The Right to Property in Georgia

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1. Introduction

The right to property is one of the fundamental human rights without which a democratic State could not exist. "The right to property serves not only as an elementary basis of human subsistence, but also ensures a human being's freedom, adequate exercise of his skills and abilities, and the leading of life under his own responsibility".[1] At the same time, private property as a notion is a cornerstone of market economy. Hence, not only it is a prerequisite for economic competition between proprietors, but also one of the most important basis of existence of a State.[2]

As the Constitutional Court of Georgia stated in its Decision in the case *Citizens Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others vs. Parliament of Georgia*[3], "Neglect of basic human rights and freedoms and, especially, of the right to property, excludes the possibility of development of a free market economy, ensuring a worthy life of the society at large and its individual members, and political, economic and social stability. The economic power of a democratic, rule-of-law and social State has respect for and protection of the right to property in its foundation."

In the recent years, economic development, attraction of investments and facilitation to business have been constantly nominated as one of the main priorities of the country. Naturally, these aims can hardly be achieved without creating strong legal guarantees for the right to property and actual operation of such guarantees. To what extent the Government is succeeding in turning the loud statements concerning these aims – is the question we will try to answer in the present paper.

For the last two years, the Office of the Public Defender of Georgia, international and local non-governmental organizations, media and opposition parties have been raising their voice regarding the facts of infringement of the right to property. In its September 2007

[1] First Panel of the Constitutional Court of Georgia, Decision No. 1/2/384, 2 July 2007 (printed 4 September 2007).
[2] *Ibid.*
[3] The Constitutional Court of Georgia, Decision No. 2/1-370,382,390,402,404; 18 May 2007.

report concerning Georgia, The Economist Intelligence Unit, a British organization, stated: "In the past year a number of incidents have been reported where the commitment of the government to recognizing property rights has been called into question".[4] The annual report of the Public Defender of Georgia indicates that despite the existing legislative guarantees, "the number of facts of criminal infringement on the right to property in Georgia is not reducing but significantly increasing."[5]

It is worth mentioning from the inception that the present research paper does not represent a comprehensive and thorough analysis of the Georgian legislation concerning the right to property. Nor discussion of every specific problem relating to the right to property is our end. Instead, the present research paper is confined to discussing the cases of violation of the right to property that the Georgian Young Lawyers' Association has been working on and, therefore, is aware of complete and objective related information. Furthermore, the paper discusses international obligations assumed by Georgia in relation to the right to property and specific legislative acts whose analysis will enable an interested reader to have a better understanding of the nature and volume of violation of the right to property by the State.

The paper consists of two parts. The first part reviews the status of the right to property in international law and ensuring the right to property-obligations by Georgia assumed under international treaties. The second part discusses specific violations of the right to property by the State where the Georgian Young Lawyers' Association was involved as a defender of the victims' rights or as a holder of comprehensive information based on applications received from citizens and information obtained from State bodies. The second part also discusses legislative acts that were referred to or should have been referred to by State bodies to prevent violations of the right to property.

[4] The Economist Intelligence Unit, Country Report, Georgia, September 2007, Controversy over Property Rights Continues, p. 14.
[5] Annual report of the Public Defender, 2006, p. 283.

2. Obligations assumed by Georgia in relation to property rights

2.1. The right to property in international law

The right to property is expressly and unequivocally recognized in basic international human rights instruments such as the Universal Declaration of Human Rights and Protocol No. 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter, "the European Convention").[6]

Pursuant to Article 1 of the Protocol No. 1 to the European Convention:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

As it is seen from the contents of the article, the right to property is not an absolute right from which no derogation is ever possible. Therefore, it is of crucial importance to determine scope and contents of possible interference with this right. Protocol No. 1 to the European Convention contains a comprehensive list of conditions meeting which may justify interference with the right to property. In particular, pursuant to the Protocol, the following standards shall be met:

- A public interest dictated by a public or social need, serving a legitimate aim and proportional to this aim;[7]
- Any interference with unimpaired enjoyment of the right to property, whether in the form of deprivation of property or

[6] Although the UN International Covenants on *Civil and Political Rights* and on *Economic, Cultural and Social Rights* provide a broad spectrum of human rights and freedoms, none of the Covenants mention the right to property. However, actual enjoyment of the rights and freedoms enshrined in the Covenants do require that the right to property be protected.

[7] Committee on Economic, Social and Cultural Rights, E/C 2/200/13, p. 9.

imposing restrictions on its use, must be prescribed by law and must be executed in accordance with procedures determined by law;

- Deprivation shall be performed subject to observing conditions envisaged by the general principles of international law.[8]

A State may not invoke the provisions of its internal law as justification for its failure to perform its international treaty obligations.[9] According to this principle, Georgia must have enacted appropriate legislative amendments in order not to threaten performance of its international obligations.

In restricting the right to property, the State must be guided by the principle of proportionality; in particular, it is the obligation of the State not to impose limitations more than are required by the specific need.[10]

At the same time, any interference with the right to property must be properly compensated.[11] Article 1 of the Protocol No. 1 says nothing about compensation; however, the European Court of Human Rights has stated that deprivation of property without compensation is an unjustified infringement of the right to property.[12] It should be noted that compensation may not be full. Its amount should be in "reasonable correlation"[13] with the value of the deprived property.[14]

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8 "*No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*".

9 1969 Vienna Convention on the Law of Treaties, Article 27.

10 The Constitutional Court of Georgia, Decision No. 1/2/384, *Citizens of Georgia David Jimshelishvili, Tariel Gvenetadze and Neli Dvalishvili vs. Parliament of Georgia*, 2 July 2007.

11 STEVEN GREER, The European Convention on HumanRights, 2006, p. 274.

12 *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, para.54.

13 *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, para. 122; *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98,para.54; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, para.73.

14 Proper compensation does not always mean payment of a market price. An economic reform or the objective of achieving social justice may warrant a compensation that is lower than a market price. Decision on the amount of compensation is taken by the State and its reasonability is assessed by a court. *(Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, p. 121).

According to the Court's explanation, any interference must be based on law[15] and serve a legitimate aim. The law, on its turn, must be clear and unambiguous.[16] Legal proceedings related to the right to property must be fair and lawful. The State does not have the right to act arbitrarily.[17] When interfering with the right to property, in addition to being based on the law, there shall be a public interest; to put in other words, interference with an individual's property rights must be warranted by an expected benefit for the public.

According to the case-law of the European Court, existence or non-existence of a public interest shall be determined by the State,[18] however, it is the prerogative of the European Court to assess whether the State was able to observe fairness in deciding on correlation between public and private interests and whether it violated rights of individuals.[19]

At the same time, adoption of laws that are "necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties arbitrary interference"[20] cannot be considered as arbitrary interference with the right to property. In relation to tax measures, the Court assesses the actions of the State in a manner described above. The State may

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15 *Iatridis v. Greece* [GC], no. 31107/96, para. 58, ECHR 1999-II.

16 *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, para. 45; *Iatridis v. Greece* [GC], no. 31107/96, ECHR 1999-II, para. 58.

17 *Hentrich v. France*, judgment of 22 September 1994, Series A no. 296-A, para. 42; *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102,para.110; *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, para. 39, para.45; *Špaček, s.r.o., v. the Czech Republic*, no. 26449/95, 9 November 1999, para. 54.

18 *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, para. 52; *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, para. 69; 73.

19 *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, para.32, para.46, para. 50; *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102,para.120 ; *AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, para. 52, *Pressos Compania Naviera S.A. and Others v. Belgium*, judgment of 20 November 1995, Series A no. 332, para. 38; *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, para. 69; 73; *Former King of Greece and Others v. Greece* [GC], no. 25701/94, ECHR 2000-XII , para. 70.

20 Article 1, Protocol No. 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

enact any fiscal law it desires if such law does not allow for "arbitrary confiscation".[21]

2.2. Georgia's international obligations relating to the right to property

On 27 December 2001, the Parliament of Georgia ratified Protocol No. 1 to the 1950 European Convention, thereby assuming the obligation to secure the right to property within its jurisdiction.[22] When ratifying, Georgia used an option prescribed by Article 57 of the European Convention and made a reservation to the relevant provision of the Protocol No. 1 to the European Convention, limiting the scope of its obligations prescribed by Article 1 of the Protocol No. 1.

As stated in the Resolution of the Parliament of Georgia No. 1243 "on ratification of the Protocol No. 1 to the European Convention on the Protection of Human Rights and Freedoms", Protocol No. 1 does not apply to individuals having the status of internally-displaced persons (IDPs). "The State assumes the obligation to secure exercise of property rights in relation to the property existing in permanent places of residence of the IDPs" only after Georgia's territorial integrity is restored.[23] With the mentioned Resolution, Georgia also liberated itself from responsibility for violation of Protocol No. 1 provisions by the self-declared *de facto* authorities in Abkhazia and Tskhinvali region, until Georgia regains the ability to exercise its jurisdiction on these territories.[24]

Article 57 of the European Convention clearly determines criteria a reservation made by a signatory State in respect of Convention's provisions shall meet. These criteria are the following:

- At the moment of signing the Convention, a signing State shall have a law, which is not in conformity with the Convention's provision in respect of which a reservation is made;

[21] *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, judgment of 23 February1995, Series A no. 306-B, para. 62.
[22] Article 1, the European Convention on the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.
[23] Article 2 of the Resolution.
[24] Article 8 of the Resolution.

- A reservation shall not be of a general character;
- A reservation shall contain a brief statement of the law concerned.

The reservation made by Georgia 1) concerns specific circle of individuals – the IDPs and 2) is limited to certain territories. Albeit the case-law of the European Court of Human Rights excludes territorial exceptions.[25] Based on the case-law of the European Court, it can be stated that the reservation made by Georgia in respect of Article 1 of Protocol No. 1 is not in conformity with the appropriate Convention requirements.

It is worth noting here that constitutionality of Resolution No. 1243 of the Parliament of Georgia was discussed later by the Constitutional Court of Georgia. Plaintiff Anzor Tevzaia, an IDP from Abkhazia, filed a constitutional lawsuit against the Parliament of Georgia requesting the Constitutional Court to declare the mentioned provisions of the Parliament's Resolution (Articles 2 and 8) unconstitutional. He asserted that these provisions were unconstitutional because they were stopping application of Protocol No. 1 to the European Convention in respect of IDPs. This, on its turn, resulted in leaving his property located at his place of permanent residence legally unprotected. According to the plaintiff, the case-law of the European Court of Human Rights regarded making territorial reservations in the form given in Article 8 of the Resolution as incorrect. In the plaintiff's view, the disputed provisions were discriminatory and contradicted Articles 14 and 21 of the Constitution of Georgia.

While reviewing the case, opinions of the judges of the hearing Panel of the Constitutional Court divided into two. For this reason, under the Organic Law of Georgia on the Constitutional Court of Georgia, the constitutional lawsuit was rejected by Decision No. 1/5/224 dated 16 November 2004. However, part of judges, referring to the case-law of the European Court of Human Rights, considered that there was an adequate basis for declaring the disputed norms unconstitutional. "Reservations in respect of Protocols to the European Convention shall not be made for the sole purpose of limiting own responsibility

[25] *Matthews v. the United Kingdom* [GC], no. 24833/94, para.30, ECHR 1999-I; *Assanidze v. Georgia* [GC], no. 71503/01, para.138-140, ECHR 2004-II.

by a State. This cannot be justified by references to any political motives", reads the Decision. This part of judges of the Panel had the following arguments:

1. The reservation contained in Article 8 of the Parliament's Resolution are not in conformity with the requirements set forth for reservations in the European Convention itself;
2. The disputed provisions contradict Article 14 of the Constitution as they place both the IDPs and the residents of territories occupied by the separatist regimes in a discriminatory position vis-à-vis to other citizens of Georgia;
3. The disputed provisions contradict Article 21 of the Constitution as the State, though recognizing the right to property, temporarily refuses to secure this right, thereby leaving a certain circle of individuals beyond the application of Article 21 of the Constitution.

In the opinion of the other part of judges of the hearing Panel, "the disputed provisions do not disclose any intent of the State to limit the rights of IDPs. The State, as a sovereign entity, does not relieve itself of obligations toward them. The rights of IDPs are limited by the existing factual circumstances."

As already mentioned, due to differences of opinions of Panel members, the disputed provisions are still in force.[26] Therefore, in terms of securing the right to property, Georgia's obligations under the European Convention are not applicable only to a specific group of individuals and on a specifically-defined territory, and are related to Georgia's ability to actual exercise its jurisdiction on this specific territory. Overall, save the mentioned exceptions, **Georgia as a state is fully responsible for "securing to every natural or legal person within its jurisdiction the peaceful enjoyment of his possessions".**

The following chapters will discuss to what extent Georgia fulfills its obligations under the European Convention, at least within the scope of its shrunk by the reservation obligation.

[26] On this issue, several applications were filed with the European Court of Human Rights against Georgia, in particular: *Nanava vs. Georgia and Russia* and *Mekhuzla vs. Georgia and Russia.*

3. The right to property is recognized and secured in Georgia – a myth or truth?

3.1. Constitutional guarantees of the protection of the right to property

Under Article 21(1) of the Constitution of Georgia, "property and the right to legacy is recognized and secured in Georgia. Abolition of property, the right to acquire, the right to alienate or the right to receive it through legacy is prohibited.

As already mentioned, the right to property does not belong to the list of absolute rights. According to Article 21 of the Constitution of Georgia, it is allowed to interfere with the right to property for public needs, in particular, by restricting the right to property and deprivation of property.

Pursuant to Article 21(2) of the Constitution of Georgia, "The right referenced in the first paragraph may be limited for necessary public needs, in cases prescribed by law and according to the procedure prescribed by law." Therefore, *limitation* of the right to property shall meet the following requirements:

(a) The law shall prescribe the events when necessary public needs exist;

(b) The law shall prescribe limitation rules.

Regarding *deprivation* of property, Article 21(3) of the Constitution of Georgia allows deprivation of property:

(a) For necessary public needs, when directly so prescribed by law, on the basis of a judicial decision and with appropriate compensation;

(b) For necessary public needs, in urgent cases of urgent necessity prescribed by an organic law, with appropriate compensation.

3.2. Law of Georgia on the Rules of Deprivation of Property for Necessary Public Needs

The events of necessary public needs warranting deprivation of property are listed in the Law of Georgia on the Rules of Deprivation of Property for Necessary Public Needs, adopted 23 July 1999. On 26 December 2005 the Law was significantly amended, placing proprietors, as the Georgian Young Lawyers' Association believes, in a less favorable condition then provided for by the initial version of the Law.

According to the initial version, expropriation matters were falling within the jurisdiction of Regional Courts. Naturally, due to the amendments to the Law on General Courts of Georgia,[27] Regional Courts, as judicial instance having jurisdiction on expropriation cases, were replaced by district (town) courts.[28] Therefore, if before the amendments expropriation cases were heard by collegiums of three judges, after the amendments they are heard by single judges of the district (town) courts acting in with a sole capacity.

Moreover, as per the Law, a decision of a district court granting the right to expropriation is subject to immediate execution,[29] meaning that appealing against the district court decision to upper instances will not impede execution proceedings. In our view, this rule contradicts Article 21(3) of the Constitution of Georgia, pursuant to which "deprivation of property in cases prescribed by law is permissible only on the basis of a judicial decision". The Georgian Young Lawyers' Association is of the opinion that "a judicial decision" implies only a decision already entered into force and handed down by **the highest and final judicial instance**. Otherwise, immediate execution of a first instance court decision on property expropriation will result in staring an expropriation process against someone's property while there is a high probability that an upper instance court will alter or even cancel the decision of the lower instance courts regarding deprivation of property. In such cases, it would be very

[27] By amendments to the Law on General Courts, Regional Courts were abolished.
[28] The Georgian Young Lawyers' Association prepared its conclusion regarding these amendments, which were sent to the Chairman of the Legal Matters Committee of the Parliament of Georgia (see the conclusion at www.gyla.ge).
[29] Article 5(4).

difficult (and even impossible) to restore the initial situation, thereby resulting in unwarranted limitation of the proprietor's constitutional rights (for example, execution of an expropriation decision resulted in dismantling a proprietor's building, a land plot became unusable for agricultural purposes because of the construction or other activities on it, etc).

To prevent such consequences from happening, the Georgian Young Lawyers' Association deems that the law shall not directly prescribe immediate execution of a court decision on granting the right to expropriation; instead, execution shall be subject to judicial review in each specific case, due to the following reasons:

According to Article 268(2) of the Civil Procedure Code of Georgia, immediate execution of a judicial decision is a matter falling within courts' jurisdiction. In particular, immediate execution of a court decision may start only if delay of execution may cause substantial damage to the creditor or execution of the decision will turn impossible. Naturally, these circumstances are assessed by a court in each specific case. Therefore, the Georgian Young Lawyers' Association considers that, for the purpose of securing the right to property prescribed by Article 21 of the Constitution of Georgia, a court, together with considering deprivation of property, should also decide on reimbursement of damages caused to the proprietor during an expropriation if a higher instance court cancels the decision of the decision of the lower instance court. No court handing down a judgment granting the right to expropriation should allow immediate execution until such reimbursement modalities are determined. Subject to this condition, a proprietor will be protected against damages that may be caused by cancellation or alteration of a district court decision put into immediate execution.

3.3. Article 53^3 of the Law on Entrepreneurs

On 24 June 2005, amendments were made to the Law of Georgia on Entrepreneurs; one of the novelties among the amendments was Article 53^3 (mandatory sale of stocks). According to this Article, a stockholder possessing more than 95% of voting stocks of a joint-stock company (hereinafter, "a majority stockholder") had the right

to purchase stocks from other stockholders (hereinafter, "minority stockholders"). On their turn, minority stockholders had the right to receive a fair price for their stocks. The same article also determined the sale procedure, in particular:

1) A decision to purchase stocks is made by a majority stockholder who publishes a relevant announcement in printed media, indicating information on conditions and procedure of purchase;
2) A registrator drafts a so-called Purchase Register which contains information on all registered stockholders, their identity and address as well as the number of stocks owned;
3) On the day of publishing the announcement, the majority stockholder submits to the registrator a request for purchase and a purchase report drawn up by an independent expert or a brokerage company. He is also obliged to send an announcement on purchase with a registered letter to each stockholder whose name is contained in the Purchase Register;
4) The registrator shall inform each nominal owner of the purchase date, not later than 5 days before the purchase takes place;
5) After the majority stockholder fulfills relevant legal requirements, the registrator formally registers him as the official owner of all stocks;
6) A minority stockholder who does not agree to sell his stocks at a price set by an independent expert or a brokerage company, may apply to a court with a request to set a different price of stocks.

The law prescribes two different mechanisms for determining a fair price:

1) A fair price is determined by an independent expert or a brokerage company;
2) A fair price is determined according to rules prescribed by the charter of the relevant joint-stock company.

The law-maker also determines the lowest margin of a fair price; in particular, it should not be lower than the highest price the purchasing majority stockholder paid for the relevant joint-stock company stock during the last 12 months. However, it is unclear what the lowest

margin would equal to if the majority stockholder has not purchased any stocks of the relevant joint-stock company during the last 12 months or no stock-sale took place in this period.

These amendments were made against the background of on-going economic reforms in the country and a campaign for attracting foreign investments and, according to Government representatives, served development - strengthening of joint-stock companies.

Dispute concerning appropriateness and conformity with the Constitution of the mentioned novelty in the Law on Entrepreneurs later on moved to the Constitutional Court of Georgia. In March – August 2006, the Constitutional Court received 5 different constitutional lawsuits from minority stockholders of various joint-stock companies who were forced to sell their stocks due to the mentioned provision of the Law on Entrepreneurs. The plaintiffs were asking the Constitutional Court declare that Article 53^3 of the Law on Entrepreneurs contradicted Articles 14 and 21 of the Constitution of Georgia. The Constitutional Court of Georgia handed down its Decision in the Case of *Citizens Zaur Elashvili, Suliko Mashia, Rusudan Gogia and others vs. Parliament of Georgia* on 18 May 2007.

During the hearing of the case, the plaintiffs' counsels argued that the disputed provision violated the right to property and, moreover, placed minority stockholders in an unequal condition due to his property status toward the majority stockholder. Plaintiffs asserted that limitation of minority stockholders' right to property was not justified by necessary public need. Further, the plaintiffs called the mechanism of determining stock price for minority stockholders into question.

In this context, it is interesting to recall arguments about necessity of the disputed provision in the Law on Entrepreneurs set forth by the State Minister of Georgia on Economic Reforms who was summoned by the Constitutional Court as a witness. The Minister considered necessary existence of this provision and stated that "after quasi joint-stock companies are liquidated, the market will be freed to the possibilities of establishing joint-stock companies at free will that will be able to attract capital. Such enterprises will facilitate to the development of economy and creation of new jobs."

"The notion of mandatory sale of stocks had positive results in practice – large and reputable investors entered several joint-stock companies; if minority stockholders were present, the investors would be unable to make capital investments on the one hand and minority stockholders are sources of various judicial proceedings on the other hand. This is an additional risk and it is very positive to avoid it", stated the State Minister during the hearing of the case in the Constitutional Court.

Despite this and other arguments set forth by Parliament counsels, the Constitutional Court of Georgia declared Article 53[3] of the Law on Entrepreneurs unconstitutional in relation to Article 21(1)-(2) of the Constitution of Georgia.

The Constitutional Court took on ascertaining whether there existed a legitimate aim the law-makers had in mind and further assessing whether mandatory sale of stocks was a proportional means to achieve this aim.

As the Decision reads, "during the main hearing of the case, no single circumstance was named whereby a joint-stock company incurred losses due to destructive actions of minority stockholders. Expulsion of minority stockholders cannot be justified by the reason that they are exercising their rights under law, including the right to apply to a court".

As per the Court's words, the law-makers shall formulate a provision establishing mandatory sale of stocks in a way to help retain a fair balance between the parties and exclude misuse of economic power. "A minority stockholder has full right to know why his stocks are transferred in the majority stockholder's property. He must have the means to express his views and defend his interests by lawful means. The wish of a majority stockholder to own a full package of stocks is understandable and natural but is not fit to constitute a basis for limiting the right to property. Holding 95% or more stocks in the hands of one stockholder as such does not create a social need to mandatorily sell other stocks to him. Mandatory sale of stocks can take place only if this is a necessary measure for the normal functioning and development of the relevant enterprise."

The Court use two criteria in assessing the matter of mandatory sale:

1) Whether the procedure of decision-making on mandatory sale of stocks and the procedure of execution of this decision are in conformity with the abovementioned requirements;

2) Whether the procedure of setting stock price during the mandatory sale of stocks ensures fair compensation to minority stockholders.

According to the Court, "A rule introduced on the motive of economic effectiveness cannot be put as a burden on one side unilaterally; otherwise, in addition to legal problems, there is a risk of having market disorganization, violation of supply-demand balance as a result. The rule prescribed in Article 53^3 of the Law on Entrepreneurs does not comply with these requirements. It manifestly violates a fair balance in favor of the majority stockholder. The disputed provision, unlike its counterparts in foreign countries, does not disclose the aim of mandatory sale of stocks. This allows the majority stockholder to mandatorily purchase stocks from minority stockholders even if such purchase is unnecessary for the enterprise. The procedure set forth in the disputed provision is opaque. During a mandatory sale of stocks, a minority stockholder is, in fact, in informational vacuum and finds himself in rather losing condition than the majority stockholder."

In exactly 10 days after the Constitutional Court handed down its decision (18 May 2007) and Article 53^3 of the Law on Entrepreneurs was declared unconstitutional, President of Georgia filed a legislative initiative with the Parliament, presenting draft addendum to the Law on Entrepreneurs. The draft, of which the Parliamentary majority made a law on 11 July 2007, established a new rule of mandatory purchase of stocks.

If under Article 53^3 of the Law the decision on mandatory sale of stocks was to be made by a majority stockholder, the new Article $53^4(2)$ prescribed that "a decision on mandatory sale of stocks shall be made by a court, according to the procedure prescribed by the Civil Procedure Code of Georgia."

Notably, in addition to enacting Article 53^4 of the Law on Entrepreneurs, a new Chapter 34^2 was added to the Civil Procedure Code of Georgia,

determining rules of judicial hearing of a case concerning mandatory sale of stocks, procedure of setting price of stocks and rules of appealing a judicial decision on mandatory sale of stocks. It should be noted that the new amendment changed only the party entitled to decide on matters, taking away the decision-making power from a party to the case (a majority stockholder) and granting it to a neutral party (a court). However, the new procedure did not take into account the main idea expressed by the Constitutional Court of Georgia during its discussion of constitutionality of Article 53^3 of the Law on Entrepreneurs: "Mandatory sale of stocks can take place only if this is a necessary measure for the normal functioning and development of the relevant enterprise", stated the Court in its abovementioned Decision dated 18 May 2007. Disregard of determining whether it is necessary to effect mandatory sale (together with other circumstances) constituted a basis for the Constitutional Court to declare Article 53^3 of the Law on Entrepreneurs unconstitutional.

Notwithstanding the rule contained in Article 25(4) of the Organic Law on the Constitutional Court of Georgia, pursuant to which "After the Constitutional Court has declared a legal act or its part unconstitutional, it is impermissible to enact/issue a legal act that contains provisions having the same contents that were declared unconstitutional", in 2 months after the defective provision (Article 53^3 of the Law on Entrepreneurs) the legislative organ enacted a provision having the same contents and repeating the same mistakes.

The Government's quick response to the Constitutional Court decision reflected in beautifully-restructured procedure of mandatory sale of stocks was met with manifestly negative attitudes from the public. A part of the opposition "assessed [this response] as disregard to a decision of the Constitutional Court"[30], the other part label it as a clause protecting business interests of Government members[31] and violation of the right to property.[32]

Article 53^4 of the Law on Entrepreneurs was negatively assessed also by the Public Defender of Georgia who was one of the plaintiffs

[30] "Robbing of stockholders continues", Newspaper "Resonance", 21 August 2007.
[31] "Takes away from the poor, gives to the rich", Newspaper "Alia", 5 July 2007.
[32] TV News program "Mzera", 22 June 2007, 8:00pm, interview with Giorgi Tsagareishvili, representative of the faction "Industrialists".

himself in the aforementioned case before the Constitutional Court. On 2 September 2007 he addressed the Constitutional Court again, requesting that the Court declare the new procedure unconstitutional this time.

In their interview given to the Newspaper "24 hours", representatives of the Office of the Public Defender of Georgia stated: "The contents of the disputed provision is absolutely identical [to Article 53^3 of the Law on Entrepreneurs] and establishes the possibility of mandatory purchase of stocks – something that has already been declared unconstitutional by the Constitutional Court. We request the Constitutional Court to declare Article 53^4(1) of the Law on Entrepreneurs unconstitutional and to suspend validity of the act until a final decision is made in the case."[33]

The Constitutional Court already stated once that the procedure of mandatory sale of stocks prescribed by Article 53^3 of the Law on Entrepreneurs was, as a mechanism, contradicting the abovementioned requirements. However, the same issue enshrined in Article 53^4 of the Law on Entrepreneurs this time will again become a matter of discussion for the Constitutional Court.

3.4. Law of Georgia on Property Legalization

The Law of Georgia on Property Legalization was adopted 22 June 2007. According to Article 1 of the Law, "The purpose of this Law is to provide for additional guarantees for securing the right to private property enshrined in Article 21 of the Constitution of Georgia, Georgia's international treaties and other laws."

The article further goes on enumerating normative acts protecting the right to property that were adopted by the Parliament of Georgia a long time ago. The Georgian Young Lawyers' Association is of the view that the necessity of adopting a law on property legalization in the given form would never be put on agenda lest the State would effectively enforce the normative acts listed in the mentioned Article 1 of the Law. Consequently, adoption of a new law, which may be

[33] "Sozar Subari's another constitutional lawsuit", Newspaper "24 hours", 10 September 2007; "Sozar Subari appeals against one of the provisions of the Law on Entrepreneurs", Newspaper "Akhali Taoba", 4 September 2007.

ignored in the future very much like its predecessors, cannot provide for additional guarantees for securing the right to private property.

Article 2 of the Law is a logical continuation of Article 1, in particular: "Any State organ and public official is obliged to provide for a guaranteed protection and inviolability of the right to private property." Reading this article of the Law creates an impression that protection and inviolability of the right to property was not an obligation of the State organs and public officials before the adoption of this Law.

According to Article 4 of the Law, "This Law shall apply to any property of State or self-governing unit, on which ownership right was acquired or a basis for acquiring ownership was created by a legal act or a transaction before 26 July 2007, except for the possessions prescribed in paragraph 2 of this Article."

The drafters of this provision definitely forgot about prescription term because, pursuant to Article 129 of the Civil Code of Georgia, prescription term in relation to real estates contracts is 6 years. Consequently, if a basis of ownership acquiescence was a contract executed on 26 July 2006, the right to challenge the contract is valid till 26 July 2010. Pursuant to the Law, however, this right is abolished, because its Article 5 expressly stipulates: "Immediately upon the entry into force of this Law, acquiescence of ownership and/or a basis for acquiescence of ownership effected in relation to possessions indicated in Article 4(1) of this Law until 26 July 2007 shall be considered legalized." ("This Law shall apply to any property of State or self-governing unit, on which ownership right was acquired or a basis for acquiring ownership was created by a legal act or a transaction before 26 July 2007, except for the possessions prescribed in paragraph 2 of this Article").

Therefore, Article 4(1) of the Law contradicts the term of prescription envisaged by the legislation of Georgia.[34]

[34] According to the Civil Code of Georgia, submission of a claim that a third person act in a certain way or abstain from doing something is limited by a prescription term.

3.5. Deprivation of possessions as a type of additional measures of punishment

According to amendments dated 28 December 2005 to the Criminal Code of Georgia, deprivation of possessions as one of the types of additional measures of punishment (Article 40(1)(i) and 41(2) of the Criminal Code of Georgia). Article 52 defined deprivation of possessions as "deprivation without compensation, for the benefit of the State, of an object and/or weapon of crime or a thing designed for commission of a crime and/or possessions acquired through criminal ways."

As per paragraph 2 of the same Article, "deprivation of an object and/or weapon of crime or a thing designed for commission of a crime means deprivation without compensation for the benefit of the State, of possessions used for commission of intentional crime or designed to be used for this purpose in any form, owned or lawfully possessed by a suspect, an accused person or an indicted person. Deprivation of an object and/or weapon of crime or a thing designed for commission of a crime shall be effected by a court, in respect of any intentional crime prescribed by this Code, where an object and/or weapon of crime or a thing designed for commission of a crime exists, and their deprivation is necessary due to State and social necessity or in the interests of protection of an individual's rights and freedoms and/or for the purpose of preventing commission of a new crime."

According to the explanation provided in the explanatory note to the aforementioned draft law, in drafting of these amendments to the Criminal Code the law-makers were driven by the aim of bringing the Georgian Criminal Code in conformity with international standards. In particular, on 17 February 2004, Georgia acceded to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime dated 8 November 1990[35]. Already the preamble of the Convention states that one of the main aims of deprivation of criminal proceeds is to fight against serious crime. States Parties to the Convention agreed that "Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate

[35] Ratified by Resolution of the Parliament of Georgia No. 3345.

instrumentalities and proceeds or property the value of which corresponds to such proceeds."[36]

Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.

It is notable that the abovementioned article of the Criminal Code allows for confiscation of possessions that are not owned but lawfully possessed by an offender (having the status of a suspect, an accused person or an indicted person depending on the current stage of legal proceedings). A real-life story identical to the described in the article[37] became a basis for the Constitutional Court to discuss constitutionality of the mentioned article of the Criminal Code based on a constitutional lawsuit of victims.

In assessing constitutionality of deprivation of property as it is envisaged in Article 52 of the Criminal Code, in its Decision No. 1/2/384 in the case *Citizens of Georgia David Jimshelishvili, Tariel Gvenetadze and Neli Dvalishvili vs. Parliament of Georgia*, the Constitutional Court of Georgia stated: "Though deprivation of possessions as a measure of liability does not itself contradict the Constitution, but this circumstance does not liberate the State from its obligation to bring its contents strictly with the constitutional frames. Also, this obligation does not expire merely with making this notion consonant to constitutional provisions specifically governing the right to property. In prescribing the possibility of property deprivation, the law-maker must take into account and observe requirements of all constitutional rights and constitutional principles within whose regulation this notion may fall."

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36 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, Article 2(1).

37 David Jimshelishvili, Tariel Gvenetadze and Neli Dvalishvili deposited their goods having a value of 0.5 million Lari with a freight-forwarder company Nugo-Tourism Ltd, in Turkey. The freight-forwarder company was obliged, at an agreed price paid, to deliver the goods to Georgia. When crossing the Georgian border, the company driver committed a crime under Article 214(2) of the Criminal Code. By a judgment of the Khelvachauri District Court of 20 April 2006, with a reference to Article 52(2) of the Criminal Code of Georgia, the driver was deprived, without compensation for the benefit of the State, of the object of crime lawfully possessed by him – goods belonging to David Jimshelishvili, Tariel Gvenetadze and Neli Dvalishvili.

The Constitutional Court considered that "the disputed provision achieves a public interest without disproportionally interfering with the right to property" and "achievement of the public interests protected by the disputed provision, being a necessary public need in the sense of Article 21(2) of the Constitution of Georgia, justify limitation of the right to property". Therefore, the Constitutional Court deemed that the disputed Article 52 of the Criminal Code of Georgia was constitutional, however, having analyzed this provision, the Court indicated that it required further improvement and asked the Parliament to ensure perfection of the current legislation and Article 52(2) of the Criminal Code of Georgia.

As the Court stated, "full and effective protection of possessions requires existence of adequate, comprehensive and articulated in detail procedure to enable a proprietor to lead a dispute concerning lawfulness of deprivation of property. The Constitutional Court stated that any court, in applying the measure of punishment prescribed by the disputed provision of the Criminal Code, is obliged to ascertain whether a proportional balance exists between a State and public need on the one hand and rights of specific individuals on the other hand. "Deprivation of an object of crime, a weapon of crime or a thing designed for commission of a crime, as an additional punishment measure, is justified only if used to achieve the purpose for which it should be used as the most effective means. To do so, the relevant judge shall correctly assess, in addition to other requirements envisaged by the disputed provision, existence of a public need in each specific case. Otherwise, both achievement of the public purpose and lawfulness of interference with the right to property will be called into question", stated the Constitutional Court in the abovementioned decision.

However, according the Court's explanation, it is the law-maker first who should clearly articulate a margin of appreciation given to the judges; "it is the law-maker to ensure that relevant definitions in a law as clear as possible. Any views expressed during a legislation process or general purposes expressed in relation to criminal policy on which the draft laws were based but which were not articulated in the law, cannot serve as justification for specific judgments by the judges".

Another flaw of disputed provision, identified as such by the Constitutional Court with a request of elimination of which it also addressed the Parliament, is a vague terminology. First of all, a judgment finding a person guilty as a basis for imposing a punishment can be passed only in relation to an indicted person. It is therefore unintelligible, why and how a person having the procedural status of a suspect or an accused person can be subject to a punishment. According to the Court, the issue of imposing an additional punishment upon a convicted person is also unclear. The disputed provision makes it possible to happen that deprivation of property can be imposed on a person who is already convicted and is already sentenced by one judgment.

It is noteworthy that, in drafting its decision, the Constitutional Court took into account the case-law of the European Court of Human Rights, whose approach to deprivation of property as a measure of punishment is clear-cut and considers this measure to be in conformity with Article 1 of Protocol No. 1 to the European Convention. However, the Court regarded that the most important question was whether the property deprivation mechanism ensured adequate protection guarantees for the proprietor. "In all of the cases where an offender was deprived of an object or weapon of offence he lawfully possessed, the European Court decided not in favor of the application primarily for the reason that a proprietor was provided by the legislation of his country with a possibility to challenge a decision on property deprivation thereby securing adequate procedures for restoring his rights (see the decision dated 26 June 2001 on declaring an application inadmissible in the case of *C.M. v France*; Judgment in the case of *Air Canada v United Kingdom* dated 5 May 1995; Judgment in the case of *Agos v United Kingdom* dated 24 October 1986). This is of crucial importance because (a) a proprietor is able to challenge the assessment by a judge (or other organ taking decision on property deprivation) of whether there existed a public need to interfere with the right to property; (b) ascertainment of connection between the proprietor and the offence will be guaranteed. The latter has a crucial importance to both the proprietor and satisfaction of public interests."

The decision of the Constitutional Court was announced 2 July 2007. Unfortunately, the legislative organ of the country has not yet[38] responded to the Court's recommendations and flaws in the Criminal Code still make it possible for imperfect procedure of property deprivation to happen.

3.6. Law of Georgia on State Supervision over Architectural and Construction Activity

This Law governs powers of State bodies supervising architectural and construction activity and of all other subjects acting in this field, their obligations and questions of liability for violations committed in the course of architectural and construction activities.

According to the Law, State bodies supervising architectural and construction activity have the right to enact a resolution on full or partial dismantling of buildings constructed in violation of the applicable legislation and on imposing a fine of the offenders. However, before issuing such resolution, a supervisory body shall observe certain procedures, in particular:

- When a violation is identified, a supervisory body is obliged to send a recommendation letter to persons participating in the construction activity, setting a reasonable term to voluntarily fulfill measures indicated in the letter for the purpose of rectifying the violation;
- After expiry of the reasonable term indicated in the recommendation letter, the supervisory body shall check the offender and draws up a check-up protocol. Whether or not the offender fulfilled the supervisory body's demands regarding voluntary rectification of the violation shall be entered into the protocol;
- If the violation is not rectified, the supervisory body issues a resolution on imposing a fine on the offender. The resolution imposing a fine may be challenged before a higher administrative body or a court within 15 days upon its delivery to the offender. Appealing against the resolution will suspend the execution proceedings until the dispute is finally resolved.

[38] By the status of 27 October 2007.

In spite of these procedures, if a body supervising architectural and construction activity deems that failure to immediately rectify the violation may damage State or public interests, pursuant to Article 6(4) of the Law, it is entitled "to make a substantiated decision on fulfilling the recommendations contained in its recommendation letter by himself or through third persons and/or at his own expense."

In order for the relevant person to have a real ability to appeal against the "substantiated decision", naturally, the latter should be in writing.

However, because the Law does not contain a word-by-word statement that a substantiated decision must be made in a written form, there have been several examples in practice[39] when the Supervision Service made "a substantiated decision" on dismantling an unlicensed construction orally and immediately started dismantling the building.

Although Article 51(1) of the General Administrative Code of Georgia allows for issuing individual administrative-legal acts in an oral form, Article 51(2) of the same Code states that "If an individual administrative-legal act limits a person's lawful rights and interests … an oral individual administrative-legal act must be issued in a written form within 3 days. The decision may be appealed in accordance with procedure prescribed by the legislation of Georgia. Appeal against the decision shall not stop its execution."

Naturally, the Supervision Service's decision on dismantling someone's private building limits the right to property guaranteed to this person by the Constitution and legislation of Georgia. Therefore, within 3 days after an oral decision is made on dismantling a building, the Supervision Service is obliged to issue an administrative-legal act in a written form and observe legal procedures concerning making the act available to the interested party. However, as the practice shows, the Supervision Service has not been complying with its obligation under law of making an individual administrative-legal act in a written form (if any) available to the interested party. Specific examples of non-

[39] *Citizens Alina Manukyan, Eter Razmadze, Lali Khizanishvili, Elizaveta Acridit, Giorgi Kandelaki and Zaira Ananikov vs. Tbilisi Mayor's Office.*

compliance from the part of the Supervision Service will be discussed later in this paper.

Another legal problem in relation to the aforementioned provision is that even if the proprietor has a chance to actually appeal against the Supervision Service's decision according the appeals procedures prescribed by the legislation, the appeal will not stop execution of the appealed decision. With such wording, the law-maker virtually excludes the possibility of a court deciding in favor of the proprietor. In practice, immediate execution of the Supervision Service's decision results in the fact that the proprietor can only request reimbursement of damages because the building is already destroyed and there is no longer any interest in stopping the dismantling process or cancelling the dismantling decision.

Before moving to discussion of several examples of dismantling of buildings by the Supervision Service during the last two years, we will conclude analysis of the Law on State Supervision over Architectural and Construction Activity by analyzing its Article 8(3), a transitional provision, which tasked the President of Georgia to enact, until 1 March 2006, a Decree on Legalization of Objects Built without a Permit or in Violation of Construction Project. Unfortunately, the President has not fulfilled his obligation under the Law thus far and it is unknown how long more tens of thousands of citizens across Georgia will have to wait. The point is that under the legislation currently in force citizens are unable to legalize buildings built years ago without appropriate permits due to lack of knowledge of legislation, bureaucratic barriers, negligence or other reasons.

The Georgian Young Lawyers' Association intended to file a lawsuit against President for the purpose of timely obtaining the aforementioned decree through courts. According to the law, in such cases, suers can be only the specific individuals whose rights and lawful interests were directly violated or damaged by the failure of the President to enact the decree. Though GYLA is being approached through its Legal Aid Center by numerous citizens daily on this very matter, none of them agreed to be a suer against the President in courts. Why? An answer is contained in the examples discussed below.

3.7. Dismantling or destruction of buildings?

In late 2006 and early 2007 several buildings were dismantled in the central parts of Tbilisi, in particular:

- A living building located on Tabukashvili Street No. 50-52;
- A commercial center located on Vazha-Pshavela Avenue, near Metro Station "Viktor Gotsiridze";
- A series of shops owned by Mia Ltd, located on Dadiani Street, near the Transit Bridge in Nadzaladevi District;
- A shop owned by individual entrepreneur "Bochorishvili", located on Gorgasali Street, in front of the Prosecutor-General's Office in Ortachala.

All of these objects are still duly registered in the Public Register as private property. The Georgian Young Lawyers' Association is of the opinion that dismantling of these buildings lacked legal basis, the Supervision Service did not analyze case materials and did not listen to the views of the proprietors.

In this context, on 21 February 2007, the Georgian Young Lawyers' Association addressed a written application to the Tbilisi Supervision Service requesting the following public information:

1. The number buildings dismantled in Tbilisi in the period of November 2006 – 21 February 2007 and the basis of dismantling;
2. A list of buildings dismantling of which was planned during the current year;
3. Copies of resolutions on dismantling of various objects in Tbilisi in the period of November 2006 – 21 February 2007.

The Tbilisi Supervision Service refused to provide the abovementioned information. For this reason, the Georgian Young Lawyers' Association addressed an administrative complaint to the Tbilisi Mayor's Office. On 2 May 2007 the Tbilisi Mayor's Office reviewed the administrative complaint and tasked the Tbilisi Supervision Service to issue the requested information. The decision of the Tbilisi Mayor's Office was not challenged and therefore entered into legal force.

In June 2007, the Tbilisi Supervision Service fulfilled the Mayor's Office's decision and provided the information.

Materials received from the Tbilisi Supervision Service did not contain information – possibly, due to its absence – on number of dismantling facts in Tbilisi central parts. They contained only copies of resolutions on dismantling of balconies unlawfully built by citizens in Tbilisi outskirts. **Therefore, we can say that dismantling of buildings in Tbilisi central parts by the Tbilisi Supervision Service had no legal basis.**

3.7.1. Residents of a living building located on Tabukashvili Street No. 50-52 vs. Tbilisi Supervision Service

On 3 June 1998, Tbilisi Chief Architect issued his Order No. 292 approving a construction project of a living building on land plot belonging to Apartment Building Partnership "Iveria" located in Tbilisi on Tabukashvili Street No. 50-52. Construction of the living building was completed in 2004. Apartments within the living buildings were private property of individual persons and each apartment was duly registered in the Public Register.

In 2006, proprietors of the apartments learnt that Tbilisi Mayor's Office was intending to destroy the living building at Tabukashvili Street No. 50-52. They were orally informed thereon by Deputy Chief of the Tbilisi Supervision Service though no written act was issued.

On 22 March 2006 proprietors of the living building located at Tabukashvili Street No. 50-52 addressed a lawsuit to the Administrative Panel of the Tbilisi City Court, requesting that Tbilisi Supervision Service be disallowed to dismantle the living building located at Tabukashvili Street No. 50-52 without complying with rules of appropriate administrative proceedings.

By decision of the Tbilisi City Court dated 26 march 2007 the lawsuit was fully upheld. Therefore, Tbilisi Supervision Service of the Tbilisi Mayor's Office was ordered not to dismantle the living building located in Tbilisi at Tabukashvili Street 50-52 without proper administrative proceedings. The decision was not challenged and it entered into legal force.

In early July 2007 Tbilisi Supervision Service revived its actions concerning the dismantling of the living building at Tabukashvili Street 50-52. The living building proprietors demanded from the Tbilisi Supervision Service, on the basis of the court decision dated 26 March 2007, to conduct administrative proceedings and to make a decision only through administrative proceedings. Administrative proceedings implied comprehensive study of the subject matter and hearing of proprietor's views.

Despite this, on 20 July 2007, without inviting the proprietors and public hearing of the case, Tbilisi Supervision Service made a decision to dismantle the living building at Tabukashvili Street 50-52. Execution of the decision and destruction of the apartments of the living building started immediately, on the day the decision was made (20 July 2007), without giving the proprietors the chance to appeal against the Supervision Service's administrative act and to save their homes from destruction. **The proprietors, *post factum,* as their homes are already destroyed, are holding negotiations with the State regarding their compensations.**

The Georgian Young Lawyers' Association is representing the interests of the victim proprietors before the European Court of Human Rights. The first application was sent to the European Court on 24 July 2007. The application emphasizes that the proprietors of apartments of the living house located at Tabukashvili Street No. 50-52 were not given a chance to defend their lawful right to property through courts.

3.7.2. Alina Manukyan and others vs. Tbilisi Mayor's Office

Citizens Alina Manukyan, Eter Razmadze, Lali Khizanishvili, Elizaveta Acridit, Giorgi Kandelaki and Zaira Ananikov were co-owners of a building with a total area of 494 m^2 located in Tbilisi, near Metro Station "Viktor Gotsiridze". The building was constructed in full compliance with requirements of law. In particular, appropriate administrative acts are present in the case file, including an order of the Tbilisi Chief Architect on approval of the construction project, a construction permit, a protocol of putting the object into exploitation, etc. These persons were duly registered in the Public Register as legal owners.

On 30 January 2007, the Supervision Service of the Tbilisi Mayor's Office dismantled the mentioned building without observing the requirements contained in the General Administrative Code and the Law on State Supervision over Architectural and Construction Activity. The Supervision Service action was based only on oral statements of certain public officials according to which they did not like the "ugly face" of the building.

The Supervision Service did not issue any legal act concerning the dismantling of the building. Even within the frame of the current legislation, critical analysis of which was presented above, the Mayor's Supervision Service could not find any legal argument that could serve as a legal basis for dismantling the building. Finding such argument was truly impossible because, as already mentioned, the citizens had the property registered in fully conformity with all rules of legislation.

The Supervision Service, however, found it easy to resolve "the problem" of absence of legal basis: it dragged the appropriate equipment to the Metro Station "Viktor Gotsiridze" and destroyed the building. While the citizens were file an application with a court requesting suspension of the dismantling process, the building was already destroyed and the proprietors no longer had any legal or practical interest in pursuing this claim.

The Georgian Young Lawyers' Association is of the view that Tbilisi Mayor's Supervision Service actions contained signs of a series of crimes from the Criminal Code of Georgia: inflicting damage to or destruction of property (Article 187), abuse of official powers (Article 232), and exceeding of official powers (Article 333).

Although the victim citizens did not apply to law enforcement bodies with a request to start criminal investigation, Articles 261 and 263 of the Criminal Procedure Code entitled the law enforcement bodies to start investigation because the dismantling process of the building was aired on television channels during several days. Law enforcement bodies did not get interested in this matter though.

The Tbilisi Government orally stated to the victim citizens that they would receive full compensation; however, the building proprietors have not received any compensation thus far.[40]

On 27 February 2007, the citizens addressed a court with a lawsuit against the Tbilisi Mayor's Office requesting payment of damages, approximately USD 77,000 (seventy-seven thousand) in total. According to the civil procedure legislation of Georgia, the term of reviewing a case by a first instance court shall not exceed 5 months but no review of the case by the court has taken place thus far.[41]

3.8. Homes deprived or robbed off?

On 20 December 2000 Tbilisi Municipality passed its Decision No. 15-5 approving Rules of Creating and Disposing of Housing Fund. Based on this Decision, in 2000 – 2003, the Tbilisi Government provided citizens having serious housing problems (about fifty families) with living apartments, transferring property rights on these apartments to them.

On 21 November 2006, the Criminal Cases Panel of the Tbilisi City Court found Giorgi Sheradze, formerly one of the leading officials of Tbilisi Government,[42] guilty of abusing official powers (a crime under Article 332 of the Criminal Code). In particular, judgment of 21 November 2006 stated that Giorgi Sheradze, acting in violation of public service requirements, for the purpose of granting benefit to third persons, in the course of distributing living apartments created an noncompetitive environment; in particular, he did not pay any attention to citizens' applications requesting living spaces and, completely disregarding Decisions of Tbilisi Municipality No. 15-5 dated 20 December 2000 and No. 12-7 dated 9 September 2003, issued Resolutions of the Tbilisi Government. It should be mentioned here that the Tbilisi Government was a collegium body that was making decisions (resolutions) through a collegium, by a majority of votes, based on a positive conclusion of the Housing Commission. Nevertheless, only its chief was held liable and this decision became

[40] By the date of 5 October 2007.
[41] By the date of 22 October 2007.
[42] In August 1998 G. Sheradze was appointed Premier of the Tbilisi Government.

a formal basis for cancelling all resolutions adopted by the collegium. Following the Tbilisi City Court logic, other members of the Tbilisi Government should have shared the same fate too.

Based on the mentioned judgment, the Tbilisi Government, on 30 March 2007, adopted its Resolution No. 07.01.205 declaring certain resolutions of the Tbilisi Municipality Cabint and Tbilisi Government fully or partially void and resulting in depriving 65 families with severe housing problems of the living apartments they received in during 2000 – 2003. The Tbilisi Government passed the mentioned Resolution without taking into account its obligations under the General Administrative Code, in particular Article 60^1(4), which stipulates that it is impermissible to declare an empowering administrative-legal act void if an interested party (an interested citizen) has a legal trust to it. Nor were the interested citizens' factual circumstances taken into account, namely their serious housing conditions, which once became a basis for issuing living spaces to them.

The Georgian Young Lawyers' Association is defending three families having the abovementioned problems. Having analyzed the issue, the Association found the following:

- The Tbilisi Government violated rules of commencing administrative proceedings; in particular, the Prosecutor-General's letter by which the judgment dated 21 November 2006 was sent to the Tbilisi Government could not serve as a basis for initiating administrative proceedings;
- Decision was made on the issue without first comprehensively studying it; namely, the cases of 65 families were all heard during 4 hours;
- Proportionality between private and public interests was disregarded; the Tbilisi Government was unable to substantiate priority of any public interest in this dispute;
- An imperative demand of the legislation that an empowering administrative-legal act cannot be declared void was disregarded.

3.8.1. Tsitsino Zivzivadze vs. Tbilisi Government

According to Article 14 of the Rules of Creating and Disposing of Housing Fund, approved by Decision of the Tbilisi Municipality No. 15-5 dated 20 December 2000, families with severe housing problems and have been registered as Tbilisi residents for at least 5 years are eligible to be provided with living spaces. This rule is approved by decision of the Tbilisi Municipality and is still valid.

On 10 July 2003, the Tbilisi Government adopted Resolution No. 09.35.219 on providing citizen Tsitsino Zivzivadze's family with a living apartment. The Resolution was based on the following circumstances:

Tsitsino Zivzivadze has been registered and living in Tbilisi, together with 6 other people (herself, her brother, nephew, sister and sister's two children) in a double-room apartment belonging to his brother with a total area of 48 m^2. Citizen Tsitsino Zivzivadze was stating that it was impossible for so many people to live in one apartment and was asking for providing a living space to 4 persons (herself, her sister and sister's two children).

Tbilisi Housing Commission reviewed the matter and considered that the request could be satisfied.

On that basis, the Tbilisi Government resolved: citizen Ts.Z.'s request shall be satisfied and her 4-person family (herself, her sister and sister's two children) shall be provided with a double-room apartment located at 8^{th} Floor, the living building under construction No. 3, Marjanishvili Street No. 27, with a net area of 45.6 m^2 and gross area of 74.7 m^2.

Based on the Resolution of the Tbilisi Government No. 09.35.219 dated 10 July 2003, a housing order No. 2600 concerning the living apartment located at the aforementioned address was issued to citizen Tsitsino Zivzivadze.

Four years after that decision was taken, namely on 30 March 2007 the Tbilisi Government adopted a resolution unlawfully depriving citizen Tsitsino Zivzivadze of her home. Having studied the matter, the Georgia Young Lawyers' Association concluded that:

- The Tbilisi Government violated rules of commencing administrative proceedings; in particular, administrative proceedings against citizen Tsitsino Zivzivadze started without any legal basis;
- Decision was made on the issue without first studying it comprehensively; the Government did not find out the time and the basis for transferring the right to property to the living apartment as well as the status of the body that has transferred the living apartment;
- The family situation, in particular, that 7-people family lived in a double-room apartment with a total area of 48 m^2, was disregarded during the decision-making process;
- Proportionality between private and public interests was disregarded; the Tbilisi Government was unable to substantiate priority of any public interest in this dispute;
- An imperative demand of the legislation that an empowering administrative-legal act cannot be declared void was disregarded.

The Georgian Young Lawyers' Association is defending the interests of citizen Tsitsino Zivzivadze. We filed a lawsuit with the Administrative Cases Panel of the Tbilisi City Court on 30 April 2007 but the review of the case has not started thus far.[43]

3.8.2. Citizen Temur Vekua vs. Tbilisi Government

On 7 June 1991 the Government of the Republic of Georgia enacted Resolution No. 469 appointing Temur Vekua as Deputy Minister of Ecology and Use of Natural Resources of the Republic of Georgia and tasking Mr. I. Andriadze, Tbilisi Prefect, to provide Mr. Vekua with a living apartment in Tbilisi.

On 12 May 1993, for the purpose of executing Resolution No. 469 of the Government of the Republic of Georgia dated 7 June 1991, the Tbilisi Mayor's Office issued to Temur Vekua a double-room apartment with a total area of 34.44 m^2 located at Apt. 83, 15th Floor, living house under construction No. 2, Marjanishvili Street No. 16.

[43] By the date of 22 October 2007.

Fourteen years after the Resolution was enacted, namely on 30 March 2007, the Tbilisi Government adopted a resolution unlawfully depriving citizen Temur Vekua of his home. Having studied the matter, the Georgia Young Lawyers' Association concluded that:

- The Tbilisi Government violated rules of commencing administrative proceedings; in particular, administrative proceedings against citizen Temur Vekua started without any legal basis;
- Decision was made on the issue without first studying it comprehensively; the Government did not find out the time and the basis for transferring the right to property to the living apartment as well as the status of the body that has transferred the living apartment; in particular, citizen Temur Vekua acquired the right to property to the living apartment based on a resolution of the Government of Georgia and the Government of Tbilisi had no right to confiscate it;
- The family situation of the citizen was disregarded during the decision-making process;
- Proportionality between private and public interests was disregarded; the Tbilisi Government was unable to substantiate priority of any public interest in this dispute;
- An imperative demand of the legislation that an empowering administrative-legal act cannot be declared void was disregarded.

The Georgian Young Lawyers' Association is defending the interests of citizen Temur Vekua. We filed a lawsuit with the Administrative Cases Panel of the Tbilisi City Court on 2 May 2007 but the review of the case has not started thus far.[44]

3.8.3. Jumber Lezhava vs. Tbilisi Government

On 23 September 2002, the Zhiuli Shartava Foundation addressed a letter to the President of Georgia. In the letter, the Foundation was asking the President to provide Jumber Lezhava with a living space in Tbilisi. The President of Georgia responded to the letter and on 29 September 2002 tasked Ivane Zodelava, Tbilisi Mayor, to assist this famous person by providing him with a living home.

[44] By the date of 22 October 2007.

On 18 October 2002, the Tbilisi Government reviewed the matter of providing Jumber Lezhava with a living apartment and found:

"A proposal of the Tbilisi Housing Commission shall be upheld; Jumber Lezhava, a round-the-world bike-rider, shall be provided with a double-room apartment located at 7th Floor, a living building under construction, in the corner of the Kutaisi and Agladze Streets, on the left side."

Five years after the Resolution was enacted, namely on 30 March 2007, the Tbilisi Government adopted a resolution unlawfully depriving citizen Jumber Lezhava of his home. Having studied the matter, the Georgia Young Lawyers' Association concluded that:

- The Tbilisi Government violated rules of commencing administrative proceedings; in particular, administrative proceedings against citizen Jumber started without any legal basis;
- Decision was made on the issue without first studying it comprehensively; the Government did not find out the time and the basis for transferring the right to property to the living apartment as well as the status of the body that has transferred the living apartment;
- The family situation of the citizen was disregarded during the decision-making process;
- The Tbilisi Government did not take into account that citizen Jumber Lezhava is "a world citizen" and has made a great contribution to popularizing Georgia worldwide;
- Proportionality between private and public interests was disregarded; the Tbilisi Government was unable to substantiate priority of any public interest in this dispute;
- An imperative demand of the legislation that an empowering administrative-legal act cannot be declared void was disregarded.

The Georgian Young Lawyers' Association is defending the interests of citizen Jumber Lezhava. We filed a lawsuit with the Administrative Cases Panel of the Tbilisi City Court in May 2007 but the review of the case has not started thus far.[45]

[45] By the date of 22 October 2007.

3.9. "Attempted robbing off" of land plots

On 20 July 2007 the Tbilisi Government enacted its Resolution No. 15.22.419 starting proceedings "for the purpose of revising certain resolutions" enacted in 1994 – 1999 by the Tbilisi Municipality Cabinet and the Tbilisi Government. Administrative proceedings started concerning 48 resolutions of the Tbilisi Municipality Cabinet and 2 resolutions of the Tbilisi Government. Tbilisi Government Resolution No. 15.22.419 affected in total hundreds of physical and juridical persons' private land plots.

According to Resolution of the Tbilisi Government No. 15.22.419, the Tbilisi Government asserted that "the Tbilisi Municipality Cabinet and the Tbilisi Government issued the aforementioned resolutions in violation of requirements of legislation then in force". Consequently, based on Article 60 of the General Administrative Code, the Tbilisi Government felt obliged to initiate administrative proceedings for declaring these resolutions void.

The Georgian Young Lawyers' Association is of the view that Resolution No. 15.22.419 was enacted in violation of a series of requirement of the legislation and without properly studying circumstances relevant to the case. The Association's stance was based on the following:

1. A great majority of physical and juridical persons, by 2007, had the land plots issued to them by the disputed acts already privatized and were registered in the Public Register as legal proprietors. In the opinion of the Georgian Young Lawyers' Association, the disputed resolutions, privatization contracts concluded on the basis of these resolutions and other related acts concerning transfer of property are, by their nature, empowering administrative-legal acts. And, according to Article 60^1(4) of the General Administrative Code, "it is impermissible to declare an empowering administrative-legal act void if an interested party has a legal trust to it."According to paragraph 5 of the same Article, "A legal trust from the interested party exists if he performed an action having juridical results on the basis of an administrative-legal act and declaring that administrative-legal act void would cause damage to him."

   Consequently, even if resolutions enacted in 1994 – 1999 were prepared and issued in violation of legislation, Article 60^1(4) of the General Administrative Code prohibits declaring them void

because the proprietors of the land plots performed actions having juridical results on the basis of these acts (in particular, they privatized the land plots, registered the land plots in the Public Register, sold the land plots to third parties, etc.)

2. Nevertheless, from a legal point of view, the Tbilisi Government still had the right to declare these acts void only if it could prove that the disputed acts substantially violated State, public or individuals' lawful rights and interests. However, in this case, the relevant administrative body (the Tbilisi Government), as per Article 60^1(6) of the General Administrative Code, would be obliged, in order to balance private and public interests, to compensate damages sustained due to declaring an empowering administrative-legal acts void to the interested parties. If the current market price of the possessions mentioned in the disputed acts is taken into account, the entire Tbilisi budget would be insufficient to cover the amount of damages. Therefore, as a result, we would have hundreds of victimized good faith citizens waiting in vain for payment of compensation from the budget.
3. The Tbilisi Government did not take into account that a number of the possessions referred to in the disputed acts have already been re-disposed (sold) by the physical and juridical persons to third parties. According to Article 185 of the Civil Code, "In the interests of the buyer, the seller is considered a proprietor if he is so registered in the Public Register, except when the buyer knew that the seller was not a proprietor."

It follows from this article that if the third parties would be regarded as bad faith buyers, the administrative body would be obliged, in this case, to prove that the buyer know that the seller was not the land plot proprietor. Because the sellers were registered in the Public Register as legal proprietors, it would be hardly possible from legal point of view to prove what was said above.

Hence, because the buyer's interests were legally protected, declaring the disputed resolutions void would not affect the possessions of the good faith buyers, namely they could not be deprived of these possessions anyway. Therefore, the administrative proceedings were senseless and the Tbilisi Government would not receive the results for which the administrative proceedings started.

The Georgian Young Lawyers' Association expressed its opinion through the media means. We stated that we stood ready to provide free legal advice and litigation services to interested persons. The same announcement was published on our web site. The Legal Aid Center of the Georgian Young Lawyers' Association was working on studying the cases in detail; for this purpose copies of all disputed resolutions were requested from the archives. Despite the fact that the resolutions were public information and were kept by the Tbilisi Mayor's Office, the interested persons were refused to be given copies of the resolutions. For thousands of citizens it was unintelligible whether the Resolution of the Tbilisi Government of 20 July concerned their possessions.

After having received copies of resolutions from the archives, we drafted special lists to make information easily available to interested persons. These lists were published in the printed media and put out in our office. We provided telephone and personal consultations to about 200 persons on this subject matter.

On 4 August 2007, the Tbilisi Government enacted Resolution No. 16.01.435, pursuant to which "Having comprehensively studied and analyzed circumstances having importance to the matter, it is expedient to cancel the Resolution of the Tbilisi Government No. 15.22.419 dated 20 July 2007." The resolution contains wording of GYLA's arguments described above. In particular, the resolution reads:

"Having comprehensively studied and analyzed circumstances having importance to the matter, the administrative body deems it expedient to cancel the Resolution of the Tbilisi Government No. 15.22.419 dated 20 July 2007 because there is a risk that it will cause substantial damages to public interests; in particular, in the course of administrative proceedings it was established that a great majority of physical and juridical persons who received land plots by means of the disputed acts have had these land plots privatized and registered in the Public Register as their private property. However, the possessions granted by the disputed administrative-legal acts (acts issued by the Tbilisi Municipality Cabinet and, in a number of cases, by the Tbilisi Government) had been, in most cases, re-disposed, i.e. sold to third parties by the recipient physical and juridical persons; these third

parties, deriving from the legal meaning of "a good faith buyer", cannot be affected by the legal regime of declaring the disputed acts void. Consequently, the Tbilisi Government, taking into account the need to ensure a balance between public and private interests, deems inappropriate to continue further administrative proceedings in relation to the disputed acts."

The Resolution of the Tbilisi Mayor's Office dated 20 July 2007 is a clear example of decision-making by the Government on specific matters without fully studying and analyzing the subject matter. Though, unlike the previous examples shown above, in this particular case the Government was smart and daring enough to cancel an act that would damage the interests of hundreds of citizens. The Georgian Young Lawyers' Association welcomes this step from the part of the Tbilisi Government.

4. Conclusion

As already mentioned in the introduction part of this paper, the Georgian Young Lawyers' Association did not have pretensions to reviewing all legal problems relating to securing the right to property in Georgia and each specific case of violation of this right. Unfortunately, the scale of violation of the right to property in Georgia has increased so much that only the Georgian Young Lawyers' Association's resources, irrespective of its great desire, are insufficient. It is necessary that the mentioned problem become a matter of interest to local and international organizations. In a democratic society the guarantor of the right to property is rule of law whose strongest guarantor on its turn is independent judiciary. The Georgian Young Lawyers' Association considers that the development of both the country's economy and the town infrastructure on the one hand and fight against corruption on the other hand are necessary. However, these measures shall be based on democratic principles, implemented in accordance with established rules and the final word shall stay with the court. Although an independent judiciary and the reputation of judges (public trust to the judiciary) is a serious problem today, only the judicial protection of the right to property can ensure full-fledged enjoyment of this right.