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## **Impeachment of the President and the practice of the Constitutional Court of Georgia**

*The article discusses the conclusion of the Constitutional Court of Georgia on the impeachment of the President. On October 16, 2023, the Constitutional Court of Georgia rendered a conclusion “On Violation of the Constitution by the President of Georgia” (case № 3/1/1797). In the practice of proceedings of the Constitutional Court, consideration of the issue of impeachment took place for the first time therefore, it has a precedential value. The present article discusses the extent to which the Constitutional Court has realized the importance of constitutional control when concluding the issue of impeachment.*

*The article presents the essential shortcomings of evaluating the issue by the court. In particular, the article discusses the effectiveness of constitutional control, the issue of the autonomous content of the constitutional terms, the formal definition of the norms of the constitution, and the issue of the normative content and establishing the facts by the court.*

*Three judges expressed a dissenting opinion on the mentioned conclusion. The article reviews the issues that point out the dissenting opinion.*

*The article also scrutinizes the legal nature of the conclusion rendered by the court.*

**Keywords:** *Impeachment of the President, Conclusion of the Constitutional Court, Status and Authority of the President, Normative Content of the Constitutional Norm, Rule of Autonomous Interpretation of the Constitutional Norm, Assessment of Facts by the Court, Legal Nature of the Conclusion.*

### **1. Introduction**

On October 16, 2023, the Constitutional Court of Georgia rendered a conclusion “On Violation of the Constitution by the President of Georgia”(case №3/1/1797).<sup>1</sup> In the practice of proceedings of the Constitutional Court, the issue of impeachment took place for the first time therefore, it has a precedential value. Thus, the approaches of the court presented in the conclusion may become decisive for evaluating the constitutionality of the actions of executives in the future. This article discusses the extent to which the Constitutional Court discerned the importance of constitutional control when concluding the issue of impeachment.

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<sup>1</sup> Conclusion № 3/1/1797 of the Constitutional Court of Georgia dated October 16, 2023 (in Georgian).

The issue of impeachment involves political and legal importance. The legal literature focuses on the political and the legal side of impeachment. In particular, impeachment is a mechanism to remove the official from office who, due to misconduct, no longer deserves trust. The purpose of the impeachment process is to find out whether the official has lost the trust of the people due to wrongdoing and what is more appropriate in the relevant situation – to retain the position or remove him/her from office. Evaluating this issue requires applying political criteria that is the entitlement of the political body – Parliament.<sup>2</sup> Notwithstanding the above, once the issue of impeachment is referred to the Constitutional Court to assess the constitutionality of the action, the issue takes legal significance. Following the case of the Georgian model, the participation of the Constitutional Court of Georgia in the impeachment procedure significantly changes the nature of the impeachment, initiating the impeachment procedure and rendering the final verdict is ensured by the Parliament – a political body, thus, the Georgian model of impeachment is a political-legal institution.<sup>3</sup>

According to Article 48, Paragraph 2 of the Constitution of Georgia,<sup>4</sup> the Constitutional Court of Georgia confirms/or does not confirm the violation of the Constitution by an official. The primary purpose of the Constitution is to assess the constitutionality of those actions that became the basis for impeachment. The Constitutional Court should refrain from evaluating the actions and/or alleged actions of the officials, which did not become the basis for raising the issue of removal from office by the process of impeachment. This is further clarified by Article 26, Paragraph 4 of the Organic Law of Georgia “On the Constitutional Court of Georgia”, based on which, examining the case of impeachment of a person provided by the Constitution, the Constitutional Court evaluates only the action that is considered grounds for impeachment by the members of the parliament.<sup>5</sup>

Taking account of the fact that the opinion of the court may serve as the basis for the removal of an official provided by the Constitution, the role of the Constitutional Court is immense in assessing the constitutionality of the action of an official. In addition, “in the process of interpretation of the Constitution, the Constitutional Court must ensure the protection of the order established by the Constitution, the understanding of the provisions of the Constitution following their objectives and values.”<sup>6</sup>

## **2. Factual Circumstances of the Case**

### **2.1. The Norm of the Constitution which was Claimed to be Violated by the President of Georgia**

The authors of the constitutional submissions believed that the President of Georgia violated Article 52, Paragraph 1, sub-paragraph “a” of the Constitution of Georgia: The President of Georgia

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<sup>2</sup> *Gotsiridze E.*, For the Political Nature of Impeachment, “Justice and Law” journal, №1(44)15, 19 (in Georgian).

<sup>3</sup> *Khetsuriani J.*, The Power of the Constitutional Court of Georgia in the Impeachment Process, “Justice and Law” journal, № 2/3, 45/46, 53 (in Georgian).

<sup>4</sup> Constitution of Georgia, Article 48 (in Georgian).

<sup>5</sup> Organic Law of Georgia “On the Constitutional Court of Georgia”, Art. 26, 4 (in Georgian).

<sup>6</sup> Decision № 2/7/667 of the Constitutional Court of Georgia of December 28, 2017, on the case “JSC Telenet”. against the Parliament of Georgia, II-62 (in Georgian).

shall: “with the consent of the government, exercise representative powers in foreign relations, negotiate with other states and international organizations, conclude international treaties, and accept the accreditation of ambassadors and other diplomatic representatives of other states and international organizations; upon nominations by the Government, appoint and dismiss ambassadors and other heads of diplomatic missions of Georgia” . In the course of hearing the case on the merits, only the following entry was identified as a disputed provision: “The President of Georgia, with the approval of the government, exercises representative powers in foreign relations, conducts negotiations with other states and international organizations...”.

## **2.2. The Authors of the Constitutional Submission**

On September 14, 2023, the members of the Parliament of Georgia<sup>7</sup> applied to the Constitutional Court of Georgia with a constitutional submission (registration No. 1797). Following the constitutional submissions, the president needs the approval of the Georgian government not only for conducting international negotiations and concluding international agreements but also for the exercise of representative authority in foreign relations in any form.

Following the constitutional submission No. 1797, the President of Georgia, Salome Zurbishvili, without the consent of the Government of Georgia, made three working visits (to the President of the Federal Republic of Germany on August 31, 2023, to the President of the European Council on September 1, 2023, and to the President of the French Republic on September 6, 2023) and within the framework of these visits held working meetings violating the requirement of the Constitution of Georgia.

## **2.3. Representatives of the President**

The representatives of the President of Georgia noted that the President had not violated the Constitution. Article 52, Paragraph 1, sub-paragraph “a” of the Constitution of Georgia ought not to be completely understood as the president is bound by the government and cannot act in foreign relations without its permission. The constitutional status of the President of Georgia should be taken into consideration. Article 49 of the Constitution of Georgia defines the actual legal status of the President, according to which the President of Georgia is the head of the state of Georgia, the guarantor of the country's unity and national independence, and the Supreme Commander-in-chief of the Defense Forces of Georgia. The status of the President of Georgia provides the head of state with the authority to represent Georgia in foreign relations independently, within the framework of Article 49 of the Constitution, without the special consent of the government (paragraph 3 of Article 49 of the Constitution of Georgia). The authority granted to the President within the mentioned provision does not require the approval of the government. The Constitutional Court must distinguish between the normative content of Article 49, Paragraph 3 of the Constitution, and Article 52, Paragraph 1, sub-paragraph “a” of the Constitution. It is essential to evaluate the purpose of the mentioned norms in the constitutional and legal order. The President of Georgia acted in support of the European integration

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<sup>7</sup> Irakli Kobakhidze, Shalva Papuashvili, Mamuka Mdinaradze, and other 80 members.

course announced by the government. The mere fact of a meeting does not constitute evidence that representative powers have been exercised or that negotiations have taken place. Diplomatic practice covers a wide range of activities, making treaties, or communication in formal formats. The exchange of ideas is the most important thing in diplomatic practice. Maintaining contact, relations, and communication between the heads of state plays a vital role in protecting the interests of the state and establishing friendly and trust-based relations between the countries. Such actions are necessary to build trust in the relationship and expand the circle of supporters of the country's interests.

### **3. Substantial Circumstances of Deficiencies in the Evaluation of the Issue by the Court**

#### **3.1. The Question of the Effectiveness of Constitutional Control**

The Court jeopardized the effectiveness of constitutional control over the impeachment and left the final decision with the Parliament to make the final decision on the case. Although the impeachment is political,<sup>8</sup> the court should be guided by the principle that the actions of the official are evaluated following the values provided by the constitution, and in case of confirmation of the violation of the constitution, to ensure the stability of the constitutional order, the political subjects of the parliament will have to confirm the conclusion of the Constitutional Court. In particular, the court noted that “the court centers upon the following: despite the confirmation of the legal grounds of impeachment, it is constitutionally justified that the person who committed the impeachment act should not be removed from office. This indicates that signifying the Constitution, all kinds of “violations of the Constitution” or actions “with the signs of crime” do not create a real need for removal from office. The Parliament shall assess the need optionally in the presence using political criteria.”<sup>9</sup> Also, “in addition, the court explains that the existence of a legal basis for the impeachment of the President does not oblige the members of the Parliament to support the verdict of impeachment. Solving the issue with political expediency, they should act with political criteria coordinating the idea of impeachment and make a decision accordingly.” Henceforth, with such an interpretation, the Constitutional Court reduced the effectiveness of constitutional control on the issue of impeachment.<sup>10</sup>

#### **3.2. The Issue of Autonomous Content of Constitutional Terms**

The Constitutional Court clarified the content of Article 48 of the Constitution of Georgia. However, the court did not pay attention to the autonomous content<sup>11</sup> of constitutional terms. Their interpretation should be done taking account of the goals of the constitution, in this certain case, the goals of impeachment. In particular, the court refrained from defining important constitutional terms and indicated, “In the grounds of impeachment – “violation of the Constitution” or “presence of signs

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<sup>8</sup> *Gotsiridze E.*, For the Political Nature of Impeachment, “Justice and Law” journal, № 1(44)15, 19 (in Georgian).

<sup>9</sup> *Ibid.*, II-21.

<sup>10</sup> *Ibid.*, II-78.

<sup>11</sup> Decision № 2/2/579 of the Constitutional Court of Georgia dated July 31, 2015, on the case “Georgian citizen Maya Robakidze vs. Parliament of Georgia”, II-19 (in Georgian).

of crime” – the ordinary understanding of these concepts should be implied... According to the court, the autonomous definition of these terms would be necessary and relevant if the positive conclusion of the Constitutional Court automatically entails the dismissal of the relevant official, or if it exercises further constitutional control over the verdict of the Parliament.<sup>12</sup>

### **3.3. Formal Interpretation of Constitutional Norms by the Court and the Issue of Refraining from Verifying the Normative Content of Constitutional Norms**

#### **3.3.1. Article 49<sup>13</sup> of the Constitution of Georgia**

The Constitutional Court did not take account of the status of the President of Georgia as the head of state and the powers, the normative content of Article 49 of the Constitution of Georgia, paragraph 3 of the same article, according to which the President of Georgia represents the country in foreign relations.<sup>14</sup> The court considered that the powers of the president should be specified individually in the constitution, while the constitution indicates that the president of Georgia exercises other powers defined by the Constitution (see. Article 52, Paragraph 1, subparagraph “h” of the Constitution of Georgia). Article 52 does not cover the mentioned issue but it might be verified in other articles of the Constitution. The court did not take into account that the content of the actions of an official must be evaluated by each specific individual case, and the Constitution cannot provide a certain list of actions. The court could not make a correct interpretation of the factual circumstances of the case considering the threat of “government arbitrariness” which eventually led the court to the wrong conclusion. In particular, the court noted: “The Constitutional Court clarifies that such a connection between the “status of the president” and the “powers of the president” does not mean the constitutional status of the president as the founder of the authority, which is not directly provided by the constitution. It might be the authority of an exclusive character shared with other constitutional body/bodies, or completely symbolic in nature. An ambivalence and indeterminacy of official powers of constitutional bodies will undermine the effectiveness of the system to separate powers and create the danger of arbitrariness. Therefore, it is inadmissible, based only on Article 49, under any component of the status of the president, to accept the power of the president, which is not defined by the norms of the constitution”.<sup>15</sup>

This approach of the Constitutional Court is wrong because such an interpretation of the Constitution does not correspond to the constitutional order. It evolves the norms of the Constitution into a formal requirement and excludes the content. The norms of the Constitution and the status and authority of constitutional institutions should be interpreted by the principles of a legal, democratic

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<sup>12</sup> Conclusion № 3/1/1797 of the Constitutional Court of Georgia of October 16, 2023, II-20 (in Georgian).

<sup>13</sup> Article 49. Status of the President of Georgia: 1. The president of Georgia is the Head of the state of Georgia and is the guarantor of the country’s unity; 2. The president of Georgia is the Supreme Commander-in-Chief of the Defense Forces of Georgia; 3. The President of Georgia shall represent Georgia in foreign relations (in Georgian).

<sup>14</sup> Constitution of Georgia, Article 49, 3 (in Georgian).

<sup>15</sup> Conclusion № 3/1/1797 of the Constitutional Court of Georgia of October 16, 2023, II-37 (in Georgian).

state, constitutional values, and the constitutional requirement of integration into European and Euro-Atlantic structures.

The status of the head of state of Georgia confers a legal status on the president. The legal status in turn is a set of rights and duties that determines the position of the President, including in the system of foreign relations. Accordingly, the President of Georgia, as the head of state, acted following Article 49 of the Constitution, within the scope of her authority granted by the normative content of the standard. Accordingly, the court should have evaluated the three foreign visits as the powers of the president given by the Constitution.

### **3.3.2. Article 52, Paragraph 1, Sub-paragraph “a” of the Constitution of Georgia**

The Constitutional Court did not observe the normative content of Article 52, Paragraph 1, sub-paragraph “a” of the Constitution of Georgia, but interpreted this norm in a formal and literal sense, and defined all the actions of the President, the grounds for impeachment in the context of Article 52, Paragraph 1, sub-paragraph “a”. In addition, the Constitutional Court made a dangerous interpretation and considered that the President can only carry out all kinds of foreign relations with the approval of the Government of Georgia. The court rejected its practice, according to which the terms established by the Constitution have an autonomous meaning. It did not separate from each other the following terms provided by Articles 49 and 52 of the Constitution: “represents Georgia in foreign relations” and “performs representative powers in foreign relations with the consent of the government.” In addition, the court misconstrued the facts and considered that the impugned meetings were inconsistent with the purposes of Article 52, Paragraph 1, sub-paragraph “a” of the Constitution. Fearing threats that the president might “undermine the government's competence in foreign relations,”<sup>16</sup> the court concluded that the president cannot represent Georgia in foreign relations without the consent of the government and the terms of Article 49, Paragraph 3, and Article 52, Paragraph 1, sub-paragraph “a” have the same normative content. This is a wrong assessment and contributes to the establishment of an anti-constitutional interpretation of the norms of the Constitution. Besides, we can recall the practice of the Constitutional Court, when considering one of the cases,<sup>17</sup> the same term (“legal the court verdict entered into force”) provided by two different articles of the Constitution (Paragraph 5 of Article 31 and sub-paragraph “d” of Article 39, Paragraph 5) interpreted in different contexts. The court noted that the same entry specified in two different articles was subject to autonomous interpretation, taking into account the purpose of the norm. Considering the issue of impeachment, the court fully agreed with the authors of the submissions about their opinions, shared their definitions, and noted that “ Following Article 52, Paragraph 1, sub-paragraph “a” of the Constitution, any conversation, a mutual exchange of ideas, making commitments or communications can be implied because they ensure a legal or political result, including an international agreement, and constitutes the implementation of foreign policy over which the government has the exclusive authority. The court mentions that if it shares the position of the president's representatives concerning the issue of “negotiations”, the

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<sup>16</sup> Ibid, II-52 (in Georgian).

<sup>17</sup> Decision № 3/2/1473 of the Constitutional Court of Georgia dated September 25, 2020, on the case “Nikanor Melia v. Parliament of Georgia”, II-20-23 (in Georgian).

president's working visits and protocol meetings with officials indicate that the president exercised her representative authority in foreign relations under Article 52, Paragraph 1, sub-paragraph "a" of the Constitution.

As noticed, the court interprets the mentioned norm more broadly than the Constitution provides.<sup>18</sup>

### **3.3.3. Establishing the Facts by the Court**

The court shared the position of the authors of the submission, without any investigation. Considering that all three disputed actions of the President of Georgia constituted negotiations for Article 52, Paragraph 1, sub-paragraph "a" of the Constitution, the authors of the submissions neither present the factual circumstances confirming this nor were they investigated by the court.

In particular, the court noted that during the working meetings with the presidents of the Federal Republic of Germany, the Republic of France, and the European Council, the President of Georgia represented the state and people of Georgia in foreign relations without the consent of the Government of Georgia, and held negotiations with the presidents of foreign states and international organizations on foreign political issues, the integration of Georgia into European Union in the capacity of the President of Georgia and compliance with the formal protocol.<sup>19</sup>

## **4. A Dissenting Opinion**

The mentioned conclusion is followed by a dissenting opinion<sup>20</sup> of three judges (the Constitutional Court consists of 9 judges). Considering the number of authors of the dissenting opinion, it is clear how inappropriately the court (the conclusion was reached by 6 judges) underestimated the goals and purpose of the legal side of impeachment. The dissenting opinion indicates that the court incorrectly interpreted the constitutional mandate of the Institute of the President of Georgia, as well as the essence and purpose of the constitutional provision determining the consent of the government to the exercise of representative powers by the president in foreign relations. Simultaneously, converting the violation of the constitution considered as a basis for impeachment to a formal violation of any degree, the importance<sup>21</sup> of judicial control in this process decreased. Thus, the dissenting opinion presents the position of three judges.

## **5. The Conclusion of the Constitutional Court and its Legal Nature**

In its conclusion, the Constitutional Court confirmed the violation of the Constitution by the President. The conclusion was sent to the Parliament on 18.10.2023. The Parliament of Georgia did not take into account the conclusion and did not impeach and remove the President from office.

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<sup>18</sup> Conclusion №3/1/1797 of the Constitutional Court of Georgia of October 16, 2023, II-64 (in Georgian).

<sup>19</sup> Ibid, II-65 (in Georgian).

<sup>20</sup> Dissenting opinions of the judges of the Constitutional Court of Georgia – Irine Imerlishvili, Giorgi Kverenchkhiladze and Teimuraz Tughushi related to the Plenum of the Constitutional Court of Georgia dated October 16, 2023, № 3/1/1797 (in Georgian).

<sup>21</sup> Ibid, 2.

There arises a question of whether the President is obliged to comply with the conclusion of the Constitutional Court or not, which confirmed the violation of the Constitution concerning the three European visits of the President on the issue of European integration. However, during the voting in the Parliament (18.10.2023), the political body did not decide on a removal of the President from office by impeachment.

First of all, the decision of the Constitutional Court should be distinguished from the conclusion on confirmation of a violation of the Constitution by the President, which is not supported by not less than two-thirds of the full composition of the Parliament during the voting at the Parliament session. As a rule, the decision is required to be implemented. Non-implementation or hindering implementation of the court decision is punished by law.<sup>22</sup> The conclusion of the court on the impeachment procedure is not a decision, it is one of the acts of the Constitutional Court, and following the results of voting in the parliament, it may be mandatory or advisory in nature.<sup>23</sup> The conclusion of the court about the violation of the Constitution becomes binding only if the Parliament votes to support the decision to dismiss the official.

Although the court confirmed the violation of the constitution by the president, two-thirds of the full membership of the parliament did not support the conclusion during the voting at the parliament session. Considering the normative content of Article 48 of the Constitution, the official (the President of Georgia) is not removed from office and continues to hold office in the legal and institutional order provided by the Constitution.

Accordingly, from the moment when the Parliament did not decide on the impeachment of the President, № 3/1/1797, 16.10.2023, the conclusion of the Constitutional Court took a consultative nature, it does not have a binding character.

The conclusion (№ 3/1/1797. 16.10.2023) of the Constitutional Court is advisory which is indicated by the Constitutional Court following paragraph 78 of the conclusion. The court notes that the existence of a legal basis for the removal of the president from the position of the president by impeachment does not oblige the members of the parliament to support the impeachment verdict. Solving the issue of political expediency, they should act with political criteria corresponding to the idea of impeachment and make a decision accordingly.

It should be considered that the Constitutional Court of Georgia, according to the current legislation, cannot deviate from its authority in its conclusion and discuss the issue/action of foreign relations, which did not become the basis for impeachment. It is entitled to discuss only the constitutionality of those actions (actions/inactions) which, according to the constitutional submissions, became the basis for initiating the impeachment process. Accordingly, taking into account the advisory nature of the conclusion, the mentioned conclusion cannot become a punishment mechanism for the President of Georgia for future visits. The conclusion cannot create a basis for legal responsibility, and cannot serve to punish the official.

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<sup>22</sup> Constitution of Georgia, Article 62, Paragraph 1 (in Georgian).

<sup>23</sup> *Kakhiani G.*, Constitutional Control in Georgia, Tbilisi, 2011, 259-261 (in Georgian).



## 6. Conclusion

The arguments and approaches of the court discussed in this article may contribute to the inefficiency of the constitutional control of the Constitutional Court, and impair the development of law and the practice of the court. This article will help to focus on the issues that are of essential importance for developing constitutional control and determining the correct practice of the court on the issue of impeachment.

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