The Problems of Detention, Its Transformation into Arrest and other Preventive Measures under the Criminal Procedure Code of Georgia, Legal Practice and the New Draft Code

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1. Introduction

At the turn of the Millennium the United Nation Member States are so concerned over the unheard-of "boom" of criminality, that they allocate between 2% and 16% of their budgets for combating crime.[1] The indicator of such a "boom" is that criminality has become transnational (sometimes even global) and of increasingly organised nature. Furthermore it is continuously growing both in absolute and relative terms. Thus, the current and future challenges of resolute strengthening of fighting against criminality require the adequate application of a series of modern and reasonably modernised measures. Consequently the necessity of further, relatively fundamental reform of criminal proceedings and related fields becomes ever more pressing.[2]

The outcome of such a conceptual approach in Georgia is the concept of reform of security and law enforcement bodies, on the basis of which the New Draft Criminal Procedure Code[3] was submitted to the President under the auspices of the respective Commission (chaired by Prof. *Chanturia*, the now former Chairman of the Supreme Court). Later on, due to changing political and state reality it became apparent that much water would flow under the bridge before final adaptation and before its becoming a law. Considerable revision of the Draft and even the elaboration of the new Code or a new version of the Draft are not excluded as well, if we take account of the telling criticism against the Draft.[4] It is important to adopt not just another Code,

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[1] *Volevodz*, Legal Regulation of New Trends in International Co-operation in the Field of Criminal Proceedings, 2002, 19.

[2] For details see: *Gabisonia*, the Status of Procuracy in Foreign Countries and Georgia (Comparative Analysis of Basic Conceptual Issues), 1999, 9-16.

[3] For good reason the Draft is not available for general public. The quotations are from a final working hard copy of the Draft as of September 30, 2003.

[4] A number of the so-called preliminary considerations of the Draft were held in Tbilisi and in Budapest – under the participation of the Georgian and foreign specialists. The observations made during one of the considerations (at the enlarged session of the Department of Criminal Proceedings and Criminal Law of the Tbilisi State University) are accumulated in an article of Professors *Papiashvili* and *Paliashvili*: It Is Inadmissible to Adopt the Criminal Procedure Code as It is Now (the newspaper The Republic of Georgia, 2003, 24-27 December).
The author of this contribution shall examine the relatively acceptable provisions of the Draft only provisionally, in total he is skeptical about it. I would like to note briefly (I have expressed my opinion more than once

but a Procedure Code, which will combine the vitally important "two-in-one", but still problematic tasks to a maximum extent – efficient control of criminality (the primary task) and at the same time (in unison, simultaneously), appropriate protection of human rights and freedoms. However, one should remember that the progressive principle embodied in Article 14 III of the effective Criminal Procedure Code– in cases, provided for by the Law, personal legal interests shall prevail over public interest in disclosing a crime and punishment of an offender. Protection of personal interests of an individual, ultimately serves public interests. In other words, the new Code is to create the modern, optimum "procedural conditions" for the democratic control of criminality.

2. Detention and Related Issues (Several Aspects)

2.1 Comparison of Conceptual Models

The effective Criminal Procedure Code of Georgia (hereinafter the CPCG) is based on the following underlying conceptual provisions and rule-principles:

a) Unlike the new Russian CPC,[5] detention on the grounds of doubt is not divided into actual and procedural (legal) detention from a terminological-conceptual point of view. However, if we reason from the recent status quo, an actually detained person i.e., a captive (this term, in case it is adopted by our law, will enable us to make a terminological difference between the actually detained person and the person detained through legal or procedural implementation (denominated as a "detainee"[6] without using any definitive words)– irrespective of whether a representative of an official body captured him/her or an ordinary citizen (according to the last sentence of Article 143 I[7]) – is considered to be legally detained only after drawing up a report on his/her detention. This was the beginning of legal implementation of detention and the outcome of this process was his/her recog-

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both in writing and during the above mentioned considerations), that the modern Georgian court (which is based on the Constitutional principles of competition and equality of parties) would not be able "to swallow" the "semi finished" product of investigation (actually the so called prosecutor's inquest of German type) offered by the Draft (based on the above concept) – it requires the German type of court, which is not aware of these principles, is absolutely "free" and is the sole master of the investigation (For details see: *Filimonova*, Basics of Criminal Law of Germany, Moscow, Publishing House of the Moscow State University, 1994, 901; *Gabisonia*, Basic Conceptual Aspects of the Criminal Procedure Law of the German Federal Republic (Short overview), Samartali, 2001, No. 6, 52).

[5] Criminal Procedure Code of Russian Federation, 2002, 91-96.

[6] For details see: *Gabisonia*, Detention, Bringing in, Search: Some Theoretical-Practical Aspects, Samartali, 2000, No. 3, 69-72.

[7] Comp: The new CPC of Belarus Republic denominated detention, starting from actual one as the detention by an official persons (namely, by a representative of a criminal prosecution authority), while the detention of a person in the capacity of a committer of a criminal crime by a civilian – as "capture" (See: The Criminal Procedure Code of Belarus Republic, 2001, 107-115)

nition as a suspect and a decision on his/her detention,[8] was acknowledged as unconstitutional under the Decision of 29 January, 2003 of the Constitutional Court of Georgia.[9] Thus, by virtue of this Act of the Constitutional Court, the body of respective provisions have been invalidated since 1 May, 2003, while Parliament unfortunately failed to make relevant changes and amendments to the CPC, envisaged by Para. 3 of this Decision, and created a vacuum in the CPCG.[10] This situation caused certain misunderstandings and errors in legal practice. For example, instead of drawing up a report on detention, the respective bodies limited themselves to making a decision on detention (i.e. this trivial and necessary document on the enforcement of the decision was not drawn up) and due to this reason, it was often not clear from the case file, when the suspect was actually brought and detained, i.e. it was not clear where to calculate the detention and later on the arrest terms (the latter includes the detention period as well and both are valued in minutes!..) I would like to mention that the Constitutional Court declared as unconstitutional the following provisions and certain sections related to detention: the first sentence of Article 72 III, Article 142 II (now revoked), Article 146 I and II and the words 'when' and 'has finished the inspection'.

For reasons of comparison, I would like to mention that a similar provision provided for by Article 142 II is still available in the new Russian CPC (Article 91 II), in the new CPC of Belarus Republic (Article 108 I (4)) and in the Ukrainian CPC (Article 106 I). Due to the acknowledgement of the above quoted sections of Article 146 as unconstitutional, the following is the situation starting from 1 May, 2003. This Chapter of the CPCG (Chapter XIX – Detention) does not provide for drawing up a report on detention, verification of the legality and validity of the detention, its terms, time limits for and the procedure of making a decision. The last deficiency, in contrast with the spirit of the decision of the Constitutional Court, is partially redressed by the provision, somehow maintained in Article 265 II of the CPC: "When a person is detained the statements regarding his/her commitment of a crime shall be verified and a criminal case shall be initiated not later than 12 hours following the bringing of the person concerned to a police station or any other inquiry body". It is not difficult to notice that this provision coincides with the provisions, declared as unconstitutional. The first sentence of Article 142 III and Article 146 II should be taken into account during the "revision" on the CPCG according to the decision of the Constitutional Court of Georgia.

b) The new draft CPCG (hereinafter the "draft") does not essentially (in basic issues) differ from the current model, except for the reflection of one fact in the institute of detention. The draft is not aware of a suspect, as such– a person is regarded as an accused from the very moment of his/her detention, irrespective whether he/she was "physically" charged at all or not (in the current meaning) or a decision is delivered on bringing him/her to account in the capacity of an accused (such a procedural document

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[8] For details see: *Gabisonia,* the above mentioned article, 69-72.
[9] See Sakartvelos Sakanonmdeblo Matsne, IV, 2003, 7 (5.02.2003), 7-34.
[10] I wrote about the danger of occurrence of such a vacuum in early 2003 (See: *Gabisonia*, Constitutional control and Procedural Problems related to Detention-Arrest (Comparative Analysis), A human Being and the Constitution, 2003, No.1, 93).

will not be delivered in the future either). The institute of detention is regulated in a somewhat narrower manner as compared with the current one. For example, the specific grounds for detention are not specified (no differentiation is made) – it is generally mentioned (Article 165 I) that a person is detained "in the case of urgent necessity" (the first condition), provided there are grounds for issuance of an order on taking a person to detention or medical establishment (the second condition). But these grounds are stipulated in some other chapter, rather than in the Chapter dedicated to the detention. For example, the grounds for detention are envisaged in the respective chapter (Article 172), but no mention is made of such "common" circumstances, as they are catching red-handed (*a propos*, this term is constitutional – see e.g. Article 87 I, Article 88 V etc.), evident traces of crime on a person, his/her cloths, etc. A detained person is explained his/her rights, which is recoded in the report on detention together with the time of detention (it deems the actual detention – capture is meant). A person detained by the police is to be forthwith presented to the investigation body. Generally, within 48 hours following the detention an accused is to appear before the investigation judge (i.e., the judge of the first instance court, who is delegated with this function), who decides on arresting or non-arresting him/her.

2.2 On Some Deficiencies of the Law on Detention and the Practice of Its Application before Making Changes and Amendments to the CPCG

Due to non-fulfilment of the Constitutional Court Decision, the situation with the law on detention is rather grave, that along with "eternal" and widely agitated problem of hastiness, groundlessness, and discretionary approach is ever more intensified by other, more or less common legal practice infringements and deficiencies. E.g.:

– As a rule, the time of actual detention is not recorded anywhere, if recorded, very "discretionarily", that is conditioned by the fact that, unlike in advanced and a number of other post-Socialist countries, no procedural importance is accorded to this time. After the enactment of the Decision on declaring Article 146 I as unconstitutional, the recording of this time was not required by the law, while in practice it was almost completely ignored.

– In criminal cases the time of bringing a detained suspect to a police station or an investigation body, the procedural time limits were to be calculated in accordance with Article 146 VII of the CPCG (with precision), was often unclear or recorded just approximately.[11] This situation was supported by the fact that the Code did not provide for any special format or document for recording the moment of bringing a person (for example, a "report on detention", "report on bringing"; even if an entry to the registration journal was made with great accuracy, it could not be regarded as such, furthermore, such an entry, of course, could not be reflected in the case file without drawing up a special document).

[11] Unfortunately, the current Code is not consistent with this respect – Article 283 I already speaks about the time frame calculated from "the date of drawing up a report"

– Sometimes a "report on bringing" or a "report on bringing and detention" is made instead of a "report on detention",[12] which appears as a printed form. Sometimes such a form has the following title "On the Detention of a Person Suspected in the Commission of a Crime", that, is stylistically deficient (it should be: "Regarding the Detention of a Person Suspected in the Commission of a Crime"; it is also possible to substitute the composite "Commission of a Crime" with "Crime", also the composite "a Person Suspected" with "a Suspect").

– Furthermore, sometimes no report on detention but a substitute was made – due to the obsession of certain high officials (investigation officers), a resolution on the detention as a suspect (with various titles having various implications) was considered as a "substitute" for the detention report. This is wrong as the resolution is a procedural document which communicates the so called "declaration of will", "resolution", "order" of a person conducting the procedure and does not concern its enforcement – actual detention that should necessarily be recorded via a detention report.

– There is an opposite alternative choice, when, despite the existence of a detention report after making a resolution on acknowledging as a suspect and detention, whether jointly or separately (invalidated Article 72 I and the effective provision – Article 146 III did not coincide with respect to this issue, which allowed for the adoption of any decision[13]), a new similar document was made – a detention report, i.e. "a detained person was detained", that of course is absolutely superflous.

– Legal and practical aspects of search (especially of personal search) upon detention are particularly problematic, first of all in the context of "search as the grounds for detention".[14] Such search and detention is still the most agitated, serious source of human rights violations.

– Sometimes the institute of "detention of an accused for not more than 24 hours", envisaged by Article 160 I of the CPC, is misused in practice. It aims at preventing a charged person, with respect to whom a petition is filed for issuing an arrest warrant, from escaping from the person who conducts the procedure. To put it in other words, it is an additional instrument for the prosecution, which should be carefully applied – an

[12] As an example I would like to refer to criminal case (3403028) against A.T. (House breaking) investigated by the investigator of one of the district offices of the Investigation Department of the Ministry of Internal Affairs.

[13] It already became an established practice that "when it is necessary to further detain an individual in the capacity of a suspect is, a "coupled" resolution is made on "acknowledgement of an individual as a suspect and his/her arrest"; furthermore, if an individual remains to be a suspect, but his/her further detention is not required, a resolution should be made, pursuant to this principle, on acknowledgement of an individual as a suspect and his/her release, but the law does not say anything directly with this respect. (About some of these issues, or the issues of similar urgency, see *Jorbenadze*, Detention as a Coercive Criminal Procedural Measure (Several Aspects), Samartali, 2003, No. 4-5, 93-95)

[14] About several important aspects of this issue see *Jorbenadze*, Personal Search upon Detention (Several Ideas about the Improvement of Legislation), Samartali, 2003, No. 6-7, 81-87.

accused should be forthwith brought before a judge in order to make maximum use of the detention term which should not exceed 24 hours. The law does not provide for any extension of this term. If it is impossible to bring an accused before a judge (or to bring in due course) or to issue an order within this period, a detainee should be forthwith and unconditionally released under the resolution of the person, who detained him/her – a prosecutor, an investigator or the chief of the place of detention, where the detainee is kept (Article 150 I (c)). Unfortunately, this rule is sometimes not observed in practice, while judges and prosecutors do not fundamentally and comprehensively react to such a gross violation.

2.3 Changes and Amendments to the CPCG based on Constitutional Court Decision and Law Enforcement Practice

As already mentioned, as of 1 May 2003 changes and amendments were made to the Criminal Procedure Code, deriving from the Court Decision, only eighteen months later – by the Law of 12 August 2004 On Changes and Amendments to the Criminal Procedure Code of Georgia.[15] Of them the following " new versions" are worth mentioning:

– First of all, Article 23^1 was added to Article 44 of the CPCG (Definitions of the Terms Used in the Code), which provides for the definition of one of the main figures (participant of the proceedings) – "the suspect": "a person, who there are grounds to believe has committed a crime, provided for by the Criminal Code of Georgia, but this doubt is not sufficient to bring charges against this person". We hope, that this provision will have a positive impact on the removal of erroneous practice, when following the many months "Odyssey" of investigation, one day, a person questioned in the capacity of a witness is arrested as a suspect without any new evidence, on the grounds of a resolution and the right away or the other is charged with the crime, in the commission of which he was suspected on the grounds of a doubt;

– The new version of Article 72 V establishes better conditions for securing a detainee with defence – "The request of an individual on inviting a counsellor should be met upon his detention, before giving any explanation, or if this is impossible due to some objective reasons, within a maximum reasonable period, in order for the suspect to be given enough time and means to defend himself". Of course, it is not difficult to predict that the exceptional situation when "it is impossible due to some objective reasons..." will be more "applicable" in our reality. And indeed, it sometimes happens, and the situation is complicated by the fact, that the "reasonable period", which is familiar for advanced countries, fails to acquire specific meaning and due to this reason its relatively uniform understanding and usage is complicated. This concerns the right of a suspect to meet his attorney in private, alone, without any limitation of the frequency and duration of visits – here again is meant the limitation of this right to a reasonable extent, only in exceptional cases, in the

[15] See Sakartvelos Sakanonmdeblo Matsne, I, 2004, 25 (27.08.2004), Art. 125.

interests of the investigation and only on the grounds of respective, well-founded resolution of the investigator (the new wording of Article 73 I of the CPCG).

– The most diversified and sizable changes and amendments concerned detention. Primarily they touched on the conditions and purposes of detention (the following are the purposes of detention: suppression of a criminal activity, prevention of escaping, hiding away or destruction of evidence) and definition of the moment of detention (it was established, that a person is regarded as detained from the moment of restriction his freedom for the purpose of detention and not from the moment of bringing him to a police station or some other law enforcement agency and drawing up a report on detention). As it could be observed, according to Euro-Atlantic standards, this is not the case of a "rude" detention, with traditional meaning, but rather "light", "partially" superfluous restriction of a suspect's freedom, which is guaranteed by Article18 of the Georgian Constitution. Furthermore, in any such case, as per the new wording of Article 72 III of the CPCG, subparagraph "a[1]" added to Article 73 I and the new wording of Article 145 I CPCG, a detaining person is liable to forthwith perform the actions provided for by the so called "Miranda Warning" and other relevant actions with respect to a detainee. Namely, the former is to explain the right to remain silent, the right not to take the crime upon himself, the right to a lawyer, other rights, also the crime he is suspected of.

These changes are, of course, very important, but in practice the issues related to the report on detention are ever more serious, which, it could be said, were settled to "maximum extent" by virtue of the considered changes and amendments. Namely Paragraph 2[1], which was added to Article 146, envisages the mandatory requirement of drawing up a detention report. It was also established that such a report (the requisites of which were set in a very detailed manner, on a mandatory basis) is to be drawn upon the detention (at the detention sight), without any delay. Derogation from this rule or drawing up of a detention report upon bringing a person to a police station or the authorised person of an investigative authority is admissible only in the case when there are some objective reasons (the detention occurred at night, at poorly illuminated place, in bad meteorological circumstances, under the threat of resistance or some other excesses on the part of relative or some other persons, in the case of existence of a real danger for a detainee to escape.). Furthermore the detention report should state the objective reason(s) of failure to draw up a report. The report is to be signed by the detaining person (an official or an ordinary citizen who detained the person concerned), the detainee and his lawyer (in the case he is present). Upon bringing the suspect to the police station or other law enforcement agency, the report should be signed by the authorised person of the police station or inquest agency (in practice, such persons are the heads of the Administrations, Divisions or some other relatively independent structural units or by a responsible orderly of such establishments or a person authorised to conduct inquest.). Also, the additional subparagraph introduced to Article 73 I of the CPCG provides for forthwith provision of a detained person with a copy of the detention report upon his detention. Based on this, the last sentence of Article 146 II[1] provides for an important mandatory provision: "If the detention report was not made in full compliance with the above terms, also if it was not

handed over to the detained person, the latter should be forthwith released". In this respect I would like to comment briefly, that the practice has taken up the following course: non-drawing of a detention report, as a rule, results in unconditional release of a detained person, in other cases the court (a judge) examines, say, the reasons for failure to draw up or hand over a copy of the report, and as a rule it limits itself (himself) to delivering a private decision.

2.4 A Couple of Aspects of Notification about Detention

Certain deficiencies could be detected in law enforcement practice with respect to meeting the requirement of Article 138 of the CPCG on notification (together with the attachment of a copy of respective document to a case file) of a family member, a relative or a friend of a detainee not later than 5 hours (3 hours in the case of minors) following the detention of a person or application of some other procedural coercive measure. This deficiency is manifested in non-fulfilment or under fulfilment and delayed fulfilment of this requirement of the law (which is rather severe) – although, unlike the new Russian CPC,[16] the Georgian Code does not provide for any exception. As regards the draft, it upholds the position of the effective Code. However, instead of setting a strictly determined (limited) time period, it mentions "immediate notification" (Article 175 II). Also, the changes and amendments made to the Code on 13 August 2004 added one more obligation to those of the official who detains a suspect: to explain to the latter upon the detention, that he (the suspect) has the right to "contact a relative" (Article 72 III). It is meant that a detaining official is to create all the necessary conditions for the detainee to exercise this right.

3. Some Pressing Issues of Transformation of Detention into Arrest

3.1. Comparison of Basic Outlines of Conceptual Models

In the effective CPCG arrest is just one of the preventive measures, although, rather severe. It could be attributed to arrest-type preventive measures together with house arrest, while all the others could be treated as non-arrest-type preventive measures. Along with house arrest, the other new or renewed preventive measures were also introduced, including bail, so much disliked by totalitarian systems. But, unfortunately, it was introduced in such a "rigid" manner, that its application is considered particularly difficult against so grave traditional-psychological and property background, especially when it is demanded by the defence at any stage of proceedings and not by the prosecution at first instance courts.[17] Nearly the same is the structure of preventive measures of Russia, the Ukraine, the Republic of Belarus and some other post Socialist countries.

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[16] Namely, Article 96 IV of the CPC of Russian Federation provides for the possibility of keeping the confidentiality of occurrence of detention "in the interests of preliminary investigation", what is criticised by a group of authors (See, e.g. *Steinberg*, Keeping the Detention of a Suspect in Secrecy of Violated His Right to Defence, Rossiiskaja Iustitsia, 2002, No. 7, 45).

[17] For details about the application of bail see: *Jorbenadze*, Several Procedural Problems of Imposition of Bail as a Preventive Punishment, Samartali, 2002, No.4, 8-31; *Gabisonia*, Why is not there Any Actual Alternative to Bail in Our Country?, the newspaper Sakartvelos Respublica, 2004, 21 February. The outcome of this situ-

Less diversified is the legislative practice of a number of advanced countries. The most radical is German CPC[18] – Under Paragraphs 112-126 the arrest (applied on the basis of a judges order) is the only preventive measure, all the other measures, including bail are regarded as the obligations imposed on an accused instead of non-application of arrest (including deferral of its enforcement). Along with the rejection of creation of the system of preventive measures, the term "preventive measure" is not specifically distinguished from other criminal procedural coercive measures.[19]

In France the law of 27 July 1970 introduced the sizable "combined" non-arrest alternative – the so called "judicial review" to the so called "provisional arrest", which was declared as an "exclusive measure" back in 1865. "Judicial review" consists of 16 measures (elements) and of them one or more restrictive (coercive) measure could be applied in a specific case.[20]

The draft almost fully upholds the German model. It makes a difference between the preliminary arrest and judicial arrest (Article 171). A decision on issuance of the order for application of a three months preliminary arrest or on the extension of the arrest period is made by the investigator judge against the petition of only the prosecutor, at a private session, under the participation of the prosecutor and defence attorney– the procedure is almost similar to the effective one (Articles 177-178). In exceptional cases the judges consider petitions without oral hearing (e.g. when an accused is not detained; when the accused could not be brought before the judge due to illness, as a result of the session is held at the place of placement or detention of the detainee).

The draft gives the following grounds for the imposition of arrest sanction: a) when the accused has escaped, is hiding away or there is a danger thereof; b) when the behaviour of the accused proves the doubt, that the accused will destroy, alter or forge the evidence, or will hamper the disclosure of truth through influencing other persons; c) when he has repeatedly committed a grave crime, or has committed a continuous grave crime and there are sufficient grounds to believe that the crime will be committed again; d) when he has committed a particularly grave crime; e) when there is a possibility of committing the crime the accused has earlier threatened to commit.

The provision provided for by Article 180 of the draft is rather important. An investigator judge is liable to defer the enforcement of the arrest order when it is possible that the purposes of preliminary arrest will be attained anyway (Article 180 I). Such a decision could also be adopted later on – upon the review of the order against the petition of the defence attorney (Article 179). Furthermore, an accused shall be imposed one or more obligations that are listed in Article 180 III (including house arrest and bail). According to

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ation is that actually, bail became a "dead-born measure" – in 2002 the court of first instance applied it… only once. Actually the same situation dominates in the next years as well.

[18] Criminal Procedural Code of German Federal Republic, 1994.

[19] *Filimonov*, Basic Principles of Criminal Proceedings in Germany, 1994, 43.

[20] *Gutsenko*/Golovko/*Filimonov*, Criminal Proceedings of Western Countries, II Edition, 2002, 105 (Author *Golovko*).

the effective format and procedure, decisions (any decision) of the judge are subject to appeal with the superior court (consideration without oral hearing is allowed, that in general is one of the measures of simplification of the procedure[21]).

The comparison of the existing basic or relatively popular conceptual models of application of preventive measures does not explicitly speak in favour of the German model selected by the drafters. If the Georgian lawmaker decides to drop the existing, i.e. "post-socialist" system, then the French model, briefly outlined above, would be more appropriate. This model after changes and amendments made to the French CPC under the Law of 15 June 2000 was the major reform after the adoption of the CPC in 1958.[22] Furthermore one should take account of the fact that the German Procedure Code (which was transposed from the so called Napoleon's French Code and is still called as the Code of 1878) has not undergone any "new" fundamental qualitative changes in the light of the above discussed issue since the adoption of the new version of the Code several decades ago,[23] Also the German authors themselves bitterly criticise the above mentioned model. This situation is conditioned by the following circumstances. First of all, in practice, there are cases of groundless, sometimes long-term arrest, while according to statistical data, almost half of the convicted are released from custody in the court hall – due to the imposition of conditional sentence, fine or short-term deprivation of liberty.[24] Secondly, as stated by the theoreticians, the part (e.g. the gravity of crime) of the five grounds for applying arrest is unjustified.[25] Thirdly, in Germany (despite the explanation of the Constitutional Court of 1965 that the preliminary arrest may not have any other purpose) the police and the prosecutor's office try their best to have the accused arrested for the purpose of obtaining a confession through the application of the well known means of physical or psychological pressure or to otherwise ease the investigation. Unfortunately judicial review has not proved to be efficient enough.[26] I would like to add that in this respect the psychological and legal situation in Georgia is ever more precarious, complicated and contradictory, quite peculiar for transition countries, and the majority of practising lawyers do not regard other preventive measures, except for arrest, as real preventive measures. These factors should by all means be

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[21] Regarding the simplification of the proceedings, see *Gabisonia*, Current Problems of Simplification of Criminal Proceedings (Compact Over-simplified Format), Commemorative Collection of Articles of the TSU Law Faculty (to be published).

[22] For details see *Golovko*, Reform of Criminal Proceedings in France, 2001, No.6, 89-98.

[23] Although, according to *Petrukhin* "Procedural forms are sustainable and stable", but in my opinion the absolutism of this provision would be a mistake, as this does not exclude the modernisation or even "substitution" of procedural forms or institutions, moreover in "uneasy" post Soviet space (See *Petrukhin*, Conceptual Basics of the Reform of Criminal Proceedings in Russia, 2002, No.5, 18).

[24] See *Philimonov*, the mentioned study, 47.

[25] Ibidem, 48.

[26] Ibidem

taken into account in the choice of conceptual model, in order not to provoke an unintentional undesirable action– not to push law enforcers into further deepening this negative trend. Also, it is necessary to introduce a set of provisions into the draft, which will secure the prevention of misuse of arrest to the maximum possible extent – with due consideration of the fact, that "preventive measures should not be applied as methods of influencing an accused".[27]

3.2 Deficiencies of the Law on the Imposition of Arrest and the Practice of Its Application

I would like to comment on some of the most common and otherwise topical aspects (the range of which is too wide):

– There are frequent cases of violation of the following requirements of Article 140 V: a) petition on the application of a preventive measure should be well-founded; b) It should include accurate data concerning the accused; c) It should be submitted to the judge together with the criminal case file. Namely, sometimes the petition does not mention (or mention insufficiently) the ground(s) of application of the preventive measure, or sometimes they are referred to only declaratively (sometimes the whole spectrum, provided for by the Code is listed), superfluously, without any reference to a specific ground (sometimes there is no logical argumentation). In general the reference to the pages of a case file is very rare. The case materials are partially or totally not bound or even numbered not only at district (city) courts, but even when referred to the court of superior instance (let alone the description – the law does not provide for this requirement, that is a deficiency and is promoting the non-implementation of the elementary culture of case proceedings). Sometimes the petitions do not give not only accurate (complete, comprehensive), but sometimes even relatively approximate (incomplete) data concerning the person with respect to whom the issue of application of a preventive measure is raised. This happens when under Article 153 of the CPCG this data (especially the data concerning criminal records, family status, etc.) is of particular importance for the determination of the application-imposition of a preventive measure with respect to the person concerned.

– The submission of incomplete (deficient, groundless, legally ill-founded, etc.) procedural documents by the parties is a usual practice at the next stage as well. Namely: a) petitions on the prolongation of the period of arrest or house arrest are often merely the copies of the text of the resolution on the extension of the investigation period and do not include (or duly reflect) at least the key points: how the expired arrest period was used by the investigation (i.e. what was done, what was not done and why), what should be done with respect to the case, and why the required extension is required (sometimes 2 or 3 months period is sometimes requested for the performance of a couple of

[27] *Truneva*, Current problems of application of preventive measures in criminal proceedings, Abstract of thesis for completion of scientific degree of Doctor of Legal Sciences, 2002 14.

investigative actions or establishing other accomplices), why should the accused be retained under arrest or house arrest. etc.; b) the complaints of the parties (more frequently those of the defence) are often unfounded or ill-founded,[28] furthermore the investigation panels are addressed with the claims, having fancy titles: "private complaint", "appellate complaint", "private appellate complaint", etc. I have already commented on this issue back in 1999 in the journal "Samartali",[29] but without any result (despite a chronic deficit of legal periodicals, this non-departmental Georgian legal journal with long-standing traditions is read only by a small number of practicing lawyers). Consequently, the judges become obliged to specify at court sessions that these are ordinary complaints, which are to be considered by an investigation panel judge unilaterally; c) in none of the petitions, filed on the grounds of Article 140 XVII, mention is made of a new, essential circumstance, or it is not duly presented-founded. As a rule, in both cases the petitions (through oral hearing) are considered at a court session when, in my opinion, based on the principles of simplification of the criminal proceedings, in the first case (when no new circumstance is indicated) it should not be accepted by the judge or when it should be considered in default of the parties (i.e. without oral hearing) through the delivery of a decision.

– Part of the persons, filing petitions and complaints – parties to the proceedings – make recourse only to the gravity of the accusation or incriminated offence – qualification as a grave or particularly grave crime, as self-sufficient grounds for the application of arrest – as the grounds for the imposition of the preventive punishment or the replacement of the non-arrest preventive measure or house arrest with arrest, under Article 153 III of the CPS. This is not right, as the gravity of the crime is not such a self-sufficient grounds for the incriminated offence – this circumstance, although the priority one, is just one of the circumstances to be taken into consideration together with the other circumstances mentioned in Article 153 of the CPS.[30] I would like to mention, that as "indirectly" shown above, the new draft CPCG, although in a milder manner, tends towards the exaggerated solution for the factor of gravity of the offence, that is rather inconvenient for the idea of modern, democratic, legal-human state.

– It should be said, that the list of grounds for the application of arrest measure as a preventive punishment is not in line with international standards in some other respects. As under the international agreements and treaties these standards prevail over the CPCG[31] they are subject to direct application, of course with due compliance with the

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[28] For example, in April 2003 in the complaint of the defence lawyer filed with Tbilisi Circuit Court, consisting of two sentences, regarding the cancellation of the preventive measure – Arrest against the accused charged for homicide, only the following was said: "Please, cancel the court order of 20 April 2002 as groundless and ill-founded" (see: materials 1g-297-2003).

[29] *Gabisonia*, Some Aspects of Institutional, Competences and Organisational Improvement of the Investigation Panel (Theory, legislation, Practice), Samartali, 1999, No.5, 18.

[30] For more details on taking account of the gravity factor, also the issues of the so called "inadmissibility of determination of culpability" see *Gabisonia*, Key Points of Taking Account of the Gravity of Charged offence during the Imposition of Arrest and Other Preventive Measures with respect to an Accused (Comparative Analysis), Samartali, 2002, No. 1-2, 80-83.

[31] Georgian Constitution, Article 6 II.

principle of proportionality and other principles, acknowledged by the European Court of Justice.[32] These standards along with the European Convention and the case law of the European Court of Justice are embodied in UN documents as well. According to the Resolution 17 (2) (6) of the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 1990 (The International Case Law and UN Congress on the Prevention of Crime and Treatment of Offenders)[33] there are four alternative sufficient grounds for the application of arrest as a preventive punishment: 1. He may hide away (escape); 2. He may interfere in the course of justice; 3. He may commit a new crime; 4. Public order may be breached. Without any further details, I would like to say that Georgian legislation does not provide for grounds III and IV. Furthermore, ground four is not mentioned in the draft either, while ground two is given only partially (in the light of possible fulfilment of threat). The well-known European Convention on Human Rights and Fundamental Freedoms essentially expands the list of possible grounds for arrest, in a somewhat more indistinct manner.[34] I would like also to mention that due to attesting the existence of such grounds the author of this article, acting in the capacity of the investigation panel judge, has substituted the non-arrest measure with arrest for the accused N.P.[35]

– Due to neglect and superfluous comprehension, the issues of formal (procedural) and factual (evidential[36]) grounds (the existence of both grounds is mandatory – otherwise the preventive measure can not be applied. Unfortunately this does not explicitly derive from the Code for the applications of preventive punishments are chronically problematic. Namely, in their complaints, petitions and speeches made at court sessions, the parties only declaratively refer to the existence of such ground(s), but later on they fail to clarify which ground are meant and what is the reasoning. In other cases they (and even judges in their acts) inaccurately operate with these concepts (inaccurately represent their content or legal nature).[37] It should be particularly stressed, that the following requirement of the law (Article 153 II of the CPCG) is relatively ignored: a preventive punishment is applied when the evidences in the criminal case[38] (and not only mere presumptions) provides for sufficient (and not incidental) grounds to believe (this is the

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[32] About these principles see, e.g.: *Korkelia*, Principles of Interpretation of the European Convention on Human Rights, Georgian Law Review, 2002, No. 4, 466-501.

[33] The document is referred to according to the official materials of the Conference-seminar held in Budapest, 15-19 October 2001, under the participation of the author (in the capacity of a reporter).

[34] The compact comments on the respective provisions of the Convention and the Resolution see in: *Gabisonia*, Preventive Measures in Criminal Proceedings, Practical Guide, (Supplemented with procedural documents), 2003, 124-128.

[35] File No. 1g-698-2002 (04.12.2002) of the Investigation Panel of Tbilisi Circuit Court.

[36] The last term "evidential grounds" is not mentioned in the Code, in the doctrine and practice it is introduced by the author of this contribution.

[37] For details see: *Gabisonia,* Several Pressing Aspects of the Problems Related to Factual Grounds of Application of a Preventive Measure (Comparative Analysis), Samartali, 2001 No. 11, 77-81; *Gabisonia*, Official or Procedural Grounds of Application of a Preventive Measure (Comparative Analysis), Samartali, 2001 No. 11-12, 100-103.

[38] In this part the provision is inaccurate, at least. because such an evidence can be presented directly at the court hearing.

very "substantiated presumption" mentioned in the next paragraph of this Article), that is mandatory any of the purpose (at least of one of them) mentioned in the first paragraph of this Article to be fulfilled.

Inasmuch as the petitions and complaints, filed with the court by the parties are frequently deficient and quite often they are not (can not be) corrected-completed during the court hearings either, there arises the issue of the judge's position, mainly in the light of the latter's impartiality, equality of the parties and the application of the principle of competitiveness. Namely, whether the judge is entitled, e.g., to note that in the case of being at large, there is a danger that the accused will hamper the establishment of truth and'or will escape – when the prosecution has not mentioned this ground. Some authors exclude such an activity of judges in principle[39] that from theoretical and conceptual point of view is not without good reason, but it also is the fact that judicial practices of Georgia and Russia are rather "blurred" in this respect (the principle of reasonability prevails). To illustrate this, here are the several examples from judicial practice of, where a number of violations and deficiencies are also accumulated:

– The first case is a very good sample of "legal abracadabra" and in my opinion does not require any thorough comment. Namely, in the investigator's petition on the imposition of arrest as a preventive measure, the case story is followed by the following phrase: "Taking the above said into consideration, G.T committed a grave crime and with the view to prevention of the possible liability, his staying at large will obstruct the preliminary investigation, furthermore, the applied preventive measure fully corresponds the committed crime".[40]

– The second example is quite full of various, mainly common breaches and deficiencies. Namely, in the criminal case, initiated on the grounds of Article 260 II (a) of the Criminal Code of Georgia (Illegal Purchase, Traffic and Storage of Drugs in Large Amounts)[41] the investigator filed a petition against the accused D.K., who was charged with the above crime, and demanded the transfer of the offender under police review, indicating the following circumstances: "Although D.K. has committed a crime, but he has a permanent residence in Tbilisi, has not previous criminal records and his being at large will not hamper the establishment of the truth". During the consideration of the petition the prosecutor demanded the imposition of arrest as a preventive punishment under the following motivation: the incriminated offence was qualified as particularly grave one and it was possible for the accused to hide away from the investigation and the count, fearing of severe punishment. The defence did not uphold either of these positions and demanded the rejection of the application of any preventive measure. The judge ruled that: "the evidence of the case do not provide for sufficient grounds to believe, that the accused N.K. committed the incriminated offence". Furthermore, he considered, that "...the investigator's petition was ill-founded and, thus, it should be rejected, as the accused is

[39] See, e.g.: *Zhukobski*, Is a Judge Bound by Prosecution Arguments upon Making a Decision on the Application of Arrest, Rossiiskaia Iustitsia, 2003, No.4, 43-44.
[40] Criminal Case No. 250362 (2003), 38.
[41] Criminal Case No. 1004134 (2003), 65-66.

charged with a particularly grave crime, he does not blame himself of and the supposition that his staying at large will hamper the establishment of truth and that there is a danger that the accused might evade from the appearance and hide away from the investigation bodies and the court, is groundless" (Order No 10-g-202-2004).

– With respect to the last example I would like to comment on the following key points (without detailed argumentation): 1) Investigator's assertion that the accused "has committed a crime" is an empty statement, as the commission of a crime is not a self-sufficient ground for the application of a preventive punishment, moreover without taking due account of its gravity; 2) The prosecutor has actually disallowed the possibility of obstruction to the establishment of truth, though he has not substantiated his statement; 3) The judge's conclusion on the commission of the incriminated offence, with its attributes, coincides with the grounds for bringing to account of or charging a person in the capacity of an accused (Article 281, CPC), the verification of the occurrence of which does not fall within the terms of reference of a judge at this stage and thus often becomes grounds or cause for the defence to claim the violation of the presumption of innocence; 4) The judge has expanded the list of grounds for the application of arrest with respect to the accused and the list of circumstances to be taken into consideration, as compared with both representatives of the prosecution, but at the same time he made a negative statement that the accused did not blame himself of the charged or incriminated offence. Of course, this is absolutely inadmissible, as the accused does not bear the burden of returning himself guilty – on the contrary, under the constitution and procedural law he is entitled not only to keep silent, but not to assume the responsibility for a crime, not to give evidence against himself, etc. that can not be used against him (See, the Georgian Constitution, Articles 40, 43; CPCG, Articles 10, 12, 18, 115).

– It is a vexed question (both in theory and practice), whether a decision is to be made by the judge when in a criminal case the act of an accused is qualified inaccurately – as a rule, it is exaggerated (regarded as a graver or "more serious" crime). Some authors consider that the judge is to verify the accuracy of legal qualification of the person's acts.[42] In Georgian practice the issue is a matter of compromise. If. for example, the judge considers that theft was qualified as a related crime – burglary (or vice versa), that, at the same time is not a explicitly apparent decision beyond controversy, the judge agrees to the qualification and applies the preventive measure based on this qualification. But, if, for example, the light or less serious health injury is qualified as attempted homicide, the judge will note that there is no factual evidence in the case file for the application of the preventive measure for attempted homicide and makes a respective decision without deliberation on the qualification of a crime, as this issue is "delicate" – its decision, at the stage of preliminary investigation, is the prerogative of the prosecution. It is evident, that it would be better for law to settle these issues.

[42] See, e.g. *Voronin*, Procedure, to Be Followed by a Judge When Making a Decision on Imprisonment, Rosssiiskaia Iustitsia, 2002, No.12, 45.

– Rather often in his complaints and petitions and during the consideration of complaints and petitions at the stage of preliminary investigation, a defence lawyer (who calls himself an advocate, though the law designates such a procedural figure as a "defence lawyer") develops the position which manifestly contradicts the position of the accused, that results in illegal demand. In particular, this is the case, when an accused does not plead guilty of the crime (or at least part of it), but despite this the defence lawyer demands the application of non-arrest preventive measure – under initial imposition or subsequence alteration procedure (sometimes this is justified by the statement that "there is still much to be cleared out"). In my opinion the defence should demand (basic demand) the cancellation of a preventive measure. Furthermore the practice has proved that in the case of such a position, it is not prohibited, and it would be beneficial for the case, if the defence lawyer presents all the facts and arguments, which may become grounds for making the alternative decision, which will be beneficial for the accused – say, in the case, when the judge considers, that there are grounds for imposition of a preventive measure, but not arrest.[43] The same is true with the substitution of arrest or other preventive measure with a less severe preventive measure. It is an established practice that a defence lawyer, in such cases, chooses the lesser of two evils and puts forward the issue in the light of such an alternative, that in my opinion is quite reasonable.

[43] For details see: *Gabisonia*, Preventive Measures in Criminal Proceedings..., 101-103. *Gabisonia*, Participation of a Defence Attorney in Judicial Control over the Preliminary Investigation. Practical Guide, 2003.