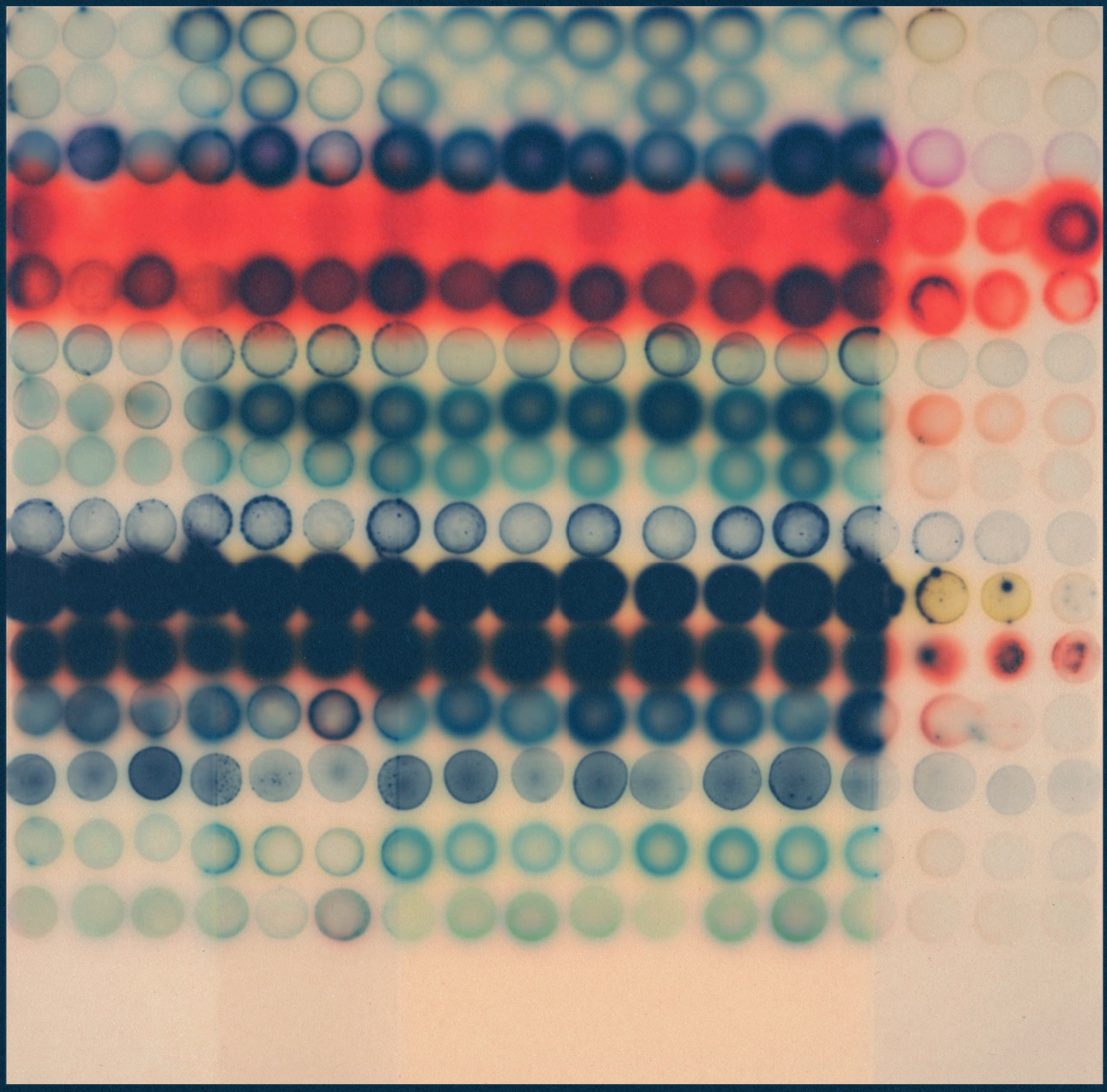

PRACTICE OF THE CONSTITUTIONAL COURT ON DRUG POLICY

Assessing the Process of Reflecting Decisions in Legislation

SOCIAL JUSTICE CENTER

Practice of the Constitutional Court on Drug Policy - Assessing the Process of Reflecting Decisions in Legislation

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Introduction

Georgia's state policy on the consumption or the purchase/storage of drugs for the purpose of consumption has long relied on the execution of severe punishment and repression. The worst experience, in this regard, dates back to 2006, when the then government announced a "zero tolerance policy", which, among others, also addressed drug crimes.[1] Stringent drug policies, in addition to leaving an indelible mark on the lives of countless people, have also failed to curtail the total number of drug users.[2] Conversely, according to some sources, the cases of consumption of high-risk drugs has been on the rise for years.[3]

In their talks, the new government, in 2012, addressed the issue of drug policy liberalization.[4] As a result of the legislative amendments in those years, criminal sanctions for the purchase and possession of drugs were reduced, and the government adopted a State Strategy and Action Plan to Combat Drugs, "*highlighting the importance of public health, drug prevention, harm reduction programs, and combatting discrimination and stigmatization of drug users".*[5] Nevertheless, drug policy in Georgia has remained extremely strict and has not undergone a substantial change until 2015.

Since 2015, radical changes in the field of drug policy, founded on the decisions made by the Constitutional Court, have been initiated. The court imparted salient clarifications on the use, possession, purchase, storage and cultivation of marijuana and other narcotic substances. Judgments of the Constitutional Court declared the deprivation of liberty for possession of marijuana for personal use impermissible; Hence, marijuana consumption in private space was legalized; Deprivation of liberty was declared to be manifestly disproportionate for the action of the possession of unusable amount of any narcotic substance, and etc.

This document aims to present the dynamics of the decisions made by the Constitutional Court, their content, main arguments and, to provide their critical analysis. Based on this, the document reviews the processes of enforcement of these decisions by the Parliament and the consequent amendments to the legislation. The document is an attempt to critically discern the process pertaining to the legislative branch defining its role and actions on the path to drug policy liberalization. In addition, the document will flag the challenges that remain in the direction of humanizing drug policy and highlight the weight carried in this process, on the one hand, by the Constitutional Court and, on the other hand, by the Parliament.

In line with the issues discussed in the document, the following findings can be ascertained:

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[1] Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies, short overview, Human Rights Watch, 2018, available at: https://rb.gy/ylieid, accessed: 26.10.2021.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Ibid.

- Drug policy in Georgia remains stringent. Instead of ensuring access to social mechanisms oriented at care provision, the policy aims to punish and repress drug users
- The legislature does not percieve itself as a main driver of the radical transformation of drug policy. As a rule, the parliament waits for the decision of the Constitutional Court and exercises reactive behavior, instead of forming a political agenda on drug policy
- The steps taken by the legislature towards the humanization and liberalization of drug policy are largely fragmentary and insufficient, including in relation to determining the amounts of narcotic drugs. The Parliament of Georgia has yet to express its political will to implement a fundamental drug policy reform
- Parliament by and large narrowed and misinterpreted the Constitutional Court's argument regarding the use of marijuana in private space. In addition, the Parliament still narrowly views the issue of marijuana consumption, in general, and does not seek to regulate lawful ways of its acquisition
- In some cases, observations show that the Constitutional Court's decision are reflected in legislation with delays
- The Constitutional Court itself, in some cases, unreasonably delays the decision-making process. In some cases, the court has not rendered a decision for 6 years
- Some recent decisions by the Constitutional Court are problematic, in particular, they do not set out appropriate and clear guidelines for the development of care-oriented drug policies. The court also considers it permissible to use repressive measures against users of certain narcotic substances.

I. A review of decisions made by the Constitutional Court regarding marijuana

1.1. Beka Tsikarishvili v. the Parliament of Georgia

The starting point on the path of humanization of drug policy was the decision made by the Constitutional Court in 2015 in the case "Beka Tsikarishvili v. the Parliament of Georgia". In this case, the Constitutional Court declared that imposition of imprisonment for the purchase and storage of up to 70 grams of dried marijuana is unconstitutional.[6] The reasoning applied by Court in Beka Tsikarishvili's case is crucial, as it creates as a recurrent theme applied to the later decisions of the Constitutional Court not only on the consumption and purchase of marijuana, but also on other narcotic drugs.

In the said judgment, the Constitutional Court discussed the essence of self-harm and pointed out that *"deprivation of liberty in the form of criminal punishment in order to avoid harm to one's own health*

[6] Ana Nasrashvili, Drug Policy in Georgia (Suspended Reform and New Trends), Social Justice Center, 2019, p. 27, available here: https://rb.gy/hi0irf, available at: 26.10.2021.

is ungrounded and unjustified."[7] The imposition of imprisonment in such cases serves the purpose of general prevention only. This, according to the court, makes the individual an object of power, "*because the punishment is not legitimized by an action, it does not justify the danger arising from the action of the person. In this way, a person becomes an instrument within the framework of state policy, which inevitably leads to the violation of his dignity.*"[8] In addition, it is noteworthy that the judgement highlights the importance and reasonableness of exercising means for caring for a person with drug addiction and not punishing them. In particular, the decision states that in cases where a person becomes addicted to a particular substance, it is ungrounded to impose imprisonment as a form of punishment against him."[9]

The reasoning developed by the Constitutional Court is also important for analyzing cases where it is permissible to criminalize the purchase and possession of marijuana and to impose imprisonment as a form of punishment. The Court points out that the issue should be assessed on the basis of two alternative facts. More specifically, whether marijuana use leads to the commission / increase the number of other crimes (1); And whether the purchase and storage of marijuana in itself poses a risk of its distribution and, consequently, of harm to the health of others (2).[10]

Speaking of the above two conditions, the Constitutional Court pointed out that in the first case the crime commission/increasing crime rate directly related to marijuana use could not be established (ie there was no correlation between these two events).[11] In the same context, the Court noted that "an act that is antisocial in nature and which, in all likelihood, could pose a real threat at the time of taking such action could potentially endanger the health of others or public order. At the same time, it is clear that the state's response to antisocial actions should be harsh only according to the severity, realness and scale of the threats posed by the action."[12]

In analyzing the second case, the court, based on the opinions of experts, found the fact of purchase and storage of up to 70 grams of dried marijuana did not in itself indicate the goal of its distribution.[13] Although 50-70 grams of dried marijuana is more than a single dose for a single person (average dosage is 1 gram), it may be intended for use by a single person over a short period of time.[14] This is due, in part, to the fact that smoking marijuana has a particularly low risk of overdose.[15] Thus, in this case, the

[7] Decision of the First Panel of the Constitutional Court of Georgia on the case №1 / 4/592, "Citizen of Georgia Beka Tsikarishvili v. the Parliament of Georgia", 2015, Motivational Part II, Paragraph 82., available at: https://rb.gy/b4o2h7, accessed: 26.10.2021.
[8] Ibid, para. 83.
[9] Ibid, para. 82.
[10] Ibid, para. 85.
[11] Ibid, para. 86.
[12] Ibid, para. 75.
[13] Ibid, para. 92.
[14] Ibid.
[15] Ibid.

court linked the purchase and storage of marijuana for personal use to its regular user and not just the beginner / first-timer. It should be noted that the review of the permissibility of criminal punishment under the alternative terms set out in this case was further extended by the Constitutional Court and applied in the following years in relation to other drug cases.

Lastly, the Constitutional Court ruled that the imposition of imprisonment for the purchase and possession of up to 70 grams of marijuana for personal use was unconstitutional, as it violated the right to dignity.

1.2. The Constitutional submission to Bolnisi District Court

In 2017, the Constitutional Court ruled on the constitutional submission to the Bolnisi District Court. The submission stated that the normative content of Article 260, para 1, which makes it possible to impose imprisonment for the possession of up to 100 grams of raw marijuana, contradicts the decision made in the case of Beka Tsikarishvili, and is its overriding norm. In this case, the Constitutional Court had to assess whether the potential harm stemming from purchasing and storing up to 100 grams of raw marijuana exceeded the harm carried by the purchase and storage up to 70 grams of dried marijuana, due to its amount.[16]

According to the motivation part of the ruling, the water content in raw marijuana is higher, which increases the plant mass without increasing the effects produced by the substance. The court pointed out that this is the reason why, according to the law, "the quantitative values in grams, which determine the small, large and especially large amount of the drug, in each case is twice as much for raw marijuana as for dried marijuana." [17] Therefore, the court concluded that considering its substantive mass, up to 100 grams of raw marijuana carries less risks than does up to 70 grams of dried marijuana.[18]

In view of the above, the court declared unconstitutional the possibility of deprivation of liberty for the purchase and storage of up to 100 grams of raw marijuana for personal consumption.

1.3. Givi Shanidze v. the Parliament of Georgia

In 2017, the court ruled the imposition of any criminal punishment for marijuana use unconstitutional and, consequently, decriminalized marijuana use.[19] Unlike in the case of Beka Tsikarishvili, this

[16] The session of the plenum of the Constitutional Court Ruling, ruling №3/1/855, 2017, II motivation part, para. 11, available at: https://rb.gy/jyd9i2, accessed on: 26.10.2021.
[17] Ibid, para 12.
[18] Ibid, para 13.
[19] Ana Nasrashvili, mentioned research, p. 29.

decision was based on the fact that the disputed norm was contradictory to the right to free development.[20]

Givi Shanidze's case concerned the question of constitutionality of the normative content of Article 273 of the Criminal Code of Georgia, which provided for the imposition of criminal liability for the consumption of small amounts of marijuana. The court focused on the recreational purpose of consuming small amounts of marijuana and noted that "*marijuana use without a doctor's prescription is mainly for leisure and entertainment. [...] The right to free development of a person allows a person, without the intervention of the state, to decide what type of entertainment or recreational activity he/she will engage in. There is no doubt that a person's leisure activities belong to the sphere of his personal autonomy. Therefore, the influence of a person on himself and thus the engaging in fun or pleasurable activities is in itself under the sphere of his free development.*"[21] The Constitutional Court has made it clear that the right of a person to choose the type of leisure he or she prefers, including the use of marijuana, is a matter of personal autonomy.[22]

The Constitutional Court drew an interesting parallel between marijuana and alcohol consumption. According to this reasoning, alcohol consumption is also done for cultural and / or entertainment purposes. Since alcohol dependence develops in individual cases, it is hypothetical to expect that it will lead to a state of abstinence and that a person in that state will commit a crime in order to obtain it.[23] In the view of the Court, the purposes and effects of marijuana use are substantially similar to those of alcohol consumption and, therefore, the punishment for its use in the individual cases could not be considered as legitimate means of protecting public order.[24]

The Constitutional Court also pointed out that the protection of citizens' health and healthy lifestyle is indeed important for the development of society and the state as a whole, and this process should be supported and nurtured by the state.[25] In this regard, state intervention may focus on the issues pertaining to advertising of marijuana products, the access of minors to this product, etc.[26]

1.4. Zurab Japaridze and Vakhtang Megrelishvili v. the Parliament of Georgia

[20] According to the previous version, the right to free development of a person was established by Article 16 of the Constitution of Georgia. According to the current version, this right is enshrined in Article 12 of the Constitution.

[21] The decision of the First Chamber of the Constitutional Court of Georgia on Case №1 / 13/732, "Citizen of Georgia Givi Shanidze v. Parliament of Georgia", 2017, Motivational Part II, Paragraph 12, available at: https://rb.gy/ikleed, accessed on: 26.10.2021.

[22] Ibid.

[23] Ibid, para 37.

[24] Ibid.

[25] Ibid, para 48.

[26] Ibid.

Decision made by the Constitutional Court in 2018 on the case "Zurab Japaridze and Vakhtang Megrelishvili v. the Parliament of Georgia" is a logical continuation of the discussed cases concerning marijuana use. In this case, the court legalized the use of marijuana in private space.[27] The court found the normative content of Article 45 of the Code of Administrative Offenses, which provided for administrative liability for personal use of marijuana (in the absence of certain circumstances), contrary to the right to free development of the person.

In the motivation part, the Constitutional Court relied essentially on the arguments used in previous cases. The court noted that the use of marijuana is not associated with serious harm to the health of the user and, at the same time, does not pose a threat to third parties (no direct link is established between its consumption and the commission of any other crime).[28] Consequently, imposing any type of punishment for marijuana use is not justified in the interests of either the health of the user or the maintenance of public order. The Constitutional Court has clearly stated that *"the state must respect the autonomy of a person, their voluntary choice, their way of life and not interfere in it, if, at the same time, there is no risk of real violation of the rights and freedoms of others or important public interests."* Intervention will be deemed even more unjustifiable and excessive when it comes to declaring an act, which endangers only the person's own self as a violation."[29]

In the same case, the court also discussed the legitimate grounds for banning marijuana use in certain circumstances. One such ground is the protection of minors from the harmful effects of marijuana. In particular, it is prudent to limit the use of marijuana at the facilities intended for minors or in their presence.[30] In addition, restrictions may be imposed in relation to other *"educational, training or learning institutions, the army, medical, state (public) institutions, as well as certain public places (for example, public transport) to protect the interests of public health and public order."*[31] At the same time, the Constitutional Court emphasized that it was impermissible to ban the use of marijuana *"in a personal, private space or elsewhere for the purpose of recreation, relaxation or entertainment."*[32]

1.5. Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. the Parliament of Georgia

Prior to rendering the ruling, in the case of Zurab Japaridze and Vakhtang Megrelishvili, in 2017, the Constitutional Court reviewed cases concerning marijuana cultivation. In this case, there were three different lawsuits related to illegal sowing, planting and cultivation of 63.73 g, 150.72 g. (large amount) and 265.49 g. (particularly large amount) cannabis.

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[27] Ana Nasrashvili, mentioned research, p. 31

[28] Decision of the Second Panel of the Constitutional Court of Georgia in the case 1 3/1282 "Citizens of Georgia - Zurab Japaridze and Vakhtang Megrelishvili v. Parliament of Georgia", 2018, Motivation Part II, Paragraphs 16 and 31.available at: https://rb.gy/5gcoji, accessed: 26.10.2021.

[29] Ibid, para. 30.

[30] Ibid, para. 35.

[31] Ibid.

[32] Ibid.

In this case, too, the Constitutional Court assessed the threat posed by the perpetrator to himself and the potential harm that could be done to third parties / the public. In the first cases, as in previous cases, the court also found that it was unconstitutional to *"deprive a person of their liberty for an act which endangers only the perpetrator of that act and is not (may not be) aim to violate the rights of others."*[33] In the second case, it needs to be assessed again *"whether (a) the consumption of cannabis contributes to the commission of another crime; and (b) in the case under the disputed norm, whether the sowing, planting and cultivation of cannabis in itself poses a risk of its distribution and consequently harm to the health of others."*[34] In this regard, in line with the cases already considered, the court pointed out that, on the one hand, there is no direct link between marijuana use and commission of other crimes, and on the other hand, sowing / cultivating a certain amount of cannabis does not automatically pose a threat of its distribution. The court found that such an amount is up to 151 grams of raw marijuana.[35]

In conclusion, the Constitutional Court has ruled that imposition of imprisonment for illegal sowing, planting or cultivation of up to 151 grams of cannabis for personal use is inadmissible. As for the cultivation of up to 266 grams of cannabis, in this case the court indicated that this high amount might present automatic risks of its distribution, which is why imprisonment for this action is permissible.[36] However, the court considered the length of the sentence imposed on the user (from 6 to 12 years) unconstitutional and clearly disproportionate and emphasized the need to determine a fair sentence.[37]

II. Reflection of the decisions made by the Constitutional Court regarding marijuana in the legislation

In order to reflect the decisions made in the above cases, amendments have been made to the Administrative Code of Georgia and the Criminal Code, as well as to the Annex of the Law of Georgia Drugs, Psychotropic Substances, Precursors and Narcological Assistance, which define small, large and particularly large quantities of raw and dried marijuana.

The legislation has undergone some changes based on the decision made in the case of Beka Tsikarishvili and the ruling on the Bolnisi District Court constitutional submission. In particular, in the case of dried marijuana, a large amount was set at more than 70, instead of 50, grams.[38] Similarly, in the case of raw marijuana, large amount was fixed at more than 140, instead of 100, grams.[39] Consequently,

[33] Decision of the First Chamber of the Constitutional Court of Georgia in the case №1 / 9 / 701,722,725 "Citizens of Georgia Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili v. Parliament of Georgia", 2017, Motivation Part II, paragraph 24, available at: https://rb.gy/6uowjh, accessed on: 26.10.2021.
[34] Ibid, para. 25.
[35] Ibid, para. 31.
[36] Ibid, para. 33.
[37] Ibid, para. 37.
[38] Amendment to the Law of Georgia on Amendments to the Law on Narcotic Drugs, Psychotropic Substances, Precursors and Narcological Assistance, available at: https://rb.gy/kxjjaa, accessed on: 26.10.2021.
[39] Ibid.

according to the existing regulations, the initial amount of criminal liability for dried marijuana is 5-70 g, and in the case of raw marijuana - 10-140 grams.[40]

It should be noted that the legislature made this change quite late, almost 2 years after the Constitutional Court renderd the final judgement in the case of Beka Tsikarishvili.

Significant changes were made in the legislation to enforce the case of Zurab Japaridze and Vakhtang Megrelishvili. Shortly after the decision of the Constitutional Court, in September 2018, a legislative package reflecting the amendments was submitted for consideration to the Parliament.[41] As already mentioned, with this decision, the Constitutional Court recognized the use of marijuana in private space as legal (abolished the administrative liability for personal use). In addition, the court also pointed to the specific circumstances in which the state, in order to avoid threat to others, might impose liability for consumption.

To enforce the ruling, Article 45^1 was added to the Code of Administrative Offenses, which set out the specific circumstances under which marijuana consumption is considered an administrative offense. The same article banned the purchase and possession of small amounts of marijuana, and under the new norm of the Criminal Code (273^1), criminal liability was established for the recommission of this particular action (purchase / storage / transportation / shipment). In addition, the commission of the offense under the influence of a narcotic, psychotropic or psychoactive substance was added as aggravating circumstances for administrative liability.[42]

According to the Code of Administrative Offenses, the use of cannabis is punishable *"in any building other than a privately owned dwelling or other building (unless the building is also used for economic activities)."*[43] In addition, the same article specifically prohibits the use of marijuana by a person under the age of 21,[44] in the presence of a minor,[45] as well as in any public space [46] and when performing official duties.[47]

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[40] Amendments to the Law on Narcotic Drugs, Psychotropic Substances, Precursors and Narcological Assistance, annex 2, №92, available at: https://rb.gy/4ddyxe, accessed on: 26.10.2021.
[41] Ana Nasrashvili, p. 22.
[42] Ibid, p. 23.
[43] Administrative Code of Georgia, article 45^1, para 2. available at: https://rb.gy/wnkcxy, accessed on: 26.10.2021.
[44] Ibid, para. 4.
[45] Ibid, para. 8 *"Drug use or being under the influence in the presence of a minor (including in the private space) or in the premises of an educational, learning or care provision institution, library, student youth camp, children's entertainment center and / or other facilities for persons under 18 years of age, at a public meeting for persons under the age of 18 or in the vicinity of such a place within a radius of 150 meters."*
[46] Ibid, para. 6 *"Drug use on the street, in the yard, in the stadium, in the square, in the park, in the court, at the airport, in the building of the medical institution and / or pharmaceutical institution and in the territory owned by institution, in the cinema, theater, concert hall, cafe, restaurant, public transport (including maritime transport and air transport), bus station, railway station and / or other public space. "*
[47] Ibid, para. 10.

It is important to note that despite the legitimacy of the emergence of such norms, the legislature has particularly narrowed the content of the decision of the Constitutional Court. In the case of Zurab Japaridze and Vakhtang Megrelishvili, the court noted that the use of marijuana should be allowed *"in a personal, private space or elsewhere, for recreation, relaxation, entertainment purposes."*[48] In addition, the case reads that marijuana use may be banned "in places of public assembly" and not everywhere.[49] The Code of Administrative Offenses effectively prohibited the consumption of marijuana everywhere except at privately owned space. This approach substantially narrows not only the spirit of the decision, but also directly contradicts the motivation part of the case. In particular, the Constitutional Court has ruled that marijuana use should be allowed not only in privately owned premises but also elsewhere, including in some (though not all) public places, under certain circumstances.

The fact that at the stage of initiation of the bill and commencement of the parliamentary debates there was no attempt to broadly regulate issues related to marijuana is also problematic.[50] The legislature has not discussed how to regulate the rule for acquiring marijuana for personal use so that it is done in a lawful manner.[51] Under the existing normative framework, this is virtually impossible because, at present, the act of sowing, planting or cultivating a small amount of the cannabis plant leads to administrative liability.[52] In addition, as already mentioned, the purchase and storage of small amounts of marijuana is punishable, for first time under administrative law, and in case of commission of the act for the second time- under criminal law.

Penalty for planting / growing / cultivating up to 266 grams of cannabis (imprisonment from 6 to 12 years) has not be revised in the Criminal Code which, due to its apparent disproportionality, was declared unconstitutional by the court. It is also problematic that the existing legislative framework continues to use repressive mechanisms instead of care-oriented policies to protect minors and persons under the age of 21 from marijuana.[53]

The amendments to the Criminal Code were also characterized by significant challenges. In particular, the driving of a motor vehicle under the influence of drugs or psychotropic drugs was defined as aggravating circumstances in order to prevent endangering the life and health of road users.[54] This change is problematic because it is unclear why driving under the influence of alcohol is a matter of administrative liability and operating a vehicle while under the influence of drugs is a criminal offense, when such a discrepancy is not supported by any statistical data (moreover, in recent years, the number

[48] Citizens of Georgia - Zurab Japaridze and Vakhtang Megrelishvili v. Parliament of Georgia, para. 35.
[49] Ibid.
[50] Ana Nasrashvili, p. 24.
[51] Ibid.
[52] Code of Administrative Offenses of Georgia, art. 100^2.
[53] Ana Nasrashvili, p. 24.
[54] Ibid, p. 25.

of crimes committed under the influence of alcohol has outnumbered the number of crimes committed under the influence of drugs).[55]

In addition, with the amendment to the Law on Combating Drug Crime, the possibility of restricting additional rights in the case of driving under the influence of narcotics (in this case marijuana), in addition to criminal action, was first extended to administrative offenses.[56] In particular, *"the judge was given discretionary power to decide on the restriction of rights of a person subjected to administrative liability, for a period of up to three years for the consumption of cannabis or marijuana."*[57] Restriction of rights has been the subject of criticism for years and it is related to the deterioration of the financial situation of drug users, their further isolation from society and their stigmatization.[58]

Lastly, it must be said that the enforcement of decisions in marijuana cases was, on the one hand, chaotic and fragmentary, and on the other hand, even the implemented changes made were aimed at strengthening the measures of punishment and repression. To this end, Parliament did not see the decisions made by the Constitutional Court in a broad sense and, where possible, narrowly defined their content. The legislative organ has also failed to address issues that are closely and directly related to the decisions of the Constitutional Court. For example, growing and cultivating a small amount of cannabis for personal use and buying and storing a small amount of marijuana are still punishable (the latter, even under criminal law, in the case of reconviction). The legislative body did not try to resolve these issues and bring them inline with the legal framework even after ruling on the cases of Jambul Gvianidze, Davit Khomeriki and Lasha Gagishvili, where the court ruled that deprivation of liberty for sowing, plantinf and cultivating up to 151 grams of marijuana was unconstitutional. Instead, a bill on cannabis control was debated in parliament, which was eventually withdrawn by its initiator.[59] The purpose of the bill was to create a legal basis for the sowing, planting, cultivating and producing cannabis for medical and / or industrial purposes for export.[60] The explanatory note stated that "*the draft law took into account the spirit of the recent decisions of the Constitutional Court regarding the circulation of cannabis plants."*[61] However, it must be said that this bill had nothing to do with the enforcement of the decisions of the Constitutional Court.

III. Review of the Constitutional Court judgements on other drugs

3.1. Lasha Bakhutashvili v. the Parliament of Georgia

[55] Ibid.
[56] Ibid, p. 26.
[57] Ibid.
[58] Ibid.
[59] Ibid, p. 22.
[60] Explanatory Note on the Draft Law of Georgia on Cannabis Plant Control, p.1, available at: https://rb.gy/slmzrt, accessed on: 26.10.2021.
[61] Ibid.

The Constitutional Court rendered a judgement on Lasha Bakhutashvili's case in 2017. The lawsuit read that because small and initial amount was not defined for desomorphine for the imposition criminal liability in Annex 2 of the Law on Narcotic Drugs, Psychotropic Substances, Precursors and Narcological Assistance, any amount of desomorphine that did not exceed one gram was considered large quantity.[62] As a result, the disputed norm imposed penalties, including for producing, purchasing, and storing the amount of desomorphine that was unusable.[63] According to the plaintiff, because desomorphine is consumed intravenously, it is impossible to use it fully, 100%, and a microscopic amount always remains in the syringe used for injection.[64] In the case of the plaintiff, the amount of desomorphine remaining in the syringe used was 0.00009 g, for which criminal liability was imposed.[65]

The Constitutional Court pointed out that the issue in this case was not the constitutionality of imprisonment as a punishment for the production, purchase and / or storage of desomorphine, which is suitable for single use only by one person [66] (this issue was further discussed by the Constitutional Court in the framework of the Public Defender's lawsuit). Nor has the possibility of using trace of desomorphine in the syringe as evidence been disputed in order for law enforcement agencies to prove the fact that it was produced in a quantity suitable for consumption by this or that person.[67] Rather, the court had to specifically address the issue of liability for the production of an amount of desomorphine that is unusable.

The Constitutional Court relied on the argument in Beka Tsikarishvili's case, stating that it was unjustified to *"impose deprivation of liberty when the person only harms his own health and the fact of drug distribution or the inevitable necessity of drug distribution is not confirmed."*[68] According to the court, in this case "*a person is punished for an act that not only does not pose a threat of the sale of drugs, but also of the consumption of a drug."* [69] Based on this argument, the court found that punishment for the production, purchase, and storage of 0.00009 g. desomorphine serves the purpose of general prevention only.[70] Accordingly, this normative content of Article 260 article 3 was declared unconstitutional with regard to the right to dignity.

3.2. Noe Korsava and Giorgi Gamgebeli v. the Parliament of Georgia

[62] Judgement of the First Chamber of the Constitutional Court of Georgia on the case №1 / 8/696, "Citizen of Georgia Lasha Bakhutashvili v. the Parliament of Georgia", 2017, I descriptive part, paragraph 6, available at: https://rb.gy/i5aqzb, accessed on: 26.10.2021.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid, II Motivation part, para 16.
[67] Ibid.
[68] Ibid, para. 19.
[69] Ibid.
[70] Ibid.

The decision of the Constitutional Court in the case of Noe Korsava and Giorgi Gamgebeli was directly based on the case of Lasha Bakhutashvili. In this case, the issue did not concern desomorphine but of deprivation of liberty for the purchase and storage of unsuitable amount of methamphetamine.

At the time of filing the lawsuit, the law did not provide for determination of small amounts or iniatial amount for criminal liability for a number of substances under special control, including methamphetamine.[71] As a result, in the case of methamphetamine, any dose of up to 1 gram would qualify as a large amount regardless of whether it was usable or not.[72] In the case of Noe Korsava and Giorgi Gamgebeli, the amount of methamphetamine left in the syringe used for the injection was 0.00000126 grams for the former and 0.0003 grams – for the latter.[73] The plaintiffs pointed out that the decision in the case of Lasha Bakhutashvili had already established a standard according to which the use of imprisonment as a punishment for possession of an unusable amount of drugs is impermissible and that this rule applies to any drug.

The Constitutional Court confirmed the validity of this reasoning, however, it paid additional attention to the specific circumstances related to methamphetamine use in Georgia. In particular, in Georgia methamphetamine is produced from the plant ephedra, or more precisely, by oxidation of its substance.[74] As a result of this process, "Ephedra Vint" is produced, which, along with other substances (amphetamine, pseudoephedrine), also contains methamphetamine.[75] Lastly, while it is true that taken separately 0.0003 g. methamphetamine is unusable (because the minimum usable amount is usually 0.005 grams), in the case of a mixture, the unusable amount of the leading drug does not automatically indicate that the mixture is unusable.[76]

Finally, the court made it clear that it is inadmissible to deprive liberty for the purchase and possession of any drug if the amount is unusable.[77] In addition, *"in each particular case, the prosecution and the trial court (with the assistance of a qualified specialist) shall assess whether the drug / drug mixture found constitutes an usable amount. It is the common court that can properly uphold and enforce the constitutional standard established by the Constitutional Court, which precludes the use of imprisonment as a punishment for the purchase and possession of unusable drugs."*[78]

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[71] Ana Nasrashvili, 2020 Report on Drug Policy, Social Justice Center, 2021, p. 8, available at: https://bit.ly/3Eg86vP, accessed on: 26.10.2021.
[72] Ibid.
[73] Ruling of the First Chamber of the Constitutional Court of Georgia in the case №1 / 19 / 1265,1318 "Noe Korsava and Giorgi Gamgebeli v. Parliament of Georgia", 2020, Descriptive Part I, paragraph 7, available at: https://rb.gy/mlwkid, accessed on: 26.10.2021.
[74] Ibid, II Motivation part, para. 18.
[75] Ibid.
[76] Ibid.
[77] Ibid, para. 27.
[78] Ibid, para. 23.

It is important to note that the Constitutional Court could have seen the issue more broadly. In particular, it is problematic that the court did not take a position in the motivation part on the reasonableness of using criminal mechanisms other than imprisonment for the purchase and storage of unusable amount of drugs. The reasoning of the Constitutional Court in this case and in the case of Lasha Bakhutashvili to declare the deprivation of liberty unconstitutional clearly gives space for the imposition of any other repressive mechanisms in such cases to also be considered unjust from the outset.

3.3. Public Defender v. the Parliament of Georgia

The Public Defender's lawsuit concerned the issue of constitutionality of the normative content of Articles 45 of the Administrative Offenses and Article 273 of the Criminal Code, which provided for administrative detention and imprisonment for illegal production, acquisition, possession, and / or consumption of small amounts of drugs for the personal use.

In this case, the Constitutional Court made an important clarification and made clear the link between drug use and possession. The court pointed out that the consumption of drugs, due to the specific nature of the action, completely excludes the risk of selling the drugs and thus harming the health of other people, and *"the production, purchase and storage of the amount of drugs for a single use is an integral part of its consumption."*[79] Thus, punishing a person for the purchase / possession / manufacture of a single-use drug is essentially similar to the punishment for its use (although, naturally, non-identical).[80]

This case is also interesting in the sense that the court separated the so-called soft and heavy drugs and pointed to the possibility of applying different criminal policies towards them. According to the court, for the protection of the user's personal or public health, imprisonment is unjustified for the consumption (even repeated consumption) of any drug or for the purchase/storage of drugs (the amount required for a single use) obviously for personal use.[81] However, differentiating between drugs for public safety purposes may be justified.[82]

In particular, according to the Constitutional Court, deprivation of liberty for the consumption / purchase-storage of small quantities of cannabis products and other soft drugs should not be considered useful means of achieving a public safety objective.[83] However, drugs that "*are easily addictive or after consumption of which a person becomes aggressive and commits violent acts, carry risks to public safety.*"[84] Based on this reasoning, the court pointed out that a significant interest is served by punishing

[79] Decision of the First Chamber of the Constitutional Court of Georgia on №1 / 6/770, Case of the Public Defender of Georgia v. Parliament of Georgia, 2019, Motivation Part II, paragraph 31, available at: https://rb.gy/u4zior, accessed on: 26.10.2021.
[80] Ibid, para. 32.
[81] Ibid, para. 55.
[82] Ibid, para. 57.
[83] Ibid, para. 40.
[84] Ibid, para. 41.

the use and purchase and storage of such drugs, the consumption of which leads to rapid addiction and a state of difficult abstinence.[85] According to the motivation part, "*it is reasonable to assume that a user in a state of abstinence is prone to commission of antisocial, illegal and often criminal acts. Therefore, the degree of danger to the public stemming from the use of such substances is high, and so it is importance of the public interest protected by the punishment of such actions*. "[86]

It should be noted that the court, based on the case of Beka Tsikarishvili (where possession of up to 70 grams of dried marijuana was considered an adequate amount for personal use), also focused on the expediency of determining/specifying different amounts for the purchase and storage of different drugs. In particular, according to the motivation part, *"the court does not rule out that in some cases, due to the nature of the drug and the conditions of its use, the act of possession of the amount of drugs, suitable for more than one use, can be considered committed clearly for person use and, similarly to drug consumption, having minimal impact on drug circulation. However, in order to determine this, it is necessary to analyze the properties of specific substances and determine the conditions of their consumption, which is impossible due to the abundance and diversity of prohibited substances within the existing lawsuit."*[87]

Lastly, in relation to the right to dignity, the Constitutional Court declared unconstitutional the normative content of Article 45 of the Code of Administrative Offenses and Article 273 of the Criminal Code, which provide for imprisonment as a sanction for the consumption and for the storage/possession of the amount for the single use of a drug which does not cause rapid addition and/or aggressive behavior.

IV. Reflection in the legislation of the decisions made by the Constitutional Court in relation to other drugs

The decision of the Constitutional Court on the Public Defender's lawsuit has become a cause for criticism. The reason for this is that instead of creating even more solid ground for a comprehensive care-oriented policy, the court found it permissible to impose prison sentences against users of certain drugs.[88] Such repression and stigmatization of drug users for the sake of public safety jeopardizes the prospect of concluding the process of developing a humane and care-oriented drug policy initiated by a court. Extremely problematic is the argument used by the court, according to which a user in a state of abstinence is prone to commit criminal acts. The court, in this case, considers the possibility of applying deprivation of liberty against a person to be admissible only on the basis of the possible consequence of abstinence. This approach is, in essence, allowing the possibility of punishing a person

[85] Ibid, para. 58
[86] Ibid, para. 58.
[87] Ibid, para. 64.
[88] Ana Nasrashvili, Drug Policy in Georgia, 2019 Trends, Social Justice Center, 2020, p. 23, available at: https://bit.ly/2ZxTDwL, accessed on: 26.10.2021.

for general prevention purposes, which is in direct conflict with the standards and arguments established by the Constitutional Court in other cases.

In addition, the court's approach to identify the so-called hard drugs based on "rapid addiction" and "aggressive behavior" criteria is also unclear. Such a separation has drawn criticism from many narcologists because of the difficulty to classify substances according to these criteria.[89] Typically, the effects of drugs vary depending on the individual characteristics of the person and the environment.[90] According to narcologists, the dose of the drug and the regularity of its use also play an important role in this regard.[91]

Nevertheless, it should be noted that the legislature is obliged to start the process of reflecting the decision in the legislation and to clarify the issues that have been unclear so far, including on the disctinction of the so-called soft and heavy drugs. The Constitutional Court has made it clear that the use of prison sentences for the use marijuana and other so-called soft drugs, and purchase and storage of the required dose for a single use is impermissible. However, at the legislative level it is not yet clear to which drugs other than marijuana this approach applies.

Given the reasoning in the motivation part of the same decision, the legislature, with the involvement of other agencies and experts in the field, should also consider whether more than one dose of certain drugs could be considered for personal use. This is stemming from the parallel drawn by the court in the case of Beka Tsikarishvili, where up to 70 grams of dried marijuana was considered as a quantity intended for personal purposes.[92] In this case, the court relied on reasoning for the amount required for a regular customer. Although the court spoke in detail in the Public Defender's case about the amount needed for only one use, they still left room for a more complex analysis of the issue and referred to the importance of further discussion on it.[93]

At the same time, some issues remain unclear even as the cases of Bakhutashvili and Korsava-Gamgebeli were finalized. For example, it is procedurally unclear whether expertise should be scheduled in all cases to determine the adequacy of the amount of drug. The legislative body has not debated whether these cases have necessitated systematic procedural guidlines and additional legislative changes to determine unusable amounts.

Amid the need for large-scale legislative changes, the amendment proposed by the legislative organ regarding the determination of drug quantities remained fragmented and unsystematic. On March 5, 2021, Parliament passed a bill that redefined the small, large, and particularly large amounts of 8

[89] Punishment for unspecified drugs abolished - what do narcologists say? available at: https://bit.ly/3GnI2Rj, accessed on: 26.10.2021.
[90] Ibid.
[91] Ibid.
[92] Public Defender of Georgia v. Parliament of Georgia, para. 64-65.
[93] Ibid.

substances under special control.[94] These include amphetamine, desomorphine (so-called "cracadil"), lysergic acid (LSD), MDA (so-called "ecstasy"), methadone, methatinone (ephedron), and methamphetamine, which previously did not have small and initial amounts for criminal liability.[95] In addition, doses were redefined and reformulated in the case of heroin.[96] The new legislative regulation was not the enforcement of any particular decision, although the need for such changes stemmed from the spirit of all decisions made by the Constitutional Court on drug quantities, first and foremost from the court's deliberations, on the one hand, in Lasha Bakhutashvili cases and in the cases of Noe Korsava and Giorgi Gamgebeli, on the other.

The named legislative changes have been sharply criticized by civil society organizations.[97] The foundation for the criticism was the proposed quantities and the principle on which their quantification was based. As the explanatory note reads, "*in determining the amounts, the harmful effects on the life and health of these substances were taken into account. More than one dose consumed by the episodic drug user was taken as a measure, which is counted as a pure substance, in the case of each substance".*[98] In addition to the fact that it is not clear how the single doses for the mentioned substances were defined, it is also problematic that the single dose is calculated not on the basis of the daily dose of a regular user but on the example of an episodic user (for example, in the case of heroin, the single dose for the regular used is usually 50 -100 mg, which is 10-20 times more than the amount specified in the bill).[99] Thus, the new regulation still ignored the needs of more vulnerable groups - regular drug users and persons with drug addiction.[100] This, in fact, recognized the problems of only a small group of victims of repressive drug policy.

The explanatory note of the bill also read that the amounts of the most commonly used drugs would be regulated in a different way from the current legislation.[101] In this regard, it is unclear what specific sources the proposed approach was based on and why other common drugs (e.g., buprenorphine and cocaine) were excluded from this list.[102]

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[94] Ana Nasrashvili, Drug Policy 2020 Report, p.6
[95] Ibid.
[96] Ibid.
[97] Civil society organizations respond to the bill on drug quantities, available at: https://bit.ly/3GrEIoC, accessed on: 26.10.2021.
[98] Explanatory note on the bill on Amendments to the Law of Georgia on Law on Narcotic Drugs, Psychotropic Substances, Precursors and Narcological Assistance, p.5, available at: https://bit.ly/3GlDKdf, accessed on: 26.10.2021.
[99] Civil society organizations respond to the bill on drug quantities, available at: https://bit.ly/3GrEIoC, accessed on: 26.10.2021.
[100] EMC responds to the bill on drug quantities, available at: https://bit.ly/3EfsUDR, accessed: 26.10.2021.
[101] Civil society organizations respond to the bill on drug quantities, available at: https://bit.ly/3GrEIoC, accessed on: 26.10.2021.
[102] Ibid.

Beyond these significant shortcomings, it must be said that a new determination of the amounts of several drugs may not be sufficient for a systemic and fundamental change in existing drug policies. In this regard, it is important to highlight the observations of Human Rights Watch on Georgia, which points to *"the problem of penalizing the act of possessing small amounts of drugs, as well as the need for decriminalization of drug use in general and the importance of narco-policies based on public health approaches."*[103]

An attempt to make a fundamental change in this issue in Georgia was a draft law developed by the Georgian National Drug Policy Platform and initiated in the Parliament in 2017, as a way to substantially change the state policy.[104] The bill provided for the improvement of treatment-rehabilitation and prevention systems and the decriminalization of possession of all types of drugs for consumption and possession for the purposes of consumption.[105] It fairly defined the small and initial amounts of narcotics for criminal liability, as well as the sanctions imposed for drug related crimes, and so on.[106] However, after the first reading of the legislative package in the Committee on Health, the works related to the bill have been suspended for an indefinite period in the Parliament.[107]

Conclusion

The history of drug policy development in Georgia embodies particularly difficult experiences, as well as examples of episodic but significant victories in the direction of the policy humanization. Decisions made by the Constitutional Court were and still remain pertinent in terms of humanization and liberalization of drug policy. These decisions provided the basis for a more comprehensive, systematic, and care-oriented approach with regard to the issues of consumption, purchase and storage of any narcotic drugs. Although this basis initially seemed quite solid, the lack of political will made it impossible to make a fundamental change in drug policy, and the Constitutional Court itself, in some recent decisions, failed to show the will to radically transform the status quo.

The legislature implemented the decisions made by the Constitutional Court mainly in technical terms. However, there were cases when the reflection of the decision made by the Constitutional Court in the legislation was unreasonably stalled, not enforced at all, or the Parliament unduly narrowed the reasoning of the court and misinterpreted it. Most importantly, the only attempt to substantially amend the drug policy in Georgia was back in 2017, however, as already mentioned, the discussion of the bill submitted for this purpose was suspended in Parliament.

Consequently, in the light of the decisions made by the Constitutional Court since 2015 and the legislative amendments implemented by the Parliament, the current situation calls for a critical

[103] Ana Nasrashvili, Drug Policy 2020 Report, p. 7.
[104] Ana Nasrashvili, Drug Policy in Georgia (Suspended Reform and New Trends), p. 16.
[105] Ibid.
[106] Ibid.
[107] Ibid.

assessment. Although drug policy has undergone significant changes in recent years, fundamental amendments have not taken place. Lack of political may be understood as a decisive factor in this case.

The Georgian government continues to fight drugs through repressive means. In fact, the fate of a regular user of any drug other than marijuana is still more closely linked to prison than to care and treatment services. This is against the backdrop of the universally acknowledged fact that the harsh criminal liability for drug users brings very little (if any) benefit.[108]

Human Rights Watch notes that it is "*unaware of any empirical sources proving that the perpetrators of the drug crime commit any other serious crime*."[109] The same organization states in its report: "*Criminalization of drug use is also counterproductive for public health purposes. Despite a harsh criminal drug policy, drug use has, in fact, increased in the last decade. For people who struggle with drug dependence, criminalization often means cycling in and out of jail or prison, with little to no access to voluntary treatment. Criminalization undermines the right to health, as fear of law enforcement can drive people who use drugs underground, deterring them from accessing health services and emergency medicine and leading to illness and sometimes fatal overdose."*[110]

Against this background, the approach of the Constitutional Court, which, in its decision in the application submitted by the Public Defender, considered employing repressive means against the so-called heavy drug users permissible, can be described as problematic. In addition, the fact that the Constitutional Court delays deciding on a number of cases is also undoubtedly problematic. For example, the court did not render a judgement on two lawsuits filed by the Social Justice Center in 2015 and 2016. The first case concerns the constitutionality of the automatic deprivation of various civil rights (including the right to drive a vehicle and the right to work at public service) against persons convicted of drug offenses (citizens of Georgia - Konstantine Labartkava, Malkhaz Nozadze and Irakli Gigolashvili v. Parliament of Georgia).[111] In the second lawsuit, the organization requested the criminalization of the purchase / possession of a small amount of drugs for personal use (Georgian citizens - Gela Tarielashvili, Giorgi Kvirikadze, Vladimer Gasparyan, Ivane Machavariani and others against the Parliament of Georgia) to be declared unconstitutional.[112] In addition, the complaint of the Public Defender, which was submitted to the Constitutional Court in late 2015, is noteworthy.[113] The

[108] Harsh Punishment – The human toll of Georgia's abusive drug policies, short overview, Human Rights Watch, 2018, available at: https://rb.gy/ylieid, accessed on: 26.10.2021.
[109] Ibid.
[110] Ibid.
[111] The problem of delays at the Constitutional Court of Georgia, available at:https://bit.ly/3BbnKXr, accessed on: 26.10.2021.
[112] Ibid.
[113] The Public Defender of Georgia v. the Parliament of Georgia, the Minister of Internal Affairs of Georgia and the Minister of Labor, Health and Social Affairs of Georgia, available at: https://bit.ly/3Etwg6r, accessed on: 28.10.2021.

ombudsperson appealed the entire "street drug testing" procedure, "from the subjection of the person to the issuance of a court ruling on an administrative offense against him."[114]

It is important that both the Parliament and the Constitutional Court properly understand their crucial role, mission and the need for a radical change in existing drug policy. It is essential that the actions of all actors be focused on creating a humane, care- and treatment-oriented drug policy focused on a person. In this process, the possibilities of imposing repressive means should be limited as much as possible.

In conclusion, the following recommendations can be made:

- The legislature should implement a fundamental drug policy reform that, among other things, fairly determines the amounts of drugs
- Drug policy should focus not on punishing drug users but on access to care and treatment services
- Instead of taking a reactionary stance on the decisions of the Constitutional Court, the parliament should set its own political agenda on acute drug policy issues
- The legislature should not narrow down the scope of decisions of the Constitutional Court. Parliament should reflect them in the legislation on the basis of the arguments in the decision, to the fullest extent
- Parliament should ensure that the decisions of the Constitutional Court are reflected in the legislation within a reasonable time period
- For its part, the Constitutional Court must ensure that decisions are rendered in due time
- The Constitutional Court needs to be more consistent and clearly articulate the need to develop a care-oriented drug policy.

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