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Communications Commission seeks to regulate broadcasters and goes beyond the authority provided by law

On December 7th, the National Communications Commission issued a statement calling broadcasters not to broadcast programs containing obscenity otherwise it will use its statutory authority. We believe that the Commission, under the guise of protecting the rights of citizens, is trying to regulate broadcasters, authority of which it does not have by law.

The Commission notes in a statement that a program containing obscenity may be subjected to judicial review, and since its decision is subject to judicial review, it also has the power to regulate the content of such a program. This reasoning of the Commission does not follow from the Law on Broadcasting or the Judgment of the Constitutional Court by which the judicial review over a program containing obscenity has been allowed.

The point is that the paragraph 2 of the Article 14 of the Law of Georgia on

Broadcasting did not allow the right to apply to the commission and the court in case of placement of a program containing obscenity, degrading human and a person's dignity and his/her fundamental rights, and this issue used to be resolved within the framework of the broadcaster's self-regulatory mechanism. According to the Judgment of the Constitutional Court №1/3/421,422 of 10th November 2009 in the case "Citizens of Georgia - Giorgi Kipiani and Avtandil Ungiadze v. Parliament of Georgia", the court considered this restriction on the court unconstitutional, as it contradicted the right to apply to the court. Accordingly, pursuant to the Judgment of the Constitutional Court, only the judicial review was allowed over the program containing obscenity, and in relation to the powers of the Commission it has not even been discussed.

In this case, the Constitutional Court could not discuss the constitutionality of the ban on applying to the National Communications Commission, as the right to apply to a court protected by Article 31, point 1 (Article 42 point 1 of the old version of the Constitution) was the subject of dispute. According to the case law of the Constitutional Court: "The right to a fair trial is ensured by appealing to the judicial bodies provided for by the Constitution of Georgia. Pursuant to Article 59 of the Constitution of Georgia, the judiciary in Georgia is exercised by **the Constitutional Court of Georgia and the Common Courts of Georgia**. The judicial body of constitutional review is the Constitutional Court of Georgia, and the justice of common jurisdiction is administered by common courts. "[1]

Thus, according to the Judgment of the Constitutional Court of November 10th, 2009, persons have the right to appeal against programs containing obscenity in a common or constitutional court. As the first paragraph of Article 31 of the Constitution does not protect the right to apply to the National Communications Commission, the Judgment of the Constitutional Court of 10th November 2009 does not allow the obscenity of the broadcasting program to be the subject of study or response by the National Communications Commission.

The law still precludes today the Commission from considering the matter on the basis of complaints and allows only court oversight.

According to the first sentence of Article 5, Paragraph 2 of the Law of Georgia on National Regulatory Bodies, the relevant law defines the issues within the competence of the National Regulatory Authority. Paragraph 2 of Article 5 of the Law of Georgia on Broadcasting directly lists the powers of the Commission in the field of broadcasting,

where we do not find the Commission's right to review and evaluate obscene content on the basis of a complaint. Moreover, Paragraph 2 of Article 14 of the same law directly excludes such authority and the right of oversight, in accordance with the Judgment of the Constitutional Court, leaving it only to the common courts. Consequently, such authority of the Commission derives neither from the law nor from the Judgment of the Constitutional Court, on the contrary, it contradicts them.

In another Judgment of the Constitutional Court, the Georgian National Communications Commission was banned from regulating the right to regulate offensive material, bypassing the Parliament. The Constitutional Court has stated that blocking offensive material on the Internet is a substantive regulation of freedom of expression. Parliament, not the National Communications Commission, has the power to pass such a regulation.

We would also like to point out that the content regulation of expression implies the restriction of the dissemination of an opinion/ information according to its content. Content filtering of information and determining which restriction on the dissemination of information/opinion is constitutionally justified should be done by the supreme legislative body on the basis of a transparent procedure characterized for passing a law, and the standards proposed by any other body are inherently unauthorized. [2] Based on this decision, the National Communications Commission has an obligation to prevent obscenity or insult in the broadcast media, when it is authorized by the Parliament of Georgia, after the detailed regulation of the concept of obscenity by law. Without such a legislative mandate, Article 17 of the Constitution would be violated, which prohibit the National Communications Commission from substantively restricting freedom of expression.

It is also noteworthy that the National Communications Commission makes such an explanation of the law 11 years after the Judgment of the Constitutional Court was delivered. Consequently, the question arises, if the Commission really had such authority, why it was not using it. We also emphasize that it is the duty of the legislator to create guarantees/safeguards for the protection of the fundamental rights of persons against obscenity, and it is the responsibility of the court and not the commission to have the right to oversee it. Accordingly, in case of violation of the rights of individuals, they can apply to the court in the manner prescribed by law.

In view of all the above, we call on the Commission do not make any interpretations against law any more and not to go beyond its authority given by law when making a decision.

[\[1\]](#) Recording Notice (Minutes) of the Constitutional Court N1/1/1312 of March 21st, 2019 in the case of Konstantine Gamsakhurdia v. Parliament of Georgia

[\[2\]](#) Judgment of the Constitutional Court of Georgia №1/7/1275 of 2 August 2019 in the case: "Alexander Mdzinarashvili v. Georgian National Communications Commission", II, 41.