the suspension of sentence was in compliance with the established jurisprudence of the Court of Cassation.

In my opinion, the application of release on parole is of the same degree of probability as application of specific penalty (for example of incapacitation) or abrogation from responsibility. Person has equal expectations towards certain severity of penalty or release on parole. As release on parole is a form of realisation of penalty, it is not of material importance whether the law ameliorates the penalty or the form of its realisation, because this latter is ultimately a condition-specific form of realisation of penalty. With this logic, the right to prohibit retroactive application of law aggravating penalty is equivalent to prohibition of retroactive application of the law aggravating requirements for release on parole. On the basis of the aforementioned, before the application of release on parole retroactive application of the law aggravating its conditions is a genuine retroactivity case and contradicts the constitutional requirements.

4. The author of the article also does not agree with the judgment of the court and with the position in my dissenting opinion regarding the application practice of impugned norm in the courts of general jurisdiction. Despite the fact, that according to the dissenting opinion, the current practice indicates to ambiguousness and unconstitutionality of the impugned norm, whereas according to the court although the norm itself is constitutional, but in case the general courts had applied the norm correctly they would not have come to the same decision, which have questioned prohibition of retroactive application of the aggravating law; the common position between me and my colleagues is that it is in principle unacceptable position that Article 3 of the Criminal Code of Georgia be applied only with respect to the Special Part of the Criminal Code. The approach of the general courts of Georgia is exactly this. In their decisions it is clearly stated that protected area of Article 3 of the Criminal Code is only the Special Part of the code and therefore the provisions regulating statues of limitations and issues of release on parole are beyond the scope of that provision. In my opinion, this position might by shared even by the Supreme Court of Georgia. This means that practice of application of this provision will continue in this direction. It is noteworthy that this practice of the Supreme Court concerns general issues. The issue is about application of general rule, the scope of its interpretation, which conditions consistent application of the norm in all analogous cases. Therefore the courts exclude extensive interpretation of the provision (which is provided by the judgment of the Court and shared by Mr. Sulakvelidze). As it seems, they do not see any possibility of use of Article 2 in this case, because if they did they would not have used the new law that aggravated responsibility, instead of the less severe law valid when the crime was committed, while this have not been done.

On the basis of the above-mentioned, it is unclear as to the basis on which Mr. Sulakvelidze justifies existing practice. While in the article he does not agree with only the argument of the courts of general jurisdiction and thinks that it is necessary to apply prohibition of retroactivity to the General Part of the Code (with only exception, if the case concerns genuine retroactivity), it is evident that his position that the judgment of the court and dissent is unjustified and ungrounded.

Apart from this, the author of the article justifies the practice of the general courts on the basis of specific claimants. The case was not of genuine retroactivity, which means that courts should have used the law that was valid during the proceedings. But then how he can explain the fact that these specific decisions were made by the courts on the basis of Article 3? If the issue is not of genuine retroactivity then there is no reason for indication of either Article 2 or Article 3.

In my opinion, analysis of the practice indicates additionally on the ambiguousness of the provision, as there is no clear position regarding the scope of the provision. Although there is a precedent of application of the impugned norm with respect to the General Part of the Criminal Code, but Appellate and Supreme Courts clearly stated that the protection by Article 3 covers only the Special Part of the Criminal Code. If the judge applying the provision does not make decision solely on the basis of the Constitution then he/she has a choice between stating that the impugned provision does not have any in dependent meaning or applying the law at hand retroactively, which is prohibited by the Constitution.

In my opinion, this kind of legislative regulation, application of which contains risk of violation of the Constitution, is against requirements of foreseeability and certainty of the law.

“When the provision can be interpreted in more than one way (including one of them in line with the Constitution and another not) the judge applying the law may only see one or all ways. If he simultaneously sees two options of reading a provision – one contradictory to the Constitution and another not, it is evident that the provision should be interpreted the way that is in line with the Constitution. But ambiguousness is exactly this, that it gives reasonable grounds that different judges will read it differently. Of course, if the person applying the law deems, that the provisions constitutionality is under question, he should be guided directly by the Constitution, but this does not mean that the provision is constitutional.

It is undisputed, that the person applying the law has an obligation to act in line with the Constitution, and a violation of which results in relevant consequences. But the existence of such and obligation does not make the provision constitutional and does not justify leaving unconstitutional provisions in force. In case of a dubious provision, if the application of the Constitution would have been a sufficient guarantee, constitutional control of normative act would be unnecessary.

If an ambiguous provision gives reasonable grounds to read it in contradiction to the Constitution, it does not satisfy requirements of foresight and should be recognised as unconstitutional. In this case, neither the obligation of a judge to interpret the provision in line with the Constitution nor the case-law of the Constitutional Court would ensure constitutionality of the provision” (Dissenting opinion of the member of the Constitutional Court of Georgia Justice K. Eremadze regarding the Judgment of the Court N 1/1/428 447 459 13 May 2009).