



STRENGTHEN THE PRINCIPLES OF EQUALITY OF ARMS AND ADVERSARIAL PROCEEDINGS IN THE PROCESS OF EVIDENCE COLLECTION INTRODUCTION AND EXAMINATION

RESEARCH

Tbilisi, 2018

This report was made possible by the generous support of the American people through the United States Agency for International Development (USAID). The report was prepared under grants provided by East-West Management Institute's (EWMI) program "Promoting Rule of Law in Georgia» (PROLoG). The contents of this report are the sole responsibility of the author organization and do not necessarily reflect the views of the United States Government, the United States Agency for International Development and East-West Management Institute.

The research was implemented by the Association of Law Firms of Georgia within the project "Strengthening the Due Process Rights and the Role of Lawyer in Justice System".

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INTRODUCTION

This document has been prepared within the framework of the Association of Law Firms of Georgia (ALFG) project “Strengthening the Due Process Rights and the Role of Lawyer in Justice System”, supported by USAID project Promoting Rule of Law in Georgia Activity (EWMI/PROLoG). The document has been Formed and drafted by Mr. Davit Kvachantiradze, an ALFG expert and Ms. Ketevan Chomakhashvili, an invited expert. Also, the executive director of ALFG – Tinatin Shugarova and assistant of the executive director of ALFG – Tamar Abuladze were involved in the process of preparing the research.

The ALFG project aims to strengthen the principles of equality of arms and adversarial proceedings in the process of collection of evidence, their presentation and examination.

The Criminal Procedure Code of Georgia (CPC) is based on the principles of adversarial proceedings and equality of arms. These principles imply that the prosecution and the defence should have reasonably equal procedural opportunities starting from the commencement of a criminal prosecution till delivering a judgement of the court of the final instance.

There are a number of legislative gaps in the CPC, among them the ones that refer to provision of equality of arms and adversarial proceedings. At the same time, there are cases when the absence of clear regulations in the CPC creates unequal opportunities for parties in the process of obtaining and examining evidence.

As a result, gaps in the criminal procedure causes violation of the right to a fair trial, as equality of arms and adversarial proceedings are one of the fundamental principles of the fair trial.

Various international and local human rights organizations have been referring to these problems for years. This document is a compilation of opinions and recommendations made by various international and local organizations concerning these gaps.

The document covers 16 issues. Each issue is presented in an identical format. The essence of a problem/legislative gap is described in the first part, surveys conducted by various organizations concerning the identified problems are presented in the second part and recommendations for filling the gaps are made in the third part.

During the process of working on the document meetings were held with the representative of various state bodies: Legal Issues Committee of the Parliament, Ministry of Justice and the Chief Prosecutor’s Office; Supreme Court judges; lawyers of Georgian Bar Association and ALFG; representatives of non-governmental organizations. The document has been sent to Mr. Richard Gebelein, international expert for evaluation of the document and recommendations. His opinions have been reflected in the final version of the document.

A package of legislative amendments has been prepared on the basis of the document, which will be presented to the Parliament of Georgia and other interested state bodies.



1. NOTION OF EVIDENCE – NOTION OF A PROCEDURAL DOCUMENT

1. Problem / Legislative gap

Under article 3/23 of the CPC, “ Evidence - information or an item, document, substance or any other object containing the information submitted to the court in the manner prescribed by law, which parties use in a court to prove or refute certain facts and make their legal evaluation, perform duties, protect their rights and lawful interests, and which a court uses to establish whether there exists a fact or action because of which a criminal proceeding is conducted, whether a certain person has committed a certain action and whether or not a person is guilty, also to establish circumstances that affect the nature and degree of liability of the accused, and characterise the person. A document is considered to be an evidence if it contains information required for the establishment of factual and legal circumstances of a criminal case. Any source in which information is recorded in the form of words and signs and/or photo-, film-, video-, sound or other recordings, or through other technical means, shall be considered a document”.

Based on a notion of the evidence, the most disputable issue is whether such procedural documents like a ruling of a judge on the conduct of search, arrest protocol, decree on the indictment, etc. are evidence. The indicated documents prove that these evidences were collected legally and/or express the procedural position of the parties concerning certain issues. This issue is important, as parties and court interpret the authority granted by these procedural documents in an inconsistent manner and misuse their authority granted by the law concerning finding these procedural documents inadmissible and removing them from the case, especially considering the fact that finding some of these documents (e.g. decree on indictment) inadmissible has a huge influence on the case results.

2. Surveys done by other organizations

A group of experts¹ referred to this problem in a survey “Evidence in Criminal Proceedings” conducted in 2016 concerning this issue. During the survey persons interviewed talked about this problem. They declared that the indicated norm lacks certainty that leads to establishment of an inconsistent court practice that, in most cases, develops in a contradictory manner. This hinders the parties to fully realize their rights. The survey has presented the following recommendation: “Therefore, it would be expedient to change the notion of evidence stipulated under article 3/23 of the CPC, to distinguish between evidence and procedural documents so that in court practice there are no cases when the defence assumes the burden of proof and a judge interprets the law in an inconsistent manner based on the circumstances of the case.”²

The indicated issue is also discussed in the OSCE Trial Monitoring Report of 2014, where there is a recommendation addressed to the judiciary not to allow considering the indictment as evidence, because this actually causes shifting of the burden of proof onto the defendant.³

3. Court practice:

The Appeal Court practice – By the ruling of Tbilisi Appeal Court dated October 20, 2016, the judge has distinguished between procedural decision, procedural action, investigative action and evidence (with the consideration of crimi-

1 https://www.osgf.ge/files/2016/Publications/merged_document_2.pdf

2 https://www.osgf.ge/files/2016/Publications/merged_document_2.pdf , p. 155.

3 <http://www.osce.org/odihr/130676?download=true>, paragraph 120.

nal case files), despite the fact that this was not stipulated under the CPC). The aim was to define which written document would be evidence and generally, what are admissibility criteria for the evidence that would be reviewed by court. In the opinion of the judge:

a) A procedural decision is the one made regarding certain issues by a person conducting the process, e.g. a decree on the indictment of a person, a decree on conducting search or seizure in the case of urgent necessity, or a decree on the assignment of a forensic examination and other similar procedural decisions.

b) A procedural action is any action of the person conducting the process, which is not a procedural decision and/or an investigative action. E.g. report of a police officer, application of an investigator to an expert about the conduct of examination, a letter of an expert to an investigator about provision of a report on the conducted examination, bringing charges against a person (presenting a decree on indictment and handing over a copy of a decree to prosecute him/her as the accused (unlike delivering a ruling on bringing a person to trial as an accused, which is a procedural decision) and other similar cases.

c) An investigative action is such a procedural action that is directed towards obtaining evidence.

d) Evidence is any document (among them a testimony), object, item, or substance with the help of which the parties are trying to prove and the court establishes innocence of a person, gives less grave qualification to actions; and/or circumstances that have influence on criminal liability, type and amount of punishment, i.e. evidence is any document (among them a testimony), object, item, or substance through which the parties try to prove and court establishes any issue related to the subject of proof (concerning the subject of the action, the object of an arbitrary side and/or the unbiased side). Therefore, the judge found that during the preliminary hearing the first instance court is authorized to discuss about the admissibility of the evidence obtained only as a result of investigative actions (e.g. forensic examination report, crime scene inspection protocol, a record of identification, etc.).

4. Recommendation - It would be expedient to change the notion of evidence stipulated by Article 3/23 of the CPC and to distinguish between evidence and procedural documents in order to eliminate ambiguity existing in the court practice and to enable the parties to argue about inadmissibility of evidence as well as of procedural documents based on various legal grounds. At the same time, it is necessary that the CPC lists the legal grounds and mechanisms for finding procedural documents inadmissible/void.

2. WITNESS INTERROGATION PROCEDURE

1. Problem/ Legislative gap

According to the CPC, the prosecution and the defence have different capacities for the interrogation of witnesses during investigation, which violates the principle of adversarial proceedings between the parties. In particular:

Under article 114/1 of the CPC, during the investigation both the prosecution and the defence may file a motion for the interrogation of a witness before court if there are certain circumstances. Namely:



- a) There is an actual risk to the life or health of the witness, which may interfere with his/her examination during a hearing on merits;
- b) Witness intends to leave Georgia for a long period;
- c) The collection, from other sources, of evidence necessary for the conduct of the hearing on merits requires unreasonable effort;
- d) This is necessary for the application of a special protective measure.

However, article 114/2 establishes at the same time that “an interviewee may also be examined as a witness, upon the motion of the prosecution, before a magistrate judge according to the place of investigation or the location of the witness, if there is a fact and/or information that would satisfy an objective person that the person in question may hold information necessary for ascertaining the circumstances of the criminal case and if this person refuses to be interviewed”.

Therefore, if under paragraph 1 of the article both parties may file a motion for the interrogation of a witness, under paragraph 2 only the prosecution may apply to the court. At the same time, grounds of the second paragraph is wider and the prosecution has a possibility not to reason the expedience of interrogation of a witness under paragraph 1 and file a motion for the interrogation of any witness (who refused to be interviewed) in court only on the basis of paragraph 2. In contrast, the defence does not have such a possibility and it can only apply to the court with the grounds stipulated under paragraph 1.

At the same time, under article 114/10 of the CPC, in case the witness interrogation is conducted upon the motion of the prosecution because of the reason that he/she refused to provide information voluntarily, the defence does not have a right to participate in this interrogation. This is different from other cases of witness interrogation in court established by this code, which violates the principle of adversarial proceedings and deprives the defence of the possibility to have a cross examination of the witness.

Apart from this, article 113/8 of the Georgian CPC, based on article 114/2, stipulates only the authority of the prosecution, in the case of the refusal of an interviewee to be interviewed, to inform the interviewee that he/she may be summoned before the magistrate judge to give testimony, and that the giving of testimony is obligatory and that the failure to perform this obligation will result in the criminal liability of the interviewee. This should be also amended.

It should be also noted that the legislation does not stipulate the presence of the defence at the hearing during the interrogation of a witness invited through the prosecutor’s motion. Therefore the defence does not have a possibility to have a cross examination of the witness.

Therefore such a regulation of the CPC puts the prosecution in a clearly advantageous position from the point of view of evidence collection, which violates the principles of equality of arms and adversarial proceedings.

2. Surveys done by different organizations

Georgian Democracy Initiative has referred to this problem in its “Report on the Implementation of Chapter 1 of the Human Rights Action Plan” published in 2016⁴. The organization thinks it is a violation of the principles of equality of arms and adversarial proceedings that the defence does not have a possibility to be present during the interrogation of the witness, invited upon the prosecutor’s motion, by a magistrate judge.

⁴ “Report on the Implementation of Chapter 1 of the Human Rights Action Plan”, Georgian Democracy Initiative, 2016, p.20-21

In the Report⁵ of the Public Defender of Georgia of 2015 it is also underlined that the prosecution has a priority over the defence during the witness interviewing, as it has a possibility to interrogate witnesses during the trial. Also, the defence is not present during the interrogation. “Yet another problematic issue is that in the abovementioned case, the defence (when an accused person is already involved in the case) does not attend the interrogation of a witness at court. The parties must enjoy equal possibilities to directly and orally examine the evidence. Without such possibility the equality of the arms cannot be ensured. Evidence – the testimony of a witness - examined at a court hearing with the involvement of the parties has a higher degree of reliability than the testimony obtained from interrogation involving only one party. When interrogating a witness at a court, even when it is conducted at the investigation stage in the presence of a magistrate judge, it is necessary (when criminal proceedings have already been instituted) to ensure that the defence attends it and participates in it.”

3. Recommendation – to make changes to articles 114/2 and 113/8 of the CPC and instead of the prosecution to indicate the parties and to delete article 114/10, as the current version of the norms is against the principle of adversarial proceedings. At the same time, other norms related to these regulations should be also amended.

3. PROCEDURE OF REQUESTING INFORMATION FROM A COMPUTER SYSTEM

1. Problem/ Legislative gap

Under article 136/1 of the CPC⁶, only a prosecutor has an authority to file a motion with a court to request information stored in a computer system or a computer data carrier.

According to the CPC and the established court practice, requesting information or documents essential to the case stored in a computer system or a computer data carrier of any person falls under the same regime as the procedure of requesting information from a service provider concerning a client⁷.

Therefore the prosecution, unlike the defence, is authorized to request and receive information from any electronic data carrier through the court, which puts it in a privileged position with the consideration of the current technological reality.

At the same time, article 136/4 of the CPC stipulates the obligation to collect information from a computer system through a secret investigative action. This, on its part, violates the principle of adversarial proceedings, in favor of the prosecution.

2. Surveys done by other organizations

Association of Legal Firms of Georgia (further “ALFG”) referred to the following in its report⁸ of 2016: “According

⁵ Report of the Public Defender of Georgia, 2015, p. 372

⁶ “1. If there is a reasonable cause to believe that information or documents essential to the criminal case are stored in a computer system or on a computer data carrier, the prosecutor may file a motion with a court, according to the place of investigation, to issue a ruling requesting the provision of the relevant information or document.”

⁷ There is an opinion in legal literature and among practicing lawyers that the procedure of requesting computer data applies only to requests of information from “service providers”.

⁸ “Collection of evidence by the defence through court”, 2016. <http://alfg.ge/wp-content/uploads/2016/07/sifa-new.pdf>



to articles 136-138 of the CPC, only the Prosecutor's Office is authorized to file a motion with a court to request information stored in a computer system or a computer database. A wider interpretation of article 136 of the CPC is being established in court practice and any information that may be kept in a computer is implied. Such a regulation and the court practice developed on its basis deprive the defence of the possibility to collect any such evidence that is stored in a computer system. As a result, there is a significant imbalance in favor of the prosecution. It is necessary to amend article 136/1 of the CPC and to clearly define that the request of information under article 136 should be applied only during the process of investigation of crimes committed with the help of computer systems."

A group of researchers referred to this problem in their report of 2016 concerning the evidence in criminal procedure⁹. The report presents the following recommendation: "As the CPC has granted a possibility of obtaining information/collecting evidence from a computer system only to the prosecution and at the same time, the court practice has developed in an unusual manner, it is necessary to specify the notion of a computer data in the Code and to provide a new definition of information collection possibilities. Also, to add a reference to the relevant norms concerning their collection under the procedure established by Article 112 of the Georgian CPC.

Georgian Democracy Initiative considers the indicated issue as a clear example of violation of principles of adversarial proceedings and equality of arms¹⁰ – "A larger part of data that may be needed to strengthen the defence position can be preserved in computer systems. The defence is not authorized to request information from these systems unlike the prosecution. Such an unequal approach towards the parties of the trial cannot be justified based on the most significant principles of adversarial proceedings. Therefore it requires revision."

3. Court practice

a) The Constitutional Court practice - The Constitutional Court of Georgia has reviewed the constitutionality of article 136 of the CPC and in its decision N1/1/650,699 dated January 27, 2017 found that normative content of article 136/1 of the CPC unconstitutional that excludes the possibility for the defence to file a motion with a court to request information or documents stored in a computer system or a computer data carrier. The Court considered that the article 136/1 of the CPC violates the principle of adversarial proceedings, as based on this norm and considering the current reality with the increased volume of digital information, a huge spectrum of information is beyond the access of an accused, which may be not only necessary for reasoning of his/her position based on a character of various crimes, but it can be the only evidence that may acquit him/her. Therefore this norm violates the right to defence guaranteed by the Georgian Constitution (article 42/3) as well as the principle of adversarial proceedings (article 40/3, Id.);

b) The Appeal Court practice

b.a) In cases N1c/118, N1c/548 and N1c/119 Tbilisi Appeal Court Investigative Collegium judges fully shared the opinion of the first instance court judge and considered a CD that contained materials, provided to the prosecution as a result of a voluntary inspection allowed by the owner, as collected in gross violation of the law. According to the reasoning, the party was obliged to collect these materials under a court ruling and in compliance with the procedure stipulated by article 136 of the CPC. The court explained in its rulings that "when there is a case of requesting information significant to the case from a computer system or a computer data carrier by the investigative body, this action should be carried out as a secret investigative action and not as an ordinary investigative action that restricts

⁹ https://www.osgf.ge/files/2016/Publications/merged_document_2.pdf

¹⁰ <http://www.gdi.ge/uploads/other/0/252.pdf>, p. 13-14

private property, ownership or the inviolability of private life". At the same time, the court has established that "voluntariness does not apply to the secret investigative actions, as otherwise this investigative action would lose that criminal meaning, which is implied under obtaining information in a secret manner".

b.b) By the ruling of Tbilisi Appeal Court dated October 4, 2016, the court ruled that all electronic devices, among them a professional video camera, have a processor, which may record and keep information. It means that it represents a computer system;

b.c) By the ruling of Tbilisi Appeal Court dated September 20, 2016, the court distinguished between a collection of information from a computer system and a seizure. It has explained that in case of a request to collect information significant data or a document (kept in an electronic format, in this case an item) kept in a computer system or a computer data carrier is gathered, whereas a seizure aims at collection of an item, document, substance or other object containing information (such an object that is not presented in an electronic format and does not represent a computer data) significant for the case, when there is a reasonable cause that this item, document, substance or other object containing information is stored in a certain place, with a certain person and it is not necessary to look for it.

b.d) On 2 June 2017, the court of the Tbilisi Court of Appeal satisfy the prosecutor's appeal on the Judgment of the Bolnisi Regional Court and explained the following: Requesting information or documents essential for the criminal case is one of the particular cases of seizure. Article 112 of the Criminal Procedure Code, for conducting search/seizure or other investigative measures restricting property, ownership and privacy, stipulates a strictly defined procedure for requesting information and documents, Which should be applied to the request of information and documents provided in Article 136. After the decision of the Constitutional Court, the procedure for requesting information shall be in compliance with the procedure of conducting an ordinary investigative act, which is regulated by Article 112 of the CCP and not a standard for the conduct of a secret investigative action. Therefore, this requirement applies to the prosecution and defense parties equally in terms of realization their procedural rights, because the request for information in its content is the usual investigative action.

4. Recommendation - For the purpose of implementation of the Constitutional Court decision dated January 27, 2017 in the CPC and provision of adversarial proceedings for parties, changes should be made to articles 136/1, 136/4 and 3/28 of the CPC. Namely: a) to specify the notion of a computer data; b) parties should be equipped with equal authority to obtain data from a computer system; c) similarly to a conduct of a secret investigative action, to add a formulation to the CPC about conducting this investigative action under the procedure set by article 112 of the CPC.



4. RIGHT TO PRIMARY EXAMINATION OF EVIDENCE

1. Problem/ Legislative gap

Under the CPC, the defence has a right to file a motion with a court to request an investigative action – search/seizure.

In case a judge accept the defence motion concerning the search/seizure, he/she will instruct an investigative body to conduct investigation. Search/seizure is conducted by an investigator, who does not investigate this case.

Under Article 120/10, a prosecutor has the right to primary examination of an object, item, substance collected as a result of search/seizure conducted by the investigator. Only after that the evidence can be transferred to the defence.

This regulation of the CPC poses threats to the implementation of such a right of a fair trial like the right to defence and the privilege of an accused to be protected against self-incrimination. Namely, the threat is the following:

Very often there is a situation during criminal proceedings when a party (among them the defence) does not know in advance whether an investigative action brings collection of favorable evidence or not. At the same time, the defence, unlike the prosecution, is not obliged to be impartial and thorough. The defence considers the issue of expediency of presenting evidence after obtaining the latter and makes a decision about presenting it to the court and the prosecution, but this is done not for the interests of ascertaining the objective circumstances of the case, but for the accused's interests. Therefore the defence has a right not to present the evidence detrimental to the accused to the prosecution and the court.

The prosecution is in a different position. Namely, under Article 37/2 of the CPC, an investigator shall be obliged to conduct investigation thoroughly, fully and impartially. Therefore, if the prosecutor establishes during examination of the evidence collected on the basis of a motion filed by the defence that this evidence is important for impartial, thorough and full investigation of the case circumstances and moreover, if this evidence is necessary for strengthening the position of the prosecution, he/she shall be obliged to include the evidence and its examination results in the case files. Therefore, very often there is a situation when the prosecutor not the accused enjoys the right granted to the defence (to obtain evidence through a court) to the detriment of the accused's interests. This situation violates the principle of adversarial proceedings and contradicts to the implementation of defence rights of an accused. As it was indicated above, a defence counsel acts only in compliance with the interests of the accused and legal instructions for strengthening the position for acquittal or mitigation of the situation. This is the most significant characteristic of the right to defence. That is why, if the prosecution applies the evidence obtained by the defence without the consent of the latter, implementation of the right to defence for an accused will be at risk. At the same time, the right to defence from self-incrimination is violated as well, which is one of the guarantees of a fair trial.

2. Surveys done by other organizations

ALFG raised the indicated problem in its report of 2015¹¹. According to the latter, it would be expedient that the defence conducted an investigative action itself. The report has the following recommendation: "it would be expedient to make changes to article 111/1 of the CPC and grant the authority to conduct investigative actions to a defence counsel upon a reasoned motion of the latter and based on a court ruling, whereas paragraph 10 of article 120 of the CPC should be deleted. The defence party shall decide the issue of presenting the evidence (collected upon a

¹¹ http://alfg.ge/wp-content/uploads/2015/07/sisxlis-temaze-kvleva_opt.pdf

motion of the defence and as a result of the investigative action carried out upon a court ruling) to the prosecution and the court as per procedure set by article 83 of the CPC.

Georgian Democracy Initiative has raised the indicated problem¹². According to the organization, granting a right to the prosecution of a primary examination of an object, item, substance, or document containing information seized upon a motion of the defence under article 120 of the CPC, should be considered as putting the prosecution in a privileged position and this privilege should be abolished¹³.

3. Recommendation - It would be advisable to abolish paragraph 10 of article 120 of the CPC (right of a prosecutor to primary examination of evidence), which would avert a threat of violation of rights to defence of an accused and against self-incrimination.

5. INADMISSIBILITY OF DISCLOSURE OF INVESTIGATION DETAILS

1. Problem/Legislative gap

Under article 104/1 of the CPC, “A prosecutor/investigator shall be obliged to ensure that information on the progress of an investigation is not made public. For this purpose, he/she shall be entitled to obligate a criminal trial participant not to disclose details of a case without his/her permission, and warn him/her about criminal liability.”

Under article 104/1 of the CPC a prosecutor and/or an investigator shall be authorized to obligate a trial participant not to disclose details of a case without his/her permission. The CPC does not provide a definition of a trial participant and according to the established court practice, it covers both an accused and his/her defence counsel. The indicated issue is especially important against the background of what was revealed by the practice of recent years – very often the prosecution, without any reasoning, warns the defence, among them a defence council (as a trial participant) not to disclose details of a case without his/her permission. However, at the same time, the prosecution discloses the case details because of high interest of the public, which, to a certain extent, forms the preliminary public opinion.

Article 374 of the Georgian Criminal Code stipulates criminal liability for disclosure of case details. In particular, it is indicated in the article that “disclosure of materials related to operative-investigative activities or of investigative information by a person who has been duly warned that the disclosure of such information was prohibited, shall be punished by a fine or corrective labour for up to two years, or with imprisonment for up to a year”.

According to the definition of the indicated article, liability can be imposed against any persons (among them on an accused and his/her defence counsel), who have been warned concerning the prohibition of disclosure of case details. Therefore, when prohibition is against the defence, it is deprived of the opportunity to extinguish the position voiced to the public based on the case materials because of the potential criminal liability. This creates inequality of arms and the public thinks that the defence does not have arguments against the information disseminated by the prosecution, which is the violation of presumption of innocence.

¹² <http://www.gdi.ge/uploads/other/0/252.pdf>

¹³ “Under article 120 of the CPC, a prosecutor shall have the right to primary examination of an object, item, substance, or document containing information seized upon motion of the defence. This should be considered as putting the prosecution in a privileged position.” <http://www.gdi.ge/uploads/other/0/252.pdf>, p. 13.



The prosecution is entitled to prohibit the dissemination of information for the defence with the consideration of its legitimate goals¹⁴. However, it should not misuse this right, especially when it disseminates this information to the public.

Besides, under the disputable norm, the decision of a prosecutor and an investigator to obligate the trial participants not to disclose information cannot be appealed. Therefore, the CPC does not contain a significant procedural guarantee which would check the correspondence of this mechanism with the principles of a fair trial. It is a significant factor that imposing an obligation of non-disclosure on the defence restricts its right to defence, namely- the right to obtain evidence. In particular, it is impossible to have a proper interrogation of a witness, to appoint examination and to conduct other investigative actions, as the defence will not be able to provide relevant information to the expert, witness and other participant of the trial. Therefore, judicial control to check the appropriateness of prohibition of information disclosure is necessary to exclude arbitrariness of the party, violation of presumption of innocence and the right to defence.

2. Surveys done by other organizations

The indicated issue was raised in the survey of ALFG conducted in 2015, which referred to ensuring equality of arms and adversarial proceedings in criminal proceedings. The organization has elaborated the following recommendation: “To introduce the prohibition of disclosure of information for the prosecution in case the latter has warned the defence not to disclose the case details. Such a stipulation may be implemented in article 104/1 of the CPC”.¹⁵

The Public Defender referred to this problem in his report of 2016. During the examination of one of the cases, the Public Defenders has revealed that “the prosecution has imposed the obligation on the defence not to disclose the information related to the case, whereas the prosecution itself publicised the case details according to its discretion. Application of such a measure is in compliance with the law, when it is necessary for the interests of the investigation. As the content-related data concerning the charges against G.M. was disclosed by the prosecution itself, the obligation not to disclose information imposed on the defence refers to putting the latter in an unequal position”¹⁶. The Public Defender called upon the Office of the Chief Prosecutor of Georgia to inform the public about the purpose of imposing such an obligation on the defence and to discontinue the restriction when it is no more absolutely necessary, in order not to violate the principle of equality of arms.

3. Recommendation – To impose a similar opportunity for both parties to notice other participants of the process about the prohibition of dissemination of information. Also, to give the opportunity both parties to impose obligation of dissemination of information to other party through the court. In case of court consent, both parties should be obliged to abstain from dissemination of information. At the same time, judicial control on prohibition of dissemination of information to a party should be established.

¹⁴ Interests of the investigation may be such a legitimate goal.

¹⁵ http://alfg.ge/wp-content/uploads/2015/07/sisxlis-temaze-kvleva_opt.pdf, p. 75.

¹⁶ Report of the Public Defender of Georgia, 2016, p. 392. <http://www.ombudsman.ge/uploads/other/4/4494.pdf>

6. REQUEST OF EVIDENCE BY THE PARTY

1. Problem/Legislative gap

Under article 9 of the CPC, “any of the parties [to the proceedings] may, under this Code, file a motion, obtain, request through a court, submit and examine all the relevant evidence”.

Under article 33/6/1 of the CPC, “a prosecutor may file a motion with the court to request evidence from private persons during the investigation”.

Under article 38/7 of the CPC, the accused may: “request the provision of evidence that is required to refute the charges or to mitigate the liability”.

Under article 39/2 of the CPC, “If such investigative or other procedural actions are required to obtain evidences that the accused or his/her defence counsel are not able to carry out alone, he/she shall have the right to file a motion with the judge, according to the place of investigation, requesting the passing of the relevant ruling.”

The court practice concerning the issue whether the parties have the right to request evidence has developed in a contradictory way. This is demonstrated by the results of the survey¹⁷ conducted by ALFG. On the basis of the Georgian courts’ practice evaluation of the capacities of the defence to collect evidence during 2014-2015 was done within the framework of the project.

There is the following reasoning developed in one of the decisions¹⁸ of the court according to which it is possible to request evidence not only on the basis of general articles 9 and 39 of the CPC, as this action (requesting evidence, seen as a possibility for the defence to obtain it) is not among the investigative and procedural actions listed in the CPC and therefore, the latter does not contain specific rules for requesting evidence.

The indicated opinion is characteristic almost of the whole court practice and only a few judges think that assistance of the court in obtaining information is possible not only through giving permission on a conduct of an investigative action, but through such a procedural action as requesting information.

It should be noted in case of prosecution as well, the court practice has been developed so that obtaining information and evidence is done through different investigative actions.

Therefore currently there is a situation that in spite of having an article in the CPC (article 33/6/1) that states that the prosecution has the authority to file a motion with the court to request evidence from private persons during the investigation, this authority cannot be implemented in reality. Based on the court practice, the defence does not have such an opportunity either. It should obtain evidence through requesting the conduct of some investigative actions (mostly search/seizure or inspection).

The above-mentioned interpretation of the CPC norms (articles 9, 38 and 39) by the court should be considered as illogical and unjustifiedly narrow definition, which contradicts the principles of equality of arms and adversarial proceedings¹⁹. However, as it seems, currently the court is tied up with the established practice and it would be impossible to overcome this problem without legislative changes.

¹⁷ “Collection of evidence by the defence through a court – situation of 2014-2015”, implemented within the framework of the project “Elaboration of Recommendations for Ensuring Adversarial System in the Criminal Procedure Code” supported by the Open Society-Georgia Foundation.

¹⁸ The ruling of Tbilisi City Court dated February 26, 2015.

¹⁹ It should be noted that the Constitutional Court decision dated September 29, 2015 presents the definition of the essence of adversarial proceedings and equality of arms and it is defined as a human right and not as a model for conducting a trial as opposed to inquisitorial proceedings. In paragraph 21 of this decision the Constitutional Court underlined that “as indicated above, adversarial proceedings imply granting equal opportunities to the parties to present the evidence and arguments favorable to their positions and influence the decision-making this way.”



Establishment of procedures for requesting information in the CPC, as a procedural possibility to obtain information, would increase the opportunities of the parties to obtain evidence. Requesting information is a simple form of obtaining information in comparison with search/seizure, which is mainly applied for obtaining information/evidence by the parties. In particular:

1. For reasoning the necessity to conduct search/seizure requires more arguments and efforts by the party than it would be necessary for requesting information. Search/seizure is an investigative action that contains potential threat for a person's constitutional rights. Therefore the CPC establishes very detailed rules for the conduct of search/seizure. Requesting information, which may not be an investigative action at all, is not related to such complicated regulations. A party would request and in case of a refusal from a private or public organization, it would obtain the document or an object that contains evidentiary value for it through the court and it will not have to obtain evidence through following detailed regulations related to search/seizure;
2. A prosecutor shall have the right to primary examination of an object/document seized upon motion of the defence, which is an additional difficulty for a speedy and effective investigation by the defence; at the same time, article 120/10 of the CPC contains a threat for the right to defence, as the prosecution has the right to primary examination of the seized evidence. Because of this regulation defence lawyers often reject the possibility to file a motion to the court on search/seizure.
3. Obtaining evidence only through investigative actions and with the involvement of state bodies in this process is related to unnecessary expenditure of financial resources of the parties and of the accused. Instead of having a simple procedure for requesting information (which is related to minimum expenses) and obtaining evidence through this procedure, the legislator has established (article 111/1) that the costs associated with search/seizure shall be borne by the accused. Search/seizure is an extra financial burden for the prosecution in comparison with requesting information.

2. Surveys done by other organizations

ALFG referred to this issue in its surveys conducted in 2015 and 2016. In the survey of 2016²⁰, which covered the research of the court practice, it was revealed that the defence does not have a possibility to request evidence based on the existing court practice and a defence counsel has to obtain it through requesting the conduct of any other investigative action (mostly it is search/seizure or inspection). ALFG has issued the following recommendation: "Several general articles of the CPC refer to collection of evidence through requesting them by parties. The survey has revealed that existence of only general norms without having a detailed procedure for requesting evidence (similar to investigative actions) established by special norms, hinders rendering assistance to the defence by courts in requesting evidence, which results in establishment of inconsistent court practice. Therefore it would be expedient to define more detailed and special procedural rules of requesting evidence in the CPC."

3. Court practice

a) The Appeal Court practice – According to the opinion of Tbilisi Appeal Court presented in its ruling N1c/816 dated May 4, 2016, article 9/2, which discusses the right of the party to file a motion, obtain, request through a court, submit and examine all the relevant evidence, indicates that all procedures should be conducted under the procedure

²⁰ <http://alfg.ge/wp-content/uploads/2016/07/sifa-new.pdf>

set by the CPC. Formulation given in article 9 is a principle, a norm of a general character. It belongs to the chapter of criminal procedure principles and the norm of the article 9 concerning realization of a right of the party implied by it refers to the established procedure, which means that a party has a right to obtain evidence with the help of a court through investigative actions (namely, seizure, search, inspection, etc.) in specific cases. Separate request of evidence does not take place on the basis of article 9. There is the same interpretation concerning the norm of article 39/2 of the CPC, where it is specified as much as possible for the defence that it is possible to obtain evidence through investigative or procedural actions with the help of a court, i.e. it is possible to obtain evidence only under the procedure established by the law through investigative/procedural actions and not generally under articles 9 and 39 of the CPC.

4. Recommendation – With the consideration of a contradictory court practice concerning the possibility to request information, it would be expedient to enable the parties to obtain evidence by requesting information and this could be done with more specific formulations to be made through legislative amendments.

7. EXCHANGE OF EVIDENCE

1. Problem/Legislative gap

The issues of exchange of evidence between the parties are regulated by article 83 of the CPC. According to paragraph 6 of this article, “not later than five working days before the pre-trial sitting, the parties shall submit to each other and to the court the complete information available by the moment that they intend to submit to the court as an evidence.”

Article 83 of the CPC (and other articles as well) does not regulate those cases, when requesting/obtaining evidence takes place earlier than five days before the pre-trial sitting or after it. Despite the fact that article 239 regulates the issues related to presentation of new evidence at the main hearing, there is no record in the CPC that would show within what time from the moment of obtaining evidence, the party is obliged to provide it to the other party and/or whether there is such an obligation at all, or whether the obligation to provide such evidence to the other party appears only after the court decides to admit the indicated evidence.

The CPC does not regulate the procedure of examination/provision of the documents marked with the security classification marking of “confidential” or the case files that are fully confidential, which creates significant problems in the court practice. This issue is regulated by Law of Georgia on State Secrets.

In particular, copies of the case files with the security classification marking of “confidential” are not provided to the defence and it is possible to access those materials only at investigative bodies. Under such procedure that exists for investigation materials, the defence does not manage to prepare adequately for the trial, because it is impossible to have a full-fledged strategy, especially in big volume cases, by only reading the investigation materials. Under such conditions, it is impossible for the defence to prepare adequately for the cross examination of witnesses, which is one of the guarantees of a fair trial. At the same time, secret cases are heard at a closed session and a right of an accused to have a public hearing is completely ignored.



2. Surveys done by other organizations

The Public Defender of Georgia referred to the problems related to a case with the security classification marking of “confidential” in its report of 2014. In the opinion of the Public Defender, refusal to provide those case materials to the defence that have the security classification marking of “confidential”, restrict the equality of arms and adversarial proceedings. The report has provided the following recommendation: “The Public Defender takes the view that, where authorities wish to classify a criminal case as “State secret”, they should evaluate propriety of classifying each individual material (document) as “secret”; furthermore, only the part of a criminal case containing the information described in the Law on State Secrets can be classified lest the defendant be deprived of the possibility of exercising his rights under the Georgian Constitution and international instruments, including the right to access criminal case materials, in pursuance of the principle of equality of arms”.²¹

The OSCE Trial Monitoring 2014 Report²² also refers to the problems related to the hearing of secret cases. In the opinion of OSCE, “practices concerning the unjustified exclusion of state secrets from evidence and the public from courtrooms risked depriving the defendant of the right to a public hearing.”²³ The report presents the recommendation: “Courts should elaborate procedures for the expeditious official verification of state secret classifications. The procedures should include a requirement to provide reasoning, and include guidelines for availing defendants of their rights to challenge the classification.”²⁴

3. Court practice:

a) The Constitutional Court practice – By the decision of the Constitutional Court of Georgia dated September 29, 2015 concerning the cases N3/1/608 and N3/1/609, the Court has reviewed the principle of adversarial proceedings stipulated by the CPC and noted that: “under article 85/3 of the Constitution of Georgia, “Legal proceedings shall be conducted on the basis of equality and competition of parties.” During the review of the indicated regulation, first of all we have to distinguish between an adversarial model of criminal proceedings, as the model of legal proceedings that has been established historically and a principle of adversarial proceedings, as one of the elements of a fair trial. The adversarial model of criminal proceedings is characterized of a specific system of conducting procedural actions and a specific distinction of the roles of the trial participants. A fundamental feature of the adversarial model is entrusting the function of finding the truth to the initiative of the parties, under the condition of neutrality of a judge. In the indicated model, it is the anticipated neutrality and passiveness on the part of a judge that works, whereas the adversarial proceedings is based upon a belief that adequately prepared and interested parties will present sufficient information and arguments to the court and the main task for the judge is to provide such possibilities to the parties. In the adversarial model, under the general procedure, the parties decide what evidence and arguments should be presented to the court and what issues will be disputed.

According to the reasoning of the court, the main goal of the adversarial principles, both in criminal as well as in other types of legal proceedings, is to provide an opportunity to a party to have access to all evidence and arguments on which the court may base its opinion, to express opinion on them and if it is in his/her interests, to extinguish them, also to convince a judge in correctness of his/her position, to present him/her relevant evidence and opinions, which should be answered by the court in its reasoned decision, both in case of acceptance of the request of the party as well as in case of its rejection. Based on this goal, it is clear that the principle of adversarial proceedings is connected with other guarantees of the right to a fair trial – the right to receive information on the evidence

21 <http://www.ombudsman.ge/uploads/other/3/3510.pdf>, p.241.

22 <http://www.osce.org/ka/odihr/130686?download=true>

23 <http://www.osce.org/ka/odihr/130686?download=true>, p. 86.

24 <http://www.osce.org/ka/odihr/130686?download=true>, recommendations, p.48.

of the other party, to have sufficient time and the facilities for the preparation of defence, the right to defence, the right to interrogate witnesses of the other party and to summon and interrogate his/her own witnesses in equal conditions, personally or through a defence counsel, the right to receive a reasoned court judgment, etc.

b) The Practice of the Supreme Court of Georgia – According to the decision dated June 29, 2015, the Supreme Court of Georgia considered that the lower courts have misinterpreted the term “full information” indicated in article 83/6 of the Georgian CPC, which does not imply obligation of parties to exchange a list of persons to be interrogated and provide it to the court. After the judge in the preliminary proceedings approves the witness interrogation protocols, the court becomes obliged to examine this evidence under the common procedure, (without any list of the evidence).

c) The Appeal Court Practice

a) Tbilisi and Kutaisi Appeal Courts have decided in the cases Nsg-1164, N1g/1019, N1/g-760 and N1/g-720 that interview record does not represent an evidence, it does not have a legal force and it only contains the information that this person, during the main hearings, confirms the existence of this or that factual circumstance. Therefore provision of interview records to the other party is sufficient grounds to presume that the parties intend to examine these evidences in court. Whereas, making a separate list of persons to be interrogated is not based on the requirements of the CPC.

b) By the ruling dated August 14, 2015 of Tbilisi Appeal Court judge did not satisfy the prosecutor’s appeal concerning the ruling of the first instance court judge on the recognition of all evidence as inadmissible and considered that transfer of evidence to that accused, who, based on the examination report, cannot defend himself independently and under the conditions, when this accused has already had the defence counsel, is the violation of article 83/6 of the CPC.

c) By the ruling of Tbilisi Appeal Court dated August 9, 2016 (N1c/1339-16) the court has established that violation of a 5-day term stipulated under article 83 of the CPC causes recognition of this evidence inadmissible, as the law prohibits putting the parties in unequal conditions and therefore, violation of the principles of equality of arms and adversarial proceedings.

d) By the ruling of Tbilisi Appeal Court (N1c/273-17) dated February 27, 2017

d.a) “delay” may be caused only by that amount of time that would be required for resolving technical issues related to the provision of information. Therefore non-submission of information at once may be justified within the limits of time objectively required for resolving the technical issues (volume of case files, time of submission of the request).

d.b) Under article 83/1, it does not matter whether the information has a power of evidence, i.e. application letters or procedural documents that clearly are not evidence, shall be also considered as the information that is available to the parties and is subject to submission in any case.

d.c) The doctrine of “the fruit of poisonous tree” does not cover the evidence found inadmissible because of violation of the submission procedure, as the original evidence was not admitted not because of violation of the rule of its collection, but because of other reason.

e) By the ruling N1c-1566-16 dated October 10, 2016 Tbilisi Appeal Court has cancelled the first instance court decision on recognition of those evidences of the prosecution inadmissible, which have been obtained by the defence, but were indicated by the prosecution in its list. The first instance court judge considered that even if the prosecution, by indication of the evidence of the defence in its list, has formally followed the requirements of the procedure law, recognition of the indicated materials as the evidence of the prosecution will cause violation of the require-



ments of law. If the prosecution has a possibility to present the evidence of the defence as its own in case of the main hearing, it will be in a privileged position compared to the defence, it will examine all the available evidence (both of the prosecution and of the defence), which will violate the principles of equality of arms and adversarial proceedings. During the evaluation of the indicated decision the Appeal Court considered that as during the process of collection of the indicated evidence, their exchange and presentation to the court, no violations of the procedure law requirements have taken place and as based on the principle of adversarial proceedings, the parties decide themselves which evidence should be presented to the court, all these evidences should be recognized admissible and they should be examined under a common procedure.

4. **Recommendation**

It is necessary to amend the criminal procedure law and to define the rules for the protection of the secret materials and to extend the regime, which is provided for information obtained through operative-searching and secret investigative activities. Also, the Law of Georgia on State Secrets should define the procedure for examination/provision of the documents marked with the security classification marking of “confidential” or the case files that are fully confidential.

8. PREPARATION OF PARTIES FOR A CROSS EXAMINATION – RECEPTION OF INFORMATION IN ADVANCE ABOUT WITNESSES OF AN OPPOSING PARTY

1. **Problem/Legislative gap**

According to the European Convention on Human Rights (ECHR), a defendant has a right to have adequate time and the facilities for the preparation of his/her defence. The indicated right forms part of the fair trial and the principle of equality of arms. Adequate time and facilities implies timely provision of essential information by the prosecution and also, informing an accused about the witnesses of the prosecution well in advance before each court hearing so that the defence has time to prepare a cross examination. The possibility to have the cross examination is one of the significant elements of the right to a fair trial.

Under the CPC²⁵, a party is authorized to cross examine the witness summoned by the other party. However, the CPC does not provide an instruction about the parties’ obligation to provide names of the summoned witnesses and order of their interrogation to the other party in advance.

The Georgian court practice has developed in an inconsistent manner. In some cases courts oblige the parties to provide information about the summoned witnesses and the order of their interrogation to the other party, or the parties themselves exchange information as an exercise of good will, but sometimes the prosecution does not provide information to the defence about the witnesses. This issue is especially problematic in voluminous cases, where there are a lot of prosecution witnesses to be interrogated and it is impossible to conduct a cross examination at an adequate level by the defence without the preliminary preparation of witnesses for interrogation.

²⁵ CPC, Article 245.

2. Surveys done by other organizations

This problem has been raised in the OSCE Trial Monitoring Report of 2014²⁶. In the opinion of the OSCE monitors, it violates the principles of equality of arms and restricts the possibilities of the defence to prepare for a cross examination. As a result, this reputable organization has provided the following recommendation: “The legislature should consider amending the provisions of the CPC regarding the calling of witnesses, to the effect that the party calling a witness is obliged to inform the opposing party of the order and timing of appearance of witnesses.”²⁷

The indicated change has not been made so far to the CPC and at present there are cases when the prosecution fails to provide/or does not provide information about witnesses to the defence in a timely manner and the court fails to regulate the situation efficiently. E.g. in one of the cases that is being heard²⁸, the prosecution was not providing information about the witnesses during several hearings despite numerous requests of the defence and even after the court called upon the prosecutor to do so. Only later (when several witnesses were already interrogated) the prosecution started providing information about the timing of appearance of the remaining witnesses.

3. Recommendation – It would be recommended to make changes to the CPC so that the party that is summoning witnesses is obliged to inform the other party **about the identity of the witness** for a reasonable time before.

9. EVALUATION OF RELEVANCE OF EVIDENCE IN CRIMINAL PROCEEDINGS

1. Problem/Legislative gap

Under article 82 of the CPC, an evidence shall be evaluated in terms of its admissibility, relevance with a criminal case, as well as of its trustworthiness.

There is no other norm besides article 82 of the CPC, which refers to the evaluation of relevance of evidence, unlike the criteria for admissibility and trustworthiness, evaluation criteria and stages of which are defined by other norms of the CPC as well. In particular:

Under article 219 of the CPC, initial evaluation of the admissibility of evidence presented by the parties takes place at a preliminary hearing. The motions concerning the admissibility of evidence are mostly heard at this stage. Whereas, evaluation of trustworthiness of evidence is done both in a judgment rendered after the main hearing and at the preliminary hearing.

Procedure of the preliminary hearing established under article 219/4 of the CPC refers only to the issue of admissibility of evidence during their evaluation – whether or not the evidence is obtained in gross violation of law. Relevance is not related to a formal side of the legality of obtaining the evidence. A defining feature for relevance would not be adherence to the rule of its collection, but its content. Therefore, evaluation of relevance should be made not by assessing whether the evidence was obtained under the established procedure, but with the consideration of its content – to what extent the evidence is related to factual or legal side of the case.

26 <http://www.osce.org/odihr/130676?download=true> Paragraph 171. “Monitoring identified concerns regarding the right to adequate time and facilities, such as a failure by the prosecution to inform the defence about which witnesses would be called to a particular hearing, and the rejection by judges of reasonable defence requests for additional time to prepare. In most of the monitored cases, judges stated that they did not have the power, upon request of the defence, to order the prosecution to say in advance which witnesses will be called in individual hearings.”

27 <http://www.osce.org/odihr/130676?download=true> p.74

28 The case is being heard by Rustavi City Court.



Is it possible to remove the irrelevant evidence from the case during the preliminary hearing?

With the consideration of article 219/4 content, it is difficult to evaluate the relevance of evidence at a preliminary hearing. At preliminary hearings courts check legality of a form of collection of evidence, i.e. admissibility issues. Court practice shows that the issue of removing irrelevant evidence from the case mostly does not happen at preliminary hearings. Courts assess the relevance of evidence at main hearings in case the relevance of new evidence is disputed or during making a final decision – rendering a judgment. However, there are separate cases, when judges have found the evidence inadmissible because of their irrelevance.

It is important that the issue of relevance of the evidence is discussed before a main hearing starts, i.e. at the preliminary hearing. This is especially important for a jury trial because of the following:

Irrelevant evidence does not contain information about the case from the point of view of factual or legal assessment. However, it may have a negative influence on the case hearing, which is inadmissible. By providing a useless, irrelevant evidence there is a risk that the decision-making process, carried out by a juror (who is not a lawyer), will be influenced by such information, which has no relation to factual or legal side of the case. Therefore, under such situation the jurors will make a decision under the influence of such “evidence”, which are irrelevant for the case. This risk can not be fully mitigated by explanations given by a judge or the parties to jurors. Therefore timely removal of irrelevant evidence from case files is important (before the selection of jurors).

This is also important for such cases, where there are no jurors involved. In this case, parties will not spend time and other resources on invalidation of irrelevant evidence during the main hearing.

2. Surveys done by other organizations

ALFG referred to this problem in its survey of 2015. According to the recommendation provided by this organization: “parties should be allowed during the preliminary hearing to file motions on removal of irrelevant evidence. Such a regulation may be stipulated in article 219/4 of the CPC by extending the list of issues to be heard at a preliminary hearing”.²⁹

3. Recommendation

Article 219 of the CPC should be amended and a possibility of filing a motion on inadmissible of clearly irrelevant evidence must be added to the list of issues to be discussed at a preliminary hearing.

²⁹ http://alfg.ge/wp-content/uploads/2015/07/sisxliis-temaze-kvleva_opt.pdf p.72.

10. PROHIBITION OF FILING A MOTION FOR FINDING EVIDENCE INADMISSIBLE AT A MAIN HEARING

1. Problem/Legislative gap

On the basis of the established court practice, the issue of admissibility of evidence is heard at a preliminary hearing³⁰, where parties should file motions on inadmissibility of evidence.

Parties may file a motion concerning admissibility of evidence and their review during the main hearing, but only under the procedure stipulated by article 239³¹ of the CPC and, as an exception, during the hearing of the issue of admissibility of additional evidence.

The Georgian court practice does not recognize the possibility of filing a motion on finding evidence inadmissible at the main hearing and therefore, in case of disclosure of significant violation (which may have become basis for finding the evidence inadmissible) during the examination of evidence at the main hearing, the court does not hear the motion of a party on finding the evidence inadmissible on the spot. In spite of this, it is possible for a court to evaluate this issue in its final decision – a judgement.

Such practice creates additional difficulties for the parties. Namely:

- a) In a case, which is heard by jurors, failure to hear the motion on finding evidence inadmissible at the main hearing increases risks that at the moment of delivering a verdict jurors may be guided by such evidence that should not be admissible;
- b) The parties do not have an opportunity to get the court's answer on the admissibility of evidence at the main hearing, immediately after their examination. They get an answer only after provision of a reasoned judgement. Because of this situation, the parties are forced to take efforts during the main hearing and spend time on analysis of such evidence in their closing arguments (because they do not know whether a judge finds them inadmissible or not in a judgement), which finally will not be accepted by the court on the basis of inadmissibility.

2. Surveys done by other organizations

Within the framework of the project run by Article 42 of the Constitution expert opinions have been provided from several countries (p. 22-23). Namely, experts of criminal procedure from Hungary, Poland and Azerbaijan confirmed that a party in their countries is authorized to file a motion on finding evidence inadmissible at any stage of a trial.

30 As per procedure established by article 219 of the CPC.

31 Article 239 of the CPC: 1. The presiding judge shall enquire whether the parties intend to file a motion stipulated by this article. Similar motions shall be filed together with the court. A person filing a motion shall be obliged to indicate the circumstances that need to be established under the motion.

2. When providing additional evidence during the main hearing, the court shall, upon motion of a party, review its admissibility, and enquire about the reason for failure to provide the evidence before the main hearing, based on which he/she shall make a decision whether or not to admit the evidence.

3. During jury trials the admissibility of evidence shall be decided without the participation of the jury.

4. If presented additional evidence is admitted in the case, the court may, upon motion of a party, adjourn the case hearing for a reasonable period if a party needs additional time to prepare his/her defence or prosecution.

5. A motion for obtaining substantially new evidence during the main hearing shall be granted if obtaining such evidence or filing such a motion in the manner provided for by this Code was objectively impossible before. If the motion is granted, evidence shall be obtained in the manner prescribed by this Code.

6. The evidence provided for by this article shall be examined in accordance with the general procedures established by this Code, taking into account the specifics of the main hearing.



The indicated problem was reflected by the authors of the survey conducted in 2016 “Evidence in Criminal Law”³². They issued a recommendation that a party should be granted a possibility to file a motion on finding evidence inadmissible at that stage of a trial when this ground appears.

This issue was also referred in the report of ALFG published in 2015³³. The association singled out the following recommendation in the indicated report: “Article 239 of the CPC should provide for a possibility that the parties file a joint motion on inadmissibility of evidence after finalization of examination of evidence. Such an amendment to the CPC would allow the parties not to waste efforts on inadmissible evidence in their closing arguments; it would also reduce risks that jurors (in those cases which are heard by jurors) make a decision on the basis of inadmissible evidence.”

3. Recommendation

It is possible to change the established court practice by making amendments to article 249 of the CPC, which refers to filing a motion during the main hearing and the relevant procedure. Namely, it is possible to add a paragraph to the article, which will define that the court will also hear the issue of admissibility of evidence provided a party files a reasoned motion about its inadmissibility. In order to avoid abuse of this right by the parties and unreasonable lingering of the trial, it is possible to establish a rule of filing a joint motion concerning inadmissibility of evidence, after examination of evidence is finalized by the parties.

11. APPEAL AGAINST THE RULING OF THE PRELIMINARY HEARING JUDGE CONCERNING ADMISSIBILITY OF EVIDENCE

1. Problem/Legislative gap

A preliminary hearing judge hears motions of the parties concerning admissibility of evidence and makes a decision on finding an evidence inadmissible or rejection of a motion and admitting the evidence.

Under article 219/7 of the CPC, the decision of the judge of the preliminary hearing on the recognition of evidence as inadmissible may be appealed only once, within 5 days, through the court that delivered the decision with the court of appeal.

The law does not allow for appealing, within 5 days, against that decision through which the preliminary hearing judge did not accept the motion of the party and found the evidence admissible.

It is important that a party has a possibility to appeal against the ruling of the preliminary hearing judge after its motion on finding the evidence inadmissible has been rejected.

2. Surveys done by other organizations

A group of experts referred to this issue in the survey conducted about evidence in 2016. According to the recommendation presented in this document: “formulation of article 219/7 should be changed and the parties should be

³² https://www.osgf.ge/files/2016/Publications/merged_document_2.pdf

³³ http://alfg.ge/wp-content/uploads/2015/07/sisxliis-temaze-kvleva_opt.pdf

given a possibility to appeal against the decisions of judges concerning admissibility of evidence in case if the opposing party files a motion on finding the admitted evidence inadmissible”.

3. Recommendation

It is necessary to make amendments to article 219/7 of the CPC in order to solve the problem and to allow the parties to appeal against the decision of a judge concerning the admissibility issue as well if the other party has filed a motion concerning inadmissibility of evidence and this motion has not been accepted by the judge.

12. PREVIOUS CONVICTIONS OF AN ACCUSED

1. Problem/Legislative gap

Under article 115/4, “a question on previous convictions may be put to a witness if it is necessary to establish the reliability of the witness.”

Under article 238 of the CPC, “ before the announcement of the verdict, the jurors shall not be notified of a previous criminal or administrative liability or conviction of the accused (unless this constitutes one of the qualifying elements of the charges brought, and/or is intended to verify the reliability of the testimony of the accused), nor of any other evidence that is not related to proving the charges.”

Therefore, information on previous convictions of an accused may be provided to court (among them to jurors) in case it is necessary for establishing the reliability of the witness.

The information about previous convictions of an accused is connected with the presumption of innocence. Allowing for a consideration concerning the previous convictions of an accused may create the impression that the accused is a criminal, which may not be in compliance with the facts presented in the case. It can create the impression that a judge is prejudiced concerning the guilt of the accused. That is why, the information about previous convictions should be carefully provided to court and especially to jurors.

2. Surveys done by other organizations

The indicated risk was discussed in the OSCE Trial Monitoring Report of 2014, according to which “although a prior conviction may not need to be examined, the prosecution should still be required to prove its admissibility in support of an element of the crime charged or to verify the reliability of the defendant’s statements. Such information should in any event not be presented during the main hearing where the pre-trial judge determines that its prejudicial effect outweighs its probative value.”³⁴

As a result of court practice monitoring, the following observation is made in the indicated report: “ a practice of judges allowing the discussion of a defendant’s criminal record during trial, without stating the purpose of such discussion”³⁵ and application of information about the previous convictions as a matter of routine, which undermined the presumption of innocence.³⁶ “The presentation of the defendant’s criminal record, and discussion of

34 <http://www.osce.org/odihr/130676?download=true> p.113.

35 <http://www.osce.org/odihr/130676?download=true>, par. 112.

36 <http://www.osce.org/odihr/130676?download=true>, par. 9.



prior convictions, without such information being relevant or probative for the pending charge may undermine the presumption of innocence.”³⁷

The final document of the OSCE Trial Monitoring presents the recommendation that “courts should consider assessing the admissibility of criminal records at the pre-trial stage, taking into consideration any possible implications regarding the presumption of innocence.”

The indicated recommendation has not been reflected in the CPC. That is why there is a risk that the violations revealed by the OSCE Trial Monitoring mission will still remain.

3. Recommendation

To amend article 219 of the CPC and to introduce the discussion of the issue at a preliminary hearing concerning the expediency of allowing the information about previous convictions of an accused at the main hearing.

13. CHANGING OF THE QUALIFICATION OF THE ACTION COMMITTED BY THE ACCUSED AT THE INITIATIVE OF THE COURT

1. Problem/Legislative gap

According to the last sentence of article 273/1 of the CPC, if the qualification of the charges is incorrect, the court shall be obliged to reason the grounds and motives for changing the charges in favour of the accused in its decision.

At a glance, the goal of the indicated norm of the CPC and presumably, the will of the legislator were to create additional guarantees for the defence of the interests of an accused and not to allow his/her conviction based on the presented qualification if the latter would not be proven during the court hearing. However, in reality this norm has an opposite effect as well and it creates the risk for the violation of the important procedural right of the accused. These rights imply the right of the accused to be informed promptly of the nature and cause of the accusation against him and to have adequate time for the preparation of his defence. It should be underlined that the risk is there only in case changing of the qualification of the action takes place without a motion of the accused/defence and it happens only at the initiative of the court.

Right of the accused to be informed about the cause of the accusation against him is guaranteed by article 6/3/a of the ECHR. Whereas, his right to have adequate time and facilities for the preparation of his defence is stipulated under article 6/3/b of the ECHR.

Changing the qualification at the initiative of the court on the basis of article 273 of the CPC creates the situation, where the accused does not have information about new (even if mitigated) charges and therefore does not have a possibility to prepare his/her defence strategy concerning these charges. The European Court of Human Rights (ECtHR) considers changing the qualification of an action by the national court from the point of view of inadmissibility of bringing new charges.

Several cases from the court practice refer to the similar situation – when the court changed the qualification of the action at its own initiative, e.g. cases of Pelissier, Dallos, Sadak, Sipavicius.

At the same time, under the established practice of the ECtHR, it does not matter whether, through changing the

³⁷ <http://www.osce.org/odihr/130676?download=true>, par. 114.

qualification, the court has mitigated the charges or not. It is important that a person is informed about changing the charges in advance if there is a significant difference between the main elements of the changed and the original charges. In the case *Abramyan v. Russia*, the applicant learnt about changing of the qualification of the action (graver article – extortion of bribe was changed with relatively lighter one - fraud) on the day of announcement of the judgment. The court considered that the important elements of bribe extortion and fraud differ. Therefore it concluded that the person did not have a possibility to prepare his defence around the changed charges.³⁸

It should be noted that according to the ECtHR practice, if a higher instance court has fully reviewed the case at the stage of appeal, which has remedied the shortcomings and the accused had a possibility to prepare his/her defence around the new charges, violation of article 6 of the ECHR will not be established. In the cases indicated above, these shortcomings were remedied by higher instance courts at the level of appeal (except for the case of *Abramyan*). In the case of *Abramyan*, the higher court did not invite the convict or the defence counsel at a court hearing and did not change the decision of the first instance court. The ECtHR has found that as the applicant and his defence counsel did not have a possibility to present their position concerning the changed charges at a higher court, the applicant was deprived of the possibility to efficiently defend himself from the changed charges.

It is interesting whether it is possible to remedy this shortcoming on the basis of the CPC at the stage of a court hearing or at a higher instance court level.

The CPC does not stipulate a possibility or an obligation of provision of information in advance to an accused about changing the qualification of the charges at a court hearing stage. In some cases it is possible that a judge informs parties at his/her own initiative that the elements of another crime and not of the one for which the charges have been brought against the accused are there in the action. Although, a judge does not have an obligation to inform the parties based on the law. With the consideration of the CPC structure and system, it will be difficult to initiate such changes in the CPC. This will require significant changes to the procedural norms regulating investigation, bringing of charges, evidence system and admissibility issues. Although, at this stage it is possible to improve the relevant legislative regulations during the appeal against the judgment (at the Appeal Court).

Currently, under article 297 of the CPC, the limits of case hearing by the Appeal Court are restricted, among them the possibilities of admitting evidence or finding them inadmissible, e.g. under article 297/d, “upon motion of a party and by decision of the court, the new evidence may be examined by the court of appeal if the person filing the motion proves that the evidence is particularly important for justifying his/her position, and the presentation of this evidence during the hearing at the court of first instance was objectively impossible”. Consequently, the defence is limited in presenting new evidence during the appeal against changing the qualification of the action. Therefore it would be advisable to expand the limits for reconsideration of a case at a main hearing at the Appeal Court and presentation of evidence for those cases, when the appeal is against the qualification changed by the court. In such a case, the parties should be granted a possibility to present additional evidence.

2. Opinions of different organizations

The indicated issue was raised in the report of 2015 by ALFG, which referred to ensuring equality of arms and adversarial system in criminal proceedings. The report presented a recommendation about the expediency of expanding the limits for presenting new evidence in Appeal Court, when there is an appeal against the qualification changed at the initiative of the court.

³⁸ *Abramyan v. Russia*, no 10709/02, ECHR, January 9, 2009.



3. Recommendation

To expand the limits for presenting new evidence in Appeal Court, when there is an appeal against the qualification changed at the initiative of the court or changes of the basic elements of crime. In such a case the parties should be granted a possibility of presenting additional evidence with the consideration of the changed charges and re-examination of the evidence that has already been examined despite the fact whether it was possible or not to present and review them objectively at the first instance court.

14. INDIRECT TESTIMONY

1. Problem/Legislative gap

Under article 76 of the CPC:

1. A testimony that is based on the information disseminated by any other person shall be considered indirect.
2. An indirect testimony shall be considered an admissible evidence only if the person giving an indirect testimony refers to the source of information that can be identified and the real existence of which can be established.
3. During the substantive hearing of a case at a court, an indirect testimony shall be considered an admissible evidence, if it can be proved by any other evidence that is not an indirect testimony.

Therefore, according to the indicated wording, indirect testimony is admissible evidence if the person giving an indirect testimony refers to the source of information and the testimony is corroborated by any other evidence that is not an indirect testimony.

However, by the Constitutional Court decision dated January 22, 2015³⁹, the standard of admissibility of indirect testimony indicated in article 76 of the CPC has been rejected in case of two important procedural decisions. Namely, during bringing charges and delivering a judgment.

By the Constitutional Court decision, the normative content of article 13/2⁴⁰ of the CPC was found unconstitutional that stipulated the possibility to pass a judgement of conviction based on the evidence determined under Article 76 of the same Code - an indirect testimony.

The normative content of article 169/1⁴¹ of the CPC, which stipulated finding a person guilty on the basis of the indirect testimony, was also found unconstitutional.

Despite the fact that different interpretations have followed the decision of the Constitutional Court, in reality it has banned application of an indirect testimony for reasoning a decree to prosecute as the accused and a judgement.

³⁹ <http://constcourt.ge/legal-acts/judgments/saqartvelos-moqalaxe-zurab-miqadze-saqartvelos-parlamentis-winaagmdeg-884.page>

⁴⁰ Article 13/2 of the CPC: "The confession of the accused, unless corroborated by any other evidence that proves the person's guilt, shall not be sufficient to pass a judgement of conviction against the accused. A judgement of conviction shall be based only on a body of consistent, clear and convincing evidence that, beyond reasonable doubt, proves the culpability of a person." On the basis of the Constitutional Court decision N1/1/548 dated January 22, 2015, to find unconstitutional that normative content of the second sentence of this paragraph, which stipulates the possibility to pass a judgement of conviction based on the evidence determined under Article 76 of the same Code (wording dated June 14, 2013) - an indirect testimony."

⁴¹ Article 169/1 of the CPC: "The grounds for the indictment of a person shall be the body of evidence that is sufficient to establish probable cause that the person has committed a crime. On the basis of the Constitutional Court decision N1/1/548 dated January 22, 2015, to find unconstitutional that normative content of the second sentence of paragraph 2 that stipulates the possibility of indictment based on the evidence determined under Article 76 of the same Code (version of June 14, 2013) - an indirect testimony".

After the Constitutional Court decision, the state has launched a certain activity for the elaboration of detailed criteria for the admissibility of indirect testimony. However, the relevant change has not been reflected in the CPC yet.

2. Surveys done by other organizations

The 2016 parliamentary report of the Public Defender of Georgia⁴² reflects the issue of implementation of the decision made by the Constitutional Court by common courts.

Monitoring implemented by the Public Defender has revealed that often common courts do not apply the essential part of the indicated decision, but take into account only the operative part of it based on a formalistic approach. In 2015 the Constitutional Court of Georgia found unconstitutional those norms of the procedural law through which it was possible to render a judgment of conviction based on an indirect testimony. A lot of judgments, made on the basis of the unconstitutional norm, still remain in force because the common courts ignore the reasoning of the Constitutional court decision.⁴³

The indicated problem was raised in the survey conducted by a group of experts in 2016 concerning evidence.⁴⁴ The survey contained the following recommendation: “Despite the fact that the Constitutional Court of Georgia made a decision on finding the second sentence of the article 13/2 of the CPC void, no relevant amendments in the articles of the Code has taken place and the Court has to provide its own and often inconsistent interpretation for the other norms as well that are related to indirect testimony”. According to the available information, the Ministry of Justice of Georgia has already prepared a draft law “on Making Changes to the Civil Procedure Code of Georgia”, which takes into account in detail the Constitutional Court’s opinions concerning the indirect testimony. Unfortunately, the indicated draft law has not been reviewed and approved by the Parliament of Georgia yet. Therefore, it would be expedient that the Parliament reviews the draft in an accelerated manner and makes relevant changes to the CPC.”⁴⁵

3. Court practice

a) The Constitutional Court practice – In the case N1/1/548 the Constitutional Court of Georgia has accepted the claim of Zurab Mikadze, the citizen of Georgia against the Parliament of Georgia and found that normative content of the CPC unconstitutional, which allows for delivering a judgment of conviction and finding a person guilty on the basis of the indirect testimony (article 13/2 and article 169/1 of the CPC).

In its decision the Constitutional Court of Georgia has reviewed that according to the Georgian Constitution, for delivering a judgment of conviction and finding a person guilty there should be trustworthy evidence authenticity of which does not cause suspicion. Otherwise, there is a risk of groundless and arbitrary accusation. As it was indicated by the Court: “A criminal act should be proven beyond a reasonable doubt, any reasonable doubt concerning commission of a crime by the person must be excluded. The society, which is trying to defend the rights and freedoms of a person, knows the price of a person’s freedom and it will not allow for a conviction of the person, whose guilt remains suspicious for an unbiased and reasonable observer”.

The Court has considered that the indirect testimony is a less reliable evidence in general and its application may be allowed in exceptional cases and not under the general procedure defined by the effective CPC, provided there is an objective reason because of which it is impossible to interrogate the person whose statement is the basis for the indirect testimony and when this is necessary because of the interests of justice. The issue of finding the indirect testimony admissible and making a decision concerning its application should be done in compliance with the clearly formulated norms and relevant procedural guarantees.

42 <http://www.ombudsman.ge/uploads/other/4/4494.pdf>

43 <http://www.ombudsman.ge/uploads/other/4/4494.pdf>, p.389.

44 https://www.osgf.ge/files/2016/Publications/merged_document_2.pdf

45 <http://www.ombudsman.ge/uploads/other/4/4494.pdf>, p.156



b) The Practice of the Supreme Court of Georgia – In the decision N225/ap-15 of the Supreme Court of Georgia the criminal chamber of the court, based on the analysis of the evidence in the case, has decided that only the testimonies of the witnesses N.D. and I.I. indicated to the fact of an alleged request and acceptance of a bribe from D.K. directly, which was not sufficient for making a judgment of conviction. The Supreme Court has referred to the Decision N1/1/548 of the Constitutional Court of Georgia as an argument and stated the following: “As under the decision of the Constitutional Court of Georgia dated January 22, 2015 the indirect witness testimony does not meet the constitutional-legal standard of trustworthiness, such testimony can not become the basis for the judgment of conviction.”

4. Recommendation

To give a recommendation to the Ministry of Justice of Georgia to initiate the draft law at the Parliament in a timely manner in order to have a definition of indirect evidence and its inadmissibility at the legislative level. This will facilitate the foreseeability of norms and we will avoid having an inconsistent judicial practice.

15. RESTRICTION OF WITNESS TESTIMONY PUBLICATION AT A COURT HEARING

1. Problem/Legislative gap

Under article 243/2 of the CPC: “ If a witness appears before the court to give testimony at the main hearing, a party may request that the record of interview of that person or the testimony given in accordance with Article 114 of this Code be publicly read fully or partially, and that the audio or video recording of this testimony be played (demonstrated). The court shall be obliged to satisfy this request.”

Therefore, the CPC allows for publication of the following:

- a) interview record;
- b) the testimony given before the court in accordance with Article 114 of the CPC (examination of a person as a witness during an investigation).

Significance of publication of the indicated information is indisputable. A party is able to conduct a cross examination fully and juxtapose the testimony given by the witness in a court and the information obtained during the investigation process.

At the same time, under the CPC there is one more possibility to interrogate a witness at the investigation stage for certain types of crimes. Namely, under the procedure established by article 332 of the CPC, until January 1, 2018, during the investigation of crimes defined in Articles 108, 109, 115, 117, 1261, 178, 179, 276, 323–323², 325–329 and 378² of this Code, interrogations shall be conducted in accordance with paragraphs 1 and 2 of this article⁴⁶.

Therefore, we can conclude that under the indicated articles and as per article 243/2 of the CPC, a party shall not be authorized to request publication of the testimony given by the witness who was interrogated under the procedure stipulated by the old civil procedure code. It makes it impossible to have a full cross examination of such witness, which violates the right to a fair trial.

⁴⁶ Under the CPC of February 20, 1998, a person summoned to the investigator/prosecutor was obliged to give testimony under oath.

2. Reports of international organizations

The importance of using the testimony and statements made during the investigation in the process of cross examination of a witness at the trial was underlined in the OSCE Trial Monitoring Report of 2014 according to which, “if out-of-court statements are included in the case file, and thus available for the judge to use in making a decision, it is critical for the opposing party to have the opportunity to either contest their reliability, or use the statements to contest the credibility of a witness’s in-court testimony. Without such a possibility, the right to impeach a witness, and the broader right to cross-examine witnesses, would lose their meaning.”⁴⁷

3. Recommendation

Article 243/2 of the CPC should be amended and a party should be given a possibility to file a motion about publication of a witness testimony interviewed or interrogated during the investigation under any procedure.

16. OBLIGATION TO INTERROGATE AN IDENTIFYING PERSON AT THE HEARING WHEN IDENTIFICATION IS CONDUCTED BY MEANS OF A PHOTOGRAPH

1. Problem/ Legislative gap

Under the CPC, investigative action – identification can be conducted with the participation of a person or with a help of an object or a photograph.

Under article 131/2 of the CPC, before identification, the identifying person shall, under this Code, be interviewed/questioned with respect to individual and generic characteristics of the object to be identified, and to the circumstances under which he/she came into contact with that object to be identified. During the identification, the identifying person shall indicate the characteristics by means of which he/she identified the object to be identified.

Therefore a party will have a possibility at the court hearing to use the indicated information during a cross examination of the identifying person.

In contrast to the indicated procedure, in case of the identification conducted by a photograph it is not clearly indicated that an identifying person should be interviewed/questioned concerning the issues related to identification before this process is conducted. In particular, the law states the following: “When an object to be identified cannot be presented for identification to the identifying person, or if that requires unreasonable effort, the identification may be conducted by means of a photograph. In this case, the identifying person shall be presented with at least three other photographs depicting the objects that do not differ significantly from each other and from the object to be identified. Photographs may be presented for identification in an electronic format. An identification shall not be conducted, and if conducted, it shall be considered inadmissible evidence, if the identifying person indicates such characteristics that are not sufficient for the identification of an object subject to identification, or if the identifying person was given a hint as to that object.”⁴⁸

47 OSCE Trial Monitoring Report, 2014 <http://www.osce.org/odihr/130676?download=true> Paragraph 207.

48 Under article 131/5 of the CPC.



2. Surveys done by other organizations

In 2014 the OSCE monitors observed the case of interpretation of this article by the prosecution so that allegedly there is no obligation to interrogate an identifying person at the court hearing in case of identification by means of photographs. This has been assessed as a restriction of a right to defence⁴⁹, as the defence party did not have a possibility to interrogate the identifying person at the court hearing. No change has been made since then to the CPC. Therefore, there is a possibility to interpret the indicated norm the same way in the future as well.

3. Recommendation – Article 131 should be amended and it should define clearly that a person identifying by means of a photograph should be interrogated in advance concerning the identification. At the same time, a party should have a possibility to cross examine the person identifying by means of photographs at the court hearing.

ANALYSIS OF THE RESULTS OF COURT MONITORING DONE BY THE GEORGIAN YOUNG LAWYERS' ASSOCIATION (GYLA)

At the request of the experts and in the framework of the project, the monitors of GYLA have carried out monitoring of 160 preliminary sessions at common courts, among them:

- Batumi City Court - 52 sessions;
- Kutaisi City Court - 47 sessions;
- Tbilisi City Court - 28 sessions;
- Gori District Court - 32 sessions;
- Telavi District Court - 1 session.

During the indicated sessions, 58 accused were not represented by defence counsels, 30 were defended by 30 public (treasury) advocates and in 72 cases private defence counsels were invited by the accused.

During the analysis of the monitoring results, attention of the monitors was attracted by the fact that there was the extremely high percentage of cases where the defence did not find the evidence presented by the prosecution disputable. In particular: it was revealed that out of indicated 160 cases the defence has not disputed the evidence in 97 cases (60%), among them at 52 sessions the accused was not represented by the defence counsels, in 15 cases the interests of the accused were defended by the public (treasury) advocates and in 30 cases – by private lawyers.

This index is especially high in case of Kutaisi City Court, where in 33 cases (70%) out of 47 monitored cases the defence has not disputed the evidence presented by the prosecution and in most cases this decision is made by the accused (26 cases), who participated in the trial without a defence counsel.

⁴⁹ A defendant should have an opportunity to challenge “any aspect of a witness’ statement or testimony during a confrontation or an examination”, which also includes the person’s demeanour. In one case, the defence moved to question a witness who had purportedly identified a defendant as a perpetrator at the investigation stage of the proceeding. The prosecutor objected to the motion, highlighting that there is no provision requiring a witness who identified the alleged perpetrator of a crime through the use of photos to be questioned in open hearing. The interpretation that a positive identification through legal means is beyond dispute is questionable, as there are many visual, social, contextual and psychological factors that may affect a witness’ ability to identify a perpetrator, and the defence must have the right to test these factors on cross-examination.”, OSCE Trial Monitoring Report 2014, paragraph 212.

Number of requests presented by the defence concerning recognition of the evidence submitted by the prosecution inadmissible is surprisingly low, as there were only 5 such cases: 3 by private and 2 by state (treasury) advocates.

Analysis of 160 preliminary court sessions make it clear that only in 16% of cases (26 cases) the defence counsels presented the defence evidence (mostly certificates on the state of health, interview records, 1 inspection and 1 seizure protocols). Among them 7 were state (treasury) advocates and 19 – private. Only in 5 cases out of the presented motions the prosecutors have filed motions on recognition of the defence evidence inadmissible (twice because of irrelevance and three times - on the basis of the fact that the evidence had been obtained in gross violation of law) and in all cases the courts have shared the position of the prosecutors.

During the monitoring there were no cases of recognition of any party's evidence inadmissible at the initiative of a judge.



Richard S. Gebelein, J.D., MJS, BS - Review of ALFG Final Report and Recommendations

November 24, 2017

Introduction: I have had an opportunity to review the finalized report of ALFG with respect to the issues of Equality of Arms and Adversary rights in the criminal court system of the Republic of Georgia. The purpose of my review is to assess the findings and recommendations with respect to International and United States best practices.

I have had the pleasure of working with the experts at the Association of Law Firms of Georgia (ALFG) as they developed this final report on improvement of the criminal procedure of the Republic of Georgia to better meet the principles of “equality of arms” and “adversarial process” and best practices in criminal proceedings.

The activities undertaken since the preliminary draft included a review of best practices in Europe and the United States, a review of numerous studies of the criminal processes of the Republic of Georgia, review and discussion of the initial drafts of the report, consultations with numerous participant agencies of the Republic of Georgia and Civil Society organizations, suggested amendments to the initial draft of the report and additional consultation with the ALFG experts.

The fundamental principles for the review come from practices evolved from the ECHR Article 6 and court decisions implementing that article. Likewise, the principles of best practices in the United States are derived from the concept of “due process of law” as required by the Constitution and Supreme Court decisions defining that concept. Many of the principles are quite similar.

The ALFG report in my opinion is very well prepared and documented. It takes up issues in enumerated sections. I will briefly comment on each section with respect to its relation to best practices internationally and in the United States.

Section 1. Witness Interrogation.

The report points out that under current law and procedure both prosecution and defence may file a motion to have a witness examined before a court under certain limited enumerated circumstances. However, the prosecution may also seek by motion to have a witness be examined before a magistrate judge if the witness refuses to be interviewed. The defence does not have the right to bring such a motion. This statute also does not stipulate that the defence be present at the magistrate proceeding where the witness is interrogated.

Clearly, this present statute and procedure puts the defence at a disadvantage. It violates the principle of an adversary proceeding where each side has an opportunity to gather and present evidence.

The recommendation of ALFG is that the statute be amended to allow either party to file a motion for interrogation before a magistrate. This recommendation would address part of the issue raised. It should also be provided that when either party moves for this interrogation that the other side be notified and be permitted to be present and cross examine the witness (presuming that there is another side at that time).

The ALFG recommendation is clearly a step toward a more fair adversarial system as required by the ECHR and decisions of the Georgia Constitutional Court.

Section 2. Procedure of Requesting Information from a Computer System.

The report notes that under the criminal procedure code (“CPC”) only the prosecutor is authorized to file a motion with a court to request information stored in a computer system or a computer carrier. It has been noted that the

court practice may have expanded the coverage of this article to include any information stored on a computer. ALFG also notes that the statute allows for this type of request to be proceeded upon as a secret investigative technique.

Current statutory law and practice violates the principle of an adversary proceeding. The defence is at an extreme handicap if it cannot procure information that is kept electronically. The report notes the decision of the Constitutional Court finding this provision to violate the Constitution of Georgia and recommends enforcing that decision by mending the CPC provisions. The issue of using secret investigative techniques with regard to computer or electronic data is a difficult question requiring a delicate balance. It is essential to some investigations that this type of information be gathered prior to the subject of the investigation knowing of that investigation. Otherwise, the information may easily be destroyed or corrupted. This is especially true in financial crimes, corruption cases and organized criminal activities. A balance must be maintained between fairness and the ability to properly investigate serious criminal acts.

The recommendation of ALFG is a step toward enhancing fairness of the proceedings and providing equality of arms to the parties.

Section 3. Right to Primary Examination of Evidence.

Under the current CPC the defence is authorized to motion the court for an investigative action such as search and seizure. If authorized such action is carried out by an investigator not assigned to the accused's case. If evidence is seized it is taken first to a prosecutor and only then to the defence. The report correctly notes that this is extremely troubling to the defence. Because of the different roles of defence attorney versus the prosecutor this procedure likely deters defence lawyers from moving for such action. If their action uncovers evidence that points toward guilt and it is used by the prosecutor to help convict, the defence attorney has breached his duty to his client.

It should be noted that in many systems the defence cannot get the assistance of a government investigator to seize evidence. Further there is a legitimate interest that what is seized is recorded and preserved. The solution offered in the report to strike Article 120, paragraph 10 would address one problem. Providing the defence should have access to sufficient staff to perform its own investigative actions would be a significant additional improvement.

Section 4, Prohibition of Filing a Motion for Finding Evidence Inadmissible at a Main Hearing.

Under current practice motions on the admissibility of evidence are heard at a preliminary hearing. Such motions are not permitted at the main hearing unless they fall under the provisions of CPC Article 239. This prohibition of filing motions on admissibility of evidence at the main hearing after introduction of evidence that constitutes a grave legal violation complicates the trial especially if there are jurors. In most adversary systems, the parties may file objections to or motions on admissibility at the main trial. The current procedure in Georgia violates best practices in the adversary fair trial in that it allows inadmissible evidence to possibly influence the judgement.

The ALFG suggested solution to amend the CPC to allow for a joint motion on admissibility of evidence to be filed at the conclusion of the trial would cure part of the problem. It does not address the serious problem of jurors considering inadmissible evidence in those trials utilizing a jury. It is a positive step toward complying with international standards for a fair adversary hearing.

Section 5. Preparation of Parties for a Cross Examination.

The ECHR provides that defendants have a right to adequate time to prepare for cross examination of witnesses. United States constitutional law also provides that the defence have time to prepare for cross examination for the defendant to have had "due process" of law. The problem is that the CPC currently has no provision requiring a party to notify the other parties as to what witnesses will be called, or in what order or what time.



This can be cured by amending the law as suggested in the final report to require reasonable notice in advance of the names and timing for witnesses to be called. Of course, such amendment should provide for relief should emergencies require modification of the scheduled time.

Section 6. Request of Evidence by the Defence

The final report notes that court practice in Georgia is inconsistent and confusing related to the ability of the defence to request the production of evidence. While the prosecutor may move the court to request evidence from a private citizen it appears that the defence can only seek to have such evidence seized through special measures.

While equality of arms does not require that each side have the identical procedure at its disposal; it does require that differences do not preclude the party's ability to obtain the evidence available to the other party. The recommendation to allow the defence to motion the court to request information would resolve the disparity. This would be a step toward equality of arms.

Section 7. Restriction of Witness Testimony Publication at a Court Hearing.

This issue relates to testimony taken and recorded under the previous CPC provisions. The CPC provision allowing publication of recorded testimony did not include publication of such testimony.

The ALFG recommendation to amend Article 243/2 would correct this oversight and provide for a fair adversary trial.

Section 8. Obligation to Interrogate an Identifying Witness at the Hearing When Identification is by Photo.

This section relates to the difference in practice when a witness identifies a person or object through use of a photograph. The witness identifying an object or person is first interrogated as to the basis for identification. Not so where a photo array is used. In addition, some courts have decided that there is no need to interrogate an identifying witness at the hearing if the identification was by photograph.

Clearly, this practice both handicaps the defence if no prior interrogation was had; and, violates the principle of an adversary hearing if no examination is allowed at the actual hearing. Finally, this would appear to violate the right of confrontation of the identifying witness.

The recommendation of ALFG to amend the law to require interrogation when a photographic identification is made as well as to allow for cross examination of such witness at the main hearing would provide a fair adversary trial. This would be a significant improvement over current practice.

Section 9. Evaluation of Evidence in Criminal Proceedings.

This issue raised by the report addresses the relevance of evidence. The CPC provides that evidence shall be evaluated for admissibility, relevance and trustworthiness. The CPC and court practice allows for motions on admissibility to be decided upon motion at a preliminary hearing. There is no mention of any determination of relevance except as evaluated at main hearing. This complicates trials and can be detrimental to a fair adversary hearing if irrelevant evidence is heard by the court and especially where there are jurors.

The AFLG suggested remedy is to amend the CPC to allow for relevance issues to be raised and decided at a preliminary hearing. This solution would bring the practice into conformity with best European and United States practice. This remedy would avoid any chance of such irrelevant material influencing jurors.

Section 10. Notion of Evidence – Notion of a Procedural Decision.

This section of the report notes an inconsistency in how courts in the Republic of Georgia view procedural decisions and documents. Do they constitute evidence? The issue is one of definition and then of court practice. While an indictment and a decision on issuing a search warrant become part of the court file should they be considered in proving any of the factual allegations necessary to decide the case?

This is an important issue because acceptance of these documents as evidence can cause the shifting of the burden of proof thus precluding a fair adversary hearing.

The ALFG suggested reform is to define procedural documents and provide a method for challenging their admissibility at trial. This would be an improvement to the CPC and provide for a fair adversary trial with the burden of proof remaining on the prosecution.

Section 11. Appeal from Decision of Preliminary Hearing Judge that Evidence is Admissible.

Currently, only a decision finding evidence inadmissible can be immediately appealed. When a Judge denies a motion to find evidence inadmissible that may only be considered in the judgement.

The remedy proposed ALFG is to amend the CPC so that a decision be made appealable where a motion has been denied. This would create uniformity and would provide for a fair adversary proceeding..

Section 12 Inadmissibility of Disclosure of Investigation Details.

This section relates to the ability of the prosecution to direct the defence not to make public any details of the investigation. To violate such an order is a crime. This allows the prosecutor to release information that the defence cannot respond to. It creates an unfair advantage in the public perception.

The recommendation is to allow all parties to inform the other parties of the impropriety of disclosure of investigative details and to seek court intervention to control parties from such disclosures.

This recommendation would be a step toward equality of arms.

Section 13. Previous Conviction of Accused.

A defendant's prior record of conviction can be admitted with respect to the reliability of his testimony and/or if it constitutes part of the offence. Clearly, the admission of such evidence puts the defendant at a disadvantage.

Best practices for fair adversary trials require a balancing of any evidentiary value (disproving reliability) against the harm to the defendant (assumption if he did it once he did it again). The recommendation by ALFG is to allow this balancing at a preliminary hearing. This would meet best practices in both the United States and Europe.

Section 14. Changing the Qualification of the Action Committed.

The law allows the judge to amend the charges in favor of the accused where the evidence does not support the original acts charged. This can be done even at the end of the main hearing. When this happens, it deprives the defence of an opportunity to present a defence to the new (admittedly less serious) charges.

European best practices as set out in decisions of the European Court of Human Rights require that the defence have an opportunity to defend against the charges. That defence however could be at the appeal court level.

In the United States, a court may consider "lesser included offences" provided the defense has been given the opportunity to defend against them. Only crimes included in the acts originally charged are permitted.



The recommendation of ALFG is to expand the opportunity to present additional evidence at the appeals court proceeding in these situations and to reargue the previously admitted evidence as it relates to the new charge. This would meet European Standards as to fair adversary proceedings.

Section 15. Use of Indirect Testimony

Indirect testimony is that taken from another person and presented in testimony. It may be considered as admissible evidence if it is corroborated by any other evidence or if the witness discloses the source and the source can be verified. In the United States, this would usually be inadmissible as “hearsay” evidence. The Constitutional Court has held that finding a person guilty on the basis of indirect evidence was unconstitutional.

The recommendation of ALFG is to amend the CPC to adopt the decision of the Constitutional Court that a person cannot be convicted upon the basis of indirect testimony. The CPC should also be amended to include norms for the uses if any of indirect testimony.

Such an amendment would bring the practice into conformity with international best practices and clarify court practice in Georgia.

Section 16. Exchange of Evidence

This section deals with several issues. The first has to do with exchange of evidence required not later than 5 working days before preliminary hearing. The article does not regulate earlier exchange or later exchange of evidence. New evidence may be admitted at trial under Article 239. There is no direction in the law when later developed evidence must be disclosed or if it need be prior to it being accepted by the court. This lack of guidelines makes it difficult to prepare a defence.

The second issue is material marked confidential or secret. This is not disclosed and prevents preparation of any defence or any ability to challenge the evidence or cross examine witnesses. The use of “state secrets” is a serious impediment to the adversary process.

The Constitutional Court has recognized that for an adversary system to work both sides must have access to the evidence on an equal basis. Procedures must be designed to allow that.

The recommendations by AFLG are to amend the CPC to establish guides for when evidence must be exchanged or disclosed whenever it is discovered. Those guides must establish adequate time to prepare. The recommendation as to confidential information is to amend the CPC and/or state secrets statute to provide mechanisms for confidential materials to be assessed to determine the need for secrecy.

It is suggested that amendments requiring that only those parts of the evidence that must be kept secret for national security reasons should remain so classified and that an independent arbiter or judge should be empowered to make those decisions .

Should these amendments be developed and adopted that would help in ensuring the Fair Adversary Hearing required by European Standards.

Conclusion

The report makes concrete recommendations to improve the criminal justice system within the Republic of Georgia. The recommendations made are practical and would do much to bring the system into compliance with European standards.

It has been a pleasure to work with you to address these issues. I wish you success in the adoption and implementation of the improvements that have been suggested.

