



საია ეხმიანება კანონის პროექტს „საქართველოს სისხლის სამართლის საპროცესო კოდექსში ცვლილების შეტანის თაობაზე“

GYLA Responds to the Draft Law on Amendments to the Criminal Procedure Code of Georgia

On 19th May 2021, a draft law was introduced in the Parliament of Georgia [1], which aims to enforce the Judgment of the Constitutional Court of Georgia in the case "Giorgi Keburia v. Parliament of Georgia" [2] and, consequently, to bring the criminal procedure legislation in line with the Constitution of Georgia.

In particular, the Constitutional Court of Georgia has declared unconstitutional the normative content of Article 13 part 2 of the Criminal Procedure Code of Georgia (CPCG), which allows an illegal item that has been seized as a result of the search to be used as evidence, provided that the possession of the seized item by the accused is confirmed only by the testimony of law enforcement officials. At the same time, the staff of the law enforcement body could, but had not taken appropriate measures to obtain neutral evidence proving the credibility of the search. [3]

Part 3 of Article 13 has to be added by the draft law, which regulates the issue of search/seizure based on the information provided by the confidant/whistleblower. The

record reads that such evidence can be the basis for a Judgment of conviction only if the possession of an illegal object, item or substance by a person is confirmed not only by the testimonies or protocols/records of the persons involved in the investigation but also by other evidence. The record also reads that this rule does not apply when it is objectively impossible to obtain/present evidence. [4]

The Constitutional Court of Georgia declared the norm invalid on July 1st, 2021, giving the legislature a six-month period [5] to clearly define the proper search instructions by the parliament for law enforcement agencies and to provide technical means to the agencies during this period. [6] In contrast, the amendment proposed by the draft law is not fully imbued with the spirit provided by the Constitutional Court, and it largely technically implements the court's decision.

The proposed draft law does not specify what can be considered "other evidence", while the reasoning part of the Constitutional Court clearly states the importance of neutral evidence and also speaks about what such evidence can be - on the one hand, the presence/attendance of a neutral witness, on the other hand, a video recording, which can be easily performed in the conditions of modern technological progress. [7]

The record defined by the draft law, which refers to the derogations from the rules ("This rule does not apply when it is objectively impossible to obtain/present other evidence"), is general and leaves room for mixed interpretation of the record. Furthermore, in practice, there are frequent cases when the search/seizure is carried out as a derogation from the rules, which implies a search/seizure on the grounds/motive of urgent necessity. [8] Judicial review over such motions is also weak. GYLA studied the satisfaction rate of the search and seizure motions conducted in the period from January 2016 to July 2020 on the grounds of urgent necessity and the degree of substantiation of the rulings. The data show that the courts grant the motions for searches/ seizures conducted under an urgent necessity in almost all cases. For example, in the period from 2017 to June 2020, the Prosecutor's Office filed a motion with the Tbilisi City Court in **38,628 cases, of which the court rejected the motion in only 66 (0.2%) cases.** [9]

A study of 100 Rulings revealed that the court is guided by a low standard in assessing investigative actions carried out without prior permission and is limited to a mere blanket justification. The court does not properly substantiate the 74% of search/seizure warrants issued without prior permission, the factual circumstances,

the purpose of the investigation and the possible consequences of the delay are not specified. [10]

The search/ seizure report, whether or not it constitutes objectively substantiated information, is considered as legal evidence at the substantive hearing stage and is often becoming even the main basis for delivering a Judgment of conviction in several categories of cases. GYLA has filed two cases with the European Court of Human Rights where the violation of Article 6 (1) of the European Convention (the right to a fair trial) by the state has been established. [11] In both cases, the Judgment of convictions delivered by the common courts were based solely on the search record which was carried out on the basis of operative information, the testimony of the police officers who carried out the search and arrest operations, and the evidence obtained during the search. The European Court further noted that the applicants' searches were carried out based on operative information, without the prior permission of a judge, the accuracy and reliability of which were not properly assessed by the national courts at either the pre-trial or hearing on merits. [12]

Given all the above, it is important that the draft law address the existing structural and systemic shortcomings, become more specific, provide more legal guarantees for defendants, and equip law enforcement agencies with real opportunities to obtain "neutral evidence," including videotaping.

[1] Initiator: Members of Parliament: Anri Okhanashvili, Aluda Ghudushauri, Rati Ionatamishvili, Alexander Tabatadze, Giorgi Amilakhvari, Davit Matikashvili, Guram Macharashvili, Nino Iobashvili. Author: Member of Parliament of Georgia Anri Okhanashvili. Draft law: 07-3/55/10. Available at: <https://info.parliament.ge/#law-drafting/22080> .

[2] Judgment of the Constitutional Court of Georgia №2/2/1276 of December 25th, 2020, available at: <https://www.constcourt.ge/ka/judicial-acts?legal=10430> .

[3] *ibid*, III-1., „a“.

[4] Draft law: 07-3/55/10, Article 1.

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[5] Ibid, III-1.,„c“.

[6] Ibid, II- p.111.

[7] Ibid. II, 107-108.

[8] See. GYLA's Four Year Criminal Trial Monitoring Report, Trends and Challenges, 2021. p.112. Available at: <https://bit.ly/3wU8DQr> .

[9] Ibid, pg. 46.

[10] Ibid, pg. 49.

[11] Megrelishvili v. Georgia (Application no. 30364/09). Judgment available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-202419%22%5D%7D> .

Flashadze and Kakashvili v. Georgia (Application no. 41674/10). Judgment available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-208752%22%5D%7D> .

[12] GYLA Statement: "The European Court has found a violation in the case of planted drugs and a gun." Available at: <https://bit.ly/3fOlspN> .