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Coalition for
an Independent and
Transparent Judiciary

Application of Preventive Measures in Criminal Proceedings:

Legislation and Practice

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Coalition for an Independent and Transparent Judiciary

Study on Legislation and Practice Preventive Measures

The Coalition for an Independent and Transparent Judiciary conducted a study on problems in the legal regulation and the application of preventive measures. Along with the analysis of national and international legislation, this paper provides an overview of shortcomings revealed as the result of studying the practice. Given that the aim of the study was to draw up such a document that would contribute to the improvement of existing situation, the study also contains key recommendations.

Research of the national legislation and its comparison with the international standards have shown that the legislative framework largely conforms with human rights requirements and does not require essential revision with regard to fundamental issues, save few exceptions. However, the situation with practical application of preventive measures is absolutely opposite. In this regard, the study has shown that the conformity of the legislation with human rights standards is a mere formality because it is not implemented in practice and consequently, has virtually no effect on the protection of rights of a person. The study has revealed that poor substantiation, banality and non-uniform approaches in the application of preventive measures jeopardize the use of preventive mechanism in a lawful and fair manner.

- *Legal Framework*

Coalition Members:

Article 42 of the Constitution
Multinational Georgia
Solidarity to Illegal Prisoners
Georgia Small and Medium
Enterprise Association
Civil Integration Foundation
Georgian Lawyers for
Independent Profession
Liberal
Center for Protection of
Constitutional Rights
International Society for Fair
Elections and Democracy
Association Green Wave
The Union "21 Century"
Georgian Young Lawyer's
Association Human Right
Center
Transparency International
Union of Meskhetian Democrats
Liberty Institute
Georgia Bar Association
Civil Development Agency
United Nations Association of
Georgia
The European Law Students'
Association
Civil Society Institute
Open Society Georgia
Foundation
Institute of Democracy
American Chamber of
Commerce
Association of Civic Initiatives
and Employees Defense
Eurasia Partnership Foundation
Institute of Development of
Freedom of Information
Human Rights Priority
Tbilisi Media Club
Human Rights Education and
Monitoring Centre
Foundation for the support of
Legal Education

The analysis of legislation has shown that legal grounds for the use of preventive measures are exhaustive and the use of any type of preventive measure by a judge is only allowed if these grounds exist. These grounds are a reasonable doubt that an accused person will:

- Go into hiding;
- Not appear before the court;
- Destroy material evidence of the case;
- Commit a new crime

Such an exhaustive list of grounds in the law is strength of the legislation, thereby clearly restricting a prosecutor in selecting a motion as well as a judge in taking a final decision. All in all, it creates a guarantee for the protection of a person's liberty against an unreasonably broad interpretation of the law.

Yet another guarantee is a legal requirement for the proportionality of a preventive measure which is expressed in determining alternative types of preventive measures. As regards the most severe form of preventive measures – the imprisonment, the law contains a special provision concerning this measure, which requires that a court can apply imprisonment only in the event when general aims of preventive measure cannot be otherwise attained.¹ The legislation, in general, obliges a court to consider, when taking a decision, personality of an accused person, his/her activity, age, health condition, family and property status, etcetera.²

To ensure the presumption existing in favor of liberty, it is as important for relevant guarantees to be provided in the law as these guarantees to be actually exercised in concrete cases, which we will discuss below.

As noted in the introductory part, in terms of preventive measures the legislation largely complies with human rights requirements and standards. However, as of now, the law still contains one problematic provision which is conflicting in the context of the right of appeal. In particular, the effective legislation allows a person to appeal a decision of the court of first instance, and prescribes that the appeal must be enclosed with the evidence supporting those new circumstances which were

¹ Criminal Procedures Code of Georgia, paragraph 3, article 198, 2010.

² Criminal Procedures Code of Georgia, paragraph 5, article 198, 2010.

unknown to the lower court and which corroborates the position of the appellant. This provision enables the court to deem an appeal inadmissible if a party fails to provide a judge with evidence of newly revealed circumstances irrespective of the fact that a party challenges legal circumstances and not factual circumstances of the case. Such barriers in the law unreasonably restrict the right to appeal, thereby rendering it a mere formal procedural mechanism.

- Practice

According to statistical data of the Supreme Court of Georgia, out of 13,309 instances of application of preventive measures in 2011, imprisonment was used in 6,558 cases (49.3 percent), as compared to 14,959 and 8,109 (54.2 percent), respectively, in 2010. In the remaining cases in 2011, non-custodial measures, including 6,726 cases (50.5 percent) of release on bail, were applied as compared to 6,757 cases of bail (45.2 percent) in 2010.³

To scrutinize the application of preventive measures in practice, a team working on this study has analyzed 50 court decisions.⁴ The study of the decisions has shown that in contrast to legislation, the practice of applying preventive measures runs counter to human rights standards.

To describe an overall picture, it is important to note that among the decisions studied by the team there was not a single case in which a preventive measure was denied or a motion of the prosecutor was not satisfied. Nor was any other measure but the imprisonment and bail was applied. As regards the problems identified in the application of preventive measures, the main issues include the following:

- Banality of court decisions;
- Lack of substantiation;
- Application of different preventive measures under similar circumstances;
- Lack of deliberation on the use of less severe measure.

It is worth noting separately that several court decisions contain identical phrases. For example, decisions of Mtskheta and Khelvachauri district

³ <http://www.supremecourt.ge/files/upload-file/pdf/7-arkv11.pdf>

⁴ The decision on application of preventive measures, that were studied, were taken after 1 October 2010, after the new Criminal Procedures Code of Georgia entered into force.

courts and Kutaisi city court identically note that: “It [the sum of bail] represents a guarantee for an accused person to behave normally and a reminder for him to determine his further behavior properly.”

The study has shown that the main problem in decisions is the scarcity of facts and general references to threats, without any substantiation and proof of relevance of those threats to a concrete case. Moreover, courts never start deliberation with discussing the use of preventive measure in general. Instead, decisions begin with the consideration of a particular type of preventive measure, which runs counter to the provision in the law requiring that preventive measures be applied only in strictly prescribed cases.

It has been revealed that courts lack a common approach/test which would be used uniformly in considering an issue. Application of different preventive measures without any substantiation towards several accused persons creates a sense that the approach of a court is inconsistent. In several cases of studied decisions the court noted the reconciliation of an accused person with a victim, compensation of damages, existence of permanent residence, thus excluding the threat of a concerned person going into hiding. Nevertheless, at the end of such deliberation a court still applied a bail as a preventive measure, which is incomprehensible.

A common problem in the decisions is that courts do not deliberate on the possibility of applying less severe preventive measures although this is a requirement provided in the law. It has been identified that courts exercise a formal approach to that issue, which is expressed by judges limiting themselves to a single sentence in decisions, which says that the application of any other preventive measure is deemed inexpedient.

- Recommendations

- *Decisions taken by court are banal and fall short of the requirement for substantiated decisions:*

Courts must evaluate individual situation and factual circumstances of concrete cases, including personal qualities of accused persons, health and economic conditions as well as any relevant factor which may be of importance in taking decisions on the use of preventive measures.

- *Standard of proof, when prescribing preventive measure, is low, thus placing the prosecution in an advantageous position:*

Given that courts are required to apply preventive measures only in case the grounds explicitly identified in the law exist whilst to apply the

imprisonment as an exceptional measure alone, judges must strictly observe the standard established by the law when considering motions of prosecutors and only in case of proper substantiation, meet requests of prosecutors.

- *Courts do not start deliberation with discussing the expediency of preventive measures, in general:*

A decision taken by court must, first and foremost, answer a question as to why the use of a preventive measure is necessary in a given case. Only after having provided a substantiated answer to that question, it must proceed with the selection of preventive measure.

- *Court decisions do not allocate equal attention to arguments of the defense and the prosecution:*

Bearing in mind the principle of equality of parties and the equal legal power of evidence submitted by the parties, a judge must pay equal attention to positions and arguments of the defense and the prosecution. At the same time, decisions must properly reflect arguments of the defense.

- *Courts lack common approach which creates a danger of establishing double standard:*

Courts must develop a common approach to the selection of preventive measures in order to avoid different treatment of cases with identical circumstances.

- *According to the Criminal Procedures Code of Georgia, the defense has no right to appeal a decision on the application of a preventive measure without the consent of an accused person:*

The Criminal Procedures Code of Georgia must not require the consent of an accused person for appealing the decision on a preventive measure.

- *According to the Criminal Procedures Code of Georgia, an appeal of a decision on the application of a preventive measure must be enclosed with new evidence:*

The Criminal Procedures Code of Georgia must not contain a direct obligation of presenting new evidences when appealing a decision on the application of preventive measure.

- *The legislation does not define admissibility criteria for complaints to appeal courts:*

The legislation does not define the admissibility criteria for complaints to appeal courts, thereby enabling courts to deem complaints against preventive measures inadmissible. Admissibility criteria for such complaints must be set out in detail in the Criminal Procedures Code of Georgia.