REPORT
IMPLEMENTATION OF THE CHAPTER I OF THE HUMAN RIGHTS ACTION PLAN

PROJECT
HUMAN RIGHTS ACTION PLAN
EXECUTION MONITORING FOR
IMPROVING JUSTICE SYSTEM

Georgian Democracy Initiative

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INTRODUCTION

The „Georgian Democracy Initiative" (GDI), with the financial support of the Open Society – Georgia Foundation carried out a second phase of the project titled: "Monitoring Human Rights Action Plan for the Improvement of Justice System" (hereinafter the "project"). The project took place between October 22, 2015 – July 22, 2016 and it intended to monitor and evaluate the activities foreseen by the Chapter 1 (Criminal Justice) of the Government's Human Rights Action Plan (2014-2015), both from qualitative and quantitative perspective (Hereinafter "Action Plan").

The Government of Georgia adopted an Ordinance on July 5, 2013 on "Creating an Inter-Agency Council for Elaborating the Human Rights Strategy and Action Plan and Adoption of its Statute". The Inter-Agency Council, created by the above mentioned Ordinance, prepared drafts for the 2 Year (regularly updated) projects for the National Strategy Human Rights Strategy (hereinafter "Strategy"), and for the Georgian National Human Rights Action Plan (hereinafter "Action Plan").

Elaborating the Strategy and its adoption by the Parliament (on April 30, 2014) must be assessed positively, since it aims to:

1. Establish systemic approach to implementing human rights related duties for every branch of the government;
2. Raising awareness of the Georgian population on the essence of human rights. The Strategy is valid for the years 2014 – 2020.

The Strategy consists of 23 chapters and covers important avenues, such as refinement of various Criminal Laws and reinforcement of the principle of equality of the parties; improvement of the protection of the right to fair trial; reform-

ing Prosecutor's Office for human rights-based fair, effective and transparent criminal prosecution conducted independently; establishment of mechanisms to care for former prisoners and to establish penitentiary and probation system compliant with international standards; implementing effective measures against torture and improper treatment, including independent and transparent investigation; implantation of guarantees for higher standards to protect the inviolability of the right to private life; implementation of the guarantees for higher standards for the right of freedom of expression, and the right of assembly and manifestation; ensuring the freedom of faith and belief; ensuring gender equality; implementation of higher standards for the right to property.

In order to effectively implement the strategy, the #445 Ordinance dated by July 09, 2014 introduced an Action Plan. On the bases of the same ordinance, an Inter-Agency Coordination Council (for 2014-2015 Action Plan) was set up, which includes the representatives of the Georgia's Executive and Legislative branches, local non-governmental organizations and international organizations.

The Action Plan defines specific actions to implement the Strategy and the bodies, which are tasked to carrying out these duties. Timeframes are written, which dictate what task should be implemented and when. At the same time, indicators are given, which ensure that qualitative and quantitative evaluation of the activities are performed. It is also important, that this forma includes they duty to consider opinions and recommendations prepared by the Public Defender of Georgia, local and international NGOs with regard to qualitative and quantitative criteria on the implementation of the Action Plan.

Also, the Administration of the Government of Georgia (AOG) created a Human Rights Secretariat (hereinafter "Secretariat") which receives reports from responsible state bodies later to be presented to local and international NGOs on the state of implementation of the Action Plan. Furthermore, the Secretariat prepares Action Plan Implementation Report, presented to the Government of Georgia.

For several reasons, the fact that an action plan was developed for implementing the Strategy merits positive evaluation. Namely,

1. As already outlined, specific activities are foreseen for achieving each separate aim, their deadlines, evaluation indicators and responsible agencies;
2. Unlike the Strategy, Action Plan implementation has shorter timeframe for implementation (2014-2015);
3. Inter-Agency Council, created on the basis of the Action Plan (hereinafter "AP") must report on its implementation to the Government of Georgia in every March, who then presents the report to the Parliament of Georgia.

These factors support effective/consistent implementation of the Strategy and allows to evaluate activities carried out by responsible government agencies.

The second phase of the project "Monitoring Human Rights Action Plan for the Improvement of Justice System" began on October 22, 2015 and was finished on July 22, 2016. The goals and aims of the project were determined by the efficiency of the monitoring in mind and included various activities. One of the activities was a permanent monitoring, which meant qualitative and quantitative monitoring of activities carried out by agencies listed by the AP. Furthermore, within the project, we have prepared numerous recommendations, comments and propositions to respective responsible governmental agencies. At the same time, one of the most important activity of the project was to inform the public about the compliance of activities foreseen by the AP and whether their implementation correspond to the aims of the AP itself.

The above mentioned activities were implemented with the goal to ensure comprehensive and quality monitoring of the activities foreseen by the first two chapters of the AP, to facilitating this process, supporting them and thus ensuring the aim defined by the Government of Georgia is achieved – improving existing standards. It is oriented towards specific aims – filled with specific comments and recommendations, comments made at working meetings, dissemination of the results of the monitoring to the public, which establishes a well-documented expectations/demand for establishing higher standards for the protection of human rights in Georgia.

It must be noted, that the present report aims not at criticizing any of the governmental agencies, but to identify problems that emerged in the implementation process of AP. The present report also presents specific recommendations, which will support elimination of the problems identified and compliance with the aims of the implemented activities with the aims of the AP; improving monitoring of NGOs of the implementation of the AP.

Since the firsts phase project report covered the period from July 9, 2014 (when the AP was adopted) to December 31, 2014 activity implementation monitoring, therefore the second phase of the project covered the period from December 31, 2014 to December 31, 2015. The report focuses on activities implemented by responsible agencies in throughout this particular period and it does not go into the details about the activities, which took place after January 01, 2016. However, in certain cases, the report will present qualitative evaluation of activities during the 2016.

BRIEF REVIEW OF PROJECT ACTIVITIES CARRIED OUT BY THE GDI

The project staff permanently monitored, qualitatively and quantitatively, the activities by respective agencies indicated throughout the Chapter 1 of the AP and the aims it sets out to achieve.[1]

The project lawyer has participated in 15-16 February, 2016 in the working meeting held by the Human Rights Secretariat, which discussed the 2016-2017 Draft Action Plan. Furthermore, the participants were divided by the chapters of the AP activities into separate groups, and for the total duration of one day, they discussed the issues foreseen in the respective chapters of the AP. The project lawyer attended working group 1, which among other topics, included the discussion on the Chapter 1 of the AP – Criminal Justice and took active part in the discussion.

Furthermore, the project staff have been permanently participating in various meetings, organized by NGOs or other initiative groups, which related to state of affairs of the implementation of the activities or initiatives foreseen by the Chapter 1 of the AP. In October, 2015, the project lawyers participated in Criminal Justice Reform Group of the "Coalition for Independent Justice", including the presentation of the report of the expert, Nikolai Kovalev, who presented his findings on the draft law on reforming jury system at the courts, such as the introduction of new standards in the Criminal Procedure Code on Hearsay, indirect testimony and admissibility of general evidences. They participated in discussions of on various conclusions prepared by foreign experts on the new

[1] Note: in most cases, AP indicators only evaluate implementation of activities. It looks at it as a fact and does not evaluate its content. Unlike this, we have evaluated the activities in terms of their compliance with international standards that were carried out by responsible agencies and whether they were able to reach the goals and aims the AP had envisioned for them.

Administrative Offence Code of Georgia. The key issue was the transparency of the Justice Council and the importance of implementing of a system of electronic assignment of cases.

On February 05, 2016 the project staff participated in the meeting organized by the "Coalition for Independent and Transparent Justice". The meeting was devoted to discussing internal matters of the Coalition, including the issue of agreed and targeted strategy. On February 23, 2016 they attended and actively participated in the meeting with the foreign experts on the topic of independent investigative mechanisms, that was held in Mukhrani. On February 25, 2016 they participated in the conference jointly organized by the CoE Office to Georgia and the Supreme Court of Georgia, titles: "Disciplinary Violations of the Judges, Proposed List and Explanations".

In addition to the above mentioned, the project lawyers were actively participating in discussing research and propositions prepared by NGOs. Among them, we must note the presentation of the research by "Judges Unity" on the issue of affording the judges to ask follow-up questions without agreeing this to the necessary parties. We believe that this issue should become a subject of discussion, since it is not ruled out, that if this amendment is introduced, it will negatively affect they system of adversarial trial of criminal procedures. Also, the lawyers attended the presentation of the various research and discussions by the member organizations of the "Coalition for Independent and Transparent Justice". The research was focused on the results of the monitoring of the High Council of Justice activities. Furthermore, one of the meetings was dedicated to future steps of Court system reform.

Of particular importance was the meeting with the representatives of the US Embassy to Georgia and the US Judge they had invited, Susanne Lee. The meeting was part of the Coalition's Criminal Justice Reform Group activities. The meeting was dedicated to the introduction of the probation institute to Georgia. At the same meeting, the members of the Criminal Justice Reform Group discussed the most recent project related to jury trial and addressed the Parliament of Georgia to consider those important recommendations, which in

the opinion of the Group, would eliminate essential gaps in the Government proposed draft law. The project lawyers were active in preparation of the statement text.

At the same time, within the frames of the project, we requested public information from the respective agencies, including the Ministry of Internal Affairs, the Prosecutor's Office, the Justice Ministry, the Human Rights Secretariat and the Administration of the Government of Georgia on those activities, which were to be implemented to achieve aims foreseen by the AP.

The Ministry of Justice elaborated alternative mechanism of witness interviewing and rejected an important achievement of the 2009 reform – the right to give testimony willingly. Hence, the project lawyers prepared significant recommendations on the topic. Namely, GDI believes that the procedure for witness interviewing, that had already been in the processual laws did not have alternatives. However, given the position of the Government of Georgia on how much unprepared in general the courts and investigative bodies can be, we offered the Justice Ministry an effective way to implement an already prescribed procedure for interviewing, which was that the existing procedure should enter into force gradually. Therefore, the law enforcement bodes and the Judiciary branch would be given additional time to prepare. Namely, from January 01, 2016 to July 01, 2016 a procedure that involves interviewing a witness directly at a substantial hearing would enter into force only for those violations, which foresee restriction of freedom for up to 2 years or lesser punishment. From July 01, 2016 to January 01, 2017 the new procedure would be spread to crimes of lesser gravity, while from January 01, 2017 to July 01, 2017 the same procedure would now be covering grave crimes and from July 01, 2017 to extremely grave crimes.

Additionally, from the first half of 2016 the GDI has submitted its comments and recommendations to the Human Rights Secretariat for the 2016-2017 governmental project for the AP. The project team has prepared a document, that discusses in detail the gaps in the 1st and other chapters of the Plan. Particular attention is paid to qualitative evaluation of the activities to be carried out.

Negative sides have been outlines, the need for their improvement has been emphasized and various models to mediate the issues have been proposed, which, one the one hand, respond to the aims the AP sets out to achieve, and on the other hand, ensures that relevant international standards are established in the Georgian Law. The document focusses on the correct definition of the indicators and with regard to specific formulations, gives recommendations to increase their qualitative evaluation.

Within the project, the GDI became an active member of the "Coalition for Independent and Transparent Justice" since January 11, 2016. Within the same project, the GDI actively joined the Criminal Justice Reform Group of the Coalition, where the project lawyer participates as the full member. The cooperation foresees working on such fundamental issues, as Justice reform, systematic review of Administrative Offence Code of Georgia, jury trial reform, etc.

It must be noted, that the project lawyers have prepared and after the discussion in the afore-mentioned group, submitted a constitutional claim on constitutionality of the Paragraph 1 of Article 136 of the Criminal Procedure Code (the right to request information stored electronically) and the Paragraph 10 of Article 120 (the right to initial investigation) with regard to the Paragraph 1 of Article 42 of the Constitution of Georgia (right to fair trial).

7 QUALITATIVE AND QUANTITATIVE EVALUATION OF ACTIVITIES CARRIED OUT BY RESPECTIVE RESPONSIBLE AGENCIES UNDER CHAPTER 1 OF THE ACTION PLAN

Goal: 1. To review crime laws with the aim to approximation to the international standards

Task: 1.1. To initiate changes needed to refine criminal procedure legislation

Activity: 1.1.1. Reinforcement of the principles of adversarial system and the rights of the defense party

Deadline: 2014

Indicator: Legislative change was initiated

Status: Incomplete

The Government of Georgia, under the AP 14/15 Chapter 1 Para. 1.1.1. undertook a responsibility to reinforce the principles of adversarial system and the rights of the defense party in the criminal procedure laws.

The monitoring conducted within the project has shown, that the responsible bodes have completely failed to honor the responsibility during the 2014. Despite the Government inaction, the Human Rights Secretariat awarded the status of "Complete" in the report to the respective chapter. The implementation report claims that legal amendment activities carried out in 2013 and in 2015 qualify as completed activities.

This type of approach was evaluated negatively in the GDI 1st phase report. We believe that the Secretariat has the duty to accurately reflect activities that

were complete and that were not complete. Otherwise, there will always be a feeling that the Secretariat is trying to portray things in a positive manner.

Amendment timeframe in criminal procedure laws that had anything to do with the adversarial system and the rights of a defense party, have already violated deadlines mandates by the AP. Despite this, we believe it is reasonable to still evaluate these changes with regard to the general aim of Ch. 1 of the AP. Namely, it must be clarified to what degree the legislation has been approximated to the international standards of human rights.

When talking about the changes, it must be noted, that the enactment of the rule of witness interviewing on February 20, 2016, despite its positive sides was implemented with significant defects (what is meant here is the introduction of the rule for the voluntary interviewing, but with certain limitations). Further noteworthy are the changes, reflected in the Secretariat's report, of July, 2015 that relate to the change of rule for the revision of the judgment on one of the methods of the restriction of liberty – an arrest. This change has slightly ameliorated the state of the rights of a defense party.

At the same time, despite the changes, it still remains actual and problematic, that there are procedures in the procedure laws, that significantly diminish adversarial system and the rights of a defense party. Among those is the right to request from the courts to access information from electronic carriers which is only afforded to the prosecution[2] and it is also the prosecution party, which is entitled to research first the evidences that were solicited by the defense party.[3]

It must be noted, that the GDI has submitting a constitutional claim to the Constitutional Court of Georgia to resolve these two issues. The GDI requested the Court to render the Paragraph 1 of Article 136 and the Paragraph 10 of Article 120 unconstitutional, since they violate the right protected under the Paragraph 1 of

[2] Article 136 of the Criminal Procedure Code of Georgia, Legislative Herald of Georgia №1772, 03/11/2009.

[3] Article 120 (10) of the Criminal Procedure Code of Georgia, Legislative Herald of Georgia №1772, 03/11/2009.

Article 42 of the Constitution of Georgia – the right to guaranteed and fair trial, namely, the important element of the right in question: the principles of adversarial system and the equality of the parties. Furthermore, we believe that the right to defend oneself from self-incrimination is violated by the fact, that the evidences solicited by the defense can first be examined by the prosecuting party.

THE PRINCIPLES OF ADVERSARIAL SYSTEM AND EQUALITY

Prior to delving into details of the issue, we must note that a proper explanation is due as to what constitutes adversarial trial and equality. Both, the Constitutional Court of Georgia and the European Court of Human Rights have established the practice, according to which, the principle of adversarial trial is a core element of the right to fair trial.[4]

Adversarial trial is closely linked with the principle of the equality of the parties[5] „requesting equality ensures, that the parties, with respect to each other, will not be subjected to differential treatment and none of them will find themselves in an unfavorable circumstance".[6] Equality is interpreted as awarding similar processual rights to the procedure (prosecution and defense).[7]

Adversarial system and the equality of the parties is always enabled, even at the stage of soliciting evidences during the investigation stage.[8] There is an exception though, when the investigation is launched, but prosecution procedures have not been launched against any particular person.[9] Therefore, both

4 09.29.2015, № 3/1/608,609 Decision of the Constitutional Court of Georgia on the case "Constitutional Submission of the Supreme Court of Georgia on the constitutionality of Part 4 of Article 306 and the Constitutional Submission of the Supreme Court of Georgia Regarding the Constitutionality of the Sub-Paragraph "G" of Article 297 of the Criminal Procedure Code of Georgia. II.P. 16. Dombo Beheer B.V. v. the Netherlands, § 33, Feldbrugge v. the Netherlands, § 44

5 ECHR, Reinhardt and Slimane-Kaïd v. France (Appl. Nos. 23043/93 and 22921/93), 31 March 1998, §103., Delcourt v. Belgium (Appl. no. 2689/65), 17 January 1970, § 28. ECHR, Borgers v. Belgium (Appl. No. 12005/86), 30 October 1991, (procureur general), §§ 24 and 26.

6 Decision of the Constitutional Court Plenum №3/1/608,609, 09.29.2015, Para. 19.

7 Doucet v UK, ECtHR, 24/06/2003, §41; ICCPR, Article 14(3)(d); ECHR, Article 6; G.B. v France, ECtHR,02/10/2001, §58; Brandstetter v. Austria, ECtHR, 28/08/1991, §66.

8 Imbrioscia v Switzerland, 24th November 1993, No. 13972/88, §36.

9 Commentary to the Criminal Procedure Code of Georgia, Various Authors, 84, §2-3, "Meridiani" Publishing House, 2015.

the prosecution and the defense parties must have the right and the possibility to solicit, present and examine evidences under similar circumstances.

New procedures for interviewing and interrogation

Criminal justice reform is a subject of active discussion for several years now. Among its most debated aspects are the fundamental changes in the criminal procedure system. The 2009 Procedure Code prioritized the constitutionally recognized principle of equality of the parties and the adversarial system and unlike the 1998 Criminal Procedure Code, criminal justice was transformed from inquisitive model into the adversarial model.

In addition to ensuring that justice system was in full harmony with the international and the European human rights standards, the main goal of the reform was to reinforce the principle of adversarial trial in the criminal procedures, including among those, during the investigation phase.[10] In this regard, one of the core innovations of the reform was to eliminate mandatory testimony during the investigation and ensuring that witness testimony is voluntary. Furthermore, the criminal justice reform strategy notes, that the principle of voluntary testimony may include certain exceptions. Deviation from the established rule may be justified by investigation of crimes that are exceptionally threatening for the society and solving them is in the public interest, however it was clearly written in the document that **in such circumstances, during the pre-trial investigation phase, the witness must be interrogated with both parties present and in front of the judge.**[11]

As for the rule that mandated the witness to testify during the pre-trial phase and the need to amend it, it must be noted that the 1998 Code had established a procedure for witness interviewing and the practice based upon this procedure has become the subject of criticism on multiple occasions. The analysis of

[10] 2005 Criminal Justice Law Reform Strategy, elaborated by the group created by the Presidential Decree #914 on 09.10.2004. Tbilisi. 3.

[11] 2005 Criminal Justice Law Reform Strategy, elaborated by the group created by the Presidential Decree #914 on 09.10.2004. Tbilisi. 5.

the practice and the legislation demonstrates, that the regulations enabled by the 1998 Criminal Procedure Code gave the investigative bodes the opportunity to extract important information from the person, under a status of a witness, whom the investigation had identified as a suspect/accused but had not yet given him/her such status officially, while at the same time, after the status had been conferred, this person was entitled to right to remain silent.[12]

That is why, the need for systemic change of the legislation was established and the criminal procedure system needed to move onto the rails of adversarial trial.

Therefore, on October 09, 2009, the Georgian Parliament has adopted a systematically new Criminal Procedure Code, which is purely based on the adversarial trial, which entered into the force on October 01, 2010. The new Code introduced the institute of voluntary interviewing at the pre-trial inquiry phase.

Despite the aim of the Legislator, until February 20, 2016 interrogation still continued to be conducted using the 20.02.1998 Code procedures.[13] After the February 20, 2015 the State has rejected to fully enact the new procedure introduced by the 2009 reform with regard to voluntary interviewing and proposed an alternative rule to the necessary parties. According to new regulation, the State has partially equalized processual state of the parties during the investigation, however it could not force itself to fully reject privileging prosecution over the defense party.

The legislative proposition, prepared by the Justice Ministry presents it so that on the surface one might believe that during the interviewing giving information is voluntary, however, on the other hand, it still allows for such exceptions, that clearly contradicts the principle of voluntarily giving out information as well as the principle of adversarial trial and the principle of equality. This merits negative evaluation.

12 ibid, 2

13 Part 1 of Article 332 of the Criminal Procedure Code of Georgia, Legislative Herald of Georgia #1772, 03/11/2009.

The changes allow the prosecuting party to petition magistrate court to interrogate the person to be interviewed in front of the judge. The petition must be based on the refusal of the person to be interviewed by an investigator (1) and also there must exist an established fact and/or information (2) which would satisfy an objective person to arrive at a conclusion, that the person in question may be in the possession of the information that may be used for establishing the circumstances related to the criminal case. We believe that significant violation of the principles of adversarial trial and the equality of the parties occurs due to the lack of a right of a defense party to attend the process when the witness is being interrogated, at the petition of the investigation, in the presence of a magistrate judge.[14]

We believe that when the witness has refused to testify, allowing only the prosecution to interrogate the witness in the presence of a magistrate judge and restriction the defense party to attend this process significantly violates the right to fair trial, namely the principle of adversarial trial and the principle of equality of the parties, since it puts the parties in an unequal position to solicit, present and examine evidences and hence, affect the correct and fair court decision.

It must be highlighted and negatively evaluated, that a very low threshold is introduced when the investigation petitions to force the witness to be interrogated in the presence of a magistrate judge. Namely, according to the existing norms, the prosecuting party needs a "totality of facts or of information" to conduct any investigative function (in this case, to interrogate the witness), while according to the Law adopted, forced interrogation of a person in the presence of a magistrate judge can be conducted based on a single piece of information or a fact. There is a danger, that this standard may be used by the investigation by extremely broad margin of interpretation, at the detriment of fair justice and the interests of an accused.

Given all of the afore-mentioned, the new procedure for witness interrogation contains transitional statement, which states, that until the January, 2017 a whole list of crimes, including the ones that are directed against life and health,

[14] Article 114 of the Criminal Procedure Code of Georgia, Legislative Herald of Georgia №1772, 03/11/2009.

state interests (murder, bodily harm, conspiracy or revolted against constitutional order) will be investigated based on the procedures introduced by the 20.02.1998 Criminal Procedure Code procedures. The same Code will be used until January 01, 2018 to interrogate witness on the cases that involve crimes directed against property (robbery, banditry), etc.

Procedure to request electronic data

One more example how adversarial system in the criminal proceedings and the equality of the parties is violated, is the procedure on requesting electronic data from computer systems or data storage systems. Article 136(1) stipulates that only the Prosecutor is able to motion for the permission to access data.

Among theorists and practitioners of the law there is an opinion, that electronic data request procedure only concerns "service providers". For the purposes of the procedural legislation, service provider is any physical or legal person, which provides users with the ability to communicate electronically; also, any other person, who stores or farms computer data for providing such electronic communications or on behalf of the users of such services.[15] (e.g. internet providers, mobile operators, etc.)

With regard to this subject, the Appellate Court has made an important interpretation. Namely, it has outlined, that electronic data request from service provider also covers request of important documentation or information for the case.[16]

For the purposes of procedural legislation, computer system is any mechanism or group of linked mechanisms (via software), that farms data automatically (e.g. personal computer, any equipment with a microprocessor, cell phone, etc.).[17] Computer/electronic data is any electronically convenient format, including a software, which ensures the functioning of the computer system.[18]

15 Criminal Procedure Code of Georgia, Para. 29. Art. 3, Legislative Herald, 31, 03/11/2009, #1772.
16 Tbilisi Appellate Court Order, December 9, 2014. Case #1c/1245.
17 Criminal Procedure Code of Georgia, Para. 27. Art. 3, Legislative Herald, 31, 03/11/2009, #1772.
18 Criminal Procedure Code of Georgia, Para. 28. Art. 3, Legislative Herald, 31, 03/11/2009, #1772.

Therefore, unlike defense, the prosecution is eligible to request and receive information regarding any electronic data carrier. Given today's technological reality, this is a significant advantage.

In summary, in the criminal case, the imposition of differential treatment on acquiring information/evidence is not only conditioned by those subject what may be in the possession of electronic data (service provider), but **the norm regulates as its object the information/electronic format of the documentation.**

This view becomes more apparent when we engage in the comparative norm analysis. Namely, in the present time, the motion of the prosecution towards the courts to collect data, the ensuing order is directed at the service provider and it is mandatory only for it to comply with the order.[19]

As a result, electronic data request must be viewed as a specific case of data collection general rule, since technological advancement and widespread adoption of electronic usage of information/documentation mandated to introduce a new regime to collect evidences that are in the electronic format.

The right to initial examination of evidences

According to Article 120(10), only prosecutor has the right to initial examination of evidences collected as a result of the defense petition: an object, a piece of evidence, a material, a document containing information. We believe, that this provision does significantly violate the principles of adversarial system and the equality of the parties, in addition to violating defense guarantees against self-incrimination.

The history how the norm was adopted matters. The Parliament of Georgia has adopted the norm on June 14, 2013, however enacted it later. The norm was enacted on September 1, 2014, as a part of the amendment package. Among those, the defense was equipped with the right to search and seize, at the permission

[19] Criminal Procedure Code of Georgia, Art. 138, Legislative Herald, 31, 03/11/2009, #1772.

of the court, however the legislator simultaneously eliminated the right of a defense to present evidences as an exception.

The report prepared by the Legal Affairs Committee of the Parliament reads, that the aim of the awarding the right to search and seize to defense, in parallel with awarding the prosecution the right initial examination of the evidences serves the purpose of fortifying the adversarial system. We don't believe this is argued well.

Namely, before the change took place, it was believed, that the parties were in an unequal position. The unequal state of the parties was balanced out by awarding the defense to search and seize, however awarding the right to initial examination of evidences has again, disturbed this balance.

The ECHR views the right of non-self-incrimination as the cornerstone of the right to fair trial. It sees the defense against self-incrimination in various ways, such as:

- The right of the defendant not to testify against self (right to silence);
- Right not hand over any evidence to prosecution which will prove his/her guilt.

In Funke v. France, the ECHR found, that an attempt at the appellant to present evidences on the case he may have committed, was the violation of Article 6 of the Convention. Namely, it violated his right to silence and the prohibition to facilitate self-incrimination.

The Constitution of Georgia also safeguards against self-incrimination. Namely, according to the Constitutional Court interpretation, Article 42(8) is a private case of protection against self-incrimination and only covers the prohibition to testify against self. Therefore, the prohibition to hand over evidences of other types of evidences to the prosecution, which would prove his/her guilt, is not protected under this paragraph. However, Article 42(1) does protect, in general, the right to fair trial, including every type of self-incrimination.

Besides, the explanatory note attached to the norm illustrates, that the reason for its adoption is to stratify the adversarial principle. With this, the Constitu-

tional Court interprets, that "the believe is devoid of any grounds, which argues that a procedure, that rules out achieving an aim, may be justified by the means to achieve this aim, in this case, with upholding the adversarial principle",

We believe it is reasonable to abolish the paragraph 10 of Article 120 (the right to initial examination of evidences) which, in this case, would eliminate the threat of the violation of the right to non-self-incrimination.

In summary, we believe that the responsible parties, that prepared and enacted these legislative changes, have attempted to somehow approximate Georgian Law with the European standards. Despite this, the stringent issues we have identified remain actual. The later substantially threatens adversarial criminal proceeding and such fundamental principles, as adversarial system, equality of the parties and protection of the defendant against self-incrimination. Further, it disallows full realization the right to defense.

The Report of the Secretariat also speaks about the changes to be made in the Procedural Code, currently under development at the MoJ. It's about the new procedure on the admissibility of evidences, including, the definition of clear criteria for the admissibility of indirect evidences. In general, the concept of the reform merits positive assessment, but the duty to carry out these changes was mandated by the Constitutional Court decision on December 22, 2015.[20] The Court declared the normative content of the second sentence of Article 13(2) and the Article 169(1), what allowed to charge a person as accused and to issue negative decision on the basis of an indirect testimony. Furthermore, we believe, that only the process of working on the changes and their initiation cannot a priori be assessed as approximation of Georgian legislation to the European standards. Changes are required, first to correspond in content to the Constitutional Court decision and then, to the standards, which are mandatory under international treaties and the ECHR practice.

[20] See <http://constcourt.ge/ge/legal-acts/judgments/saqartvelos-moqalaqe-zurab-miqadze-saqartvelos-parlamentis-winaagmdeg-884.page >

Activity1.1.2. Plea bargain reform

Indicator: Initiation of legislative reform

Deadline: 2014

Status: Completed

Changes were made to plea bargain system on July 24, 2014, reforming its core aspects. 2015 GDI report gave positive assessment to the changes, which were in line with Ch. 1 of the AP.[21] There haven't been any legislative changes since.

Activity:1.1.3. Jury trial reform

Indicator: Respective legislative changes initiated

Deadline: 2014

Status: Incomplete

According to the 2014-2015 Human Rights Action Plan, jury trial reform was supposed to be completed in 2014. True, some changes were indeed made to the regulatory norms on 18.09.2014 and 19.02.2015 in the Criminal Procedure Code, however it wasn't addressing jury trial reform, but instead, diminished it significantly. 2015 GDI Report assessed these changes as negative and hoped, that the Government would continue reform process in terms of refining and improving it.[22] Unfortunately, AP deadlines passed, but legislative changes haven't been made. Hence, similar to the previous report, GDI issues negative assessment in this regard. Human Rights Secretariat has also given the status of "incomplete"

21 GDI Report on the implementation of Chapter I and II of the Human Rights Action Plan, 2015, 15 <http://gdi.ge/uploads/other/0/252.pdf>

22 GDI Report on the implementation of Chapter I and II of the Human Rights Action Plan, 2015, 18 <http://gdi.ge/uploads/other/0/252.pdf>

to the actions that respective responsible bodies were supposed to carry out in terms of jury trial reform.

Given their importance, we still believe we should engage in the assessment of June 24, 2016 Criminal Procedure Code amendments, to be enacted on January 1, 2017. The changes were preceded by CoE expert prepared research on comparative-legal models of jury trial in Europe, used by the MoJ as the basis for the draft Law. NGOs were actively involved in drafting it as well, sharing their views with the MoJ. Particularly noteworthy are the views of a Canadian expert on the draft Law, Nikolai Kovalev, invited by the OSGF.

Initial draft was extremely faulty and has been criticized by international organizations and foreign experts, however the final draft has incorporated most of the comments. The Coalition for Independent and Transparent Justice responded to these amendments and stated that the proposed changes significantly improve basic functions and actions of the jury trial system.[23]

According to the explanatory note, the aim of these changes is to "improve jury trial deficiencies and bring them in line with international standards regulating it." Given this aim, several directions of the Criminal Procedure Code were amended, including, territorial and material jurisdiction of jurors, grounds for the inadmissibility of jurors, dates and logistics of jury trials, removal of jurors, etc. Core body of changes merit positive assessment, as it is directed towards refinement of trials were jury are included. Nevertheless, the Law still maintains norms, that significantly reduce the jurisdiction of jury trial.

A welcome change was made to provide jurors with transportation[24], selection criteria and timeframes, which state that jury pool must be made up of not 100, but 300 persons, who will receive a judge-approved questionnaire 20 days prior to court date, which they return within 5 days, and a court forwards them, also

[23] <http://www.gdi.ge/ge/news/koaliciis-damoukidebeli-da-gamchvirvale-martlmsadjulebisatvis-gancxadeba-sisxlis-samartlis-processhi-nafic-msadjulta-institutis-reformirebastan-dakavshirebit-momzadebul-kanonproeqtze.page>

[24] Law of Georgia on Amending the Criminal Procedure Code of Georgia, Para. 2, Article 1 (Para. 1 of Article 28, Criminal Procedure Code).

within 5 days to the parties.[25] Previous version of the Code did not set dates, a reason jurors usually received the questionnaire a day before trial.[26] Furthermore, the list of subject, a judge must explicate to the jurors before the opening of hearing and before they head to issue verdict, was broadened.[27]

According to the amendment, previous conviction is now one more reason for recusal of a juror. Persons, who have been fined with administrative fines for minimal amount of drug abuse may not serve as jurors if less than 1 year has passed since the imposition of fines. Changes were made to appellate court hearing of the verdict's conviction part. Namely, unlike the previous procedure, even if the Appellate Court has eliminated the verdict of guilt issued by jurors, it is now able to Order a new conviction, which cannot be further appealed. The previous procedure mandated the same jury hearing chair to hear the case again and issue a new verdict.

There were several additional changes made to the Code. A norm was removed, prohibiting unsubstantiated evidence usage to discriminate jury candidates on the basis of "race, skin color, language, sex, belief, worldview, cultural and social belonging, origin, family, wealth or status, living place, health status, lifestyle, birth place, age or any other sign." It must be noted, that with regard to this norm, Professor Kovalev and NGOs were concerned[28] that it was just a declaratory statement and despite prohibition, given no mechanisms were instituted to enact it, it was impossible to establish, wither unsubstantiated recusal of jury candidate was based on a discriminatory ground. Instead of adding additional mechanisms in the legislation, the norm was eliminated altogether, however no reasoning was provided for doing so. We believe that such prohibition, coupled with effective mechanisms, would be fruitful to eliminate discriminate in carrying out justice.

25 Law of Georgia on Amending the Criminal Procedure Code of Georgia, Sub-Para. 5, Article 1 (Para. 1 of Article 221, Criminal Procedure Code).

26 Explanatory note to the Law of Georgia on Amending the Criminal Procedure Code of Georgia, Para. 9, Article 1 (Para. 1 of Article 226, Criminal Procedure Code). <http://info.parliament.ge/file/1/BillReviewContent/123251? >

27 Law of Georgia on Amending the Criminal Procedure Code of Georgia, Para. 10, Article 1 (Para. 4 of Article 231, Criminal Procedure Code).

28 Jury Trial in the Criminal Proceedings, Georgian Human Rights Network, 2016, 25, 39.

Special attention needs to be paid to changes made to the Criminal Procedure Code, negatively assessed by international experts and the NGOs. This concerns subject matter jurisdiction and venue jurisdiction of jury trial. Unlike the previous procedure, which spread jury trial subject matter jurisdiction onto every crime that results, if found guilty, in the restriction of liberty, the new change list specific acts, jury can trial. The list is rather limited and covers only intentional murder (Articles 108–109), intentional grave damage of health (only the Paragraphs 2, 4, 6 and 8), Violence (only Para. 2), trade in human body parts, also a list of crimes against human rights and freedoms, namely: illegal restriction of liberty (only the Paragraphs 2–4), crimes related to trading in humans, holding someone hostage, torture and threat of torture, degrading and inhuman treatment (only the Para. 2), intentionally charging an innocent person guilty (only the Para. 2), intentional unlawful detention or imprisonment, unlawful placement or detention at the psychiatric institution, also the following crimes: falsification (only the Para. 4), production, import or selling of materials threatening human life or health (only the Para. 3) and explosion.[29] The explanatory note does not mention, why these articles and why not others were selected. Such narrowing down of the jurisdiction of jury trial merits negative assessment, especially given that the legislation does not even intend to broaden it in the future, unlike the previous transitional provision, which mandated the Legislator to gradually expand jury trial jurisdiction.

As for the venue of jury trial, the Law defines specific territorial units, where jury trial will function. These are: Tbilisi, Kutaisi, Batumi, Rustavi city courts. Also, Zugdidi, Telavi and Gori regional courts.[30] The explanatory note provides, that this approach is in line with the practices of other countries, where as a rule, jury trial is functional in large cities and regional centers. It must also be noted that the explanatory note does not show why the jurisdiction of jury trial was shrunken down. Until today, jury trial was scheduled for expansion and according to transitional provisions, initially it was enacted in Tbilisi and Kutaisi

[29] Law of Georgia on Amending the Criminal Procedure Code of Georgia, Para. 9, Article 1 (Para. 1 of Article 226, Criminal Procedure Code).

[30] Law of Georgia on Amending the Criminal Procedure Code of Georgia, Para. 1, Article 1 (Article 21^1, Criminal Procedure Code).

city courts. Hence, it would be better, if the legislation continues gradual roll out of jury trials and covered the entire territory of Georgia. Contrary to this, however, the adopted changes state it directly, that there are only 7 courts listed in the Law, where jury trial will be enacted, however the Code remains mum on the expansion perspective.

Also, the changes did not concern the mandatory nature of jury trial in aggravation or reduction of penalties. In this regard, the OSCE and CoE August 22, 2014 joint report is quite vocal, also pointed out in the GDI previous report. The joint assessment negatively assesses the restrictive nature of jury trial recommendations, which me cause inconsistency with court practice on similar cases and the number of sentences it regularly sets for a given crime. Further, experts believe that accused has the right to know why did the jury aggravated/reduced his/her sentence.[31] There has not been any change in this regard.

The GDI hopes that the Government of Georgia, as well as, the Parliament of Georgia will take these comments into the consideration and take measures to eliminate these gaps in the Legislation in question.

Activity: **1.1.4. Initiation of legislative changes to fortify the rights of the victims**

Indicator: **Respective legislative changes are initiated**

Deadline: **2014**

Status: Completed

In order to fortify the rights of victims, legislative amendments were made on July 24, 2014 in several subject, that ensure that the rights of victims are prop-

[31] Joint Opinion on The Criminal Procedure Code of Georgia, OSCE/ODIHR and Council of Europe, Opinion-Nr.: CRIM -GEO/257/2014 [RJU], Warsaw/Strasbourg, 22 August 2014, §§ 27-28. Cited in GDI Report on the implementation of Chapter I and II of the Human Rights Action Plan, 2015, 19. <http://gdi.ge/uploads/other/0/252.pdf>

erly defended and in general, the institute of victim is enhanced in the criminal proceedings. The GDI 2015 Report gave positive assessment of these changes, both in terms of quantity and quality. After that, no more substantial changes have been initiated into the Law.

Despite the implemented changes, in order to further fortify a victim's rights, more changes would be advisable. The right to have access to information would be one such important change. Today's norms allow a victim to "get to know" with the case materials, if this doesn't contradict the interests of the investigation.[32] The practice, based on this norm, dictates that the prosecution lets the victim to get to know to case materials on the spot and even if they request, they will never receive these materials, which on numerous occasions, infringes upon the interests of the victims.

It would be welcome change if the prosecution not only allowed the victims to get to know the materials of the case but if they were mandated to hand copies to them. This should be clearly indicated in the legislative norm.

It must be noted, that the Chapter 1 of the 2016-2017 Human Rights Action Plan foresees the further fortification of the rights of victims as one of its actions to be taken. GDI hopes, that the above-mentioned recommendations will be taken into the consideration.

Activity: **1.1.5. Preparation of necessary legal initiatives to implement European standards in the criminal justice system to protect the right to privacy**

Indicator: **Respective legislative changes are prepared**

Deadline: **2014-2015**

Status: Completed Partially

Chapter I and II Implementation Report (2015), GDI focused on changes adopted in 2014, which regulated implementation of secret investigatory activities. Part

[32] Criminal Procedure Code of Georgia, Sub-Para. h) of Art. 57

of the changes were assessed positively. However, concerns were expressed with respect to few issues and respective recommendations were given. Unfortunately, no more changes have been implemented in the Law since then.

On April 14, 2014 the Constitutional Court found, that a list of norms that regulated secret investigatory activities were unconstitutional with regard to Articles 16 and 20 of the Constitution. Namely:

- The law of Georgia on Electronic Communications Sub-Paragraph A of Article 8^3, its first sentence allows a respective state authority to "have access to communication and physical lines of communication and their connectors, mail servers, bases, station equipment, communication networks and other communication connectors and to be technically able to retrieve information in real-time and with this aim, to install equipment and software for free of charge for lawful interception of communication at the means of communication and operators."
- The first sentence of B Sub-Paragraph of Article 8^3 of the Law on Communications, the responsible authority has the ability to copy and retain identification data from the communication channel for up to 2 years.
- The Paragraph 31 of Article 31 of the Criminal Procedure Code of Georgia stipulates, that two-key electronic system is a combination of technical equipment and software for secret investigatory activities, which rules out the possibility for the law-enforcement to access monitoring system without the electronic permission of the Personal Data Inspector and to activate the object independently.
- The Paragraph 4 of Article 143^3 of the Criminal Procedure Code stipulates: "the responsible authority can retrieve and retain any communication metadata from telecom operators' networks, computer networks and systems with the aim of conducting secret investigatory activities foreseen under the Sub-Paragraphs a) and b) of Article 143 and to be technically able to retrieve information in real-time and with this aim, it installs equipment and software for free of charge for lawful interception of communication at the means of communication and operators."

In deliberating on the disputed norms, the Constitutional Court examined legislative gaps and circumstances, which allowed the disputed norms to impose

significant threats of disproportional interference in the rights. Namely, the court considered the following factors:

- The ability of State Secret Service to own and administer technical equipment (to retrieve information in real-time and with this aim, to own infrastructure and technical abilities which are created by responsible authorities and they are also responsible for administering it).
- The ability of the State Secret Service to have access the telecommunication source of information, using lawful interception of communication, the Secret Service has direct contact with the communication channel;
- The respective authority is allowed to install and operate equipment and software at the operations base of the communication tool;
- Secret Service is professionally interested to own as much information as possible, which increases the risks and temptations of interfering in the right;
- The Legislation does not allow Personal Data Inspector to conduct full and comprehensive audit of technical infrastructure;
- The two-key system is not enough to carry out control effectively, since it cannot rule out that it can be sidestepped (therefore, skipping the courts and the Inspector) by usage of other equipment and software (in parallel mode) to eavesdrop telephone communications;
- It is ineffective that the Inspector inspects the lawfulness of data farming grounds and the fact that respective responsible persons are able to farm data, since she cannot rule out the fact that secret investigatory functions can still be carried out without her participation in it;
- The disputed norms foresee the possibility to retrieve information from internet communication in real time, which is not even regulated by the two-key electronic system. At the same time, the disputed norms do not differentiate which technical means are used for which investigatory function by the respective authorities.

Given all of the above-mentioned, the Court found that: "Consequently, such model not only rules out, but itself increases the risk of violating a right and cannot be counted as the least restrictive and proportional means to interfere

in privacy, hence it violates the Paragraph 20 of Article 16 of the Constitution of Georgia."[33]

As for identification data copying and storing for 2 years, the Court took into the consideration the following circumstances:

- The disputed norm equips the State Secret Service with both technical means, as well as, immediate authority to copy identification data and store them in the so called "banks";
- The risks to violate rights by storing such data are increased by the fact that effective control mechanisms cannot be introduced, as the existing laws won't allow for it;
- Technically, it is possible to create an "alternative bank" in the process of copying and storing identification data, which may not be a shared knowledge and not even the Personal Data Inspector may be aware of its existence. Furthermore, there is a risk that anyone could have access to these illegal copies;
- The control mechanisms are there for the files that have been copied/stored. However, there is not control how the information is copied and how it is retrieved;
- It is ineffective control mechanism, foreseen by the current Law, which stipulates that the Personal Data Inspector must inspect the state of the affairs on the locations. The Inspector randomly verifies changes in data banks;
- The disputed norm is also unconstitutional because the identification data is stored for 2 years;
- The disputed norm does not bind the State with the responsibility to only copy and retain relevant information. Instead, it provisions that every, any identification data can be stored;

[33] The Constitutional Court of Georgia Decision, April 14, 2016 №1/1/625,640: Public Defender of Georgia, Citizens of Georgia – Giorgi Burjanadze, Lika Sajaia, Giorgi Gotsiridze, Tatia Kinkladze, Giorgi Chitidze, Lasha Tugushi, Zviad Koridze, NELP "Open Society Georgia Foundation", NELP "Transparency International Georgia", NELP "Georgin Young Lawyers Association", NELP "International Society for Fair Elections and Democracy" and NELP "Human Rights Center" V. Parliament of Georgia II. Para.79

- The credible risks exist that the identification data could be accessed by responsible bodies, without the decision of the courts and without immediate necessity.

Given these circumstances, the Constitutional Court found the norms allowing the copying and retention of identification data for up to 2 years unconstitutional.

Hence, the Constitutional Court found the 2-key system for carrying out secret investigative operations and mandated the Legislator to introduce a model, which will eliminate the possibility to gain access to personal information beyond what is required by the law and is protected by control mechanisms. The Court also took into the consideration that executing this judgement requires fundamental legislative changes and technical and institutional arrangements to enact it, thereby setting the date for the enactment of the judgement on March 31, 2016.

Unfortunately, the Human Rights Secretariat's 2014-2015 Action Plan Implementation Report only focuses on the implemented legislative changes and does not even mention the judgement of the Constitutional Court, which rendered these changes unconstitutional.

Georgian NGOs have drafted a legislative proposition as part of the "Es Shen Gekheba/This Concerns You" campaign, which the Parliament failed to consider. There are no legislative propositions currently registered in this regard currently in the Parliament.

The GDI hopes, that the Legislator will fully implement the judgement of the Constitutional Court, including the motivation part and will introduce personal data collection model in full compliance with the European standards and the Constitution of Georgia.

Task: 1.2. To prepare package of legislative changes to liberalize the Criminal Procedure Code, to increase the discretion of judges, to formulate legal norms that have higher clarity and certainty.

Activity: 1.2.1. Prepare a project on General Part

Activity: 1.2.2. Prepare a project on Private Part

Deadline: 2014–2015

Indicator: Respective legislative changes are prepared

Status: Completed

The 2015 GDI Report gave positive assessment to the activities carried out by respective bodies to review and amend the Criminal Code of Georgia. GDI forwarded its comments and recommendations to the MoJ. The July 09, 2014 Project has been handed over to the CoE for expertise. The CoE conclusion has been received in March, 2015. The Implementation Report of the Secretariat claims that the Code project was renewed and was based on the CoE findings. At the October 13, 2015 conference the amended draft Code was discussed, which included the CoE expert findings. The final version of the Draft will be sent out in 2016, claims the Secretariat's Report.

Despite the violation of AP deadlines, the fact that numerous activities were carried, that the scale of the planned changes is large, that the draft document was sent to CoE, which takes its time to review it, we believe that the actions of the responsible body were proportional with regard to the aim of the action.

Task: 1.3. Systematic review of the Administrative Violations Code of Georgia

Activity: 1.3.1. To elaborate a systematically new project of the Administrative Violations Code of Georgia; To harmonize the norms regulating administrative detention with the right to fair trial

Deadline: 2014–2015

Indicator: Administrative Violations Code of Georgia was reviewed systematically; The Annual Report of the Public Defender of Georgia

Status: Incomplete

The position of the Human Rights Secretariat with regard to implementation of the present sub-chapter merits negative assessment. The report of the Secretariat describes the changes to the existing Administrative Violations Code as if they underwent systematic review. While it is true, that these changes somehow improved the quality of protection of constitutionally guaranteed rights, and in some cases, brought it on par with the European Standards (the reduction of administrative detention from 90 days to 15 days), but these changes under no circumstances can be presented as the results of a systematic review.

The public is unanimous in its assessment that the presently enacted 1984 Code is faulty. GDI shares this view: outdated, Soviet regulations still enacted within the Administrative Violations Code are often themselves the source of threats to human rights and freedoms violations. Therefore, it is vitally important that a new Code is elaborated and adopted. The new Code must adopt new approaches, those based on the European Standards.

Although the Secretariat's Report does not mention it, we have requested information from the Administration of the Government, which shows that the Commission on the Revision of the Administrative Violations Code[34] has elaborated a substantially new draft Code, as well as, propositions to amend Criminal and Criminal Procedure Codes.

[34] The Commission was set up on November 3, 2014. Government Order #1981.

Fundamental approach to changes means, that certain violations are moved from the Administrative Violations Code into the Criminal Justice field. The violations must be regulated by the so called "criminal justice prosecution" field. Their nature must be significantly approximated to the criminal violations, which will ensure that those that have perpetrated these acts are guaranteed higher standards in the criminal proceedings.

The changes proposed by the Government foresee a new notion of light crime, which combines 5 existing administrative violations. These are: petty hooliganism, abuse of 112 (emergency services) telephone number, violation of Articles 9, 10 and 11 of the Law of Georgia on the Freedom of Assembly and Manifestation, disobedience to the lawful request of the law-enforcement officer, including verbal and other insults and violation of the restrictions imposed by the Protective or Restricting Order.[35] The Criminal Code imposes up to 3 months of penalty for these crimes and it does not result in having convictions. Furthermore, the planned changes to the Criminal Procedure Code will liberalize petty crimes. E.g. for one incident, a person can only be convicted for no longer than 2 months prior to the trial hearings have begun for petty crimes, in order to restrict liberty, the incarceration will not be applicable anymore, etc.

The author of these changes believes that these violations do have criminal nature, since for each of them a penalty in the form of administrative detention is foreseen.

We also welcome the Government's approach to review the Administrative Fines Catalogue. The new Administrative Violations Code does no longer include administrative detention.

The foreign expert conclusions must be cited when these changes are discussed.[36] These conclusions were handed over to the Criminal Justice Reform Group of the Coalition for Independent and Transparent Justice. The project lawyers were actively involved in this process.

The Conclusion covers changes to the Administrative Violations Code (general part), as well as, changes to the Criminal and Criminal Procedure Codes. The

35 http://www.transparency.ge/node/5915 [Last checked on 14.08.2016]

36 Expert evaluation of the Administrative Violations Code as of February 11, 2016 by the Professor, Doctor Lauren Bachmayer Winter, Universidad Complutense, Madrid, Spain. Peter Pavlin, Slovenian Ministry of Justice.

experts welcome, in general, to the idea of a reform and its form. They note, that the changes are in line with the European and the UN Standards, such as the guarantees to fair trial, presumption of innocence and the right to appeal. Nevertheless, they also present important recommendations, most of which are assessments of technical parts of the Code.

First, the inclusion of enhanced judiciary control in the Administrative Violations Code is a welcome step. This ensures higher standard of human rights protection and the right of a person to be heard by a court. At the same time, the experts found that criminalization of the violations of criminal nature is justified, which provides higher standard for processual guarantees for those who perpetrate these acts. However, they believe that the criminal justice nature of an administrative violation is not limited to the fact, that administrative legislation provisions detention as the penalty for its perpetrators. The experts principally believe, that the processual guarantee standard provided for petty crimes must be spread to the majority of administrative violations, since their nature, despite the sanctions imposed, are still what the Convention includes under the criminal justice prosecution.

In general, we view the reform and the package of change prepared by the Government as positive. We also understand that the changes are in the process of elaboration, but we believe that any attempt of responsible bodies to delay the reform will negatively affect the entire reform. We also share expert views, including where they argue for more strictly defined and delineated regulations that prohibit double-punishment, better define the presumption of innocence and norms about an intention, and an imprudence.

Besides this, we believe that the proposed changes to the rules for administrative detention, and the obscurities it is marred with, need to become the subject of discussion. Despite the fact that higher level of judicial control mechanism is proposed to oversee the law-enforcement than what the current Code offers, the threat of unsubstantiated and arbitrary administrative detention still persists in the proposed Code.

Our assessment is negative in terms of proposed changes to criminalize violation of certain norms of the Law on the Freedom of Assembly and Manifesta-

tions: for violating a perimeter established by the Law and partial, or full blockade of traffic route by the participants of meeting and manifestation (Articles 9 and 11[1]).[37] Given the level of social threat of these acts, they cannot be regulated by criminal justice legislation. There will always be a negative feeling about the threats that a government will interfere in the Constitutionally guaranteed right, without due substantiation and with high intensity.

Despite certain activities, the responsible bodies were unable to complete the tasks assigned by the AP in a timely manner. It still is unclear why the responsible bodies could not ensure to complete the assigned tasks in time. It is equally perplexing as to why the completion of Administrative Code reform process is being delayed. It is particularly alarming, that the responsible bodies did not respect deadlines set by the AP, which the monitoring shows, have been neglected systematically.

Task: 1.4. To increase the role of judges in the criminal justice to improve human rights protection.

Activity 1.4.1. Analyzing the role of a judge in the criminal justice process and material legislation and administrative violations norms with the aim to protect human rights, ensure higher standards, prevent the violation of the rights and react to the violations.

Deadline: 2014-2015

Indicator: A research is prepared; research results are available to the public.

Status: Unclear

Activity: 1.4.2. and 1.4.1 foresaw analysis. Within this analysis, if the need is identified, to prepare legislative propositions and present to the Legislative Body.

[37] http://www.transparency.ge/node/5915 [Last checked on14.08.2016]

Deadline: 2015

Indicator: Respective legislative changes are prepared

Status: Unclear

With regard to these activities, the Secretariat's report indicates, that legislative change package was prepared by the Inter-Agency Council Against Torture, Inhuman Treatment or Treatment Directed Against Dignity and Honor. The package intends to increase the role of judges in the criminal process to prevent torture and other forms of inappropriate treatment. Namely, according to changes to be introduced in the Criminal Procedure Code of Georgia, the judge has the authority to refer to investigative authorities to launch investigations if she/he has been given a reasonable doubt during the proceedings that a defendant may have been subjected to torture, inhuman or degrading treatment.

Preparing similar legislative propositions, merit positive assessment as it will contribute to eliminating and identifying the incidents of torture and inhuman treatment of defendants/accused.

The GDI has addressed the MoJ and requested to have access to this document, as well as, the information regarding the implementation of activities foreseen in the Articles 1.4.1. and 1.4.2. of the AP. We have not received any response from the Ministry. Since no other media has reported on these propositions and the Ministry has ignored our request, and that no other source is able to confirm this information, we find it impossible to trust the Secretariat's report about the completion of Articles 1.4.1. and 1.4.2. of the AP. Therefore, the implementation of these activities are assessed as "Unclear".

Information about the timely implementation of the activities of the AP

Number of Activities	Number of Completed Activities	Number of Partially Completed Activities	Number of Activities Incomplete	Unclear Status
10	4	1	3	2

BRIEF HISTORY OF THE ADOPTION OF THE DOCUMENTS

On June 13, 2016, the Government of Georgia № 1138 Order approved the draft of the 2016-2017 Human Rights Action Plan and the report on the 2014-2015 Human Rights Action Plan Implementation. According to the same Order, the project and the report was forwarded to the Parliament of Georgia for further approval. On June 20, 2016 these documents were registered at the Parliament of Georgia, but they still remain to be approved by the Parliament.

It must be noted, that according to the Statute of the Inter-Agency Coordination Council of the 2014-2015 Human Rights Action Plan, the Council was responsible to prepare annual implementation reports no later than March 15 of every year, to be presented to the Parliament no later than March 31 of the same year. However, the document wasn't presented to the Parliament until at least 3-months delay.

NGOs joined the development process of the 2016-2017 AP in November, 2015, when the HR Secretariat made the first draft public. After the first round of comments, another discussion cycle was held in February, 2016, after which the Secretariat started working on the final version. GDI was actively involved in the process and has provided oral and written feedback on the document.

COMMENTS REGARDING THE AP

HRAP of the Government (2016-2017) were also commented by foreign experts: Sabrina Buchler[38] and Mark Limon[39]. Their views mostly coincide with the views

[38] Buchler S., Expert on Government Human Rights Action Plan Development, Promoting Rule of Law in Georgia (PROLoG), December 2015.

[39] Limon M., Institutional strengthening and organizational development of the Human Rights Council of Georgia, Promoting Rule of Law in Georgia (PROLoG), November 2015.

of GDI and other international or local organizations. Hence, in the present chapter we present those gaps and respective recommendations, which were pointed out the discussions of the final version of the Document.

- Some elements of the National Strategy are not adequately reflected in the Plan. E.g. the issues related to equality and anti-discrimination issues. While the final version of the Plan reflects a list of aims, goals and activities, the Plan does not fully incorporate for example, activities to protect the rights of sexual minorities.
- The AP includes aims, goals and activities irrelevant to the issues of human rights, which leaves the impression that it has been simply been carried over from another action plan. The list of such indirectly linked activities are e.g. carrying out trainings, providing manuals and textbooks to some respective persons, etc.
- There are errors in the functions of the structural units created for the purpose of, and tasked with the implementation of the Strategy and the AP monitoring. Namely, it is problematic, that the exact role of the Secretariat and its mandate has not been clearly identified in the acting regulations. Also, the mandate of the Inter-Agency Coordination Council is even more obscure and problematic, as are its activities and structure;
- Some headings of certain chapters are selected not according to the list of rights, but according to the list of various state bodies. Given that the AP is a national instrument, that only exists to implement the National Human Rights Strategy and to guarantee specific rights, it would be better if the plan would also be divided by Rights. It must be noted, that unlike the working version, such irrelevant chapters have been reduced in the final draft, but some still are listed separately. For example, a "Prosecutor's Office" is one such heading example of a respective chapter;
- Indicators of the AP deserve strong criticism. Despite numerous calls of foreign experts and local NGOs, none of the comments have been taken into the consideration. It must be noted, that the majority of the indicators are directed at activities (and not to aims and goals) and evaluates only e.g. how many changes were initiated or how many individuals were trained. Such indicators make it impossible to evaluate how well the tasks and aims

of the AP have been achieved. The Indicators must take into the account the qualitative assessment as well. With this regard, GDI 2015 Report has been quite vocal. It is disappointing, that 2016-2017 AP does not incorporate none of these recommendations;

- It remains obscure, as to what is the link between the Government HRAP and other action plans in other fields (the same goes true for the relations between Coordination Council and other inter-agency coordination councils). According to the experts, it's unclear, whether it is understood in the Government if the AP should act as an umbrella document and whether it should include or not a detailed policy of the Government's human rights policy;
- Relations between the HR Secretariat and responsible bodies, also between them and the NGOs have been problematic during the elaboration of the AP;
- It is desirable that the AP is linked with Georgia's international responsibilities and considers aims, tasks and activities Georgia needs to fulfil;
- Mark Limon recommends, that the AP would be better off, if it wasn't a two-year document, but a four-year document. However, there is no unanimousness on this subject. Furthermore, the expert has recommended to establish an online platform, where responsible bodies would enter real-time data on the activities that have been carried out and the Secretariat could monitor these activities from there.

QUALITATIVE ASSESSMENT OF THE CHAPTER I OF THE 2016-2017 GOVERNMENT ACTION PLAN

The new action plan foresees two aims in terms of criminal justice: 1) revision of crime laws with the aim to approximate them with international human rights standards; 2) best ensuring that law-enforcement does not internally violates human rights and efficient reaction to each violation, also bringing law-enforcement to the international standards, which will fully incorporate the human rights standards.

A whole list of AP actions and aims merit positive assessment. Among those, initiation of legislative changes, which directly transform the grounds for dis-

crimination listed in the Anti-Discrimination Law into the aggravating circumstances for respective articles in the Criminal Code of Georgia. Also positive are activities aimed at increasing the sensitivity of judges with regard to hate-motivated crimes and domestic violence, training of judges, ensuring that public statements of prosecution are respectful of the presumption of innocence, etc.

Nevertheless, despite incomplete implementation of the previous AP activities (previous chapters of the report detail these shortcomings), the new AP does not even contain these activities as deliverables (it only keeps activities linked to the fortification of victims' rights and activities linked to the initiation of the Code of Administrative Violations). These facts leave the impression, that the responsible bodies (in this case, this is firstly the Ministry of Justice) somehow believe that have already achieved aims, and actions foreseen in the previous plan that no longer require revision. According to foreign expert, Sabrina Buchler, the actions aims at legislative changes must be carried over onto the 2016-2017 AP and must be evaluated in terms of their execution, because just initiating these changes does never guarantee its proper implementation.[40] Unfortunately, this recommendation has in fact, not been applied with respect to Chapter 1 of the AP (such actions were only taken were the rights of the victims were concerned).

[40] Buchler S., Expert on Government Human Rights Action Plan Development, Promoting Rule of Law in Georgia (PROLoG), December 2015, 7.

SECRETARIAT:

Deficiencies identified at the 1st phase of the project remain actual and the recommendations to remedy them, including:

- Action Plan indicators must be more specific and formulate in a detailed manner, with the ability to evaluate it quantitatively and content-wise; an indicator must allow to evaluate activity but also if the aim was achieved through the activity;
- The reports must fully reflect the state of affairs in terms of activities that have and that have not been achieved, so that the information is understandable in terms of achievements and partial achievements. Also, information about deadlines and timeframes that have been respected by responsible bodies;
- Also, it is important, that AP reflects activities, that despite their number of accomplishment, do not qualitatively respond to aims set by the Plan, or worse, deteriorates existing state of affairs.

RESPONSIBLE BODIES

- In order to fortify the principles of adversarial system and the rights of defense, we believe it's important to enact the procedure for interviewing in the manner that was there as the result of 2009-2010 reform; the procedure made it full voluntary to provide information to the investigation;
- In the criminal proceeding, to enhance adversarial system and the rights of defense, existing gaps must be eliminated in the Law. Namely, defense must be equipped, similar to prosecution, with the right to request elec-

tronic information. Furthermore, the privileged right to initial examination of evidences must be eliminated;

- To enhance the rights of a victim in the criminal proceedings, he/she must be enable to request and receive copies of case materials, in addition to current ability to read these materials;
- In order to reform jury trial, legislative changes must be initiated, that fully reflect ODIHR and UN Human Rights Committee recommendations;
- Based on the Constitutional Court decisions, a personal data collection model must be elaborated, in line with the European standards and the Constitution of Georgia;
- Work must be resumed to systematically examine Administrative Violations Code. The project, prepared by the Government, must reflect comments and recommendations expressed by international experts. Local NGOs and interested parties must be enable to participate in the article-by-article discussion of the Code;
- The responsible bodies must carry out respective duties within deadlines imposed by the Action Plan.