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„Amicus Curiae“ Brief

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I. Formal Part

1. Details of the Author:

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2. Name of the case regarding which the Amicus Curiae brief is drafted ¹

N1/13/1424 Lasha Janibegashvili vs. The Parliament of Georgia

¹ Note 1 In the below field the following should be indicated: the number of the constitutional claim, name of the applicant or defendant or any other information that will allow the court to identify the case regarding which the Amicus Curiae Brief is submitted

II. “Amicus Curiae” Brief²

Note: James Moliterno is the Vincent Bradford Endowed Professor of Law at Washington and Lee University. He has taught courses on the legal profession for thirty-eight years at five US law schools, and at law faculties in eight other countries, including Georgia. He has consulted on lawyer, judge, and prosecutor ethics codes and laws in ten countries, including Georgia. He has been a frequent speaker at conferences on the ethics of legal professionals. He is the author or co-author of ten books. He has worked in eight European countries, some within and some not within the European Union. He has worked with lawyers, judges, and prosecutors in Georgia since 2006, within various USAID funded programs, including USAID/PROLoG project and he has had approximately 20 professional visits to Georgia.

In this Brief, Professor James Moliterno wishes to provide his views in relation to constitutional claim N1/13/1424, Lasha Janibegashvili vs. the Parliament of Georgia as far as the review of the claim has direct impact over the strength and independence of the legal profession in Georgia.

Amicus Curiae Brief

According to its Ruling dated 26 December 2019, the Constitutional Court of Georgia admitted the Constitutional Lawsuit of Mr. Janibegashvili (a member of the Georgian Bar Association, hereinafter GBA) to be heard on merits in two aspects of that lawsuit – the words included in Article 1.2 of the Law of Georgia on Advocates “and who is a member of the Georgian Bar Association” in relation to the first and second sentences of Article 26.4 of the Constitution of Georgia according to which “Freedom of enterprise shall be guaranteed. Monopolistic activities shall be prohibited except in cases permitted by Law”.

1. The Law of Georgia on Entrepreneurs directly excludes lawyers’ activities from entrepreneurial activity, underling in its Article 1.2 that “Artistic, scientific, medical, architectural, lawyer’s or notary, audit, consulting (including tax consultants’), agricultural or timber-industry activities of natural persons shall not be considered as entrepreneurial activity”.
2. The claimant maintains that the words of Article 1.2 of the Law of Georgia on Advocates “and who is a member of the Georgian Bar Association” are in breach of sentence two of Article 26.4 of the Constitution of Georgia, according to which “Monopolistic activities shall be prohibited except in cases permitted by Law”. Claimant states that the “creation of professional unions is a part of freedom of association and not a separate and independent right. The State is obliged to allow persons in accordance with their interests to create professional unions. As it is stated in his Lawsuit “it is especially impermissible to establish only one professional union where the membership shall be mandatory.”
3. Author of this *amicus curiae* believes that Claimant misunderstands the nature of the GBA. Rather than a voluntary, professional union, GBA is a public body, created by the legislature to perform certain delegated public functions. Mandatory membership in GBA for those wishing to practice law, as established by the Law on Advocates, is necessary for the successful achievement of the purposes of the legislature in establishing the GBA. The membership requirement triggers the functions delegated to GBA from the

² Note 2 - In the field below the following should be indicated: arguments of the “amicus curiae” and evidences based on which author substantiates the position regarding the case

legislature. GBA manages the entry into the legal profession. GBA hears complaints regarding lawyer conduct and resolves those complaints in accordance with the functions delegated to it by the legislature. Without mandatory membership, GBA would lack the authority delegated to it by the legislature to apply the law that regulates lawyers to members of the lawyer profession.

4. Contrary to Claimant's assertion, any lawyer, while being a member of GBA as required by the Law on Advocates, is free to establish voluntary associations of similarly-interested lawyers. For example, it would be permissible to establish a business lawyers association, a criminal defense lawyers association, a family law practice lawyers association, and so on. To be a lawyer in Georgia, a person must belong to GBA, but they may also establish and join other, voluntary associations of lawyers. As a result, Claimant is not being denied any right of association because of the language of the Law on Advocates of which he complains.

5. GBA is not itself an economic or entrepreneurial activity or entity. Instead it is a body of the state, created by the legislature to perform delegated functions. It was created by the state to regulate the activities of lawyers. And lawyers' work is not entrepreneurial, as is clearly stated by the Law on Entrepreneurs.

6. The Constitutional Court of Georgia has dealt with several cases on the legal profession and on the Law on Advocates, in which it stipulated a number of significant principles about the legal profession. Collectively, these cases establish that lawyer work is neither entrepreneurial nor economic activity, and that GBA is a state-created entity assigned by the Law on Advocates to perform several necessary functions for the purpose of maintaining an independent and well-regulated legal profession.

7. In its Judgment in case #1/1/207 dated 25 January 2000, the Constitutional Court of Georgia dealt with the taxation of notaries under the Tax Code which (the Code) declared that notarial activity was non-entrepreneurial economic activity due to the results of this activity. In the same Judgment, the Court touched upon lawyers' activities as well and noted that "the protection of human rights by a lawyer is much greater value in the process of building a rule of law state than the results of taxation of income received through his/her activities".

8. In its Judgment in case #2/10/256 dated 2 December 2004 the Court noted that "As regards to setting the necessity of testing of advocates by the State, the Chamber of the Court considers that it (i.e. testing) is a minimal standard to provide qualified protection of human rights by advocates". Furthermore, the Court stated that the "appropriate norm of the Constitution should not be understood in a way that the state cannot define the main principles of private service, especially when we talk about advocates' activities during which, unlike other types of so-called "liberal professions", advocates have to carry out professional activities within a contractual framework".

9. The Judgments referred to in paragraphs 7 and 8 inevitably recognize advocates as a liberal profession and as non-entrepreneurial activity carried out mainly within a contractual framework – i.e. not within the terms stipulated by the state but agreed between an advocate and the party whom he/she represents.

10. In a case regarding the constitutionality of the performance of the functions delegated by the legislature to GBA (Case #1/6/319, 7 March 2005), the Constitutional Court refused to admit the lawsuit of three lawyers who argued that the GBA should not have been authorized to have the right to terminate lawyers' membership as this constituted to assumption of the function of courts. The Court correctly refused the

claim because the claimant “failed to show why the GBA should not have a right to terminate membership to its members”. According to the Court, the argument that “there is no alternative association for carrying out legal activity cannot be considered as an argument a contrario to such situation”. The legislature had necessarily given that power to GBA in order to carry out the functions delegated to it from the legislature. The Court upheld the Law, giving GBA the sole power to impose sanctions on lawyers.

11. In Case #1/5/323 decided by the Constitutional Court on 30 November 2005, the Court correctly ruled that GBA is “a legal entity of public law established by a special law (Act of Parliament) and in this regard, the principle of voluntary membership could not be applied to it since it was not a private association.” The claimants were six lawyers who thought that the following stipulations of the Law on Advocates were unconstitutional: a) the words of Article 1.2 “and who is a member of the Georgian Bar Association” and b) the words in Article 20.1 “under public law”. They maintained that those articles were in breach of Article 26 of the Constitution, according to which “every individual has the right to create and join any association, including trade unions”. The claimants noted “they had to be members in order to carry out legal activity and if they are not members, they would not be able to practice i.e. to earn funds”. The Constitutional Court disagreed with their arguments and rejected their lawsuit on merits. The Court said that “the GBA was not an association but a legal entity established by public law.” The Court also indicated “it was up to the legislature to decide which organizational form it would select for establishment of this or that profession, which could not be subject of Article 26 of the Constitution”.

12. The Constitutional Court also clarified in that Judgment that “because at some point lawyers perform public activities, the legislature . . . set higher standards and established mandatory membership in the special professional union. Mandatory membership to GBA was justified from a constitutional point of view because the state established it for fulfillment of legitimate public functions”. The Court invoked a case of the European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium*, in which the ECtHR decided that doctors in Belgium could be imposed to be members of the Medical Association of Belgium.

13. The Constitutional Court further noted that “peculiarities of the purposes of the establishment of the GBA presupposed a non-ordinary legal status for this organization – taking into consideration the specificities of the legal profession, the GBA was established as a legal entity of public law of special nature possessing a very high level of independence from the state”.

14. Based on analysis of the Constitution of Georgia, the Law on Advocates, the Law on Entrepreneurs, and the case law of the Constitutional Court of Georgia it can be concluded that (a) lawyers’ activity is no entrepreneurial activity; (b) GBA was established by the legislature to perform legitimate public functions (i.e. regulation of the profession, sanctions in relation to lawyers, etc.); (c) thus, mandatory membership to the GBA is justified from the constitutional point of view.

15. It is obvious that the GBA is not the seller of any product. GBA does not produce or deliver legal services. The members of GBA, as required by the Law on Advocates, not GBA itself, provide legal services. The profession of lawyer is not entrepreneurial or economic activity. GBA cannot be a monopoly under the

Georgian definition of monopolistic activity because it does not sell a product or service to the public. No other body is given power to regulate lawyers by the state.

16. In Case #2/13/391, 10 July 2006, a lawyer claimed that Article 6802 of the Criminal Procedural Code of Georgia violated Article 26.6 of the 5 Constitution (which read as follows: “the prohibition of activities of public and political parties or groups is possible only by a court decision in cases and rights determined by organic law and established rights”), because Article 680² set two rules in order to make it possible for a person to represent someone in criminal proceedings: a) A lawyer should have had a certificate of lawyer and b) at the same time, he had to be a member of GBA. In addition, the Claimant maintained that “above-mentioned Article 6802 also contradicted Article 30.2 of the Constitution (which read as follows: “The state is obliged to foster conditions for the development of free enterprise and competition. Except cases envisaged by law, the monopolization of activity is prohibited. Consumer rights are protected by law”) because it put the GBA in monopolistic conditions in breach of competition and consumers’ rights”. The Constitutional Court did not admit this lawsuit, stating that “above-mentioned Article 30.2 of the Constitution provided assistance to freedom of entrepreneurial activity and guarantees to consumers’ rights while the disputable Article of the Criminal Procedural Code regulated lawyers’ activities which did not belong to entrepreneurial activities.” A different result would effectively have permitted an unregulated profession of criminal defense lawyers because the legislature has delegated to GBA the power to sanction lawyer misconduct. If a person with law training were permitted to represent criminal defendants without being a member of GBA, no state body would have authority to sanction such a lawyer’s misconduct.

17. As persuasively demonstrated by the Amicus Brief of the CCBE, and as is consistent with my experience working with bar associations in many European countries, especially those of Central and Eastern Europe, from the European perspective, none of the arguments of the claimant in this constitutional claim N1/13/1424, Lasha Janibegashvili vs. the Parliament of Georgia, could be considered valid: The claimant put forward the following arguments: (1) The legal profession should be deemed entrepreneurial; (2) The mandatory membership to the Georgian Bar Association stipulated in Art. 1 of the Law of Georgia on Advocates (“Advocate is a professional who . . . is a member of the Georgian Bar Association”) violates the lawyer’s right to free entrepreneurship set out in Art. 26.4 (“Freedom of enterprise shall be guaranteed”) and freedom of association pursuant to Art. 22 (“Freedom of Association shall be guaranteed”) of the Constitution of Georgia; and (3) The fact that there is only one Bar in Georgia, namely the Georgian Bar Association, should be considered to indicate that there is a monopoly, hence violating Art. 26.4, sentence 2 of the Constitution of Georgia: “Monopolistic activities shall be prohibited, except in cases permitted by law”.

18. My conclusions about European case law, legal norms, and practices is consistent with that of the CCBE Amicus Brief, so I will not repeat all of the salient points made in that document. Instead, I will simply relate these summary points on European law and practice.

19. The profession of lawyer is not an entrepreneurial profession. This is clearly stated in the laws governing the legal profession in different countries in Europe. Lawyers are independent agents of the area of justice and not salesmen of legal advice. They are subject to strict professional laws, such as the obligation to be independent, to be loyal to the client, to observe confidentiality, and to refrain from representing conflicting

interests, etc. No entrepreneur on any free-market economy is bound by such professional laws and requirements.

20. The Bar Association is not a company. In all European countries, the Bar Association is a body incorporated under public law, established by an act of Parliament in order to fulfil vital public functions, both in the justice system and in society at large. The Bar fulfils important self-regulatory functions such as admission to the profession, supervision of the lawyers' compliance with professional laws, execution of disciplinary proceedings in cases of breaches of professional laws. Therefore, self-regulation can only work on the basis of a mandatory membership which makes all lawyers, without exception, subject to the same regulations. Mandatory membership is ensured in the vast majority of European countries and can be considered as a prerequisite for a self-regulated and genuinely independent Bar or Law Society, which is essential to guarantee the quality of legal services and the independence of lawyers.

21. Therefore, the Bar is not a commercial enterprise with the objective to generate income. In Europe, Bars are only funded by the contributions of their members. Furthermore, the mandatory membership to a Bar does not prevent lawyers from exercising their constitutional rights and establishing voluntary professional associations. Every European country has many professional associations of lawyers, such as criminal lawyers' associations, family lawyers' associations, etc.

22. The Bars are neither enterprises nor business players; they are self-regulatory institutions of the legal profession. The purpose of anti-monopoly laws is to prevent predatory business practices. These laws cannot be applicable to Bar Associations.

23. The abolition of mandatory Bar membership would have many serious negative impacts over the independence of lawyers and the independence of the Bar. An independent legal profession is the cornerstone of a free democratic society based on the rule of law.

24. Mandatory membership to one Bar Association is favorable for citizens. Disciplinary proceedings, proceedings for breaching the professional code of conduct, and professional development protect the powers delegated to the bar association from the legislature.

25. The authority to terminate or partially suspend the rights of lawyers to practice when the obligation of continuing legal education is not respected is also one of the responsibilities of the Bar. This procedure is only possible with mandatory membership and if the Bar has the power to decide on standards of professional development and obligations regarding continuing legal education.

26. In summary, (a) the Constitutional Court of Georgia already recognized that lawyers' activity is not entrepreneurial activity; (b) the GBA cannot be considered as a monopoly since it does not carry out entrepreneurial activity; (c) GBA was established by the legislature to perform legitimate public functions (i.e. regulation of the profession, sanctions in relation to lawyers, etc.) and thus, mandatory membership to the GBA is justified from the constitutional point of view; (d) from the European perspective, the profession of lawyer is not an entrepreneurial profession. This is clearly stated in the laws governing the legal profession in different countries in Europe; (e) the legislatures of European countries clearly understood the special status of the legal profession and clarified its non-entrepreneurial nature in their laws; (f) autonomy and independence are primarily ensured through an autonomous association of lawyers through Bar

Associations; (j) the abolition of mandatory Bar membership would have many serious negative impacts over the independence of lawyers and the independence of the Bar.

27. Therefore, and following the reasons stated above, Professor James Moliterno proposes to the Constitutional Court of Georgia to dismiss the claim of Lasha Janibegashvili as ungrounded. Doing so will preserve the strong and independent legal profession in Georgia.

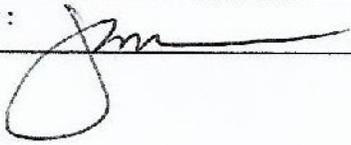
a. Documents that are recommended to be attached to this Opinion (please, tick the relevant box)

1. Text of the normative (legal) act under the question
2. Electronic Version of the Amicus Curiae Brief

b. Other documents

- 1.
- 2.

Signature of the Author :



Date

July 31, 2020