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Constitutional Guarantees of Protection against Unjustified Dismissal of Officials with an Important Public Legal Function in a Democratic Society

In a democratic society, the activities of officials with a special public legal function, elected by the legislative body for a specific term, should be stable. It is true that a number of such officials do not have constitutional status, but nevertheless, their dismissal from office should not be done without justification, in violation of the constitutional guarantees of protection of rights. By appointing a person to a position for a fixed term, the legislator equips the person in this position with guarantees of independence. Personal and institutional independence is required for impartial decision-making and is therefore a prerequisite for impartiality. When limiting the official powers of such persons, the legislator is obliged to justify the valuable public (legitimate) interest that led to the need to limit the right.

Reforming public institutions is a discretionary authority of the government, however, the legal norm should provide for the possibility for such officials to continue their term of office as the head of any newly created service. Termination of the term of office would be justified if the goal of institutional reform was to perform fundamentally different functions. In addition, premature termination of authority undoubtedly causes a “stinging effect” not only for the dismissed person, but also for other public officials. The disputed legal norm has discouraged them because they do not have the sense of stability to exercise their public office without interruption.

Keywords: *an official holding a public legal function, the position of a state inspector, creation of guarantees of independence for persons elected for a specified term, constitutional guarantee of protection of official status, the issue of compliance with the constitution of termination of authority, protection of the balance of proportionality between public and individual interests.*

1. Introduction

This article touches upon the constitutional guarantees of protection of the rights of the officials who are elected by the Parliament of Georgia for a term determined by the Parliament, and who carry out the public legal function important for the democratic society, and whose status is not determined by the Constitution. According to the practice of the Constitutional Court of Georgia, “the Constitution creates special guarantees with respect to a number of positions... In this case, the functional load of officials and their importance in a democratic society comes to the fore.” The constitution allows that they may have to make decisions that are not desirable for various interested parties. Accordingly,

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ensuring that they exercise their powers properly requires special guarantees of protection from any interested parties... Unhindered exercise of these functions is an unconditional requirement of democracy, so as not to endanger the value system of governance. Accordingly, when assessing the constitutionality of the regulations established in relation to these types of positions, the emphasis is usually shifted to what effect the restriction has on the person's exercise of his official powers.”¹

By the Law of Georgia “on Amendments to the Law of Georgia “on the State Inspector Service”, on December 30 of 2021, the Parliament of Georgia abolished the State Inspector Service and, on its basis, created the Personal Data Protection Service and the Special Investigation Service with the same functions.² This led to the premature termination of the authority of the State Inspector elected by the Parliament for a period of 6 years (2019-2025). According to the first paragraph of Article 27¹ of the Law of Georgia “On the State Inspector Service”: “From March 1, 2022, the State Inspector Service and the position of the State Inspector shall be abolished. As of March 1, 2022, the state inspector shall be dismissed from his/her position ...”.³ According to the named norm, from March 1 of 2022, the official authority of the state inspector was terminated. The Parliament of Georgia did not give the state inspector the opportunity to continue his/her official powers in the remaining term (until July 3, 2025).⁴

It should be noted that reforming this or that field, increasing its effectiveness is a legitimate goal of the government, and the state government enjoys wide discretion/wide scope of state opinion in the field of reforms. At the same time, the reform should not be a spontaneous decision, should not disproportionately restrict human rights. It should lead to public trust, for which it needs to be preceded by the involvement of interested parties, discussions, study of existing problems, sharing of possible legislative projects, etc.

Taking into account Article 4, paragraph 2, Sentence 2 of the Constitution of Georgia,⁵ the Georgian Parliament/Legislator is limited by human rights and freedoms, as applicable law, when exercising discretionary powers. “This document gives basic rights to the binding power of the government, protects a person from the arbitrariness of the government. In the absence of such an approach, the rights and freedoms provided for by the constitution would have only a declaratory weight, ... a person would be deprived of the means of constitutional and legal protection, and the state would be given immense opportunities for arbitrary action and ignoring basic rights...”⁶

¹ Decision № 3/1/1298,1313 of the Constitutional Court of Georgia dated April 23, 2021 in the case “Tamaz Mechiauri vs. Parliament of Georgia”, II-10.

² See Law of Georgia “On State Inspector Service” on Amendments to the Law of Georgia, № 1312-VIIRS-XMP, 30/12/2021. By the same law, the Law of Georgia “On the State Inspector Service” was renamed and renamed to the Law of Georgia “On the Special Investigation Service”.

³ Ibid, Article 27¹.

⁴ The state inspector – Londa Toloraya appealed to the Constitutional Court of Georgia about the constitutionality of his dismissal and requested to suspend the validity of the disputed norm until a decision is made. The Constitutional Court did not suspend the contested norm. see Minutes of the Constitutional Court of Georgia № 1/1/1673 of February 28, 2022 in the case “Londa Toloraya v. Parliament of Georgia”, III-3.

⁵ Constitution of Georgia, 24/08/1995.

⁶ Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007 in the case “Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia”, II-5.

It should be taken into account that the legislator is obliged not to violate the principles, system of values, and human rights established by the Constitution of Georgia when establishing the rules of conduct. The Parliament of Georgia should take into account that the interest of the majority cannot always prevail, in the presence of a conflict between interests, it is important to maintain a balance between public and private interests. A person's rights can be restricted to the extent necessary in a democratic society. According to paragraph 3 of Article 34 of the Constitution of Georgia, “restriction of basic human rights must correspond to the importance of the legitimate goal it serves to achieve.”⁷

2. Official Status of the State Inspector Determined by the Legislation

The position of state inspector is not stipulated in the constitution. Nevertheless, taking into account the special public legal functions granted to the State Inspector by the legislation and according to the rule of appointment to the position of State Inspector, the position of State Inspector, from the point of view of constitutional-legal protection, was equal to the positions provided for by the Constitution of Georgia. The aforementioned gave rise to the legislator's obligation to protect the 6-year term of being in an elective position and to give the state inspector the opportunity guaranteed by the constitution to continue his activities during the remaining term of office.

Such solution of the issue is not alien to the legislator. This is clearly confirmed by Article 27 of the Law of Georgia “On the State Inspector Service”,⁸ according to which, when the position of the Personal Data Protection Inspector was abolished, the State Inspector and the State Inspector's Service were considered the successors of the Personal Data Protection Service and the Personal Data Protection Inspector. The personal data protection inspector elected by the Parliament of Georgia at the time of the implementation of the Law of Georgia “On the Service of the State Inspector” acquired the authority of the state inspector before the expiration of the authority of the personal data protection inspector. It was a constitutional, fair resolution unlike the present case before us. The Parliament of Georgia established different regulations in two identical cases, which shows the inconsistent approach of the Parliament's actions.

The State Inspector Service/State Inspector was created on the basis of the law and the legislator assigned important public legal functions to it. In addition, the State Inspector's Office represented the successor of the Personal Data Protection Inspector. Article 2 of the Law of Georgia “On the State Inspector Service” indicated that the State Inspector Service is an independent body. As an independent state body, it was not part of the legislative and executive branches. The State Inspector performed public legal functions important for the effective functioning of a democratic and legal state, which today are distributed between two new independent services created on the basis of the State Inspector's Service. Its activities were carried out in three directions: control of the legality of personal data processing, control of covert investigative actions and activities carried out in the central bank of identifying data of electronic communication (within this function, the service was authorized to stop the covert monitoring and recording of telephone communication), the representative, officer

⁷ See Article 34 of the Constitution of Georgia.

⁸ See Law of Georgia “On State Inspector Service”, 21/07/2018.

or equivalent of a law enforcement body Impartial and effective investigation of crimes committed by a person (including the investigation of facts of torture, inhuman and degrading treatment). From the point of view of carrying out the function of impartial and effective investigation of a crime committed by a law enforcement agency representative, official or a person equal to it, the State Inspector Service was considered a qualified and independent mechanism that acted independently from law enforcement agencies (police, prosecutor's office) as an impartial representative of society.

It is important to create guarantees of independence for persons elected for a specified term. According to the case law of the Strasbourg Court, “independence” refers to the necessary personal and institutional independence required for impartial decision-making and is therefore a prerequisite for impartiality.⁹

Article 11 of the Law of Georgia “On the State Inspector Service” defined the same guarantees of independence of the State Inspector Service as are provided by the Constitution for elected officials (for example, Public Defender, Auditor General). According to the named article, the State Inspector Service is independent in exercising its powers and is not subject to any body or official. Any influence on the state inspector, the employee of the state inspector's service and the investigator or illegal interference in their activities is prohibited and punishable by law. In order to ensure the independence of the state service, the state is obliged to create appropriate conditions for its activity. The state inspector has the right not to testify in relation to the authority provided by the law because of the fact that was revealed to him as a state inspector. This right is preserved even after the termination of the authority of the state inspector. The protection of guarantees of the State Inspector's inviolability was ensured by the Parliament of Georgia. In particular, without the consent of the Parliament of Georgia, it was not allowed to prosecute him, arrest or arrest him, search his apartment, car, workplace or personal in connection with a case related to his official activities. An exception is the case of witnessing a crime, which should be immediately reported to the Parliament of Georgia. If the Parliament of Georgia did not give its consent, the arrested or imprisoned state inspector should be released immediately. If the Parliament of Georgia gives its consent to the arrest or detention of the State Inspector, his authority would be suspended by the resolution of the Parliament of Georgia until the resolution on the termination of criminal prosecution is issued or the court judgment enters into legal force. Financial guarantees were also provided for by the current legislation. The activities of the State Inspector Service were financed from the state budget of Georgia. Appropriations necessary for the activities of the State Inspector Service were determined by a separate code of the State Budget of Georgia.

The necessity of applying the standard of constitutional protection to the person in the position of the state inspector is indicated by the rule of establishment of the position of the state inspector. According to Article 6 of the Law of Georgia “On the State Inspector Service”, the candidature of the State Inspector was selected by an independent commission, presented to the Prime Minister, and the Prime Minister to the Parliament of Georgia. The State Inspector was elected by the Parliament of Georgia. According to paragraph 7 of the same norm, the term of office of the state inspector was determined for 6 years. Termination of the term of office of the state inspector was provided only in

⁹ *Case of Grzeda V. Poland*, Application no. 43572/18, § 308, 15 March 2022.

the case directly provided by the law, which was specified in Article 9 of the Law of Georgia “On the State Inspector Service”. This provision did not provide for termination of authority due to reorganization or other mechanical intervention, such as division.

3. Constitutional Guarantees of Protection of the Official Status of the Official

By appointing an official with an important public legal function to a position for a fixed term, the legislator equips the person in this position with guarantees of independence. Accordingly, according to the practice of the Constitutional Court, the limitation of the official powers of such persons should be evaluated in the context of the constitutional guarantee: “regardless of whether the specific term of a person's activity in a state position is directly determined by the Constitution of Georgia, in case of termination of the authority before the term, the legislator must justify the public interest, which leads to the necessity of limiting the right. The limitation of the term of authority in the case under consideration ... should be evaluated in the context of the constitutional guarantee of independence ... special status and guarantees of protection ... serve to protect independence ... therefore, ... the limitation of the right to carry out activities will be evaluated using strict constitutional standards.”¹⁰

The analysis of legal norms and factual circumstances provides a sufficient basis for an objective evaluator to determine the standard of legal evaluation of early termination of authority for the state inspector. The special content of the powers granted to the state inspector by legislation, the manner of his appointment and the purpose of this position in a democratic society indicate that the state inspector should enjoy a high constitutional standard of protection.

3.1. The Second Sentence of the First Paragraph of Article 25 of the Constitution of Georgia

According to Article 25, paragraph 1, sentence 2 of the Constitution of Georgia, “the terms of public service are determined by law.” “The Constitutional Court of Georgia has repeatedly explained that public service is professional activity in state and local self-government bodies, in institutions established for the purpose of implementing other public functions.”¹¹ The state inspector, as already mentioned, performed functions of special importance. The named functions, by their nature, are of a public legal nature and, accordingly, the office of the state inspector was a public office, and the position of the state inspector was a public office in the sense of Article 25 of the Constitution of Georgia.

According to the clarification of the Constitutional Court of Georgia, the named provision of the Constitution includes “guarantees of the smooth exercise of this official authority and protection

¹⁰ Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case “Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia”, II-29, 30.

¹¹ Decision № 3/1/1298,1313 of the Constitutional Court of Georgia dated April 23, 2021 in the case “Tamaz Mechiauri vs. Parliament of Georgia”, II-5.

against unjustified dismissal”.¹² The Constitution of Georgia strives to “protect the public servant from unjustified interference in his activities, so that he can properly fulfill the duties assigned to him by the Constitution and the law.”¹³

The 2nd sentence of the first paragraph of Article 25 of the Constitution of Georgia “refers to the constitutional guarantees related to the position of a person employed in the public service – he will not be dismissed without justification, he will be protected from any external interference”.¹⁴ According to the explanation of the Constitutional Court of Georgia, the named provision of the Constitution protects the right to perform activities in the state service and “includes various legal components of the smooth implementation of activities in the state service, including the guarantee of protection against unjustified dismissal.”¹⁵

Within the scope of Article 25, paragraph 1, sentence 2, the law that defines the conditions of public service must comply with constitutional standards. According to the definition of the Constitutional Court of Georgia, the principle of the rule of law “makes the action of the state authorities, including the legislative authorities, within strict constitutional and legal frameworks”.¹⁶ The constitutional-legal limitation of the legislative power implies that any legislative act must comply with the requirements of the Constitution, both in terms of formal-legal aspect and material-legal content. In this case, the law, which allows the termination of the official powers of the state inspector and officials with a similar status, should comply with the formal and material content of the requirements of the second sentence of the first paragraph of Article 25 of the Constitution of Georgia.

3.2. The Issue of Constitutionality of Early Termination of Authority

Whether the early termination of the authority is consistent with the Constitution, it is necessary to evaluate the conformity of the norm establishing the termination of the State Inspector's authority with the Constitution.

According to the established practice of the Constitutional Court of Georgia: “The disputed norm must comply with the principles of proportionality and determination, which are directly related to the principle of the rule of law. It is the principle of proportionality that determines the material dimensions for the legislator when limiting the basic rights. If a norm does not conform to these principles, it allows for arbitrariness. The arbitrariness of the state in the field of human freedom automatically means the violation of human dignity as the highest principle of the constitutional order,

¹² Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case “Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia”, II-1.

¹³ Ibid, II-7.

¹⁴ Decision 3/2/574 of the Constitutional Court of Georgia dated May 23, 2014 on the case “Georgia Citizen Giorgi Ugulava vs. Parliament of Georgia”, II-19.

¹⁵ Decision № 3/2/717 of the Constitutional Court of Georgia of April 7, 2017 on the case “Citizens of Georgia, Moonusa Kevlishvili, Nazi Dotiashvili and Marina Gloveli against the Parliament of Georgia”, II-13, 14.

¹⁶ Decision № 2/2-389 of the Constitutional Court of Georgia dated October 26, 2007 in the case “Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia”, II-18.

the rule of law and other constitutional principles, and the unconstitutional violation of the basic human right”.¹⁷

“The requirement of the principle of proportionality is that the legal regulation limiting the right should represent a useful and necessary means of achieving a valuable public (legitimate) goal. At the same time, the intensity of the restriction of the right should be proportional to the public goal to be achieved, it should be commensurate with it. It is not allowed to achieve a legitimate goal at the expense of excessive restriction of human rights”.¹⁸ In addition, “the more the government interferes with human freedom, the higher the requirements for justifying the interference.”¹⁹

The Constitutional Court pointed out about maintaining the balance of proportionality between conflicting constitutional interests: “... the difficulty of the conflict of values... lies in the fact that legal interests are in conflict with each other... The only way out of this dilemma in a democratic society is to achieve a fair balance. While the conflict of interests is inevitable, there is a need to harmonize and balance them fairly.”²⁰ The Constitutional Court of Georgia always indicates that the state should be able to fairly balance conflicting interests – private and public interests. The degree of democracy is revealed in this. In a democratic society, the implementation/achievement of public interests cannot be justified at the expense of encroaching on private interests. “In a legal state, it is legitimate to expect that the relationship between private and public interests will be fair.”²¹

According to the explanatory note²² of the draft law of Georgia,²³ legitimate interests can be united around one main legitimate interest – that is, the division of the State Inspector Service into two independent services, because the creation of two independent services provides a more effective institutional arrangement. It will facilitate the control of the legal processing of personal data during the implementation of investigations and covert investigative actions, as well as expand the scope of investigation.

The named legitimate interest represents an important public interest, but it is opposed by the interest of protecting the state inspector from early dismissal. The balance between them must be assessed by the test of proportionality.

It should be noted that in order to assess the specialness of the legitimate interest of the state inspector, it is necessary to take into account what important functions the state inspector's office

¹⁷ Decision № 2/1/415 of the Constitutional Court of Georgia dated April 6, 2009 on the case “Defender of the People's Republic of Georgia against the Parliament of Georgia”, II-13.

¹⁸ Decision № 3/1/512 of the Constitutional Court of June 26, 2012 on the case “Danish citizen Heike Kronqvist vs. Parliament of Georgia”, II-65.

¹⁹ Decision № 1/2/384 of the Constitutional Court of July 2, 2007 on the case “Citizens of Georgia – Davit Jimshelishvili, Taniel Gvetadze and Neli Dalalishvili against the Parliament of Georgia”, II-19.

²⁰ Decision № 1/1/477 of the Constitutional Court of December 22, 2011 on the case “Public Defender of Georgia against the Parliament of Georgia”, II-45.

²¹ Decision № 1/2/384 of the Constitutional Court of July 2, 2007 on the case “Citizens of Georgia – Davit Jimshelishvili, Taniel Gvetadze and Neli Dalalishvili against the Parliament of Georgia”, II-19.

²² See Explanatory note on the draft law of Georgia “On the State Inspector Service” regarding the amendment to the law of Georgia, https://info.parliament.ge/file/1/BillReviewContent/289992?fbclid=IwAR1QIETXdeDBqFXyYFCx8p4UqneE_M-arLQZSfKv660blKyBoFspjXEKcz8 [14.09.2022].

²³ Ibid, 3.

performed as an independent body and what was the procedure for the election of the state inspector and the term of office. As already mentioned, the independence of the State Inspector Service from the executive and legislative authorities was determined by the current legislation. This service, as mentioned above, performed three important functions. Taking into account the modern standards of the implementation of public legal functions, the authority to implement the named functions is the competence of independent bodies, which, on the one hand, indicates the special importance of these bodies in a democratic and legal state and, on the other hand, helps to increase the credibility of these bodies.

The independence of the state inspector was indicated by the manner of holding office and the guarantees of his inviolability established by law during the exercise of authority. Public involvement was high in the selection process of the state inspector. He was selected by a commission specially created for these purposes. Political parties, representatives of the Public Defender and non-governmental organizations participated in the interview process in the Parliament. Naturally, the state inspector had the constitutional expectation of being in this position for a period of 6 years (until July 3, 2025). However, his legitimate expectations were violated contrary to the constitution and he was terminated after less than three years of his election.

According to the practice of the Constitutional Court of Georgia, “being appointed to a state position for a definite or indefinite period gives a citizen a legitimate expectation that he will carry out activities in this position during the term of office – for a definite period or – for life.” Accordingly, the limitation of the right to carry out activities within the term defined by the law is permissible only in the presence of significant public interest, in such a way that the legitimate expectations of state officials are not unjustifiably and unjustifiably limited and their trust in the existing legislation is not shaken. The Constitution of Georgia requires that the state office, taking into account its specificity and diversity, should represent a stable and independent structural unit, through which it will be possible to carry out the functions assigned by the law and the constitution without hindrance.²⁴

With broad public participation, for a person appointed to a position for a fixed term, early termination of authority leads to a decrease in trust in state institutions, a gross interference in human rights. Therefore, it should only be done for clearly expressed and very important legitimate purposes. The named public and private/individual interests are significant legitimate interests. Thus, it is important to determine to what extent the constitutional balance between the legitimate public interest provided for by the contested norms and the private/individual legitimate interest is preserved.

According to the precedent law of Strasbourg, the institutional reform of a public institution, if it serves to increase the efficiency of the functioning of these services, can be considered a legitimate goal, but the legislative authority cannot use the reform of public institutions to justify such a measure – the early termination of the mandate of a person elected for a certain period.²⁵

²⁴ Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case “Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia”, II-33-34.

²⁵ *Case of Baka v. Hungary*, Application no. 20261/12, § 155-156, 23 June 2016.

The Constitutional Court notes that “premature termination of the authority of an official, in this case, the state inspector, elected with a guaranteed term, represents an interference with the right to smoothly carry out activities in the public service, which must meet the general requirements of constitutionality”.²⁶

According to the established practice of the Constitutional Court of Georgia, the existence of an important legitimate goal does not mean that interference with the right is justified. For the proportionality of the restriction, it is also necessary to satisfy the requirement of usefulness. On the other hand, when discussing the effectiveness of the measure, “the Constitutional Court must determine to what extent there is a logical connection between the legitimate goal named by the Parliament of Georgia and the form of restriction of the right established by the disputed norms – to what extent the disputed norms provide the opportunity to achieve the named legitimate goal.”²⁷ The Parliament of Georgia indicates that by establishing two independent services instead of the State Inspector Service, a more effective institutional regulation of the control of the legal processing of personal data during the implementation of investigations and covert investigative actions will be achieved, as well as the investigative jurisdiction will be expanded and conflict of interest will be prevented during performance of functions.

The controversial norms established two independent services, and the public legal functions of the State Inspector Service were distributed between them. Institutional reform of state bodies/public institutions in order to strengthen them and increase their effectiveness belongs to the scope of the broad view of the state, therefore, the implementation of the named measure is a justified legitimate goal of the state and it really ensures the effective implementation of the public legal functions provided for them by the law by the newly created services.

It should be taken into account that the justification of the legitimacy of the named public interests/goals will not be useful in relation to the first paragraph of Article 27¹ of the Law of Georgia “On the Service of the State Inspector”. Based on the disputed norm, the state inspector's official authority was terminated early. The clarification card does not separately indicate the legitimate goals of early dismissal, why the Parliament did not use the legislative practice established by it to allow the state inspector to continue his activities during the remaining term of office, about which it is mentioned above.

The disputed legislative arrangement did not take into account the possibility for the state inspector to continue his authority as the head of any newly created service for the remaining term. Accordingly, the disputed norm establishes a different rule from the legislative practice of the Parliament.

Termination of the term of office is justified if the goal of institutional reform is to implement fundamentally different functions. In one of the cases, the Strasbourg Court noted: “Based on the reasons given by the government to justify the contested measure, it does not appear that the changes

²⁶ Decision № 1/9/1673,1681 of the Constitutional Court of Georgia of November 17, 2022 on the case: “Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia”, II-33.

²⁷ Decision № 3/3/600 of the Constitutional Court of Georgia dated May 17, 2017 on the case “Citizen of Georgia Kakha Kukava vs. Parliament of Georgia”, II-48.

made in ... functions or ... tasks were of such a fundamental nature that they could or should have caused the applicant's mandate to be prematurely terminated.” ..Furthermore, if the applicant was considered competent to carry out both functions at the time of his election, the fact that one of them was subsequently removed should not in principle affect his fitness to continue to carry out the other function ...As for the ... changes, they do not It seems to be of such a fundamental nature.”²⁸ Thus, the regulation established by the first paragraph of Article 27¹ of the Law of Georgia “On the Service of the State Inspector” does not represent a useful means of achieving the legitimate goal named by the Parliament.

According to the definition of the Constitutional Court of Georgia, “any measure restricting a person's right should represent a necessary, least restrictive means of achieving a legitimate goal. Therefore, in each specific case, the state must justify that there is no possibility of achieving the legitimate goal by using other, less restrictive measures.”²⁹ The court stated almost the same thing in another case: “A restrictive measure must be a necessary (least restrictive) means of restriction in addition to its effectiveness.”³⁰ In the case under consideration, it should be established whether the Parliament of Georgia could ensure the institutional reformation of the independent body for the state inspector elected for a period of 6 years without terminating the authority before the term.

In the explanatory note, the Parliament indicates the importance of establishing two independent services, the need for institutional reform, and the interest in increasing the efficiency of public legal functions. However, it does not explain why the state inspector could not exercise these interests without prematurely terminating his mandate. It should be noted that the powers granted by the legislation to the newly established two independent services/heads of the service do not qualitatively differ from the powers granted to the State Inspectorate/State Inspector by the legislation. The newly created services did not add any new public legal function that is not related to the activity performed by the state inspector. The public legal functions of the State Inspector Service/State Inspector were distributed between the two newly created independent services. In addition, there were no question marks regarding the independence, competence, qualifications and professionalism of the state inspector. Therefore, there is no argument to prove that the state inspector would not be able to fully lead any newly created service during the remaining term of office.

Based on all of the above, the regulation provided for by the disputed norm – early dismissal of the state inspector is not a measure caused by extreme necessity. The legitimate goal of the institutional arrangement of the public service – the establishment of two independent services did not exclude the possibility that the state inspector would continue to lead one of the newly created services during the remaining term of office. The Parliament of Georgia had all the legislative levers to regulate that the position of the head of any newly created service was considered as a substitute for the state inspector and established the following legislative reservation: at the moment of the entry into

²⁸ Case of *Baka v. Hungary*, Application no. 20261/12, § 155-156, 23 June 2016.

²⁹ Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case “Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia”, II-44.

³⁰ Decision № 3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 in the case “Citizen of Georgia Nodar Dvali vs. Parliament of Georgia”, II-26.

force of the disputed norm (by March 1, 2022), the state inspector elected by the Parliament of Georgia, who was in office, acquired any specific newly created Authority of the head of the service before the expiration of the authority of the state inspector. Thus, for the state inspector, early termination of the authority is not an extremely necessary means of achieving the goal. Therefore, legitimate objectives could be achieved using other, less restrictive measures.

According to the case law of the Court of Strasbourg, when reforming public institutions, there are clearly some alternative measures that can be taken that respect the general rule of the Constitution.³¹

In order for the restriction provided by the contested norm to be considered in accordance with the Constitution of Georgia, along with the component of necessity, it must meet proportionality in a narrow sense. The requirement of the mentioned component is that “when limiting the right, the legislator establishes a fair balance between the limited and protected interests”.³² The Constitutional Court of Georgia has repeatedly explained that “the principle of proportionality also requires that proportionality in a narrow sense be preserved. It is necessary for the state to establish a fair balance when developing a right-limiting measure in such a way that the protected good and the interest in its protection exceed the interest in the protection of the limited right.”³³

The reformation dictated by the best interests of public service and public institutions is in the interests of a democratic and legal state. At the same time, it should be noted that reforming state institutions is not a sufficient basis for early dismissal of an official elected by the Parliament of Georgia for a certain period based on transparent legal norms and legal process. It is necessary to have an increased public interest corresponding to the requirements of the Constitution. The Constitutional Court points out that the termination of the powers of such officials can be “justified only in the presence of significant public interest, while the early termination of the powers of the said officials is a necessary, effective and less restrictive means of achieving the relevant legitimate goal. Otherwise, it may take on a permanent, irreversible character, which will not only make the appointment of persons in office for a certain period of time meaningless, but also question the institutional independence of these bodies.”³⁴

As we can see, there are no special circumstances that would justify limiting the right of the person protected by Article 25 of the Constitution of Georgia – the state inspector. However, as the Strasbourg Court points out, the premature termination of authority undoubtedly causes a “stinging effect” not only for the dismissed person, but also for other public officials.³⁵ The disputed legal norm has discouraged them because they do not have the sense of stability to exercise their public office without interruption.

³¹ Case of Grzeda V. Poland, Application no. 43572/18, §279, 15 March 2022.

³² Decision № 3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 in the case “Citizen of Georgia Nodar Dvali vs. Parliament of Georgia”, II-43.

³³ Decision № 3/1/752 of the Constitutional Court of Georgia of December 14, 2018, in the case “Green Alternative Party” against the Parliament of Georgia, II-28.

³⁴ Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case “Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia”, II-53.

³⁵ *Case of Baka v. Hungary*, Application no. 20261/12, § 173, 23 June 2016.

Taking into account all the above, the disputed norm violated the guarantees of the state inspector's unhindered performance of activities in the state service protected by the second sentence of the first paragraph of Article 25 of the Constitution of Georgia, including the protection against unjustified dismissal, because it does not establish a reasonable balance between the state inspector's rights and public interests. between.

Accordingly, the normative content of the first paragraph of Article 27¹ of the Law of Georgia “On the State Inspector Service”, which does not provide for the continuation of the authority of the state inspector elected by the Parliament of Georgia for the remaining period of 6 years in the position of the head of any newly created independent body, contradicts the first paragraph of Article 25 of the Constitution of Georgia. requirements of the second sentence and is unconstitutional.

4. Conclusion

The Constitutional Court, while recognizing the normative content of the disputed norm as unconstitutional³⁶, used such wording that raised questions as to how effectively the decision will be enforced. According to the resolution part of the decision, “normative content that provides for the dismissal of the state inspector ... without offering an equivalent position or without giving fair compensation” is unconstitutional. It should be noted that the court recognized as unconstitutional not that the disputed norm did not provide for the possibility of the state inspector continuing his authority as the head of any newly created service in the remaining term of office, but indicated at the offer of „equivalent position” with the alternative of receiving compensation. Aforementioned leaves the decision practically unenforceable in the part of the offer of the position.

It should be taken into account that the court threatened the enforcement of the decision even when it did not suspend the operation of the disputed norm.³⁷ By the time of the decision, the new heads of both newly created services have already been appointed to their positions.

In this regard, it is also interesting to consider the authority of the Constitutional Court of Georgia envisaged by the law,³⁸ according to which the norm known as unconstitutional in relation to the issues of the second chapter of the Constitution of Georgia is invalid from the moment the decision is published on the court's website, not from the moment this norm is adopted/entered into force.³⁹ In addition, it should be noted that the Parliament of Georgia enjoys wide discretion to ensure the restoration of violated human rights and freedoms.

It is interesting to evaluate the practice of the Strasbourg Court on the subject of enforcement of court decisions. The court notes that in the context of the enforcement of decisions, the decision in which the court establishes a violation of the right imposes a legal obligation on the respondent party

³⁶ See Decision № 1/9/1673,1681 of the Constitutional Court of Georgia dated November 17, 2022 in the case: “Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia”, III-1.

³⁷ See Minutes of the Constitutional Court of Georgia № 1/1/1673 of February 28, 2022 in the case “Londa Toloraya v. Parliament of Georgia”, III-3.

³⁸ See Organic Law of Georgia “On the Constitutional Court of Georgia”, Article 19, Clause 1, Sub-Clause “e”, Article 23, Clause 1, 31/01/1996.

³⁹ *Kopaleishvili M.*, for the issue of invalidating a legal act, Law Journal, № 2, 2016, 170-179 (in Georgian).

to reparate (correct) the consequences of the violation in such a way as to restore as much as possible the legal situation existing before the violation was committed. It should also be taken into account that sometimes the national legislation does not provide for the possibility of reparation of the violated results in relation to specific cases. In such a case, the applicable legislation should allow the aggrieved person to be awarded such satisfaction as the court deems appropriate. In the absence of fair reparation, the state remains obligated to ensure human rights and freedoms in accordance with the court's decision.⁴⁰

At the same time, the practice of the Strasbourg Court is interesting, according to which “the judicial system in a democratic society ... is regulated by a law originating from the Parliament. Also, in countries where laws are codified, the judicial system cannot depend on the discretion of the judiciary, although this does not mean that the courts do not have some freedom to interpret national legislation.”⁴¹ A controversial example of this kind of interpretation by the Constitutional Court is the recognition as unconstitutional of the normative content of the above mentioned disputed norm by the decision of November 17, 2022 N1/9/1673,1681, which envisages dismissal from office “without offering a equivalent position or without providing fair compensation”.

With the mentioned record in the decision, the court, in fact, reduced the constitutional guarantees of unhindered exercise of official authority and protection against unjustified dismissal of persons holding an important public legal function to the point of compensation and thereby harmed not only the practice of the court before this decision, but also the effective protection of human rights.

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10. Decision № 3/3/600 of the Constitutional Court of Georgia dated May 17, 2017 on the case “*Citizen of Georgia Kakha Kukava vs. Parliament of Georgia*”, II-48.

⁴⁰ *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 193-195, ECHR 2013.

⁴¹ *Case of Oleksandr Volkov v. Ukraine*, no. 21722/11, § 150, ECHR 2013.

11. Decision № 3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 on the case “Georgian citizen Nodar Dvali vs. Parliament of Georgia”, II-26, 43.
12. Decision № 1/2/569 of the Constitutional Court of Georgia dated April 11, 2014 in the case “Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguadze, Giorgi Meladze and Mamuka Pachuashvili against the Parliament of Georgia”, II-1, 7, 29, 30, 33-44, 53.
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