

OVERVIEW OF JUDGMENTS OF THE CONSTITUTIONAL COURT OF GEORGIA

ABSTRACT

The Journal of Constitutional Law continues to provide readers with an overview of the recent case law of the Constitutional Court of Georgia. For the current issue, three landmark judgments of the Constitutional Court have been selected for publication. The editorial board of the journal hopes that this overview of the Court's practice will enhance the level of legal debates concerning the Court's activities.

I. “NIKOLOZ AKOFOVI V. THE PARLIAMENT OF GEORGIA”

On 22 November 2023, the Second Board of the Constitutional Court of Georgia issued a judgment in the case *Nikoloz Akofovi v. the Parliament of Georgia* (Constitutional Complaint No. 1444¹). The disputed provision of the Imprisonment Code granted the investigator/prosecutor the authority to restrict a defendant placed in a penitentiary facility from exercising the rights to short visits, correspondence, and telephone communication.

According to the complainant, the unconstitutionality of the disputed provisions stemmed from the absence of clear criteria defining the investigator's/prosecutor's authority to restrict the defendant's rights, that in turn, gave rise to the risk of errors or arbitrary use of discretionary powers by the investigator/prosecutor. As a result, the defendant's right to private and family life was violated.

According to the respondent, the restriction of the defendant's right to private and family life under the disputed provisions served important and legitimate public interests, such as the effective administration of justice, the protection of state and public security, and the safeguarding of the interests of the investigation. At the same time, according to the respondent's position, despite the existence of important legitimate objectives, the absence of appropriate guiding criteria granted the investigator/prosecutor unjustifiably broad discretion to restrict the communication of a defendant held in a penitentiary facility with the outside world, which in turn, created a risk of unjustified and disproportionately prolonged interference with the defendant's right to private and

¹ Judgement of the Constitutional Court of Georgia N2/8/1444 “Nikoloz Akofovi v. the Parliament of Georgia”, 22 November 2023.

family life. In light of all the above, the respondent fully acknowledged Constitutional Complaint No. 1444.

The Constitutional Court held that the restriction established by the disputed provisions constituted a suitable means for achieving the legitimate objectives identified by the respondent. At the same time, the case did not reveal the existence of an alternative legal mechanism that would be less restrictive of the right while ensuring the achievement of the legitimate objectives with the same level of effectiveness as the current legal framework. Therefore, in addition to being suitable, the disputed regulation also meets the necessity criterion of the principle of proportionality.

The Constitutional Court of Georgia explained that short visits, correspondence, and telephone communication for a defendant placed in a penitentiary facility constitute essential mechanisms of communication for maintaining and nurturing private and family life. Accordingly, the legislation regulating the restriction of these rights must provide clear criteria, be sufficiently precise, and be formulated in a manner that prevents the risk of unjustified interference with the defendant's right to private and family life by the decision-making person/institution.

Based on the analysis of the applicable legislation, the Court concluded that neither the disputed provisions nor other articles of the Imprisonment Code, nor the relevant adjacent legislation, provided any mechanism or guiding criteria to limit the discretion of the investigator/prosecutor when deciding to restrict a defendant held in a penitentiary facility from short visits, correspondence, and/or telephone communication. The applicable legislation also did not provide a mechanism for the mandatory periodic review of the restrictions imposed on the defendant, nor did it oblige the investigator/prosecutor to lift the restrictive measure in the event of a decrease or absence of the necessity for its continued application.

In light of all the above, the Court held that the existing legal framework failed to prevent the risk of abuse of power by the decision-making authority and created a real threat of excessive restriction of the defendant's right to private and family life. Specifically, it allowed for the restriction of the defendant's right to short visits, correspondence, and/or telephone communication even in cases where the objectives pursued by the restriction and the risks to be prevented did not outweigh the defendant's interest in maintaining and nurturing private and family life and the prohibition against complete isolation or exclusion from society. On this basis, the Constitutional Court found that the disputed provisions unjustifiably restricted the right to private and family life protected under Article 15, paragraph 1 of the Constitution of Georgia and declared them unconstitutional.

Alongside declaring the disputed provisions unconstitutional, the Constitutional Court of Georgia referred to Article 199, paragraph 2 of the Criminal Procedure Code

of Georgia and clarified that, based on this provision, if relevant circumstances are present, it is still possible - by a judge's decision - to impose short-term restrictions on a defendant's visits, correspondence, and/or telephone communication in order to achieve the legitimate aims previously served by the challenged restriction. In light of the above, the Constitutional Court considered that there was no need to postpone the enforcement of the judgment.

II. PUBLIC DEFENDER OF GEORGIA V. THE PARLIAMENT OF GEORGIA

On December 14, 2023, the Plenum of the Constitutional Court of Georgia issued a judgment in the case *The Public Defender of Georgia v. the Parliament of Georgia* (Constitutional Complaint No.1635²). The subject of the dispute was Paragraph 1 of Article 8 of the Law of Georgia "On Assemblies and Manifestations", which established an obligation to notify the executive body of the municipality about the organization and conduct of an assembly or manifestation no later than 5 days before the event.

The author of the constitutional complaint argued that, in many cases, when expressing protest, the public's immediate reaction held decisive importance, as a delay of 5 days could significantly undermine the effectiveness of the assembly or render it entirely meaningless. Moreover, the claimant pointed out that the real possibility of holding a spontaneous assembly is a fundamental component of the right to freedom of assembly, while the disputed provision imposed an unreasonable restriction on this freedom.

According to the respondent's position, the notification requirement served to inform the relevant authority, enabling the state to fulfill its positive obligation - namely, to protect the rights of others on the one hand, and to ensure the safety of the participants of the assembly or manifestation on the other. The respondent further explained that failure to comply with the advance notification requirement did not constitute grounds for terminating the assembly or manifestation, nor for imposing liability.

The Constitutional Court of Georgia explained that the timeliness and immediacy of an assembly or manifestation are of decisive importance for its effectiveness, as the intensity of public reaction, the strength of the social momentum characteristic of such gatherings, and, consequently, the potential to influence the issue at hand, often depend precisely on these factors. A delay or postponement in expressing a specific reaction may significantly hinder or entirely prevent the realization of the objectives of the protest. The constitutional guarantee of the freedom of assembly will remain merely declaratory in nature unless its substance is simultaneously equipped with effective

² Judgement of the Constitutional Court of Georgia N3/3/1635 "Public Defender of Georgia v. the Parliament of Georgia", 14 December 2023.

and accessible means for the full enjoyment of this freedom. In light of the above, the Constitutional Court of Georgia held that the freedom of assembly protected under Article 21 of the Constitution of Georgia encompasses the right to hold both pre-organized and spontaneous assemblies and manifestations.

At the same time, the Court accepted the claimant's argument and explained that the disputed provision explicitly imposed an obligation to notify the relevant authority 5 days prior to holding an assembly or manifestation, thereby restricting the freedom of assembly and manifestation guaranteed by Article 21 of the Constitution of Georgia.

The Constitutional Court of Georgia assessed whether the disputed regulation constituted a proportionate means for achieving the legitimate aim of protecting the rights of others, as well as the rights of the participants of the assembly or manifestation themselves. According to the Constitutional Court, the competing interests involved were, on the one hand, the right to effectively and unhindered exercise the freedom of spontaneous assembly, and on the other hand, individual and public interests, which include both the rights of the participants themselves to peacefully enjoy the freedom of assembly/manifestation, and the interests of others not to be adversely affected by disruptions to transportation or by the challenges associated with unplanned, spontaneous gatherings and manifestations.

The Constitutional Court also held that there was a logical and rational connection between the restriction imposed by the disputed provision and the legitimate public aims cited by the respondent, and conclude that the regulation established by the disputed norm met the requirement of suitability.

Specifically, the Court found that the 5-day preparation period granted state authorities an adequate opportunity to plan and adjust transportation routes to avoid significant disruption to third parties' movement, to mobilize the necessary number of law enforcement and medical personnel, to assess and properly plan for potential risks to public order during the assembly, and to determine appropriate measures for ensuring the safety of individuals in case those risks materialize. Accordingly, notifying the relevant authority 5 days in advance significantly facilitates the protection of the rights of others as well as the rights of the participants of the assembly or manifestation, allowing for the anticipation and prevention of potential risks.

The Constitutional Court held that spontaneous assemblies may disproportionately affect the interests of third parties until the assembly ends or the state responds appropriately. As for the participants, the disputed provision makes it impossible to effectively exercise the freedom of spontaneous assembly or manifestation, rendering that right meaningless. The Court determined that, given the importance of spontaneous assembly, the protection of the rights of a part of the public from potential harm caused by full or partial disruption of traffic for a certain period cannot outweigh the right of

numerous participants to effectively exercise their constitutionally protected freedom of assembly and manifestation - a right that constitutes an essential precondition for the functioning of a free and democratic society. In light of all the above, the Constitutional Court found that the restriction established by the contested provision disrupted the fair balance between the restricted and protected interests and failed to ensure the effective enjoyment of the fundamental right to assembly and manifestation.

At the same time, the Constitutional Court did not rule out the possibility of establishing a notification requirement to the competent authority, for the purpose of achieving legitimate aims, in cases where there is an objective possibility to do so.

With this decision, the Plenum of the Constitutional Court of Georgia overturned the standard established by the Court Judgment N2/2/180-183 of 5 November, 2002 and by the Record of Proceedings N4/482,483,487,502 of 10 November, 2010, which, according to the Georgian Constitution, deemed the disputed provision constitutional and consequently, had not recognized the right to hold a spontaneous protest manifestation, without prior notification, in public and traffic-accessible areas as part of the scope protected under Paragraph 1 of Article 21 of the Constitution, even in cases where the participants occupied, blocked, or impeded such public or traffic routes.

III. CONSTITUTIONAL SUBMISSION OF THE TELAVI DISTRICT COURT REGARDING THE CONSTITUTIONALITY OF PART 3 OF ARTICLE 34 OF THE CRIMINAL CODE OF GEORGIA AND PART 3 OF ARTICLE 191 OF THE CRIMINAL PROCEDURE CODE OF GEORGIA

On 12 July 2024, the Plenum of the Constitutional Court of Georgia issued a judgment in the case *Constitutional Submission of the Telavi District Court regarding the constitutionality of Part 3 of Article 34 of the Criminal Code of Georgia and Part 3 of Article 191 of the Criminal Procedure Code of Georgia* (Constitutional Submission No. 1543).

According to Part 3 of Article 34 of the Criminal Code of Georgia, if a crime was committed by a person who was legally sane at the time of the act but developed a mental illness before the verdict was delivered, they shall serve the sentence imposed by the court in an appropriate medical (treatment) facility until recovery. According to Part 3 of Article 191 of the Criminal Procedure Code of Georgia, in the case of a defendant who was legally sane at the time of committing the crime but later became legally insane, the court issues a guilty verdict, and the convicted person shall serve the sentence in an appropriate medical (treatment) facility until recovery. Upon recovery, the sentence shall continue to be served under the general procedure.

According to the position of the author of Constitutional Submission No. 1543, a defendant must have the opportunity to fully exercise the procedural rights defined by the Constitution, which include giving testimony, participating in procedural actions, effectively communicating with a defense attorney, examining witnesses, reviewing evidence, and more. A defendant who has developed a mental illness is unable to exercise these rights, yet the disputed provisions still allow for their prosecution and the issuance of a guilty verdict. The author of the submission argued that in cases where the defendant has developed a mental illness, there should be a mechanism for suspending the proceedings. Issuing a guilty verdict against such a person leads to violations of several components of the right to a fair trial.

In the case at hand, the Constitutional Court explained that the purpose of the constitutional right to a fair trial is to prevent the conviction of an innocent person and to ensure that criminal proceedings are conducted fairly. According to the Constitutional Court's assessment, the fairness and adversarial nature of the proceedings require that the defendant not only formally possess certain rights and procedural means, but also be practically able to exercise them. For this, it is essential that the defendant be competent to stand trial - that is, have the capacity to adequately understand the nature of the charges, the substance of the legal proceedings against them, and be able to establish effective communication with their defense attorney.

According to the Constitutional Court's position, although the protection of rights through a defense attorney is an important constitutional guarantee, it cannot replace the necessity of the defendant's direct participation in the proceedings, as it is the defendant who must personally make key procedural decisions such as admitting guilt, choosing whether or not to testify, entering into a plea agreement, etc. Moreover, the effective protection of an individual's rights by a defense attorney is closely dependent on the information provided by the defendant, as the defendant obviously is the one who best knows the factual circumstances of the case. Hence, the communication with the attorney may be critically important for obtaining exonerating evidence/refuting the prosecution's evidence. Accordingly, the Constitutional Court pointed out that issuing a guilty verdict against a convicted person who, for the purposes of the Constitution of Georgia, is not competent to stand trial, is effectively equivalent to convicting an individual without granting them the opportunity to participate in the proceedings.

The Constitutional Court additionally clarified that, in certain exceptional cases, it may be permissible to issue a guilty verdict without the direct participation of the defendant or in relation to a person who is legally incompetent to stand trial - for example, when the defendant is abusing procedural rights or when the conduct of the defense amounts, in essence, to a waiver of the right to exercise those rights. Such a situation may arise

when the defendant simulates incompetence, engages in certain actions to become mentally unfit in order to evade justice, or fails to appear before the court.

The Constitutional Court determined that Part 3 of Article 191 of the Criminal Procedure Code allows for the possibility of issuing a guilty verdict against any person, including one who is incompetent to stand trial, even in cases where the individual is not at fault for their condition. According to the Constitutional Court, recognizing as guilty a person who, through no fault of their own, has been deprived of the opportunity for effective defense violates the constitutional requirement for a fair trial in criminal proceedings.

In light of all the above, the Constitutional Court held Part 3 of Article 191 of the Criminal Procedure Code of Georgia to be unconstitutional in relation to Paragraph 1, the first and second sentences of Part 3, and Paragraph 4 of Article 31 of the Constitution of Georgia. In addition, the Constitutional Court postponed the annulment of the disputed provision until December 1, 2025, in order to grant the Parliament of Georgia a reasonable period to bring the matter into compliance with the Constitution and to implement the necessary legislative amendments.