



DRUG POLICY IN GEORGIA

Canceled Reform and New Tendencies

Drug Policy in Georgia

(Canceled Reform and New Tendencies)

ადამიანის უფლებების სწავლებისა და მონიტორინგის ცენტრი



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Introduction

The report aims to provide with an overview of basic tendencies concerning the state policy, legislative framework and criminal law practices on drug-related crimes. Through this report, the EMC continues documenting the systemic challenges in the field of drug-related policy in order to provide with comparative analysis of practices and circumstances of previous years as well as to contribute to fundamental changes in drug-related policy.

During the last years, no substantial legislative amendments have been made in the field of drug-related policy. Thus, the report draws attention to challenges and to situation existing in law enforcement and justice system. The report makes an overview of the particular legal novelties that were largely determined by the decisions of the Constitutional Court of Georgia.

Taking into consideration certain efforts of non-systemic nature of the government to liberalize the drug-related policy, it is well-known that drug-related crimes remain the significant challenge in the field of human rights and justice system. The government appeared unable to make a decision on substantial changes despite the large-scale protest, performed work and requests that have been lasting for many years now. Moreover, since spring 2018, the government practically refused to discuss the reform on drug-related policy within the framework of different types of working groups. The draft law was cut from the legislative schedule.

This happens under the circumstances when legislative framework on drug-related crimes, the practices of investigatory bodies and effective judicial control leaves the risks and possibilities to use drug-related policy in an arbitrary, unfair and disproportionate manner and to apply inhuman punishments.

During the last six months of 2018 year, over 50 persons detained in penitentiary establishments launched hunger strikes for the judicial decisions on drug-related crimes or unfairness of sanctions applied against them.¹ In 2018, suspended sentence is used against 4697 persons² and only in the same period of time, approximately 3000 persons have been convicted for drug-related crimes.³

1 Letter N49199/01 of February 21, 2019 of the Ministry of Justice of Georgia Special Penitentiary Service.

2 Letter N2/22629 of March 12, 2019 LEPL National Bureau of Enforcement and Probation Service of Ministry of Justice of Georgia.

3 Letter Np-112-19 of February 13, 2019 of the Supreme Court of Georgia.

In this report, under the given circumstances of the canceled reform, the EMC assesses once again legal environment, updated statistical data with regard to drug-related policy as well as peculiarities of law enforcement bodies and judiciary with regard to particular criminal law cases and based on a study of existing practices in the field of drug-related policy.

We hope that, the assessments and tendencies invoked in this report will encourage the renewal of drug-related policy reform process and will assist all the interested parties in forming fair, humane and care-oriented drug-related policy.

Methodology

Normative acts, public information gathered from State bodies, decisions of the Constitutional Court of Georgia and statistical data have been examined in order to prepare the below report. In order to study the practices of investigatory bodies and court case-law, the decisions of 2018 year of Common Courts related to drug crimes as well as particular criminal law case materials of convicted persons have been examined.

Legislative analysis

Relevant Georgian legislation and basic amendments made in 2018 have been analyzed to prepare this document.

Overview of the Constitutional Court Decisions

The Constitutional Court decisions concerning drug policy as well as the legislative amendments influenced by these decisions have been analyzed for this report. A particular attention is paid to the decision of October 24, 2015 where the Constitutional Court established that it was unconstitutional to use custodial sentence for purchasing and possessing dry cannabis up to 70 grams. Similarly the report invokes, the Constitutional Court decision of July 13, 2017, related to using custodial sentences for purchasing and possessing a narcotic substance “desomorphine” weighing 0.00009 grams. The report overviews Constitutional Court decisions of 2017 year concerning the constitutionality of applying custodial sentences for cultivation of cannabis. The report analyzes the decisions of Constitutional Court of November 30, 2017 and July 30, 2018 that first decriminalized consumption of cannabis and later legalized consuming cannabis in a private space.

Public Information Gathered from State Bodies

Public information requested from the Ministry of Internal Affairs, the Ministry of Justice, the Special Penitentiary Service, the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia, is important for this research. The requested and examined information concerns the following issues: statistical data on persons transferred for drug testing; statistical data on persons convicted for drug-related crimes and persons who are on suspended sentence; data on state expenditures for cure and rehabilitation for drug consumers.

Common Courts

During the reporting period, the Supreme Court statistical data related to administrative fines for drugs as well as guilty verdicts and applied sentences were analyzed to examine the dynamics and related issues in the field of drug policy.

The verdicts of 2018 concerning drug-related crimes were requested from the Common Courts. The study of the above-mentioned verdicts aimed to establish the relevance of the quantity of narcotic substances and applied sentences. It also aimed to identify the most widespread narcotic substance as well as to assess the court case-law of the previous year.

Analysis of Criminal Cases on drug crimes

The report also overviews 3 criminal cases of convicted persons for drug crimes. For that reason the existing case materials are used. The EMC selected these cases according to the publicity of information and based on the submissions made by the citizens. The main criteria for selecting the cases was the violation of rights of convicted/accused persons, illegal acts allegedly committed by police officers and the existence of signs that demonstrated non-objective investigation.

Main Findings and Recommendations

Within the framework of the research, the following tendencies and challenges have been identified:

- The drug policy reform process is cancelled and the government has not disclosed its approach towards the solutions to the problems that exist in drug policy;
- It is unclear which state body is responsible to coordinate the drug-related policy reform process and to create a platform for interested parties;
- The actions of the government is limited to enforcement of Constitutional Court decisions and it avoids to initiate a systemic reform and sharing political responsibility on the issue;
- There is an increased number of applying suspended sentences for possessing narcotic substances in a small quantity. However, dozens of people still remain in penitentiary establishments for the very crimes;
- Last year, transferring persons to drug testing was decreased and slightly increased the number of positive forensic reports of the persons transferred to drug testing. Nevertheless, the legal basis to transfer and the protection of rights of transferred persons is a subject to critics;
- While working on the report, 2017 year has been recognized once again as an exceptionally troublesome year with regard to drug policy. Manipulating with evidence in criminal cases on drug crimes was manifest. In 2018 year, such facts have not come to light;
- The state does not collect relevant statistical data concerning drug crimes that would enable to determine drug policy in fair and rational way. The following statistical data is absent: the number of imprisoned or otherwise convicted persons; the statistics on the most widespread drug types; the overall number narcotic substances and statistics on applied sentences; the number of guilty verdicts with regard to types of crimes; data on problematic drug consumers in the country. Consequently, it is impossible to rationally plan the mobilization of resources for rehabilitation and treatment programs;
- There is no information on administrative arrests used against persons who were transferred to drug testing;

- The law amended and partially improved the methods of drug testing for motor car drivers. However, no improvements have been made to drug testing as a whole and to the procedures of transferring persons to drug testing from the streets;
- The Law of Georgia on “Combating Drug-related Crime” provides with additional deprivation of rights to persons convicted for drug-related crimes. Judges are not entitled to individually assess the necessity and proportionality of deprived rights. Along with the amendment made to the above-mentioned law in 2018, the scope of the problematic provisions was extended to administrative fines for cannabis consumption. However, it leaves the margin of appreciation for judges to decide on deprivation of rights up to three years for the persons with administrative liabilities;
- The law in force leaves the possibility to apply inhuman punishments without taking into account the quantity of narcotic substances. Plea agreement is the only legitimate possibility for the accused person to avoid such a punishment;
- The role of operative information within the framework of investigation remains a systemic challenge. The main investigatory actions are carried out based on the operative information and investigator is the only party to the criminal proceedings who can appeal or access to its content;
- According to the established practice, the testimonies of the police officers are the only source evidence to establish in what kind of circumstances was a narcotic substance obtained. This increases the risks of arbitrariness by police officers;
- Standard of proof on drug crimes established by the Court is such low that a person can be easily convicted if the police officers deliver testimonies prepared in advance and if the chemical expertise delivers a positive report on a narcotic substances.

In order to eradicate the problems in legislation and in practice, the EMC gives the following recommendations:

To the Parliament of Georgia:

- To recommence discussions of draft laws N7800/2-1 elaborated by “Georgia’s National Drug Policy Platform” on June 22, 2017 and initiated by the members of Parliament (A. Zoidze, L. Koberidze, D. Tskitishvili, S. Katsarava, I. Pruidze) and to make the existing repressive drug policy more human by adopting that draft law;

- To abolish the possibility that enables automatic application of additional sentences to the convicted persons for drug-related crimes before the adoption of the law. To leave the margin of appreciation to the Court to decide individually the necessity of deprivation of rights when rendering guilty verdict;
- To make relevant amendments to the Law of Georgia on “Operative-investigative Activities” and to Criminal Procedure Code of Georgia that would enable the Court to access to detailed content and sources of the information obtained via conducting a search based on the operative information on drug crime;
- To make amendments to Criminal Procedure Code of Georgia that would outlaw the risks of arbitrariness by the investigatory bodies while conducting a search on drug crimes. To discuss among others, the issue of using body cameras while conducting an investigative activities;
- To make a political decision to release (amnesty/ pardon) the persons who are victims of unfair or disproportionate punishments, before making fundamental drug-related reform. That should be made as an interim decision for transitional period. To create a working group in Parliament that would bring together the relevant bodies of executive branch and non-governmental organizations working on human rights and on the rights of drug users, in order to effectively carry out the work.

To the Government of Georgia:

- To collect data on number of drug users as well as on narcotic substance consumption types and on length of consumption in order to plan health-care oriented drug policy;
- To analyze such statistical data that would assist the State to make relevant political decisions on drug-related crimes. The following statistical data should be analyzed: the number of convicted persons for drug crimes; the data demonstrating the most spread types of narcotic substances; information on amount of narcotic substances, applied sentences and amounts of fines; statistics on guilty verdicts with regard to types of crimes;
- To encourage educational activities as preventive measures that would be oriented to raise public awareness about drug addictions;
- To create “Assignment Commissions” and to enlarge the scope of support and care services.

To the Common Courts:

- Not to check merely the urgency of investigative activities and decrees issued by investigator but, to check factual/substantive grounds for search as well, while the issuing relevant rulings for searches conducted under urgent necessities;
- Taking into consideration adversarial hearings, not to assess that testimonies of police officer bear higher credibility compared to testimonies of defense and to be guided by the fair trial principles;
- To raise the quality of checking the credibility of the evidence obtained via investigation conducted based on operative information;
- To be guided by the human rights principles while assessing the evidence on drug-related crimes and to take a decision on culpability beyond reasonable doubt under Criminal Procedure Code of Georgia;

I. Existing context

To assess the drug-related situation during the reporting period, it requires to discuss the landmark events of 2018 along with legislative regulations. The above-mentioned illustrates the reasons for the failure of drug-related policy reform and the existence of inhuman legislation in force.

Canceled drug policy reform

On June 22, 2017, the draft law elaborated by active involvement of civil society was initiated by five members of Parliament. That was the fruit of long-term discussions on drug policy reform and wide scale campaign. The draft law was elaborated by “Georgia’s National Drug Policy Platform” and it envisaged fundamental changes to the repressive drug policy of the State. After introduction the legislative package to the Parliament and since the first hearing on the Committee of Healthcare, the working process on the draft law has been canceled for indefinite time at the legislative body.

The legislative package deals with practically all the challenges that the existing drug-related policy encounters with regard to human rights. It envisages decriminalization of consumption and possession of drugs for personal use with regard to all types of narcotic substances. It also sets fairly what should be the minimum quantity that can result in criminal liability and what sanctions can be proportionate. The draft law also deals with the abolishment of blanket norms with regard to deprivation of rights for the convicted persons and prefers the existence of discretionary power of the Court to decide individually on the necessity and length of deprivation of rights. The draft law package introduces a new methods and grounds for coercive drug testing. It also covers the issues of improvement of treatment-rehabilitation and prevention systems and establishment of “Assignment Commissions”.⁴

Due to the absence of political will and unity inside the government to undertake fundamental changes and despite the different types of discussions on the legislative package, no political decision has been made with regard to the draft law. Moreover, from the beginning of 2018 year, different groups undertook an organized and intentional discrediting campaign towards the supporters of drug policy reform. This was accompanied by dissemination of fake information on the content and objectives of the draft law and by the counter-campaign on drug policy reform. Later, in order to discredit the club spaces of Tbilisi and to discredit the groups supporting drug policy reform, a wide scale police operation was carried out in May 12, 2018. It can be assumed that the Parliament used the context to cut the wide scale drug policy reform from the legislative schedule.

⁴ The draft law N07-3/77/9 elaborated by the Georgia’s National Drug Policy Platform is available at <https://bit.ly/2F5fkqp>.

Events of May 12

The wide scale police operation carried out in Tbilisi night clubs on May 12, 2018, finally canceled the fundamental reform of drug policy. The police operation started at night of May 12, by entering armed and masked Special Forces and particularly numerous police officers to Tbilisi night clubs. The special operation started when already tens of guests were gathered for the events. According to the official statement made by the Ministry of Internal Affairs, the wide scale special operation and the search operation were based on a Court ruling and aimed to identify and prevent drug crimes. The special operation of May 12 was preceded by the fatal cases of overdosing and by making the issue of political debates. Consequently, the demonstratively repressive acts carried out by the police officers towards the night clubs and participants of the manifestation that took place nearby the club “Bassiani”, resulted in discrediting the drug policy reform supporters and thus left the existing repressive drug policy unaltered.⁵

The Ministry of Internal Affairs arrested 8 persons for having committed a drug crime, just a couple of hours before the mass search in the night clubs. The Ministry of Internal Affairs made the reference to the arrest of the eight persons in order to legitimize the operation of May 12 and to underline the necessity/urgency of the operation. However, the monitoring of the cases of arrested persons, made the official version and reasons less credible. The proceeding of the criminal cases of the persons arrested completed in February 2019. EMC monitored the Court hearings of the cases. As a result, it is worth mentioning that the link between the cases of the arrested persons and the wide scale operation conducted in the clubs became even more ambiguous.

The Court found that, only one person, out of 8 persons arrested, had narcotic substances in possession the day of arrest. In the rest seven cases, the fact of possessions and selling drugs had happened weeks earlier before May 12. The arrest and accusations of the above-mentioned persons were connected to episodes of purchase, storage and resale of March and April 2018. Consequently, demonstrating these arrests as an integral part of the special operation conducted in the clubs on May 12, represents an attempt of the law-enforcement bodies to increase legitimacy of the special operation, to demonstrate force and to mislead the society. After a year of the May 12 events, it can be stated more clearly that the main goal of the police operation was to discredit the supporters of humanized drug policy and to weaken the protest of civil society as much as possible.

⁵ “The Human Rights Education and Monitoring Centre” (EMC)/ The Georgian Young Lawyers Association, “May 12 – wide scale police operation in Tbilisi night clubs”, 2018, p.6.

II. Overview of Legislative Framework on Drug Crimes

General legal framework

Law of Georgia on “Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance” enlists the substances that are under special control and determines legal grounds of State policy associated to their illegal circulation. The law is annexed with the lists I and II containing Narcotic Drugs Strictly Limited for Circulation. It is also annexed with list III and IV that enumerates psychotropic substances and precursors. The law determines the minimum limits of quantities of narcotic substances under special control to be classified as administrative offences and establishes the minimum limits of small, large, and particularly large quantities of substances under special control to be classified as criminal acts. In case the law does not determine the dosage of a substance under special control, any amount can be considered to establish criminal liability⁶ that can lead to up to 6 years imprisonment.⁷ The law does not determine the minimum quantity for imposing criminal liability of three fourth of the substances under special control.⁸

The first fact for purchase, storage or illegal consumption in small quantity results in administrative penalty. The repeated commission of such an act by a person who has been subjected to an administrative penalty results in criminal liability.⁹

Law of Georgia on “Combating Drug Crime” determines additional sanctions against persons who were found guilty for having committed a drug-related crime. Under this law, along with the punishments prescribed by the criminal legislation, the Court is obliged to deprive the following rights to the convicted person: a driving license, the right to medical and/or pharmaceutical practice, the right to practice law and the right to work in pedagogical and educational institutions as well as the right to work in public bodies. The length of deprivation of rights is determined by the gravity of the crime: up to three years for drug-users; from 5 to 15 years for other cases of drug crimes prescribed by the chapter of drug-related crimes; up to 20 years for drug-dealers.¹⁰

6 Article 6, paragraph 41 of the Law of Georgia on “Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance”.

7 Article 260, paragraph 1 of the Criminal Code of Georgia.

8 Human Rights Watch, “Exemplary punishment – tough human results of repressive drug-related policy of Georgia”, 2018, p.1.

9 Article 273 of the Criminal Code of Georgia.

10 Article 3 of the Law of Georgia on “Combating Drug-related Crime”.

Along with the above-cited legislative acts, one of the possibilities to combat drug-related crimes is to establish the fact of narcotic drug or psychotropic substance by medical examination. That is regulated under Decree of the Ministry of Internal Affairs.¹¹ The instruction determines the following grounds to submit a person to be examined in an expertise establishment: 1) when the police officer identify the fact of possession or consumption of narcotic drugs in a small quantity; 2) when a person does not obey the legal instructions of police officers or attempts to escape; 3) operative information obtained by operative-investigative or secret investigative activities, including the information provided to 112 or directly to the police officer that a person is under drug influence. The last ground is largely connected to the risk of arbitrariness of police officer as far as under the legislation in force, it is practically impossible to check the credibility of the operative information. It does not fall within the scope of prosecutor's or the Court supervision.¹² That Decree about coercive drug-testing entitles the police officers to arrest and forcefully submit a person to drug testing in the event the person refuses to voluntarily undertake an examination. Not a single normative act or decree envisages the case when a person consents to be transferred but when having arrived at the establishment declines to participate in a laboratorial or clinical expertise. The above-mentioned Decree does not provide legal provisions whether and based on what grounds are the police officers entitled to detain or arrest a person in this particular case. In practice, this is normally used against the rights of transferred persons.

Since April 1, 2019, the above-mentioned drug-testing rule has been partially improved with regard to establishment of fact when driving a car in a state of narcotic or psychotropic substance intoxication.¹³ Under instruction, if there is enough basis to believe that a driver is in a state of narcotic or psychotropic intoxication, he/she is tested with a portable drug-tester. In case a drug-tester shows a positive response, the driver is transferred to Expert-criminalistics establishment of the Ministry of Internal Affairs to undertake clinical or laboratorial examination. In the event when a driver refuses portable drug-testing, she/he is directly transferred Expert-criminalistics department. In case a driver refuses to undertake clinic-laboratorial examination, he/she is considered to be in a state of narcotic intoxication.¹⁴

11 Decree N725 of September 30, 2015 of the Minister of Internal Affairs on "Instruction to submit a person for examination to establish the fact of narcotic drug or psychotropic substance consumption".

12 "The Human Rights Education and Monitoring Centre" (EMC), "What changes have been made to coercive drug-testing practice", 2016, p.11. available at <https://bit.ly/2F0SznK>.

13 Joint Decree N25 –N01-30/N of March 29, 2019 of the Ministry of Internal Affairs and Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia on "The Rule establishing administrative offences related to narcotic and psychotropic substance consumption". The Decree amended the joint Decree N1244-N278/N of October 24, 2016 of Ministry of Internal Affairs and Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia.

14 Article 2 of the Decree.

Overview of amendments made to the legislation during the last years

Elaboration of liberal legislative regulations in the field of drug policy was determined by a number of Constitutional Court decisions. During the last years, the following Governmental policy was manifest – the Government was attempting to avoid political responsibility with regard this issue and left the whole burden to the Constitutional Court and made it responsible for the changes. Even in the event, when Constitutional Court highly criticized the basic characteristics of the existing drug policy, the actions of Government were limited to execution of particular cases and refused to commence a systemic reform process that was recommended in Constitutional Court decisions.

It can be assumed that, if there is any progress made with regard to humanization and proportionality of punishments in the field of drug policy, it is made thanks to the efforts of Constitutional Court. Since 2015, the Court case-law amended drastically the preexisting legislation on consumption of cannabis. It also altered the sanctions with regard to consumption of other narcotic drugs.

At first, the decision of Constitutional Court abolished custodial sentence as a sanction for purchasing and possessing cannabis (up to 70 grams) for personal consumption.¹⁵ Later, the Court ruled that it was unconstitutional to hold persons criminally liable for consumption of cannabis in general.¹⁶ Finally, by the decision of July 30, 2018, the Constitutional Court declared that the blanket prohibition of consumption of cannabis was unconstitutional. The Court considered that it was disproportionate interference into a private life and abolished administrative fine for consumption of cannabis without doctor's prescription. The above-mentioned decision practically legalized consumption of cannabis in private space. The very decision indicates that it is proportionate to regulate the consumption of cannabis for the purpose to protect other persons.¹⁷ The Constitutional Court underlined the necessity of legislative regulations to restrict consumption of cannabis in order to protect minors from negative impact. That refers to the cases when cannabis is consumed in presence of minors or at institutions that are normally visited by minors. For maintaining public order and public health, the Court justifies the prohibition of cannabis consumption at educational, pedagogical establishments as well as at medical and State establishments and at certain public spaces.¹⁸

15 The decision of the Constitutional Court of Georgia of October 24, 2015 on “Citizen of Georgia – Beka Tsikarishvili v. Parliament of Georgia”.

16 The decision of the Constitutional Court of Georgia of November 30, 2017 on “Citizen of Georgia – Givi Shanidze v. Parliament of Georgia”.

17 The decision of the Constitutional Court of Georgia of July 30, 2018 on “Citizen of Georgia – Zurab Japaridze and Vakhtang Megrelashvili v. Parliament of Georgia”, §35.

18 Ibidem. §35.

Shortly after rendering the above-mentioned Constitutional Court Decision, in September 2018, the legislative package reflecting the decision and the draft law on Control of Cannabis were simultaneously submitted to the Parliament. The draft law aimed to establish legal basis for cultivation of cannabis for medical or commercial purposes. The explanatory note to the draft law invoked the Constitutional Court decisions related to circulation of cannabis.¹⁹ The draft law envisaged to create the regime for granting license to export cannabis for medical or commercial purposes. It also aimed to determine the State competences with regard to this issue and to determine security measures. On the other hand, the draft law prohibited the realization of product obtained by licensed practice in Georgia.²⁰ On November 2018, the author withdrew the legislative package from Parliament due to the critics and different attitudes in society towards the draft law.

As for the legislative package reflecting the Constitutional Court ruling of July 30, 2018, it entered into force from November 30, 2019 and suggests new approaches towards criminal acts and offences related to consumption of cannabis.

Amendments made to Administrative Offences Code of Georgia

Commission of administrative offence in a state of narcotic or psychotropic intoxication was added as aggravating circumstances to impose an administrative penalty.²¹

Issues related to consumption of cannabis are regulated under a separate provision – under Article 45¹ of Administrative Offences Code of Georgia. The amendments abolished the pre-existing regulation concerning consumption of cannabis in a small quantity that was regulated under Article 45 of Administrative Offences Code of Georgia.

Under paragraph 1 of the new provision illegal purchase, storage, transportation or sending of cannabis in a small quantity is classified as an administrative offence. The repeated commission of such an act by a person who had been subjected to an administrative penalty results in criminal liability.²²

The legislative amendment prohibits consumption of cannabis at any premises except for the living place of a person. The penalty for this administrative offence is defined from 500 to 1000 GEL. The same act committed repeatedly envisages a fine from 1000 to 1500 GEL.²³

19 See explanatory note to the draft law on “Control of Cannabis” available at: <https://bit.ly/2F3JuKG>.

20 See the Law of Georgia on “Control of Cannabis” available at: <https://bit.ly/2IAiW1b>.

21 Article 35, paragraph 6 of Administrative Offences Code of Georgia.

22 Article 273, paragraph 1 of the Criminal Code of Georgia.

23 Article 45, paragraphs 2 and 3 of Administrative Offences Code of Georgia.

The legislative amendment introduced restrictions on consumption of cannabis by underage and by persons who have not reached 21 years.²⁴ It prescribes a strict liability for consumption of cannabis in presence of an underage person as well as at educational and pedagogical establishments²⁵ intended for underage persons and at public spaces. The law prescribes liability for the establishments in case they identify an employee in a state of cannabis intoxication and do not react to the fact.²⁶ Administrative penalties for popularization and advertising of narcotic substances became stricter.²⁷

Making amendments to Administrative Offences Code of Georgia related to consumption of cannabis was intended to duly execute the last ruling of the Constitutional Court. However, neither on a stage of draft law initiation nor on committee hearings, there has not been any attempt to broadly regulate the issues related to cannabis based on the indications made by the Constitutional Court. The legislative body avoided to regulate the rules of acquisition of cannabis on a legislative level. Presumably, this question is left to Constitutional Court for future decisions. Moreover, it is ambiguous why the legislative regulation became stricter with regard to underage persons and person under age of 21. It is problematic that a legislative body is still addressing to repressive measures instead of introducing care-oriented policy in order to protect underage persons and persons under age of 21 from potential negative impact.

Amendments made to Criminal Code of Georgia

Amendments have been reflected to the Criminal Code of Georgia in order to protect minors from negative impact caused by narcotic substances. The amendments made to Criminal Code of Georgia establish criminal liability for the act of inducement to use narcotic substance with respect to person under age of 21 along with minors.²⁸ Amendments have been made to the Chapter of transport-related crimes. Driving in a state of narcotic or psychotropic intoxication was added as an aggravating condition, in order to prevent the violation of traffic safety rules.²⁹ By this novelty, drunk driving remains an administrative offence,³⁰ while the same act committed in a state of narcotic intoxication established criminal liability.³¹

24 See Explanatory Note of the Draft law on “Amendments made to Administrative Offences Code of Georgia”, available at: <https://bit.ly/2F3KmPs>.

25 Article 45¹, paragraphs 4, 5 and 6 of Administrative Offences Code of Georgia.

26 Article 45¹, paragraphs 14 of Administrative Offences Code of Georgia.

27 Article 159¹⁰ of Administrative Offences Code of Georgia.

28 Article 272, paragraph 3 of the Criminal Code of Georgia.

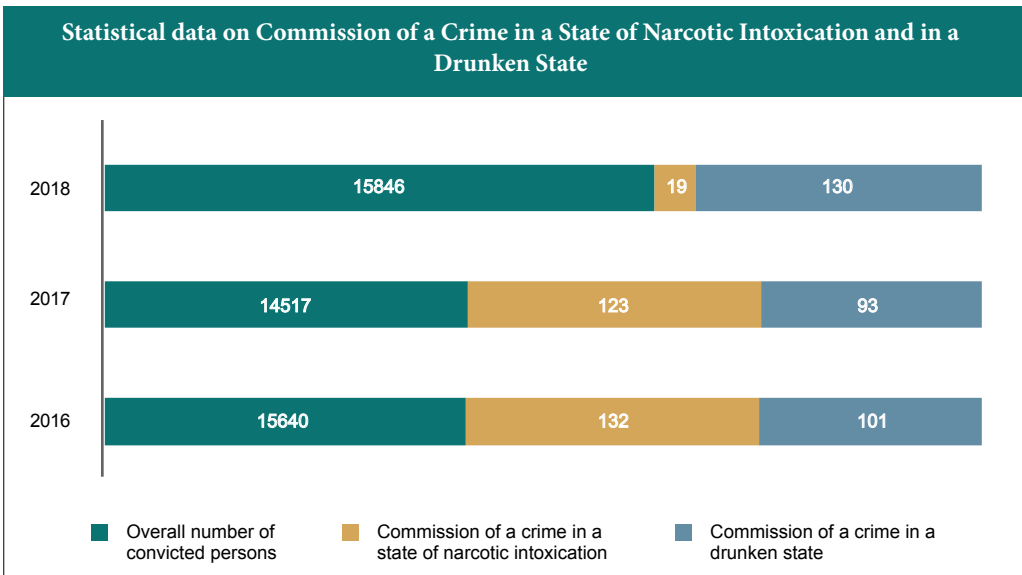
29 Article 275, paragraph 3; Article 276 paragraph 3 of the Criminal Code of Georgia.

30 Article 116 of Administrative Offences Code of Georgia.

31 Article 276, paragraph 1 of the Criminal Code of Georgia.

The above-mentioned legislative amendment makes it ambiguous why there is two different approaches towards drunk driving and towards driving in a state of narcotic intoxication. It is not clear what justifies the drunk driving to be the ground for administrative liability and what makes driving in a state of narcotic intoxication to be the ground of criminal liability.

The statistical data on commission of a crime in a drunken state and in a state of alcoholic intoxication demonstrates the new regulations are problematic. The statistical data of the last year makes it clear that the commission of a crime in a drunken state is much higher compared with the commission of crime in a state of narcotic intoxication. Namely, in 2018 year, 130 persons were found guilty for commission of a crime in a drunken state (0.8 % of the whole number of convictions) and 19 persons were found guilty for commission of crime in a state of narcotic intoxication (0.1% of the whole number of convictions). According to the data of 2016 and 2017 years, there is a slight difference between the statistical data of convictions for commission of crimes in a state of narcotic intoxication (0.8%) and in a drunken state (0.6%).³²



Deprivation of civil rights for a convicted person is also established by the new regulation along with the establishment of criminal liability for commission of a crime in a state of narcotic or psychotropic intoxication. The Law of Georgia on “Combatting Drug-related Crime” enlarged the scope of definition of drug user and determined deprivation of rights up to three years for driving a motor car in a state of narcotic intoxication.³³ The amendments

32 The Supreme Court of Georgia “Justice in Georgia – statistical data of 2018 year” available at: <https://bit.ly/2X1W8UD>.

33 Article 3 of the Law of Georgia on “Combatting Drug-related Crime”.

made to the above-mentioned law envisage for the first time the deprivation of rights for administrative offences as well. Namely, the Court has been granted with discretionary power to make a decision on deprivation of rights up to three years against a person who previously had been subject to administrative penalty for consumption of cannabis.

The approach of the legislative body with regard to deprivation of rights against a person who previously had been subject to administrative penalty for consumption of cannabis, shall be assessed negatively. The mechanisms of deprivation of rights with regard to drug-related crimes is a subject to critics for its blanket nature. The automatic application of deprivation of rights with regard to convicted persons results in a grave financial consequences, stigmatization and isolation for a convicted person. For that reason, the necessity to make amendments to the Law of Georgia on “Combating Drug-related Crimes” has been a subject to discussions for many years now. Consequently, the enlargement of the scope of the problematic legislation and using the discretionary power of the Court with regard to administrative offences – is unjustified.

Analysis of the Constitutional Court Rulings

Constitutional Court rulings served as a basis to make substantive legislative amendments in the field of drug-related policy. The Constitutional Court discusses the legislative regulations related to narcotic substances in the light of the rights guaranteed by the Constitution – including the prohibition of inhuman punishment, the right to personal development and the right to equality.

Prohibition of Inhuman Punishment

The approach developed in the Constitutional Court ruling on Beka Tsikarishvili case, made a huge impact on the fundamental changes undertaken in the field of drug-related policy in general and particularly on the aspects of strict punishments established for drug policy. The Court ruling concerned the issue, whether applying imprisonment for possessing 70 grams of cannabis for personal use was in compliance with the prohibition of inhuman punishment guaranteed by the Constitution. While discussing the issue of possessing cannabis for personal use, the Court made references to the rights guaranteed under the Constitution – human health, public order and ensuring security and stated: – “It contradicts the Constitution to imprison a person for an act that endangers merely the person herself/himself and is not intended (or cannot be intended) to violate the rights of others. It has no purpose and thus it is unjustified to impose criminal liability in form of imprisonments on a person for an act

that can only harm his own health. Taking everything into consideration, imposing criminal liability that can envisage imprisonment of person for purchase/possessing cannabis for personal use, represents disproportionate measure to attain the objective of securing health.³⁴

The Court developed a similar approach in the case of illegal cultivation of cannabis in large quantity (150.72 gr. and 63.73 gr.) and in particularly large quantity (265.49 gr.). Cultivation of cannabis for personal use of the above-mentioned quantities resulted in penalty of imprisonment up to five years. The regulations in force stipulated 4-7 years imprisonment in case of large quantity and 6-12 years imprisonment in case of particularly large quantity, respectively. The Applicants argued that it violated the principle of prohibition of inhuman punishment.³⁵ Along with the assessment of health and security interest, the Court also discussed whether the appealed quantities could create the risk of automatic distribution and thus inevitable danger for other people's health. The Court found that sanctions imposed for cultivation of cannabis of 150.72 gr. and 63.73 gr. shall not be considered proportionate as such quantities did neither indicate to purpose of reselling nor to real risks for realization or any reasonable risks and thus to endangering the health of others. The Court found that the problem of the regulation was its blanket nature as long as it was impossible to impose sanctions on a person by individual assessment and by reasonable assessment of risks.³⁶ Contrary to that, the Court confirmed the necessity of State interference in case of particularly large quantities (265.49 gr.) due to the related risks. On the other hand, the Court assessed the proportionality of the penalty (6-7) and made comparison with regard to crimes bearing equal or more dangers such as rape and burglary.³⁷ The obvious severity of sanctions imposed for cultivation of cannabis compared with the above-mentioned crimes was found disproportionate and thus served as a basis to find them unconstitutional.³⁸

Constitutionality of punishment imposed (5-8 years) for fabricating and storage of 0.00009 grams of narcotic substance – desomorphine – was also the subject to the Court discussions with respect to human dignity. The absence of a minimum quantity for imposing criminal liability for possession of desomorphine was considered as a problem. Possessing desomorphine even below to 1 grams that can be completely useless for consumption implied automatically possessing the substance in a large quantity. In that case as well, the Court found it unconstitutional to impose criminal liability for possessing a substance that is 111 times

34 The decision of the Constitutional Court of Georgia of October 24, 2015 on "Citizen of Georgia – Beka Tsikarishvili v. Parliament of Georgia", §84.

35 The decision of the Constitutional Court of Georgia of July 14, 2017 on "Citizens of Georgia – Jambul Ghvianidze, David Khomeriki and Lasha Gagishvili v. Parliament of Georgia".

36 *Ibidem*: §31.

37 *Ibidem*: §35.

38 *Ibidem*: §37.

smaller than a minimum quantity for consumption.³⁹ The Court further explained that the State intended to use criminal liability in form of imprisonment as a general preventive measure. The basis of severity of a punishment is not an act committed itself, but the preventive purposes and the convicted individual is a mean for attainment of the above-mentioned purposes. Solely general prevention cannot be regarded sufficient as long as this approach will turn a person into a “threatening object” in the hands of a State. Using a human being as an object of menace is ruled out and contradicts the rule of law.⁴⁰

Contradiction to right to free personal development

Abolishing criminal liability for consumption of cannabis in 2017 was a continuation of fundamental changes of the Constitutional Court with regard to the right to free personal development.⁴¹ The subject of the case was to assess whether imposing criminal liability for consumption of cannabis was in conformity with the Constitution. The Court, therefore, did not assess the constitutionality of criminal liability for fabrication, purchase, storage and consumption of other narcotic substances.

The Parliament indicated that the protection of health of society (negative side effects of cannabis on health) was the legitimate goal to impose criminal liability for consumption of cannabis. Moreover, the respondent regarded consumption of cannabis as a starting point to use other narcotic substances. While assessing the above-mentioned objectives, the Court explained one more time that consumption of cannabis might have some potential risks for health, though, the harm largely depends on a state of health of a person individually. The harm caused by consumption of cannabis is less dangerous compared to the harm caused by consumption of other narcotic substances.⁴²

The ruling states: „The Constitution guarantees the right of a person to freely determine plans and goals of his/her own life and act in a way that does not make harm on others. Despite the fact that, consumption of cannabis is related to negative side effects for its users – it derives from the freedom of choice and personal autonomy and it is guaranteed under the right to free personal development: the possibility to make a decision to try side effects of the substance even if in some manner it makes a negative impact on his/her health”.

39 Ibiden. §11.

40 The decision of the Constitutional Court of Georgia of July 13, 2017 on “Citizen of Georgia – Lasha Bakhtashvili v. Parliament of Georgia”, §19.

41 The decision of the Constitutional Court of Georgia of November 30, 2017 on “Citizen of Georgia – Givi Shanidze v. Parliament of Georgia”.

42 Ibiden, §28-30.

The Court found that it was a disproportionate interference into someone's personal autonomy to impose criminal liability for a repeated consumption of cannabis merely on a basis of "moral self- degradation". The decision was based on the justification invoked in Beka Tsikarishvili's case. It referred to the risks related to consumption of cannabis that were insignificant towards public health, public security and other relevant interests. Thus, this makes it unjustified to impose criminal liability for consumption of cannabis.⁴³

The Court underlined particularly the necessity to keep the balance between criminal liability mechanisms and the preventive measures to lower the risks to public security and public health – "to use result-oriented and practically effective approaches". The Court explains that imposing criminal liability for an act that does not create risks for the health of others cannot be considered as a necessary and proportionate interference into the right to free personal development. Holding a person criminally liable (including even using a discretionary power or making a plea agreement), convicting and stigmatizing a person does not comply with the objectives that were invoked by respondent party to justify criminal liability for repeated consumption of cannabis. Without a prescription of doctor it turns a human into a simple objective of criminal prosecution.⁴⁴

After having declared unconstitutionality of imposing criminal liability for consumption of cannabis, in 2018 the Constitutional Court abolished as well administrative liabilities while discussing the case related to the right of free personal development. The ruling was substantively based on the approaches developed in the case-law of the Court. Repeated act of purchase and storage of cannabis in a small quantity remains the subject to prosecution as long as the Court did not address this issue.

The Principle of Equality under Law

The quantity of narcotic substances has been a subject to constitutional assessment for several times. The question was whether the principle of equality under law was respected when there was not a minimum limit determined for particular narcotic substances to establish a criminal liability and therefore committing such an act automatically falls within the scope grave crimes (for possessing narcotic substances in a large quantity. It is worth mentioning that the Constitutional Court has never found the violation of the principle of equality under law in similar cases. The applicant argued that there have been a violation of the principle of equality under law with regard to possession of desomorphine in unusable quantity (0.00009 gr.). Specifically, the applicant argued that Annex N2 of the Law of Georgia on

43 Ibidem: §56.

44 Ibidem, §49.

“Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance” did not establish the quantities for possessing desomorphine (as a result, possessing 0.00009 gr. of desomorphine is classified as – large quantity). The prosecutor while qualifying an act and the Court while rendering a verdict were unable to individually classify the cases based on personal characteristics of the person and based on assessment of relevant facts and circumstances. The applicant argued that the norm was discriminatory as long as the it caused unequal treatment under substantially equal circumstances.⁴⁵ The demand did not surmount the admissibility stage. The Court found that the application did not identify how and against who did the norm violate the principle of equality under law. The Court indicated that: If the applicant finds that criminal liability or application of the punishment is discriminatory against him then he shall appeal the demining rule of criminal liability imposition/punishment application and simultaneously, he shall justify how and with regard to whom has the law different approach.⁴⁶

The Court developed similar approach with regard to other narcotic substances that lack legal regulations on what is considered as small quantity and what quantity may serve as a basis to start prosecution.⁴⁷

45 The decision of the Constitutional Court of Georgia of July 13, 2017 on “Citizen of Georgia – Lasha Bakhtashvili v. Parliament of Georgia”, §6-7.

46 *Ibidem* §4.

47 The decision of the Constitutional Court of Georgia of June 22, 2017 on “Citizens of Georgia – Gela Tarielashvili, Giorgi Kvirikadze, Vladimer Gaspariani, Ivane Matchavariani et al. (9 applicants in total) v. the Parliament of Georgia.

III. Statistical data analysis of drug-related crimes

Analysis of statistical data related to a range of drug crimes for the report period is crucial for assessing the current situation in terms of effective drug policies. In the information provided by various state agencies on drug-related crimes, for the year of 2018 the main focus was placed on the following:

- Dynamic of prosecution;
- Rates of applying custodial sentences;
- Number of individuals serving conditional sentence;
- Number of individuals with administrative penalties for drug use;
- Statistics of individuals subjected to forced drug use inspection;
- Statistics of deprivation of civil rights to persons with conditional discharge.

Notably, for the purpose of the presented report it was also important to compile and process data about the total number of individuals placed in custody for drug-related crimes; however, the Special Penitentiary Service does not collect and maintain statistics about the convicts for crimes listed in certain articles of the Criminal Code, therefore, it is not possible to collect detailed data on this matter.⁴⁸ Due to the lack of statistics it is also impossible to obtain information about the amounts of drugs purchased and under possession by individuals for which they have been detained. The only means of information is to analyze each court ruling on drug-related crimes and scrutinize them with regard to the amounts of drugs and the applied punishment.

Statistical analysis of a range of data regarding drug-related crimes demonstrated prevalence of more liberal practices on the part of the state, compared to previous years. The number of individuals subjected to drug use inspection and those with administrative penalty for drug use has dropped. With regard to prosecution of drug crimes, 80% of cases have ended with conviction and every fifth convict has been subjected to custodial sentence. Notably, most of the convictions (about 85%) have been settled through procedural bargaining agreements. The mechanism of depriving the convicts for drug-related crimes of additional rights, which has been applied to about 5 000 conditional convicts within the report period, remains to be a challenge. Individuals under custodial sentences will face these restrictions after they leave the penitentiary institutions.

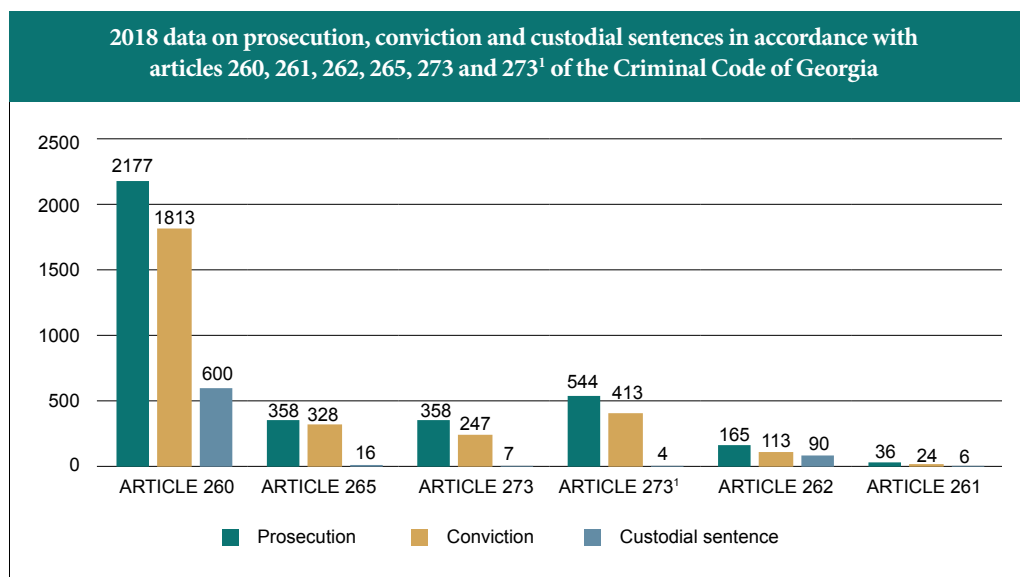
⁴⁸ March 11, 2019 Correspondence N69404/01 of the Special Penitentiary Service under the Ministry of Justice.

Statistics on prosecution and convictions

In 2018 prosecution for drug-related crimes⁴⁹ began against 3,638 individuals.⁵⁰ The District/City Courts of Georgia convicted 2,938 persons for these crimes, which is 84,2% of the prosecution for drug-related crimes. The remaining cases (15,8%) are either pending or have ended with acquittal.

In 24,7% of the convictions the courts imposed custodial sentences on 723 persons. Due to the lack of information in court statistics about the amounts of drugs,⁵¹ it is difficult to establish the number of convicts who are detained for possessing small dosage of drugs (for personal use); however, according to the 2018 data, 11 persons have been placed under custody for repeated use of drugs (Article 273 of the Criminal Code) and for purchasing-possessing small amounts of marijuana or cannabis (Article 273¹ of the Criminal Code).

The table below offers statistics on most frequent drug crimes and the numbers of prosecution, conviction and custodial sentences per each type of crime.



49 The number includes crimes listed under the articles 260, 261, 262, 265, 273 and 273¹ of the Criminal Code.

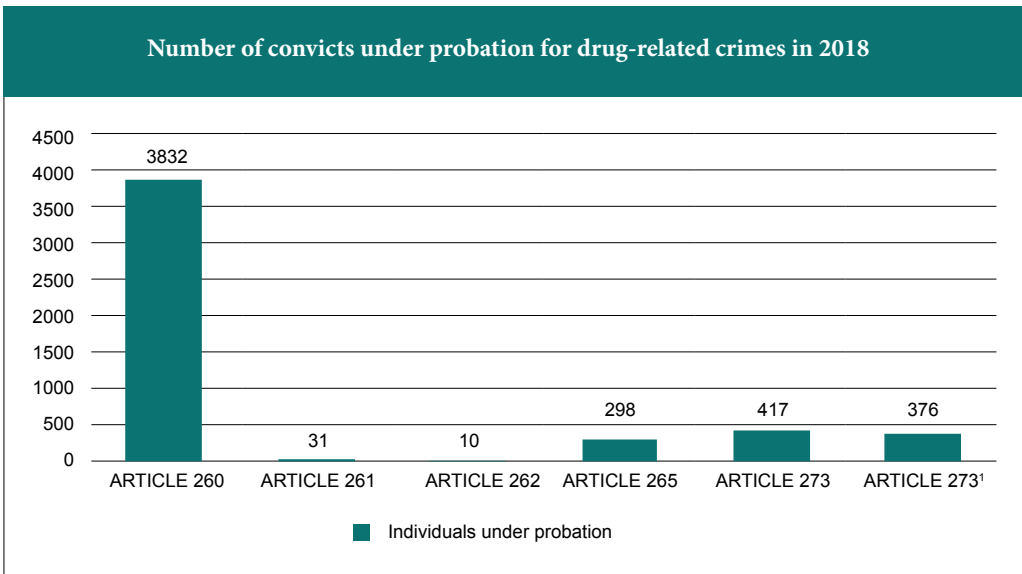
50 April 23, 2019 correspondence N13/29585 of Attorney General of Georgia.

51 Letter №-112-19 of February 13, 2019 of the Supreme Court of Georgia.

According to January 31, 2018 data of the Council of Europe, the number of individuals convicted for drug-related crimes composed 34,1% of the inmates in penitentiary institutions which is 3,733 persons out of 8,016 convicts.⁵² Compared to the 2015 information of the Council of Europe, in the total number of inmates the share of individuals convicted for drug-related crimes has increased by 4%,⁵³ (2,721 convicts out of 10,242 inmates), however, this change stems from the decline in the overall number of convicts in 2018.

Number of conditional convictions

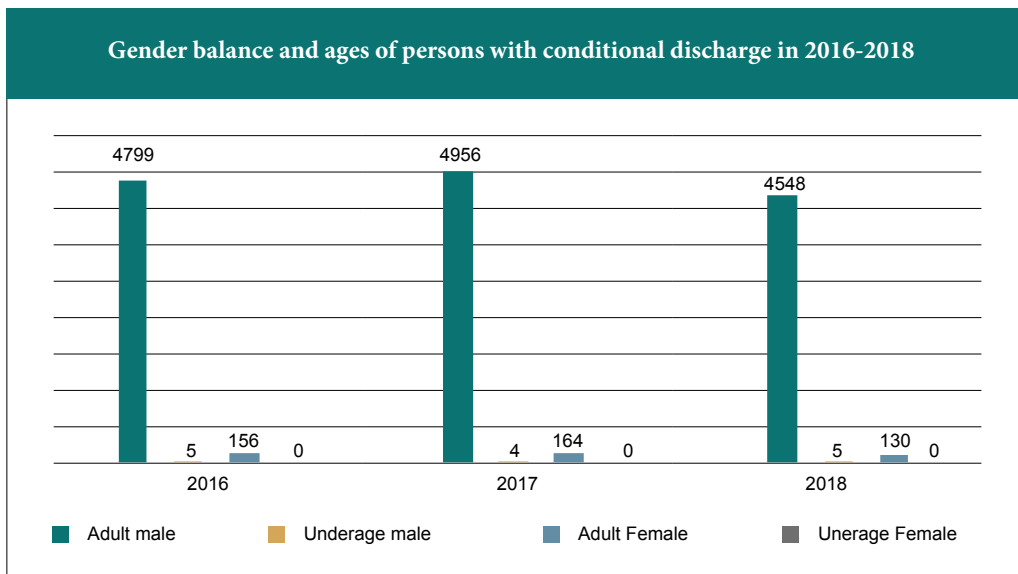
According to the 2018 data, the number of individuals subjected to conditional sentences reached 5,000. This number includes those who have received non-custodial sentence for drug-related crimes. According to the information provided by the National Probation Agency,⁵⁴ the highest number (77%) of probation sentences has to do with purchasing and possessing primary or large amounts of drugs/psychoactive substances under the paragraphs 1, 2 or 3 of Article 260 of the Criminal Code. The number of individuals convicted for these crimes amounted to 3,832 in 2018. High share of probation sentences also applies to the drug use and possession of small amounts of marijuana under articles 273 and 273¹ of the Criminal Code and the number of these individuals is 793. Conditional sentences are also imposed for cultivating marijuana or cannabis as described in Article 265 of the Criminal Code – 298 persons have been placed under probation for these actions.



52 Please see Council of Europe Annual Penal Statistics – SPACE I 2018, available at: <https://bit.ly/2K0VD84>.

53 Please see Council of Europe Annual Penal Statistics – SPACE I 2015, available at: <https://bit.ly/2ryNxY5>.

54 February 19, 2019 correspondence № 2/16395 of the Ministry of Justice LEPL National Probation Agency.



As it was expected, statistical data of the previous three years concerning drug-related crimes (for commission of acts prescribed under Chapter XXXIII of Criminal Code of Georgia) with regard to gender balance and ages of the persons with conditional discharge, demonstrates that adult males represent the absolute majority. The number of underage males with conditional discharge is below ten. There is not a single underage female with conditional discharge. As for the adult females, in the above-mentioned years, their number was between 130 and 165.⁵⁵

Number of individuals with administrative penalty

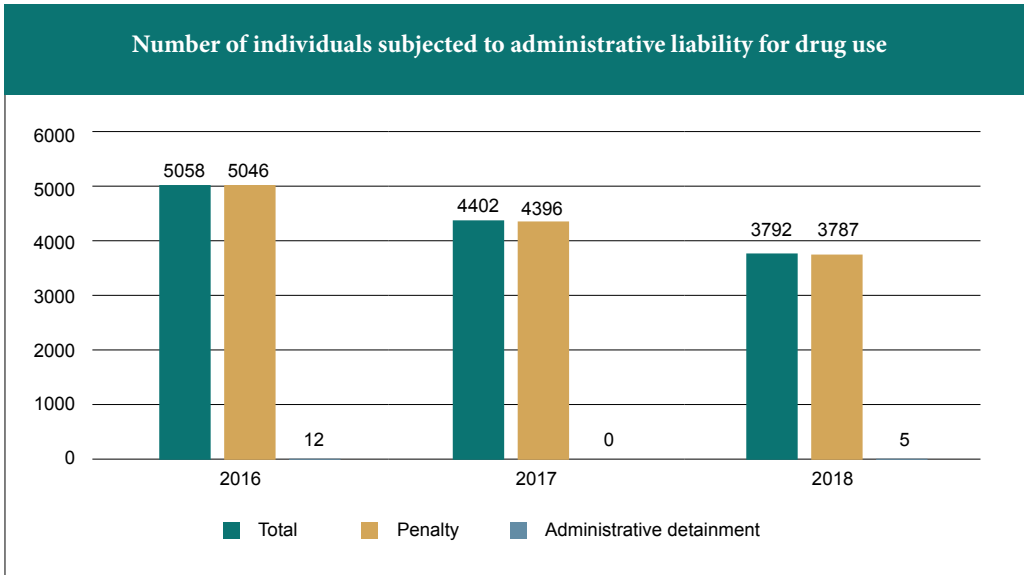
The legislation imposes administrative penalty of GEL 500 or imprisonment for 15 days for the first occurrence of using or possessing small amounts of drugs.

As of November 30, 2018, the same sanctions apply to owning and/or using small amounts of marijuana in a public space according to Article 45¹ of the Administrative Code of Georgia. The total number of individuals who have been penalized in the administrative manner for using marijuana amounted to 373 in the first quarter of 2019.⁵⁶ The court has enforced monetary penalty as the administrative sanction in all of the cases.

⁵⁵ The letter N2/53606 of June 17, 2019 of the LEPL National Bureau of Non-Custodial Sentence Enforcement and Probation Service of the Ministry of Justice of Georgia.

⁵⁶ April 22, 2019 correspondence Np-754-19 of the Supreme Court of Georgia.

The statistics⁵⁷ clearly demonstrate that in contrast to 2017 data, the number of administrative imprisonment for possessing or owning small amounts of drugs has marginally increased (by 5 units) in 2018. The frequency of subjecting individuals to administrative liability for listed offences has diminished in recent years. It may be the outcome of July 2018 ruling of the Constitutional Court of Georgia, which abolished administrative liability for marijuana use and effectively prompted legalization of marijuana.



Statistics of drug testing

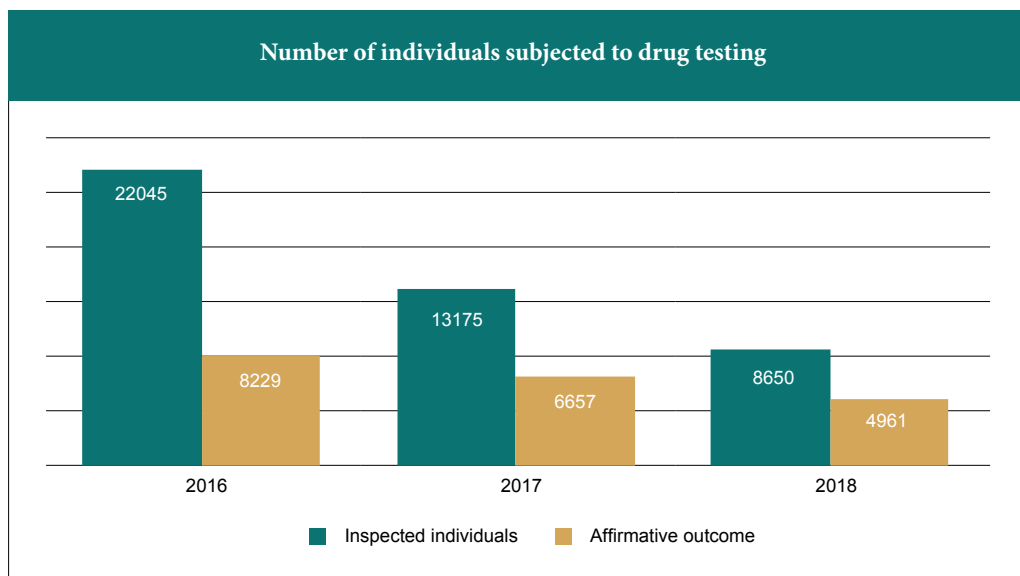
According to the information provided by the Ministry of Internal Affairs,⁵⁸ the number of individuals subjected to drug testing has dropped in recent years. This number has decreased by 34,3% compared to 2017. Nevertheless, approximately 42% of persons who underwent drug testing were not found to have used them.

For the purpose of assessing the practice in drug testing during the report period, it was important to look at the frequency of applying administrative arrest by the law enforcement bodies for the individuals subjected to drug testing in 2018; however, the Ministry of Internal Affairs does not maintain data on this practice for legal grounds which makes it impossible to examine data in this regard.⁵⁹

57 March 19, 2019 correspondence Np-457-19 and April 16, 2019 correspondence Np-752-19 of the Supreme Court of Georgia.

58 Ministry of Internal Affairs statistics on drug use inspections, available at: <https://bit.ly/2WxkOQL>.

59 March 11, 2019 correspondence №MIA21900613593 of the Ministry of Internal Affairs.



Additional punishments for drug-related crimes

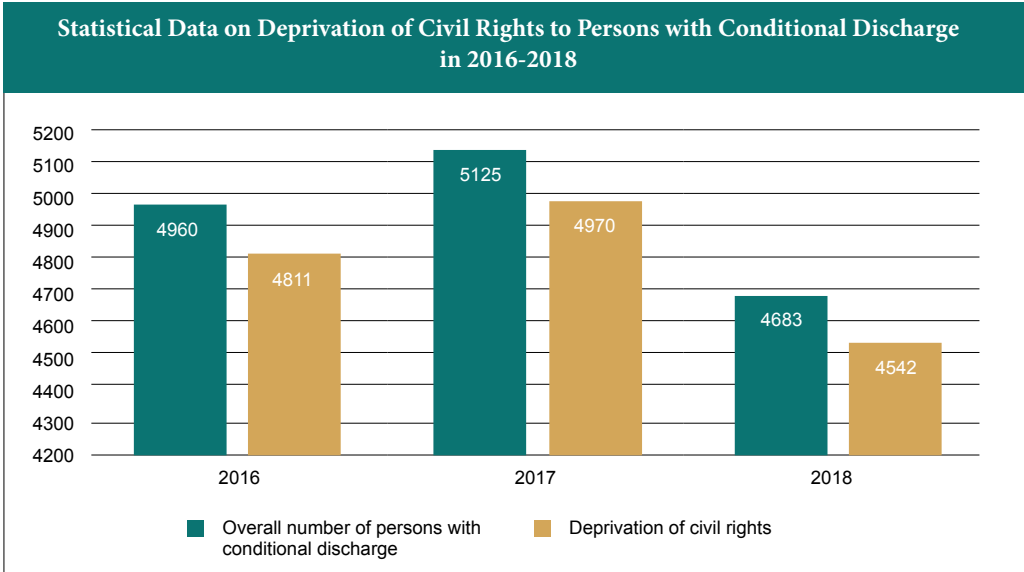
Pursuant to the Law of Georgia on “Combating Drug-Related Crimes”, custodial sentences for drug-related crimes and administrative liability for possessing or using small amounts of drugs result in deprivation of a range of rights by default and through court rulings respectively. Persons convicted for drug use are stripped of the right to operate any type of vehicle and the rights to be employed at educational institutions, government bodies and in the legal sector for 3 years. If convicted for purchasing, keeping and selling drugs, these rights may be restricted over the course of 5 to 20 years.

Restriction of the right to operate a vehicle is particularly burdensome for convicts of drug-related crimes as the realization of this right is frequently their only source of income. Based on the 2018 data, these restrictions were mainly imposed on the 4,967 individuals under probation as well as the 723 persons in custody – the countdown of the restriction period for the latter will start once they have served the sentence.⁶⁰

The statistical data on deprivation of rights for drug-related crimes under the Law of Georgia on “Combating Drug-related Crime” demonstrates that during the last three years, approximately 5000 persons are deprived from their civil rights annually. Taking into consideration the provision of the Law that establishes minimum term of 3 years for deprivation of civil rights, it can be assumed that in 2016-2018 years 14 323 persons were deprived from civil rights.⁶¹

⁶⁰ Article 3 of the Law of Georgia on Combating Drug-Related Crimes.

⁶¹ Article 3, paragraph 11 of the the Law of Georgia on “Combating Drug-related Crime”.

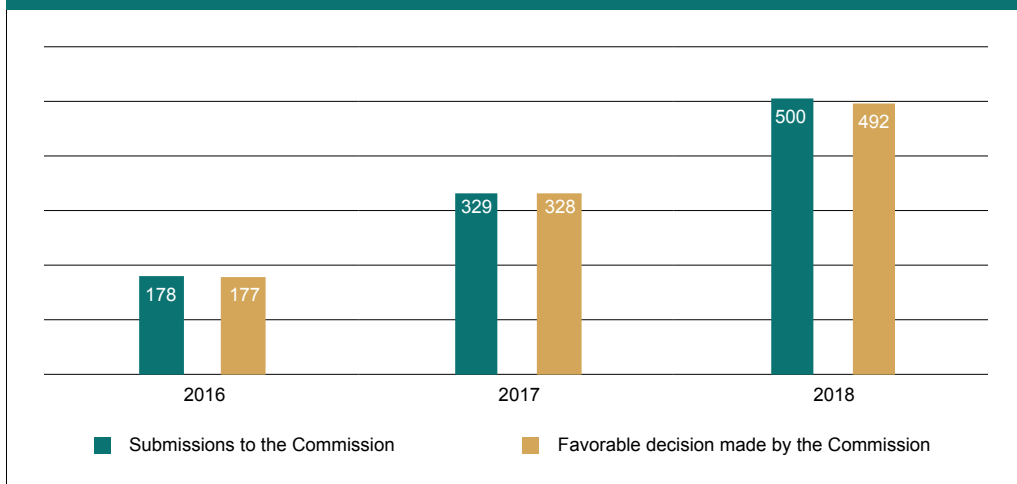


The only possibility to be discharged from additional punishment before full term is to address the Permanent Commission on the Issues of Abolishment of Conditional Discharge of the National Bureau of Non-custodial Sentence Enforcement and Probation Service. The Commission is entitled to discuss the possibility of restoration of deprived rights for drug-related crimes or to discuss the possibility to reduce the term under a precondition – one third of the term should be already passed.⁶²

Notwithstanding the particularly high number of cases on deprivation of rights, the submissions made to the Commission are very rare. It must be assessed positively that during the last three years, the majority of submissions made to the Commission have been decided in favor of applicants with respect to abolishment or reducing the term of the deprived rights.

62 The letter N2/53606 of June 17, 2019 of the LEPL National Bureau of Non-custodial Sentence Enforcement and Probation Service of the Ministry of Justice of Georgia.

Statistical data on restoration or reducing the term of deprivation of rights in 2016-2018



Statistics of drug-related crimes handled through plea agreements

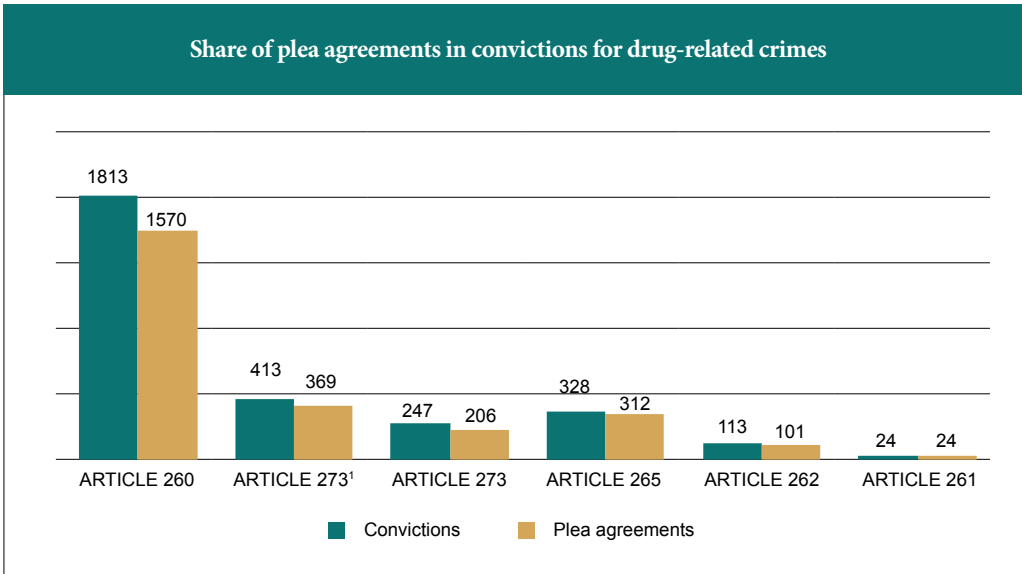
The share of plea agreements in the final outcome of drug-related crime trials have always been high which has also continued into 2018 as demonstrated by the available statistics. In 85% of convictions of drug-related crimes the convicts and the prosecutor's office have settled the case through plea agreements.⁶³

Despite the fact that plea agreement presents a quick and effective method to implement justice, frequent application of this mechanism in settling drug-related crimes may also be emanated from additional factors. High level punishments for drug-related crimes may be one of the reasons circumvention of which and application of a minimal punishment is not the judge's discretion as determined by the legislation and which can only be implemented through plea agreement.⁶⁴ Forming plea agreements is also frequently linked with opportunities it offers to negotiate with prosecutors the restriction of additional rights of the convict.⁶⁵

63 April 17, 2019 correspondence Np-753-19 of the Supreme Court of Georgia.

64 Article 2¹ of the Criminal Code of Georgia.

65 Paragraph 4¹ of Article 3 of the Law of Georgia on Combating Drug-Related Crimes.



Treatment and rehabilitation programs for drug users

In addition to examining the tendencies in prosecution policies of drug-related crimes, it is also important to review available state programs for treatment and rehabilitation of drug users. Currently the state runs an addiction treatment program which offers services such as: residential detoxification and primary rehabilitation during psychiatric and behavioral disorders caused by opioids and other psychoactive substances and the drug replacement therapy in Tbilisi and the regions. This program also offers drug replacement therapy and extensive detoxification services at №2 and №8 penitentiary institutions.

178 inmates of the penitentiary institutions are currently enrolled in this program of which 1 is female and 177 are male.⁶⁶ It is a positive tendency that the program budget has been increasing annually since 2016 – the 2016 budget amounted to GEL 5 million while in 2019 it has reached GEL 12 million.

⁶⁶ April 1, 2019 correspondence N01/5562 of the Ministry of Internally Displaced Persons from the Occupied Territories, Health, Labour and Social Affairs of Georgia.

IV. Analysis of court practices in drug-related crimes

For the purposes of analysing judicial practices on drug offenses, EMC has requested 2018 judgments from the District and City Courts, as well as Appeal and Supreme Courts. The courts provided (incompletely) a total of 705 judgments, which is about 25% of all drug-related cases of 2018. Despite the fact that, processing this number of decisions does not provide enough for the generalization of judicial practices, the study of the verdicts still shows the tendencies in different directions.

Most of the judgments received from District/City courts, ended in decision on signing a plea agreement – without consideration of the case, and the processing of these decisions has shown to some extent, the policy of the Prosecutor's Office in relation to criteria for making a plea agreement in drug-related cases. The analysis of the judgments, made without substantial examination of the case, was also interesting, in the sense that, it is the only way to evaluate the proportionality of the sentences used by the court against the number of drugs and convicts.

For assessing the judicial practice of drug crimes, and the standard of proof, it was especially important to study the decisions made following the essential consideration of the case. Out of 705 obtained cases, we were able to study the verdicts of the cases from Tbilisi and Kutaisi Court of Appeals, adopted as a result of substantial discussion (and not the plea agreement). We received in total, 160 verdicts, from both courts, and in some of them, the parties had requested to change the sentence used. For the purposes of the report, we focused on 100 judgments, in which, the parties requested to amend the verdicts of the first instances due to his illegality or unsubstantiation.

Analysis of decisions of the first instance courts

The processing of the statistical data on drug offenses revealed that the majority of criminal cases in 2018 (approximately 85%), ended with a plea agreement between the accused and the Prosecutor's Office. According to the verdicts of the District/City Courts, the terms and conditions of a plea agreement for drug offenses are related to the gravity of the drug crime, which is determined by the amount of narcotic drugs in the criminal case.

According to the reviewed verdicts:

- In the case of acquisition and storage of narcotic drugs, as stipulated sections 1, 2 and 3 of Article 260 of the Criminal Code, in most cases, suspended sentence is used together with fine.
- In case of use of drugs (Article 273 of the Criminal Code), as well as prosecution for growing and cultivation of marijuana, a plea bargain is reached and the penalty is public benefit or fine.
- In cases, where large numbers of drugs were involved or any amount was intended for sale, the absolute majority of the decisions were made without substantive examination and resulted in prison sentences.
- At least 26 persons are deprived of liberty for the possession of drugs that are considered small or unsuitable for consumption according to the draft “Law on Special Substances and Narcological Assistance” developed under the uniform legislative package presented to the Parliament.
- The majority of judgments against individuals deprived of liberty are related to the acquisition and retaining of drugs such as buprenorphine, heroin, amphetamine, methamphetamine, MDMA and new psychoactive substances. The possession of amphetamine and methamphetamine in the amount from 1 to 5 grams, in case of failing to reach a plea bargain, is liable for imprisonment from 5 to 8 years under the existing legislative regulation.

Analysis of the judgments of the Appellate Courts

As mentioned above, in the reporting period, it was important to study the judgments adopted as a result of substantial discussion. For this purpose, 100 judgments of Tbilisi and Kutaisi Court of Appeals have been studied, where the prosecution or defence requested the amendments of illegal/unjustified decisions of the first instance courts.

Operative information

In all cases, the launch of an investigation of the facts of illegal purchase and storage of narcotic drugs is preceded by the receipt of information by the police officer. According to 2018 court practices, a police officer who writes the reports based on the received information, is questioned as a witness in the court and gives a general characteristic regarding the receipt of information.

Information to the police is the information provided to an investigator or operative officer by a secret employee (confidential), or another anonymous person, about a crime that has been committed or is being planned. The recipient of such information writes a report containing the content of the received information without indicating the identity of the information provider. According to the norms of the law on the operative-searching measures, it is impossible to share an informant's identity with a judge and/or to question the witness before the court.⁶⁷ In addition to the information about confidant, the methods, tactics, and organization of acquiring operative-investigative information are also secret and are beyond the prosecutorial supervision.⁶⁸

Article 119 and 121 of the Criminal Procedure Code provides a prerequisite for search, confiscation and personal search – based on reasoned assumptions; in particular, where a combination of facts or information exists that, together with the circumstances of the criminal case, would satisfy the objective person to consider the possibility of a crime. This standard is used for conducting an investigative action as well.

The report of the police officer, who receives information and the same police officer's testimony, are used as a collective of information on narcotic crimes, which creates ambiguity and suspicion, when the accused denies the possession of the narcotic substance removed during the search, while, according to legislation, neither the court nor the prosecutor is able to verify the content of such information, the source of information and the circumstances of the urgent necessity. Instead, the content of the information is determined by the policeman's report and explanations, which cannot be equal to the degree of specificity of the first source. In this case, we are dealing with similar evidence of indirect testimony, except that it is impossible to identify the source of the information.

In two cases studied in the reporting period, the time discrepancy between the time of receiving the operative information and the commencement of investigative action, became the basis for the acquittal of the defendant together with other circumstances by the way of appeal. Interestingly, in this case, there was no discussion about the need for detailed access to the information from the court.⁶⁹ The analysis of the cases discussed below, as well as the court practices of 2018, show that in the course of establishing the legality of the search, the court relies only on confidential information, while neither the court, nor any other side, has the possibility to verify its actual existence, and there is no mechanism for evaluating its content.

67 Commentary to the Criminal Procedure Code, 2015, p. 331, 389, 619.

68 Law of Georgia On Operative Investigatory Activities, Article 21.

69 Tbilisi Court of Appeals, September 28, 2018, case №1b/834-18; Tbilisi Court of Appeals, May 17, 2018 case №1b/688-17.

Personal Search Report

According to the 2018 court practices, the most important evidence in deciding whether a person is guilty of criminal offense is the personal search report, the actual and relevant data, which is the subject of detailed examination by the court. In the majority of the examined judgments, the court directly points out that “the central evidence proving the guilt of a person is the personal search protocol”,⁷⁰ which should be in compliance with the policemen’s statements. The courts also pay particular attention to the recognition of the legality of a personal search report. Based on the analysis of 2018 judicial practices, to determine the guilt of a person it is very important that personal search protocol signature is confirmed, in which case, the alternate position of the defence on the search and the possible illegality, is considered by the court, to be largely unconvincing.⁷¹

The analysed decisions demonstrate that in cases of the acquittal verdict, there is no signature of the person on the search protocol. The court emphasizes the accuracy of the information indicated in the personal search protocol. In particular, it is examined whether the police officer, involved in the investigative action, described the character of the drug, colour, shape, types of packages, and so on. In some cases, the general character of the search protocol became the basis for the acquittal of the defendant.⁷²

Police witnesses of the search and other persons

Most of the studied decisions are based on testimonies of police officers interrogated as witnesses. In assessing police statements, the court emphasizes the consistency of the statements of policemen participating in the search regarding the time, place and direction of investigative action. In drug offenses, it is often problematic to challenge the testimonies of police officers by the defence, if the search was conducted without witnesses or video cameras. There is an inconsistency in the courts’ attitudes and in every case, the credibility of the testimony given by the family member or close friend of the accused, is evaluated.

In most of the judgments in the reporting period, in the circumstances of the court competitive process, the court required the parties to obtain evidence. In the judgments, it is clarified that, since the commencement of criminal persecution at all stages of the proceedings (including the substantive examination of the case), proceedings are conducted on the basis of the principle of adversariality, meaning that the parties had to present the evidence to they

70 Tbilisi Court of Appeals, April 23, 2018 case №1/b-26-18.

71 Tbilisi Court of Appeals, July 23, 2018 № 1 b / 1066-17.

72 Tbilisi Court of Appeals, June 29, 2018 case № 1b / 599-18.

confirm or deny the facts.⁷³ In only one of cases analyzed, where the person was found not guilty, the court indicates the necessity to have other witness present during search: “The obligation of the prosecution (and not it’s authority) is also, to obtain not only the evidence that proves the person’s guilt but, in order to ensure the establishment of truth on the case, they are obliged to obtain mitigating or justified evidence of the responsibility of a specific person in order to exclude any suspicion (including circumstances causing suspicion) on the factual circumstances.”⁷⁴

In the number of judgments, the court directly points out that “due to the specific nature of narcotic crimes, the offender is sometimes detained without the presence of other attendees and in this case, the basis of evidence is the testimony of police officers.”⁷⁵ The Court notes that there are frequent cases when the witness, because of his relationship with the accused, may testify in his defense, however, when court evaluates the police testimonies on the one hand, and on the other hand, the testimony of witnesses, attention should also be paid to other factual circumstances that may put the testimonies of either side under the question mark.⁷⁶

In the circumstances, where the biological-genetic examination, as well as the recording of the search, is not a prerequisite for a conviction, it is difficult to imagine, what other evidence may be available to question the police testimonies, or for sharing the interpretation of the defense.

Biological-Genetic Examination

Similar to previous years, the judicial practice of 2018 regarding the appointment of biological- genetic examination in drug-related criminal cases, on narcotics obtained as a result of a search, varies. This additional information provides whether, the accused, has had a physical connection to the drugs removed as a result of personal search.

The cases studied during the reporting period have shown that the prosecution made a decision, on the appointment of this examination, in only few of the cases. It is problematic that in these cases, there were no attempts to obtain such evidence even from defence side, which may be explained by the absence of the financial resources required to carry out this examination.

73 Tbilisi Court of Appeals, June 28, 2018 case №1b/189-18.

74 Tbilisi Court of Appeals, May 17, 2018 case №1b/688-17.

75 Tbilisi Court of Appeals, December 5, 2018 case №1/b 149-18.

76 Ibid.

The court decision on one of the cases, where the conviction of a person in the first instance and 6 years imprisonment, was based on testimonies of police officers involved in detention and personal search, the detention protocol, and chemical examination of 0.000082 grams of methamphetamine 0,000046 grams in the empty syringe. The Tbilisi Court of Appeal changed the guilty verdict. The Court of Appeal clarified that “the prosecution has the right to conduct, or not, any kind of examination, and the kind and the quantity of evidence presented in the court is also their decision, but in the event that, the accused denies his guilt from the beginning, and there is no signature on any investigative protocol, while he voluntarily submits a biological material for examination and relevant examination is not conducted, such action calls into question the objectivity of the fact of removing drugs in the syringes from the hands of the accused”⁷⁷

The Court of Appeal made a different decision in a similar case where the defendant questioned the search protocol from the start and the biological genetic examination indicated that the genetic profile of the defendant was not revealed for the drugs. In this case, the Court of Appeals didn't change the guilty verdict with the argument that “overlapping one genetic profile and maintaining biological profile on the subject depends on many circumstances, including how genetic profile is revealed, what the surface is like, and so on. What is the probability of the genetic profile remaining on the subject, there is no exact answer.” The result of the examination was not taken into consideration due to the fact that the testimonies of police officers, interrogated in the case, were in full cohesion.⁷⁸

Conclusion

Based on the judgments in the reporting period, courts' approach and standard of proof have not changed substantially on narcotic crimes. Like previous years,⁷⁹ the conviction by a standard beyond reasonable suspicion, is usually based on the testimony of police officers, search protocols, and examination of narcotic drugs. The different and more critical assessments of the police officers' testimonies are performed by the court, when the accused refuses to sign the protocol of the search and makes the possession of drugs debatable, before the substantive discussion from the initial stage of an investigation. In contrast to the practices of 2017, the Court of Appeal does not normally overturn the conviction of the guilty verdict issued by the first instance and there is only one such case. The problem remains to be able to obtain neutral evidence in the case of narcotics, where the fact of searching is conducted without any personal or technical confirmation. The court practices of 2018 also vary in terms of existence or assessment of the biological-genetic examination in drug offenses.

⁷⁷ Tbilisi Court of Appeals December 23, 2018, case №1/b 149-18.

⁷⁸ Tbilisi Court of Appeals December case 13, 2018 №1/b-437-18.

⁷⁹ Human Rights Education and Monitoring Center, (EMC), “Drug case hearings in courts – trends of 2017”, 2018, p. 10.

V. Analysis of problematic criminal cases

Together with the court practice analysis, EMC examined three criminal cases of acquisition and storage of drugs in which the defendants referred to violations at the stages of investigations or trial. The study of cases has shown analogous shortcomings in terms of legality by investigation the law enforcement authorities and exercising of fair justice.⁸⁰ According to the existing court practices, the defence side is devoid of the opportunity to provide evidence to prove its position, especially, under conditions, where the personal search/detention of defendants takes place without witnesses or recording. The processing of these cases showed similar flaws that EMC has indicated in drug analysis for investigations and judicial review on drug offenses in 2017.⁸¹

The definitive character of testimony of a police officer

In all three criminal cases, one of the most important witnesses was a police officer, who received the information, and based on his report, other employees started the search. The authors of the report do not have the obligation to disclose the source of the information to the court. Based on this, it is important to evaluate these testimonies, because in this case, we are actually dealing with indirect testimony-based evidence.

In relation to the use of indirect testimony to prove a person's guilt, the Constitutional Court⁸² in its judgment assessed the extent to which the criminal procedural legislation provided sufficient safeguards for establishing the fact of a crime committed by a person. The aim of the Constitutional Court was to exclude the danger that is related to the guilty verdict based on suspicious, false, unreliable evidence. The Court stated that “the principle of liability on the basis of justified evidence is a guarantee that no innocent person shall be convicted by arbitrariness or error of state officials”. In drug-related cases, in the conditions, where the information is fully classified and the context in which it was obtained is only known to the investigator, a procedural reality is created, where the defence has no opportunity to fully confront the allegations, which even the prosecutor may not know, and obviously cannot become the subject to Court's attention. At that time, the accused cannot rely on the “good will” of the prosecution's office to provide him with all the information that could make the credibility of the main evidence in the

80 With the consent of convicted persons in criminal cases reviewed in the report, their full names are given.

81 Human Rights Education and Monitoring Center, (EMC), „Gaps in the investigation and prosecution of of the drug crimes “, 2017; EMC, “Drug case hearings in courts – trends of 2017”, 2018.

82 Decision of the Constitutional Court of Georgia of January 22, 2015 “Citizen of Georgia Zurab Mikadze v. Parliament of Georgia”

case, questionable.⁸³ The absence of prosecutor's supervision further reduces the expectations of the accountability and makes the evidence against the person trustworthy dependent only on the "presumable honesty" of the investigator.

Similar arguments are cited in the constitutional suit by EMC, in which, one of the issues was the issue of reviewing the testimony of the police officer, who received the information, as indirect evidence and its constitutional assessment.

Since the Constitutional Court has already established that information can be indirectly transferred and can be wrongly understood, the same risk accompanies the investigator's testimony in the case, "since he is unable to fully verify the information that he is presenting, he can only voice his assumptions, which in case of arbitrary actions by a policeman will not result in liability."⁸⁴ Thus, in the conditions, when the information about the informant is undisclosed, the defence side is unable to challenge this effectively, but also it's beyond the actual responsibility or direct supervision of prosecution, and at the same time, is not subject to court examination without the participation of the defence side.⁸⁵ Specifically, in the context of drug crimes, while the defendant is indicating the fact of "planting the drugs", based on the character of the crime, may become the only evidence for the defence.⁸⁶ In the present case, the confidentiality of all information on confidentiality creates a threat that the decision may be based on suspicious, false, unreliable or absolutely non-existent evidence. As it was noted, the substance evidence obtained during the search on the basis of confidential information and the narcotic substance in connection with the plaintiff often becomes the basis for liability.

The challenging nature of this topic was once again confirmed by the study of the cases. Temur Kalandadze's criminal case is particularly interesting, in which the police officer, who received information, unlike the report drawn up at the stage of the investigation, stated at the trial for the first time that he had received information through the internet. He did not answer the additional questions on the timing of receiving the information, location and the identity of the informant. The Court of Appeal found the policeman's testimony in conjunction with the testimony of two policemen participating in the search to be the basis for the conviction.

83 Decision of the Constitutional Court of Georgia of January 22, 2015 "Citizen of Georgia Zurab Mikadze v. Parliament of Georgia" §20.

84 Constitutional suit in the case N1276 "Georgian citizen Giorgi Keburia v. Parliament of Georgia".

85 Ibid., §29.

86 Ibid., §33.

The credibility of police testimony

The cases studied showed that the court found the police to be particularly trustworthy in all three cases. In all three cases, the guilty verdicts were based only on police statements, except for the conclusion of chemical examination on drugs removed during the search. In all three cases, the defence denied the fact of possession of drugs, and police officers testified about the personal search and drugs removed during the search at the stage of the investigation. The convicted Kalandadze openly accused the police of “planting the narcotic substance” throughout the trial. On the background of these clarifications, the court has assessed the position of the defence as an attempt to escape the expected responsibility, and the police testimonies, despite the inconsistencies, were accepted unconditionally. In the conditions, when the defendant states that the police officers conducted illegal acts (planting the drugs and threat of physical attack), giving credibility to the police testimony is especially problematic, since, if the court sees this as an attempt from the defendant to avoid the responsibility, with the same logic, it can be stated that the police officers also tried to cover up their actions and avoid the subsequent responsibility. The case law of the European Court of Human Rights disagrees in terms of giving the advantage to the police officer’s testimony as evidence over the testimonies to the defendant or other witnesses. In many cases, the Court criticised the decisions by the investigative authorities to prioritize the police officers statements, while national courts didn’t provide grounds for assessing their testimonies as credible and the statements by the defendants, not trustworthy.⁸⁷

Standard of proof of guilty verdicts

The prosecution didn’t request genetic-biological examination in any of the cases to establish the circumstances, whether genetic evidence was present on the main evidence – the drug substance and its package.

According to the testimony given by one of the convicts – Roin Chikhradze, the syringes that according to the police, was in his possession, had traces of blood. The accused stated that he had seen the illegal items mentioned in the search protocol for the first time in the police station and as a result of his personal search, nothing was removed from the scene. Nevertheless, the investigative body has not considered the appointment of biological examination to approve the opposite, nor the absence of this examination has been evaluated during the conviction of the conviction by the court. Despite that, the investigative body didn’t deem it necessary to prove the opposite by requesting the biological examination and this was not

⁸⁷ Virabyan v. Armenia, ECHR,2.10.2012, §167.

seen a shortcoming of the investigation during the trial either. Similar circumstances were present in Temur Kalandadze's case, which was suspected of importing drugs from France to the territory of Georgia via Turkey in the polyethylene parcel placed in the back pocket of his pants, while the defendant stated from the start that the drugs had been planted. In such a case, the conclusion of biological-genetic examination would be the answer to the question of whether the genetic profile of the defendant had been transferred to the illegal substance in his pockets during the course of a few hours, however, such an examination was not conducted within the investigation. According to the report of personal search of Irakli Chkheidze, the narcotics placed in the syringe were taken out of his hands. In this case, it is obvious that the interest of the investigation should be interested in the appointment of biological genetic examination to support the information indicated in the search report, but no examination conclusion is available in this case.

The existing investigative and judicial practice, established evidence standards in relation to the right to a fair trial as protected by the Convention, has been the subject of the assessment of the European Court of Human Rights in the case *Kobiashvili v. Georgia*, on which the decision was announced on 14 March 2019.⁸⁸ The applicant, in the ECtHR, indicated the violation of the right to a fair trial on the grounds that the verdict was based on the "planted" evidence.⁸⁹ In this case, the applicant was arrested for possession of 0,059 grams of heroin after the personal search conducted on the basis of operative information. According to the case file, according to the criminal procedural law existing in 2004, the fact that the narcotic substance was removed from the applicant by the investigative act was confirmed by two impartial attendees (witnesses), apart for the two police officers who conducted the search. One of them denied the fact at the trial and said that his interrogation took place under police pressure and intimidation at the investigation stage, and the other witness, according to the defence side, was a police agent. The courts of First and Second Instances, based on the testimony of police officers and chemical examination, sentenced the applicant to six years of imprisonment. The Supreme Court ruled that the appeal was not admissible for a re-examination of the case.

The ECtHR assessed the protection of the right to a fair trial, guaranteed by Article 6 of the Convention, by focusing on several issues. The focus was on the whole process, including the method of obtaining evidence and the fairness of its review at the trial, as well as the circumstances in which the applicant had the opportunity to argue the evidence and contradict it.⁹⁰ Before determining the violation of the right to a fair trial, the Court discussed the search on the basis of operative information and noted that the reason for conducting the search

88 *Kobiashvili v. Georgia*, ECHR, 14.03.2019.

89 *Ibid.*, §42.

90 *Ibid.*, §56

with the urgent necessity was vague “without reference to any relevant factual information simply based on the drawn-up text that only contained the applicant’s name and the fact of possession of illegal substance.”⁹¹ The court also noted that the search procedure itself – in the face of the contradictory statements of police officers and the attendees, created doubts on the actual circumstances of the search.”⁹² In addition, the fact that the national court, after changing the testimony given to the investigation, automatically relied on the credibility of the defendant’s testimony, in which the witness had indicated on the police’s pressure and the absence of the search, was also criticized by the Court. Based on the above, the Court established the violation of Article 6 of the Convention.⁹³

This decision of the European Court of Human Rights directly addresses the existing investigations and judicial approaches to drug offenses. Even though, as a result of investigation and overall assessment of the court hearing, the violation of the right to a fair trial was established in the case of 2004, the existing practice has not changed and evaluations in the judgment apply to the criminal cases studied.

Injustice caused by unspecified amounts of substances

In two criminal cases discussed, convicts are sentenced to six years of imprisonment for possession of narcotic drugs in the amounts unsuitable for consumption. Irakli Chkheidze was convicted for the possession/acquisition of 0,000305 grams of MDMA and 0,000106 grams of Methamphetamine (salt) for personal consumption and Roin Chikhradze – 0,001116 grams of methamphetamine (salt) and 0,001035 grams of Amphetamine. As it was already mentioned, the Law of Georgia “on Drugs, Psychotropic Substances, Precursors and Narcological Assistance”, in the case of many drugs, including MDMA, Amphetamine and Methamphetamine, does not define initial small amounts for criminal liability, thus possession of these drugs in any amount is punishable to the full extent (under Article 260, paragraph 3).

In the criminal case of Irakli Chkheidze, EMC appealed the conviction of the Constitutional Court of Georgia and challenged the fact of the possession of Methamphetamine in the given amount and the subsequent imprisonment from 5 to 8 years in relation to the protection of the dignity and equality of human rights protected by the constitution. Constitutional Court has to give assessment, in line with person’s right to dignity, as guaranteed by the Constitution,⁹⁴ whether it is relevant, for the purposes of general prevention, in the conditions where

91 Ibid., §61.

92 Ibid., §62-64.

93 Ibid., §71.

94 Constitutional suit in the case N1276 “Georgian citizen Giorgi Keburia v. Parliament of Georgia”.

realisation is not the case and the risk of damaging other people's health is absent, to use the strictest instrument that the State has, for the passions of 0,000305 grams of MDMA and 0.000106 grams of Methamphetamine, in the name of achieving the abstract goal.

Temur Kalandadze's criminal case

Information to the Police

Temur Kalandadze was detained on 3 May 2017 at Tbilisi International Airport based on the information that police received. According to the information provided to the police through the Internet, Temur Kalandadze was "a drug user; he was planning to enter Georgia through Istanbul-Tbilisi flight via Tbilisi International Airport and bring drugs."

Personal search and detention conducted with the urgent necessity

According to the personal search report included the case materials; Temur Kalandadze was searched by three police officers of the operative group – Z.R, V.L. and K.B. in the room adjacent to the Tbilisi Airport Arrivals Hall on May 3, 2017, without using the technical means (video recording). The search protocol indicates that the 32 pill-like items in two packages were discovered in Temur Kalandadze's back pocket; after that he was detained for storing drugs in especially large amounts and bringing them across the border under the Article 260 (6) (a) and Article 262 (4) (a) of the Criminal Code of Georgia.

The search conducted in the urgent need was recognized by the Court as legal without any factual and legal reasoning, citing the existence sufficient information and evidence for the justified supposition standard set out in Article 119 of the CCG.

Chemical Examination

In the search protocol, there was no mention of the name of the label, colour, and the image placed on the tablet, except that the pills were wrapped in two pieces of polyethylene.

The following was submitted for the examination: 32 pills packed in two packages, which were white, oval shaped, with B8 inscribed on one side. When opening the sealed packet submitted to the expertise, it also appeared in the empty pieces of transparent polyethylene, which, according to the defence, makes the identity of the items that were subject of the examination and search, questionable.

According to the forensic examination, the drugs manufactured by the factory were buprenorphine and the total weight of narcotic drug buprenorphine was 0, 2513 grams, which according to the law “On Drugs, Psychotropic Substances, Precursors and Narcotics Aid” is especially large amount.

Narcological examination of the accused

After the personal search and detention, the accused was tested for drugs, and it was revealed that he was not under the influence of drugs. The defendant has voluntarily handed biological material and after the investigation, the facts of usage of buprenorphine, cocaine and psychotropic substance was established.

Position of the defendant

The accused pleaded not guilty and told the court that on May 3, 2017, 10-11 people participated in the search and detention and not three policemen as it was indicated in the case files. According to him, he knew, before passport control, that two men and one girl dressed in civilian clothes were watching him. The latter followed him to the luggage claim air, and tried to give him to the plastic package, he refused to take it.

Soon afterwards he was detained and taken to a luggage check room where 10-12 people demanded that he voluntarily submitted the “fact”. According to the defendant, the policemen were verbally and physically abusing him, and because he had a strong physical trauma on the backbone, fearing physical violence, and he signed the search protocol. The defendant also explained that he had been under the police surveillance for about two months and three weeks before his detention, the search was conducted in his house, but nothing illegal was found. The defendant did not name a specific reason for his persecution or being the subject of interest by the police, but the documents related to this search are included in the case file.

Police Testimony

The case files include the testimonies of the police officers mentioned in the search report. All of them generally indicate the launch of investigation case and conducting a search in the Tbilisi International Airport arrival hall based on the received information.

The statements of these police officers interrogated as witnesses at the trial are contradictory. In particular, Z.R. clarified that the defendant was searched as soon as he crossed the border (at the top level the airport) and the policemen did not allow him to get to his luggage and after the search, he was taken to the police station immediately. In contrast, the remaining two policemen participating in the search indicate the ground floor of the airport as a place of search. Also, both police officers stated that after the search, Kalandadze was not taken to the police department but to the topographic and narcological examination. In essence, these policemen describe the place of search at the airport as well as legal actions taken against him after the arrest of the defendant, differently.

Video Recordings

Against the background of contradictory interpretations by the police and the detainee regarding the personal search, the defence side appealed to the court on issuing permits for obtaining the video recordings from the day of search and detention of the defendant at Tbilisi International Airport. The defence included the existing judgments and the personal search protocol in the appeal, which clearly indicated the specific time of this investigative action in the airport's specific area. Despite that, the court denied the motion on the grounds that the combination of the necessary information was not provided. The Investigation Panel of the Court of Appeals, citing the same argument, left the denial to issue the video recordings from the airport cameras, into force, after appealing the above-mentioned ruling.

Court Hearing

With the judgment of the Tbilisi City Court of 22 January 2018, Temur Kalandadze has been found not guilty of illegal purchase and keeping of drugs in large quantities and illegally import into Georgia. The Court did not take into account the testimonies of persons carrying out personal searches, because of the contradictions in search protocol in the case. The absence of video clips of the cameras inside the airport, which would make the actual place of search and detention were additional grounds for acquittal. The court also stated that the accused crossed the borders of two countries – France and Turkey without any problem and while entering the territory of Georgia, drugs were found in the back pocket of his pants, which deepened the court's suspicion and became the grounds for acquittal.

The Tbilisi Court of Appeals, in contrast to the first instance, found evidence in the case sufficient to convict beyond reasonable doubt and sentenced him to 15 years imprisonment on June 11, 2018, as a result of the assessment of evidence in the case. It should be noted that

the practice of changing judgments in criminal cases related to drug offenses by the Court of Appeal, has been noticeable since 2017.⁹⁵

According to the Court of Appeals, the offender accused of having a standard beyond the reasonable suspicion of the evidence in the case – the testimonies of the participants of the search and the conclusion of the chemical expertise. The controversy between the police explanations, and regarding the place of conducting the search, and the place of detention of the accused was assessed by the court as an insignificant, and the police testimony as a whole was assessed as reliable.

It is noteworthy that the Court of Appeals compared the statements of three police officers – Z.R., V.A. and K.B., mentioned in the search protocol, instead of checking the compliance of each other, compared the testimony of two police officers – V.A. and K.B., on the other hand – the testimony of the police officer receiving the information (The latter did not participate in the search and according to his testimony it was not at the place of investigative actions at the airport). In the judgment, it is directly and incorrectly stated that after the receipt of the information, the investigation was launched and the operative group was formed by the three policemen who met Kalandadze at the Tbilisi airport, took him to the luggage room as soon as he crossed the border and carried out a personal search. According to the case materials, the testimony given to the police's court found that the policeman who received the operative information was not involved in the search or detention and was not present during the investigative activities at the airport. But the third person who was involved in the search was Z.R., which is not mentioned in the appeal decision at all. Consequently, neither his contradictory testimony is evaluated with the testimony of other police officers participating in the search.

In addition, the Court of Appeal found the fact that Temur Kalandadze bought drugs during his stay in France as established. None of the evidence in the case file provides the grounds for making this conclusion, and even the prosecution side cannot specify the place of acquisition of drugs. Thus, it is unclear what the Court of Appeal relies upon when making this conclusion.

It is noteworthy, that the problem of court practice in connection with the time and place of acquisition of drugs, was the fact that in the part of the illegal purchase of narcotic drugs, accusations were made without presenting any evidence to the court about the circumstances of this acquisition. The court accepted the position of the prosecution based on supposition, in relation to acquisition of drugs illegally, in “unrecorded time and circumstances”, without

95 Human Rights Education and Monitoring Center, (EMC), “Drug case hearings in courts – trends of 2017”, 2018, p.20.

any judgment and assessment.⁹⁶ Although such cases were not observable when studying the 2018 judgments, in the present case, the Court made the conclusion on the acquisition of drugs in France by the accused and did not indicate that even the prosecution did not assert that.

According to the verdict of the Court of Appeal, the absence of video recordings from cameras inside the airport in the criminal case could not have been the basis for the acquittal of the defendant, since the personal search protocol was sufficiently credible in terms of the details of the investigative action and the prosecution determined which evidence should be have been presented to prove the guilt. The Court of Appeal viewed Temur Kalandadze's testimony on "planting" the evidence and different place of the search, as an attempt to avoid responsibility. It should be noted also that the same composition of the Chamber of Appeals in one of the cases⁹⁷ involving identical narcotic crimes in 2018 issued different explanations: "When the law enforcement statements contradict the testimony of the defendant and his relatives (friends), or when, there is a difference between the testimonies of a defendant and other witnesses, the advantage should not be given to the police officers' testimony unconditionally, especially in cases, when complaints are made against police officers on their conduct, because they are likely to be interested in avoiding the responsibility."⁹⁸ A completely different approach from the Court, on similar case, can be explained by the fact that, unlike the case of Kalandadze, in the latter case, the criminal case and the court hearings were closely followed by the media and the public. It is noteworthy that one of the major challenges to the practice of drug crimes in 2017 was the substantial difference in judicial execution in well-known criminal cases and other cases. The mentioned was demonstrated in the uneven assessment of the evidence, judgments of the decisions, the identification of problematic issues by courts and their critical assessment and the standards used to reach the verdict.⁹⁹ On 18 January 2019, the Supreme Court ruled that the cassation appeal of the defence was inadmissible and as a result, the verdict of the Court of Appeals remained unchanged on Temur Kalandadze's conviction.

96 Ibid., p.20.

97 Tbilisi Court of Appeals, May 17, 2018, case # 1b / 688-17; At the time of consideration of Kalandadze's case, one judge has been replaced in the Chamber of Appeals.

98 Tbilisi Court of Appeals, case № 1 b / 688-17 May 17. 2018.

99 Human Rights Education and Monitoring Center, (EMC), "Drug case hearings in courts – trends of 2017" 2018, p.20.

Irakli Chkheidze Criminal Case

Information to the Police

Irakli Chkheidze was detained on March 6, 2017, on the basis of information to the police, in the entrance of his house, after the search under the first part of article 260 of the Criminal Code of Georgia. Information to the Police On March 6, 2017, was received by an officer of Vake-Saburtalo IV Division of the Tbilisi Police Department. According to the information, Irakli Chkheidze was on Petritsi street in Didi Dighomi, Tbilisi, with his friend, and was under the influence of drugs and had drugs. The interview with the officer who received the information started at 00:06 and finished at 00:17.

Personal search and detention conducted with the urgent necessity

According to the case file, Irakli Chkheidze's personal search was carried out within two minutes after the receipt of the information (before the interview with the recipient was concluded) by three policemen in the entrance to his house in Petritsi Street.

According to the information provided in the personal search report, the glass, transparent ampoule in the open plastic package, the injection syringe with the white substance on the upper wall, one piece of insulin syringe fluid dyes, two pieces of insulin syringe from his right hand. After Chkheidze's personal search, he was arrested. Irakli Chkheidze refused to sign the search and detention protocol.

Chemical Examination

The chemical examination was appointed within the scope of the investigation to investigate the syringes and ampoules removed during the search. In the syringe contents, according to the chemical expertise conclusion, 0,000305 grams of MDMA and 0,000106 grams of methamphetamine have been identified, which is defined by the legislation as a large amount. By the initiative of the prosecution, there was no biological genetic examination.

Narcological examination of the accused

As a result of testing, Irakli Chkheidze was under the influence of narcotic substance and he refused to submit biological material.

Position of the defendant

Irakli Chkheidze made all the allegations of the prosecution doubtful, and pleaded not guilty. According to him, when he entered the entrance of his house, he met his friend B.K.. Within 5 minutes after the conversation, two men came to them, when Piranishvili fled to the upper floor and Chkheidze stayed. He was arrested on the spot. According to the defendant, he saw the syringes mentioned in the search protocol in the police station for the first time, also he indicated the police station and not the area of his residence as a place where the search protocol was prepared.

Police Testimony

According to the materials of Irakli Chkheidze's criminal case, four policemen arrived at the spot of his personal search. They describe the departure to the spot and the details of investigative actions identically, regarding the removal of drugs from Chkheidze's hand and his detention.

Court Hearing

The court, in this case, also sentenced the accused to 6 years of imprisonment for possession of a large quantity of narcotic substance under Article 260 of the Criminal Code of Georgia. The guilty verdict was based on police officers' testimony because they were "are in unison with the evidence, as well as the provisions of the personal search protocol and the conclusions of examination." The Court also relied on the protocol of the inquiry of a friend, who was with him during the detention. The mentioned person denied this information during the trial and said he did observe the fact of the removal of narcotic substance during Irakli Chkheidze's personal search. According to the verdict, the reason for the change of testimony by the witness was to promote his friend's avoidance of responsibility, for which the testimony given to the trial was assessed as false information.

It should be noted that this explanation of the Court's case of change of testimony contradicts the practice of the European Court of Human Rights. The case law establishes that in the fair and competitive process, the advantage should be given to the testimony given before the court, and not at the investigative stage unless there is a good basis for the opposite.¹⁰⁰ Such a decision was taken by the Court in the circumstances where the applicant's conviction was based on the testimony given to the police and the witness's testimony, who during the trial

100 Erkapic v. Croatia, ECHR, 25.04.2013. §75.

changed their testimony, which naturally led created serious doubts in terms of reliability of such testimony.¹⁰¹

The court's explanation on the fact of planting the drugs is also interesting. According to the verdict, in such a case the attention is paid to the existence of video recording of the search conducted by the prosecution or to neutral person's presence, but in the absence of such, this fact annulled by the testimony of the witness who gave two different testimonies in the course of investigation and during the trial.

On March 14, 2019, the court halted appeal on Irakli Chkheidze's criminal case and the making of a final decision. The reason for this is the appeal of the judge of the case to the Constitutional Court; as a result, the penalty for the possession of the small amount of drugs in the given case shall be assessed by the Constitutional Court in relation with human rights.

Roin Chikhradze's Criminal Case

Information to the Police

Roin Chikhradze was detained on February 27, 2017, by the officers of III Division of Vake-Saburtalo Division of Tbilisi Police Department based on received information on Nutsubidze territory. According to the information, Roin Chikhradze was on Nutsubidze Street. He should have been under the influence of drugs and he had to have drugs on him.

Personal search and detention conducted with the urgent necessity

According to the case files, in 6 minutes after receiving operative information, two police officers conducted the personal search on the basis of the urgent necessity. Despite Chikhradze's request, the third person didn't witness the search. The search protocol indicated that from the right pocket of Chikhradze's coat, 3 pieces of paper package with crumbly substance were removed and two pieces of 20 ml syringes in the plastic packaging with the substances placed in them, and 1 piece small glass bottle in plastic bag, with sediments on the inner walls, Also 1 piece one ml syringe with substances.

101 Levinta v. Moldova, ECHR, 16.12.2008, §§101- 103.

Narcological examination of the accused

Roin Chikhradze's narcological examination revealed that he was not clinically under the influence of narcotics, and in laboratory examination, the use of amphetamine, methamphetamine, and benzodiazepine group psychotropic substance in the past was confirmed.

Chemical Examination

The chemical examination on the items removed as a result of personal search and the powder revealed 0,001116 grams of methamphetamine (salt), 0,001035 grams of amphetamine and 0,0341 grams of psychotropic substance Ephedrine.

Position of the defendant

According to Roin Chikhradze, he was under conditional sentence during his arrest and should have appeared at the National Probation Agency on February 27, 2017, the day of his arrest. Prior to that, he was helping his friend to carry out the electric power works.

During the hearing, he refused the removal of any illegal items as a result of the search and explained that he saw the items mentioned in the search protocol for the first time when he was detained in the police station. According to him, the police officers were persuading him to make a plea agreement from the very beginning, that why he signed the search protocols.

Police Testimony

According to the case materials, two police officers participated in the personal search of Roin Chikhradze. Their testimonies are identical to the circumstances surrounding the personal search and the detention conducted by the police as investigative acts.

Court Hearing

On 16 November 2017, Roin Chikhradze was found guilty of committing a crime under Article 260 (3) "a", "d" and "c" of the Criminal Code of Georgia and was sentenced to six years of imprisonment Under Article 273, and a fine in the amount of 2000 GEL for use of narcotics.

The Court did not discuss the circumstances that have been disputed by the defendant – the absence of illegal items on the spot, as well as the non-compliance with the request to have other witnesses during the search. The court did not pay attention to the fact that Roin Chikhradze was not under the influence of drugs, as established by the examination. It was also not considered that, the psychotropic substance of the powder and syringe that were seized was found to have the ephemeris of the drug, but his narcological inspection did not determine the fact of consumption of such substance. The accused was disputing the possession of substances and items mentioned in the search protocol, saying that he saw them, for the first time, in the police station and there were bloodstains on the syringes. Nevertheless, the absence of tectonic and genetic examination was not viewed as problematic by the court. In contrast, the Court observed that the absence of the conclusions of the examination in the case does not exclude the guilt of the person and does not explicitly indicate the acquittal, when there is other objective evidence in the case and there is no reason to doubt its credibility. The Court reiterated the same on the use of technical means – the video record. According to the court, this kind of evidence is the most important in the drug offence cases. This evidence is of crucial importance for court for the decision-making, when the defence's evidence (e.g. witnesses testimonies) is confirmed the prosecution's evidence is different from the facts of the case, however, in the given case, there is no such evidence that would put the evidence presented by the prosecutor under the question mark.

The court didn't clarify what kind of evidence could the accused present, when the police refused to have witnesses/third person at the scene and the testimonies of the police officers, which in the case, were also the prosecuting side, were considered legitimate without checking the fact, whether the accused had any physical connection to the items removed during the search.

The guilty verdict by the Tbilisi City Court was based on the testimony of two police officers and the conclusion of the chemical examination that resulted in six years imprisonment for the minor particulars of the drug found in the empty syringe. The Tbilisi Court of Appeals left the verdict unchanged and the Supreme Court ruled that the cassation complaint was inadmissible.

Conclusion

In the discussed criminal cases, the judge did not assess the actual circumstances to the necessary level. Meanwhile, in order to issue the guilty verdict, the level of evidence as established by the law – the unanimous and convincing evidence agreed with each other – is not sufficiently clear in any of these judgments. During the hearing, the passive role of the

court and the low standard for establishing the guilty verdict do not encourage the law enforcement agencies to conduct comprehensive, complete and objective investigation into the person's drug offense and in practice, this creates expectations among the law enforcement that based on the police testimony and examination, a court shall pass the guilty verdict by standard beyond the reasonable doubt.

ILL-TREATMENT PREVENTION IN POLICE WORK



Ill-treatment Prevention in Police Work

Human Rights Education and Monitoring Center (EMC)

2019

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Introduction

Effective response to crimes of ill-treatment committed by law enforcement officers and imposing criminal liability on perpetrators has been a major challenge for the justice system for years. The state impunity with regards to such cases has found its basis in the legal system, making it critical necessity to prevent ill-treatment at the legislative level, including the establishment of an institutionally independent investigation mechanism.

The problems with regard to investigating abuse of power by police officers or other crimes against persons under their control, should be considered in the legislative and practical context, along with institutional independence.

This document will analyze the factors inducing ill-treatment by the law enforcement officials on the basis of a discussion of the uniform problems in relation to the criminal proceedings conducted by the organization. There have been 6 criminal cases in the practice of the EMC on alleged cases of abuse against subjects under the control of police officers from 2017 to date, in which law enforcement officials allegedly mistreated 16 citizens. Analysis of these cases reveals gaps of an identical nature in legislation and practice. Prevention of ill-treatment is significantly complicated by the lack of responsibility to document the police-citizen relations, the lack of documenting communication through technical means, the ineffectiveness of special training and retraining in the prevention of abuse of power, and other circumstances.

After analyzing factors behind the state's ineffective response to the problem of ill-treatment, in light of the legislation in place, taking into consideration international standards and the best practice of different countries, legislative amendments will be proposed, with a view to overcome the existing problems faced by the state in addressing or preventing the cases of ill-treatment.

Methodology

Problems with regard to the investigation of cases of ill-treatment by the police officers in Georgia is analyzed in the document in light of the ongoing cases conducted by the organization, which cover criminal cases of alleged ill-treatment by various police units throughout Georgia from 2017 to date. Public information and the analysis of the legislation covering ill-treatment have also been used as additional tools to address the uniform problems raised in these cases.

Analysis of legislation

Relevant legislative acts and legislative amendments aimed at combatting ill-treatment were analyzed in preparation of this document. Particular attention was paid to institutional changes and legislative gaps in the exercise of policing or investigation powers, which increase the risks of ill-treatment by the police officers in various situations.

Public Information

For the goals of the document, different statistical information, internal regulations, information regarding technical equipment of the police officers and the policing units, storing the received information, guidelines for ensuring the exercise of procedural rights by the detainees, as well as information regarding the training and retraining courses for the police officers on ill-treatment, received from the Ministry of Internal Affairs and the Prosecutor's Office, in a form of public information, has been analyzed.

Much of the requested information was provided by the Ministry of Internal Affairs, but we did not receive information on some of the issues, including the use of video cameras by police units, and the police communications radio system.

International practice

With the expert involvement, the relevant international standards, identified by the Committee against Torture or other organizations, in a framework of specific documents, in order to effectively address legislative or practical problems in the country in the field of preventing ill-treatment.

This document outlines some of the best practices regarding the factors behind the use of force by law enforcement officials in several countries, relevant to Georgian context, including Slovenia, Great Britain, Ireland, and Germany.

Findings and Recommendations

The following problematic issues were identified based on the analysis of the gaps in legislation and practice in the field of preventing ill-treatment:

- The Ministry of Internal Affairs does not have a unified guidance document on the prevention of the excessive use of force by law enforcement officers, covering all important legal and practical issues related to the rights and needs of a person under police control;
- Protocols on the detention of persons detained under administrative or criminal grounds do not ensure a complete reflection of information on alleged ill-treatment;
- In contrast to the judges' increased authority under the Criminal Procedure Code in terms of the prevention of ill-treatment, the Administrative Code, in case of the alleged ill-treatment of a person detained on administrative grounds, does not clearly define the powers of a judge – to address the investigation authority to start investigation.
- Legislation on communication with family members of persons detained under administrative law does not require law enforcement to produce appropriate documentation;
- The log of detainees brought to the police station includes details of the time spend at the station, information about the injuries, details about the transfer to a detention facility, but does not record similar data on persons brought to the police station under different status;
- The request for access to a lawyer by a detained person is not documented by the law enforcement, which, in practice, makes it impossible to determine the actual time of the detainee's request addressed to the police and to ensure that law enforcement has provided access to the lawyer;
- The legal basis for transferring a person to a police station after detention is often unclear; The maximum length of time a detainee is held at a police station is not defined and this may lead to the violation the rights of persons under police control;

- From police officers, only the patrol police are equipped with video surveillance cameras, they are authorized to turn on the video surveillance cameras during police activities, although the use of this technical means is not required by applicable law;
- Internal Regulations of the Ministry of Internal Affairs do not regulate the use of personal mobile phones by police officers during the exercise of their powers, which in practice results in the arbitrary use of phones by the law enforcement officers;
- The case of interference by a police officer in the recording of a policing / investigation activity by a citizen through private cell phone is not clearly defined in the legislation, as a ground for imposing liability on a law enforcement officer;
- Internal and external perimeters of the police building and territorial structures of the police, as well as police cars are not properly equipped with video cameras; There is no surveillance equipment installed in the internal spaces intended for the communication with the citizens at police stations;
- Training and retraining police officers once every five years is not sufficient for the purpose of preventing ill-treatment.

To eliminate problems in legislation and practice, EMC puts forward the following recommendations:

To the Ministry of Internal Affairs:

- Develop uniform guidelines for the law enforcement on arrest, detention and restraining procedures, which will consistently outline all subsequent actions of the police officer and the corresponding legal safeguards starting from the initial stage;
- For the prevention of ill-treatment, elaborate a comprehensive detention protocol, which will describe all the circumstances from the moment of the arrest of a person to their transfer to the temporary detention center, including the exact time the detainee was read their rights, signs of injury, disease signs, timing and reasons for holding a detainee in the police facility, details about communication with family / friends and a lawyer, providing detainee with food, information about the provision of medical aid and details about communication with third parties;
- Include in the register of detainees accurate information about the detainee's request for a lawyer and actions taken by the law enforcement to ensure access to the lawyer;

- In the event of transfer of a person to the police station to complete the administrative detention protocol, the law enforcement officer should be instructed to indicate such a reason in the detention protocol, in detail;
- Similar to the patrolling officers, equip law enforcement officers, who are in contact with the citizens, with body cameras;
- The use of body cameras when communicating with the citizen should be an obligation for the law enforcement; The rules for keeping the data obtained through such technical means, on a central level, for a reasonable time period, should be legally defined;
- Elaborate rules for the use of alternative technical means and storage of the data when a law enforcement officer is in contact with a civilian, and video cameras are not available for objective reasons. Clearly define the inadmissibility of police officers' use of their personal mobile phones for official record keeping.
- Interference by the police in recording police / investigative actions by a citizen on a mobile phone should become the basis for a disciplinary action;
- Equip all areas of the police station, where the citizen is transferred and investigative / policing / operative activities are conducted, with video surveillance cameras. Define the rules for storing the video footage on a central level, for a reasonable period;
- Equip a vehicle, which is used to transport a detainee, with a technical recording equipment.
- Record the exact time of entry to and exit from the police station of a person under any status, their health status / injuries (if there are any), the reason for entering the police station; Establish control over the accuracy of documenting this information to prevent police arbitrariness;
- Provide comprehensive, regular and effective police training to prevent violence and ill-treatment during arrest or police detention. Trainings for police officers shall include, in particular, specific theoretical and practical training on matters where the risk of ill-treatment of the citizen is high;
- Provide police training on interpersonal communication, nonviolent conflict management, and stress management on all the stages of arrest, detention, coercion, along with special training courses;

- In line with best practice, the Academy of the Ministry should develop a comprehensive practical course on the prevention of ill-treatment, which will cover theoretical, practical issues of questioning, detention and arrest

To the Parliament of Georgia

- Implement a fundamental reform of the Code of Administrative Offenses, which provides procedural safeguards based on the human rights of the detainees / charged persons;
- Amend the Code of Administrative Offenses of Georgia and provide the judge with the authority to address to the investigation authority with a request to initiate an investigation if the judge raises suspicions regarding alleged ill-treatment of a person detained on administrative grounds;
- The Code of Administrative Offenses of Georgia should regulate the issues of communication with the family of the person detained for the offense and the obligation of a law enforcement official to draw up appropriate documentation;
- Amend the Criminal Procedure Code to verify the lawfulness of a person's detention and establish an internal and / or administrative mechanism that will assess the lawfulness of a person's arrest within the first 48 hours; A similar legislative change should apply to a person, detained under administrative law, whose detention is longer than 12 hours;
- Limit the circle of law enforcement officers with administrative or criminal detention authority (except for cases when apprehending someone in the course of wrongdoing);
- Expand the mandate of the Legal Aid Service and ensure that provision of legal assistance to those charged with administrative offenses, is not solely depended on the financial capabilities of the person, the special circumstances of the cases, and sanctions for offenses;
- With regard to a person detained in criminal or administrative proceedings, the main rule should be to transfer that said person immediately to a temporary detention center. In exceptional cases, grounds for transfer to the police station should be specified in the law and the maximum time allowed for a detainee to be held at the police station should be regulated by law;

- Communication with a citizen, brought to the police station for operative, policing or investigation purposes, should be recorded with audio and / or video equipment, as a mandatory rule. Rules for storing the obtained data securely, for a reasonable time, should be defined.

Overview of the Context

The problem of torture, inhuman or degrading treatment in Georgia has not been systematically practiced in recent years, however, effectively combating ill-treatment remains one of the major challenges in the country. Independent, impartial, effective and timely investigation of the crimes allegedly committed by the police officers, under the jurisdiction of the Prosecutor's Office, is not conducted, which is explained by institutional and legislative reasons.¹

The Public Defender speaks annually about the problematic nature of this issue within the mandate of the National Mechanism for the Prevention of Ill-treatment. For example, PD's 2013-2017 reports on the State of Human Rights and Freedoms, covering issues concerning investigation of the cases of ill-treatment, note that 72 statements were sent to the Prosecutor's Office on starting the investigation against police offices in cases of alleged ill-treatment, in none of the cases has the PO office initiated prosecution proceedings.² According to internal statistics by the human rights organizations, more than 50 cases of ill-treatment have been reported in 2017-2019 and relevant reports have been sent to the Prosecutor's Office, however not a single verdict has been issued, so far.³

Prior to November 1, 2019, it was the responsibility of the Prosecutor's Office of Georgia to initiate investigations and prosecutions in cases of ill-treatment allegedly committed by the law enforcement officials.⁴ In 2018, Prosecutor's Office started investigations into the facts of torture and ill-treatment by officers of the Ministry of Internal Affairs of Georgia in 367 criminal cases, out of which 13 persons were prosecuted. According to the same data for 9 months of 2019, in connection with the alleged ill-treatment, investigations have been initiated in 237 cases, and of these cases criminal proceedings have been initiated against a total of 6 persons.⁵

1 See the coalition's assessment on creating State Inspectorate Office, available at: <https://bit.ly/2XBJuyg>.

2 Public Defender's Report of 2017 on the State of Human Rights and Freedoms in Georgia, p.11

3 See the coalition's assessment of the postponement of Independent Investigation Mechanism, available at: <https://bit.ly/2Xzr2BQ>.

4 Order N34 of the Minister of Justice of Georgia of 8 July 2017 on the Determination of the Investigative and Territorial Investigative Subordination in Criminal Cases.

5 Letter N13 / 71009 of the General Prosecutor's Office of Georgia, dated October 8, 2019.

Number of investigations and prosecutions against the Law Enforcement Officers, initiated by the Prosecutor’s Office in 2018-2019

| Article | 2018 | | Until September 19, 2019 | |
|--|---------------|-----------------|--------------------------|-----------------|
| | Investigation | Persons Charged | Investigation | Persons Charged |
| Total | 367 | 13 | 237 | 6 |
| Exceeding official powers (CCG Article 333) | 332 | 12 | 227 | 3 |
| Abuse of Official powers (CCG Article 332) | 0 | 1 | 0 | 2 |
| Torture (CCG, Article 144 ¹) | 14 | 0 | 1 | 0 |
| Degrading treatment (CCG, Article 144 ³) | 21 | 0 | 9 | 1 |

The challenges in relation to the institutional independence of investigations into alleged human rights abuses by the law enforcement officials have been evident over the years, which has been reflected in a low number of investigations of these crimes and the prosecution of perpetrators.⁶ Ineffective response of the Prosecutor’s Office to ill-treatment criminal cases prompted the request of the Public Defender, international and nongovernmental organizations to establish an independent investigative mechanism equipped with a criminal prosecution function, which came into force on November 1, 2019.

⁶ Reports of the Public Defender of Georgia of 2014-2017 on the State of Protection of Human Rights and Freedoms in Georgia.

I. Legislative Amendments to Prevent Ill-Treatment

In terms of the effectiveness of the state's response to crimes committed by law enforcement officials when dealing with citizens, fragmented, though significant, changes have been made in 2018 to a number of procedural and institutional issues. Particular emphasis should be placed on enhancing the role of the judge in the investigation of ill-treatment and the introduction of judicial control over the recognition of the victim status in the investigation proceedings, as well as the creation of an institutionally independent body responsible for investigating ill-treatment.

The purpose of this chapter is to evaluate recent legislative and institutional changes in criminal justice in relation to crimes committed by the law enforcement system.

1. Independent investigation mechanism

Creating an independent investigative mechanism to tackle the problem of impunity for crimes committed by the law enforcement has been a constant demand of local and international organizations for years. In order to combat the systemic shortcomings, in as early as 2015, civil society, with the participation of the Public Defender, also drafted a bill to establish an independent investigative mechanism equipped with investigative and prosecutorial functions.⁷ The need for an institutionally independent investigative body is highlighted in the Association Agreement, signed between Georgia and the EU in June of 2014, and the accompanying 2014-2016 Association Agenda.⁸

After lengthy discussions with the authorities and civil society in various formats, Parliament finally adopted the Law on State Inspector Service on 21 July 2018, which, among other tasks, assigned investigative powers to the State Inspector in relation to the crimes of ill-treatment. The agency became the successor of the Personal Data Protection Inspector Service and encompassed additional investigative authority over the crimes committed by the law enforcement officials.⁹ According to the transitional provision of the legislation, the law was to be enacted by January 1, 2019, however authorization of investigative powers of the Office of the State Inspector has been postponed four times since July 21, 2018, and finally November 1, 2019 was set as a new deadline for the

7 See Coalition and Public Defender's assessment of independent investigative mechanism, available at: <https://bit.ly/2rhPyuW>.

8 See the 2015 National Action Plan for the Implementation of the Association Agenda between Georgia and the European Union, available at: <https://bit.ly/35nrKon>.

9 See the Coalition's Assessment on Creating a State Inspector Office, available at: <https://bit.ly/34ntPQU>.

initiation of the investigation service. The reason for the postponement was a lack of consideration by the Georgian government to allocate funds necessary for staffing and logistics in the state budget.¹⁰

Despite legislative shortcomings related to the independence and mandate of the State Inspector Service, taking all the steps necessary for the law to take effect from January 1, 2019 - was a major responsibility of the state to address systemic problems in cases of ill-treatment. The repeated delays in the investigation has left many criminal cases unanswered, where alleged criminal activity of law enforcement officials could have been identified. The urgent need for a timely and effective operation of the State Inspector's Office became even more clear in light of the alleged crimes committed by the law enforcement officers amidst the protest near the Parliament building on June 20-21, 2019 and during and after the detention of the protest participants. The General Prosecutor's Office of Georgia is investigating the aforementioned under Article 333, para. 3 (b) of the Criminal Code of Georgia, which, provided that the timely launch of an independent investigative mechanism could be ensured, would have been a competence of the State Inspector Service.

The creation of an independent investigative mechanism for the state to respond appropriately to the cases of ill-treatment has been welcomed by the general public. However, the mandate of the Office of the State Inspector to investigate crimes committed by law enforcement officials is limited, in accordance with the law, which raises questions about its effectiveness. It is problematic that it is not in the competence of the Office of the State Inspector to investigate a crime allegedly committed by the Minister of Internal Affairs, the Prosecutor General and the Head of the State Security Service.¹¹ Limiting the investigation mandate of the Office of the State Inspector with a list of offenses prescribed by law was also critically assessed. To be more specific, investigative jurisdiction of the State Inspector Service applies to crimes of alleged torture, threat of torture, degrading or inhumane treatment committed by the law enforcement officers as well as cases of abuse of official powers or exceeding official powers, committed using violence or a weapon, or by offending the personal dignity of the victim. Investigative jurisdiction of the agency applies to criminal law cases on using coercive means during questioning, other crimes committed by the representatives of law enforcement body, which caused the death of a person under the effective control of the state.¹² Actions beyond the aforementioned offenses, which may also involve some form of coercion by a law enforcement official, are automatically excluded from the jurisdiction of the agency.

¹⁰ See Explanatory note on the Draft Law of Georgia on Amendments to the Law on State Inspector Service, available at: <https://bit.ly/336srRj>.

¹¹ Law of Georgian on the State Inspector Service, article 3

¹² Law of Georgian on the State Inspector Service, article 19

A problematic issue related to the effectiveness of the independent investigation service was equipping the State Inspector Service with solely investigation capacity, without the authority to initiate criminal prosecution, considering that the applicable criminal procedural law provides for more intensive and extensive prosecutorial supervision, and the prosecutor in practice takes a leading role in the process of investigation.¹³

An additional factor impeding the effective operation of an independent investigative mechanism may be the exclusive authority of the Prosecutor General provided by the Code of Criminal Procedure to bypass the investigative authority, remove a case from one investigating authority and transfer it to another.¹⁴ The law does not provide sufficient safeguards against such interference in the investigative activities of the Office of the State Inspector Service. The Law on State Inspector Service provides for the right of the State Inspector to submit a substantiated proposal to the Prosecutor General if it comes to their attention that any investigating authority is investigating a case falling within the Inspector's investigative jurisdiction, and the said case was transferred to the investigating agency through the abovementioned exclusive authority of the General Prosecutors. The Prosecutor General shall review the appeal of the Inspector within 24 hours upon the submission of a written appeal by the State Inspector, although the law does not provide for any mechanism to control the decision taken by the Prosecutor General. Thus, the legislation does not, on the one hand, limit the possibility for the Prosecutor General to refer a case, falling under the competence of the state inspector, to another investigative body. On the other hand, it is problematic that the Prosecutor General, at his/her own discretion, again considers the written request of the State Inspector to change the decision to transfer the criminal case to another investigating body, without the possibility of external control, and makes the final decision.

To improve investigation activities of the State Inspector Service, amendments were made to the issues regulating investigation organ's communication with the supervising prosecutor. The time limit for the Deputy State Inspector, in charge of the activities of the investigation service, to address the prosecutor with the recommendation to start investigation proceedings, on the basis of the court ruling, in frames of a specific cases, has been increased. The time limit set for the investigation organs, setting the time period by when the investigation organs was to address the supervising prosecutor with an argumentative request to add concrete evidence to the list of evidences, was also terminated.¹⁵ These changes for effective implementation of investigative or procedural actions should be positively assessed.

¹³ The coalition's assessment on the creation of the State Inspector Service, available at: <https://bit.ly/33cvRC4>.

¹⁴ Article 33 (6) (a) of the Criminal Procedure Code of Georgia.

¹⁵ See Explanatory note on the Draft Law of Georgia on Amendments to the Law on State Inspector's Service, available at: <https://bit.ly/2OvJ97y>.

With the additional legislative changes, the State Inspector's Investigation Service was equipped with the power to carry out operative-investigation activities. In spite of the need to fundamentally reform operative activities in the criminal justice field and the general ambiguity of the role of operatives in the investigation, the State Inspector's Investigation Service, in its capacity, was equated with other investigation bodies.

2. Increasing the role of the judge

For detecting and responding to ill-treatment in a timely and proper manner particularly important is the role of those who have been in primary contact with a detainee or a person whose freedom is otherwise restricted. In this regard, changes were made to the legislation in order to respond effectively to the alleged ill-treatment of a person under state control. To be specific, the judge was authorized to address the investigation authority to initiate an investigation if the accused / convicted person had raised allegations of torture, inhuman or degrading treatment or if the judge himself/herself had doubts about the matter. In order to ensure the adequate protection of a life and health of a person in a penitentiary establishment, a judge has been authorized to issue special order that may include any special measure related to the security of a person in a penitentiary institution.¹⁶

In order to effectively combat ill-treatment, it was necessary to increase the role of the judge in the criminal proceedings. However, the judicial authority to refer to the investigating organs did not apply to the possible incidence of violence by a law enforcement officer against a person detained for an administrative offense. It is also appropriate to extend the authority of a judge in such cases to prevent ill-treatment, as cases of alleged ill-treatment of persons detained for administrative offenses are often common in practice.¹⁷ In the framework of the existing study, in the 5 out of 6 cases administered by the EMC, persons subject to administrative detention were allegedly victims of violence by the police.

Thus, for the prevention of ill-treatment, it is appropriate to include in the Code of Administrative Offenses a record granting similar authority to a judge to address the investigation body to start investigation, which is provided by the legislative amendment in the criminal proceedings.

¹⁶ Article 191¹ of the Criminal Procedure Code of Georgia

¹⁷ Reports of the Public Defender of Georgia for 2017-2018 on the State of Human Rights and Freedoms in Georgia.

3. Victim Status

The purpose of preventing ill-treatment is to protect the rights of persons under state control. Victims of torture, degrading or inhumane treatment are also primarily interested in conducting an effective investigation and prosecuting the offender. Accordingly, legislation should ensure that this person is involved in the investigation, which includes effective provision of information on the progress of the investigation, the possibility to identify the deficiencies of the investigation, and the right to have access to the evidence.

Obtaining the status of the victim in the course of the investigation is the only way to gain these rights.¹⁸ Based on the cases administered by the EMC, it may be argued that the practice of granting victim status to victims of ill-treatment is not uniform and the recognition of a person as a victim is often refused in order to restrict their access to the case file.

Prior to the Constitutional Court's decision of December 14, 2018,¹⁹ the Criminal Procedure Code recognized the possibility of appealing a prosecutor's decision to deny the victim status, with the exception of serious offenses, one time, by filing a complaint to a higher prosecutor. Thereafter, the rule of recognizing the victim status under the criminal procedure code was changed several times, and finally, according to the current version, the refusal to recognize the victim status, in crimes under the investigative jurisdiction of the State Inspector, can be subject to filing a one-time appeal to the court.²⁰

In addition, as amended by the Criminal Procedure Code,²¹ the victim of cases falling under the investigative jurisdiction of the State Inspector has, unlike other categories of offenses, been granted a right the appeal the refusal of the investigation authority to start the criminal prosecution proceedings to the court. Along with the introduction of judicial control over the granting of victim status, this amendment is also a positive step towards transparency in the investigation of ill-treatment.

18 According to Article 56 of the Criminal Procedure Code of Georgia, access to investigative materials is only available to a person only after being identified as a victim.

19 Citizens of Georgia - Khvicha Kirmizashvili, Gia Patsuria, Gvantsa Gagniashvili and Ltd "Nikani" v. Parliament of Georgia (Constitutional Claims 291229, №1242, №1247 and №1299), in accordance with the disputed norms in the case, the prosecutor's denial to grant the victim status or terminate the resolution on the victim status in ნაკლებად მძიმე და მძიმე დანაშაულის could not be appealed in the court. The Constitutional Court of Georgia has indicated that granting victim status is a prerequisite for access to important rights under the criminal proceedings. Accordingly, a person has increased interest in appealing the prosecutor's decision regarding the victim's status to the court. In view of the above, the Constitutional Court held that, on the one hand, the interest of appealing the Prosecutor's decision to the court and, on the other hand, the need for protection from discrimination in this relationship was greater than the good protected by this norm - the prevention of court backlog.

20 Article 56 para. 5 of the Criminal Procedure Code of Georgia.

21 Law of Georgia on Amendments to the Criminal Procedure Code of Georgia, July 21, 2018 № 3276.

4. Change of the rule of the primary medical examination of the detainee

One of the key factors for effective response to cases of ill-treatment is the proper recording of injuries to the person's body and timely provision of information to the law enforcement. In the case of detainees, injuries are documented on the one hand by providing relevant information in the detention protocol, and on the other, by subsequent medical examination of the detainee after their transfer to the temporary detention facility.

The Rules of Procedure of the Temporary Detention Facility of the Ministry of Internal Affairs of Georgia has undergone changes regarding the procedure of the first medical examination of the detainee in the temporary detention facility.²² According to the Ombudsman's recommendations,²³ the Internal Regulations stipulate the obligation of a temporary detention physician to report to the Prosecutor's Office of Georgia and the General Inspection of the Ministry in case of suspicion of torture and ill-treatment. This power granted to medical staff in temporary detention facilities guarantees a more timely and effective response to the alleged fact of ill-treatment.

22 Order N423 of the Minister of Internal Affairs of Georgia of August 2, 2016 on the Approval of the Regulations and the Rules of Procedure of the Temporary Detention Facilities of the Ministry of Internal Affairs of Georgia, article 6

23 Reports of the Public Defender of Georgia of 2014-2015 on the State of Protection of Human Rights and Freedoms in Georgia.

II. Safeguards against torture and ill-treatment

In the law enforcement system, combatting ill-treatment can be ensured by providing minimum guarantees of legal protection for detainees. Such legislative safeguards include effective access to information about the reasons for detention (in an understandable manner/language) and procedural rights, access to counsel, access to medical care, and the right to notify family members about the detention.

In addition to the proper exercise of these rights, important means of protecting against ill-treatment are the documentation of a citizen's registration and communication (with audio / video recordings) by a law enforcement officer at the moment of their transfer to the police station.

This chapter will analyze the key factors of excessive use of force in Georgia, as well as review international standards and examples of best practices in different countries, based on which appropriate recommendations will be proposed.

1. Documenting detention

Current legislation recognizes a person's subjection to the police control on a number of grounds, which includes different procedural safeguards for the protection of human rights. In reviewing measures to prevent ill-treatment, a detailed description of the circumstances of a person's deprivation of liberty, consistent documentation of detention and post-detention is an important factor. The Ministry of Internal Affairs does not yet have a single guideline on detention procedures and the provision of minimum legal guarantees, covering all important legal and practical issues concerning the rights and needs of a person under police custody. According to information provided by the Ministry of Internal Affairs, the development of a document on standard operating procedures for detention is an ongoing process.²⁴

Current legislation envisages arresting a person for committing a crime or administrative offense and therefore provides different procedural safeguards for detention. The total length of criminal detention is 72 hours, which obliges law enforcement officers to charge a person within the first 48 hours, and within 24 hours, the person is required to appear in court.²⁵ The law does not provide for any internal mechanism for assessing the

²⁴ MIA letter dated 7 October 2019, MIA 41902661905.

²⁵ Part 1 of Article 196 of the Criminal Procedure Code of Georgia.

lawfulness of detention within the first 48 hours of a person's arrest. The detention on administrative grounds, is a rule, short and it usually lasts 12 hours.²⁶

In case of detention on administrative or criminal grounds, a record shall be drawn up concerning the detention of a person, stating the reason for the detention, the exact time, place, information on the use of force and injuries of the detainee, as well as the details regarding those involved in the act of detention. In both cases, the content of the record is confirmed by the police officer and the detainee with the signature. The latter is authorized to refuse to sign the record of detention and to make a note on the document.²⁷

With respect to the accused and the person detained under administrative law, a record of detention shall be drawn up in accordance with the law at the place of detention. The Criminal Procedure Code, in this respect, clearly states the obligation of the law enforcement to immediately complete a detention protocol at the place of detention, and if there is an objective reason that the document cannot be drafted at the place of detention, the officer is obliged to detail the said reasons in the detention protocol and there is a possibility to fill in detention protocol at the police station or other law enforcement agency²⁸. Unlike criminal procedural law, in cases of administrative detention, reasons for inability to fill in a detention protocol and grounds for transfer to a police station are not indicated,²⁹ which in practice often results in the transfer of the detainee to the police station without fair grounds and leads to the arbitrariness of the law enforcement.

The detention record does not in any case contain additional information on the reason for contacting the detainee's family members, the route of his or her transfer, and the reason for their transfer. A separate procedural document from the detention protocol is filled in with the information on notifying family members regarding the detention of a person and in some cases details regarding transfer of a person from the place of detention to the police station are also included.

Under national law, procedural documentation related to the detention of a person under administrative or criminal grounds is essentially focused on the detention episode and the physical injuries of the detainee. The law does not envisage the existence of a single document reflecting the actions by the law enforcement agencies in relation to the person, during the first hours of detention

26 Article 247 of the Code of Administrative Offenses of Georgia specifies the holding of a person for 48 hours in the temporary detention facility in case of arrest during non-working hours.

27 Article 245 para. 5 of the Code of Administrative Offenses of Georgia.

28 Article 175 of the Criminal Procedure Code of Georgia.

29 Article 244 of the Code of Administrative Offenses of Georgia

Committee against Torture considers it important to draw up a comprehensive detention protocol to prevent ill-treatment. According to CAT, the record of detention should also include details, such as the exact time of familiarizing detainee with their rights, the signs of injuries, mental illness, information about contacting family / friends and a lawyer, providing food to the detainee and information about the interrogation time.³⁰ In terms of the content of information contained in the detention protocol, it is important to discuss the practice of the United Kingdom, which includes the elaboration of a comprehensive document with respect to any detainee brought to the police station. The protocol includes a description of the grounds for arrest, search warrants and items recovered from the search, the required level of control of the detainee (according to appropriate assessment levels), medical card and specific cell placement timing, medical service and treatment plan, information / justification of the use of force, factual data on providing the detainee with the legal acts (describing procedural rights of the detainees).³¹ In addition to elaborating comprehensive detention protocol, in order to provide systemic and proactive monitoring of the police detention, in accordance with the international standard, it is important to separately record information in the law enforcement system, regarding the use of force and weapons, acts of violence between the detainees and other incidents, disciplinary actions used against the detainees during the police detention and while the stay of the detainees in the detention facility, information depicting entry to and exit from the police facility.³²

National instruments for documenting detention, aimed at preventing ill-treatment, need to be refined in line with international standards and best practices. It is important, on the one hand, for the law enforcement agencies to develop a unified guideline on arrest and detention procedures that will consistently outline all subsequent actions and corresponding legal safeguards, starting with the initial stage of a first contact of a police officer with a person. Best practice in producing a comprehensive detention protocol, which outlines the legal and procedural issues related to person under the police control, as well as the details of access to medical care and communication with third parties, should also be considered.

2. System of communication with a lawyer / family members

Access to legal aid is one of the fundamental rights guaranteed by law. The legislation distinguishes the set of norms covering the involvement of a lawyer in administrative and criminal detention.

30 CPT, excerpt from 2nd general report [CPT/Inf (92) 3], published in 1992, § 40

31 Authorised Professional Practice, Detention and custody, available: <https://bit.ly/2rf9kHK>.

32 APT, police detention monitoring, pg. 148.

When arrested on criminal grounds, a person is immediately warned of his / her right to remain silent and to refrain from answering questions and to seek legal advice. The accused may, at his own discretion, choose or replace a lawyer, in cases prescribed by the law or in cases of social and material disadvantage – a lawyer will be appointed at the expense of the state.³³ Within three hours of the arrest, the prosecutor or investigator, under the prosecutor's instruction, is obliged to provide information to the family of the detainee on the detention, with the appropriate notification protocol reflecting precise timing of the notification.³⁴

Person arrested for committing an administrative offense has similar procedural rights. Specifically, in this case, the detaining officer is obliged to immediately explain to the detainee the grounds for detention, the right to counsel and, if he wishes, the detainee should be given the opportunity to inform the family of the fact of his detention and whereabouts.³⁵ The law does not provide for any procedural document regarding the communication with the detainee's family on the commission of the offense, which, in practice, allows the arbitrary restriction of the exercise of this right.

For years, a particular problem for an administrative detainee has been access to a lawyer while in police custody. Although such arbitrariness has not been noticeable in law enforcement lately, informal "agreement" initiated by the law enforcement officials with the detainees to conduct processes without the involvement of a lawyer, "to avoid" further complication of the process and get non-custodial sentence in return, still deserves criticism.

Regarding the procedural guarantee of access to a lawyer, the existing legislative regulation is also problematic, which does not require to include information on the request of a lawyer by the detainee in the register of detainees. Accordingly, it is difficult to determine whether conducting case proceedings without the participation of a lawyer was the individual decision of the detainee or the result of the unlawful conduct of the police. Information to be included in the journal registering detainees at the Police territorial bodies, covers exact timing of the detainee entering police administrative building, data regarding injuries inflicted on the detainee and the reasons of the said injuries, as well as details regarding the transfer from the police building to the temporary detention facility. It is problematic that, according to the journal, it is not possible to determine whether a police officer offered the detainee to contact a lawyer, when the detainee was explained this right, and what position he had on the issue.

33 Article 38 of the Criminal Procedure Code of Georgia.

34 Article 177 of the Criminal Procedure Code of Georgia.

35 Article 245 of the Code of Administrative Offenses of Georgia.

Conducting administrative litigation proceedings for victims of ill-treatment without the involvement of a lawyer is also established in the practical experience of the organization, which is compounded by the problem of financial resources required for the lawyer involvement and the limited mandate of the free legal aid service in litigation cases. Assigned state attorneys-at-law may, on request, be provided to the persons with limited financial means, who may be subject to administrative imprisonment, lawyer is not already involved in the case, and the matter is of particular legal importance.³⁶ However, in case of people cannot afford a lawyer (those who are registered in the database of socially vulnerable families), the law does not provide free legal aid. In this respect, extending the mandate of the Legal Aid Service may be appropriate to prevent ill-treatment.

In addition, the analysis of EMC cases indicates that 12 out of 16 persons detained on administrative grounds in different regions, who were physically assaulted at police stations were “advised” by law enforcement to disengage lawyer in the proceedings to avoid further “complication” of the administrative process. For vulnerable detainees, such communication by the police is an additional psychological pressure, which is why detainees choose the strategy of confirming the position of the police regarding the offenses and choose to conduct speedy proceedings without a lawyer. As part of the investigation of the physical injuries of these persons, their “confession” of resisting police, leads to some distrust towards the victims by the police and their preconditioned attitudes regarding the nature of the injury.

The Committee on the Prevention of Torture, with regard to access to the right to protection, focuses on the guarantees provided by the law enforcement agencies. According to the committee, “access to a lawyer” should apply not only to “official suspects” but to all persons deprived of their liberty, including witnesses and anyone who is required to attend and / or remain in a police station for “informational conversation.”³⁷

The Committee also considers it important for the law enforcement to allow detainees, at the initial stage of detention, to notify their detention to a close relative or to a third party. According to the same recommendation, the details of the telephone communication of the detainee to third parties - the exact time, the identity of the communication recipient should be documented by the police officer and confirmed by the detainee’s signature, which avoids the risks of arbitrariness in the police system. According to the standards of the CPT, the delay in notifying arrest must be recorded in writing, and confirmed by a senior police officer who is not related to the particular case of the detain-

36 Article 5 of the Law of Georgia on Legal Aid.

37 CPT Standards, excerpt from 12th General Report [CPT/Inf (2012) 15], Available: <https://rm.coe.int/1680696a88>.

ee.³⁸ In any case, the delay shall not exceed 18 hours.³⁹ An additional recommendation concerns allowing a detained person to speak directly with family members by making a phone call upon arrest, in the presence of a police officer, which is not mandatory for the law enforcement in accordance with the international standard, but is considered a good practice.⁴⁰

Taking into account the above, strict recording of the details of the communication with the lawyer and the family in the law enforcement agencies, the obligation to draft the relevant notification document in case of the offense and the direct notification by the detainee will create better conditions for the use of legal guarantees in the national law.

3. First aid and decent conditions

One of the most important safeguards for the prevention of ill-treatment of persons under police control is holding them in the environment tailored to their needs, after the arrest. A person detained under criminal or administrative grounds should have access to medical care, needed toiletries and personal space.

Initial medical examination of a detainee is possible upon arrival in a temporary detention facility. In the view of the Public Defender, the practical challenge in this respect is to conduct a confidential medical examination, without the presence of the facility staff, with the participation of only a doctor and detainee. According to the standards of the Committee against Torture, medical examinations should be performed in full confidentiality, without the participation of the staff, beyond their area of their direct vision.⁴¹

The practice of ill-treatment reveals the practice of the law enforcement officers holding the detainee at the police facility before transferring the detainee to the temporary detention facility, which is often explained by the need to fill in the detention protocol. The leaflets and posters containing information on procedural rights of the persons detained on administrative or criminal grounds are not found in the police buildings, as opposed to the detention center,⁴² therefore, problems might arise in terms of providing information regarding the procedural guarantees to the detainees, when they are held in the police custody for extended period.

38 *ibid*, § 43.

39 APT Police custody monitoring, p. 126.

40 Initiative Convention against Torture, Guarantees in the First Hours of Police Custody.

41 SPT, Report on the visit to the Maldives of the Sub-Committee on Torture (SPT), §112.

42 Public Defender's Report 2018 on the State of Human Rights and Freedoms in Georgia

Additionally, procedural rights and needs of detainees are not adequately provided in the police units, also in terms of infrastructure. In practice, detainees are often delayed for several hours in the common area of the police station, when other law enforcement officials, other than those involved in the detention, attend or establish relationships with the detainee. In practical experience, police efforts to negotiate with the alleged victims of ill-treatment, to refrain from reporting alleged violence or other abusive behavior, are particularly common in the territorial police organs.

An analysis of the criminal cases of ill-treatment administered by the organization shows that, out of the 16 police officers under police control, in the case of 12 administrative detainees, access to toilets, water and food was dependent on the “good will” of police officers. In all of the above cases, person was detained for an hour and a half to three hours in police building in a free space without video surveillance, and therefore, in no case was the police relations with the person of interest documented. In one case, a detained citizen was held for about four hours with a policeman who detained them in the yard of a police station. During this time, despite numerous requests, policemen did not allow the detainee to use the toilets, which led to the detainee urinating at the site and this resulting in putting the detainee in a degrading position.⁴³

Proper conditions for the detainees under effective police control can be achieved through the immediate transfer of a detainee to a temporary detention facility, which would limit the relationship between the police and the citizen in informal areas free from external surveillance.

According to the guidelines of the Committee against Torture, in countries where cells are incorporated in police establishments, detainees must be provided with adequate toilets with appropriate conditions and adequate facilities for washing, to meet the minimum standard. They should have free access to drinkable water and provided with adequate nutrition, including at least one full dinner (eg something more nutritious than a sandwich) each day. Persons who remain in police custody for 24 hours or longer should be allowed exercise daily in the fresh air, when possible.”⁴⁴ Although in the case of Georgia, temporary detention cells are not set up at the police station, it is important that the appropriate conditions are provided to persons subject to police control, in the police stations.

43 A.D. case

44 SPT, Report on the visit to the Maldives of the Sub-Committee on Torture (SPT), §§112, 47.

4. Holding a detainee in the police car or at the station

The more time a citizen is under police control, the significantly increased the risk is of psychological or physical pressure and violence. Being in the environment that ensures the necessary standard of guaranteeing the rights of a citizen after arrest is a precondition for constructive communication with a law enforcement official. Practice of ill-treatment also shows that there is a high risk of physical or verbal abuse by law enforcement in the neutral environment free of video surveillance – police custody or a police car, before the detainee is placed in a temporary detention setting.

Particularly problematic in this respect is the existing legislation, which does not recognize the obligation of a police officer to transfer a detainee to a temporary detention setting, right away, where the conditions for ensuring the detainee's procedural rights, medical examination, and technical equipment of the facility are substantially better. Therefore, direct transfer of a detainee in a temporary detention setting may be an important factor in preventing ill-treatment.⁴⁵

The law requires the detaining officer to bring the detainee to the nearest police station or other law enforcement agency during criminal and administrative detention. This means that the law enforcement officer is not obliged to transfer the person deprived of his or her liberty to a temporary detention facility immediately. As a basis for bringing the detained person to the police custody, law enforcement officers often refer to the need to fill in the detention protocol at the administrative building of the police, which, in criminal or administrative detention, is permissible if there are objective reasons,⁴⁶ However, in practice, this reason is referenced, without any justification. Instead of transferring the detainee to the police station, the detention protocol can also be completed at the temporary detention facility.

An impeding factor in the transfer of a detainee to a temporary detention facility is that the internal regulations of the detention facility provide for the submission of a written application by a representative of the competent authority as a precondition for receiving the detainee, aside of the detention protocol. The application should contain the personal data of the person to be detained, the grounds for detaining the person, the request for his placement in detention, information on the staff of the detaining authority who will escort the detainee to the detention facility.⁴⁷ The detainee shall not be placed in a

⁴⁵ The Public Defender's Recommendation from the 2018 Report on the State of Human Rights and Freedoms in Georgia.

⁴⁶ Part One of Article 175 of the Criminal Procedure Code of Georgia, Article 244 of the Code of Administrative Offenses of Georgia.

⁴⁷ MIA letter dated November 8, 2019, MIA 61902998517.

temporary detention isolator without the written application, in accordance with this rule, which results in his / her transfer to a police station for drafting the written application.

The problem is also that before transferring the detainee to the temporary detention setting, the maximum time for a detainee to be held in the police custody is not specified. Such legislative regulation is often abused by the law enforcement, as evidenced by the analysis of ill-treatment cases. The practice of delaying the drafting of a protocol on the detention by the police to keep the detainee in the police custody and the practice of violence against the detainee in this setting is evident in the criminal cases administered by the organization. Therefore, the issues related to the grounds for transfer of detainees to the police station and the length of the delay in this setting need to be clearly regulated.

It is noteworthy that at the time of the detainee's arrival at the police station, the territorial police authorities keep a "register of persons detained at the interior ministry organs" and a "register of detainees transferred to the temporary detention facility", identifying the detainees, the existence of the injuries and the reason for the detention, as well as the timing of bringing the detainee to police facility and transferring them to the temporary detention facility⁴⁸. The applicable procedure only records data on persons brought to the police station as detainees, but does not include documentation of any other relationship between the police and the citizen, such as the presence of a witness or a persons to be interrogated at the police station. In addition, the responsibility for completing the data on detainees is exercised by on call employee at the Ministry's structural units and territorial authorities, the overall responsibility for controlling the quality is on the chief of the on duty staff.⁴⁹ Therefore, it can be said that the control over the accuracy and correctness of the data related to the detainees in the register books of the detainees at the territorial authority does not go beyond a specific police unit, which, if there is such an interest, makes it easy for law enforcement to manipulate.

An analysis of criminal cases related to ill-treatment showed that detention in a police station lasted from two to three hours on average in each case, according to the records of the detainees' registry. Given that the questioning / interrogation of detainees at the police station was not undertaken and the transfer served only the purpose to complete the administrative detention protocol, which consists only of a few lines, this length of time used to hold a detainee at the police station is unreasonable even when the real

48 Annexes N6 and N7 approved by the Order of the Minister of Internal Affairs of Georgia N605 of August 8, 2014 on Approval of the Rules of Procedure of the Organization of the on duty Devisions of the Ministry of Internal Affairs of Georgia.

49 Ibid, article 4.

reason for the holding the detainee at the station was to draft a detention protocol and not to exercise unlawful influence.

When transferring a detainee from a place of detention to a police station when a person is in police custody without any supervision, the risk of ill-treatment by law enforcement is also highlighted in international standards concerning detention.⁵⁰ In order to reduce such risk, law enforcement authorities are required to record the day and hour of each transfer and to include in the record of detention.⁵¹ The transfer of a person deprived of his liberty may not be a form of punishment.⁵² However, to avoid escaping during detention, the use of handcuffs is permitted as a precautionary measure, but equipment may not be used to inflict pain. Handcuffs should be taken off, as soon as these risks are no longer present.⁵³ Despite the absence of a mandatory international standard, video-recording in police cars is also considered important by the Torture Prevention Association and International Penal Reform.⁵⁴

To ensure compliance of national standards and practices with these standards, it is recommended that unnecessary delays of the detainee at the police station is prevented, and in case of his / her transfer to the police station, the appropriate grounds and length of delay should be recorded in writing. However, taking into account existing practice, it is appropriate for the law to prescribe immediate transfer of a person to the temporary detention setting, where the protection of human rights is relatively high.

4.1 Questioning of a person under police custody

The risks of ill-treatment of a person by the law enforcement are particularly high during the questioning stage. Therefore, consideration should be given to possible tools for preventing the psychological or physical violence at the police station during questioning.

The questioning of the person in the police unit is voluntary in the frames of investigation. Person is explained about the right to have a lawyer, at their own expense, the voluntary provision of information and the imposition of criminal liability for the provision supply of false information. The obligation to testify as a witness arises only before

50 UN Minimum Standard Rules for the Treatment of Prisoners (Mandela Rules) and the United Nations Principle on the Protection of All Persons Arrested or Imprisoned in Any Form (Set of Principles)

51 Mandela rules, rule 7.

52 Torture Prevention Association (APT). "Police Detention Monitoring - A Practical Guide" (2013), p.116

53 *ibid*, 47-48.

54 Penal Reform International : Video recording in police custody Addressing risk factors to prevent torture and ill-treatment, available : <https://bit.ly/2Kldk9C>, p.1.

the court.⁵⁵ The investigating authority makes a decision on the use of a voice or image recording technique during the interview, and the person being interviewed is warned in advance.⁵⁶

The Laws on Police and Operative-Investigation Activities also provide for the summoning and interrogation of a person at a police station. The policing instruments in the two laws mentioned above are identical in content. The purpose of both provisions is to summon a person to the police to interview the person if the police officer believes that the citizen possesses the information needed for performing policing functions. When summoning a person, in the form of a police measure, holding of a citizen at a police station shall not exceed 4 hours. At the same time, the summoned person should be informed that appearing in the police and leaving the police unit is voluntary.⁵⁷

In the scope of operative activities, the purpose of interviewing a person by an operating officer or investigator is to obtain information about a specific case or a person. In this case, questioning is voluntary and the person is not warned of criminal liability for giving false testimony or refusing to give testimony. The investigating officer or investigator is required to report on the questioning, which is not disclosed to the person who is questioned. Given the conspiratorial nature of the operative work, the lack of legal guarantees, and the fact that the person performing the operative functions is not even required to present himself to the citizen, there is a risk that the citizen may disclose information that will be used in the future against him, in violation of the principle of self-incrimination.

Regarding the creation of legal safeguards for a person in effective police control, it should be emphasized that operative and policing measures are used as a repressive tool, in practice. Unlike minimum legal safeguards provided during the administrative or criminal detention of a citizen, when a person is summoned to a police station under a policing or operative measure, it is often the case that a person is not warned that appearing to the station and reporting information to the police is on a voluntary basis and questioning of a person is related to the suspicion that the said person had committed a crime.⁵⁸ Additionally, due to the lack of procedural mechanisms, it is difficult to determine the contextual and other aspects of citizen-law enforcement communication. For example, the rule of administering a special journal at a police territorial authority at the time of arrest does not apply to contact with a citizen on the basis of policing or oper-

55 Article 113 (1) of the Criminal Procedure Code of Georgia.

56 Article 113 (9) of the Criminal Procedure Code of Georgia.

57 Article 21 of the Law of Georgia on Police.

58 Such cases concerning three persons were reported

ative measures. There is no record of the timing of a persons' entering and leaving the police premises, no bodily injuries of a citizen are checked and recorded after arriving and leaving the police station, the time of the summoning a person to the police unit and the person is being held at the police unit is not recorded and there is not obligation for the police to file any documentation.

Due to the lack of minimum human rights protection standards in the legislation, the application of these provisions in cases of ill-treatment is particularly evident in the territorial police units. Violent acts committed by police officers against civilians were carried out in the context of operative activities in one of the cases administered by the EMC. One of the two citizens taken to the police station for operative interrogation later died by suicide, while the other reported physical abuse by the police. In the course of the investigation into the aforementioned case of ill-treatment, the documents reflecting the actions of the police officers within the operative measure,⁵⁹ were not obtained by the investigation even after two years.

Thus, it can be said that the measures of questioning the citizens on different legal grounds at the police station do not even provide for the minimum legislative guarantees of protection against ill-treatment.

Considering the high risk of physical or psychological pressure on a citizen, international standards on interrogation at the police station, including UN Special Rapporteur on Torture, focus on developing tools and guidelines for the prohibition of torture and ill-treatment.⁶⁰ From a procedural point of view, providing accurate and reliable information about a person's status and rights prior to the questioning is critical. Authorized authorities may not "have an informational conversation with a person" in order to bypass the legal safeguards accompanying the suspect's interrogation." Any person who has a legal obligation to attend or remain in a questioning facility shall enjoy the same rights as enjoyed by the suspect. From a procedural point of view, providing accurate and reliable information about a person's status and rights prior to the questioning is critical. Authorized authorities may not "have an informational conversation with a person" in order to avoid the legal safeguards accompanying the suspect's interrogation." Any person who has a legal obligation to attend or remain in a questioning facility shall enjoy the same rights as the suspect enjoys. Regarding the duration of the questioning, the UN Special Rapporteur's report noted that except in exceptional circumstances, strict national regulations should be elaborated to ensure that the detainee is not subjected

59 Report, form N12, which served to identify the personal information and circle of acquaintances of the questioned persons.

60 UN Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/71/298) 2016

to questioning for more than two hours without a break and is provided with adequate breaks, and every 24 hours is given continuous eight-hour interval, which will be free from questioning and any other kind of actions related to the investigation.”⁶¹

One of the key tools for preventing ill-treatment during a police interrogation, according to the UN Special Rapporteur, is continuous audio-video recording and safe keeping of records. The report calls for the law enforcement to use “every reasonable effort” to fully record the process of questioning the detainee. In the event of impossibility of audio or visual recording under objective circumstances, and in case of refusal by the person who is being interviewed, it shall be indicated in writing. The UN Special Rapporteur, in the case of questioning the suspect, considers it mandatory to provide at least audio recording. In the case of limited financial resources, video recording should be used primarily for suspects, vulnerable victims.⁶²

In order to minimize the risk of ill-treatment and the introduction of good practice, during investigative or policing measures in relation to the citizen, it will be important to establish a practice of continuous audio-or video-recording in the law enforcement system. At the same time, it is important to record details of a person’s visit to a police station during a policing and operative inquiry.

5. Documenting communication between the police and a citizen through technical means

Under the current law, interaction between a citizen and a police officer may be based on an investigative, policing or operative measure. For these purposes, the Patrol Police Department, Public Order Enforcement Officers, as well as Central Criminal Police Officers and Police Department Officers under the Ministry’s territorial authorities have an intensive relationship with the citizen.⁶³ In the event of an incident involving police contact with a citizen, the main challenge is to obtain a neutral witness or evidence of the incident.

An analysis of the cases of ill-treatment administered by EMC shows that in the case of violence and alleged ill-treatment of a citizen, the investigating authority, on the one hand, has the information from police officer, and on the other hand, a completely different position on the subject from the citizen’s point of view. Obtaining other evidence of a citizen’s injuries,

61 *ibid*, §§ 85-89.

62 UN Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/71/298) 2016

63 Regulation of the Ministry of Internal Affairs of Georgia approved by Resolution N337 of December 13, 2013 of the Government of Georgia

such as a neutral witness's testimony or a video camera recording, is largely impossible. In this regard, documentation of police communication with citizens through technical means, including audio / video recording, is often crucial for the prevention of ill-treatment.

5.1 Video recording with body cameras

The Ministry of Internal Affairs does not specify the obligation for its subordinate staff to record the interaction with citizens. The special rule for recording a police officer's interaction with a citizen is established only in the context of special police control, so-called raids, in accordance with the Law of Georgia on Police. Any other contact with the citizen during policing, operative or investigation action, can be established bypassing the use of technical means.

For the purposes of ensuring public order and security, when responding to the violent act, in order to ensure the protection of the rights of citizens and police officers, a patrol police officer has the authority to conduct video-audio recording using technical means when patrolling, for a comprehensive, complete and objective examination of the case. Patrol police are equipped with shoulder video cameras that allow continuous video recording for up to 12 hours, and the date and time is stamped on the video recording.⁶⁴ An amendment to the ordinance of the last year changed the rules for storing data captured on a shoulder video camera while patrolling, and imposed an obligation to store video recordings from the body cameras, attached to the Patrol-Inspector's uniform, on a special server for a 30 day period.⁶⁵

Despite the positive changes, the optional rule of video recording remains unchanged. The discretionary content of this regulation is problematic in practice, because even if a citizen insists, the patrol-inspector may, at his discretion, decide to turn on the body camera. In this regard, it is important to consider the experience of the United Kingdom, in particular Northern Ireland, which does not impose the obligation on the law enforcement to carry body camera or camera on dashboard of a patrol car, but most police stations use it in some circumstances. Specifically, cameras have a built-in system to prevent arbitrary discontinuation of video recording, which records the date and time of turning on and off the camera.⁶⁶

64 MIA letter dated October 29, 2019 from MIA 51902888374.

65 Order of the Ministry of Internal Affairs Order No. 1310, of December 15, 2005 "On Approval of the Instructions for Patrol Police Service by the Ministry of Internal Affairs of Georgia", article 12¹.

66 Hungarian Helsinki Committee, "Investigation of Police Misconduct in Europe", Comparative Study in 7 EU Countries, 2017, p. 118.

Besides authorizing the use of body video cameras by patrol officers, the legislation does not recognize the use of technical means by other police forces (Central Criminal Police Officers or Ministry Territorial Staff). For law enforcement officials, the absence of this important tool for abstaining from excessive use of force is particularly problematic in practice, as criminal police and territorial police officers have daily intense contact with citizens. For example, in criminal cases administered by EMC, allegations of ill-treatment in all cases are against detectives or district inspectors at the territorial organs of the Ministry of the Interior.

Vehicles, used by the police departments and divisions, are also not equipped with technical means,⁶⁷ and therefore, contact between citizens and police officers is not documented, this, in the frames of investigation of cases of ill treatment is challenging for establishing factual circumstances of the case.

There is no international standard obliging law enforcement to use body cameras. However, restrictive factors, flexible resolution of complaints and criminal proceedings, as well as improved accountability and transparency in the law enforcement system are considered to be the benefits of the use of body cameras. Interference with one's personal life (especially when using cameras in private homes) and large amounts of data storage, access and destruction of the information by the police, are cited as risks.⁶⁸

Due to the lack of internationally recognized standards for regulating the use of body cameras, it is interesting to review the best practices of individual countries. The US Department of Justice has developed recommendations for the use of body cameras.⁶⁹ The document focuses on the need to develop a unified policy on the use of body cameras at police agencies, which defines issues such as the circle of law enforcement officers authorized to operate body cameras, the location, the rules for turning on and off the equipment. The document also includes data storage regulations. According to the recommendations, in case of insufficient resources, road and patrol police should be given the priority of carrying body cameras. Police officers will be required to turn on body cameras in response to all calls and disputes related to the public order, until the incident is over, or the supervisor has issued an order to stop filming. According to the same document, the police officer should inform the citizen about the recording. As for the Footage obtained by the police, it is recommended to download the data from the cameras at the end of each shift, classify the video footage according to the type of the accident /

67 MIA letter dated October 29, 2019 MIA 51902888374.

68 Special Rapporteur's Report on Out-of-Court, Simplified and Arbitrage Enforcement, Use of Information and Communication Technologies to Ensure Right to Life, A / HRC / 29/37, §§ 55-57, available at: <https://bit.ly/3381Xij>.

69 USA, Department of Justice, Implementation of the Portable Body Camera Program: Recommendations and Experiences p. 37-46, available at <https://bit.ly/349D6vW>.

incident and storing the data for a specific period (60-90 days), in accordance with the elaborated policy. The records may be periodically review by the supervising officer, for the purposes of internal oversight to assess the effectiveness of the officer.

The reflection of the aforementioned approaches to international policymaking standards and best practices in Georgian policing will create effective safeguards to prevent ill-treatment and respond to such crimes. It is especially necessary to change the non-mandatory nature of the use of body cameras. Keeping in mind the intensity of the contact with the citizen, it is also important to equip other police units step by step with this technical measure, as well as to develop a unified standard for storing the obtained data.

5.2 Use of Mobile Phones

Investigations of ill-treatment show recordings made on mobile phones depicting communication between the police officer and the citizen. Both parties (both policemen and citizens) are actively using this equipment in practice.

The right of police officers to film the process of exercising their authority with a personal mobile phone, the rules for further storage and use of data are not regulated at the level of law and by-law. Accordingly, the video recording of the exercise of his or her official duties, by the police officer, with their personal mobile phone, raises the risks of selective use of this leverage in a particular situation. Even if the information recorded on a police officer's mobile phone is beneficial for the citizen, there is no legal guarantee of the lawful use / disclosure of data obtained by law enforcement to the citizen. The decision to store, disseminate, delete such data in an uncontrollable manner is also made by the person who obtained it. It is noteworthy that in one of the cases of ill-treatment administered by the organization,⁷⁰ a police officer recorded a communication with a citizen under his control by means of his personal mobile phone, but later declined to submit this record to the investigating officer and indicated that it had been accidentally deleted. In the second case, the cellphone footage was selectively and episodically shot after the incident with the detained person, and later publicly disseminated to discredit the detainee.⁷¹

A citizen's use of his cellphone to record contact with the police largely depends on whether law enforcement will give him the actual opportunity to do so and the matter is not regulated. As an example of good practice with regard to video recording of police

70 V.M. case

71 Z.R. case

actions by citizens, we can consider Northern Ireland, where the introduction of the audio-visual system in the law enforcement is of particular importance. A police officer has no right to stop a citizen from videotaping the interaction with the law enforcement or erasing the record.⁷² The seizure of a recording device by a police officer is permitted only in exceptional cases, but the seizure must be substantiated by reference to that particular circumstance. Removing any material from the seized devices is a serious misconduct by the police.⁷³

Therefore, due to the frequent practical use of cellphone video recording by both parties in the interaction between police officers and citizens, it is appropriate to elaborate legislation in this regard on the basis of good practice.

5.3 Equipping indoor and outdoor perimeter with video cameras

Equipping police stations with indoor and outdoor video surveillance cameras is another effective tool for the prevention of ill-treatment that is of particular interest to investigation in cases of allegations of ill-treatment.

An analysis of the criminal cases administered by the organization shows that police departments, largely record the entrance to the building, with a surveillance video camera (the area where there is an operative on duty). In none of the cases of ill-treatment administered by the EMC, in which citizens reported being subjected to violence in a police administration building, was a video surveillance camera installed in the questioning room, or the place where police officers would come in direct contact with the citizen, at the police station. The camera installed at the entrance to the police station, only allowed to record exact timing of the law enforcement officers and detainees entering and leaving the building, when the alleged instances of violence in these police departments took place in areas free of video cameras.

Despite our requests for public information on details of indoor and outdoor perimeter video cameras at police units of the Ministry and the agency did not provide this information. Public Defender's 2018 report, based on the information provided by the Ministry of Interior, criticized the police departments' (mis) use of internal and external perimeter cameras to cover all areas, the problematic aspect was also indoor surveillance, where cameras were positioned only at the entrance of the building, leaving the persons, under the supervision of the law enforcement, deprived of their liberty, without

72 Hungarian Helsinki Committee p. 68.

73 *ibid* pg. 119.

control. The term of data storage of a video surveillance system located on the premises of the Ministry of Internal Affairs depends on the characteristics of the technical means, though they can be stored for a period of no less than 14 days and up to three years.⁷⁴

Regarding surveillance cameras at police stations, electronic monitoring of most of the police units, including the on duty unit, electronic monitoring of the corridors leading to the cells, is considered good practice. Such a pilot project in Dublin, Ireland, where most police stations are monitored by cameras, was welcomed by human rights monitors and the Committee against Torture.⁷⁵ Surveillance cameras should monitor the developments in the establishments, prevent violence by and among detainees, and provide safeguards against torture and ill-treatment, as well as protect high-level police officials from false accusations.⁷⁶

In spite of the effectiveness of the use of electronic resources for the prevention of ill-treatment, the implementation of this technique should also focus on the protection of the privacy of detainees in the law enforcement system, which precludes video recording in specific areas, such as toilets or shower zones. Video recording should not be carried out in places where there is a meeting with lawyers or medical examinations. Surveillance cameras in „wake-up” cells, or in areas where detainees are examined when naked, may be the subject of debate.⁷⁷

With this in mind, for the prevention of violence against persons under effective control of the law enforcement officers in police units, special attention should be paid to equipping the premises of the police building, where policing / investigative activities are conducted with citizens, with video surveillance. It is also important for law enforcement to engage with citizens in the spaces where such technical means are provided.

74 MIA letter dated October 29, 2019 from MIA 51902888374.

75 CTI, Guarantees in the First Hours of Police Detention, UNCAT, Implementation Tool 2/2017, p. 7.

76 APT, PRI; Video Surveillance in Police Custody, (2015), p, 1, available at:<https://bit.ly/34bRzHT>.

77 *ibid*, p. 3.

6. Training and retraining to prevent excessive use of force

Policing must be based on the respect for human rights and fundamental freedoms, taking into consideration the principles of legality and proportionality.⁷⁸ One of the most effective instruments of human rights protection should be the police, an institution created by the state, which will take preventive and repressive means to protect public safety and constitutional lawfulness within the scope of its powers under the law.⁷⁹ The use of force by the police, as delegated by the state, may be a threat to human rights in the absence of human rights related knowledge and lack of relevant practical skills. An important tool against disproportionate, unlawful conduct of police officers is a qualified human rights-based training within the law enforcement system. Training in this regard implies police officers' knowledge of the scope of one's policing powers, on the one hand, and the rights of others, on the other hand, while having the practical skills necessary to safeguard these rights in critical situations.⁸⁰

The analysis of criminal cases of ill-treatment also often requires an assessment of the proportionality of the use of force by the police, in a conflict situation between a police officer and a citizen. The requirement of proportionate and necessary use of police or restrictive measures is enforceable in practice if the police officer is capable of managing aggressive behavior or resistance by the citizen.

Based on the ill-treatment cases administered by the organization, it can be argued that when detaining the citizen, the law officer's lack of theoretical or practical skills to manage anger or resistance from the citizens is one of the important factors leading to a physical injury of the citizen and other legal violations. Therefore, this chapter will focus on the theoretical and practical training of police officers in the protection of fundamental human rights and freedoms.

78 Article 8 of the Law of Georgia on Police.

79 Turava, Paata, "Compliance of the Regulations of Georgian Police Activities with European Human Rights Standards", in the collection of articles: Human Rights and Legal Reform in Georgia, p. 119-138, 2014.

80 Schicht Günter, Menschenrechtsbildung für die Polizei, Available: <https://bit.ly/2satSlf>.

6.1 Training and retraining of police officers on the prevention of ill-treatment

The system of the Ministry of Internal Affairs establishes a different educational benchmarks for accepting personnel of different ranks. The prerequisite for a junior specialist position is full general education. For middle level specialist position, higher education or complete secondary education is necessary. It is also compulsory for those with general education to attend specialized vocational education / training courses at the Academy of the Ministry.⁸¹

The Academy of the Ministry defines the content of the curriculum for special professional education course, for those who want to become policemen, and qualification courses for active staff. The Academy has developed a basic program that prepares trainees for the profession of Public Order Enforcement officers, investigators, patrol inspectors and district inspectors by providing training in various areas of law. Training lasts up to four to five months.⁸² A promotion and qualification program is in place, within the Academy, to support the further professional growth of existing staff.

As part of the basic program, there are 24 academic hours dedicated to teaching human rights related issues at the Academy. The course focuses on legislative safeguards for the proper treatment of detainees and the provision of basic rights. The course also includes national and international law on the prohibition of torture and ill-treatment, the right to liberty and security, the State's positive and negative obligations in respect of the prohibition against torture, national and international standards in relation to the rights of the detainees, including obligation to provide information about the grounds for detention.⁸³ Given the scope of the issues mentioned and the limited time available, it is difficult to assume that the training and preparation in the field of human rights is comprehensive.

Along with the theoretical teaching of human rights, the students of the Academy are trained in the peculiarities of communication with different groups of society. The curriculum, consisting of a total of 30 academic hours, covers anger and aggressive behavior management, as well as recommendations for effective communication with citizens with aggressive behavior. Six academic hours are devoted to conflict management and negotiation skills, and a separate lecture is devoted to interaction to vulnerable community groups (14 academic hours), including training for communicating with homeless persons or persons under the influence of substances.

81 Article 12 of the Law of Georgia on Police.

82 See Police Academy curriculum, available at:<https://bit.ly/33eGjiN>.

83 MIA letter dated 7 October 2019, MIA41902661905.

In the frames of the basic training program, limited time and resources, dedicated to the learning oriented at interrelation between the policing and the protection of human rights, can be balanced out, if, in parallel with the performance of official duties, the theoretical and practical skills will be refined through periodic training courses according to the specifics of the functions of the police officers. According to the current regulation, the middle-level managers at the Patrol Police Department and Operative Unit of the Ministry,⁸⁴ as well as Detective Investigators, District Inspector-Investigators, Public Order Law Officers are required to undergo retraining courses every five years. In case of failure to pass the retraining course, the person is dismissed from the position.⁸⁵ The mandatory 5-year interval for retraining fails to increase staff qualifications and help them adjust to legislative or institutional changes in various areas.

Along with the basic training program, the Academy has a substantially different promotion and qualification programs for the MIA staff, which provides qualification programs for investigators and detectives, a training course for the promotion of the Patrol Police Officers and a program for Public Order Officers, according to the profile of the staff. In 2018, 140 employees of the Ministry were sent to the promotion courses and 1250 employees were sent to different courses to increase qualification.⁸⁶

The duties of different police officers vary according to their functions in society. Thus, it is important that the training disciplines also focus on the training needed to perform the specific functions of the law enforcement officials. In this respect, the Ministry's training and retraining programs are not substantially identical. For example, it is notable that, given the intensity of the relationship with citizens, the training of the Public Order Officers and patrol inspectors focuses on the development of communication skills, and in the case of criminal investigators, the priority is on theoretical and practical preparation for investigative activities. However, it is advisable that the training courses are distinguished more clearly for the specific law enforcement circles, which will facilitate staff-oriented training according to their investigative, operative or policing activities.

Training courses focused on the prevention of ill-treatment are not offered in the academy. The current staff training course differs for investigators and those performing operative functions, although mixing preventive and investigative functions is a major

84 N995 (31-12-2013) According to Article 77 of the Order, it includes the posts of the Head and the Deputy Head of the Criminal Police Department, Head and Deputy Chief of the Territorial Authority, Head and Deputy Head of the Division, Patrol Police Officer Head of 20 person squad, Shift Head, Head of the Division and the Deputy Head

85 Order N995 of the Minister of Internal Affairs of Georgia, dated December 31, 2013 "On Approval of the Procedure of Service in the Ministry of Internal Affairs of Georgia", Article 771

86 MIA letter dated October 29, 2019, MIA 31902884952.

problem in practice.⁸⁷ In the framework of the qualification training program, MIA employees performing operative tasks are offered courses to deepen their knowledge of the material and procedural aspects of criminal justice, while their human rights education is largely general. In addition, the training of investigators focuses on the practical knowledge of conducting and documenting specific investigative actions. While training of the operative personnel, along with criminal justice matters, is focused on the acquiring practical skills on detention and use of force.

Qualification training program at the Academy of the Ministry of Internal Affairs

| MIA Staff | Human Rights | Practical training for prevention of abuse of power / Communication with the public |
|---|---|---|
| Investigators | <ul style="list-style-type: none"> ✓ General Overview of Human Rights in National and International Legal Framework (6 academic hours) | - |
| Promotion Program for the District Senior Inspector-Investigators, District Inspector-Investigators | <ul style="list-style-type: none"> ✓ Legal basis for the use of force ✓ Contextual scope of certain rights (18 academic hours) ✓ Case-law of the European Court (6 academic hours) | <ul style="list-style-type: none"> ✓ Training in tactical prep., fire arms and special equipment (24h) ✓ Physical restraint methods (10 hours - practical training on detention methods and the use of force when resisting arrest) |
| Patrol Police Officers Promotion Training Program | <ul style="list-style-type: none"> ✓ Managerial training | <ul style="list-style-type: none"> ✓ Effective communication with the public |
| Training Course for Acting Officers to be prepare for Public Order Officer program | <ul style="list-style-type: none"> ✓ Human Rights and Police (18 Academic Hours) ✓ Review of Individual Rights Training on International Organizations | <ul style="list-style-type: none"> ✓ Anger / conflict management training ✓ Communication with vulnerable groups |

A separate qualification training program for the Ministry staff concentrates on the use of firearms and special equipment at the Academy. The training is a 6-day course, covering the legal bases and principles of the use of force, the personal safety of the police officer, the basic aspects of the insurance of the enjoyment of the right to life and assembly. According to the module, the program is essentially focused on improving the practical

87 „Human Rights Education and Monitoring Center (EMC)”, Analysis of the Investigation System, 2018, p. 32.

skills of firearms use, but does not include the training required for other means of physical restraint. Such an approach is problematic because the principle of proportionate and necessary use of restraining measures authorizes police officers to use firearms in extreme cases. Within the course, it would be advisable for staff to receive thorough theoretical and practical training on alternative, less intrusive means, practices, and methods of proportional use of force.

According to a report by the UN Special Rapporteur on Torture and Inhuman Treatment⁸⁸ comprehensive, regular and effective police training is a necessary aspect of preventing violence and ill-treatment during arrest or police detention. According to the document, trainings for police officers should include specific theoretical and practical training on issues where the risk of ill-treatment is high when used in relations to the citizens. In particular, law enforcement officials should be familiar with international and national detention law, differentiated use of force strategies and tactics of de-escalation, safeguards to ensure the protection of a third party (family members, passers-by, witnesses). The report also points to the need for the theoretical and practical training of investigators on detention, post-arrest procedures, use of situational exercises, recording and reviewing of the questionings.⁸⁹ Concerning the detention, the report focuses on the use of force and other restraint devices and the importance of dealing with detainees with a humane approach. According to the same document, in addition to special training courses, police officers should also be trained in interpersonal communication, nonviolent conflict management and stress management at all of the above stages.⁹⁰

In the field of police professional training, the United Kingdom is an example of good practice, where the main component of law enforcement training is 'detention'. The course covers all aspects of arrest and detention, including registration of the detainee, care of the detainee and release from detention. In addition, on-the-job training and systematic training on the experience with regard to the instances of the death of the detainee or unintentional bodily harm is considered to be an important component of police training. Senior officials plan the trainings of the police officers after conducting training needs analysis exercise as part of the annual personal development review process.⁹¹

88 UN Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/71/298) 2016, § 56.

89 UN Special Rapporteur on Torture, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (A/71/298) 2016, § 56.

90 APT, Police Custody Monitoring, p. 164.

91 Authorised Professional Practice, Detention and custody, available: <https://bit.ly/2pGqPjD>.

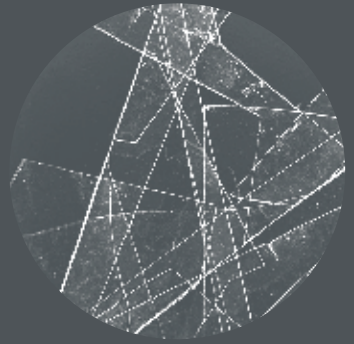
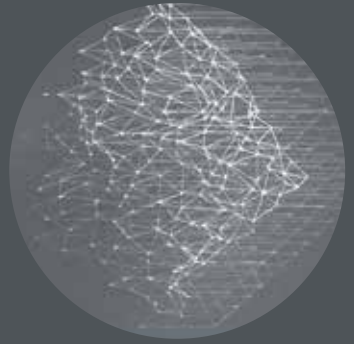
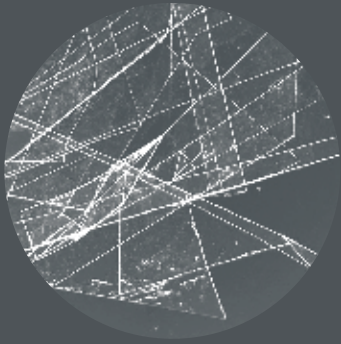
In view of the above, it is important to focus on trainings in the academia with particular emphasis on the use of force, arrest standards and practical skills of police officers. The current regulation on mandatory police training with 5-year intervals fails to meet the best practice standard for intensive law enforcement training. Additionally, as in the United Kingdom, it is advisable for the Academy to have a comprehensive practical course on the prevention of ill-treatment, which covers theoretical, practical issues of inquiry, detention, and arrest.

III. Conclusion

In terms of addressing the problem of impunity for ill-treatment, there have been positive changes in the legislation over the recent years, including the introduction of a State Inspector Service as an independent investigative mechanism, increasing the role of the judge in preventing ill-treatment. However, there is still a need for taking necessary steps. The current institutional, legislative, and organizational structure of the law enforcement system requires complex changes to eliminate the factors contributing to ill-treatment.

The procedural legislation on administrative offenses, which is particularly problematic in cases of ill-treatment, in the absence of standards ensuring the protection of basic rights, should be fundamentally changed. Equipping police institutions, police cars, and law enforcement with adequate technical means remains a challenge, which is an important tool in preventing ill-treatment of persons subjected to the police control.

In addition, special attention should be paid to the elaboration of a unified strategy on the use of force by the Ministry of Internal Affairs, intensive training and retraining of the law enforcement on the issues such as protection of human rights, communication with citizens and utilizing practical restraining measures.



ANALYSIS OF INVESTIGATIVE SYSTEM

EMC

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Human Rights Education and Monitoring Center (EMC)

Association of Law Firms of Georgia (ALFG)

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Introduction

In 2009, after the long working process, the Parliament of Georgia adopted a new Criminal Procedure Code.¹ Main objectives of the Code were to implement/strengthen adversariality, publicity, equality of arms, direct examination of evidence, respect to defendant's rights and other important principles in criminal justice.² One of the main innovations of the Code was to transfer from inquisitorial to adversarial procedural model, which implies the provision of more or less equal leverage to prosecution and defense parties, so that both can conduct an effective investigation independently from one another.³

In general, adversarial model has a more complex theoretical framework and active debates regarding the model are still underway among scholars. Despite the difference of opinions on several topics, the clear advantage of this model is to give every individual, including the defendant, an opportunity to effectively present his own story from his own perspective. To eliminate inequality of resources/powers available for the State and the citizen, the adversarial model imposes number of structural restrictions on the State in the course of proceedings.

The adversarial procedural model is mainly based on 18th century Enlightenment Movement which set solid theoretical and philosophical bases for human rights and personal autonomy.⁴ Afore-mentioned restrictions, imposed on the State, are designed to ensure that positions of the citizen are fully reflected in a particular case, and all the main decisions are made publicly, by an impartial judge, who personally examines every important circumstance of the case.

The adversarial model imposes three main restrictions on the State:⁵

- It shall be prohibited by the law for the State to use its powers or material capacities and pressure the citizen physically and psychologically to distort the free testimony of the accused
- The law shall ensure that the state must be prevented by the law from using its higher-up power and resources to create an unfair trial for an accused (Prohibiting false accusation);
- The defendant shall be an active subject of the proceedings, not an object placed in the hands of state agencies.

Mentioned restrictions are of primary importance at the investigation stage to insure that the defendant is capable to conduct an independent and effective investigation. Structural and or-

1 The Parliament of Georgia adopted new Criminal Procedure Code on 9 October 2009, setting 1 October 2010 as a date for its main provision to come into force.

2 Refer to the explanatory card of the bill at: <https://info.parliament.ge/#law-drafting/9219>

3 Article 9, Criminal Procedure Code of Georgia.

4 Vogler, R. (2017). *A World View of Criminal Justice*. Aldershot, Ashgate, pp.136-138.

5 Vogler, op cit, p.127.

ganizational separation of the investigation and criminal prosecution bodies, including the existence of effective check/balance mechanisms, are also of considerably essential at this stage. The necessity of functional separation between the institutions is caused by the fact, that without the separation, State investigatory and prosecutorial functions becomes monolithic, lacking effective mechanisms of accountability and increasing risks of arbitrariness.⁶

The Constitutional Court of Georgia emphasizes the importance of protecting defense rights by the adversarial model and explains that “by guaranteeing the defense rights, the Constitution aims to prevent conviction of a person through unfair legal proceedings. Within the frames of adversarial legal proceedings, this can be achieved by, first of all, providing maximum equal opportunities for the parties for gathering and presenting evidence”⁷. According to the position of the Court, in order to comply with the constitutional standard of the evidence authenticity⁸, it is necessary to assess the evidence on the bases of their formal and contextual criticism, in the adversarial process, established for the legal proceedings in Georgia, this may be implemented only by the submitting contrary facts and other counter arguments by the opponent party,⁹

Unfortunately, afore-mentioned topics have not yet become subject of in-depth research and study in Georgia. Despite the implementation of a new procedural model, it has not yet been analyzed how distant are investigator and prosecutor from one another in the investigative process, what problems can be created in everyday practice by Prosecutor’s active role in the process, and if procedural legislation ensures defendant’s right to obtain necessary evidence without the State agencies. In this regard, it is also interesting whether investigative bodies were adapted to the new procedural model and if institutional and operational arrangement of investigative agencies ensures that investigators carry out their obligations properly and with dignity.

The actuality of the research is caused by the significance of this issue itself – as far as existence of effective investigative system, with the procedural capability of objective and detail oriented case examination is of particular significance to the fair justice. In adversarial model this goal is firstly achieved by the effective external control of investigative bodies and secondly, by the empowerment of individual defendant to participate fully and independently in evidence gathering. The problem is aggravated by the fact that the legislative environment never adapted to the new procedural code. Up until now, regulative norms for operative-investigative and police activities contradict the norms of procedural code in a number of ways. At the same time, the Procedure

6 Vogler, op cit, p.23ff.

7 27 January 2017 Decision #1/1/650,699 of the Constitutional Court of Georgia on the case: “Citizens of Georgia – Nadia Khurtsidze and Dimitri Lomadze against the Parliament of Georgia’ II, paragraph, 30.

8 Article 40, part 3, The Constitution of Georgia.

9 27 January 2017 Decision #1/1/650,699 of the Constitutional Court of Georgia on the case: “Citizens of Georgia – Nadia Khurtsidze and Dimitri Lomadze against the Parliament of Georgia’ II, paragraph, 42.

Code itself does not clearly define roles and status of investigator and prosecutor in the investigation process and the intensity of subordination between them is frequently the matter of practice.

The presented research analyzes legal acts that define rules of investigation, relationships between subjects involved in the investigation process, and the level of their independence from each other, as well as from external parties. Subordination between the prosecutor and the investigator is of particular interest in this regard – how broad is the procedural oversight of the prosecutor over the investigation, in what intensity can a prosecutor, being the party of the process at the same time¹⁰, interfere in investigative actions and what space remains to the investigator to carry out the investigation in a thorough, full and impartial manner. The research also focuses on institutional arrangement of investigative bodies, qualification of the investigator, and issues that influence impartiality and effectiveness of investigation.

Research Methodology

The purpose of presented research is not complete and thorough study of the legislation regulating investigation or bodies authorized to investigate. The scope of the research is limited to the stage between receiving an information about the crime and sending the case to the court. Research focused on the investigatory and prosecutorial power, as well as the level of subordination between them in the entire process of criminal proceeding.

Such a direction of research is stipulated by the fact that afore-mentioned topics have significant influence on the process of investigation and its' impartiality. These topics were never subject of broader analysis or deeper consideration. The research analyzes existing investigative system to the extent that would be sufficient for creating an idea on general institutional arrangement of specific investigative agencies, qualification of the investigator and the level of his independence.

'The Human Rights Education and Monitoring Center (EMC)' and the 'Association of Georgian Law Firms' have jointly worked on this research. In order to completely analyze local context and amendments made to the procedural legislation, as well as to better identify problems existing in everyday practice, the project team was supported by Ketevan Chomakhashvili, Assistant-professor of the Free University of Georgia. Professor Richard Volger, from the University of Sussex was also involved in the research. He prepared analysis of theoretical framework of adversarial procedural model as well as analysis of relevant legislation for England, Wales and United States – countries with the biggest tradition of adversarial procedural model. Academic document prepared by professor Vogler also focuses on institutional arrangement of prosecution and investigative bodies.

¹⁰ Criminal Procedural Code of Georgia, , article 3, part 6

As for the research instruments, the project team has relied on the analysis of legislation and practice, workshops with different thematic groups, individual interviews with investigators, prosecutors, academic cohorts, as well as public information and statistical data requested from specific departments, opinions of local and international experts, and secondary analyses of existing relevant researches.

Analysis of Legislation

Relevant legislation regulating principles of criminal justice, process of investigation, investigatory and prosecutorial powers in the process, and the level of subordination between the investigator and prosecutor were completely analyzed within the scope of this research. Normative/subordinate acts regulating institutional arrangement of investigative bodies, as well as other practical matters, were also analyzed. Legislation was analyzed retrospectively, taking into consideration important recent amendments to the normative acts. The following normative acts were studied for the research purposes:

- The Constitution of Georgia;
- The Criminal Code of Georgia;
- The Criminal Procedure Code of Georgia;
- The Law of Georgia on Prosecutor's Office;
- The Law of Georgia on Operative-investigative actions;
- The Law of Georgia on Police;
- As well as the following subordinate normative acts:
 - The Resolution of the Ministry of Internal Affairs (the Resolution is approved by the decree of Government of Georgia);
 - Order N34 of the Minister of Justice of Georgia of 2013 on Investigative Jurisdiction;
 - Internal regulatory acts of each investigative agency regulating institutional arrangement of the agencies, rules for selecting and appointing employees and establishing mandatory professional criteria for the investigator.

Public Information Received from the State Agencies

For the purposes of the project, statistical information, internal regulatory acts, statistics on the number of employees etc. were requested as public information from different agencies. Requests were submitted to the following public agencies:

- Common Courts – information on the satisfaction of specific motions of prosecutors, as well as judicial practices for the topics relevant to the research;
- Chief Prosecutor’s Office of Georgia – number of prosecutors and investigators, information on the number of investigated cases, internal regulatory acts and available guidelines on prosecutorial discretion and other relevant topics;
- Parliament – notes, conclusions, disclosure cards, and protocols of the session prepared during the working process on reforming Procedure Code 2009;
- Ministry of Internal Affairs and other investigative bodies – internal regulatory acts, number of investigators employed in the agency, legislative requirements on their mandatory qualifications, number of investigated cases etc.

Most of the requested information has been received, however, the project team was refused a response to number of topics on different grounds.

Public/statistical data and materials found on official web-pages of specific agencies were also studied in the course of the research. Secondary analysis of relevant researches and reports on investigative/criminal justice and procedure legislation was also included.

Researching Practice

Based on the fact that important part of communication between the investigator and the prosecutor in the investigation process is regulated beyond the formal legal documents, the research team has decided to conduct individual interviews with the representatives of different groups, to better demonstrate the problem. With this purpose, the research team has prepared a questionnaire comprised of open and closed questions, using which the interviews with investigators and prosecutors were conducted.

Each interview was conducted face to face, without the attendance of external parties and was documented by audio recording in most cases (only in exceptional cases was it requested by the respondents to record in writing). The interviews were conducted with:

- 3 investigators of the Ministry of Finance;
- 5 investigators of the Ministry of Internal Affairs;
- 13 Prosecutors.

In selecting respondent investigators, representatives of different departments were considered to better reflect various nature of problems. With regards to prosecutors, via active communication with the management of Prosecutor's Office and on the bases of unilateral decision, the project team has decided on such a list of respondents that would allow better representation of different types of crime and special regional characteristics as well.

Interviews with the representatives of academic circles, former employees of investigative and prosecution systems and individuals involved in systematic reforms of procedure legislation were also conducted within the scope of the research. 8 such interviews were conducted in total.

To complete the practice research, individual interviews were scheduled with the judges as well. However, despite the number of attempts and communication with the representatives of judicial system, cooperation with judges, within the frames of the research, could not be achieved.

Workshops with different stakeholder circles were conducted. More specifically, several workshops were conducted with the representativeness of non government organizations, representing members of criminal justice group of 'the Coalition of Independent and Transparent Judiciary'. Workshops were conducted with attorneys working on criminal cases. Purpose of these meetings was to obtain additional information regarding the relevant practice, as well as to introduce recommendations prepared within the scope of the research and to receive additional evaluations.

Obstacles in the Course of Research

One of the significant challenges of the research was timely and complete receipt of public information from the relevant agencies. Most often, the grounds for refusal to provide information was that the agency did not process specific materials and processing them for the purposes of this research only, required vast administrative resources. Important challenge was created by the fact that number of issues are not clearly regulated at the legal level and it became impossible for the project team to draw generalized conclusions on such issues based on conducted interviews.

The project team intended to conduct interviews with the representatives of judicial system. However, as mentioned previously, judges never agreed on cooperation. The number of investigators and prosecutors involved in the interview was a result of agreement reached with the management of the relevant agencies.

The project team is grateful to every individual who participated in the research, to the Chief Prosecutor's Office of Georgia, Ministry of Internal Affairs and the Investigative Service of the Ministry of Finance for their active cooperation through the research process. Important part of this research would not be available to the society without the cooperation of mentioned agencies.

Main Findings and Recommendations

The reform of Criminal Procedure Code, implemented in 2005-2009, was a crucial step for the further development of Georgian criminal justice system, as it had to establish new standards of crime investigation, high protection guarantees for the defendant, and a new culture of legal mentality, in general. Unfortunately, the final edition of the Code, which came into force in 2010, did not prove to be enough for achieving the mentioned goals, due to number of uncertainties and systematic deficiencies in it. At the same time, the fact that, existing general legal system was never adapted to new procedural regulations, causing problems in practice in number of directions. It is noteworthy that, in the nearest post-reform period, Constitutional Court of Georgia satisfied almost all leading constitutional complaints referred to the equality of arms at an investigative stage. In light of the aforementioned, it's obvious that Criminal Procedural Code of Georgia, after 10 years from adoption, still cannot provide the fundamental guarantees for full, through and impartial investigation.

The following issues were identified within the scope of the research:

- Institutional arrangement of investigative bodies and existing legal framework cannot ensure independent, thorough and impartial process of investigation. Investigator remains the prosecution in the process and is heavily dependent on Prosecutor's decisions;
- The existence of 'pre-investigative' mechanisms that are not subject to prosecutorial and judicial control, remain as a problem. Effective judicial control does not apply to operative-investigative actions. There is no procedure for direct interrogation at the court of persons involved in these activities;
- Statuses of prosecutor and investigator are not clearly defined in the Criminal Procedural code and, in number of instances, both of their roles are contradictory. The investigator is, on one hand, obliged to carry out the investigation in a thorough full and impartial manner and, on the other hand, he represents the prosecution. The prosecutor has the supervisory power over the investigation to control the legitimacy of investigator's actions, but, at the same time he is, in fact, leading the investigation process and is actively involved in it. This significantly complicates proper execution of effective and objective prosecutorial oversight;
- The prosecutor is actively involved in the process of investigation and, quite frequently, defines the strategy and directions of the investigation. This creates a threat for the impartiality and neutrality of the investigation; Level of autonomy of the prosecutor and investigator becomes irrelevant and these two individuals, are naturally motivated to cooperate;

- No obligation of documenting relationship/communication between the prosecutor and investigator exists. The legislation does not specify in what form should a prosecutor give binding instruction to the investigator and what standards of proof shall it satisfy;
- Despite the fact that the Criminal Procedure Code does not even define the status of Investigative Agency Head, individual interviews conducted by the research team, within the frames of the research, revealed that the Heads actively participate in the investigation process and, quite frequently, directly define standards and quality of investigation carried out by specific agencies;
- Institutional arrangement of investigative agencies differ from one another. Mostly, Operative-investigative divisions are not separated from investigative bodies; the concentration of investigative and operative-investigative functions under one agency decreases standard of transparency and is negatively reflected on the quality of investigation, in general;
- The qualifications of the investigator and rules for appointing them to the position are subject of concern. There are no common standards and no criteria that would be compulsory to grant the status of investigator. In some investigative bodies, the investigator is not required to have higher legal education. Rules for appointing them to their positions are in most cases obscure and contain risks of arbitrary decisions by specific officials;
- Methods of responding to the received information about the crime, are problematic and contradictory. The Procedure Code on the one hand, obliges investigative agencies to launch an investigation immediately after receiving information on the crime. However, the so called „preliminary investigation” is quite frequent in practice, within which the investigators try to find factual circumstances relevant to the case, without any procedural regulation. The existence of such practice is supported by obscure and contradictory records in the Law on Operative-investigative actions and the Law on Police;
- There are no common standards and criteria, regulated by the procedural legislation, on the assessment of received information about the crime. The interviews have also revealed that the process of crime registration can negatively be influenced by the issue of crime statistics. Interviews have demonstrated that crime statistics are given incorrect meaning in practice;
- There is no effective mechanism, either in the legislation or practice, that could examine how the investigator performs the obligation, imposed upon him, to register the crime and launch the investigation, immediately after receiving information about the crime;

- Final decisions on implementing all important investigative actions in the process of investigation are made by the prosecutor, not by the investigator. The prosecutor also takes decision on such procedural matters as the qualification of the case, granting a status of victim, transferring the case from one investigator and to another.
- Investigative Jurisdiction of criminal offenses is regulated not by the law, but by the order of the Minister of Justice. At the same time, the Chief Prosecutor of Georgia is authorized , without any justification, disregard subordination rules and withdraw a case from one investigative authority and transfer it to another investigative body.

The project team is presenting the following recommendation to eliminate existing problems in legislation and in practice:

- Investigative jurisdiction of cases shall be regulated by the Criminal Procedure Code of Georgia, instead of the order of the Minister of Justice;
- Authority to transfer a case from one investigative body to another granted to the Chief Prosecutor of Georgia (and to the person authorized thereby by him) shall be limited to exceptional cases and be subject to proper written justification. At the same time, Chief Prosecutor shall not be entitled to delegate mentioned authority to undefined circle of persons;
- In investigative bodies, that do not already practice this, investigative and operative-investigative services shall be separated institutionally and operationally. Employees of each department shall specialize in relevant direction;
- Uniform qualification requirements shall be set out for investigators in all investigative agencies. Alongside with other professional/conscience criteria, higher legal education shall be defined as obligatory minimum requirement for investigators of all investigative agencies;
- Foreseeable and democratic rules for appointing the investigator to his position shall be normatively written out. In this regard, other agencies may implement staff selection and recruitment procedures similar to those at the Investigative Agency of the Ministry of Finance;
- Regulations of the Law of Georgia on Police shall be redefined so that, they could only be used for preventive purposes. Reacting to already committed crime may only be possible via investigative actions within the entirely frames of Criminal Procedure Code of Georgia;

- In order to avoid parallel mechanism to the investigation, the Law on „Operative-investigative actions” shall be annulled. Investigatory mechanisms existing in it, as well as measures of criminal justice intensity, envisaged by the Law on Police, shall be incorporated into investigative activities under the Criminal Procedure Code of Georgia;
- It is important to abolish so called pre-investigative stage and relevant bodies to launch the investigation immediately after receiving the information about the crime, within the frames of Procedure Code and according to the established rules;
- Every investigative body shall implement special rule for registering the information about the crime. The rule, along with instruction on registration, shall define mechanisms for controlling registration process, functions of controlling bodies, and appropriate liability measures for violating registration rules;
- The Criminal Procedure Code of Georgia shall make it obligatory for the relevant bodies to issue written notice to the applicant on the receipt of the information about the crime;
- The crime statistics shall not be the independent ground ,for performance evaluation of specific investigative body or an official, without taken into consideration other important facts. Career related decisions shall not be based only on the crime statistics. as this, in the end, causes an issue of incorrect course of crime registration and statistics;
- Investigatory power shall be driver out from the Prosecutor’s Office and it shall be assigned to other investigative bodies, thematically;
- The prosecutor’s authority to transfer a case from one investigator to another , shall be annulled;
- The prosecutor should not have a role whatsoever in the launching of investigation or involving in entirely investigation process, or in the specific investigative actions; prosecutor should not obtain the status of an investigator;
- In order to make the investigation process and the Prosecutor’s Office more distant on operational level, the prosecutor’s authority to give binding instruction to the investigator for the purposes of investigation, shall be limited;

- The Criminal Procedure Code of Georgia shall specify that prosecutorial oversight is carried out only to ensure the lawfulness of investigation and within the procedural oversight, prosecutor has no authority to identify an investigative strategy;
- The prosecutor shall only be entitled to change or annul investigator's actions/decision if they are obviously illegal; admissibility and effectiveness are not sufficient motives for the Prosecutor to interfere in the investigator's power;
- In order for the investigator to examine the case thoroughly, fully and impartially, it is necessary for his status to be redefined in the Procedure Code; Investigator shall not be considered as a prosecution party and shall be distant from the Prosecutor's Office functionally;
- In order to decrease the level of investigator's dependence on the Prosecutor, it is important for their communication to have an obligatory written character. At the same time, in cases when the investigator deems it necessary to carry out investigative actions requiring court order, but the Prosecutor does not agree, the Prosecutor's refusal on addressing the Court shall be justified in writing and filed into case materials (It is noteworthy that, in some adversarial jurisdictions a police officer has the authority to apply for the court warrant, without prosecutor's involvement in the process);
- The Procedure Code shall define procedural status of the Head of Investigative Service Agency. The later shall ensure effectiveness, qualification and high quality of investigation carried out by the agency reporting to him. The Head of the agency shall be entitled to give out binding instructions to the investigator, assign case to a particular investigator, examine complaints related to investigator's actions etc;
- The prosecutor's failure to disclose evidence that excludes or mitigates person's guilt shall result the prosecution to be terminated or a conviction to be overturned.

1. Institutional Analysis

1.1. Introduction

Reviewing institutional arrangement of bodies equipped with investigative competence is important for a complete analysis of investigation process and authorities of a specific investigator within its scope, as well as for finding out how high is investigators qualifications and level of independence while carrying out investigative actions. As of currently, investigative agencies of the Ministries of Justice, Internal Affairs, Defense, Correction, and Finance, as well as the Prosecutor's Office and State Security Service are equipped with investigative authority.¹¹

The investigative system has not always been decentralized and, until 2003, the mentioned authority was only given to The Prosecutors Office, Ministry of Internal Affairs, and Ministry of State Security.¹² In 2003, a provision on Investigative Department of the Ministry of Finance emerged in the Procedure Code. However, this agency only became active starting from 2004. The agency gained its current status - that of State subordinate agency - in 2009.¹³

In 2005, Investigative Service of the Ministry of Justice was established, functions of which were to investigate crimes related to the execution of judicial acts or committed at the territory of penitentiary agencies.¹⁴ The jurisdiction to investigate the later type of crimes was taken out from the competence of the Agency in 2008, since established a separate Ministry of Correction of Georgia, including a relevant investigative department, entitled to investigate crimes committed at the penitentiary agencies.

In 2006, Investigative Service of the Ministry of Defense – Military Police – was established . In the same period investigative services of the Ministry of State Security, as a separate investigative body were repealed but more precisely they were merged with the Ministry of Internal Affairs. In 2007-2011, Investigative agencies of the Ministry of Environment Protection and Natural Resources, as well as Ministry of Energy, were functioning independently,¹⁵ however, none of them exists in an independent manner today and majority of their competencies is allocated to the investigative bodies of the Ministry of Internal Affairs.

¹¹ Article 34, Criminal Procedure Code of Georgia

¹² Refer to article 61 of the Criminal Procedure Code of Georgia, 20 February, 1998 (this edition was effective until 26 August) – invalidated on 1 October 2010

¹³ <http://is.ge/4162>

¹⁴ The order of the Minister of Justice of Georgia on the Adoption of the Regulation of Investigative Department of the Ministry: <https://matsne.gov.ge/ka/document/view/1427487>

¹⁵ Article 61 of the Criminal Procedure Code of Georgia, 20 February, 1998 (Edition effective from 22 January, 2007)

In 2015, as part of the institutional reform, carried out in the Ministry of Internal Affairs, the State Security Service was established as an independent entity, directly subordinated to the Government.¹⁶ Along with many other functions, investigative competence was also delegated to the agency and it investigates facts related to corruption, state security, crimes against constitutional order and acts of terrorism.

Under the conditions of such decentralization of the investigative agencies, it is difficult to define which agency is responsible for the criminological situation in the country. As of today, the Prosecutor's Office is carrying out procedural oversight over the investigations by every investigative agency and it can be argued, that the Prosecutors Office is responsible for ensuring that the investigation is carried out as per the common standards and common strategy for combating crime is in force. Such situation is problematic in a sense that the Prosecutor's Office is a prosecuting authority, while crime prevention, detection and suppression, as well as its effective and complete investigation remain in the hands of other agencies. It is noteworthy, that no common strategy and model of crime prevention exists in the country¹⁷ and that's why, the risks of pursuing inconsistent policy against crime by the relevant agencies are increased.

1.2. Investigative Jurisdiction and Case Distribution to Specific Investigative Agencies

Prior to institutional analysis of investigative services, it is important to analyze principles and procedures for distributing specific criminal cases between them. Having clear and fair rules for case subordination are crucial for ensuring effective, impartial and reliable investigation. In this sense, it is problematic that subordination rules for criminal cases are regulated not at the legislative level, but by the order of the Minister of Justice.¹⁸ The legislation does not specify what level of justification shall be included in the decision of the Minister on changing the content of an order.

Regulating the issue of such importance by the subordinate act is clearly problematic, as it creates the risks of changing the content of the Order as a result of unjustified and non-transparent decision. The issue is delegated to the Minister – to the political figure – increasing the risks of politicizing the topic. In this context, authority delegated to the Chief Prosecutor (or person authorized by him) to disregard subordination rules defined by the order of the Minister without

16 Refer to the Law of Georgia on State Security: <https://matsne.gov.ge/ka/document/view/2905260>

17 The Human Rights Education and Monitoring Center (EMC), "Crime Prevention, Risks of Police Control" 2017, page20:<https://emcrights.files.wordpress.com/2017/10/e18393e18390e1839ce18390e183a8e18390e183a3e1839ae18398e183a1-e1839ee183a0e18394e18395e18394e1839ce183aae18398e18390.pdf>

18 See the Order of Ministry of Justice referring to Criminal case investigative and territorial jurisdiction issues (N34-2013. 7 July)

any justification and hand criminal case over from one body to the other, set out by article 33 of the Criminal Procedure Code of Georgia, is also problematic.

It is noteworthy that the Legislation does not consider either the obligation for justification the decision taken by the Chief Prosecutor or a person authorized by him, or a mandatory form of decision. It also does not specify who specifically, along with the Chief Prosecutor, shall be authorized thereby to transfer the cases, between investigative agencies, by disregarding the subordination rules, as the law only makes general reference to an 'authorized person'.

Granting such broad powers to the Chief Prosecutor, in fact, disables the Order of the Minister of Justice, as it makes it possible to routinely violate investigative jurisdiction rules established by the Order, without any justification. To get a complete picture of this issue, the research team has requested public information from the Prosecutor's Office on a number of cases when a criminal case was transferred by the Chief Prosecutor/person authorized by him. Unfortunately, the Prosecutors Office refused to provide such information on the grounds that the Agency would not normally record the requested material.¹⁹ Under such conditions, it becomes impossible to control/monitor the mentioned authority of the prosecutor and this increases arbitrary risks from his side even more.

No clear rules of case distribution exist in the sense of allocating cases to investigators/investigative subdivisions within a specific Investigative Agency. The only exception is the Ministry of Internal Affairs, where subordinate cases for each department are defined by the Order of the Minister²⁰, however, what principle is used to distribute cases to specific employees within the department, remains unclear. As a response to the request of public information on the mentioned topic, submitted to each investigative agency, only the Ministry of Defense notified the research group, by responding that cases between specific employees are distributed according to the rotation schedule²¹ (However, the latter does not specify what rules of rotation are applied in the agency and how are these rules defined).

There might not be a need for the common rule of case distribution between the subdivisions of investigative services for each and every case, as they are distributed logically in line with territorial or crime grade principles in some agencies. However, it is important that case distribution issues to be regulated by clear rules to avoid conflict of interest, arbitrary decisions by the Head of Investigative Service and to effectively use human resources of a specific agency.

19 Public information obtained from the chief office of the prosecution of Georgia and from the Ministry of justice officially dated 24.01.2018. N13/5475

20 31 July 2015 Order #566 of the Minister of Internal Affairs on "Investigative Jurisdiction of criminal cases subordinate to the Ministry of Internal Affairs"

21 29 January 2018 Letter #MOD2 18 00087365 of the Ministry of Defense of Georgia

1.3. Internal Structure of Investigative Bodies

Institutional arrangement of individual investigative agencies has a significant impact on the quality of investigation carried out by them, as well as on the qualifications and independence of the investigator. Under the conditions of decentralization of investigative system, internal arrangement of investigative agencies also differs from one another, influencing investigator's daily actions in some ways. In this regard, it is particularly important whether and how separated are operative-investigative and investigative agencies from one another. Experts interviewed within the scope of this research²² have clearly indicated, that when operative and investigative functions are not operationally and institutionally distant, risks of the abuse of authority by the law enforcement officers increase. E.g. cases of so called preliminary investigation, when information about the crime that was received by the investigator did not become ground for launching investigation.

Uniting operative-investigative and investigative actions under one agency and equally equipping law enforcement officers with both of these competencies, is problematic in the following two ways:

1. Judicial/prosecution control over operative-investigative activities is carried out in a limited and pointless manner. For the information, obtained by such activities, to satisfy minimum standards of credibility, it shall be assessed by a neutral individual before it becomes a part of the investigation or before specific investigative actions are carried out on the bases of such information. When afore-mentioned two functions are not institutionally allocated to different agencies, the 'operational information' does not undergo any test of credibility and directly becomes part of investigation/ground for investigative actions. In such cases, individual responsibilities of operative employee and investigator also become vague;
2. Operative-investigative and investigative actions require significantly different theoretical knowledge and practical skills. That is why it is necessary to institutionally separate mentioned functions and specialize employees in more specific directions, in order for them to effectively carry out operative-investigative and investigative functions.

It must be noted that situation is different in diverse investigative agencies in this respect:

²² Experts of criminal law with relevant academic or practical experience were interviewed along with prosecutors and investigators within the scope of the research

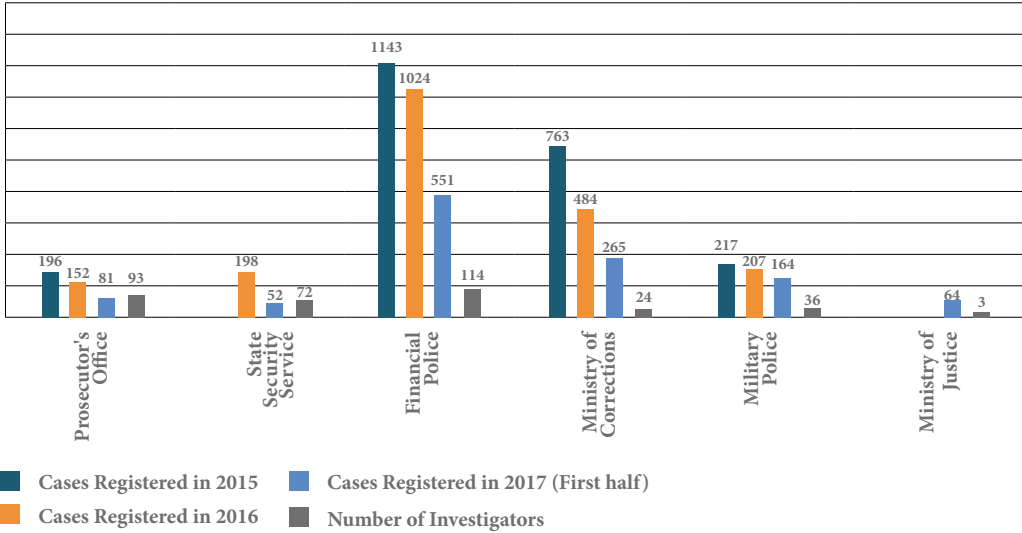
| |
|--|
| Ministry of Internal Affairs |
| Main investigative agencies: Criminal Police, Patrol Police and Operational Department Investigative and operational-detective agencies are not separated |
| Financial Police |
| Investigation is carried out by the investigative department Operative-investigative function is separated from the investigation |
| Military Police |
| Operative-detective agency exists in the form of a separate unit |
| Prosecutor's Office |
| Operative-detective and investigative agencies are not separated As a response to offenses committed during proceedings, investigation and prosecution functions are combined under newly created departments |
| Investigative Units of the State Security Service |
| Main investigative agencies: Counter-intelligence and State Security departments, Anticorruption Agency and Counterterrorist Center Investigative service is partly separated |
| Investigative department of the Ministry of Correction |
| Investigation is carried out by two territorial agencies Operative-detective service exists in the form of a separate subdivision |
| General Inspection of the Ministry of Justice |
| Investigative and Operative-detective functions are separated |

Size of investigative agencies as well as the number of their employees also differs and this is naturally dependent on the type of work for each of these agencies. As mentioned previously, Ministry of Internal Affairs is the main investigative body of the Country and it employs 7948 investigators in its different agencies. Statistics on crimes registered and cleared by the Ministry of Internal affairs is as follows:

- 2015 - 35 096 cases, 21 176 cleared;
- 2016 - 35 997 cases, 20 661 cleared;
- First half of 2017 - 18 465 cases, 10 035 cleared.²³

²³ 22 January 2018 letter #4 18 00161750 of the Ministry of Internal Affairs as a response to the request of public information from the research team

With regards to the number of investigators employed in remaining six investigative bodies and registered crime statistics, please refer to the below picture:



* Crime data for 2015-2016 was given in a combined form by the State Security Service. Registered crime for 2015 is implied under the 2016 data on the diagram;

* The Ministry of Justice provided crime data in a combined manner, without a reference to years, thus, 2017 data also unites registered crime statistics from 2015 and 2016.

1.4. Qualifications of a prosecutor and investigator

Qualifications of a prosecutor and investigator directly determine quality of investigation for individual criminal cases, influencing the effectiveness of investigative system, in general, in the long run. Accordingly, it is important to assess minimum professional requirement, established at a normative level, in order for a person to qualify as a prosecutor or an investigator.

Law of Georgia on Prosecutor's Office establishes clear requirements for appointing the prosecutor or the investigator at a Prosecutor's Office²⁴. More specifically, an individual who has higher legal education, practices language of judicial process, has completed 6 months to 1 year internship in one of the agencies of the Prosecutor's Office, and has passed qualification exam in rele-

24 Article 31, part 1, The Law of Georgia on the Prosecutor's Office

vant legal disciplines to the Qualification Exams Commission, can be appointed to the position.²⁵ At the same time, an employee of the Prosecutor's Office is required to possess relevant business and moral features and prove that his health condition is fit enough to carry out obligations required from the prosecutor or the investigator of the Prosecutor's Office.

Only in exceptional cases does the law on Prosecutor's Office allow an opportunity to start working at the Prosecutor's office without satisfying the afore-mentioned requirements. Namely, a person may become exempt from passing the Prosecutor's Office Qualification Examination, in case he has already passed judges' qualification exam, or has taken lawyer's test. At the same time, a person may become exempt from the obligation to complete internship at the Prosecutor's office, in case he has no less than a year of experience working as a judge, attorney, or investigator, has passed lawyer's qualification exam, or has no less than 3 years of work experience in jurisprudence.

The Afore-mentioned criteria and procedure for appointing employees to their positions creates a real idea on recruitment requirements in the Prosecutor's Office. Positive assessment must be given to the fact that minimum space is left for the possibility of making exclusive, unjustified decisions by the management of the Prosecutor's Office.

With regards to the investigative agencies, there is no common standard and individual agencies have different criteria for the investigators.

Investigative Department of the Ministry of Penitentiary and Probation: Minimum criteria defined for investigators is to have higher legal education, no less than 6 months of experience working as an investigator or an intern in the investigative service, complete knowledge of office computer programs, knowledge of foreign language (preferably) and participation in trainings, local and international seminars (preferably)²⁶. The higher the position is the stricter the criteria is becoming.

Financial Police: Investigators are required to have higher legal education and knowledge of foreign language and office programs.²⁷ The agency is practicing appointing individuals after they have passed the preparatory training courses; this is aimed at employing qualified personnel at investigative agencies.²⁸

25 Constitutional Law, International Law of Human Rights, Criminal Law, Criminal Legal process, Penal Law, and bases of operative-investigative actions

26 Article 4 of 24 June 2015 Order #51 of the Minister of Penitentiary and Probation on the "Approval of additional qualification requirements and topics for adversarial process for recruiting staff at vacant positions at the investigative department of the Ministry of Penitentiary and Probation"

27 21 April 2010 Order #324 of the Minister of Finance of Georgia on "Approval of special qualification requirements for the recruitment at positions in the Investigative Agency of the Ministry of Finance"

28 The rule of service at the Investigative Agency of the Ministry of Finance of Georgia, Chapter III

Military Police: Higher legal education is required from the investigators of Military Police.²⁹

Ministry of Internal Affairs: Employment criteria in investigative services of the Ministry of Internal Affairs is problematic in terms of qualifications. The Law of Georgia on Police sets unreasonably general employment requirements for the largest investigative agency of the country. Any citizen of Georgia, who has reached 18 years of age, knows state language, and is by his professional and personal character, education, physical fitness and health conditions capable to carry out functions required of a Policeman, can be employed in the Police.³⁰ According to the Regulation established by the Minister of Internal Affairs,³¹ secondary or higher education is enough to be appointed as an employee of the Police (in accordance to the maximum applicable rank in the staff unit). Mentioned order never refers to additional qualification requirements or mandatory legal education. The Minister, by his own order, equips himself with an excessive discretion to use exclusive authorities in the process of staff selection³².

To sum up, the legislation does not define uniform standards to qualify as an investigator. In most of the cases, higher legal education is a mandatory criteria, however, the main investigative agency of the country (the Ministry of Internal Affairs) considers full secondary education as sufficient.

Selection procedures also differ for different agencies – Investigative Agency of the Ministry of Finance does provide preparatory training courses³³ for its employees, other agencies, however, either don't practice such mechanism at all or less frequently apply it. Intensity of further training/improvement of qualifications also differs in different agencies.

Quality of preparation and qualifications of an individual investigator significantly impact activities of the investigative agencies in general. Under such conditions, it becomes complicated to implement common investigative standards and define clear responsibilities for the investigators in the criminal investigation process, as, in most cases, their level of preparation and their qualifications define the intensity of Prosecutor's involvement in the process. Severity of mentioned problem was revealed in the interview with the prosecutors who clearly indicated that investigators' qualifications represent a serious problem, naturally causing prosecutors' active involvement in the investigation process. It is noteworthy that some investigative agencies (Military Police, for instance) do not face such problems.

29 Article 19, point I of the Law of Georgia on the Military Police.

30 Article 37, The Law of Georgia on the Police

31 31 December 2013 order #995 of the Minister of Internal Affairs on the approval of rules of service at the Ministry of Internal Affairs

32 The Human Rights Education and Monitoring Center (EMC), Political neutrality in the Police System, page 42, 2016

33 22 December 2017 Letter 9656/15-02 of the Investigative Agency of the Ministry of Finance

Recommendations

When investigative agencies are being so decentralized and internal institutional arrangements, as well as the level of independence differ in individual agencies, risks of developing non-uniform practice are increasing. Qualifications and impartiality of an investigator are not sufficiently ensured. In this regard, it is important to apply following amendments to the legislation:

- Investigative Jurisdiction of cases shall be regulated by the Criminal Procedure Code of Georgia, instead of the order of the Minister of Justice;
- Authority to transfer a case from one investigative body to the other, granted to the Chief Prosecutor of Georgia (and to the person authorized by him) by the Procedure code, shall be limited to exceptional cases and be subject to proper written justification. Also, the Chief Prosecutor shall not be entitled to delegate mentioned authority to undefined circle of persons;
- In investigative bodies, that do not already practice this, investigative and operative-investigative services shall be separated institutionally and operationally. Employees of each department shall specialize in relevant direction;
- Uniform qualification requirements shall be set out for investigators. Alongside with other professional/ conscience criteria, having higher legal education shall be defined as obligatory minimum requirement for investigators of all investigative services;
- Foreseeable and democratic rules for appointing the investigator to his position, shall be normatively written out. In this regard, other agencies may implement staff selection and recruitment procedures similar of those at the investigative Service of the Ministry of Finance;

2. Stages of Criminal Proceedings

2.1. Introduction

There are several stages in criminal proceedings. The initial stage is the receipt of information about the crime which, according to Georgian Legislation, is a ground for launching investigation. State's Investigative authority constitutes its obligation to the society to take immediate and effective response to specific criminal actions. Approach of the Criminal Procedure Code to the investigative stage is quite straightforward at one glance - every single action related to the information about the crime shall be taken within the frames of the investigation. However, the opposite is demonstrated by systematic analysis of legislation. More precisely, the receipt of information about the crime is not always considered as a sufficient ground for launching the investigation and carrying out operative-investigative activities in parallel, are allowed.

Contradictory regulations of the legislation erase boundaries between investigative and non-investigative stages. Despite the imperative requirement of the Procedure Code, it is still vague whether the investigation starts, - right after the receipt of the information or investigative-operative actions are carried out first, instead. Regulations of the Law of Georgia on Operative-Investigative Activities, directly create alternative investigative regime or at least, practical risks of so called preliminary investigative stage.. These risks are strengthened by the fact that prosecution and judicial control over operative-investigative actions are far less intense than that over standard investigative actions.³⁴

The Law of Georgia on Police also creates similar risks. According to this law, operative-investigative action is one of the means of crime prevention. The law is also familiar with several such preventive actions³⁵. Grounds for implementing such a measure may be related to an offense, person being hiding, illicit property, and other such circumstances that are clearly a subject of investigation.

Taking these circumstances into consideration, legal nature of preventive actions is also problematic. Risks of concrete measures getting transformed into investigative actions is high. Accordingly, it is difficult to differentiate some of these measures from investigative actions.³⁶ The following chapter of the research will provide legislative analysis of afore-mentioned topics. The goal of this chapter is to emphasize legislative barriers between investigative, preventive and operative-investigative actions, as well as risks of investigative intensity of preventive measures. The chapter

³⁴ The Human Rights Education and Monitoring Center (EMC), *Crime Prevention, Risks of Police Control*, 2017, page 31

³⁵ Article 18, the Law of Georgia on Police

³⁶ E.g. Surface inspection Considered under the Law of Georgia on Police

will also analyze the crime reporting and registration issues, as well as the ways relevant bodies' respond to the reporting of crime.

2.2. Police Activity and Investigation

One of the main goals of the Law of Georgia on Police was to grant preventive authorities to the Police, as part of legislative amendments of 2013. However, Police is equipped with not only the authority to carry out preventive measures. Some measures established by the Law on Police directly apply to the detection of already committed crime, while the latter shall be the competence of investigation. According to the article 22 of the Law, for instance, frisk and examination is carried out, if there are reasonable grounds to believe that a subject or the mean of transport is located where a crime may be committed, for avoidance of which surface inspection is necessary. Movement of an individual or of a mean of transport as well as factual ownership of a subject is also limited in order to avoid crime or an administrative offense. According to the Law of Georgia on Police, the existence of an assumption that crime or offense was/may be committed, is sufficient grounds for special police control, so called raids³⁷.

Under existing legislative order, risks for the Police prevention to take over investigative competence – or for law enforcement officers to carry out police-preventive measures for investigative purposes - are high. This is encouraged by the fact that agencies having preventive functions are at the same time those that carry out investigation and, in most cases, legal boundaries between these two activities are not clear enough. As it has been demonstrated, some preventive measures, by their nature, are a lot like investigative actions (e.g. interrogation). Some police measures can easily be transformed into investigative actions. (E.g. surface inspection to search). Criminal intensity of preventive measures is particularly problematic in a sense that, prosecutorial monitoring standard over police mechanisms is low, unlike the one over investigative actions and the Judicial control is only possible post factum.

It becomes clear that the Law of Georgia on Police directly considers the possibility to implement police preventive measures with the purposes of establishing factual circumstances of the crime and responding to it and this is illogical and unjustifiable. These measures are not perceived as investigative or criminal procedure mechanisms and, as mentioned previously, prosecutor's procedural oversight does not apply to these measures. At the same time, in several instances, boundaries for interference in this authority are not clearly established and the legislation does not sufficiently ensure that such interference does not reach criminal intensity.³⁸

³⁷ Article 24, The Law of Georgia on Police

³⁸ The Human Rights Education and Monitoring Center (EMC), "the Politics of Invisible Power" 2015, page 46.

It is straightforward that the legislator fails to ensure clear boundaries between investigative and preventive measures. Especially, when implementing such police measures that are basically of procedural-judicial nature and have more of an investigative character than preventive. Such police actions certainly involve high risks of restricting human rights. This becomes especially relevant under circumstances when investigative and preventive authorities are placed in the hand of one agency and the legislation does not foresee mechanisms of human rights protection. It may well be concluded that the legislator entrusts an individual to the pre-assumed good faith of the law enforcement agencies.

2.3. Operative-Investigative Actions

One of the main goals of operative-investigative actions is to detect, suppress and prevent criminal action. The legislation foresees several types of measures for achieving defined objectives – interview a person, collect information and conduct surveillance, controlled delivery, identification of person and others being among them³⁹. Specific actions, established by the legislation, clearly indicate that operative-investigative measures are aimed at not only identifying, putting an end to and preventing a crime or any other unlawful act, but also at responding to/determining factual circumstances of complete or incomplete crime.

Together with the types of measures, grounds for implementing such measures are also problematic. Quite often, operative-investigative measures are based on the assignment given to the investigator by the prosecutor or as a result of prosecutor's approval. The legislator only allows implementation of operative-investigative measures on this grounds, in case when there is a duly received report or notification that a crime or any other unlawful action is being prepared, or is in progress or has been committed, and which requires the conduct of an investigation, but there are no elements of a crime, or of any other unlawful action that would be sufficient to commence an investigation⁴⁰. Mentioned provision directly contradicts with regulations of the Criminal Procedure Code. The Procedure Code imposes imperative requirement to start an investigation immediately after receiving information about the crime in any form.⁴¹

Mentioned rule applies to already committed and complete crimes, as well as to the information on the preparation or attempt of a crime (if the legislation deems such preparations and attempts punishable). Thus, the legislation, on the one hand, establishes the obligation of investigative response to the information in the scopes of Procedure Code, while, on the other hand, it allows

39 Article 7, the Law of Georgia on Operative-investigative actions

40 Article 8, paragraph 1, sub-paragraph "b", the Law of Georgia on Operative-investigative actions

41 Article 100, the Criminal Procedure Code of Georgia

law enforcement officers to carry out law enforcement measures on the bases of this information, and obtain important materials for the investigation, by avoiding the obligation to start an investigation.⁴²

Contradictions in the legislation between the grounds for implementing investigative and operative-investigative actions are obvious. The procedure code imposes the obligation to launch the investigation, immediately after receiving the information about the relevant offense.⁴³ The Code does not require any special standard nor does it define the reliability level. Quite in contrary, the law of Georgia on Operative-investigative measures emphasizes the quality of this existing information for the implementation of a specific investigative action⁴⁴.

The existence of such obscure records in the legislation, increases risks of arbitrariness. Law enforcement officers are allowed, for each specific case, to independently, without relevant legal criteria, assess the received information and decide whether to react by investigative or operative-investigative manner. Taking into consideration that prosecution and judicial control over operative-investigative actions is far less intense in comparison to investigative actions, it is logical that the law enforcement officer will give his preference to the former and will try to gather necessary information within its' scope.

Responding to the information about the crime by operative-investigative measures, or implementing so called preliminary investigative actions is a solid part of practice. This is referred to as a „verification” stage in practice. This method is used by the law enforcement officers to uncover the real situation not through procedural steps, but through artificially established mechanisms lacking procedural standards and guarantees. These methods and associated problems will be reviewed below in further detail. However, it shall be noted here that, external mechanisms beyond the scope of procedure code are mainly evaluated as problematic by the representatives of academic circles, as well as practitioners and it is deemed reasonable to incorporate these procedures into the Criminal Procedure Code⁴⁵.

2.4. Types of Information about the Crime

Law enforcement agencies receive information about the crime in different ways. Investigation may start on the bases of information that was given to the investigator or the prosecutors, was

42 The Human Rights Education and Monitoring Center (EMC), „Crime Prevention, Risks of Police Control” 2017, page 31

43 Article 100, the Criminal Procedure Code of Georgia

44 Article 8, the Law of Georgia on Operative-investigative actions

45 The information is based on the results of interviews with the representatives of academic circles and practitioners.

revealed during criminal proceedings, or was published in the Media. Criminal Procedure Code of Georgia does not set out a specific form of submitting information about the crime to the relevant agencies. Information about the crime may be verbal, written or recorded in any other way⁴⁶. The code does not establish the requirement on conducting any kind of test to check the authenticity of information source. Instead, it directly imposes the obligation to launch an investigation immediately after receiving the information.

In practice, information about the crime goes through several stages before a final decision on it is taken, regardless of in what form it was received (written, verbal, telephone message, confession etc) it needs to be registered, first of all. According to the established practice, when the information is received verbally, via phone call or confession, relevant person shall compose a report on the receipt of notification⁴⁷. The report shall be registered as information, in case the applicant confirms it.

Quite often individuals approach the Police with already completed application or compose their application at the Police office directly. Seems like the most problematic cases in practice are the ones when the application is composed at the police office. As revealed from the interviews, there are cases when the employees of the Police, in order to avoid worsening the statistical picture of crime, try to formulate the content of the application so that signs of crime are not revealed⁴⁸. Problems related with statistical data will be discussed in further detail below.

2.5. Registering Information about the Crime

It must be noted that there is no uniform rule of registering information about the crime in the relevant agencies. Such information is subject to the general regulations of the proceedings (e.g. in the Chief Prosecutor's Office, Investigative Service of the Ministry of Finance).⁴⁹ Situation in this regard is different in the Ministry of Internal Affairs where the rules of registering information about the crime are defined by the order of the Minister⁵⁰. According to the order, it is obligatory to register any information received by the Ministry in the electronic system and refusal on registration is prohibited. In case of technical difficulties, notifications are registered in a special recording journal. Content of the application must be kept as precisely as possible

⁴⁶ Article 101, Criminal Procedure Code of Georgia

⁴⁷ Guidelines for Investigation Methodology, Multiple authors, 2017, Tbilisi , pages 20-23

⁴⁸ The assessment is based on the results of interviews conducted with representatives of academic circles and practitioners.

⁴⁹ The assessment is based on public information on special rules of crime registration received from the Chief Prosecutor's Office of Georgia, The Ministry of Internal Affairs of Georgia, and the Investigative Agency of the Ministry of Finance of Georgia

⁵⁰ 14 April 2012 order of the Minister of Internal Affairs on the approval of electronic registration of information containing signs of crime and/or any other notification received by the Ministry of Internal Affairs

during the registration and interpretation is not allowed. It is obligatory to record date and time for the receipt of the information. The order also defines the rules for redirecting the information via the system of document circulation. It also establishes the obligation to send the information on grave, particularly grave and resonant crimes to operational-rotation service of the Administration of the Ministry.

Despite the fact that the Ministry has uniform special procedure for registering the information about the crime, afore-mentioned regulation is still problematic in a number of ways: It is not obligatory to hand over the document confirming registration to the applicant. The authorized employee (on duty) is only obliged to hand over the registration card (date and number) to the applicant, if this has been requested by the applicant. The instruction lists prohibited cases (refusal of registration, interpreting the content of the application etc), however, in parallel to this, no special rule that would establish liability for violating rules of registering information/notification, has not been determined. Violation rules of information registration is not recorder as a separate paragraph, when processing disciplinary statistics. As, statistics are being processed by general norms, it becomes difficult to identify what was implied under improper performance of official duties – was it the violation of crime registration rules or other disciplinary misconduct. Such situation does not allow for transparency, public accessibility and control of statistics with regards to registering the received information.

Information about the crime, along with other type of information on which the relevant bodies shall start proceedings, requires special attention. By having a proper registration system, the State expresses its readiness to respond to any criminal act and thus protect individual and public interest. Nonexistence of special rules for registering the information in different agencies, excludes the possibility of effective internal and external control over the registration.

2.6. Verifying Information about the Crime

Launching investigation is the stage that follows crime registration. As opposite to criminal persecution, investigation stage is not entirely discretionary one and is exercised upon the received information about crime. The existence of imperative investigative obligation over the information about the crime cannot be assessed as a defect of the Procedure Code. Quite in contrary, investigative obligation, unlike investigative discretion, hinders the establishment of impunity culture in the state⁵¹.

51 Eileen Overbaugh, Human Trafficking: The Need for Federal Prosecution of Accused Traffickers, 39 Seton Hall L. Rev. 635, 641-42 (2009).

As revealed from the interviews with practitioner lawyers, despite the imperative norms in the Criminal Procedure Code of Georgia, there is no concurring opinion between officials authorized to launch the investigation on whether the investigation shall start on the ground of any information about the crime. Information about the crime is sorted out by the investigative agencies in the following way:

- Information where crime presence is obvious;
- Disputable information where crime presence is not clear;
- Information indicating on the different type of legal or factual problem and does not include signs of crime⁵².

Despite the fact, that according to the Criminal Procedure Code, the only process following the information registration is the launch of investigation, cases of ‘assessing’ or ‘verifying’ the information before officially starting the investigation are familiar to the practice. Rules and standards of “preliminary assessment” are non-uniform. Investigator, as well as prosecutor are involved in the assessment of information about the crime; As a rule, three main decision are taken on the information about the crime: launching investigation (in case the criminal action is clearly revealed from the information), carrying out so called preliminary on the bases of the information (in the form of ‘verification’ in case the existence of crime signs in the action is debatable) and refusing to launch the investigation (in case the information does not indicate to criminal offenses and describes other types of factual circumstances or legal problems).

In this regard, information from which the criminal action is not obvious is particularly problematic. It turns out, that in such instances, relevant officials artificially refer to mechanisms established in parallel to the Criminal Procedure Code – to so called ‘verification of information’ via pre investigative actions. As previously mentioned, ‘verification’ is carried out in different ways, however, it clearly is not a procedural-legal tool and is not considered as an investigative action. ‘Verification’ stage is considered as a step preceding the investigation and its’ results determine decision on whether to start or refuse the investigation process.

In practice there exist different methods of ‘verification’. Relevant agencies often use the so called official inquiry, interviews, requesting additional information from interviewed persons etc. The interview is usually taken from the author of the information or from the person who actually received the information about the crime. Interview may be scheduled with other neutral parties, not directly involved in these facts.⁵³

52 The information is based on the results of interviews conducted with the representatives of academic circles and practitioners

53 The information is based on the results of interviews conducted with the representatives of academic circles and practitioners

It must be noted that such responses to the crime are not considered by the Criminal Procedure Code at all. Such practice, along with the fact that it does not coincide with the requirements of the Criminal Procedure Code, is also problematic in a sense that no warning is given on the imposition of criminal liability in case the false information is communicated. Defense rights are never explained to the person in this process. Mentioned measures are not limited in time either. Relevant officials are free to define desirable and effective method, time and duration of verification. The applicant does not have any procedural ability to control the proceeding of so called pre-investigative actions and receive information in a timely manner, on the application submitted by him.

Such approach increases risks of arbitrariness, refusal to start investigation or procrastination of investigation by relevant officials. The verification process requires significant effort. However, due to the fact that it is not carried out on the bases of norms set out by the Criminal Procedure Code, information obtained as a result of verification, does not have the value of proof. Accordingly, in case the investigation does start, the investigative agency has to repeat summons in order to frame information received by pre-investigative actions into the format of investigation.

2.7. Influence of Crime Statistics

In practice, the introduction or pre-investigative stage may have an intention to artificially influence crime statistics. Representatives of investigative agencies do not confirm the influence of crime statistics in any way, but they indicate that crime statistics should not be defining their activities. Statistics and cleared crime index were set as one of the main indicators of success for the management of Ministry for many years and this increased the influence of statistics on daily activities of policemen. Interviewed investigators declare that statistics should not be defining their activities⁵⁴.

Influence of statistics on investigative stage is shared by the representatives of experts interviewed within the project. According to their position, factor of crime statistics largely determines activities of law enforcement agencies. In this picture, 'Good statistical' situation might as well be assessed as a job guarantee for the law enforcement officer. Under such circumstances it is difficult for the authorized individuals to act with honesty and not to respond to the relevant information in a pre-investigative manner, instead of an investigative one.⁵⁵ It becomes clear, that by non-procedural response to the information about the crime, law enforcement agencies are trying to study the situation without starting the investigation and thus, avoid worsening crime statistics.

⁵⁴ The information is based on the results of interviews conducted with investigators and prosecutors

⁵⁵ The information is based on the results of interviews conducted with the representatives of academic circles and practitioners

Systematic analysis of the Criminal Procedure Code demonstrates that established practice of launching the investigation contradicts with requirements of the legislation. Obligation to launch an investigation on the bases of any information, is set out by article 105 of the Code as well. According to this norm, the investigation shall be terminated in case no action considered under Criminal code is established. It is clear that the Code requires to start an investigation to establish whether signs of crime in a specific action are well-founded or not. Investigation shall be terminated and/or criminal persecution shall not start/be terminated in case evidences obtained by the investigation does not ascertain the existence of crime.⁵⁶

2.8. Informing Prosecutor and Applicant on Launching the Investigation

According to the Criminal Procedure code, when information on the crime is received and the investigation is launched, the investigator becomes automatically obliged to immediately inform prosecutor. No uniform standard of informing the prosecutor about launching the investigation exists in practice. Obligatory indication of the Criminal Procedure Code to immediately inform the prosecutor can be interpreted differently. The Criminal Procedure Code does establish the necessity of informing, however, it never indicates what types of notification are sufficient procedural legal purposes.

With regards to receiving information about the crime and investigative response to this information, it is important to note that the initial edition of Criminal Procedure Code included control mechanisms for responding to mentioned information. More precisely, the investigator/prosecutor was obliged to inform the applicant on launching the investigation within 3 days of launching the investigation⁵⁷.

Current edition of the Code only foresees the possibility for the applicant to receive written notification confirming the receipt of the information⁵⁸. However, this provision is not of obligatory character for relevant agencies⁵⁹ and it becomes subject to their preferences. The problem is not fully solved by the fact that the victim has the right to receive information about the proceedings of the crime⁶⁰, as a person who delivered the information is not always granted a status of victim.

56 Commentary to the Criminal Procedure Code, plural authors, Tbilisi, 2015, page 337

57 Refer to Article 100, Criminal Procedure Code of Georgia (Edition before the amendments of 7 December, 2010, N3891)

58 Article 101, Criminal Procedure Code of Georgia

59 Ibid:Part2'

60 Article 57, Criminal Procedure Code of Georgia

Recommendations

To sum up, non-existence of a clear boundary between investigative and non-investigative stages represents a severe problem of the legislation. So do criminal intensity of preventive measures and risks of them being transferred into investigative stage, as well as artificially established pre-investigative stage, that does not even comply with legislative regulations, situation on crime statistics and its influence on procedural stages.

In order to eliminate mentioned deficiencies, the following is recommended.

- Regulations of the Law on Georgia on Police shall be redefined so that they could only be used for preventive purposes, so that reacting to already committed crime may only be possible via investigative actions in the frame of Criminal Procedure Code of Georgia;
- In order to avoid parallel mechanism to the investigation, the Law on Operative investigative actions” shall be annulled. Mechanisms of investigative effect existing in it, as well as measures of criminal justice intensity, envisaged by the Law on Police shall be subject to investigative actions under the Criminal Procedure Code of Georgia;
- It is important to abolish so called pre-investigative period and relevant bodies to launch the investigation immediately after receiving the information about crime, within the frames of Procedure Code and only by the established order;
- Every investigative body shall implement special rule for registering the information on the crime. The rule, along with instruction on registration, shall define mechanisms for controlling registration process, functions of controlling department, and appropriate liability measures for violating registration rules;
- The Criminal Procedure Code of Georgia shall make it obligatory for the relevant bodies to issue written notice to the applicant on the receipt of the information on crime;
- When assessing activities of a specific investigative body or official, crime statistics shall not be the only factor taken into consideration, as this in the end causes an issue of correct processing of crime registration and statistics;

3. Investigation and the Process of Obtaining Evidence

3.1. Introduction

According to the Criminal Procedure Code, the State, unlike for criminal persecution cases, does not have a full monopoly over the investigation. Within the scopes of adversarial process, the parties, in order to be placed in equal conditions in the investigation, shall have an opportunity to obtain and exchange evidence. This model somehow limits the State's sole authority over criminal jurisdiction and this strengthens chances of the defense side to independently obtain evidence⁶¹. The existing Criminal Procedure Code is based on basic principles on Adversarial system, however, it does not fully ensure the establishment of these principles. Equal investigative authorities of the parties, prosecutors board monitoring role over the investigation and impartial, full and thorough investigation guarantees, accordingly, are all problematic within the scope of the Code.

Initial edition of the Criminal Procedure Code contained important amendments to make the general principle of adversariality affectively work in practice. Provisions that innovated regulations of investigation and rules for carrying out specific investigative measures are particularly interesting: Firsts of all, operative-investigative actions were transformed to investigative actions. One of the main purposes of this amendment was to establish judicial control of same level over the activities that in their intensity did not differ from investigative actions and were potential causes of interference into personal life (e.g. secret eavesdropping, visual control, conspiracy etc).⁶²

Unfortunately, afore-mentioned legislative amendment was annulled before it actually came into force: According to transitional provisions of the Criminal Procedure Code established in 2009, the chapter on secret investigative measures would become active in April of 2011 and the law on operative-investigative actions remained into force before then.⁶³ However, by amendments of 24 September 2010, the parliament of Georgia, without any justification took out provisions on secret investigative actions from the Criminal Procedure Code, together with the indication on the annulment of the Law on Operative-investigative actions.⁶⁴

61 European Journal on Criminal Policy and Research, pp.203-224, pp.204-207

62 Refer to the explanatory card of the legislation, 'ა' 'ბ'

63 The Procedure Code also included the indication that the chapter on secret investigative actions would have a temporary nature and the Minister of Justice would prepare new legislation, regulating secret investigative actions in a new manner

64 Georgian Young Lawyers' Association, Gaps and Recommendations in Criminal Justice, 2012

Later, by the amendments of 1 August, 2014,⁶⁵ several measures from the Law on Operative-Investigative activities⁶⁶ were moved to the Criminal Procedure Code and became subject to Prosecutorial control. However, the mentioned reform was not systematic and the Law on Operative-Investigative actions is still in force, enabling specific measures to be carried out for the purposes of investigation, without being subject to relevant procedural standards.

By the Criminal Procedure Code of 2009, Scopes of Prosecutorial control over the investigation were expanded and independent action area for the investigator was partly limited. More precisely, the investigator became fully dependent on the management of the prosecutor overseeing his case, and prosecutor was defined as a decision maker on every investigative measure, subject to court approval. Such unequal distribution of authorities between the investigator and prosecutor is not characteristic to the adversarial model, in general. It is noteworthy, that according to the existing legislation, Investigator represents the prosecution. Thus, it becomes difficult to trust that the investigator will carry out investigation in a thorough, full and impartial manner.

This part of the research includes legislative analysis of specific investigative actions, assessment of the level of involvement of the prosecutor in the investigative stage and its comparison to classical adversarial systems. Analysis of problems related to full and objective investigation and monitoring authorities of the investigator will also be presented.

3.2. Status of a Prosecutor and Level of His Involvement in Investigative Measures

Institutional and operational separation of agencies carrying out investigative and prosecutorial functions is of crucial importance in limiting administrative and material resources of the State in the investigation process. In order to achieve this it is important for the legislation to clearly define statuses of prosecutor and investigator, their institutional objectives and establish specific structural barriers between them – mechanism of checking and verification.

The Georgian legislation, at one glance, clearly defines the status of a prosecutor and grants him exclusive function of criminal persecution. In other words, according to the Criminal Procedure Code, The Prosecutor's Office is the only prosecuting authority in the country. For the execution

65 1 August 2014 Law on amendments to the Criminal Procedure Code: <https://matsne.gov.ge/ka/document/view/2457218#DOCUMENT:1>

66 Eavesdropping and recording of telephone conversation; removal and fixation of the information from the communications channel, control over post deliveries, secret video and audio recordings, filming and photo shoots, electronic surveillance procedures (Article 1431, Criminal Procedure Code of Georgia)

of mentioned function, the Prosecutor's office is equipped with procedural oversight authority over the investigation, along with other tools.⁶⁷

Prosecutor is an active subject involved in the investigation stage, and gets involved in the investigation from the initial stage⁶⁸. Involvement of a prosecutor in the investigation is expressed by giving mandatory instructions to the investigator, assign criminal case to a specific investigator, by following requirements of Investigative Jurisdiction, or seizing a case from the investigator; the prosecutor is also authorized to get directly involved in the investigation or to carry it out on his own with a status of an investigator. He has unlimited authority to review case materials or the entire case and to seize the investigation in specific instances⁶⁹.

The Criminal Procedure Code also establishes Prosecutor's obligatory participation in several investigative measures and procedural activities. Only the prosecutor is authorized to appeal to the court to request approval on such investigative or procedural measures that limit constitutional rights and freedoms of an individual⁷⁰. The list of such measures is quite broad and it includes search seizure, secret investigative measures, mandatory interrogation of witnesses etc.

Unlike the prosecutor, the investigator is not authorized to take independent decisions on investigative measures of the same type. If taken into consideration how important the listed investigative measures are for the thorough review of cases, it can be concluded, that the investigator is fully dependant on the prosecutor In the investigation process.

With regards to obtaining evidence in practice, this process is different in various investigative agencies. As a rule, planning the process of obtaining evidence as well as basic investigative actions are carried out by the involvement of the prosecutor. Investigation process is most frequently defined by the prosecutor, taking investigator's opinions into consideration. Active involvement of prosecutors is also caused by the fact that in number of cases investigators try to avoid the responsibility, which might be caused by the problem of their qualifications⁷¹. In some investigative bodies, however, (investigative service of the Ministry of Finance), investigator is the one who draws strategy for obtaining evidence and obtains the evidence too, through the communication with the prosecutor.

It is noteworthy that investigators are more independent in the cases of more simple category and prosecutor's involvements in there is also comparatively low. Qualification problem stands out

67 Article 32, Criminal Procedure Code of Georgia

68 Article 100, Criminal Procedure Code of Georgia

69 Article 33, Criminal Procedure Code of Georgia.

70 Article 112, Criminal Procedure Code of Georgia

71 The information is based on the results of research interviews conducted with the representatives of academic circles and practitioners

while investigating some crimes of a specific nature – when a legal case contains not only criminal but adjoining, sectoral characteristics too. E.g. in case of fraud, when equal qualifications are required in criminal and civil laws. The issue is intensified by the fact that no specialized investigative bodies, oriented on specific cases, exist in the country⁷².

As made obvious by the above stipulations, scopes of procedural oversight of the prosecutor are too broad and include every important aspect of the investigation. Under such conditions, questions on the status of the prosecutor naturally arise – shall the prosecutor be leading the investigation, or shall there be an external party monitoring him in the process in the sense of legitimacy and effectiveness.

It shall be noted that in classic adversarial model, prosecutor has more limited investigative authorities. Legislations of some countries⁷³ only grant the authority of electronic surveillance or execution of secret investigative actions to the prosecutor in exceptional cases⁷⁴. Countries of common law are characterized by strict separation of the prosecutor from the investigation process. Unlike Georgian legislation, legislations of England, Wales and US, prosecutors do not exercise any investigative powers at all in either jurisdiction and have no authority whatsoever to identify an investigative strategy or to initiate the implementation of specific investigative actions. These are matters entirely and exclusively within the discretion of the investigative bodies. The prosecutor's involvement in investigation stage may be merely advisory. Outcomes of consultation only have a recommendational character and, thus, are not obligatory for the investigative agency⁷⁵.

In these countries discretion to start an investigation is only granted to the Police, which is not considered as a prosecution and has an authority to fully lead the investigation. Accordingly, liability for investigation of any case is distributed not between the investigator and prosecutor but within the investigative agency itself, between the direct investigator of the case and a superior investigator⁷⁶. The investigative agency is responsible for ensuring the safety of victims and obtaining evidence, independently from the prosecutor's office⁷⁷.

72 The information is based on the results of research interviews conducted with the representatives of academic circles and practitioners

73 The US legislation is familiar with the involvement of prosecutor in the stage of investigation, at a federal level, for some instances

74 AMERICAN BAR ASSOCIATION (2013). *ABA Standards for Criminal Justice (Third Edition)*. Prosecutorial Investigations. Washington, American Bar Association., p.1

75 JACKSON, R. H. (1940). *The Federal Prosecutor*. 3(5) *Journal of Criminal Law and Criminology*, pp.3-6., p.3

76 *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice*, s.3(i).

77 Harris, D. (2012). *The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and how this Affects Police Reform Efforts*. Luna, E., Wade, M. and Bojańczyk, A. *The Prosecutor in Transnational Perspective*. New York, Oxford University Press: 54-66, pp.57.

3.3. Procedural Guarantees for Carrying out thorough, Full and Impartial Investigation

Provisions of the Criminal Procedure Code are contradictory in identifying investigator's status and authorities during the investigation as well. The investigator is granted a status of a party (prosecution), on the one hand, and is obliged to conduct investigation in a full, thorough and impartial manner, on the other hand.⁷⁸ The latter obligation takes the investigator out from the position of the prosecution. The investigator shall not act only for the effective criminal persecution at a later stage, but shall study every important circumstance of the case in a thorough, full and impartial manner and make is possible to obtain beneficial evidence for both parties.

In order for the investigation to be carried out fully, thoroughly and objectively, it is important for the legislation to ensure operational independence of the investigator, expressed in the definition of the status of the investigator in the first place. As it has been mentioned already, the existing Criminal Procedure Code, unlike the older edition, perceives investigator as prosecution party⁷⁹.

Contradictory provisions in the Criminal Procedure Code with regards to the status and role of the investigator, as well as prosecutor's active oversight in the process, make executing the obligation of full, thorough and impartial investigation in practice, impossible. Existing edition of the Code cannot ensure functional independence of the Investigator from the prosecutor, and this effects the level of impartiality of the investigation at the end.

Status of the Head of Investigative Service in the investigation process is also problematic. He is not considered as a subject of investigation, by the existing Criminal Procedure Code. However, in practice, heads of investigative services play an important role in the process of Investigation. Interviews with prosecutors and investigators have demonstrated that the involvement of the head of Investigative body in the investigation process is different in various agencies. Head of investigative services of the Ministry of Internal affairs – head of Police or his deputy – mainly participates in handling administrative issues such as ensuring movement of the investigator and other technical questions. However, there are cases, where the head gets involved in the contextual part as well. E.g. participates in defining strategy and tactics of an investigative measures directly.

Contextual involvement of the head of the agency in the investigation process might not have the permanent character but it depends on the category and significance of the crime to be investigated. For instance, in cases of assassination, heads are more actively involve than in other types of

⁷⁸ Article 37, part 2, Criminal Procedure Code of Georgia

⁷⁹ Article 3, part 6, Criminal Procedure Code of Georgia

cases. The Investigative Service of The Ministry of Finance has a mechanism of periodic reporting to the head that may be followed by additional commands from the manager⁸⁰.

It is straightforward that the Head of the Investigative Service plays an important role in the practice and can directly participate in the investigation process as well. The fact that this issue is not regulated by the legislation at all, increases risks of developing non-uniform practices and taking arbitrary decisions by the Head of the Service.

In countries of classical adversarial model, where investigative bodies are strictly distant functionally and institutionally⁸¹, Investigator enjoys maximum independence at the investigation stage. These countries are not familiar with the practice of granting the status of prosecution party to the investigator. Thus, it is logical, that unlike in Georgia, the investigator is equally obliged to obtain convictional and equittal evidence⁸². Therefore, it is crucially important investigator to have the obligation to collect exculpatory as well as inculpatory evidence.

3.4. Disclosing Evidence with the Parties

Together with objective investigation, disclosing evidence and its availability for another party is of particular importance to the adversarial process. The Criminal Procedure Code obliges both parties to satisfy each other's request on sharing the information that is intended to be submitted to the court as an evidence, at any stage of criminal proceedings⁸³. The Criminal Procedure Code also obliges the prosecution to ensure the provision of existing acquittal evidence to the defense party.

In this case it becomes problematic that there are no effective legal impact mechanisms for the violation of procedural obligation for disclosing evidence. The only legal consequence of not exchanging information (including acquittal) to the defendant is that the prosecutor is not able to present such information at the court⁸⁴.

As conducted individual interviews highlighted the issue is problematic in practice as well. In most cases, procedural legal guarantees for disclosing evidence are assessed differently in practice. According to one approach, the prosecution party is not obliged to obtain acquittal evidence. However, if such evidence is obtained in any case, unconditional obligation of passing such evi-

80 The discussion is based on the results of research interviews conducted with the representatives of academic circles and practitioners

81 European Journal on Criminal Policy and Research, pp.203-224, pp.204-207.

82 Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, paragraph 3(5)

83 Article 83, part 2, Criminal Procedure Code of Georgia

84 Same as above, part 3

dence to the defense party is imposed. Prosecutor's authority to not present acquittal evidence at the court is also assessed as problematic⁸⁵.

Unlike Georgia, other countries of adversarial model, norms for obtaining and disclosing evidence, as well as related liabilities are strictly defined by the legislation. For instance, according to the legislation of England and Wales, the investigator, as an independent party, is liable to obtain convictional as well as acquittal evidence. Exchange of evidence is mainly the function of Prosecution⁸⁶ and investigator is not involved in this process. Federal legislation of the United States obliges the prosecutor to make timely disclosure to the defence at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.

At federal as well as local levels in the US, the Prosecutors office is obliged to ensure the availability of even minor acquittal evidence to the defense party. Clearly, the question as to what is "material either to guilt or punishment" is a complex one and some states have simply adopted an "open file" policy to enable the defence to have full disclosure⁸⁷. Other countries of adversarial model, unlike Georgia, has also established strict legal consequences for violation the rule of exchanging evidence. E.g. according to the procedure legislation of England and Wales, failure to disclose such evidence will result in the court ordering a prosecution to be discontinued or a conviction to be overturned⁸⁸.

3.5. Scopes and Objectives of Procedural Oversight over the Investigation

According to the Criminal Procedure Code, the prosecutor is an individual equipped with the exclusive authority of criminal persecution. In order to carry out this function effectively he is in charge of procedural oversight over the investigation. Effective investigation is a necessary precondition for criminal persecution, thus, it is logical that the intention of supervision over the investigation is related to better execution of criminal persecution and not to ensuring the impartiality of the investigative process.

85 The discussion is based on the results of research interviews conducted with the representatives of academic circles and practitioners

86 Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, paragraph 3(5).

87 Siegel, D. M. (2014). An Introduction to Exculpatory Evidence Under US Law for the Uzbek Prosecutor. Boston Research Paper No. 15-06, p.7

88 The Police and Criminal Evidence Act 1984, Code C, para. 11.1A. See <https://www.gov.uk/guidance/police-and-criminal-evidence-act1984-pace-codes-of-practice>, accessed 14th February 2018.

It is not debatable that the prosecutor, taking his obligations into account, cannot remain as a neutral figure in the process of investigation and his main priority will always be to obtain evidence favourable for the prosecution. Based on the fact that the prosecutor is a party in criminal proceedings,⁸⁹ his procedural oversight over the investigation shall have a limited character and his involvement in the investigative process in general should be minimized. However, as mentioned previously, the practice has demonstrated quite a contradictory conditions, as the involvement of the prosecutor in the process of investigation is basically unlimited.

More precisely, prosecutors oversight role is expressed in different ways in the course of the investigation. In this context, one of the most significant functions of the prosecutor, as of the procedural leader of the investigation, is to annul decision taken by the investigator. The prosecutor is also entitled to review the complaint on investigator's actions and decisions as well as to periodically request materials of criminal case⁹⁰. Despite the afore-mentioned procedural interventions in investigative actions, the Criminal Procedure Code also enables the prosecutor to, by following the Investigative Jurisdiction, transfer a case from specific investigator and to different one⁹¹.

The only prosedural leverage that the investigator has when communicating with the prosecutor, is the right to refuse executing the commands of the latter, in which case the investigator shall present the case and his opinions in writing to the superior prosecutor. The superior prosecutor in such case annuls the command of a subordinate prosecutor or transfers the command to other investigator for execution⁹². This mechanism cannot be considered as impartiality and objectiveness guarantee of the investigation as it only allows for the possibility of 'negative decision' – seizing individual from the case or annulling the command⁹³. Interviews with practicing investigators and prosecutors have demonstrated that they never refer to mentioned legal leverage and any disagreement between the prosecutor and investigator is always settled via internal communication.

Another significant element of procedural oversight is the control over the lawfulness of investigators actions. According to the legislation,⁹⁴ investigators actions related to the investigation of criminal case are objected before the superior prosecutor, however this loses the point in practice, since the prosecutor is the main decision maker on important circumstances of the investigation. At the same time, the interviews have revealed that investigators, in most cases, undergo consultations regarding the strategy of investigation as well as before actually conducting specific investigative activities. Thus, according to the current situation, decisions/actions that are

89 Article 3, part 6, Criminal Procedure Code of Georgia

90 Article 33, Criminal Procedure Code of Georgia

91 Same as above, part 6, point 'a'

92 Article 37, part 3, Criminal Procedure Code of Georgia

93 The Human Rights Education and Monitoring Center (EMC), 'Politics of Invisible Power' 2015, page 54

94 Article 33, part 6, subparagraph 'h', Criminal Procedure Code of Georgia

objected before the prosecutor, are the ones that were planned through the involvement of this very prosecutor.

It becomes clear that absolute boundaries of procedural supervision over the investigation as well as strong subordination of the investigator to the prosecutor, cause imbalance of the investigative system. The investigator is in fact no longer able to conduct a thorough investigation. The prosecutor, instead of being a neutral controller of the investigation and investigative process, is directly leading the investigation and takes decisions on all important aspects. Under such conditions it becomes vague what shall prosecutor's role be in the investigative process, what shall his main priority be – conducting effective and objective investigation ensuring maximum protection of rights for each and every citizen or preparing case for the criminal persecution and the decision to convict guilt.

As mentioned in the previous paragraph, prosecutors active involvement is not characteristic to the criminal proceedings of the adversarial system. Institutional and functional separation of the Prosecutor's office from investigative system ensures maximum independence of investigation from the prosecutor. One of the leverages of functional independence of the investigator is the fact that in discussed systems, the investigator is not considered as a prosecution⁹⁵. In countries of adversarial model, prosecutor is not authorized to directly lead the investigation and get actively involved in the process⁹⁶.

Recommendations

A legislative, practical and theoretical analysis of discussed issues has revealed main problems faced at different stages of criminal proceedings. As confirmed by the research, equal investigative authorities of the parties, issues of full, thorough and impartial investigation, existing legislative order of exchanging evidence, issues of institutional and functional independence of agencies in the scope of adversarial model, as well as the broad investigative authorities of the prosecutor and the risk of his influence on the impartiality of the investigation - all represent a significant problem.

In order to eliminate discussed problems, it is important to consider the following:

- The Prosecutor's Office of Georgia shall be seized the competence to investigate criminal offenses and it should be distributed to other investigative bodies, thematically;
- The prosecutor's authority to seize one investigator from the case and transfer the case to the other investigator, shall be annulled;

95 Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice, paragraph 3(5).

96 European Journal on Criminal Policy and Research, pp.203-224, pp.204-207

- The prosecutor shall not be authorized to get directly involved in the investigation process and fully run the investigation, obtaining the status of an investigator;
- In order to distance the investigation and the prosecutor's office more on operational level, the prosecutor's authority to give binding instructions to the investigator for the purposes of investigation, shall be limited. The Criminal Procedure Code of Georgia shall specify that procedural oversight over the investigation is carried out to ensure the lawfulness of investigation and the prosecutor has no authority to identify an investigative strategy within the prosecutorial supervision;
- The prosecutor shall only be entitled to change or annul investigator's actions/decision if they are obviously illegal; admissibility and effectiveness are not sufficient motives for the prosecutor to interfere in the activities of investigator;
- In order for the investigator to study the case thoroughly and impartially, it is necessary for his status to be redefined in the Criminal Procedure Code; Investigator shall not be considered as a prosecution and shall be distant from the Prosecutor's office institutionally as well as functionally;
- In order to decrease intensity of investigator's dependence on the Prosecutor, it is important for their communication to have an obligatory written character. At the same time, in cases when the investigator deems it necessary to carry out investigative actions requiring an approval from the court, but the Prosecutor does not agree, the Prosecutor's refusal for appealing to the Court shall be justified in writing and filed in case materials (It is noteworthy that, in some adversarial jurisdictions a police officer has the authority to apply for the court warrants, without prosecutor's involvement in the process);
- The Criminal Procedure Code shall define procedural status of the head of investigative service. The later shall ensure effectiveness and high quality of investigation carried out by service reporting to him. The Head of investigative service shall be entitled to give out binding instructions to the investigator, assign case to a particular investigator, examine complaints related to investigator's actions etc;
- In the course of disclosing evidence by the parties, legal effect shall become more severe for cases, when the investigator/prosecutor did not ensure to disclose to the defendant of such evidence that excludes or alleviates person's guilt; Such cases shall become grounds for terminating criminal prosecution or for acquittal sentence by the Court.

Research Summary

The legislative and practical analysis of the investigative system revealed the fundamental problems that exist in the areas of institutional, organizational and functional independence of the investigation. These problems largely determine the settings of the objective, thorough and effective investigation.

The main purpose of systematic reform of the Criminal Procedure Code was the creation of guarantees of an independent and objective investigation to improve the defendants' rights. However, the incomplete review of the legislation and the lack of supportive institutional reforms hindered the process of achieving the goal. The research shows that the existing legislative order does not provide sufficient guarantees for the independence of the investigative system, which impedes the process of thorough and impartial investigation.

Under the current legislation, an investigator has the status of the prosecution and is largely bound by the prosecutor's decisions regarding a case. A prosecutor has direct investigative powers and also has the right to give the investigator mandatory instructions, which enhances the influence of the prosecution on the process of investigation. In addition, a prosecutor's active involvement in the investigation of the case prevents the proper supervision of the legitimacy of the investigation.

Within the frameworks of the research, it became clear that in order to achieve the impartiality and independence of the investigation, it is important to review the procedural status of an investigator. An investigator should not be regarded as the prosecution party and a prosecutor should not be entitled to investigative powers. For the purpose of dividing the investigative and prosecutorial activities, it is important for the Prosecutor's Office to not have an investigative competence and the investigative jurisdiction should be regulated by the law instead of the order of the Minister of Justice.

The goal of the procedural supervision should be the control of the legality of an investigation, therefore prosecutor should not be entitled to decide the strategy of the investigation or to conduct certain investigative actions. In order to ensure the quality of investigation, the research revealed the need to determine the procedural status of the head of the investigative agency under the Criminal Procedure Code. Instead of the case prosecutor, the head of the investigative agency, together with investigators of the case, should ensure the efficiency and quality of the investigation carried.

In order to improve the quality of an investigation, the attention should be given to the investigator's qualification. As the research shows, there are no uniform qualification requirements for investigators, including the fact that the investigator of main and largest investigative body - the Ministry of Internal Affairs – is not required to have a higher legal education. It is important to determine consistent and relevant minimum qualification requirements for investigators of all investigative bodies.

One of the main challenges of the investigative system, as the given research demonstrated, is the existence of the so-called “preliminary investigative” mechanisms, which is caused by the controversial legislative framework. The research showed that the operative-investigative and investigative activities are not divided. A number of investigative agencies are involved in investigative and operative-investigative activities at the same time. In order to eliminate legislative and practical inconsistencies, it is important to implement the obligation to start an immediate investigation upon receiving information about the crime. At the same time, it is necessary to bring the legislative system in line with the Criminal Procedure Code to eliminate parallel investigative mechanisms and the superficial “preliminary investigative” stage, which is conducted without prosecutorial and judicial control. In this regard, one of the main recommendations of the research team is to repeal the law on operative-investigative activities. The research also revealed that the process of disclose evidence by the parties needs to be regulated differently. It is important to aggravate the legal outcome of cases when the prosecution does not provide for the exchange of exclusion and/or mitigating evidence for the accused. Such cases should be the grounds for termination of criminal prosecution against a person, or the acquittal by the court.

Taking into consideration the results of the research, in order to ensure independent, thorough and impartial investigation, it is necessary to organize systemic reform at the legislative level, as well as, in terms of organization of the system of the investigative and prosecutorial bodies. The investigative system reform must ensure a clear division between the investigative and prosecutorial activities, as well as, increase the role and importance of an investigator in the investigation process and strengthen the quality of prosecutor's supervision by distancing a prosecutor from an investigation.

Annex

| Authorities of investigator and prosecutor in the investigative process (according to the legislation in force) | |
|--|--|
| Investigator | Prosecutor |
| Launching the investigation/qualification of crime | |
| <ul style="list-style-type: none"> • The investigator is authorized to start an investigation on the crime, according to the relevant article of the Criminal Code (Articles: 37,100); • Investigator is obliged to immediately notify the prosecutor about launching the investigation (article 100). | <ul style="list-style-type: none"> • The prosecutor is obliged to start an investigation on the bases of information about the crime (Article 100); • Prosecutor is authorized to change qualifications of investigation started by the investigator or terminate the investigation (Article 33, part 6, paragraph „G“). |
| Investigative jurisdiction | |
| <ul style="list-style-type: none"> • The investigator starts investigation on the crime under his/her investigative jurisdiction (Order N34 of the Minister of Justice). | <ul style="list-style-type: none"> • The Chief Prosecutor of Georgia or a person authorized by him is entitled to assign investigation to the investigative agency despite the investigative jurisdiction (Article 33. part 6, paragraph „a“); • The prosecutor is entitled to transfer a case from one investigator to the other (article 33. part 6, paragraph „a“); • If a competence of other investigative body becomes relevant after launching the investigation, the case, according to its subordination, is handed over by the prosecutor (Article 102). |

| Rights and obligations of investigator and prosecutor in the process of investigation | |
|---|--|
| <ul style="list-style-type: none"> • The investigator is obliged to conduct investigation in a full, thorough and objective manner (article 37, part 2); • The investigator is obliged to follow the instructions of the prosecutor (Article 37. part 3). <p>The investigator is entitled to:</p> <ul style="list-style-type: none"> • Investigator is entitled to present a case and personal opinion on prosecutor's command to the superior prosecutor; • At his own initiative, carry out only such investigative actions that do not restrict private ownership or the right to personal life; The investigator is not authorized to independently take decisions on search and seizure (except in case of urgent necessity) implement secret investigative actions related digital data, or interrogate the witness (except for specific cases considered under the older edition of Criminal Procedure Code); • Request a revision of a submission of document; • Invite interpreter, expert, or a person to be identified; • Issue command on bringing detained persons to the relevant location; • Send material to prosecutor/the court in cases his decision is being objected; • Address the prosecutor to grant investigative assignment to another investigator⁹⁷. | <ul style="list-style-type: none"> • The prosecutor is entitled to implement any investigative action, appeal to the court by motion on conducting a specific investigative action, assign mandatory instructions to the investigator regarding implementation of a particular action or its avoidance (Article 33); • Request either part of case material or a full case; • Annul decision of the investigator; • Make a decision about the complaint on investigator's actions, give an explanation in case of appeal. |
| Protecting rights of participants of criminal proceedings | |
| <ul style="list-style-type: none"> • The investigator is not authorized to grant status of a victim to the victim of the crime (article 56, part 5); • The investigator is not authorized to independently take decisions on implementing measures for protecting rights or parties involved in the process, in order to ensure their security (Article 68, part 2). | <ul style="list-style-type: none"> • Status of a victim is granted to the person by the prosecutor (Article 56, part 5); • The prosecutor takes decision on the usage of special measures of security (Article 68, part 2). |

97 Criminal Procedure Code, article 37.

| Accusing a person and case proceedings | |
|--|--|
| <ul style="list-style-type: none">• The investigator is not authorized to accuse a person (article 169, part 2);• The investigator is not authorized to address the court through the motion on detention (article 171, part 1);• The investigator is not authorized to participate in the selection of evidence should be presented to the Court;• The investigator is interrogated as a witness at the trial. | <ul style="list-style-type: none">• Only the prosecutor is authorized to accuse a person (article 169, part 2);• The prosecutor is authorized to address the court through the motion on detention (article 171, part 1);• The prosecutor takes independent decision on the selection of evidence to be presented to the court;• The prosecutor is authorized to use diversion/mediation mechanism against the defendant or sign plea agreement with him (article 168¹, 210). |

| The post-reform situation | |
|---|---|
| Institutional arrangement: | |
| <ul style="list-style-type: none"> • The Criminal Procedure Code defines the status of the Head of Investigative Agency and grants him the authority of direct guidance over the investigation; • The Head of the Agency will be authorized to give mandatory instructions to the investigator, change investigator’s decision, transfer a case from one investigator to the other, review complaints on the legitimacy of investigator’s actions; • The investigator and the Head of Investigative Agency should not be considered as the prosecution; • The prosecutor will carry on with procedural oversight over the investigation, in order to control the lawfulness of the investigation. | |
| Competences of prosecutor and investigator | |
| Investigator | Prosecutor |
| Launching investigation/qualification of the crime | |
| <ul style="list-style-type: none"> • The investigator is obliged to start an investigation immediately after receiving information about the crime under him investigative subordination; • The investigator independently decides on what qualification to grant to the action. However, the Head of the Agency is entitled to change the mentioned decision; • The investigator immediately informs the prosecutor on launching the investigation; • The investigator is not authorized to terminate the investigation. | <ul style="list-style-type: none"> • The Prosecutor’s Office is not an authorized body for carrying out an investigation; • The Chief Prosecutor of Georgia, only in exceptional cases, is authorized to transfer the case from one investigative agency to the other, through the justified decision, despite the obbing of investigative jurisdiction rules. This decision shall become inseparable part of the case; • The prosecutor is not authorized to transfer a case over from one investigator to the other; • The prosecutor is authorized to terminate the investigation on the bases of investigator’s motion. |

| Rights and obligations of prosecutor and investigator in the process of investigation | |
|--|---|
| <ul style="list-style-type: none"> • The investigator collects exculpatory as well as inculpatory evidences; • The investigator is authorized to independently take decisions on conducting investigative actions, except those that restrict rights of a person and require court order; • The Head of Investigative Agency leads the process of investigation, in the scope of which, he is authorized to give mandatory instructions to the investigator, transfer a case from one investigator to the other; • The investigator is authorized to address the prosecutor with the purpose of carrying out investigative actions, which require court order. | <ul style="list-style-type: none"> • The Prosecutor is in charge of procedural oversight over the investigation, in order to ensure the legitimacy of investigation/particular investigative actions; • The prosecutor does not have a status of investigator and is not authorized to directly carry out investigative actions; • The Prosecutor is authorized to observe the course of investigation via electronic system; • The prosecutor can address the court by the motion on implementing such investigative action that causes interference into a person's constitutional rights*; • In case the prosecutor deems that no sufficient base exists for submitting motion to the court, his position shall be justified in writing and be reflected in the criminal case; • The investigator has a one-off right to object the prosecutor's refusal on submitting the motion before the superior prosecutor; • The prosecutor is authorized to review the complaint on the lawfulness of investigator's actions; • The prosecutor is authorized to annul unlawful decision. |

| Protecting rights of parties involved in the process | |
|---|--|
| <ul style="list-style-type: none"> • The investigator is not authorized to grant status of a victim to the victim of a crime. | <ul style="list-style-type: none"> • Status of a victim is granted by the prosecutor; • The prosecutor, within the scope of his competence, takes the decision on the use of special security measures against the person. |
| Accusing a person and case proceedings | |
| <ul style="list-style-type: none"> • The investigator is not authorized to accuse a person or to address the court with a motion on detention; • The investigator does not participate in the selection of evidence to be presented at the court; • The investigator is interrogated as a witness at the trial; • The investigator does not participate in the process of disclosing evidence to the parties. | <ul style="list-style-type: none"> • Only the prosecutor is authorized to accuse a person; • The prosecutor takes independent decision on the selection of evidence to be presented to the court; • The prosecutor is obliged to disclose every obtained evidence with the defense side, including those that may be acquittal or may alleviate the guilt; • The prosecutor is authorized to use diversion/mediation mechanism against the defendant or sign plea bargain. |

*Prosecutor's involvement in this process diverse in different adversarial jurisdictions. For instance, according to the South Wales legislation, the police officer has the authority to apply directly for seeking the court warrants, but in some cases, only a high ranking police official holds the authority to apply for specific court warrants. Confirming with the US legislation, prosecutor should review court warrant applications before they go to a judge, even if the jurisdiction allows police officer to apply directly. In reviewing the application, the prosecutor attempts to assure that it is complete, accurate and legally sufficient.

Events of 20 June: Dispersal of the Rally and Related

Practices of Human Rights Violation

(Initial Legal Assessment)

Overview of the General Context

The events of 20-21 June 2019, that took place in Tbilisi, Rustaveli Avenue, namely dispersal of a large scale rally and the police power used to achieve this objective, turned out to be the most severe and intense governmental action of the last years. Since the 2012 government transition, this was practically the very first case¹ when the police decided to disperse a large-scale demonstration and in the course of several hours used special measures of different types and intensity against the demonstrators.

These events were preceded by a meeting of the International Assembly of Orthodox Church on June 20, which was held in the historic Hall of the Parliament of Georgia, in Tbilisi. A Member of Parliament of the Russian Federation, Sergei Gavrilov took the speaker's seat and addressed the participants of the Assembly in Russian. Considering the occupation of the Georgian territories by the Russian Federation, the presence of the Russian MP in the legislative body and the symbolic act of him taking the high tribune have caused great dissatisfaction and protests in public.

Following mobilization of the public groups inside as well as outside of the Parliament building, also after representatives of the parliamentary opposition blocked the presidium in the Parliament Chamber, the parliamentary majority announced the cancellation of the Assembly session.² As a result, the Russian delegation and Sergei Gavrilov first left the Parliament building and later Georgia.

The spontaneous demonstration and dissatisfaction during the day turned into a large-scale organized protest in the evening of June 20. Civil activists announced anti-occupation rally in front of the Parliament building.

The rally with the slogan "Shame" started at 7 pm in front of the Parliament building. The main demand of the protestors and organizers was the resignation of the Chairman of the Parliament of Georgia, the Minister of Internal Affairs and the Head of the State Security Service.³

The rally was peaceful in the course of the first several hours. However, later, when a part of the protestors under the direction of opposition political leaders, tried to break into the police cordon and enter the Parliament building, the situation escalated. It was followed by multiple episodes of severe massive physical confrontations among protestors and law enforcement personnel. Evidently, the behaviour and intentions of the rally participants nearby the police cordons obtained a violent character, which exceeded the scope of the freedom of peaceful assembly. As the situation escalated, the police made the decision to disperse the rally around midnight. During the dispersal, police used a variety of special means, including tear gas, rubber bullets and

¹ Note: recent facts of unprecedented mobilization of the police and use of special means were also observed on 21 April 2019 regarding the construction of HPPs in Pankisi gorge.

² Available at: <https://bit.ly/2NqwRjr>, last seen on: 02.07.19.

³ Available at: <https://bit.ly/2RPiDau>, last seen on: 02.07.19.

water cannons. The use of special means lasted for several hours and it clearly lost its purpose of preventing the attack on the Parliament building and threat coming from non-peaceful participants. Hence, it turned into the use of illegitimate and disproportionate force. At around 2 am, the police units moved from the territory in front of the Parliament building to Rustaveli Avenue and decided to clean the entire Rustaveli Avenue and its surrounding areas from rally participants. The confrontation between the police and part of the rally participants lasted all night. On 21 June, at dawn, police officers launched administrative arrests of the rally participants and citizens on Rustaveli Avenue and adjacent streets. Police demonstrated unjustified violence and inhuman treatment towards protestors. Some of the detainees point out that after arrests, the police, already having an effective control, used coarse force against them.

As a result of events of Rustaveli Avenue, the police subjected 305 individuals to an administrative arrest on 20-21 June,⁴ of which 121 were sentenced to administrative imprisonment.⁵ Later, as the cases were heard at the Tbilisi Court of Appeal, a large portion of detainees was released by shortening the term of imprisonment. In the context of the dispersal of rally, the number and condition of the victims and injured protestors were especially severe. According to the latest information, 240 were injured as a result of the clashes and used police force, out of which 34 were journalists and 80 policemen.⁶ Several rally participants have lost an eye and the health condition of two remains severe.

In connection with the events of June 20, the Prosecutor's Office of Georgia launched an investigation into the instances of abuse of power in certain episodes by police officers and expressed readiness to involve the Public Defender in the investigation process.⁷ On June 21, at a special briefing, the Ministry of Internal Affairs announced the launching of an investigation into the facts of the organization and leadership of the group violence and participation therein.⁸ Later on June 24, the Ministry of Internal Affairs also informed the public that authority of 10 law enforcement officers was suspended within the scope of the investigation conducted by the General Inspection, while the cases of the 2 law enforcement officers were sent to Prosecutor's Office.⁹ On July 3, it became public that the authority of the Director of the Special Tasks Department of the Ministry of Internal Affairs was also suspended.¹⁰

The practice of the police violence and arbitrariness of June 20-21 brought back a severe experience linked to rally dispersal of previous years (including 7 November 2007, 26 May 2011) into the collective memory of our society. Once again, the issue pertaining to institutional violence became an acute question of the political agenda. The police force of this scale is especially alarming when used at the anti-occupation rally, the problem of the past, which represents the most shared challenge and collective trauma of our society. Unfortunately, none of the political groups had enough political resources to prevent and de-escalate events of June 20. They failed to elevate the public discontent and anger into the formal political arena. It is particularly alarming that even considering the extreme exacerbation of the situation and engagement of the rally participants into the violent actions, none of the political groups, including the opposition, had taken necessary political steps to prevent violent actions and for the entire night the participants were left alone against anonymous forces of

⁴ Available at: <https://bit.ly/2KSsqvP>, last seen on: 02.07.19.

⁵ Available at: <https://bit.ly/2xruvWG>, last seen on: 02.07.19.

⁶ Available at: <https://bit.ly/2XeY20h>, last seen on: 02.07.19.

⁷ Statement of the Prosecutor General of 24 June 2019 on launching an investigation, available at: http://pog.gov.ge/geo/news?info_id=2102, last seen on: 02.07.19.

⁸ Statement of the Ministry of Interior Affairs of 21 June 2019, available at: <https://bit.ly/2FH6CPB>, last seen on: 02.07.19.

⁹ Statement of the Ministry of Interior Affairs of 24 June 2019, available at: <https://bit.ly/2XFrRvb>, last seen on: 02.07.19.

¹⁰ Statement of the Ministry of Interior Affairs of 3 July 2019, available at: <https://bit.ly/2LzR7fV>.

special units. Ignoring these values and rules of the game by the political actors is an extreme manifestation of negligence and it demands adequate political recognition and assessment from our society.

It is obvious that the events developed on the June 20, including the reasons for the public dissatisfaction, require multilateral and systematic political, social and legal analysis. However, with this initial report the Human Rights Education and Monitoring Centre (EMC) provides legal analysis of the events of 20-21 June 2019, the rally dispersal, legitimacy of the applied police force and legality of the arrests of the rally participants.

Official information on factual and legal issues necessary for assessment is not yet received from the Ministry of Internal Affairs and other agencies. Thus, the present assessment is substantially based on information existing in the public sources, including TV and online media and extensive photo-video material. Also, while preparing the legal assessment, in order to acquire and double check the information, EMC talked to several rally participants, who at different times found themselves on the main locations and in the centre of the events. Some of the interviewed individuals were also subjected to administrative arrests. Among the interviewed are journalists covering the events on Rustaveli Avenue. The official statements of the Ministry of Internal Affairs and other agencies provided on June 20 and during the subsequent days, were taken into consideration while working on this assessment.

The Report will address the issues in the following order:

- Assessment of the decision about the rally dispersal on 20 June;
- The practice of chasing and arresting the protestors after rally dispersal;
- Facts of alleged mistreatment following arrests;
- Cases of interference with the journalists' activities.

Interference in freedom of assembly and legal assessment of the dispersal of the rally

A decision to disperse the rally and use the police force shall be assessed in several aspects, including:

- Whether there was a legal ground for dispersal of the rally;
- Whether the police complied with the necessary pre-conditions and rules for the rally dispersal;
- Whether the force and means used for dispersal of the rally were legal and proportional.

In order to make a comprehensive assessment of the above issues, the EMC filed an application to the Ministry of Internal Affairs of Georgia and Tbilisi City Hall on June 25. EMC requested public information pertaining to the legal basis for making the decision to terminate the assembly, decision-makers and warnings given to the participants before terminating the assembly. As of today, no information has been received from the Ministry of Internal Affairs and Tbilisi City Hall. For this reason, as mentioned above, the events of 20-21 June are analysed in light of other publicly available sources, Georgian legislation and international standards.

a) Whether or not there was a legal ground for dispersing the rally

The exercise of freedom of assembly and manifestation as a collective action of public and the action taken by the people united around the common idea is essential for building a democratic society and promoting social transformation. Implementation of the freedom of assembly is of fundamental importance for government accountability and public involvement in civil processes, also for turning the citizens into important agents of democratic processes and public voices.¹¹

Constitution of Georgia protects freedom of peaceful assembly and includes provision on its termination if the rally acquires illegal nature. Clarification as to what constitutes illegal, and/or when assembly becomes such, is provided in the Law of Georgia on Assemblies and Manifestations (hereinafter, the Law).

It is important to emphasize that Georgian legislation, as well as the European Convention on Human Rights, declares that only “peaceful” assembly is the object of protection. Only assemblies where participants or organizers hold violent intentions from the very beginning, causing public disorder, fall outside the protection of the mentioned article. Violence or disorder, which carries incidental nature, cannot go beyond protection granted by Article 11 of the Convention. Although violence is generally in place, the intention of the participants and organizers to hold a peaceful assembly, as oppose to creating possible violence, is essential for entering the scope of protection under the article.¹² Even more so, the state has an obligation to isolate violent participants of the rally and to create conditions for other participants to enjoy their freedom of assembly.

On the June 20, citizens gathered in front of the Parliament building were demonstrating in a peaceful manner for several hours. They were protesting the occupation and demanding the resignation of several high-ranking officials. Approximately 3 hours later after the commencement of the rally, member of the United National Movement, Nika Melia addressed the rally participants and called for entry into the Parliament building should the government failed to satisfy the demands within the set timeframe.¹³ It was after the expiry of the time, set by Nika Melia, that situation at rally became strained. It turned out to be obvious that the behaviour of the part of the protestors was no longer peaceful. At around 21:50 a rather large group of protestors standing on the stairs of the Parliament building tried to break the police cordon and enter the Parliament courtyard.¹⁴

The special units on-site managed to restrain the first attempt of the group of protestors from entering the Parliament building.¹⁵ Some of them were arrested and taken inside the Parliament courtyard. Following the first clash, the situation temporarily went under control. The demonstrators tell¹⁶ that one of the participants informed the protestors via megaphone that negotiations were held between the ruling party and opposition and urged them to wait for the results. However, at 23:22 the same group of protestors suddenly pushed the special units’ cordon, threw various objects at them and tried to enter the yard of the Parliament building. At the same

¹¹ UN Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 4 February 2016, A/HRC/31/66, §5, available at: <https://www.refworld.org/docid/575135464.html>, last seen on: 24.06.19.

¹² ECHR case of CHRISTIAN AGAINST FASCISM AND RACISM v. the UNITED KINGDOM, 1980, available at: <http://hudoc.echr.coe.int/eng?i=001-74286>, also see Council of Europe/ECtHR, Article 11, The conduct of public assemblies in the Court’s case-law, 2013, § 9, available at: <https://bit.ly/2J0i9Jr>, last seen on: 02.07.19.

¹³ Available at: <https://bit.ly/2Yvb7UC>, last seen on: 02.07.19.

¹⁴ Available at: <https://bit.ly/306HvNP>, last seen on: 02.07.19.

¹⁵ Available at: <https://bit.ly/2FH8uI7>, last seen on: 02.07.19.

¹⁶ EMC’s phone interview of 26 June 2019, with a rally participant Koki Kighuradze and a journalist Giorgi Gogua.

time, the participants of the rally snatched the equipment, shields, truncheons and helmets of the special units and continued moving under and into the depth of the Parliament arcs. At this moment, the first line of the special units was trying to stop the protestors with shields, while the second line was making noise by beating on shields with their truncheon.¹⁷ However, aggressive part of the protestors managed to drag the members of the special units out of the first line of the police cordon and take them inside their groups. The special units' attempt to stop participants went on during several episodes from 22:50 to 23:55. On 20 June, at 23:56, the police made the decision to disperse the rally. That was when the special units fired tear gas on the opposite side of the Parliament building, towards the Museum of Contemporary Art.

The dispersal of the rally lasted for several hours and comprised of many episodes. Each episode requires individual assessment in the context of the right to assembly and manifestation, right to liberty and security of a person and prohibition of ill treatment. However, firstly, it is of utmost importance to assess the legality of the initial decision to disperse the rally. The interference into the freedom of assembly must be exercised by mutually assessing the legality (whether there was a legitimate ground for restriction of right), the existence of legitimate objective (whether interference serves any legitimate purpose prescribed by law) and proportionality of the means used to achieve this objective.

As it has been mentioned, the Constitution and the Law on Assemblies and Manifestations provide for the possibility of terminating an assembly when the relevant rules and procedures are complied with. Moreover, according to the Law, a rally can be dispersed when there is a call for the overthrow or change of constitutional order of Georgia by force, for the encroachment of independence and territorial integrity of the country, as well as to call for actions that are intended to **propagate war or violence** and that incite national, regional, religious or social hostility and pose **obvious, direct and essential threat**.¹⁸ Hence, the existence of legitimate objective as prescribed by the Law creates a legal possibility for interfering into the freedom of assembly.

As to the legitimate objective for interfering with the freedom - for now no official statements have been released by the Ministry of Internal Affairs and Tbilisi City Hall in relation to this issue. However, based on other publicly available materials, it can be said that the legitimate goal was to avoid illegal entry into the Parliament building and to prevent violence that would have followed this process. The events that took place on the 20th of June, after 21:50, clearly point out that a certain group of protestors exceeded the scope of the freedom of peaceful assembly and violently assaulted the police. It shall be taken into consideration that the actions of this group were not of a singular nature. In a short period of time, they tried to break the police cordon several times. Simultaneously, they managed to drag the policemen inside their groups by removing them from the first line of the police cordon. They also grabbed the special equipment from the police. Moreover, it became clear that Nika Melia's call to storm the Parliament building, repeated attempts of the part of protestors to enter the building of the legislative body from 21:50 to 23:55, posed an obvious, eminent and real threat. Therefore, the behavior of the part of the protestors and repeated physical clashes with the police created the ground for interference with the freedom of assembly and manifestation.

According to the international standards, if only small group/part of rally participants is violent, the law enforcers should take appropriate measures to make sure that only those directly involved in the violence are

¹⁷ Available at: <https://bit.ly/2Xj9eOg>, last seen on: 02.07.19.

¹⁸ Law of Georgia on Assemblies and Manifestations, Article 11, § 1.

subjected to the specific measures.¹⁹ The rally of the 20th of June was fairly crowded. Most of the peaceful participants remained in the territory of Rustaveli Avenue, even when the first line of the protestors actively attacked the police. Taking into consideration the overall number of rally participants, the aggressive part of the demonstrators was not a majority. However, their placement during the rally and the intensification of their aggressive actions could be seen as essentially disturbing to the management and progress of the entire rally. Considering the aggressive actions directed at the police and special units, while police resources were broadly focused on self-defence and protection of the yard of the Parliament building, practically, it became impossible for police units to isolate dozens of aggressive protestors and move them away from the rally territory, in order to allow other participants to continue peaceful demonstration.

It should be taken into consideration that police's attempt to detain part of the protestors could encourage other participants of the rally to engage in confrontation with the police. It is noteworthy that the organizers of the rally also demonstrated weak attempts to return the demonstration into its peaceful nature and de-escalate the situation. Despite the police's obligation to support peaceful protests and individually isolate aggressive participants of the rally, the events that took place in front of the parliament building on the 20th of June, indicated that arrests of singular protestors did not calm down the situation. Hence, the decision made by police on this day at around 12:00 am about the dispersal of the rally was appropriate measure for achieving the above legitimate objective. However, discussion of the proportionality of police operation is not limited to this factor. For purposes of proportionality of the interference with the freedom of assembly, it is also important to assess whether the standards for the dispersal of the rally were upheld and the adequate police force was used.

b) Whether the police complied with the necessary pre-conditions and rules for the rally dispersal

Determination of an unlawful nature of the assembly does not automatically imply forceful termination of the demonstration and use of special means against the participants.²⁰

In public life, because of the fundamental importance of the right to manifestation, the state has a number of positive and negative obligations to promote the right to manifestation and do not allow arbitrary and illegal interference. It is a part of this obligation that the relevant governmental bodies shall adopt all necessary measures, *inter alia*, use resources of dialogue and negotiations to avoid termination of the assembly and other related consequences. A dispersal of assemblies should be a measure of last resort.²¹ It should not occur unless law-enforcement officials have taken all reasonable measures to facilitate and protect the assembly from harm or unless there is an imminent threat of violence.²²

As it is known, after the radicalization of the situation on 20 June, several high-ranking officials came to the Parliament building, including the Prime Minister²³ and the Minister of Internal Affairs.²⁴ On June 20 and the following days information was revealed that for the purposes of de-escalation, the governmental representatives and political opposition were to meet in the Parliament building.²⁵ At this stage, it is unknown

¹⁹ OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly, SECOND EDITION, §167, available at: <https://bit.ly/2xrAUBn>, last seen on: 02.07.19.

²⁰ OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly, SECOND EDITION, §§ 165-166, available at: <https://www.osce.org/odihr/73405?download=true>, last seen on: 02.07.19

²¹ *Ibid*, §§ 165-166.

²² *Ibid*, §§ 165-166.

²³ Available at: <https://bit.ly/2KS3yo0>, last seen on: 02.07.19.

²⁴ Available at: <https://bit.ly/2RPIiju>, last seen on: 02.07.19.

²⁵ Available at: <https://bit.ly/2KS1Gvq>, last seen on: 02.07.19.

what was the objective and format of the attempted organization of the meeting, and/or extent of feasibility and sufficiency of the efforts made to organize the negotiations. However, as it is known, in the end, the meeting and negotiations did not take place until the rally was dispersed. At this stage, it is unknown if the relevant bodies, except for leaders of the opposition political groups, had communication with other organizers and leaders of the rally. Due to the lack of factual information, at the moment, it is difficult to estimate the extent to which the negotiation resources were utilized and exhausted. From this point of view, the statement made by the Prime Minister of Georgia a few minutes prior to the dispersal, is especially notable, as it excluded the use of special means for terminating the rally.²⁶

After a decision to terminate the rally is made, state representatives must comply with the requirements prescribed by the law. This first and foremost means to call for the termination of the rally and give reasonable time to disperse voluntarily. Moreover, it implies giving demonstrators a possibility to leave the territory of the rally peacefully and safely.

According to Article 13 of the Law of Georgia on Assemblies and Manifestation, if requirements of this Law are massively violated, an authorized representative of the enforcement body (the City Hall) shall urge the participants to termination the assembly. On the other hand, the assembly shall be terminated immediately upon such request. Only if participants then fail to disperse may law-enforcement officials adopt measures prescribed by the law.

As to the non-massive violation of the restrictions imposed by the law, in this case, the legislation establishes an even higher standard of protection for freedom of assembly and obliges the appropriate / authorized person to warn the organizer and give him/her an additional 15 minutes to warn the assembly participants to ensure voluntary dispersal. Only if the assembly is not terminated voluntarily after this term has lapsed and the warning has been given, may the police adopt the relevant measures to disperse the assembly.²⁷

Likewise for the national legislation, international standards draw attention to the obligation to inform organizers and participants of the assembly in a detailed manner, clearly and prior to any interference. The participants should also be given reasonable time to disperse voluntarily. Only if the assembly participants fail to disperse may the law enforcement officers use special measures to disperse the rally.²⁸ It is a necessary condition precedent for the legitimate dispersal of the rally by the relevant bodies to inform the rally participants on the decision to act so via proper means of information and in an appropriate form. It creates a ground for making an informed decision by the rally participants and minimizes grounds for the use of force.

Based on the information spread via media outlets²⁹ on the events of the 20th of June and clarifications given by the rally participants on this matter,³⁰ it becomes clear that the law enforcers did not comply with the requirement of law concerning the obligatory warning. No warning, which would be understandable and perceptible for the participants, was made as to illegal nature of the assembly and the necessity of its immediate

²⁶ Available at: <https://bit.ly/2RWc85J>, last seen on: 04.07.19.

²⁷ Law of Georgia on Assemblies and Manifestations, Article 13.

²⁸ OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly, SECOND EDITION, §168, available at: <https://bit.ly/2yrcfhz>, last seen on: 02.07.19.

²⁹ Available at: <https://bit.ly/2xqoHg9>, <https://bit.ly/2Lz2lKL>, <https://bit.ly/2J6nVf9>, last seen on: 02.07.19.

³⁰ All the participants of the June 20 rally interviewed by the EMC, deny presence of any type of verbal warning at any stage near Parliament, that would urge them to disperse the rally and leave the territory.

termination. Police started using special means directly without the relevant warning. It was the police action that made it clear for the participants that the decision on the rally dispersal had been made.

Even if the participants violated the law, whether jointly (mass-violation) or individually (non-mass-violation), the law, in any case, requires unconditional preliminary warning / call. The goal of this call is to minimize damage and severe consequences, including among bystanders.

As it was noted, no on-site announcement was made by law enforcers prior to the dispersal of the assembly (i.e. approximately before midnight of June 20). The Ministry of Internal Affairs of Georgia has released a statement through official web-site and urged the participants to stop violent actions,³¹ while the Mayor of Tbilisi, Kakha Kaladze, announce through the media channels that the actions went beyond the freedom of expression, obtained anti-constitutional character and told peaceful participants that the law enforcers would act accordingly.³²

It is obvious that the statements displayed on the websites of the Ministry of Interior Affairs and Tbilisi City Hall and the ones announced through media cannot be considered as the call for dispersal or warning. The authorized person did not directly address the participants of the rally on Rustaveli Avenue nor did she/he directly request termination of the protest with a warning to use police means should protestors have failed to comply. Statements of the high-ranking officials obviously carry a risk that participants will not be able to hear and take it into consideration. Therefore, these statements failed to meet the legal obligation to warn. Hence, it shall be noted that the police failed to comply with the necessary legal pre-conditions in the context of the dispersal.

c) Whether the police force and measures used to disperse the rally were legal, proportional and hence, legitimate

The state is obliged to respect the basic standards of human rights when using force during a police operation for dispersal of assembly, both legal and illegal. The mentioned obligation is stipulated in the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.³³ According to these basic principles, law enforcement officials are obliged to, to the extent possible, use non-violent methods.

Under the international standards, even when the assembly is considered to be illegal from the point of view of the domestic state legislation, the law enforcement officials shall not use force only because of its illegality.³⁴ Use of force is permissible only if there are solid reasons for the prevention of public safety and crime.³⁵

According to the OSCE/ODIHR Guidelines, the state must adopt a means for proportional and differential use of force that implies equipping the law enforcement officials with non-lethal weapons. In addition, law

³¹ Available at: <https://bit.ly/2XnMFrO>, last seen on: 02.07.19.

³² Available at: <https://bit.ly/2KTuRyi>, last seen on: 02.07.19.

³³ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Available at: <https://bit.ly/2MJtcs9>, last seen on: 02.07.19.

³⁴ Amnesty International, Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 2015, Guideline No.7, pp. 147-148, available at: <https://bit.ly/2xrAUBn>, last seen on: 02.07.19.

³⁵ Inter-American Commission on Human Rights, Report on the situation of human rights defenders in the Americas, 2006, § 68.

enforcement officials should be equipped with defence means such as helmets, fireproof clothing, bulletproof vests and adequate transport. The main purpose of this defence equipment is to minimize the need to use force against the protestors.³⁶

Although the use of police force is often necessary for preventing the crime or arresting the offenders or alleged offenders, it must be carried out in an exceptional manner, should not be used arbitrarily, must be proportionate to the risk, aimed at reducing the damage and should be adopted only within the scope required to achieve a legitimate objective.³⁷

On June 20, after 10 pm, the police, without using active power, managed to prevent a certain group of protestors from entering the Parliament building before 23:55. Prior to this, in several cases, special units located near stairs of the Parliament building captured participants. Police were verbally and physically abusive towards some protestors.³⁸ At 23:56 the special units fired tear gas in response to the actions revealed by the protestors. Giorgi Gogua, a journalist covering events at the time, tells that tear gas was shot in the direction of the “Museum of Contemporary Art”, targeting participants standing far away from the Parliament building while, supposedly, the purpose of the tear gas was to vacate the territory from the protestors trying to enter the Parliament building. However, it is even more unclear and unjustified that 20 minutes later after firing the tear gas - rubber bullets were fired.³⁹ At 00:13, in addition to tear gas, kinetic impact projectiles, so called rubber bullets were used against protestors.⁴⁰ Already at 00:14 the footage of citizens injured as a result of rubber bullets were airing via media outlets. As explained by the individuals attending the rally, the law enforcement officials were mainly using the rubber bullets when approaching the protestors and hence, the shootings were intentional.

On June 21, in 30-40 minutes following the first attempt to disperse the assembly, the protestors started returning to the Parliament building via the territory of Freedom Metro Station.⁴¹ Law enforcement officials continued using rubber bullets against participants. In certain moments, it is depicted how members of the special unit shoot by directly targeting the participants. They were targeting those posing no threat of violence at the moment and this behaviour of policemen lasted for the whole night.⁴²

Part of the participants started gathering back near the Parliament building at 00:30 am and later, at about 01:28 am, the tension between protestors and law enforcers official has increased once again.⁴³ Special units actively used tear gas and rubber bullets. Despite this, a specific group of protestors continued resisting. Clashes moved nearby School No. 1. The rally participants brought iron structures on-site and started beating the members of the special units.⁴⁴ Law enforcement officials used tear gas and rubber bullets for this occasion. After several

³⁶ OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly, SECOND EDITION, §172, available at: <https://bit.ly/2yrcfhz>, last seen on: 02.07.19.

³⁷ OSCE Guidebook on Democratic Policing (2008): Use of Force § 68.

³⁸ Explanations given to the EMC by the participants of the June 20 demonstration.

³⁹ This is reaffirmed by explanations provided by a journalist, Guram Muradov. He was one of the first victims of rubber bullets.

⁴⁰ Available at: <https://bit.ly/2KU9lcu>, last seen on: 02.07.19.

⁴¹ Available at: <https://bit.ly/2LyvFrB>, last seen on: 02.07.19.

⁴² Available at: <https://bit.ly/327IzmC>, <https://bit.ly/2YxJ6fg>, <https://bit.ly/2ZZ0dHc>, last seen on: 02.07.19.

⁴³ Available at: <https://bit.ly/2XrmXCG>, last seen on: 04.07.19.

⁴⁴ Available at: <https://bit.ly/2YuJ87I>, last seen on: 02.07.19.

severe resisting moments exposed by the participants, the water cannon vehicle appeared on Rustaveli Avenue at 01:45. The water cannons were used from this moment.⁴⁵

Despite the use of special measures, the protestors kept resisting the law enforcement officials. The video shortage shows that prior to about 4:30 am, the rally participants repeatedly returned to the territory near the Parliament building. Each time law enforcement officials replied with tear gas and rubber bullets.

From the point of view of the freedom of assembly and standards applicable to the dispersal of the assembly, police actions were problematic in light of the several issues, including:

- When managing the rally of June 20 the most important problem was the lack of effective and reasonable plan or strategy among law enforcement bodies to control the rally participants to de-escalate the situation. The police tried to control the mass gathered at the rally using special means that failed to deescalate the situation for several hours. In the given case, authorised officials became responsible for adopting the action plan and communicating it to the state enforcement bodies. Nevertheless, the EMC has not yet been informed whether there were any instructions given to the law enforcement officers by the responsible officials;
- The police lacked a thorough, reasonable and ‘human-rights-based’ plan, that would maintain enforcement of the decision on the dispersal within the scope of legitimate objectives and maximize prevention of the excessive use of force. After the first stage of the dispersal, the violent behaviour of the police outside the territory where the assembly was held, became massive. It is unclear as to why no immediate reaction or instructions followed from the high-ranking officials. The analysis of the dispersal demonstrates that the police actions were not subject to internal monitoring and their violent behaviour was neither controlled nor eliminated;
- The fact of using rubber bullets in a few minutes following tear gas is especially problematic. The police actions demonstrated that after the use of tear gas against the protestors, the police failed to assess a possible change in threats coming from the participants in a timely and systemic manner. It includes the feasibility and imminence of the initial intention to storm the parliament building in light of the newly formed reality. Hence, when planning the necessity of further use of special means, these circumstances were not taken into consideration;
- After the first dispersal of the rally, in some cases, resistance of the participants was actually triggered by violent behaviour demonstrated by the police. This is important factor to take into consideration when evaluating freedom of assembly;
- Undifferentiated use of special means, especially the rubber bullets, was problematic. In a number of cases, it is obvious that the police used rubber bullets against participants who, at that particular moment, posed no threat of violence / assault;
- The use of rubber bullets from a short distance and targeting the face and head was particularly problematic as it led to severe and sometimes irreparable injuries to a number of protestors.

⁴⁵ Available at: <https://bit.ly/2xruK44>, last seen on: 02.07.19.

According to the Law of Georgia on Police, Article 33, a police officer shall use passive and active special equipment such as tear gas, pepper spray, sonic weapons, and non-lethal weapons and etc., to ensure public security and legal order.

Obviously, the necessity to use each special equipment should be assessed on a case-by-case basis. A police officer may use suitable coercive measures only in case of necessity and to the extent that ensures achievement of the legitimate objectives.⁴⁶ In the given situation, special criticism is drawn to the use of rubber bullets within a few minutes after the police fired tear gas, when the resources of less damaging remedies, including water cannons, were not yet fully exhausted.

According to the Guidelines of Amnesty International, use of any force beyond a lethal weapon, that carries the likelihood or high risk of causing death must be subject to the same strict application of the principle of proportionality as it is established for the use of lethal firearm. Therefore, the use of special means is allowed only in extreme cases for the purpose of preventing death or serious injury.⁴⁷

Moreover, adherence to the principle of distinguishing is crucial when dispersing the rally. Participants are not a homogeneous group. The main ground for differentiation is not the group they belong to, but rather how they act. Therefore, when force is used against violence, the police must distinguish between the individuals who are engaged in violence and those who are not. A proportionate police force may be used only against those directly involved in violent actions.⁴⁸

According to the United Nations Parliamentary Assembly report, any weapon, including non-lethal or semi-lethal, can become lethal if used in a certain manner/form.⁴⁹ According to the UN Basic Principles, “use of a lethal weapon, that causes temporary disability, should be carefully evaluated in order to minimize the risk of endangering bystander [during violent action / disorder], and use of such weapons should be carefully controlled”.⁵⁰

Although the law enforcement officials may use an alternative weapon during assembly, its use may still violate the right to life, as well as freedom of assembly and the principle prohibiting torture and inhuman and degrading treatment. These freedoms may be violated when tear gas, water cannons, and rubber bullets are used.⁵¹

In the case of *Ter-Petrosyan v. Armenia*,⁵² the European Court established a violation of Article 11. This case concerns demonstration held by the opposition party in response to the 2008 presidential election in Armenia

⁴⁶ Law of Georgia in Police, Article 31.

⁴⁷ Amnesty International, Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, short version, 2016, p. 24, available at: <https://bit.ly/32841HM>, last seen on: 02.07.19.

⁴⁸ Amnesty International, Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 2015, Guideline No.7, p.148, available at: <https://bit.ly/2xrAUBn>, last seen on: 02.07.19.

⁴⁹ PACE, Committee on Legal Affairs and Human Rights, Urgent need to prevent human rights violations during peaceful protests, Doc. 14060, 10 May 2016, §§ 70-71, available at: <https://bit.ly/2xoSWEf>, last seen on: 02.07.19.

⁵⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, 3rd Principle, available at: <https://bit.ly/2MJtcs9>, last seen on: 02.07.19.

⁵¹ PACE, Committee on Legal Affairs and Human Rights, Urgent need to prevent human rights violations during peaceful protests, Doc. 14060, 10 May 2016, § 54, available at: <https://bit.ly/2xoSWEf>, last seen on: 02.07.19.

⁵² Case of *Ter-Petrosyan v. Armenia*, Application no. [36469/08](https://bit.ly/2Yrq8qD), 2019, available at: <https://bit.ly/2Yrq8qD>, last seen on: 02.07.19.

that was followed by the dispersal and arrests of the participants. According to the Court's reasoning, the dispersal carried out by the police was insufficiently justified and took place in somewhat suspicious circumstances, namely no relevant warning was released and the excessive and unjustified use of force has occurred. Hence, the Court opined that it was disproportionate and exceeded the scope of reasonability in which the States are obliged to act.⁵³

In addition, due to the potentially lethal character of non-lethal weapon, in 2014, the Human Rights Council of the UN encouraged states to ensure "...thorough, independent and scientific testing of non-lethal weapons prior to deployment to establish their lethality and the extent of likely injury, and of monitoring appropriate training and use of such weapons."⁵⁴

International standards also established detailed instruction on the use of a non-lethal / less lethal weapon, which includes the following:

a) Use of water cannons and tear gas (chemical irritants)

The means not allowing differentiating and posing a higher threat to injuries, such as tear gas or water cannon, can only be used to disperse massive violence, yet only if all other means are incapable of stopping the violence.

Crucially, it can only be used when protestors have the possibility of disintegration, not when they are placed in a limited space, while other ways through which it would be possible for them to potentially flee are blocked. It is noteworthy that the participants of the assembly should be warned about the use of such method, after that they should be allowed to leave the place freely.⁵⁵ The information available at this point indicates that on the night of June 20, when a water cannon car was brought in front of the Parliament building, demonstrators had space/opportunity to leave the area and the exits were not blocked by the police.

b) Kinetic impact projectile

According to the UN Guidelines on Basic Principles,⁵⁶ kinetic impact projectiles are considered to be less lethal and one of the most frequently used devices to control public assemblies. They come in many various shapes and sizes: rubber bullets, plastic bullets, and rubber balls – all different in size, shape and material.

According to the mentioned Guideline, kinetic impact projectile can only be used to stop an individual directly engaged in violence against another individual. "They must not be used as a general tool to disperse a crowd, including by general firing of these projectiles aiming at the large crowd rather than specifically at individuals engaged in violence."⁵⁷

⁵³ *Ibid.*, § 64.

⁵⁴ Geneva Academy of International Humanitarian Law and Human Rights, „Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council“, November 2016, p. 26, available at: <https://bit.ly/2Xnapw6>, last seen on: 02.07.19.

⁵⁵ Amnesty International, Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 2015, p. 156-159, available at: <https://bit.ly/2xrAUBn>, last seen on: 02.07.19.

⁵⁶ Amnesty International, Use of Force: Guidelines for Implementation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 7 September 2015, available at: <https://bit.ly/2xrAUBn>, last seen on: 02.07.19.

⁵⁷ *Ibid.*, p. 157.

Use of the mentioned means by targeting the crowd and accidental shootings creates serious injuries, especially when an individual is shot in the head or upper body. Therefore, in order to reduce the injury, as a rule, this weapon should be used aiming at the lower body (except when there is an imminent threat to life).⁵⁸ It is also considered inadmissible to aim at the ground because when bouncing back the shell loses precision and may increase the risk of heating the crowd.⁵⁹

According to the analyses conducted by Human Rights Watch concerning the dispersal of the 7th of November 2007, “shooting rubber bullets at close range into the backs of demonstrators, many of whom were also attempting to disperse... suggests that law enforcement personnel were seeking not only to disperse demonstrators, but also possibly to punish them for their participation in the rallies, or deter them from any further opposition.”⁶⁰

On 20-21 of June, the law enforcement personnel used rubber bullets disregarding the mentioned international standards and rules established by the national legislation, bypassing less harmful means, misusing it against peaceful demonstrators, in apparent violation of the instructions for the use of rubber bullets.⁶¹ As a result, in adopting the strategy of rally dispersal and in the process of first choosing and later using special means, the police violated principles of proportionality and prohibition of excessive use of force against the demonstrators. This type of massive and intensive mistreatment strips the police actions of legitimacy and creates doubts as to the ultimate unjustified objective to hurt and punish participants of the assembly.

Chasing the Participants of the Assembly and the Practices of Illegal Arrests

When evaluating the events of June 20, one should draw particular attention to the episode that developed late at night and at dawn far from the Parliament building. After occupying the territory near the Parliament building, the police units started moving towards Rustaveli Metro Station. Following the dispersal the main part of the rally participants went this direction. First of all, it shall be noted that neither intentions of the police for chasing the protestors nor their action plan as to which specific area was to be vacated from the demonstrators, was clear. The content of the dispersal order, that should have contained clear references as to what areas adjacent to the Parliament building were to be vacated by the police, is unknown. The decision to disperse the rally in front of the Parliament building should have enacted for a specific time frame covering the specific area. It is logical that the argument pertaining to the defence of the Parliament building and prevention of the violence was applied in the severe context emerged in front of the Parliament building. However, the same argument would not bear the same relevance for the police actions carried out on Rustaveli Avenue, Melikishvili Avenue and other adjacent territories.

It is problematic that police failed to make clear clarification and warning for the groups that after the dispersal of the rally left the area in front of the Parliament building and started moving towards Melikishvili Avenue through Rustaveli Avenue. For them, it was not foreseeable or clear as to which territory was to be vacated under the police orders and what would qualify as a breach of law and non-compliance with the police orders.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Human Rights Watch, *Crossing the Line, Georgia’s Violent Dispersal of Protestors and Raid on Imedi Television*, December 19, 2007, available at: <https://bit.ly/2Xk0Yxz>, last seen on: 02.07.19.

⁶¹ The EMC continues to acquire and process information on the specifications of rubber bullets used, their procurement and regulatory protocols.

In this context, arrest of the protestors was even more problematic due to its massive and non-individual nature. According to the Ministry of Internal Affairs,⁶² police detained 305 participants for various offences. Later, it became known that protesters were charged for minor hooliganism and non-compliance with a lawful order or demand of a law enforcement officer as prescribed in Articles 166 and 173 of the Administrative Offences Code of Georgia.

Initially, the arrest of the demonstrators took place at around 23:00, soon after the certain group of people standing in the front line of the demonstration in front of the Parliament building tried to storm it. The second wave of arrests emerged around 2 am on the territories of Freedom Square and in front of the Parliament building, while it reached its peak at 4 am when police launched massive arrests on Rustaveli Metro station and Melikishvili Avenue.

According to Koka Kighuradze, one of the participants of the assembly,⁶³ he was attending the rally from 23:00. He went to the stairs of the Parliament building out of interest towards destructive participants gathered there. He says that special units were dragging arrested citizens inside the yard by opening the shields. That's how Kighuradze himself got into the Parliament yard, where the special units had created the corridor. Arrested demonstrators were moved through this corridor where the members of the special units verbally and physically abused them. According to Kighuradze, the detained persons were placed in the several buses mobilized in the Parliament yard. Should the arrested verbally abuse the police officer, this person was brought out of the bus and subjected to verbal and physical abuse by the police.

Massive arrests of participants started after 4 am on the territory of the Republic Square. Since then, access to Parliament building and part of Rustaveli avenue were completely empty. Special units located near Rustaveli Theater marched towards Republic Square. At this point, a certain group of participants in front of the Opera House kept throwing different objects at special units. In return, water cannon, tear gas and rubber bullets were repeatedly used by the law enforcement personnel.⁶⁴ At 04:21 protestors moved to the territory adjacent to Rustaveli monument as the special unit mobilized on the territory of the Parliament started following them through Rustaveli Avenue. From that time on, media footage shows that the group of police officers were separated from the special unit and launched the mass arrests. Participants of the rally moving from Rustaveli towards Melikishvili Avenue were arrested by the criminal police and police patrol at 04:30 am. The police exceeded power during arrests of certain protestors.⁶⁵ Media recorded the footage where participants were beaten while being arrested on the territory adjacent to Rustaveli Avenue and on Melikishvili Avenue.⁶⁶ Law enforcement personnel verbally abused the demonstrators, used truncheons during physical abuses,⁶⁷ one could also see the facts of the participants being beaten by plastic handcuffs.⁶⁸

Irakli Khvadagiani, one of the participants of the rally told the EMC that he and other participants were arrested near the dawn on the territory of Republic Square on Rustaveli Avenue. According to him, approximately 100-150 protestors were on Republic Square at that time. Khvadagiani was there with his brother. One policeman tried to arrest his brother while simultaneously beating him with truncheons. Irakli Khvadagiani shielded his

⁶² Available at: <https://bit.ly/2KSsqvP>, last seen on: 02.07.19.

⁶³ EMC's 26 June 2019 phone interview with Koki Kighuradze.

⁶⁴ Available at: <https://bit.ly/2FK7umE>, last seen on: 02.07.19.

⁶⁵ Available at: <https://bit.ly/307rdEe>, last seen on: 02.07.19.

⁶⁶ Available at: <https://bit.ly/2Jloh01>, last seen on: 02.07.19.

⁶⁷ Explanation of a protestor - Irakli Khvadagiani, provided during the 26 June 2019 phone interview with the EMC.

⁶⁸ Available at: <https://bit.ly/2NBXthM>, last seen on: 02.07.19.

brother, as truncheon was just about to hit him. As a result, Irakli received a severe head injury. After this, 4 or 5 policemen beat him for half a minute.

Arrests continued from 5 am on the territory of Melikishvili Avenue where part of the protestors gathered once again and sat on the road for a short period of time.⁶⁹ This group of citizens raised barricades on Chavchavadze Avenue while other part of it went towards Hero Square. According to them, they wanted to continue protesting the Russian occupation.⁷⁰ The police followed them and carried on with fragmented arrests.

Explanations provided by a number of demonstrators, as well as statements of the arrested ones provided during the court hearing monitoring process, indicate that since the beginning of the assembly near the Parliament building and throughout the entire night, the police used disproportionate force against certain protestors while arresting them.

It is problematic that detainment of both - participants and by passers was conducted in the absence of individual responsibility, routinely, with references to violation of public order and disobedience to lawful demands of the police. It shall be noted once again, that no clear explanation or call for termination of concrete behavior and / or leaving a specific area preceded the arrests.

The protestors were subjected to an administrative arrest based on the Administrative Offences Code of Georgia that fails to uphold the current standards of human rights. According to Article 245 of the Code, in the event of an administrative arrest, the arresting officer shall inform the arrestee upon placing him/her under arrest, in a form that he/she understands, of the administrative offence committed by him/her and the basis of the arrest and of his/her right to a defence counsel. Based on the same norm, the arresting officer is obliged to take the arrested individual to the closest police station or other law enforcement facility. In the given case, most protestors pointed to the absence of explanation as to the grounds for detainment.

In addition, 9 demonstrators, which were subjected to the administrative arrest and currently remain under the EMC's defence, were not taken to the temporary detention facility after the arrest. The detainees remained in the yard of the Ministry building, located on Noe Ramishvili Street or in the police cars parked in the yard throughout the night. It shall be noted that European Court of Human Rights established a violation of Article 5 of the Convention when following the arrest of a person participating in a peaceful gathering for violation of public order, the police delayed the detainee in the police station for three hours.⁷¹

Article 239 of the Administrative Offences Code of Georgia determines a law enforcement officer's obligation to clarify the essence of the administrative offence. Detainment and administrative offence reports contain identical content, free from any specifications and refer to the offences prescribed by Articles 166 and 173. Because of this, neither report nor police clarifications made it practically possible to identify a person's actions on an individual basis. Information concerning the detainee's cases, including monitoring of the court hearings, in a number of cases, indicated that police used arrests in an arbitrary manner.

The European Court of Human Rights is crucially critical of the formal nature of the procedure for consideration by the domestic courts when it comes to such detentions. Namely, in the case of *Gafgaz Mammadov v.*

⁶⁹ Available at: <https://bit.ly/2XnpspN>, last seen on: 02.07.19.

⁷⁰ Available at: <https://bit.ly/2Jp5Jwe>, last seen on: 02.07.19.

⁷¹ Case of Emin Huseynov v. Azerbaijan, Application No. 59135/09, 2015, available at: <https://bit.ly/2JwvBX5>, last seen on: 02.07.19.

Azerbaijan, the court opines - “the domestic courts that imposed the administrative detention also acted arbitrarily in reviewing both the factual and the legal grounds for the applicant’s detention. They failed to examine whether the police had invoked the correct legal basis for the applicant’s arrest ... In such circumstances, the Court cannot but conclude that the applicant’s deprivation of liberty as a whole was arbitrary and therefore contrary to the requirements of Article 5, section 1 of the Convention.”⁷²

Another problem of detainment was a disproportionate physical force. According to Article 32 of the Law of Georgia on Police, a police officer shall have the right to use physical force, among others, to arrest an administrative offender only if the use of non-violent methods cannot ensure the performance of police functions vested in the police officer under the law.⁷³ According to Article 10 of the same Law, when using physical force measures carried out by a police officer shall be based on the principles of the proportionality and necessity. Even when a measure of physical coercion is to be justified by necessity, the used force shall be adequate. In the given situation, the footage spread by media outlets capturing physical and verbal abuse of the detainees demonstrates the alleged criminal and disciplinary violations by the police officers. The timely reaction of the investigative authorities will be crucial for assessing the serious violations identified during the assembly.

According to the case law of the European Court of Human Rights, interference with the right to freedom of assembly is not limited to direct prohibition, whether *de facto* or *de jure*. Interference may also be expressed in the state taking other measures. For the purposes of Article 12, Section 2 of the European Convention, the term “prohibition” must include measures adopted before, during, and after assembly. If direct prohibition prior to assembly has a chilling effect on those intending to participate in assembly, that constitutes interference in the right to freedom of assembly,⁷⁴ measures adopted by the state during the assembly, such as dispersal, detainment and imposition of a penalty or responsibility for participation in the meeting, also constitute restriction of freedom of assembly and interference with the right protected by Article 11.⁷⁵

The above-mentioned decision of the European Court of Human Rights in the case of *Gafgaz Mammadov v. Azerbaijan*,⁷⁶ concerns the dispersal of assembly and manifestation and illegal arrest, and establishes that the measures used by the state to arrest demonstrators and sentence them to 5 days of imprisonment serve the purpose not related to the grounds to justify deprivation of liberty and contain elements of misconduct and arbitrary behaviour by the police officers. The Court pointed out that although an applicant was formally accused of failing a lawful request of a policeman, in fact, he was arrested because he took part in the unauthorized peaceful demonstration.

According to the Joint Report of the UN Special Rapporteur, the detainment authority exercised in the name of human rights during the assemblies, the goal of which is to prevent future threats coming from the protestors,

⁷² Case of *Gafgaz Mammadov v. Azerbaijan*, Application no. 60259/11, 2015, §§108-109, available at: <https://bit.ly/1VTXRFC>, last seen on: 02.07.19.

⁷³ Law of Georgia on Police, Article 32.

⁷⁴ Case of *Gafgaz Mammadov v. Azerbaijan*, Application no. 60259/11, 2015, §50, available at: <https://bit.ly/1VTXRFC>, last seen on: 02.07.19.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

can play an important protective function.⁷⁷ However, no one may be subject to arbitrary arrest or detention. The arrest of protestors during an assembly to prevent or punish them for the exercise of their right to freedom of peaceful assembly, especially when the arrest is unjustified or exceeds principle of proportionality, does not meet international standards of human rights. Therefore, using the “mass arrests” method by the police is problematic as it entails high risks of arbitrary arrest.⁷⁸

According to the same Report, Special Rapporteur considers administrative arrests to be particularly problematic. The human rights committee underlined that arrest that does not impose any criminal responsibility upon a person, encompasses sharp risks of arbitrary deprivation of liberty.⁷⁹ Proportionality standards are exceptionally relevant for administrative penalties issued during assembly. None of the penalties should exceed the limits of the non-proportionality because generally it might have a “chilling effect” on the exercise of freedom of assembly.⁸⁰

On June 21, arbitrary and illegal arrests took place, including, in some cases, disproportionate use of force during the police raids. The beating of the participants and inhuman treatment practices were observed even when they were under police’s effective control and therefore did not pose any threat. In these circumstances, the use of force is inadmissible and it shows unjustified motives for punishing the participants. Police that has been moving from the territory adjacent to the Parliament building did not make any clear warnings addressing the people on Rustaveli Avenue, hence, it was not clear as to what was the requirement of police and what specific territory were they obliged to leave. During the arrests, the police were not guided by individual guilt and responsibility and part of the demonstrators were detained without any legal grounds.

The Practice of Post Arrest Mistreatment

The demonstrators themselves, when being interviewed by the EMC, referred to the facts of post-arrest mistreatment of the detainees on June 21. Video footage recorded by media outlets on-site⁸¹ clearly depicted the facts of post arrest abuse of power by the police against the citizens.⁸²

One citizen under the EMC’s protection explained that he was near the Parliament building during the peaceful demonstration and later left the territory. After watching television footage of protestors being injured with the rubber bullets, he and his friends decided to go back to the territory adjacent to the Opera and provide medical assistance to the injured. He was arrested at around 2 am and spent the entire night in the yard of an administrative building of the Ministry of Internal Affairs at Noe Ramishvili street. Despite a number of requests he was not allowed to use the restroom, hence, he was forced to satisfy his biological needs on-site. He also explained that the police officers demanded him to write explanations containing the recognition of alleged offenses, otherwise they threatened with tightening the handcuff causing additional pain to the detainee.

Other participants of the rally, Irakli Khvadagiani and Davit Khvadagiani also mentioned lack of access to medical care. In his statement, Irakli Khvadagiani stated that after police truncheon hit his eyebrow, his face was

⁷⁷ UN Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, 4 February 2016, A/HRC/31/66, §44, available at: <https://bit.ly/2XoV9iz>, last seen on: 02.07.19.

⁷⁸ *Ibid.*, §45.

⁷⁹ *Ibid.*, §§ 46-48.

⁸⁰ *Ibid.*, §§ 46-48.

⁸¹ Available at: <https://bit.ly/2RLZ96A/>, last seen on: 02.07.19.

⁸² Available at: <https://bit.ly/2FLuXDM>, last seen on: 02.07.19.

bleeding while he was suffering from severe headache for the entire night. As he was brought into the building of the Ministry of Internal Affairs, he requested to be transferred to the hospital, yet he only received medical care through the treatment of his wound in the same building. The judge considering his case in administrative hearing sentenced him to 9 days of administrative imprisonment without showing any interest in his injuries. Later, after leaving the temporary detention facility, he was diagnosed with an orbital fracture. According to him, due to lack of proper medical care in the course of 3 days, he might need a surgery.

Two other demonstrators also pointed out during the court hearing that they were beaten after administrative arrest, but the judge, without clarifying additional circumstances, recommended them to apply to the investigative bodies.

The Law of Georgia on Police obliges police officers to use the forms, methods, and means of police activity that do not infringe human honour and dignity, right to life, physical inviolability, and other fundamental rights and freedoms. According to the same Law, torture, inhuman and degrading treatment shall be inadmissible when carrying out a police operation.⁸³

In order to perform police function assigned to him/her, under the Law on Police, a police officer should use proper and proportionate coercive measures only in the case of necessity and to the extent ensuring the achievement of legitimate objectives.⁸⁴ When using a coercive measure, a police officer shall try to ensure that damages are minimal and proportional.

On the morning of June 21, besides the matter of the legality of mass arrests, in certain cases, it also became clear that police mistreated detainees who were under their effective control. These detainees were beaten, deprived of the basic physical needs and their medical care was delayed and/or insufficient.

Interfering with the Journalistic Activities

Likewise the participants, the media representatives were also injured as a result of the police's disproportional use of special means during the dispersal of the protest rally held on 20-21 June 2019. According to the information provided by the Georgian Charter of Journalistic Ethics, more than 30 journalists were injured during the dispersal of the rally. Most of them injured their head and faces due to the rubber bullets.⁸⁵

During the first use of rubber bullets at the assembly in front of the Parliament building, soon after midnight, photos of a photographer Guram Muradov capturing his back being injured by rubber bullets were spread through media outlets.⁸⁶ In his interview with the EMC, Muradov pointed out that on the evening of the 20th of June, he was near the Parliament building, close to the special units' cordon. By the time the rubber bullets were shot at media representatives, the protestors were already scattered around. According to his perception, shooters were targeting the journalists. Muradov says that his journalistic activities must have been noticeable and perceptible for law enforcement officials, as he was holding a photo camera and wearing a journalist's badge. After being injured, he had to leave the rally to receive medical care.

⁸³ Law of Georgia on Police, Article 9.

⁸⁴ Law of Georgia on Police, Article 31.

⁸⁵ Available at: <https://bit.ly/2FO6U7n/>, last seen on: 02.07.19.

⁸⁶ Available at: <https://bit.ly/2xqLUPo>, last seen on: 02.07.19.

Journalist Giorgi Gogua was on the place of the accident from the beginning of the rally until the dawn. He provided EMC with the explanations concerning interference with the journalists' activities during the 20-21 June rally in front of the Parliament building. According to him, in the beginning, the police was arresting the destructive participants of the rally. However, after firing tear gas and rubber bullets, the law enforcement personnel started deliberately using these measures against peaceful protestors, forcing them to leave the rally. According to Giorgi Gogua, journalists were among injured.

On June 21, from 7 am, Nika Mukhigulashvili, a journalist for the Public Broadcaster, was on Melikishvili Avenue and Kostava street, where the protestors and law enforcers had gathered. He was covering post dispersal situation. Police arrested him on Nikoladze street where a couple of protestors entered a building to escape the police. Together with the operator, he was trying to capture this event on camera. According to Nika, police commanded him and the operator to stop recording as they started arresting the protestors. Their resistance was followed by police aggression and punches into their faces. As he explains, around 3-4 policemen were using their hands, feet and truncheons to beat him aiming at his body and head. As a result, Nika suffers from a brain concussion, excoriation and shoulder and nose injuries. The Prosecutor's Office had launched an investigation.

Article 17 of the Georgian Constitution protects the right to receive and impart information freely. Restriction of these rights in a democratic society is possible for a necessary state or public safety and to secure the rights of others as prescribed by the law.

In the case of the dispersal of the June 20-21 rally, neither verbal warnings from the law enforcement agencies nor any communication on leaving the territory for the protection of journalists was made. Therefore, their job was to cover events in front of the Parliament building and there was no reason for restricting this activity. According to the Criminal Code of Georgia, unlawful interference with the journalist's professional activities is a criminal offence. In this case, it is critical that investigation, by means of timely and objective actions, identifies persons responsible for various degrees of injuries caused to the journalists.

According to the OSCE Report, law-enforcers have a constitutional responsibility not to prevent or obstruct the work of journalists during public demonstrations, and journalists have a right to expect fair and restrained treatment by the police.⁸⁷ Although third parties, such as monitors, journalists and photographers may also be asked to disperse, it is important that they are not be prevented from observing and recording the police operation.⁸⁸

Summary

With this Report, the EMC provides the initial legal assessment of the 20 June events and at the time being, is based on the information accessible for the organization. Obviously, after more detailed analyses, human rights violations practices and individual cases will reach a larger scale and hence, will require more detailed and in-depth analyses. As of today, considering the materials at hand and limited methodological instruments for analyses, the EMC considers that on 20 June, the behaviour of the part of the protestors on Rustaveli Avenue gained uncontrolled violent character and gave to the police the legal ground for interfering with freedom of assembly and dispersal. However, during dispersal, the police disregarded legal requirement prescribed for

⁸⁷ Handling the Media during Political Demonstrations, Special Report (Vienna: OSCE, 2007), available at: <http://www.osce.org/fom/25744>, last seen on: 02.07.19.

⁸⁸ OSCE/ODIHR, Guidelines on Freedom of Peaceful Assembly, SECOND EDITION, § 168, available at: <https://bit.ly/2yrcfhz>, last seen on: 02.07.19.

dispersal and failed to utilize negotiation recourses. Without having any effective, reasonable and thorough plan to manage the human masses, the police used excessive force massively and without differentiation, clearly violating the sequence and rules for use of special means and as a consequence, severely injured demonstrators and in some cases, caused irreparable injuries. After the first dispersal of the rally, at midnight, the police actions clearly became arbitrary. At this point, it became vague as to what was the legitimate objective for chasing, arresting and abusing those standing afar from the Parliament building for several hours.

The scale and intensity of the police abusive force, lack of systems for effective monitoring and prevention of the clear and massive violation of the human rights by the police, and continuing tolerance of these processes for several hours, clearly calls for legal and political responsibilities of relevant high-ranking and decision-making officials at the Ministry of Interior Affairs.

The Report provides a detailed description of the dynamics of the development of the demonstration, including, the rally participants' attempts and objectives to storm the Parliament building, episodes of the attack on the police cordon in front of the Parliament building. This very repeated aggressive behaviour and recurring attempts to break into the Parliament yard gave to the police a legal ground to disperse the demonstration. It is unfortunate that opposition political leaders too were engaging in such illegal encouragement. Even more so, in light of the escalated situation, the organizers of the rally did not even try to stop the violent behaviour of the participants and take steps towards de-escalation. Running of the democratic processes with such tactics inherently contradicts the idea of democracy and such irresponsibility calls for an appropriate legal and political evaluation.

Despite the legality of the decision on the dispersal of the rally, the consecutive police actions revealed a number of problematic, and among them, severe episodes. First of all, the police - in clear violation of the legislation regulating the assemblies and manifestations, failed to ensure proper warning of the participants prior to the dispersal.

The police launched dispersal at midnight by firing tear gas. Shortly, even though the recourses of the less intensive and severe special means were yet not been exhausted, tear gas was followed by the rubber bullets. Moreover, the threat, feasibility and imminence of repeated attempt to storm the Parliament building and/or attack the police units after tear gas was not adequately assessed.

Dispersal operation practically lasted the whole night. A certain part of the protestors exposed aggressive behaviour towards the police in various locations, by using different objects. However, the police failed to separate peaceful rally participants from the violent ones and the intense police force was applied without differentiation. This is most clearly confirmed by the dozens of injured journalists. Use of special means by the police caused severe injuries to the protestors. In some cases, the police fired rubber bullets from a close distance targeting the head and face, hence increasing the severity of the injuries. In the process of enforcement of the decision on dispersing the rally, the police failed to comply with the rules and sequence pertaining to the use of special means and used disproportionate force.

Dispersal of the rally was followed by arrests of dozens of protestors. Grounds for arrests and clarifications of the police personnel provided to the court are weak, hackneyed and extremely identical. In a number of cases, it indicates that the arrests were arbitrary. The information on physical abuse by the police during as well as after arrest is especially alarming. Part of the detainees pointed out that they were beaten, subjected to inhuman treatment and mistreated after being arrested.

The anti-occupation rally of the 20th of June, which later turned into the violence, was dispersed by the disproportional police force. Despite the legitimate grounds for the dispersal, in the process of planning and execution, the police violated various aspects of fundamental freedoms such as: freedom of assembly and manifestation, freedom and physical immunity, and prohibition of inhuman treatment. By all means, the harshly aggressive behaviour of the part of the participants and episodes of clashes with police is to be taken into consideration. However, it is clear that in the process of dispersal, the police failed to uphold the principle of differentiation and proportionality.

The dispersal of the 20 June rally also emphasized the institutional challenges, namely that the Ministry of Internal Affairs lacks enough strategy, technics, systems and human resources to manage mass gatherings in compliance with the human rights standards.

The systems necessary for formulating a reasonable and efficient action plan, measuring and preventing threats, monitoring, checking and harmonizing the processes are still fragile, faulty and weak. Engagement of the personnel of the Ministry of Internal Affairs in the violence of this scale against its own citizens substantially damages the trust towards law enforcement agencies. June 20 was a continuation of the severe political and social experience concerning coercive dispersal of the demonstrations that took place in previous years (including 7 November 2007, 26 May 2011). It is indicative of the practice of institutional violence and weakens the confidence into the state institutions and democratic processes.

In order to react properly to the plain violation of human rights, and more generally to the recurring, long-lasting and severe illegalities demonstrated by the police actions, the below listed is of utmost importance:

- The Minister of Internal Affairs should take political responsibility for the conducted operation and its consequences, and resign;
- The Prosecutor's Office should, for the purpose of applying appropriate liability measures, conduct a timely investigation in order to identify criminal behaviour of the individuals responsible for planning the dispersal of the rally and actions of individual policemen. The public should be informed as to the forms of responses adopted per each case;
- Where journalists are victims, the investigation should focus on the aspects of interference with journalistic activities;
- Episodes encompassing attacks on the policemen by the part of the protestors that took place on 20 June in front of the Parliament building and on other territories shall also be investigated in a timely manner; the same applies to the call for storming the Parliament building and subsequent actions of the protestors;
- Arbitrary and unsubstantiated arrest shall be subjected to an independent investigation, the same as the cases of arrest and subsequent abuse and inhuman treatment;
- It is important that the public is duly informed regarding the process and outcomes of the current investigations. In addition, for the purposes of transparency and confident into the investigation, it is crucial that the rights of the victims and their representatives are highly protected. Moreover, the supervisory role of the Public Defender must be attainably fostered;

- It is important that the Ministry of Interior Affairs duly analyses the systemic defects revealed on the 20th of June through dispersal, adoption of special means and management of large-scale masses of the protestors. The Ministry must address these defects on the institutional level;
- The government must fully support the rally victims by financing their medical and rehabilitation services.