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**The Effects of the Constitutional Court Ruling of
October 28, 2015 on the Freedom Charter of Georgia**

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Introduction

Today the whole civilized world agrees that the Soviet Union was a violent regime, which committed no less crimes than the total terror of the Nazi regime.

Georgia has 70 years of Soviet history. Throughout this period, Georgia and its people were victims of Russian terror and, willingly or otherwise, were also directly involved in violence against others and even their compatriots.

After the collapse of the Soviet Union and the socialist block some of the former socialist countries adopted lustration laws, forbidding certain individuals that had previously worked for the Communist Party from holding political positions. The laws also forbid former employees of Soviet intelligence from holding political positions.

The aim of this legislation was to expose the Communist regime and condemn its crimes, as well as protect the safety and security of these former Soviet countries. This type of legislation was adopted by Lithuania, Latvia, Estonia, Hungary, Czech Republic, Poland and other countries.

Unfortunately, Georgia failed to adopt a lustration law during the first stage of its independence. The process was further complicated by the fact that the KGB officers took a significant part of the former KGB archive to Moscow, while the remaining documents in the archive were destroyed in the 1991-1992 war in Tbilisi, during a fire at the KGB building.

Only on May 31, 2011 did Georgia manage to adopt the Freedom Charter for the purpose of strengthening national security. The charter aims to protect the interests of the state and its citizens, combat crime, coordinate the activities of state agencies against terrorism, monitor objects and cargo of strategic and special importance, etc. The Freedom Charter also denounces the Soviet totalitarian ideology. The human rights violations committed by the Communist dictatorship were unprecedented for the world. These included various forms of mass terror that claimed the lives and freedoms of millions of people, as well as suppression of freedom of conscience, thought, religion and expression. The Freedom Charter aims to prevent the restoration of the Soviet totalitarian regime.

In order to achieve its objective, the Freedom Charter prohibits the employees of the former USSR special services (Article 10), as well as persons holding various positions in the Communist Party from February 25, 1991 until April 9, 1991 (Article 9) from being appointed to various state positions of independent Georgia (Article 8).

The term 'lustration' is Latin in origin and means sacrifice. Almost 25 years have passed since the collapse of the Soviet Union. To what extent is the existence of such restrictive rules justified? To what extent are these restrictions of private interest and 'sacrifice' of human rights based on a legitimate public interest?

Constitutional Complaint – Georgian Citizen Nodar Mumlauri against the Georgian Parliament

On July 24, 2013 citizen Nodar Mumlauri filed a complaint to the Constitutional Court, stating that Article 9, Paragraph 1, Subparagraphs c) and d) of the Freedom Charter were contrary to the rights guaranteed by the Constitution.

According to Article 9 of the Freedom Charter, positional restrictions apply to those persons, who, from April 25, 1921 until February 9, 1991, served as:

- a) Secret officials of the former Soviet Union's secret services, and, since the day of Georgia's declaration of independence (April 9, 1991):
 - a.a) Have refused to cooperate secretly with the special services of independent Georgia.
 - a.b) Were dismissed from the office of secret officials for state security reasons.
 - a.c) Broke off their relations with the special services of independent Georgia for unidentified reasons.
- b) Officers of the former USSR State Security Committee, who, since the day of Georgia's declaration of independence (April 9, 1991), have refused to continue working with the special services of independent Georgia or who, for state security reasons, were refused work at the special services of independent Georgia.
- c) Members of the Communist Party Central Committees of the former USSR and the Georgian SSR, as well as secretaries of district and city committees.
- d) Members of the former USSR's and the Georgian SSR's Lenin Communist Youth Union Central Committee Bureaus
- e) Chairman of the Georgian State Committee on Television and Radio Broadcasting

In order to better understand the restrictions made by the Freedom Charter and the resolution part of the Constitutional Court ruling, we should take a look at the factual circumstances and motivation of the Constitutional Court ruling.

As noted above, the Constitutional Court complaint was filed by citizen Nodar Mumlauri against the Parliament of Georgia. In the constitutional claim, the applicant pointed out that on June 17, 2013 he participated in the competition for the vacancy of governor of Telavi municipality, but was unjustifiably removed from the competition, and told that he would be unable to participate based on the above mentioned Article 1, Paragraph c) and d) of the Freedom Charter. The plaintiff indicated in the constitutional claim that he had been a member of the Central Committee Bureau of the Lenin Communist Youth Union of the Georgian SSR, and later worked as secretary of Telavi district committee of the communist party.

In his constitutional claim the plaintiff pointed out that:

- The restriction on holding state positions prescribed by the disputed norms constituted an act of political retribution, which could be used repeatedly after any parliamentary elections.
- Persons who were restricted from holding state positions listed in the Freedom Charter held important state positions and made decisions prior to the adoption of the Freedom Charter (May 31, 2015).
- The disputed provisions impose the above restriction on persons based solely on the fact that they lived during the Soviet regime – a one-party state that did not leave individuals any alternatives.
- Instead of an absolute prohibition, persons applying for state positions should be examined in terms of their cooperation with Soviet secret services.
- The Freedom Charter did not specify a limitation period, and introduced a permanent ban on holding state positions.
- The Communist Party has not been banned by independent Georgia.
- The above restrictions could have been justified for a period immediately after the collapse of the Soviet Union.
- The disputed norms are contrary to Article 17, Paragraph 1 of the Constitution (the inviolability of a person's honor and dignity), since they do not differentiate between high and low level positions of Soviet Union secret services. Article 17 of the Constitution guarantees a person's right to be treated ethically and with dignity, which was being violated by the disputed norms.
- The disputed provisions contradict Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title, place of residence) by treating individuals differently based on their political views and place of work, depriving them of the opportunity to hold specific state positions based on their past political activities and the ability to contribute to the country's development. In other words, the disputed provisions were of a discriminatory nature.
- The disputed provisions created an unjustifiable barrier and violated Article 29, Paragraph 1 of the Constitution, according to which, every Georgian citizen has the right to hold any public office, if they meet the requirements set by the law.

The defendant, a representative of the Georgian Parliament, based their argumentation on Georgia's transition period after Soviet collapse, and stated that former party officials had a strong impact on domestic policy.

The respondent also pointed out that the contested provisions intended to prevent negative consequences rather than hold someone responsible, since state positions mentioned in the Freedom Charter are positions of highest authority that are responsible for important decisions related to the

country's internal and foreign policy.

The respondent argued that the plaintiff and other persons in similar circumstances held positions (described in the disputed provision) during the period of the former USSR and, therefore, were creators or supporters of the Communist totalitarian regime. The actions or inactions of such persons made possible a regime that is unacceptable for everyone and deserves to be condemned.

The respondent also indicated that the archive data was artificially changed or destroyed, so there was no accurate list of persons who secretly collaborated with the special services of the Soviet totalitarian regime. Consequently, it was impossible to find out what additional work these people performed. According to the respondent, "in the fight against the Soviet totalitarian regime, it's important to take into consideration the whole system and not just individuals."

The respondent noted that the disputed provisions were not contrary to Article 14 of the Constitution, since it differentiated between persons of different status. Persons mentioned by the disputed norms are subjects with a distinctive status that are connected to the communist regime and held state positions in the former Soviet Union. The defendant pointed out that the plaintiff had incorrectly understood the content of the first paragraph of Article 17 of the Constitution, since "the public opinion related to an individual is not protected by Article 17". The respondent pointed out that the disputed provisions are not contrary to Article 29 of the Constitution, since the right to hold a state position is not absolute, and must meet the requirements established by law.

The Constitutional Court ruling states that the defendant also referred to the legislation of the former Socialist Republics, which imposed restrictions on certain state positions.

The Constitutional Court ruled the following:

1. The Constitutional Court was going to rule on whether the disputed provisions indefinitely banning certain individuals from holding state positions contradicted Article 17 of the Constitution.
2. "The standing constitutional and legal order is established on diametrically opposed values of the Communist system. The principle of the constitutional state, the rule of law, respect for human rights and equality are fundamental values of the Georgian state and its constitutional system."
3. In view of recent history, the state may have a legitimate interest not to allow the recovery of the totalitarian regime in the country. However, this must be carried out by legal mechanisms that are based on rule of law and human rights. If such mechanisms do not meet constitutional requirements, "the state itself will become like the regime that it is trying to suppress".
4. Article 17, Paragraph 1 of the Constitution guarantees basic human honor and dignity as essential attributes of social identity and natural rights. "Respect for human dignity means recognizing each human person, and its deprivation or restrictions is unacceptable." However,

the existence of regulations limiting rights protected by the Constitution does not lead to the violation of this right. In each individual case, the Constitutional Court, establishes the compliance of disputed provisions with rights guaranteed by the Constitution by considering the content, goal and intensity of restriction of a right.

5. According to the plaintiff's position, banning the ability to hold certain positions is a violation of one's honor and dignity, since this equates the plaintiff to those Soviet intelligence officials, who refused to work for the security services of independent Georgia.
6. It is possible that not all people holding managerial positions were directly involved in the activities of the Communist Party of the Soviet regime, and could have even fought against it, as was made evident in 1991-1992, when some of these officials fought for Georgian national interests and not for narrow party ideology. However, "the disputed norms restrict such persons' right to occupy state positions."
7. "The disputed provisions establish a blanket ban without considering the scope of activities/authority/competence of those persons who set the internal/external ideological policies of the communist party, as well as on those individuals, who did not have the authority to change the situation and influence the decision making process granted to them by law or practice."
8. The ban was also applied to persons who formally held the positions (for a short period of time) and did not have time to start performing their duties. **Also, according to the disputed provisions, the decision to restrict a person from holding a state position does not have to be based on individual reviews of each person's activities and functions.** The restriction to hold state positions automatically applies to all persons who had previously held a party position.
9. As time passes, the risks and challenges that served as the basis for adopting the disputed provisions, lose relevance. The disputed provisions prevent the plaintiff to hold a number of state positions without an assessment of how realistic the above threats are today, and to what extent is the plaintiff still the same threat to state security.
10. The Court also considered it necessary to consider the social consequences of the disputed norms. The court stated that the disputed norms may lead to social exclusion of certain individuals or groups, therefore, the implementation of these regulations holds a risk of stigmatization.
11. The permanent restriction to hold state positions was clearly conceived as a punitive rather than a resocialization measure. In addition, these measures could not serve as an effective means of preventing threats. The Law on Public Service provides for the possibility even for persons that have committed grave crimes to hold public service positions after serving their sentence.
12. "For certain individuals who had occupied high positions in the Communist Party, there may be legitimate public interest in prohibiting them to hold high state positions. However, the

risks coming from these few people cannot serve as constitutional-legislative grounds for a blanket ban.

13. Through the disputed provisions the state has used individuals as a means of achieving its specific goal, and treated them as objects rather than subjects of law. “The state is using these people as the means for protecting national security and achieving the objective of overcoming the communist totalitarian ideology. Such treatment is not consistent with the constitutionally guaranteed right to dignity.”

14. On the basis of all of the above, the Constitutional Court ruled that the disputed norms were contrary to Article 17 of the Convention.

The Constitutional Court also examined the compliance of the disputed norms with Paragraph 1 of Article 29 (“every citizen has the right to hold any public office, if it meets the conditions established by law”) and Article 14 (all people are born free and equal before the law regardless of race, color, language, sex, religion, political or other opinion, national, ethnic or social origin, property and title condition, place of residence) of the Constitution.

Regarding Article 29, Paragraph 1 of the Constitution the Constitutional Court noted that the article guarantees every Georgian citizen the right to hold an elected as well as appointed position. At the same time, the court pointed out that this right was not absolute, and that the Constitution provided for the possibility of introducing legislative restrictions on the basis of legitimate goals. The legislator may introduce special requirements for state positions. However, when restricting the right to hold state positions, the legislator is obligated to maintain the balance between the legitimate purpose and employed means.

The Constitutional Court noted in its decision that the “primary requirement of Article 29 of the Constitution is to determine reasonable, fair and non-discriminatory terms for holding any state position. At the same time, the legislation may determine different conditions for holding each specific position based on the nature of the position, its functions, and importance, since these positions are of special importance in terms of the country’s independence, stability and security.” Since the Freedom Charter aims to ensure national security and safety by overcoming communist totalitarian ideology, in certain cases, due to increased public interest, it is possible to limit Article 29 of the Constitution, which guarantees the right to hold state positions, and create a legal order, which will be conducive to achieving the legitimate aim by avoiding potential risks.

Due to the above-mentioned circumstances, the Constitutional Court found that the disputed provisions are not in contradiction with the requirements of Article 29 of the Constitution.

The Constitutional Court also reviewed compliance of the disputed norms with Article 14 of the Constitution (all people are born free and equal before the law regardless of race, color, language, sex,

religion, political or other opinion, national, ethnic or social origin, property, title condition and birth, place of residence).

In particular, it is noted in the decision of the Constitutional Court that the Constitutional Court considers it important to separate the political views and political activity. “Individuals have private political views whether or not they hold positions in a political party and/or are members of political unions. A person may have political views without joining any political organization as well. Political activity is considered to be a person’s involvement in political unions, and/or agreeing with the ideology/worldview of a political union and being involved in trying to achieve its goals.”

The Constitutional Court noted that the disputed provisions do not provide different treatment on political grounds. The restriction set by the disputed norms applied to holding political leadership positions in the Communist Part mentioned in Article 8 of the Freedom Charter. **Therefore, the Constitutional Court stated that the disputed provisions do not contradict Article 29 of the Constitution.**

The Constitutional Court ruled invalid Article 8, Paragraph 1, Sub-paragraph c) and d) of the Freedom Charter, which the Court considered as contrary to Article 17, Paragraph 1 of the Constitution.

Therefore, positional restrictions were removed from those persons who were members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus from February 25, 1921 until April 9, 1991.

Amendments to and Effective Implementation of the Freedom Charter

First of all, it should be noted that the Constitutional Court ruling discussed above can have an important impact on contemporary Georgia.

We fully share the position of the Constitutional Court judges on imposing a permanent restriction of holding state positions on certain individuals (listed in Article 9 of the Freedom Charter) without examining their functions and activities during the Soviet regime. We can draw a parallel with Poland, where after adopting the lustration law people related to Soviet special services were prohibited from public service for a period of 10 years.

Also, it is important to differentiate working with the Communist Party and cooperation with special services. All former Soviet Socialist Republics or socialist countries impose stricter regulations for those individuals who collaborated with security services. In Several countries (e.g. Czech Republic, Poland, etc.) the list of these people is public and available to any interested person.

It is important that the Court did not consider these provisions incompatible with Article 29 and Article 14 of the Constitution. We fully agree with the court's position that restrictions made under the Charter do not lead to discrimination on political grounds, but rather is based on the activities or inactivity of

certain individuals during the totalitarian regime, and that the right to hold state positions listed in the Charter cannot be more important than national security.

The Freedom Charter restricts persons, listed in Article 9, from being elected or appointed to the following state positions:

“a) Members of the Georgian government, deputy ministers and ministry department heads, members of the National Security Council, State Security and Crisis Management Council, Central Election Commission, government members of the Autonomous Republics of Abkhazia and Adjara, general auditor of the State Audit Office and his/her deputies, director of the National Archives and his/her deputies (Legal Entity of Public Law (LEPL) under the Ministry of Justice), head and deputy heads of the President’s Administration, head and deputy heads of the Government Administration, head of the State Security Service, his/her deputies and department heads, extraordinary and plenipotentiary ambassadors, envoys, consuls, president and vice-president of the Georgian National Bank, representatives of executive authorities in administrative-territorial units (state trustee - governor), members of national regulatory bodies, executive director of LEPL National Statistics Office and his/her deputies.

b) Operational unit employees of the territorial bodies of Ministries of Defense and Internal Affairs, and the State Security Service.

c) Judges of the Constitutional and Common Courts of Georgia.

d) Rectors of higher education institutions, vice-rectors, deans and department managers; General director of the Georgian Public Broadcaster, his/her deputies and board members.”

As we can see, the list is quite long. The legislator tries to cover the entire political and educational field, which can affect the safety of state and the future generation. **This list partly draws from the experience of former socialist countries, however, it can be extended further to cover more unregulated areas, such as the prosecutor's office, public schools, and so forth.** For example, Poland’s lustration law also applies to prosecutors.

At the same time, the Charter guarantees the privacy of those persons who admit that they have secretly cooperated or had covert ties with the former Soviet special services. A similar approach is used in Lithuania, where, according to the lustration law, special service employees, who admit their connection with secret services, will be guaranteed confidentiality, but be prohibited from holding state positions.

The Constitutional Court ruling discussed above also contains important recommendations that should be taken into account by the Parliament. Specifically, changes should be made to the Freedom Charter so that persons listed in Article 9 are being examined in terms of their past work activities and functions prior to applying the prohibitions. Even though the Constitutional Court declared invalid Article 9, Sub-paragraphs c) and d) of the Freedom Charter, the basis of the decision was the blanket nature of

the ban that prohibits members of the Communist Party Central Committees of the former USSR and the Georgian SSR, secretaries of district and city committees, and members of the Lenin Communist Youth Union Central Committee Bureaus from February 25, 1921 until April 9, 1991 to hold state positions listed in Article 8 without individual evaluation. Moreover, the above restriction is permanent. Therefore, if the legislator introduces individual examination of the activities of these people, and makes the restriction temporary (e.g., a 10-year term, as it is in Poland), it will be possible to modify the invalidated norms and reintroduce them in the Freedom Charter. The blanket prohibition can still apply to former employees of Soviet special services that meet the requirements of Article 9 (the plaintiff stated that his low level position was being equated to an employee of special services, which was violating his dignity, since he was trying to distance himself from them), however, other officials should be subjected to individual examinations and the limitation period.

The Freedom Charter includes many other regulations that, for example, aim to combat fascist and Soviet symbols. This issue is extremely important due to the increased frequency of recent attempts to return Soviet monuments (e.g., statues of Stalin). There are many settlements remaining in Georgia that have streets named after totalitarian leaders (e.g, Stalin Street).

In addition, Article 11 of the Charter provides for the openness of information of those persons, who apply to the election commission to be registered as a candidate. If the election commission determines that the candidate is a person who has collaborated with former Soviet special services, it will address the election administration. If the electoral administration registers the candidate anyway, and the person does not withdraw their candidacy, the commission will publish the secret information about this person. The lustration laws of former socialist countries (for example, Hungary) also apply to persons who wish to hold electoral positions.

The Freedom Charter provides for setting up a Commission inside the State Security Service, which is also includes members nominated by parliamentary factions. Essentially, the charter implements its regulations through this Commission.

The above Commission needs to work actively towards implementing in practice the recommendations included in the Constitutional Court ruling.