The assessment on pending amendments to the Criminal Procedure Code

The Georgian Young Lawyers Association discussed the draft initiated by the Legal Committee of the Parliament envisaging amendments to the Criminal Code and Criminal Procedure Code, to Law on Imprisonment and other laws.

GYLA prepared and submitted to the Legal Committee of the Georgian Parliament the assessment on pending amendments to the Criminal Procedure Code. Within the

frames of the informal working group temporarily established at the Legal Committee, GYLA experts participated in discussion of the draft and reached agreement on some issues. As a result the draft has been improved, however, we consider that some problematic issues still persist and should be reviewed.

1. Issues which were agreed on

a) According to the submitted amendments, a policeman or other competent person was no longer obliged to observe the procedures prescribed by the law when filing the protocol of detention. We think that previously the fact created the danger of law enforcement agencies having abused their power and convict an innocent person. (The issue of terms is especially significant, since if the exact term is not indicated in the protocol it caused illegality and misunderstanding). After reaching an agreement respective article has been corrected.

b) According to the project, inquiry of the financial expert on the basis of parties motion was not obligatory to the court, while expert conclusion without being proved afterwards has no force. After reaching an agreement the issue was corrected.

c) According to the project, the party could submit a motion only before starting of the court dispute. The initiative deprived party the right to submit the motion afterwards, even in case of identifying newly discovered circumstances. After reaching an agreement the issue has been improved.

d) According to the draft, parties to the case had time limits during the court hearing (5 minutes, 10 minutes), according to it not only parties, but also a judge was restricted since the draft did not entitle a judge to give more time to the party than it was envisaged by law. After reaching an agreement the issue has been improved.

e) According to the draft a judge could decide on altering a preventive measure with another stricter one during oral hearing i.e. without participation of the parties. After reaching an agreement the issue has been improved.

f) The draft envisages conducting of operation-investigative activities against a judge. The mentioned concerned the most significant element of administering justice of judges session. It pertains to special sphere of protection and intervention therein in any form is unacceptable. After the agreement was reached

the provision excluding the opportunity to break the confidentiality of judges □ session was included in a draft.

g) The draft contained the concept of not appearing at the hearing for some acceptable excuse which emerged many problematic questions. After reaching an agreement the article has been improved.

h) The draft suggested definitely unconstitutional initiative, according to which only verdict of guilty should be based on evidences beyond the reasonable ground. While article 40 of the Constitution states that □□ resolution on proceeding a person as an accused, a bill of indictment and a judgment of conviction shall be based only on evidence beyond a reasonable doubt. A After reaching an agreement the mistake was corrected.

i) The draft introduced an initiative, which we have called □□□□□□□ of guilty in 24 hours A□ It was an addendum directly contradicting the European Convention on Human Rights, the Constitution of Georgia and General Principles of the Criminal Procedure Code. Authors of the draft considered it absurd and took out of the draft.

2. Problematic issues, which were not agreed upon:

a) The project envisages the cases of appointing defense lawyers to the accused no matter whether the person concerned needs the defense envisaged by law or not. The mentioned initiative contradicts to the article 42 of the Constitution of Georgia and the European Convention on Human Rights, according to which a person is entitled to protect himself either personally or by a lawyer selected by him. Moreover, according to the draft a person may simultaneously have both selected lawyer and a public attorney, which raises many questions and makes the function of the public attorney unclear. It is worth to mention that the legal aid system is not established yet in the country and the reform is still on going. Considering the current situation we may conclude, that appointed lawyer is generally a simple formality.

b) According to the draft the case may be discussed by a judge who previously participated in discussion of the claims against investigator □□ and prosecutor □□ actions and acts, as well as in consideration on appointment of preventive measure (e.g. bail or pre-trial detention). The initiative contradicts with article 6 of the ECHR, according to which everyone has right to a fair trial. By making decision on preventive measure

the judge is governed by a resolution on proceeding a person as an accused. According to article 75 of the Criminal Procedure Code the mentioned resolution is made if there exists sufficient evidence that the offence has been committed by this very person.

According to article 281 of the Criminal Procedure Code the ground for arraignment shall be the cumulative evidence sufficient for a reasoned suspicion that the given specific person has committed an offence.

Therefore, a judge who discusses the resolution and orders a preventive measure to the accused has the preliminary faith on the culpability of a person and the fact is definitely requisite for partiality of a judge. The same opinion is reflected in ECHR judgment in the case Hauschildt v. Denmark.

c) According to the draft the first instance judgement is enforeced and brought to execution immedietly after adoption. Authors of the draft justify the initiative by the fact as though conditions of a person held in pre-trial investigation facility are improved by moving him to the penitentiary. The draft amendment does not take into account the issue of accused who is ordered the lighter form of preventive measure (e.g. bail or guarantee). If such persons will be sentenced to deprivation of liberty by the first instance court, despite the appeal, they will have to undergo a prison sentence prematurely. Moreover, this amendment is problematic concerning monetary sanctions, fines, which if order by the first instance court, despite the appeal will be executed. In such cases, the law does not envisage the mechanism of returning the money if the sentence is overturned by a higher court.

d) GYLA also suggested harmonization of the articles of the Criminal Procedure Code and Law on Imprisonment, which envisages keeping of accused persons, who were detained either on one criminal case or on several interrelated cases, separately and prohibition of their interaction. Current collision caused some misunderstanding. Authors of the draft misunderstood our suggestions and decided to change the article of the Law on Imprisonment, allowing such persons to sit in the same cells unless otherwise ordered by the investigator. We consider that this amendment is tailored to the infamous □□□□□□□□□□A case, where despite multiple requests of civil society groups and Ombudsman of Georgia, persons charged with murder are stationed in the same cell, which is in contravention with current legislation. We think that the step of the government is completely unacceptable and indicates the intention to implement

"selected justice."

e) According to the draft, courts discuss motions by oral hearings i.e. without participation of parties. Among them is the solicitation of the defense on changing the preventive measure by mitigating circumstance of annulling the preventive measure. We think that the initiative is incompatible with the fundamental principle of criminal procedure right of the party to attend court hearings and submit own argumentation and opinion on issues emerged during the hearing. The right is the substantial part of the right to a fair trial. By failure to observe it, present amendment violates article 6 of the ECHR. We would like to add that the draft already contains enough mechanisms against unjustified procrastination of the proceedings (written solicitations, establishing of reasonable terms by the judge and so on). Therefore, we consider it to remove a possibility of oral hearing on such a significant matter as ordering of a preventive measure.

In the set of amendments, the amendment to the Criminal Code is noteworthy:

1. According to the draft following actions are criminalized keeping, using and wearing of forbidden objects in penitentiaries, temporary isolation facilities and disciplinary cells. We think that this is impermissible for the following reasons:

a.) Persons kept in penitentiaries are isolated from public, respectively prohibited object may appear to the detainee only by direct intervention of the administration. Therefore, we consider that not an isolated person but the prison administration should be held liable in case such a subject is discovered. We consider that not a criminal liability but a disciplinary liability may be imposed on a person for violating of established rules in penitentiaries.

b) We would like to underline hard conditions in penitentiaries, which is enough ground to presume that mentioned article of the Criminal Procedure Code would provide possibility for various deficiencies. We see the high risk that prison administration would use A of the detained persons and abuse their power.

2. According to the project - minimal amount of fine becomes 2000 GEL, which is enormous standard for Georgia - considering of present critical socio-economic situation in the country. We think that this issue should be reviewed.