

# The Liberalization of Drug Policy and the Role of the Constitutional Court of Georgia in this Process

“A human shall not be an instrument of criminal policy and a tool for fight against crime. A human is an aim itself on which the state action is oriented, including in process of criminal policy formation”.<sup>1</sup>

## 1. Introduction

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The main objective of this paper is to give the reader a general overview of the drug policy existing in Georgia and its negative results. This article will mostly cover the judgments of the Constitutional Court of Georgia which had a crucial impact on prompting the process of liberalization of drug policy. Also, there will be presented an experience of other countries and reports of international organizations regarding this topic. Thus, while analyzing abovementioned information within the scope of comparative, teleological and systematic methods, the necessity of liberalization of drug policy and its further positive effects on society will be underlined.

## 2. Severity of the Issue

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In 2012 police arrested 30-years-old Vano Machavariani, a day before his wedding. In fact, Machavariani was on his way to his own bachelor party

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<sup>1</sup> Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia, October 24, 2015, II-54.

when police stopped him and seized two doses of the hallucinogenic drug LSD, 0.00172 grams, from him. The seized amount was qualified as particularly large, and a court sentenced Machavariani to nine-and-a-half years of imprisonment. His engagement fell apart and Machavariani spent five years in prison before he was released by presidential pardon in October 2017.<sup>2</sup> Machavariani possessed only 0.00172 grams of LSD for personal use, but according to survey in Georgia, it is not unusual for people like Machavariani to be punished by grave criminal penalties.<sup>3</sup>

This typical story indicates an abusive drug policy and use of harsh punishment in Georgia. The roots of such cruel attitude we should seek at the very beginning when Georgia chose criminalization approach against using and selling drugs. In 2006 Georgian Government announced a “zero tolerance policy” towards all crimes, including drug-related offences. The same year parliament adopted new anti-drug-related legislation that set out higher financial penalties and longer prison sentences for drug offences, reduced judicial discretion in drug sentencing and established additional penalties for drug offenders. During this process human rights were neglected and endangered that many citizen would become a victim of harsh punishment in the future.

Although the Georgian government has partly liberalized its drug policies since 2012, they remain harsh. The criminal justice system continues to treat most drug consumption or possession for personal use as a criminal felony. The impact of overly punitive drug laws and practices, including disproportionately harsh prison sentences and fines, abusive, mandatory drug tests, coerced plea bargains, and arbitrary limitations on rights, such as obtaining a driver’s license or working in various professions still remain a challenge and a serious problem in Georgia.<sup>4</sup>

However, day after day the attitude of society and the government is becoming more liberal, which is orientated on public health and safety and is focused on public awareness information campaigns, harm reduction programs and overcoming stigma and discrimination of drug users.

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<sup>2</sup> Human Rights Watch report on Harsh Punishment – The Human Toll of Georgia’s Abusive drug policies, 2018, pp. 1-2, 5, <https://www.hrw.org/report/2018/08/13/harsh-punishment/human-toll-georgias-abusive-drug-policies>, (accessed 15 September, 2018).

<sup>3</sup> *Ibid.*, p. 1.

<sup>4</sup> *Ibid.*, p. 2.

### 3. Milestone Judgment

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When we are talking about the process of liberalizing the drug policy, we have to mention a revolutionary judgment of Constitutional Court namely “Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia”, dated by October 24, 2015. According to Ketevan Eremadze, who was the reporting Judge on this case, by this judgment the Constitutional Court obliged all branches of state authority including itself to change vicious drug policy.<sup>5</sup>

According to the judgment, within this dispute the Court should have assessed whether the punishment prescribed by the disputed provision for a certain act (from 7 to 14 years imprisonment for possession/purchase of Marijuana in large quantities with the purposes of personal use) constituted inhuman, cruel and degrading treatment/punishment in the democratic society.

According to Respondent Party the legitimate aims of regulating (restricting, prohibiting) turnover of narcotic substances including Marijuana were prevention of distribution of drugs, protection of health and ensuring social safety.<sup>6</sup>

The Constitutional Court established:

- In the state based on Rule of Law criminalization of acts and setting punishment for it is successful only if it is used as ultima ratio, in cases when non-criminal legal mechanisms for protection of legal value are exhausted.<sup>7</sup>
- The imprisonment without any cause, and thus no necessity or when term of imprisonment is clearly disproportionate for achieving objective of sufficient responsibility for committed act violate the ambit of the prohibition of inhuman and degrading treatment and punishment.<sup>8</sup>
- The punishment set by law for commission of certain acts should be reasonably and logically related to the damages caused by the crime which are incurred/might be incurred on individuals/society.

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<sup>5</sup> K. Eremadze, *freedom defenders in seeking of freedom*, Tbilisi, Meridiani, 2018, p. 479.

<sup>6</sup> Citizen of Georgia Beka Tsikarishvili v. the Parliament of Georgia, October 24, 2015, II-67-68.

<sup>7</sup> Ibid., II-37.

<sup>8</sup> Ibid., II-25.

- The law should be enabling the judge to take into consideration specific circumstances of the case, damages caused by wrongful act, level of culpability of the accused etc. while deciding on imposition of penalty.<sup>9</sup>

Thus the Constitutional Court concluded that due to its blank character the disputed provision did not satisfy essential criteria used for assessment of proportionality of punishment – possibility for individualised approach, specifically:

- The punishment prescribed by the disputed provision equally applied to all narcotic substances, while they were radically different in terms of essence of dangers caused, magnitude, and level of threat.
- The legislation did not create possibility of differentiation between purchase/possession of Marijuana for personal use and for distribution.<sup>10</sup>

The Court found that it should not be denied that consumption of Marijuana carries potential threat to human health. However, consumption of Marijuana (not a distribution) can only damage the health of the consumer, not a society. Imposition of punishment on individual for an act which might endanger only his/her health is aimless and therefore, unjustifiable.<sup>11</sup>

According to the Court in relation to the danger towards the third parties/society potentially derived from purchase/possession of Marijuana there are not any trustworthy researches, which would indicate to the existence of inevitable correlation between consumption of Marijuana and increased number of other crimes. The risks of commission of other crimes derived from characteristics of Marijuana is the same or less compared to the risks derived from consumption of alcohol, which is not punishable.<sup>12</sup>

Within the scope of the claim the Court determined that the disputed provision due to its blank nature entailed possibility for imprisonment of an individual only because he/she might harm his own health, while there were no real risks of damaging the health of others (because the provision allowed punish-

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<sup>9</sup> Ibid., II-38.

<sup>10</sup> Ibid., II-98.

<sup>11</sup> Ibid., II-84.

<sup>12</sup> Ibid., II-87.

ing individual even in cases when purchase/possession was not conducted for distribution). Therefore, cruelty and eminent inadequacy of such punishment was clear and obvious. “In such cases strict punishment like this is used as aim to punish human and not as extreme and necessary measure for protection of a legitimate aim. As a result human becomes instrument in disposal of the state and not the object of protection. Therefore, it causes violation of human dignity through setting inhuman, cruel punishment”, – concluded the Court.<sup>13</sup>

#### 4. Further Steps against Criminalization

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The 2015 ruling prompted other constitutional lawsuits that challenged Georgia’s criminal drug policy. Regarding to them it is worth to mention some leading judgments:

On July 14, 2017, the Court ruled in favor of an applicant who challenged the proportionality of sanctions for growing Marijuana. The Court declared unconstitutional the deprivation of liberty as a penalty for growing up to 151 grams of cannabis.<sup>14</sup>

On November 30, 2017 the Court ruled that it is within an individual’s right to free development of one’s personality to choose a type of recreation, including Marijuana consumption<sup>15</sup>. According to the Court, unless this action creates any relevant risk or danger to another person, it should not be considered as a crime. By this Judgment the Court actually established a decriminalization of Marijuana consumption and emphasized that incarceration for Marijuana consumption is very dangerous because it may not prevent but promote using other drugs<sup>16</sup> as drug users become more vulnerable in prison, where an access to various drugs is easier today.

On July 30, 2018 the Constitutional Court issued another ruling abolishing all administrative sanctions for Marijuana consumption<sup>17</sup> (not purchase and

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<sup>13</sup> Ibid., II-105.

<sup>14</sup> Citizens of Georgia Jambul Gvianidze, David Khomeriki and Lasha Gagishvili v. the Parliament of Georgia, July 14, 2017, II-37.

<sup>15</sup> Citizen of Georgia Givi Shanidze v. the Parliament of Georgia, November 30, 2017, II-49-51.

<sup>16</sup> Ibid.. II-41.

<sup>17</sup> Citizens of Georgia Zurab Japaridze and Vakhtang Megrelishvili v. the Parliament of Georgia, July 30, 2018, II-35.

possession which are regulated under the criminal code). However, the court expressly noted that only blanket ban of consumption of Marijuana is unconstitutional with respect to the right of self-determination of a person and that the legislator has a discretion to regulate the consumption of Marijuana in sensitive places such as schools for example in order to protect the juveniles' interests.<sup>18</sup>

Moreover, at this time there are numbers of complaints pending at the Constitutional Court. Among them one challenges the constitutionality of imprisonment as a punishment for consumption of any type of drugs and another one concerns the constitutionality of mandatory drug testing and questions the proportionality of detention during this procedure as well as additional penalties which are imposed on convicted drug offenders.<sup>19</sup>

## **5. Experience of other States related to Liberalizing Drug Policy**

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According to World Drug Report 2017 of United Nations Office on drugs and crime using and selling narcotic substances still remains one of the major global problem. It has a terrible impact on health and causes HIV, hepatitis and tuberculosis. Moreover, manufacturing of drugs is increasing and links with organized crime, illicit financial flows, corruption and terrorism.<sup>20</sup>

An estimated quarter of a billion people, or around 5 per cent of the global adult population, used drugs at least once in 2015. Even more worrisome is the fact that about 29.5 million of those drug users suffer from drug use disorders. Opioids are the substances that cause the highest negative health impact, but cannabis remains the world's most widely used drug.<sup>21</sup>

For one sight a harsh punishment and criminalization is a logical response to negative effects drugs have over the society but why do the international organizations and states often prefer liberal and health-oriented approach? Because the main target of such approach are drug users, people who are

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<sup>18</sup> Ibid.. II-35-37.

<sup>19</sup> Constitutional complaints №697, №702 and №770 <http://constcourt.ge/ge/court/sarchelebi>, (accessed 12 September, 2018).

<sup>20</sup> United Nations Office on Drugs and Crime, World Drug Report, booklet 1, 2017, p. 3, <https://www.unodc.org/wdr2017/index.html> (accessed 15 September, 2018).

<sup>21</sup> Ibid.. p. 13.

already vulnerable and need help, not incarceration which in turn contributes to their further stigmatization and isolation from the society.

In 2010 report to the UN General Assembly on the right to health and international drug control, the UN special rapporteur on the right to health specifically called for decriminalization on the grounds of respect for the right to health, and recommended that “member states...should reform domestic laws to decriminalize or de-penalize possession and use of drugs, and increase access to controlled essential medicines.”<sup>22</sup>

A number of countries around the world either do not have laws criminalizing drug use and possession for personal use, or do not enforce criminal laws in practice. For example, Personal drug use and possession are not criminalized by law in Spain, the Czech Republic, and Costa Rica.<sup>23</sup>

Also Portugal is a good example to estimate the positive effect of decriminalization. In 2001, Portugal decriminalized the acquisition, consumption, and possession of illicit drugs in quantities up to a 10-day supply. Nevertheless, drug trafficking and sales still remains criminal offenses and are prosecuted. Importantly, the government also invested substantial resources in treatment and harm reduction services. The results of Portugal’s decriminalization so far indicate that public safety is much better. According to a 2010 evaluation, rates of overall use in the population have stayed low, below the European average, while use by adolescents and people deemed to be drug dependent or who inject has declined. Deaths caused by drug overdoses decreased from 80 deaths in 2001 to 16 deaths in 2012.<sup>24</sup>

Decriminalization of personal use of Marijuana and other drugs is a common practice not only in Europe but all over the world. In 2014 the Supreme Court of Mexico ruled that absolute prohibition of acts related to personal use of Marijuana for recreational purposes were unconstitutional.<sup>25</sup> The

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<sup>22</sup> Report to the UN General Assembly on the right to health and international drug control, 2010, p. 20, <https://www.ohchr.org/Documents/Issues/Water/Contributionsstigma/others/SPhealthI.pdf>, (accessed 15, September, 2018).

<sup>23</sup> Human Rights Watch report on Harsh Punishment – The Human Toll of Georgia’s Abusive drug policies, 2018, p. 64, <https://www.hrw.org/report/2018/08/13/harsh-punishment/human-toll-georgias-abusive-drug-policies>, (accessed 15 September, 2018).

<sup>24</sup> *Ibid.* pp. 65-66.

<sup>25</sup> Mexico’s Supreme Court Ruling on Cannabis – English Translation, [webpage], 2015, <https://www.scribd.com/document/289159427/Mexico-s-Supreme-Court-Ruling-on-Cannabis-English-Translation>, (accessed 19 September, 2018).

Court considered that it belongs within the strict scope of individual autonomy protected by the right to free development of personality: the possibility to responsibly decide whether to experience the effects of this substance despite the harm that this activity can generate to a person. The court found that there is a need of regulation, not a blanket ban of using Marijuana similar to alcohol and tobacco and that decriminalization should be accompanied by informational campaigns, educational and health policies. The court also noted that the policy which directly attacks the social factors that cause drug use is more effective, than a measure that combats this problem through the prohibition of consumption. Based on the same reasoning the Supreme courts of Columbia,<sup>26</sup> Argentina and the South Africa<sup>27</sup> made the decision in favor of marijuana decriminalization for personal consumption. According to Argentina Supreme Court Judge Carlos Fayt, the old conception that all criminal legislation must be directed inevitably against both the trafficker and the consumer has been proven outdated. Criminalizing an individual for drug consumption is undeniably inhumane, subjecting the person to a criminal process that will stigmatize him for the rest of his life.<sup>28</sup>

## 6. Conclusion

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To conclude, Judgments of Constitutional Court of Georgia were not arbitrary. These were reasonable and well-grounded steps based on the international progressive experience on the way of changing cruel drug policy in Georgia. It is true that Constitutional Court discussed constitutionality of certain acts and certain kind of drugs, but in its judgments the Court made clear directions based on which liberalization of general drug policy became irreversible. Blanket bans and harsh punishments were declared unconsti-

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<sup>26</sup> Judgment C-221 of 1994, Colombia Constitutional Court, <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6960> (accessed 19 September, 2018).

<sup>27</sup> Judgment №8760/2013 of the High Court of South Africa, <http://www.saflii.org/za/cases/ZAWCHC/2017/30.pdf>, (accessed 21 September, 2018).

<sup>28</sup> Argentina's supreme court "Arriola" ruling on the possession of drugs for personal consumption [website], 2009, <https://www.tni.org/es/node/11537>, (accessed 21 September, 2018).



tutional with respect of the most important values of human: dignity and the right to free development of personality. The Court also emphasized that in democratic and Rule of Law state individual should be main goal, object of respect, major value, and not means of achieving certain aims... People shall enjoy the positive outcomes of progressive humane understanding of the development of society and the law.<sup>29</sup> As a result of these judgments the legislator has partly decreased the sizes of sentences for drug offences and started working on the liberal draft laws and action plan, the courts of general jurisdiction became free from political impact, which caused ending of age of routine decisions in this field and increasing of court references in Constitutional Court. But the most important thing here is that process of changes was prompted by the society which on the one hand, better analyzed the margins of the right to self-determination of every individual and on the other hand concluded that it is impossible to eradicate drug addiction by criminalizing it, but the only solution for fully socializing these people in society is liberal approach, based on preventive measures, informational and educational campaigns and better health-oriented policies.



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<sup>29</sup> Citizens of Georgia – Valerian Gelbakhiani, Mamuka Nikoleishvili and Alexandre Silagadze v. Parliament of Georgia, November 13, 2014, II-62-64.