

# OVERVIEW OF JUDGMENTS OF THE CONSTITUTIONAL COURT OF GEORGIA

## ABSTRACT

“Journal of the Constitutional Law” continues to offer readers an overview of the latest practice of the Constitutional Court of Georgia. Three important judgments of the Constitutional Court were selected for publication in the current edition. The editors of the journal hope that the overview of the practice of the Constitutional Court will raise the level of legal discussion in relation to the activities of the court.

## JUDGMENT №3/2/1478 OF DECEMBER 28, 2021

On December 28, 2021, the Plenum of the Constitutional Court of Georgia adopted a judgment №3/2/1478 on the case “Constitutional submission to the Tetrtskaro District Court on the constitutionality of the second sentence of Article 3(20), the third sentence of Article 25(2), Article 48(1) and (2), the first sentence of Article 48(5) and the first sentence of Article 48(7) of the Criminal Procedure Code of Georgia (Constitutional Submission №1478).

Two different issues were disputed in the case. Part of the disputed norms defined by the Criminal Procedure Code of Georgia established the obligation of the accused to speak only the truth if he/she decides to testify in court. The procedural norm was also disputed in the case, which excluded the possibility of asking a question by the judge hearing the criminal case, without the consent of the parties.

Regarding the first matter in dispute, the author of the constitutional submission pointed out that the criminal procedural legislation, by imposing a mandatory oath and the obligation to tell the truth before testifying, made the accused face a choice between using the right to remain silent and giving false testimony. In particular, according to the position of the author of the submission, the strict sanctions for false testimony defined by the Criminal Code have a chilling effect and encourage the accused to use the right to remain silent when he/she has to choose between confessing to the crime and giving false testimony. Regarding the subject of the second dispute, the author of the constitutional submission also explained that the person who makes the assessment and the final decision regarding the criminal case is the judge, who determines and evaluates the important circumstances for the final decision on the case. Thus, according to the author of the constitutional submission, the judge should have the opportunity, independently of the consent of the parties, to ask clarifying questions, which would

be necessary to dispel ambiguities, to resolve a specific issue and to ensure a fair trial.

In its judgment, the Constitutional Court of Georgia, first of all, explained that the term “witness” referred to in Article 31(4) of the Constitution of Georgia includes, inter alia, the accused who decides to testify in his/her own defense. Thus, the right of the defense party to call and interrogate witnesses, implies, inter alia, giving the testimony by the defendant. In this way, the accused is given the opportunity to present his/her version of events before the decision-making court in connection with the criminal case, to influence the course of the case and the final results.

After this, the Constitutional Court pointed out that the privilege of protection against self-incrimination, guaranteed by Article 31(11) of the Constitution of Georgia, is related to the respect of the defendant’s freedom of will to remain silent. Accordingly, the named constitutional guarantee serves to ensure a person’s freedom of choice between the rights of silence and testimony. The limitation of the mentioned right cannot be caused by the regulation, within the framework of which the influence on the will elements of a person is not carried out in order to obtain evidence/testimony from him/her. The Constitutional Court reviewed the relevant norms of criminal procedural legislation and noted that the accused, taking into account his/her status and legal status, unlike other categories of witnesses, is exempted, inter alia, from the obligation to testify in court. Thus, testifying in court is the right of the accused and it is an act performed on the basis of free will. In this regard, the accused has a free choice - to use the right to remain silent and to benefit from the privilege of protection against self-incrimination or to testify in his/her own defense. In addition, with the reservation that the decision taken in favor of maintaining silence cannot be evaluated as proof of the guilt of the accused.

The Constitutional Court also emphasized that the accused may naturally have an interest in misrepresenting the facts to the court. The mandatory procedure of taking an oath during his/her testimony and the warning about the imposition of criminal liability for false testimony serve, inter alia, to provide by the accused witness only truthful information to the court and, in this way, the legal assurance of the reliability of the testimony. The ability to testify without risk of liability will reduce the credibility of the testimony of the accused, which will not help the administration of justice and, at the same time, will significantly harm the opportunity of the innocent accused to defend himself/herself. Thus, the court concluded that the accused does not have a constitutional right to perjury. And the legal system, which allows the accused to testify only on the condition of telling the truth, does not limit the constitutional privilege of protection against self-incrimination.

The Constitutional Court by the judgment in question also assessed the constitutionality of the restriction on asking questions to the judge and considered it incompatible with the right to a fair trial. The judgment explains that limiting the ability of judges to ask

questions on the grounds that an important circumstance for the case is not revealed at the hearing, not only does it not represent a requirement of the right to a fair trial, but also essentially contradicts the goals of the criminal justice process. In particular, the interest in determining the objective truth in the case cannot depend only on the desire of the parties or their competence. An individual judge (or jury) creates a guarantee of fair and proper justice in a specific case. The passivity and artificial fettering of the trial court may lead to injustice - the conviction of an innocent person or the release of a guilty person from responsibility. In this regard, the Constitutional Court noted that it is necessary for the judge to have the opportunity to thoroughly and comprehensively examine all the circumstances important to the case at the hearing, which are necessary for the formation of internal beliefs and the implementation of justice in the case. And thus, he/she must have the opportunity to ask questions when the composition of the act which is considered to be a crime is unclear, the testimony given by a witness, expert or other participant in the criminal process is unclear, confusing and/or contradictory, or when the need to ask questions is stipulated by the need for the judge to determine the sequence of events and identification of the factual circumstances of the case, etc.

The Constitutional Court explained the right to an impartial court guaranteed by Article 31(1) of the Constitution of Georgia and pointed out that the requirement of impartiality of the court applies not only to the court's decision, but also to the process through which and as a result of which the said decision is made. In this process, the court is not only obliged to be impartial, but great importance is attached to its external manifestation. The Constitutional Court noted that the judge should exercise the authority to ask questions under conditions of reasonable judicial self-restraint. The main limitation and the basic principle that should limit the use of said authority for the judge is that his/her function is to examine the evidence presented at the trial, to encourage clarity and not to create new evidence. In this regard, the Constitutional Court additionally indicated that questioning by the trial judge should not be conducted with such language and terminology, tone, gestures, behavior or form and intensity as to give rise to reasonable suspicion of the judge's bias. In compliance with these conditions, asking a question by a judge is an integral part of the constitutional requirement of a fair hearing and is an action aimed at a complete investigation of the case, establishing the truth, which does not interfere with the constitutional requirements of the equality and competition of the parties and/or the impartiality of the court.

The Constitutional Court noted that, based on the disputed norm, the judge was restricted from asking questions during the proceedings, including in a form that did not violate the principle of equality and competition between the parties and the judge's impartiality. The specified one hindered the establishment of the truth in the criminal case and limited both the right of the accused to a fair trial, as well as the interest of the injured party and the entire society to execute justice within the framework of a

fair court. While discussing the possible legitimate purpose of the limitation of the mentioned rights, the Constitutional Court noted that it would be meaningless to claim that the proceedings, which fail to ensure a proper investigation of the case, derive from any legitimate interest of any of the parties to the criminal proceedings or serve them and are in any way compatible with the constitutional requirements of the right to a fair trial. Accordingly, the Constitutional Court considered the restriction established by the disputed norm to be self-serving and incompatible with the interests of justice.

### **JUDGMENT №3/5/1341, 1660 OF JUNE 24, 2022**

On June 24, 2022, the Plenum of the Constitutional Court of Georgia made a judgment on the case “Constitutional submissions of Tetrtskaro District Court regarding the constitutionality of the first sentence of Article 200(6) of the Criminal Procedure Code of Georgia” (constitutional submissions №1341 and №1660).

According to the submissions, the norm of the Criminal Procedure Code, which determined the procedure for applying bail to the detained accused, was disputed. In particular, based on the contested norm, the provision of bail as a preventive measure against the detained person before securing the bail, in all cases, led to the accused being in custody.

According to the submissions, the judge was not authorized, based on the factual circumstances of the case, to make an individual judgment on the application of custody when he/she deemed it appropriate. At the same time, the disputed norm did not provide for the possibility of assessing the reasonableness of the imprisonment. The mentioned was contrary to the right to freedom confirmed by Article 13(1) of the Constitution of Georgia. Thus, the author of the constitutional submissions considered that the court should be able to decide in each individual case whether it is necessary to use the measure of custody for the purpose of securing bail for a person.

The Constitutional Court of Georgia assessed the extent to which the contested regulation represented a proportionate means of achieving the legitimate goal of avoiding interference with the investigation and the prompt implementation of justice. According to the definition of the Constitutional Court, in a legal and democratic state, the principle works in favor of freedom of an individual. This implies that the restriction of a person’s freedom through imprisonment is not a rule, but an exception. Limiting a person’s freedom is an extreme measure that should be used only in exceptional cases and circumstances, when the said measure is absolutely necessary and there is no other alternative to achieve a legitimate goal.

According to the court, the Constitution of Georgia separates detention and imprisonment. By itself, the fact that a person is detained, a priori, cannot become

the basis or prerequisite for justifying imprisonment. At the same time, the issue of detention, its need and necessity should be considered by the judge independently of the fact of detention.

The Constitutional Court did not rule out that in practice there can be in exceptional cases an objective need to leave the person in custody for a certain period of time to ensure the payment of the bail determined by the court, in the form of a preventive measure, even after the decision on the use of bail is made. However, the Constitutional Court explained that, in some cases, the right to physical freedom and inviolability of an individual was arbitrarily limited by the contested regulation, as long as the person continued to be in a detention/prison facility based on it, when there was no longer a necessary, exceptional reason for the restriction of freedom. Thus, the Constitutional Court shared the position of the Tetrtskaro District Court and considered that the judge should make a decision based on the individual circumstances of the case, taking into account the existing threats, regarding the need to keep a person in custody in order to ensure the immediate payment of bail.

Taking into account all of the above, the Constitutional Court concluded that the disputed norm was a disproportionate restriction of human freedom (Article 13(1) of the Constitution of Georgia), which is why it recognized as unconstitutional the normative content of the first sentence of Article 200(6) of the Criminal Procedure Code of Georgia, which precluded the judge from releasing the accused before posting bail.

### **JUDGMENT №3/6/813 OF DECEMBER 22, 2022**

On December 22, 2022, the Plenum of the Constitutional Court of Georgia made a judgment on the case “*Aleksandre Melkadze v. the Parliament of Georgia*” (Constitutional Lawsuit №813). The disputed norm in the mentioned case defined the rule of formation of the single list of voters and stated that the data of the voter will be included in the single list of voters according to the place of his/her registration.<sup>1</sup>

According to the plaintiff’s argumentation, based on the disputed norm, a voter who was removed from the registration by place of residence, whose registration was declared invalid or who was registered without specifying the address, could not be included in the unified list of voters. The inclusion of this category of persons in the unified list of voters depended on the development of a temporary, exceptional rule before the elections, with the transitional provisions of the Election Code of Georgia and the resolutions of the CEC, which gave the voters of the category named for specific

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<sup>1</sup> The subject of the dispute in full: the constitutionality of the first sentence of Article 31(3) of the Organic Law of Georgia “Election Code of Georgia” (the version valid until July 27, 2018) in relation to Article 28 of the Constitution of Georgia (the version valid until December 16, 2018).

elections the opportunity to register and vote. Based on the above, according to the plaintiff's explanation, the disputed norm excluded the possibility of fully enjoying the active right to vote and contradicted the right to vote enshrined in the Constitution of Georgia.

According to the position of the defendant, the Parliament of Georgia, on the basis of the disputed norm, the determination of the place of voter registration as a principle of the formation of a unified list of voters served the administration of the proper election system. Such an approach excluded the manipulation of voter flows and, in this way, insured the risks of election fraud and violation of the principle of equality of votes.

Based on the analysis of the legislation, testimony of witnesses and materials presented in the case, the Constitutional Court of Georgia came to the conclusion that the disputed norm excluded the category of persons in a similar situation as the plaintiff from the unified list of voters. As a result, the availability of the right to vote for the mentioned persons, every time, depended on the development of additional and temporary legislative regulations before the elections.

The Constitutional Court explained that since the active right to vote is one of the fundamental rights in terms of guaranteeing the existence of representative democratic governance in the state, its perfect realization is particularly important in a democratic society. The legislator should take all possible measures so that all those persons who are recognized by the Constitution of Georgia as subjects with active electoral rights can come to the elections and express their opinion by voting. Based on the above, the Constitutional Court determined that any restriction that excludes the possibility of individual voters, especially a specific category of voters, to participate in the elections, should be selected with extra caution and should be subject to strict constitutional and legal scrutiny.

The Constitutional Court noted that the contested regulation served to achieve the valuable public legitimate goals named by the defendant, and the restrictive measure was a useful and necessary means of achieving the mentioned legitimate goals.

At the same time, the Constitutional Court explained that the intense restriction imposed by the disputed norm, which excluded persons without registration or those registered without specifying their address, from entering the unified list of voters, established an unfair balance between the interests of ensuring the smooth administration of the election process and the proper guarantee of the active right to vote, especially in the circumstances, when, in parallel with appealing to the complication of election administration, the legislator, in order to ensure the right to vote of unregistered or registered voters without address, had established a uniform practice of regulating the issue under discussion with temporary, although constantly updated, transitional provisions, which clearly indicated the fact that the development of a solid and non-

recurring mechanism for the administration of the election process, even different from the general rule of registration in the unified voter list for the category of persons mentioned by the main provisions of the Election Code from the point of view of provision, would not create an unnecessary burden for the CEC.

Furthermore, the Constitutional Court of Georgia did not share the defendant's position regarding the regulation of the exceptional rule of inclusion in the unified list of voters in order to encourage registration with the transitional provisions of the Election Code and pointed out that, on the one hand, there was no evidence of a rational connection between the promotion of a person's registration and the regulation of the exceptional rule of inclusion in the unified list of voters with the transitional provisions and, on the other hand, based on the extremely great importance of the active right to vote, it was unjustified to limit the right to vote with a similar intensity, on the grounds of encouraging registration by specifying the address of the place of residence of citizens.

Based on all of the above, the Constitutional Court recognized as unconstitutional the first sentence of Article 31(3) of the Organic Law of Georgia "Election Code of Georgia" (edition valid until July 27, 2018) in relation to Article 24 of the Constitution of Georgia.