https://doi.org/10.59172/2667-9876/2024-1/44-53

THE ISSUE OF EVALUATING THE RESTRICTION OF FUNDAMENTAL HUMAN RIGHTS AT THE HEARING ON THE MERITS AT THE CONSTITUTIONAL COURT OF GEORGIA

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Abstract. The differentiation between the preliminary hearing and the hearing on the merits has a practical function in constitutional proceedings. Considering the growing trend in terms of application to the Constitutional Court of Georgia since 2015, in order to observe the principles of expediency of justice and procedural economy, it is important to have a clear boundary between the procedures and legal outcomes of the said two hearings. However, this should not prejudice the legal interests of the parties to the proceedings or exclude their adequate protection at any stage of the hearing.

The applicable legislation does not provide an unequivocal answer as to whether it is possible to evaluate the restriction of a fundamental human right at the stage of hearing a case on the merits as well.

The analysis of the relevant provisions of the Organic Law of Georgia on the Constitutional Court of Georgia allows drawing a logical conclusion in favour of the evaluation of restriction of fundamental human rights at the stage of preliminary hearing. The said position has been supported by judges in a number of hearings on the merits, which is confirmed by the minutes and audio and video recordings of the hearings.

In the current circumstances, the legal analysis of this issue is important to the extent that, at any stage of the proceedings, on the basis of the newly revealed factual circumstances or arguments, nothing excludes the re-evaluation of the facts evaluated during the preliminary hearing.

In addition, in exceptional cases, the judicial practice has proved otherwise as well.

***Keywords*:** constitutional proceedings, evaluating the restriction of fundamental human rights at the hearing on the merits, preliminary hearing.

1. Introduction

Each fundamental right protects individual values that are valuable to people in their respective realities.[1] In every case, it is of utmost importance for the Constitutional Court to determine the correct interrelation between the disputed provisions and the respective article establishing a fundamental right, because otherwise the correct resolution of a dispute would become questionable.[2]

According to the practice of the Constitutional Court, for hearing a constitutional claim, it is necessary that such a claim shows clear and explicit interrelationship, in terms of content, between a disputed provision and the provisions of the Constitution, with regard to which a claimant requests that the disputed provision be recognised as unconstitutional.[3]

The ground for the above reasoning is Article $31^1(1)(d)$ of the Organic Law of Georgia on the Constitutional Court of Georgia, the strict compliance with which, along with other circumstances discussed later, is not supported by the constitutional regulations themselves. In particular, the Constitution of Georgia contains articles regulating rights, which are very closely interrelated in terms of content, and in certain cases, serve to protect the same interests. In such cases, the areas protected by fundamental human rights overlap.[4]

The academic evaluation of this specific problem in constitutional proceedings is topical, because in the case of incorrect interrelation between a disputed provision and the area protected by human rights, the constitutional claim is considered ill-founded, and therefore, it is not admitted for consideration on the merits.[5]

The purpose of the present article is to evaluate, on the basis of the respective provisions of law and the judicial practice, whether it is advisable for the Constitutional Court to carry out final evaluation at the preliminary hearing of the interrelation between the provision that is questionable in terms of its unconstitutionality and the area protected by the fundamental rights.

In order to achieve that purpose, the method of analytical reasoning and formal logic will be used along with the traditional interpretation of the provisions to be evaluated and their corresponding interpretation under the Constitution, which will allow us to draw an objective conclusion in the conditions of systematisation.

1. *Chipchiuri, G.*, An Introduction to Constitutional Law, the Publishing House of Sulkhan-Saba Orbeliani University, Tbilisi, 2021, p. 75.
2. *Eremadze, K.*, The Balancing of Interests in a Democratic Society, 2013, p. 36.
3. Ruling 1/3/469 of 10 November 2009 of the Constitutional Court of Georgia in the case *Citizen of Georgia Kakhaber Koberidze v. the Parliament of Georgia*, II-1.
4. *Eremadze, K.*, ibid.
5. Record of minutes No 2/10/1264 of 27 July 2018 of the Constitutional Court of Georgia in the case *Citizens of Georgia Giorgi Mamaladze, Giorgi Phantsulaia, and Mia Zoidze v. the Parliament of Georgia*, II-1.

2. The Function Of The Preliminary Hearing

Constitutional proceedings consist of a number of interconnected stages. Each stage is a combination of the actions of the court and the parties to the proceedings, and serves to evaluate individual procedural issues before the final resolution of the case.[6] The sequence of the stages of the proceedings is directly related to the possibility of delivering a substantiated decision by the court.

The first stage of the constitutional proceedings implies the application to the Constitutional Court, i.e. the filing of a constitutional submission and a claim. In this regard, the obligation to limit the self-initiative of the Constitutional Court is evident,[7] which is based on the principle: 'where there is no claimant, there is no judge'.[8, 9]

After the formal verification and registration, the court starts to examine a claim and a submission, and to decide whether to admit it for the consideration on the merits. If the Constitutional Court admits the claim and submission for the consideration on the merits, a hearing on the merits shall be held, and as a result, a judgment is delivered.[10]

Often, a preliminary hearing has the function of a procedural barrier. In particular, under Article 31^5(2) of the Organic Law of Georgia on the Constitutional Court of Georgia, the adoption, at the preliminary hearing, by the plenum/panel of the Constitutional Court of a decision on admitting a case for its consideration on the merits, is considered as the admission of a constitutional claim/constitutional submission for the consideration on the merits by the Constitutional Court.

In order to determine the compliance of a normative act with the constitutional provision establishing a fundamental right, the court verifies a number of formal and content-related issues at the preliminary hearing, which derive from Article 31^1(1) and (2) of the Law and which are more or less identical in the conditions of exercising other powers by the court[11], and are also provided for by Article 31^1(1) of the Law.

Namely, at the stage of preliminary hearing, the court must evaluate the following issues in the constitutional claim, in terms of content:whether the constitutional claim falls under the jurisdiction of the Constitutional Court;

6. *Kakhiani, G.*, Constitutional Control in Georgia and the Challenges of its Functioning: the Analysis of Law and Practice, 2008, p. 214.
7. *Loladze B*., Das Rechtsstaatsprinzip in der Verfassung Georgiens und in der Rechsprechung des Verfassungsgerichts Georgiens, Potsdam, 2014, 156.
8. *Hopfauf A*., Kommentar zum Art. 93 GG, in: Schmidt-Bleibtreu B., *Klein F*. (Begr.), *Hofmann H*., *Hopfauf A*. (Herg.), GG – Kommentar zum Grundgesetz, 12. Auflage, Köln, 2011, Rn.52.
9. *Loladze, B.*, An Introduction to Constitutional Law, second edition, the Publishing House of Sulkhan-Saba Orbeliani University, 2021, p. 269.
10. *Loladze, B., Macharadze, Z., Pirtskhalashvili, A.,* Constitutional Justice, Tbilisi, 2021, p. 376.
11. For more details, see Article 31^1(3)-(15) of the Organic Law of Georgia on the Constitutional Court of Georgia, 31/1/1996.

- whether the claimant is a holder of the right;
- evidence, which, according to the claimant, proves the validity of the constitutional claim (the relation of the State's actions to the area protected by the claimant's fundamental right);
- whether the disputed matter specified in the claim has been resolved by the Constitutional Court;
- whether the disputed provision refers to the constitutional provision specified by the claimant;
- whether it is possible to examine comprehensively the constitutionality of the disputed subordinate normative act without considering the constitutionality of the normative act, which is above it in the hierarchy of normative acts and which has not been challenged by a constitutional claim.

In addition, as an exception, it is possible to meet the claimant's legal interest at the preliminary hearing itself, when it comes to the so-called 'overriding mandatory provision'.[12] If the Constitutional Court determines at the preliminary hearing that the disputed normative act, or a part thereof contains provisions of the content similar to those recognised by the Constitutional Court of Georgia as unconstitutional, it delivers a ruling on the inadmissibility of hearing the case on the merits and on declaring the disputed normative act, or a part thereof as invalid.[13, 14]

In the given case, in accordance with the judicial practice of the Constitutional Court of Georgia, 'a provision of similar content' does not imply the acceptance/existence of a rule with a similar formulation. 'The textual, editorial or other formal difference of the provision, alone, cannot be considered an essential distinguishing factor. The court evaluates, in each specific case, whether the disputed provision has the content similar to the content of the provision recognised as unconstitutional.[15]

From this list, in order to give a small idea of the scope of content-related matters to be evaluated by the court at the preliminary hearing, it would be sufficient to mention the time-consuming process related to the examination of the jurisdiction of a constitutional claim (the court should not go beyond the limits of the so-called 'negative legislator', to evaluate the expediency of hearing the case on the merits related to the claim on recognising as unconstitutional: a constitutional law, an invalid provision, a draft law on amendments and an addendum, a non-normative act, etc.) and to qualify the claimant as a holder of the right

12. For more details, see *Baramashvili T.*, *Macharashvili L.*, Standards of Admissibility of Constitutional Claims (Practical Guide), 2021, 171
13. *Loladze B., Macharadze Z., Pirtskhalashvili A.*, Constitutional Justice, Tbilisi, 2021, 383
14. Organic Law of Georgia on the Constitutional Court of Georgia, 31.1.1996, Article $25^1(4^1)$
15. Ruling No 1/2/563 of 24 June 2014 of the Constitutional Court of Georgia in the case *Austrian citizen Matthias Hutter v. the Parliament of Georgia*, II-10

by the Constitutional Court of Georgia ('*actio popularis*' should be excluded, the claimant should fall within the scope of regulation of the disputed provision, and the possibility to enjoy the fundamental right by a legal person should be evaluated, etc.).

Thus, the analysis of the legislation makes it clear that the stage of the preliminary hearing, along with the need to examine a number of formal issues of the constitutional claim filed for the protection of fundamental rights, obliges the court to evaluate the content-related matters, and, regardless of the degree of their complexity, the evaluation of the correct interrelation between the disputed provision and the constitutional provision establishing the fundamental right cannot be considered as an essential part of this stage of legal proceedings.

3. The Requirement Envisaged By The Legislation With Regard To The Final Examination At The Preliminary Hearing Of The Interrelation Between The Disputed Provision And The Fundamental Human Right

As it was mentioned, one of the prerequisites for considering the claim substantiated and for considering it admissible for hearing on the merits is the correct determination, which constitutional right is prejudiced by the disputed provision. In each specific case, the question of interrelation of a disputed provision depends, on the one hand, on the content of the provision itself, the scope of its regulation and the legal outcome derived therefrom, and, on the other hand, it depends on the protected scope of the constitutional right.[16]

In terms of the grammatical interpretation of the provisions, the conclusion can be drawn primarily on the basis of Article 31^2(10) of the Organic Law of Georgia on the Constitutional Court of Georgia, on the basis of which the reporting judge, while examining the constitutional claim, determines whether there are grounds specified by Article 31^3 of the said law for dismissing the claim for hearing on the merits. In accordance with Article 31^3(1)(a) of the same law, a constitutional claim shall be inadmissible for hearing, if it does not correspond, in terms of its form and content, to the requirements established by Article 31^1 of the same law. Article 31^1(1)(d), from its side, determines that the constitutional claim filed for the protection of fundamental human rights shall stipulate the provision of the Constitution of Georgia, which, according to the claimant, is not complied with or is violated by the disputed legal act.

The issue to be regulated, in terms of the legislative technique, might have been formulated much more easily, without the legislative labyrinth; however, it will be necessary to go through another labyrinth in terms of the systemic definition of the provisions. In particular,

16. *Baramashvili T., Macharashvili L.*, Standards of Admissibility of Constitutional Claims (Practical Guide), 2021, 51

in order to determine whether the Constitutional Court of Georgia is responsible at the stage of preliminary hearing to finally examine the interrelation between the disputed provision and the fundamental human right, the mentioned provision should be evaluated in connection with the provisions establishing the format of the preliminary hearing determined by the Organic Law of Georgia on the Constitutional Court of Georgia and by the Rules of the Constitutional Court, and in connection with the fundamental principles of the constitutional proceedings and the proceedings safeguarded by Article 62 of the Constitution.

The above-mentioned three provisions of the Organic Law of Georgia on the Constitutional Court of Georgia initially emerged in the Law of Georgia on Constitutional Proceedings, which was declared invalid after being combined with the Organic Law of Georgia on the Constitutional Court of Georgia in 2018. On 12 February 2002, the mentioned provisions were added to the said law by making the first amendment, in the form of Article 18(a), Article 17(6) and Article 16(1)(d)[17], and until 2006, they were effective in the circumstances where the provisions of legal proceedings did not contain a direct reference to the fact that a preliminary hearing should be conducted with or without an oral hearing.[18]

On 29 December 2006, in the Organic Law of Georgia on the Constitutional Court of Georgia, there emerged effective Article 27^1 , which provided for the general procedure – admissibility of a case for hearing on the merits shall be considered by a court without an oral hearing. In addition, there was an exception – a court shall be entitled to conduct an oral hearing of the case, where it is otherwise impossible to investigate the circumstances related to the admissibility of the case for hearing on the merits.

The mentioned procedure came into effect despite the changes in the issues to be evaluated in terms of their content at the preliminary hearing, and, according to the historical definition, its adoption was caused by the fact that three months earlier the premises of the Constitutional Court of Georgia was relocated from Tbilisi to Batumi.[19]

In assessing how important it is for the judicial proceedings that the oral hearing of the case be conducted, the Constitutional Court of Georgia considers that the oral hearing of the case, which envisages the direct participation of the parties in the hearing of the case, means to give the parties possibility to submit evidence, express their opinions, defend themselves or be defended by a lawyer, which guarantees the adequate use of the advantages of the adversarial principle and of the right of defence during the legal proceedings.[20] An oral hearing of the

17. See, Law of Georgia No 1270-II On Amendments and Addenda to the Law of Georgia On Constitutional Proceedings
18. *Kakhiani G.*, Constitutional Control in Georgia and the Challenges of its Functioning: Analysis of Legislation and Practice, 2008, 222
19. See, Law of Georgia No 3549-რს On Amendments and Addenda to the Law of Georgia on Constitutional Proceedings
20. Judgment No 3/2/574 of 23 May 2014 of the Constitutional Court of Georgia in the case *Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia*, II-61

case, on the one hand, helps the parties to better substantiate their legal claims, and, on the other, helps a judge to deliver an impartial, fair and well-founded judgment based on the overall investigation of the materials in the case.[21]

In addition, the court indicates that 'the standard for the protection of the right to an oral hearing significantly depends on the contents of the proceedings. Where the hearing of a case relates to the establishment of formal and legal issues, the interest of conducting an oral hearing diminishes. In such case, a 'Jura Novit Curia' principle applies.[22] However, when the court delivers judgment on the content-related matters along with the formal and legal issues, the approach shall be different. As for the evaluation of whether or not the claimant has a correct view of the interrelation between the disputed provision and the constitutional provisions establishing fundamental human rights, it is the issue of an utmost importance in terms of contents of the proceedings, which has a huge effect on meeting the legal interest, on the one hand, and the fair resolution of the dispute, on the other hand.

Thus, a general legislative procedure for the establishment of the format of a preliminary hearing suggesting the session be held without an oral hearing shall have a significant effect on the justice procedure and the guarantees for the adequate protection of fundamental human rights. Therefore, the formal requirement of legislation to determine the interrelation between the disputed normative act and the constitutional provisions of fundamental human rights solely in the format of the preliminary hearing, on the basis of the systemic, teleological and historical definition of the provision, is deficient; the court and the parties to the proceedings shall be given such possibility at the hearing on the merits as well.

4. Conclusion

In this article, the issue has been studied based on objective circumstances, in particular, the current legal provisions and the judicial practice of the Constitutional Court. The reasoning has been conducted in the systematised form, in accordance with the research methods referred to in the Introduction, which led to an impartial conclusion stating that, at the hearing on the merits of the Constitutional Court, both the court and the responding party shall be able to question the interrelation between the fundamental human rights and the disputed provision established by the record of minutes.

In exceptional cases, the rigidity of the current regulation is confirmed by the judicial

21. Judgment No 2/2/558 of 27 February 2014 of the Constitutional Court of Georgia in the case *Citizen of Georgia Ilia Chanturaia v. the Parliament of Georgia*, II, 35.
22. Judgment No 3/2/574 of 23 May 2014 of the Constitutional Court of Georgia in the case *Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia*, II-75.

practice of the Constitutional Court[23] and the issue becomes a particular appeal for the purposes of proceedings when the preliminary hearing is held by the court without an oral hearing.

In the legislation, the amendment made in 2002 to the Law of Georgia on Constitutional Proceedings is also related to this issue, which now exists as Article 31^4(2) of the Organic Law of Georgia on the Constitutional Court of Georgia and according to which the court shall, based on a written application of a claimant/representative of a claimant, invite the claimant/representative of the claimant to the preliminary hearing and hear the explanation on the matter of admitting the constitutional claim for consideration. However, in relation to the above the practice also shows that the court does not take into consideration such request indicated in the constitutional claim[24] and the evaluation made after the reasoning is noteworthy.

It is clear that the above does not exclude the utmost responsibility of a responding party to submit, along with questioning the interrelation between the restriction of a right and the constitutional provision, a legitimate public goal of the disputed provision at every hearing on the merits and thus emphasise his/her respect towards the Constitutional Court.

It is also clear that the evaluation of the interrelation between the provision appealed at the preliminary hearing and the respective article of the Constitution shall not be excluded and the main emphasis in this process shall be put on the inspection of incorrectness of the interrelation indicated by a claimant rather than on the establishment of the interrelation in a reliable manner.

The above-mentioned issue may be resolved by the solid judicial practice of the Constitutional Court or the legislative amendments. The latter is a particularly topical matter as long as the technical integration of the Law of Georgia on Constitutional Proceedings into the Organic Law of Georgia on the Constitutional Court of Georgia was carried out according to the latest amendment to the Organic Law of Georgia on the Constitutional Court of Georgia, and lots of details of proceedings require improvement in terms of content, as well as technical improvement in the future.

23. For further details, see Judgment No 2/4/603 of 28 October 2015 of the Constitutional Court of Georgia in the case *Public Defender of Georgia v. the Government of Georgia*, Record of minutes No 2/11/663 of 7 July 2017 of the Constitutional Court of Georgia in the case *Citizen of Georgia Tamar Tandashvili v. the Government of Georgia*, Judgment No 2/482,483,487,502 of 18 April 2011 of the Constitutional Court of Georgia in the case *Political association 'Movement for United Georgia', political association of citizens 'Conservative Party of Georgia', citizens of Georgia Zviad Dzidziguri and Kakha Kukava, the Georgian Young Lawyers' Association, citizens Dachi Tsaguria and Jaba Jishkariani, Public Defender of Georgia v. the Parliament of Georgia*.

24. For example, see the constitutional claim of 1972 and the Record of minutes No 3/5/1792 of 15 December 2023 of the Constitutional Court of Georgia in the case *Nikoloz Tomasiani v. the Parliament of Georgia and the Minister of Justice of Georgia* connected thereto.

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