

Nino Chochia

SECRET SURVEILLANCE CONDUCTED WITH CONSENT OF ONE PARTY TO COMMUNICATION AND THE RIGHT TO PRIVACY

Nino Chochia

*Consultant of the Department of
Research and Legal Provision,
Constitutional Court of Georgia.*

ABSTRACT*

With the development of technology, protection of individuals from arbitrary secret surveillance has become a challenge for the right to privacy. Therefore, the legislator should create a legislative base that strictly defines the scope of interference to the right of an individual to be left alone. In this respect, it should be decided whether a similar standard of constitutional protection applies to both “typical surveillance” (surveillance without informing the participants of the communication by a third party) and surveillance conducted with one-party consent. Namely, it should be assessed whether a person subject to surveillance with the consent of the conversation partner has the right to sue for violation of privacy and then it should be determined whether this form of the secret surveillance needs to comply with the formal criteria established by Article 20 of the Constitution of Georgia.¹

* The work was submitted to CLR at the end of 2017.

¹ Before December 16 of 2018 the right to private life was guaranteed by Article 20 of the Constitution of Georgia. However, after the new constitutional amendments entered into force on the above mentioned day, the right to private life is guaranteed/defined by Article 15 section 2 of the supreme law.

INTRODUCTION

In criminal proceedings, evidence obtained by surreptitious surveillance is an important component in the fight against crime and the administration of justice. However, the principle of proportionality requires restrictions on human rights to be based on a fair balance between private and public interests. The latter can only be achieved under the control of an impartial authorized body, which issues a permit for conducting secret surveillance.

Democratic society agrees that unrestrained and unrestricted secret surveillance is a “dirty business” which invades the privacy of an individual. Consequently, a legislator should not create a normative environment that encourages this type of encroachment upon privacy.

Secret eavesdropping can be carried out not only without informing the participants of the communication by a third party but also with the consent of one party to the communication. There is no consensus between legal doctrine and courts’ jurisprudences on whether the standard for constitutional protection against these measures is the same. This paper examines the opposing views on this issue using comparative analysis and provides strong arguments for the author’s conclusion. In addition, the paper focuses on the necessity to conduct secret surveillance only after obtaining a court’s warrant with consent of one party or when it is shown to be a urgently necessary. The paper also identifies the main threats of unrestrained secret surveillance.

The Georgian legislation, the constitutionality of which is questioned by this paper, establishes only a procedural basis for recording/eavesdropping in criminal cases. It can be authorized by specific individuals (party to criminal proceeding) in order to attain a specific aim (obtain evidence to be used in criminal proceeding). Consequently, recording/eavesdropping by private individuals in the scope of freedom expression, for instance, when one records someone for various reasons in the absence of legitimate expectation of privacy or when doing journalist’s work, are beyond the norm’s sphere. Hence, this paper will focus only on the wiretapping/eavesdropping carried out in criminal cases.

² The Public Security and Wire Tapping, Helbert Brownell Jr, Cornell Law Review, 1954, pg.195.

LEGISLATION REGULATING SURVEILLANCE CONDUCTED IN CRIMINAL CASES WITH ONE-PARTY CONSENT

Georgian legislation distinguishes between secret investigative actions³ and secret eavesdropping conducted by consent of one party to the communication.⁴ Consequently, the persons authorized to conduct these actions and criteria are different. Secret video/audio recording conducted by a third party (a state) without informing the parties to the communication, is classified as one type of secret investigative action. This action can be described as a “typical form” of secret surveillance. It limits the right to privacy and for that reason, it can only be conducted when approved by a court ruling on the basis of a prosecutor’s motion or, in the case of urgent necessity, with the court’s oversight. In addition, grounds for carrying out an investigative action, its length, the persons against whom the actions are to be carried out, the rules for the storage of the information obtained during such actions and the rules for their destruction are all strictly regulated.⁵ When surveillance is conducted with the consent of one party to the communication, different norms apply. Namely, according to the 5th sentence of the 1st part of the Article 112 of the Criminal Procedure Code of Georgia, consent of one party is sufficient for carrying out an investigative action without a court’s decision.⁶ According to the said norm, lawfulness of video/audio recording and/or surveillance in real time is conditioned by a single circumstance, i.e. the consent of one party to the communication. Therefore, in this case, an investigative action does not need *ex ante* or *post factum* court control. This rule is found in the chapter introducing investigative actions. In addition, the authority to carry out an investigative action is granted only to a party to the case.⁷ Therefore, surveillance with one-party consent may be conducted by a participant of the communication or another third person under directives received from the prosecution and defense. Besides, it is permissible to record/eavesdrop any person, including a defendant, who is in possession of relevant information for either the prosecution or defense. So, the rule established by the 5th sentence of the 1st part of the Article 112 of the CPC of Georgia, gives the party of criminal proceedings the right to obtain evidence by secret surveillance and submit it to a court against the will of the person being surveilled and use it to substantiate his/her legal position.

3 See: Chapter XV11 of the Code of Criminal Procedure of Georgia (CPC).

4 See: The 5th sentence of the 1st part of the Article 112 of the Code of procedural Code of Georgia.

5 See: 1st and 5th parts of the Article 112 and Articles 143³, 143⁵ and 143⁸ of the Criminal Procedure Code of Georgia.]

6 See, 1st and 5th parts of the Article 112 of the Criminal Procedure Code of Georgia.

7 According to the 5th part of the Article 3 of the CPC of Georgia, a party means: a defendant, convicted, acquitted, defense lawyer, investigator and prosecutor.

RIGHT TO PRIVACY OF A PERSON SUBJECT TO SURVEILLANCE IN CRIMINAL CASES

The Constitutional Court of Georgia has repeatedly commented on the value and importance of the right to privacy. In particular, it stated in one of its rulings that the right to private life, being an indivisible part of the concept of freedom, is a precondition for the protection of an individual's autonomy, independent development and his/her honor.⁸ This right grants an individual the possibility to determine the scope and form of his relations with the outside world at his/her discretion.

Obtaining evidence through secret recording of communications by various technical means, and/or through eavesdropping in real time is relevant for both the prosecution and defense. The prosecution aims to investigate a case unhindered and prevent criminal actions. The defense, on the other hand, is interested in obtaining evidence so that it can prove its legal position. However, since audio/video recordings reveal unique characters of the individual and divulge the contents of conversations, these interests are opposed by the personal interest of the individual being surveilled to protect his/her right to privacy.

For some time, the courts linked obtaining evidence through surveillance to ethics and did not see the threats to the violation of privacy.⁹ However, today the Georgian courts have adopted the general practice of viewing typical surveillance through the lens of the right to privacy.¹⁰ However, case law upholds a different approach to surveillance conducted with the consent of one party to the communication, since it is believed that such recording/eavesdropping is to some extent analogous to the typical form of secret surveillance.

The opposing opinion, i.e. that surveillance with one-party consent should enjoy the same standard of protection as typical surveillance, is based on the right of the participant of the communication to independently determine the range of listeners. One of the aspects of private life is the freedom of communication, which involves freedom to choose the audience and content of the conversation. This right has been acknowledged by many jurisdictions including the Constitutional Court of Georgia. Its interpretation runs as follows: "private life protects individuals' personal sphere (space). Personal space includes a definite territory, place (for example, house, private car or some other property), as well as a circle of people an individual chooses for socializing and finally, it also includes the themes an individual wishes to keep secret or wishes to disclose in a particular group of people. Personal space (sphere) of an individual is his/her own creation and he/she has a reasonable expectation that conversations on the themes chosen by him/her will remain unidenti-

⁸ See №1/2/458 Ruling of the Constitutional Court (10 June, 2009 on the case, *Citizens of Georgia-David Sartania and Aleksander Macharashvili v Parliament of Georgia and Minister of Justice of Georgia*, II-4.

⁹ See, *Olmstead v United States*, 277 U.S. 438 (1928), p.468.

¹⁰ See: *Katz v. United States*, 389 U.S. 347, (1967); №1/1/625,640 Ruling of the Constitutional Court of Georgia (14 April, 2016) on a case, *Public Defender of Georgia, Citizens of Georgia: Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, N (N)LPs- Open Society Georgia Foundation, International Transparency-Georgia, Georgia's Young Lawyers Association, International Society for Fair Elections and Democracy and Human Rights Centre v Parliament of Georgia*.

fied and unreachable for all those persons he/she has left outside the personal space.”¹¹ “Freedom to hold opinions and freedom of expression mean for a person not only expressing individual opinions containing particular contents or information by different ways and self-realizing this way, but they also mean exchanging these opinions with particular persons in particular community or society, and that is what the Article 20 ensures.”¹²

The freedom to select and specify the listeners is a main criterion for the existing connection between secret recording with one-party consent and the right to private life in the practice of the Federal Constitutional Court of Germany. One of its cases dealt with the inadmissibility of a secret tape recording conducted with the consent of one party in the investigation. A defendant was recorded in secret to reveal tax avoidance. The German Constitutional Court qualified the tape obtained in this way as secret. While interpreting protected sphere, it noted that an individual has a right to talk privately without any threat or doubt that his private conversation will be recorded and be used without his/her will or against such will. There is the right of an individual to the words spoken, which enables him/her to determine who should listen to his words and in whose presence his tape-recorded words should be listened to.¹³ The court applied the same standard in a civil case related to the use of the witnesses’ testimonies about the taped telephone conversations where witnesses listened with the help of a special listening device and where only one part of the conversation was informed. The Federal Constitutional Court explained that a right to so-called “self-determination” also implies the selection of those individuals who may receive information concerning the content of a conversation. This right is expressed in the individual’s power to decide whether his/her voice and words should be recorded with an audio-recording device and whether these recordings should be accessible for third parties. Consequently, the Basic Law of Germany protects an individual from the use of his recorded speech without his/her consent and the use thereof against his/her own will. The Court assessed that an individual is protected even when one participant of the communication brings in a third party secretly from other parties to the conversation as a listener or allows him/her to directly participate in the communication.¹⁴

The same approach was used by the Supreme Court of Canada in a case related to the use of a surreptitious recording by an undercover police agent without informing the affected individual. As the Court interpreted, the Article 8 of the Canadian Charter of Rights and Freedoms¹⁵ aims at protecting individuals from arbitrary recording when there is a reasonable expectation that the

11 See, A №1/2/519 Ruling of the Constitutional Court of Georgia (24 October, 2012) on the case, *Young Lawyers Association of Georgia and Citizen of Georgia, Tamar Chugoshvili v Parliament of Georgia*, II-3.

12 №1/1/625,640 Ruling of the Constitutional Court of Georgia (14 April, 2016) on the case *Public Defender of Georgia, Citizens of Georgia: Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, N (N)LPS- Open Society Georgia Foundation, International Transparency-Georgia, Georgia’s Young Lawyers Association, International Society for Fair Elections and Democracy and Human Rights Centre v Parliament of Georgia*.

13 See, Beschluß des Zweiten Senats vom 31. Januar 1973 - 2 BvR 454/71 -, Rn. 32-33.

14 See, Beschluß des Ersten Senats vom 9. Oktober 2002 -- 1 BvR 1611/96 -- -- 1 BvR 805/98 --, Rn. 29-30.

15 It provides protection against unreasonable search and seizure. According to established practice, this norm protects an individual’s privacy.

conversation would be heard only by a party of the communication. This derives from the freedom to specify a group of listeners.¹⁶

Therefore, recording/eavesdropping with the help of a technical device by the unintended party ignores such aspect of secrecy for an individual as determining the nature of his opinions' initial flow and boundaries. This aspect is naturally linked to the "adjustment" of his/her words spoken to a partner in the conversation and consequently with the right to foresee the implications of the communication.¹⁷ More specifically, if the target of the eavesdropping had been aware of the recording of the conversation or the transmission of it in real time, the contents and form of his conversation in all probability would have been different or, more than that, the communication would not have occurred at all. It's obvious that a target cannot determine the accessibility of his communication when there is recording/eavesdropping with the consent of one party.

A different standard has been applied in those courts' practices where recording with one party consent is not linked to the right to privacy. It is believed that freedom protected by the right to privacy will be misconstrued if recording conducted with one-party consent and typical eavesdropping were put on the same level and thus, were assessed by the same criteria.¹⁸ In this respect the case law of the US Supreme Court is relevant, where the lack of connection with the 4th Amendment has been substantiated by several arguments.¹⁹

In the cases *On Lee v United States*²⁰ and *Lopez v United States*²¹ the Court established a standard, according to which if a targeted person willingly permits the party of communication equipped with a recording/transmitting device to enter his/her place of business, then it cannot be considered an act of placing a recording device by means of illegal intrusion. Thus, a recording obtained in this way does not violate the 4th Amendment of the US Constitution. However, this argument cannot be considered valid. In this case, it should be examined whether the consent given by the affected person only relates to entering private premises or also to recording/eavesdropping. In these two cases the Supreme Court did not separate these two questions. As a result, the consent given by the target to enter private premises also covered the eavesdropping. Naturally, the lack of knowledge about the recording device excludes the possibility to express free will about recording the conversation, that is, there is no informed consent from the target.

In one of the cases, where a state informant obtained admission to the office from the owner and then, in the absence of the latter, searched the office, the US Supreme Court ruled that if "admission to one's home or office is obtained by stealth or through social acquaintance or in the guise

16 See, a ruling by the Supreme Court of Canada (25 January, 1990) on *R v. Duarte* and also *R v. Wiggins*]

17 See: *Beschluß des Ersten Senats vom 9. Oktober 2002 -- 1 BvR 1611/96 -- 1 BvR 805/98 --*, Rn. 34.

18 See, *Informants and the Fourth Amendment: A Reconsideration*; *Washington University Law Review*, Tracey Maclin, 1996. P.598-599.

19 It establishes a right of an individual to be protected from ungrounded search. Court practice protects privacy of an individual with this norm.

20 *On Lee v United States*, 343 U.S. 747 (1952), p. 751-52.

21 *Lopez v United States*, 373 U.S. 427 (1963), p.439.

of a business call," any kind of search, in this case, falls under the protection of the 4th Amendment.²² We observe an analogous situation when an individual has a reasonable expectation that his conversation will remain private (despite the permission to enter the premises) although, his words are clandestinely "seized" by various methods. Here, we witness the invasion of privacy, which should be subject to court oversight.²³ Consequently, the permission to enter private premises does not necessarily mean that permission is granted for the recording as well. Thus an individual subject to recording is being eavesdropped on against his will; that is, he is being eavesdropped on forcefully. The practice of the European Court of Human Rights also indicates that permission to enter is an irrelevant criteria during secret eavesdropping.²⁴

Eavesdropping with one-party consent is outside the scope of the right to privacy, because it relates to a risk of losing trust in the conversation's partner. Right to privacy does not cover partner's trustworthiness. A party to the communication independently decides whether to remember the content of the conversation and make it public afterwards or record it with an appropriate device or transmit it to another person in real time. Any person who reveals information to a party of a conversation assumes the risk that contents of the conversation may be divulged. There are plenty of cases in the practice of the US Supreme Court where the main line of reasoning is based on the risk of disclosure of the conversation. In the case *United States v. White*, the Court assessed that speaking with an individual and giving testimony to a court based on the contents of the conversation does not require the court's permission and consequently it does not violate the 4th Amendment. The situation is similar when a partner in the conversation records the conversation with an appropriate device or transmits it in real time to another person. With a proper device or without it, a party to the communication does not violate the reasonable expectation of privacy since an individual assumes the risk. Hence, in both situations,²⁵ whether an informant uses a recording device and transmits the conversation to another party or does not use a device and later unveils the contents of the conversation, the risks are similar. The Court established that a recording is an exact version of a testimony and there is no constitutional right that permits its exclusion.²⁶ The practice of equating the risks mentioned by the Court is not substantiated. On the one hand, the aim of the right to privacy is not "protecting individuals against ill advice of friends."²⁷ Thus, losing faith in a partner of the communication and the issue of disclosing the contents of the conversation is beyond the scope of the right to privacy. Social interactions among individuals are accompanied by revealing contents of the conversation by dishonest partners,²⁸ although that cannot be said about the risk of recording the conversation. In the *Lopez* case, Judge Brennan developed the "theory of risk" in his dissent and differentiated the risks.

²² *Gouled v United States*, 255 U.S. 298 (1921), p.306.

²³ See, *Informants and the Fourth Amendment: A Reconsideration*; Washington University Law Review, Tracey Maclin, 1996. P.601.

²⁴ See, *Bykov v Russia*, 10 March 2009, par.82.

²⁵ See, *United States v White*, 401 U.S. 745 (1971), p. 751.

²⁶ See, *Lopez v United States*, 373 U.S. 427 (1963), (Brennan, J., dissenting), p.465

²⁷ See a ruling of the Supreme Court of Canada (25 January, 1990).

²⁸ See, *Hoffa v United States*, 385 U.S. 293 (1966), p.302]

For instance, risk that a person may be eavesdropped on or betrayed by an informant or may be misled by a wrong identity is something inherent in human relations. This is a risk, which is always assumed by an individual while talking with others. However, the nature of risk changes when the listening is carried out with the help of an electronic device. There is no guarantee for security or privacy in this situation and no possibility to mitigate the risk.²⁹ Nowadays, the abundance of listening devices does not necessarily mean that an individual should imagine they will be used. The assumption of the possibility that a conversation could be secretly listened to does not lead to the conclusion that an individual should undoubtedly expect the conversation to be recorded.³⁰ Otherwise, if assumed differently, the grounds for a reasonable expectation that a conversation will remain private will be lost. The risk theory offered by the US Supreme Court is flawed in that it covers “everybody.” The risk of recording/eavesdropping and the burden of proof are read from a perspective of an “innocent” individual rather than a “suspect.” If we agree on risk theory, then why should it not also cover those persons, which are subject to classic eavesdropping? What is the difference between the risks of eavesdropping during a conversation and why does only typical eavesdropping fall under the protection of private life? The risk theory does not provide answers for these questions.

Defining the audience of listeners is the right of a party to the communication. This right does not depend on the forms of eavesdropping. In this light, the risk theory is somehow controversial. On the one hand, it does not reject an individual’s right to define his/her partners in conversation and on the other hand, through compelling an individual to bear a risk, it takes away from him/her the possibility to decide the scope of the accessibility of the communication. Besides, it is unclear what makes typical eavesdropping and eavesdropping with one-party consent different from each other and why the same protection criteria should not be applied to both of them. The main difference is that one party in the communication is aware of eavesdropping. However, that difference does not exclude the arbitrariness of the eavesdropping carried out with one party consent and does not negate the legitimate interest of a person being eavesdropped, which is to be protected from such eavesdropping. Therefore, the difference between surveillance techniques does not change the results for a person who was subjected to surveillance. Nevertheless, risk theory establishes a de jure waiver of constitutional protection in the circumstances when a person does not know and may not ever know that he was subject to surveillance.³¹ Therefore the position that limiting a right to privacy arbitrarily during eavesdropping in whatever form is possible equally, and that the right to be protected from it is equally important, is a consistent and substantiated position.

Clearly, the right to privacy of an individual subject to surveillance in a criminal case is not limitless and it is conditioned by a reasonable expectation of privacy. On the one hand, a legitimate expectation of privacy implies the assumption of the individual that his/her right will be violated by eavesdropping only in cases when a court will issue permission based on an objective assessment.

²⁹ See, *Lopez v United States*, 373 U.S 427 (1963), (Brennan, J., dissenting), p.465

³⁰ Beschluß des Ersten Senats vom 9. Oktober 2002 – 1 BvR 1611/96 – – 1 BvR 805/98 –, Rn.24

³¹ See, *Informants and the Fourth Amendment: A Reconsideration*; Washington University Law Review, Tracey Maclin, 1996. P.621.

At the same time, for a legitimate expectation an individual must demonstrate expectation of real (subjective) confidentiality and also the expectation that society is ready to accept it as reasonable.³² Legitimate expectation that a conversation will remain secret cannot exist in all situations and circumstances. For example, when a person is talking loudly and can be wiretapped/eavesdropped effortlessly, this expectation is groundless.³³ Besides, protection of the right to privacy is not contingent upon the content of the conversation. In particular, in respect with the protection of constitutional right, it is irrelevant what is discussed during conversation, whether incriminating or personal or well-known facts. Mostly it is impossible to foresee what paths a conversation would take; even business related and less private talks can turn into confidential private conversation.³⁴

The right of an individual not to be wiretapped or listened to secretly extends to all spheres whether it is public or private. The right to privacy aims at protecting individuals and not places. Therefore, an individual's comment in a public space, or even in a private one, is beyond the scope of the right to privacy. Contrary to that, a confidential talk in public places enjoys constitutional protection.³⁵

SIGNIFICANCE OF RESTRICTION OF THE RIGHT TO PRIVACY BY COURT'S DECISION OR URGENT NECESSITY

The right to privacy protected by the Constitution of Georgia is not absolute. It can become subject to proportionate interference. Article 20 of the Constitution determines formal and objective grounds and the scope for its restriction. More specifically, according to the 1st paragraph of the Article 20, the right to privacy can be restricted by a court decision or in the absence of the decision as provided by law when it is urgently necessary. The Constitutional Court of Georgia has repeatedly explained the importance of the constitutional guarantee of interference only by a court decision. Namely, the "constitutional requirement for the necessity of a court's decision permitting the restriction of the Article 20 requires that state intervention into the right be assessed by a neutral person for each particular case [...] operative-investigative actions unlike other forms of restriction of human rights, are covert."³⁶ The public as a rule does not see how most of these measures are being implemented so it cannot monitor their processes. In this context, the executive is more tempted

32 See, *Katz v United States* 389 U.S. 347 (1967), P.361.

33 See, Supreme Court of Illinois, *The People of the State of Illinois v DeForest Clark* (No. 115776), March 20, 2014]

34 See, Beschluß des Ersten Senats vom 9. Oktober 2002 -- 1 BvR 1611/96 -- -- 1 BvR 805/98 --, Rn.30

35 See, *Katz v United States* 389 U.S. 347 (1967), pp.351-352.

36 NN2/1/484 Ruling of the Constitutional Court of Georgia (29 February, 2012) on a case, *Association of Young Lawyers of Georgia and Citizen of Georgia, Tamar Khidasheli v Parliament of Georgia*, II-20.

to improperly intervene in human rights and risks are indeed high compared to other instances. Monitoring the actions of the executive by neutral person can reduce risks of arbitrariness from the part of the executive branch”.³⁷

A second formal ground for restriction of the right under the Constitution is “urgent necessity as prescribed by law.” “The Constitution considers determining each circumstance for the restriction of rights on the grounds of urgent necessity to be exclusively a legislator’s competence. In the absence of a law, the executive branch does not have discretion to substantiate why the right to private communication should be limited without a court’s decision. Even when a situation meets constitutional criteria for urgent necessity, intervention in the rights in the absence of law is still inadmissible.³⁸ In addition, as the Constitutional Court interpreted, urgent necessity’s material content “implies such instances where public interest under the Constitution cannot be satisfied without constraining private interests instantly because of actual objective reasons. Besides, it should be very clear and unambiguous that, protection of public interest within the Constitution’s scope is impossible in some other ways. Urgency shows shortage of time, which makes it impossible to promptly obtain a judge’s order and thus, requires immediate action without a judge’s order.”³⁹ Therefore, a law, which suggests the possibility of interference in human rights without a court decision or the urgent necessity as prescribed by law, is formally incompatible with the supreme law and consequently, it is unconstitutional. It is obvious that with such strict regulations, the Constitution tries to minimize the arbitrariness originating from unrestrained and unrestricted eavesdropping by the state and third parties.

On the one hand, intrusion in the human rights by secret surveillance/eavesdropping is characterized by specific factors. The Constitutional Court interprets that, “Due to its secretive nature, interference in human rights creates a risk of abuse of official power, which can bring about harmful consequences for the entire democratic society. Therefore, in a democratic society an intervention can be justified only in a situation where the legislation is equipped with effective and protecting mechanisms against the abuse of official power. A state, which puts its own citizens at a risk of being secretly surveilled and controlled, should not enjoy unrestrained authority. Otherwise, under pretense of defending democracy, unbalanced legislation may turn democracy itself into something very fragile and uncertain.”⁴⁰ Therefore, due to the clandestine nature of secret surveillance, both the parties which are subject to surveillance and those which are not but may come under that risk, do not have the possibility to avoid unreasonable and excessive interference into their rights. Besides, secret investigative actions, including secret video/audio recording, are *ultima ratio* measures. Consequently, their use is acceptable only when crucial evidence for a case cannot be obtained by other methods or it requires unjustifiably big efforts. Accordingly, these measures

37 NN2/1/484 Ruling of the Constitutional Court of Georgia (29 February, 2012) on a case, *Association of Young Lawyers of Georgia and Citizen of Georgia, Tamar Khidasheli v Parliament of Georgia*, II-20.]]

38 Ibid, II-22.

39 See, Ruling of the Constitutional Court of Georgia (26 December, 2007) on a case, *Association of Young Lawyers of Georgia and Citizen of Georgia, Ekaterine Lomtadize v Parliament of Georgia*, II-20.

40 See, Ibid, II-9.

should be employed on a relevant basis against a limited circle of individuals for a limited categories of crime and for limited periods. In addition, there have to be regulations that ensure that the tapes that were recorded during secret surveillance and which were not used as evidence would be destroyed or kept away from the third parties. Secret surveillance needs to be monitored by an independent and impartial body.⁴¹

Although, it's obvious that completely unchecked surveillance won't meet the above mentioned criteria in some cases and will remain unreasonable per se. Usually, the grounds for conducting any investigative action is evidential standard, which proves a need for carrying out an investigative action. The need for carrying out these measures in the course of secret surveillance by one-party consent is not, as a rule, determined by an objective body/person. Typically, a person consenting to eavesdropping is an individual authorized by that party on whose orders eavesdropping is conducted. In case of prosecution, these persons are mostly informants, and in case of defense — it may be either a party itself or any other person. Thus, while completely excluding ex ante control by courts, the 5th sentence of the 1st paragraph of the article 112 of the Code of Criminal Procedure of Georgia does not establish any limits for eavesdropping with one-party consent. This creates opportunity for state/private persons (defense), upon agreeing with a particular person, to tape an individual's conversation on any grounds for any period and for any kind of crime. Clearly, in such circumstances, secret eavesdropping with one-party consent may become a part of routine administrative practice, which will significantly reduce the application of court's prior ruling or urgent necessity and turn them into mere formality.

Besides, the “chilling effect” experienced by freedom of expression in the circumstances of this norm should be taken into account, in particular, when individuals are aware that their conversations may become subject to surveillance at any time, without any restraints and only by a consent of one party (whether it is state or private party), they will try to limit exercising their right. As the Constitutional Court of Georgia has interpreted, “[...] communicating with desirable people on chosen themes with a sense that the space and communication is not private at all, with high probability will change the character of communication, its form and content and may even compel a person to reject exercising his rights to expression and communication altogether. This goes fundamentally against and excludes the idea of development by one's own choice and makes private space poor and narrow.”⁴²

Therefore, interference on the grounds of permission from a court or urgent necessity is an effective mechanism for avoiding ungrounded eavesdropping. However, under the current legislation, secret wiretapping conducted by one-party consent is upon the discretion of those persons/bodies

41 See, Assessment of legislation concerning secret surveillance according to the standards established by the European Convention for Human Rights, International Transparency Georgia, 24 May, 2013.

42 See, №1/1/625,640 (14 April, 2016) Ruling of the Constitutional Court of Georgia on a case, *Public Defender of Georgia, Citizens of Georgia: Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, N (N)LPs- Open Society Georgia Foundation, International Transparency-Georgia, Georgia's Young Lawyers Association, International Society for Fair Elections and Democracy and Human Rights Centre v Parliament of Georgia*; II-27.

which are conducting it. It is obvious that this norm creates legal grounds for the arbitrary intrusion on the right to privacy.

CONCLUSION

An individual subjected to secret eavesdropping with the consent of one party to the communication in criminal cases is empowered to turn to a court within the scope of private life because of his/her right to determine an audience of listeners. The risk theory developed by the US Supreme Court is too broad and, besides, it imposes a burden of risk on an individual affected by the recording/eavesdropping by an electronic device. It should be noted that the risk of the repetition of a conversation and the risk of its recording are not the same. In the course of monitoring the conversation by an “unintended” party, such aspects of secrecy of an individual as the nature of the initial spread of the conversation and its boundaries are ignored. Besides, imposing a risk of eavesdropping on the individual affected does not leave space for a reasonable expectation of privacy. As a result, a sense of being under endless control brings about a “chilling effect” on the freedom of expression, kills free discussion and spontaneous expression, which makes it incompatible with the idea of a free society.⁴³

In addition, it is pointless to talk about differences between typical eavesdropping and recording with the consent of one party in light of the results. In both cases, eavesdropping is of secretive nature for the person who is subjected to the measure. The constitution aims at protecting an individual who is subject to secret eavesdropping from unreasonable intrusion in his/her private life notwithstanding the forms of eavesdropping. Besides, the interest of an individual subject to eavesdropping — to be protected from arbitrary interference in his/her private life — always exists and is not dependent on whether or not a partner knows about surveillance.

If there is a right of an individual being eavesdropped to not be recorded unreasonably, there must be an instrument that will ensure protection from arbitrary eavesdropping. The rule established by the 5th sentence of the 1st paragraph of the Article 112 of the Code of Criminal Procedure of Georgia entrusts protection from unreasonable interference to a person who is an interested party in the process of surveillance. Generally, for the protection of human rights, it is not sufficient to count on the fairness and good faith of a person who is authorized to limit a right. That is why Article 20 of the Constitution of Georgia establishes only two grounds for restricting rights: a court decision and urgent necessity. The norm discussed does not stipulate either of them, therefore, formally it does not conform to supreme law.

⁴³ See, *United States v White*, 401 U.S. 745 (1971), (Mr. Justice Douglas, dissenting), p.762