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Legal Regulations and Practical Features of a Person's Arrest with a Court Ruling

This article looks at the one of the most important institutes of criminal procedure law. Protecting the right to liberty is a major positive responsibility of any democratic state. The freedom of the person is inviolable. Consequently, the restriction of this right and the interference of the state in it is possible only in rare, exceptional cases, provided that the normative rules established by the imperative must be observed unconditionally.

The article is based on the analysis of scientific literature, legislation and investigative / judicial practice. It reviews the key provisions of lawful arrest and the challenges involved. The purpose of the study is to identify gaps in legislative and investigative / judicial practice related to the arrest of a person based on a judge's ruling and to develop the necessary recommendations for their elimination.

Keywords: *Arrest, Lawful Arrest, Judge's Ruling, Probable cause.*

1. Introduction

The study of an arrest as a procedural coercive measure is so relevant that it is directly related to one of the most important and fundamental values of a person – his freedom. In view of the above circumstances, the study of lawful arrest is important, as it is necessary to determine the completeness of the current legislation with the mechanisms of protection of rights, how it is interpreted on a theoretical level and what coherent or contradictory aspects are revealed in terms of practical application of the norm.

Arrest of a person with or without a court ruling serves to promote the proper administration of justice, which is reflected in the prevention or suppression of specific threats. However, on the other hand, the arrest of the person itself is associated with the risks of arbitrary restriction of the rights of the arrested person. In view of the above, the special legal nature of the arrest as a procedural coercive measure underscores its urgency and importance.

Arrest of a person on the basis of a judge's ruling is one of the tangible legal levers for an effective fight against crime. However, at the same time, the prosecution has an obligation to strictly enforce a number of legal rules in order not to unduly and unjustly restrict human rights. Accordingly, the provisions of the current legislation should be regulated in such a way as to exclude the risks of arbitrary interference with the person's liberty and, at the same time, impose unconditional obligations on the state servant. Moreover, the linear and lawful development of investigative practices is directly related to the protection or violation of human rights.

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In view of the above circumstances, it is necessary to identify problems at both the normative and practical levels, to seek appropriate ways to resolve them, to improve the current legislation and to apply the lawful arrest legally correct in practice.

2. Probable Cause as a Necessary Evidential Standard

Under criminal procedure law, arrest can be both lawful and unlawful, which means that a person can be arrested both on the basis of a judge's ruling and, in case of urgent necessity, without the permission of the court.[1]

The main essence of an arrest of the person on the basis of a court ruling is that before the person is arrested, the objective observer, the judge, examines the factual and formal grounds for the arrest and makes a decision to restrict a person's right to liberty only if they exist properly.[2]

The first and third parts of Article 171 of the Code of Criminal Procedure (hereinafter – the Criminal Procedure Code) directly indicate the circumstance that it does not matter whether there is lawful arrest or unlawful arrest, in both cases, there must be a probable cause[3] that the person committed a crime, i.e., any action provided for in the Private Part of the Criminal Procedure Code.

Accordingly, a probable cause is a necessary evidential standard both in the arrest of a person with a judge's ruling and without it.

The standard of probable cause should establish both the fact that a person has committed a crime and the circumstances under which the person will flee or will not appear before a court, destroys information important to the case, or will commit a new crime. The absence of one of these preconditions precludes the possibility of applying the arrest and makes it illegal.[4]

According to Article 3 (11) of the Criminal Procedure Code, law enforcement body in relation to a particular criminal case must have a totality of facts or information that raises the suspicion in so-called the third eye, in the objective observer that this particular person may have committed this crime. This ground can be established by a variety of pieces of evidence, including a record of identification for a victim / witness, a record of inspection, a record of search/seizure[5] and other evidence in the case that indicates a person has allegedly committed a crime.

Although the evidentiary standard of a probable cause is less rigid than other standards of evidence, the prosecutor is still empowered, when establishing such a standard, to file a motion with a court for the arrest of a person. Also, a person authorized to arrest is allowed to arrest a person without the permission of a court, in the presence of this standard. In both cases there is a justification to the extent that both types of arrest will inevitably pass judicial review and it is the latter who will have the final say on the legality of the arrest.

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1 *Gutsenko K.F., Golovko L.V., Filimonov B.A.,* Criminal Procedure of Western States, translation from Russian, *Gogshelidze R. (ed.),* Tbilisi, 2007, 281-285.

2 *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Process, Tbilisi, 2015, 83 (in Georgian).

3 *Anderson J.F., Thompson B.,* American Criminal Procedures, Durham, North Carolina, 2007, 178.

4 *Papiashvili L. (ed.),* Collective of Authors, Georgian Criminal Procedure Law Private Part, Tbilisi, 2017, 209 (in Georgian).

5 Ibid.

The standard of probable cause provides admissibility for a person in case of reasonable suspicion of restriction of liberty and excludes arbitrariness, is an important part of protection against arbitrary restriction of person's liberty.[6]

First of all, the judges reviewing the motion for arrest check (should have checked) the factual basis for the application of the arrest in accordance with the standard of probable cause provided for by the criminal proceedings.[7] Typically, in practice, more problems arise in setting the standard of a probable cause, not in relation to the alleged commission of a crime, but in the substantiation of other threats that must precede the arrest of a person.

There are cases when prosecutors justify these threats by saying only that "there is a probable cause of a specific person fleeing and / or other threats", but in fact their motion does not say anything else about the possible realization of these threats and / or does not substantiate those to a degree that actually gives us a standard of probable cause. Nevertheless, in most cases, the courts do not shy away from granting such motions.

It is interesting to consider one of the criminal cases from practice. In the framework of the mentioned case, on May 8, 2018, the prosecutor filed with the Tbilisi City court a motion and requested the arrest of D.S. According to the standard of probable cause, in the motion was initially established by the prosecutor that D.S may have committed an offense under Article 182, Part 2, Subparagraphs "d" and Part 3, Subparagraphs "B" of the Criminal Code of Georgia, and then he was transferred to substantiate the expected threats. In the mentioned motion, the prosecutor explains that the above crime without alternative exceed 7-11 years of imprisonment , which is why there was a probable cause that after the indictment was filed, in order to avoid the expected harsh sentence, a foreign national D.S with connections abroad, would flee from the investigation and the court. Also, a few words substantiated the fact that D.S. might have influenced both the interviewees already interviewed in the case and the witnesses to be interviewed in the future, as evidenced by his various contacts with individuals, thereby actually destroying information relevant to the case. No other substantiated evidence of the actual existence of the threats can be found in the mentioned motion.[8]

It should be noted that the above-mentioned motion of the prosecutor was satisfied by the Tbilisi City Court's ruling.[9] According to the judge's mentioned ruling, there were both formal (procedural) and factual (evidential) grounds for the arrest of D.S. According to the court, the information in the case and the totality of the materials presented gave legal grounds that D.S might have committed the crime provided for by Article 182 (2) (D) and 182 (3) (b) of the Criminal Code of Georgia. The Court also points out that he agrees with the Prosecutor in the position that once D.S. becomes aware of that he may be charged in the said case, he may flee; there is also a probable cause that he will destroy information relevant to the case and affect witnesses. It was on these grounds that the court ruled that the arrest of D.S. should have been carried out on the basis of a judge's ruling. Any

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6 *United Nations*, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, New York, Geneva, 2003, 174.

7 *Mchedlidze N.,* Standards of Application of the European Convention on Human Rights by Common Courts of Georgia, Tbilisi, 2017, 51 (in Georgian).

8 Criminal Case № 092310819001, Motion for Arrest 8/05/2018.

9 Ruling № 6137 of the Tbilisi City Court 8/05/2018.

other justification or position as to why the court granted prosecutor's motion is not read in the mentioned ruling.[10]

Following this, on May 10, 2018, based on a court ruling, D.S. was arrested according to the report of the accused person. On May 11, 2018, the prosecutor have already appealed to the court with the request for applying the measure of restraint[11] and requested that detention be applied against the accused D.S. The application of the mentioned measure of restraint was substantiated on the same grounds as discussed above about the motion to arrest. In this case, too, the prosecutor indicated that the ground for applying the detention was to prevent the accused from hiding and interfering with the rendering of justice/the collection of evidence.[12]

Interestingly, according to the decision of the Tbilisi City Court[13], the above-mentioned motion of the prosecutor to apply detention was not satisfied and the accused was selected on bail in the amount of 50,000 GEL.

According to the judge's mentioned ruling, with the standard of probable cause established only that D.S. might have committed the act charged against him, although the reality of the other threats had not been substantiated by the prosecutor. According to the court, the only fear of impending punishment cannot be the sole ground for using detention against the accused person. Although severe punishment is a relevant factor in assessing the risk of hiding, this threat cannot be assessed in the abstract. The court pointed out that D.S. was twice interviewed as a witness in this case, as well as the dispute was resolved through a civil procedure against him, and nevertheless, he had never left the territory of Georgia. In addition, he had a wife and children in Georgia, had a permanent place of residence, engaged in an entrepreneurial activity, which reduced the risk of hiding from him.

In addition, the court considered that there may have been some risks and dangers in putting pressure on witnesses by the accused person, but not to the standard that the most severe form of restraint – detention is provided for.[14]

In view of all the above, taking into account the above position of the judge, with the standard of probable cause could not establish the existence of fleeing of D.S. or other relevant threats. Consequently, this could not be substantiated with the required standard nor could in the motion for arrest, which could have led to the rejection of the mentioned motion. Nevertheless, it should be noted that the judges reviewing the motion for arrest, in most cases, do not enter into an in-depth discussion in the context of substantiating the threats and for this they give place to the judges reviewing the motion for the application of a measure of restraint, as was in the above-mentioned criminal case. Therefore, in the context of human rights protection, despite the fact that the maximum term of detention is 72 hours, it is advisable, that arrest warrants should not be issued superficially, without verifying and / or establishing the reality of the threats by the standard of probable cause.

A similar approach is being developed by the European Court of Human Rights and its established practice. Even short-term deprivation of liberty is considered to be the most severe form of

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10 Ibid.

11 Criminal Case № 092310819001, Motion for the Application of a Measure of Restraint 11/05/2018.

12 Ibid.

13 Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.

14 Ibid.

restriction of the right of a person (accused)[15], the justification of which is considered by the European Court of Human Rights under Article 5 (3) of the Convention for the Protection of Human Rights and Fundamental Freedoms.[16] According to the European Court of Human Rights, although a probable cause that a person has committed a crime is a necessary condition for restricting his or her liberty, this alone is not enough and at the same time, there must be tangible circumstances that justify such interference by the state.[17]

3. Necessity of Imprisonment as a Sentence

According to the first part of Article 171 of the Criminal Procedure Code of Georgia, If there is probable cause that a person has committed a crime for which the law provides imprisonment,…upon motion of the prosecutor, the court, according to the place of investigation, shall deliver a ruling for the arrest of the person without an oral hearing.[18] This rule refers to the lawful arrest, based on a judge's ruling, in which case it is necessary to have a probable cause against the person for the crime for which the law (CC) should provide for imprisonment.

It should be noted that the necessity of imprisonment as a sentence applies only to the lawful arrest based on a judge's ruling and not to cases of urgent necessity. A verbal explanation of the law makes it possible to make this conclusion. Article 171 of the Criminal Procedure Code explicitly states that a prosecutor should not file a motion in court and, consequently, a court should not rule on the arrest of a person against whom there is a probable cause that he has committed a crime which does not provide for imprisonment.

It should not be disputed that a person may be arrested in such a case without a judge's ruling, in a state of urgent necessity, due to the following circumstances: Article 171 of the Criminal Procedure Code is based on the grounds for arrest and should be guided by this norm when it comes to arrest. According to the 3rd part of the mentioned norm, a person may be arrested without a court ruling only if there is a probable cause that the person has committed a crime and the risk that he/she may flee, not appear before the court, destroy information that is important to the case, or commit a new crime cannot be prevented by an alternative measure that is proportional to the circumstances of the alleged crime and to personal characteristics of the accused. Therefore, it is clear, that first part of Article 171 of the Criminal Procedure Code refers to the lawful arrest of a person, while the second and third parts of the said article are entirely devoted to the unlawful arrest of a person in case of urgent necessity.

If the legislator had willed that the arrest of a person in both lawful and unlawful cases required a mandatory sentence of imprisonment, then he would have formulated Article 171 (3) of the Criminal Procedure Code as follows: If there is probable cause that a person has committed a crime for which the law provides imprisonment, or the person will flee, … Accordingly, the legislature directly

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15 *Trexeli Sh.,* Human Rights in Criminal Procedure, Constitutional Court of Georgia, Tbilisi, 2009, 452 (in Georgian).

16 Kosenko v. Russia, [2020], ECtHR, 15669/13, 76140/13, 45.

17 Idalov v. Russia, [2012], ECtHR, 5826/03, 140; I. E. v. Moldova, [2020], EctHR, 45422/13, 73.

18 *Tumanishvili G.,* Criminal Process, General Part Review, Tbilisi, 2014 (in Georgian).

referred to the necessity of imprisonment as a sentence, as it does in the first part of the norm under consideration.

This reasoning also has a practical justification, in particular, when a person authorized to arrest, for example, a person keeping public order, sees that a particular person is committing a crime, hence the urgent necessity to prevent the said action immediately.[19] The only way to achieve this goal is to arrest a person. It is clear that no one is obliged to know orally the sentences for each crime separately, but it is enough to know that this particular action is provided by the Criminal Code of Georgia. Accordingly, in such a case, the arrest of a person should be declared illegal on the grounds that the actions of the said person in this particular case were provided for in the Criminal Code of Georgia, although it did not provide for imprisonment.

A similar position is taken by the authors of the comments on the Criminal Procedure Code: "The action taken by the arrested person, which was the basis for his arrest, must contain signs of a crime under the Criminal Code, that carry imprisonment (Refers only to an arrest made on the basis of the permission of the court).[20]

Accordingly, it should be concluded that the necessity of imprisonment as a sentence applies only to lawful detention and is not related to the restriction of a person's liberty in case of urgent necessity.

4. Existence of the Risk of Hiding Person

In order to detain a person, it is necessary to have both factual and formal grounds cumulatively. The factual basis refers to the evidences that there is a probable cause in relation to a particular person according to which that person has committed a crime for which the law provides imprisonment, while the formal basis refers to the procedural grounds provided for by article 171. Both a factual and a formal basis must be established by a standard of probable cause. Preventing the risk of hiding serves to promote the proper administration of justice. In case of hiding a person will be actually prevented from administering adequate and instant justice in the case, even in the future enforcement of a judgment.

The danger of a person hiding can be indicated by a number of circumstances: he does not have a permanent place of residence, has active connections with people living abroad, frequent border crossings are observed, etc. For fear of punishment and expected judgment, the European Court of Human Rights even considers the use of detention in a number of judgments to be permissible,[21] explaining that the severity of the crime and the fear of severe punishment, combined with other circumstances, are a relevant element in assessing risk of hiding.[22]

Italian law also provides for the possibility of arresting a person on appeal for a threat of hiding. If there are sufficient grounds that a person convicted of a serious crime may be hiding, the public

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19 *Kamisar Y., Lafave W.R., Israel J.H., King N.J.,* Basic Criminal Procedure, Cases, Comments and Questions, Eleventh Edition, Thomson West, 2005, 4.

20 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 502 (in Georgian).

21 Mkhitaryan v. Russia, [2013], ECtHR, 46108/11.

22 Aleksandr Makarov v. Russia, [2009], ECtHR, 15217/07.

prosecutor may detain him or her, regardless of whether the person has been caught in action while or immediately after committing a crime.[23]

In terms of justifying the threat of absconding in relation to the fear of expected punishment, the practice in Georgian judicial law is heterogeneous. According to the explanation of the court in the ruling of the Tbilisi City Court of May 8, 2018, after DS becomes aware that he may be charged in the case, he may hide for fear of the expected punishment.[24]

According to the ruling of the Tbilisi City Court of June 30, 2017, "the circumstance that the action committed by K.G. (The first part of Article 1261 of the Criminal Code), provides, among other alternative sentences, a sentence of imprisonment. This is a relevant factor in assessing the danger of hiding".[25]

According to the ruling of the Tbilisi City Court of February 4, 2017, in order to avoid the expected punishment and civil liability (the total amount of damages is 13,783 GEL), K.B. may avoid the investigation. The expected severe punishment is in itself a relevant factor in assessing the danger of hiding.[26]

In view of all the above, it should be noted that judges of Tbilisi City Court often point to the dangers of fleeing in their rulings for fear of expected punishment, but the judgment of 4 February 2017 also states that, "However, at the same time, the court clarifies that the only indication of the expected severe sentence is not sufficient to arrest a person, and notes that in this particular case there may be a fear of the expected sentence, given its severity, and the court is convinced that K.B. may also continue criminal activities.[27]

Consequently, taking into account these circumstances, it is also clear that the only fear of an expected punishment should not be considered sufficient to justify the danger of absconding and, consequently, to satisfy a motion for the arrest of a person. It is also necessary that there be other circumstances that either indicate a greater risk of absconding (for example, frequent border crossings) or a direct indication of other legal threats (committing a new crime, destroying information important to the case). Although severe punishment is a relevant factor in assessing the risk of hiding, this threat cannot be assessed in the abstract. The risk of absconding can be reasonably determined by reference to factors when a person has previously attempted to flee from the country for a lawful punishment and / or there are specific signs of a plan of hiding.[28]

According to one of the rulings of the Tbilisi City Court, "Fear of passing possible judgment of conviction and punishment may become the driving motive for him to hide and not appear before the court. This assumption is also supported by the fact that at present it is not possible to determine his (the detainee's) whereabouts, and it is clear from the records of the announcement of the apartment that B. D. has no permanent place of residence, no contact with his parents, no control over his

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23 *Vingart K.* (ed.), Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 260.

24 Ruling № 6137 of the Tbilisi City Court 8/05/2018.

25 Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.

26 Ruling № 1044 of the Tbilisi City Court 4/02/2017.

27 Ibid.

28 Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.

movement and behavior.[29] Consequently, in addition to the fear of expected severe punishment, other indicators were identified – a lack of control over the place of residence and movement – which together constituted the danger of hiding.

In view of all the above, when talking about the threat of hiding by prosecutors, it is expedient and necessary to justify the mentioned threat by referring to specific, actually existing circumstances and not in an abstract / stereotyped way. Accordingly, the danger of a person hiding must be assessed in a similar way by the court.

4.1. Danger of not Appearing Before the Court

One of the formal grounds under Article 171 of the Criminal Procedure Code is that a person will not appear before the court. Accordingly, if there is a danger of not appearing before the court, it must be established by the standard of probable cause, after which, once the factual basis has been established, the court will have the opportunity to issue a ruling on the arrest of a particular person.

Although the law (Article 171 (1) of the Criminal Procedure Code) specifically mentions a person hiding and not appearing before the court, it is clear that these two grounds are closely related. At the investigation stage, the investigator, the prosecutor has no idea whether a particular person will appear in court in the future, even because at the investigation stage the person may not need to appear in court for a sufficient period of time. The mentioned subjects (investigator, prosecutor) discuss depending on whether the person is announced by summoning them to the investigative body or to the prosecutor. Consequently, appearing in court is also directly related to appearing in an investigative body or in the prosecutor's office. This is related to the dangers of hiding a person. Not appearing in court, as well as in investigative bodies, impedes the proper administration of justice, which is why the prevention of both threats is precisely in line with the goals of effective justice.

Indeed, in practice, there are cases when prosecutors simultaneously indicate the danger of both hiding and non-appearance before the court to justify the threats. Although the above-mentioned grounds are listed alternatively under the above-mentioned article, from a practical point of view, it is difficult to imagine that there is no danger of absconding and there is only the danger of not appearing before the court. However, in case of justification of the threat of hiding, the danger of not appearing before the court will be automatically substantiated. The prosecutor's motion[30] emphasizes the fact that a person who must be arrested will hide from both the investigation and the court because of the fear of expected punishment, which will prevent the proper administration of justice.

Also, according to the prosecutor's motion for arrest of the prosecutor of Gldani-Nadzaladevi District Prosecutor's Office on June 29, 2017,[31] the prosecutor could not serve questionnaires to K.G. because he was not in the apartment rented by his family. At the same time, it was impossible to connect with him through his mobile phone. Therefore upon instructions of the prosecutor, since the whereabouts of K.G. were related to a number of difficulties, it emphasized the fact that K.G. was hidden from the investigation and avoided appearing in the investigative body.

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29 Ruling № 19341 of the Tbilisi City Court 19/10/2021.

30 Criminal Case № 007290918005, Motion for Arrest 15/02/2019.

31 Criminal Case № 001150617003, Motion for Arrest 29/06/2017.

Consequently, if a person hides from the investigation and avoids appearing in the investigative body, there is a danger that he will not appear before the court either. Due to the above, the danger of both hiding and non-appearance before the court is substantiated at the same time. A similar reasoning is developed in the judge's ruling of person's arrest based on the mentioned motion, who considered the above-mentioned threats to be real.[32]

In addition to the above, according to the prosecutor's motion for arrest on February 3, 2017,[33] in order to avoid the expected punishment and civil liability (the total amount is 13,783 GEL), K.B. is hiding and will not appear before the court. It was on the basis of these circumstances that the court ruled that K.B. might have avoided the investigation.[34]

In view of all the above, it is clear that the dangers of hiding and non-appearance before the court are very closely related to each other, and if the threat of hiding is actually determined by the standard of probable cause, the danger of non-appearance in court will be also substantiated.

4.2. Destroying Information Important to the Case

One of the formal grounds for arresting a person is also the risk of destroying information important to the case. Accordingly, the prosecutor must establish that there is a probable cause that a particular person has destroyed information / evidence important to the case.

Important information for the case includes any information related to the factual circumstances of the criminal case, as well as an item, a document, substance or any other object containing this information.[35]

The risk of destroying evidence can be manifested in the destruction of documents, or in exerting pressure on accomplices or witnesses.[36]

As far as destruction is concerned, evidence can be destroyed either by the physical destruction of evidence (for example, burning a document; breaking / throwing evidence, blowing it up…), as well as by substantially altering its features by erasing traces of it – for example, by replacing a firearm, clearing traces of weapons, processing the place of commission of a crime to remove traces there, setting fire to the crime scene to clear traces, and so on.[37]

The risk of destroying information important to the case is indicated by the kinship or other close ties between the accused / potential accused and the victim / witness. Indeed, according to the Tbilisi City Court ruling for arrest,[38] "given that the people examined as a witnesses in the case are the spouse of the person who may be arrested, they have a close relationship with key witnesses, it provides a basis for the probable cause that there is a risk of destroying information important to the case".[39]

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32 Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.
33 Criminal Case № 092130916001, Motion for Arrest 3/02/2017.
34 Ruling № 1044 of the Tbilisi City Court 4/02/2017.
35 See, Article 3 (23) of the Criminal Procedure Code.
36 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 597 (in Georgian).
37 Ibid, 597-598.
38 Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.
39 Ibid.

It should be noted that the risk, which may lead to changes in the testimony of witnesses, should be the basis for the release of the accused and / or his refusal to be released.[40] The need for this is reinforced by the current procedure code, according to which, in order for the information entered into the record of the interview to become evidence, it is necessary to confirm the information provided by the person examined as a witness in court.[41]

Also, fear of revenge may not infrequently be enough for intimidated witnesses to refuse to participate in criminal proceedings altogether. The safety of witnesses who have already testified against the applicant is accountable. See also the desire of other Witnesses to testify in the future.[42]

In addition to the above, one of the rulings for arrest of the Tbilisi City Court[43] also contains the following entry: "Besides, the people being questioned in the case, the witnesses, are related to K.B.,[44] which is why he may influence the witnesses to get the testimony he wants.[45] Consequently, not only kinship, but even just acquaintance with a person can become an appropriate indicator for determining the reality of a risk based on the destruction of information important to the case.

If the case file reveals that the accused has personal ties to witnesses or can be bribed or otherwise influenced, there is a real risk of interfering with the administration of justice.[46]

It should be noted that in order to prevent undue influence on witnesses, the possibility of arresting a person is also provided for in Danish law. In particular, the arrest of a person by the police is permissible if there is a probable cause that the person has committed a crime and the restriction of his or her liberty is necessary to prevent him / her from coming into contact with other persons.[47]

It indicates the lack of danger of destruction of evidence when, based on the case file, the accused was aware of the investigation conducted by the investigative body against him, however, he did not interfere with the investigation and cooperated with him (indicated the identity of the weapon, object of crime, accomplices, etc…).[48] The above-mentioned reasoning is also developed by the judge of the Tbilisi City Court in his ruling of 12 May 2018,[49] in particular, "for the accused, who became aware that a criminal case was under investigation, he did not influence any of the witnesses".[50] Accordingly, the judge considered that in this particular case there was no danger of the defendant destroying the evidence, in any case, the said threat could not be substantiated by the relevant evidential standard by the prosecutor.

In view of all the above circumstances, it should be noted that the prevention of the risk of destruction of information important to the case is one of the important circumstances for preventing

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40 Letellier v. France, [1991], ECtHR, 12369/86, 39.
41 See, Article 3 (24) of the Criminal Procedure Code.
42 Sopin v. Russia, [2012], ECtHR, 57319/10, 44.
43 Ruling № 1044 of the Tbilisi City Court 4/02/2017.
44 K.B. – person, who may be arrested.
45 Ruling № 1044 of the Tbilisi City Court 4/02/2017.
46 Mikiashvili v. Georgia, [2012], ECtHR, 18996/06, 102.
47 *Vingart K. (ed.),* Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 79.
48 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 598 (in Georgian).
49 Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.
50 Ibid.

the impediment to the proper administration of justice in the future. In domestic crime cases, for example, the risk in question may be excessive, but in other cases, irrelevant. Therefore, it is expedient and necessary to substantiate this risk in each specific case, based on facts actually existing in nature and not with reference to abstract dangers.

4.3. Risk of the Possible Committing a New Crime

An analysis of investigative and case law reveals that one of the most important, tangible, and often cited formal grounds is the emphasis on the threat of a possible committing a new crime. If there is a standard of probable cause in the commission of a crime against a person, it is unequivocal that the prosecution is tempted to substantiate the motion for the arrest of a person by assessing the wrongdoing already committed and to highlight the risk of continuing criminal activity in the future. However, it is self-evident that only the crime committed, no matter how serious it is, isolated by the permissible standard, it does not indicate the risks in question.[51]

According to the definition of the Constitutional Court of Georgia, "an action that is antisocial in nature and which, in all probability, may pose a real threat at the moment of such an action, potentially endanger the health of others or public order, may be subject to restriction / regulation. At the same time, it is clear that the state's response to anti-social action should be tightened only according to the severity, quality and scale of the threats posed by the action".[52] Accordingly, the prosecutor and the judge must assess, including the nature of the action and whether there is / is a real threat of recurrence.[53]

According to the European Court of Human Rights, the burden to prove the charges shall lie with the prosecution in relation to the motion for arrest / detention. It is the prosecution that must prove the existence of the circumstances that justify the application of the arrest / detention. It is also responsible for checking all the circumstances proving the existence of public interests or against it.[54]

In any case, a person should remain at liberty during the proceedings against him / her, unless the state can provide "appropriate and sufficient" reasons to justify the application of the arrest / detention.[55] Evidence of a new crime must be derived from the accused's past life, personality traits, and facts in the case.[56]

It should be emphasized that both the decision for the arrest a person and the choice of a specific type of restraint depend not on the number of preconditions (threat of hiding, committing a new crime, destruction of evidence), but on the intensity and significance of each of these threats.[57] The risk of

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51 Bykov v. Russia, [2009], ECtHR, 4378/02, 64.

52 Ruling № 1/8/696 of the Constitutional Court of Georgia 13/07/2017 "Citizen of Georgia Lasha Bakhutashvili v. Parliament of Georgia", II-12, see. Citation 27.Ruling № 1/4/592 of the Constitutional Court of Georgia 24/10/2015 "Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia, II-75.

53 Criminal Case № 001230521008 , Motion for Arrest 19/10/2021.

54 Ilijkov v. Bulgaria, [2001], ECtHR, 33977/96, 84.

55 Wemhoff v. Germany, [1968], ECtHR, 2122/64, 18.

56 Clooth v. Belgium, [1991], ECtHR, 12718/87.

57 Ruling № 10a/4502-21 of the Tbilisi City Court 18/10/2021.

committing a new crime helps the court to correctly recognize a person's restriction of liberty / being in detention.[58]

All of the above is based on the conclusion that when discussing a possible risk of the committing a new crime, the prosecution and the court should not only consider the gravity or violent nature of the action,[59] but also the abstract and stereotyped reasoning in order to avoid In order to avoid unjustified arrests, violation of Article 5 of the European Convention for the Protection of Human Rights and Freedoms and, consequently, the responsibility of the state at the international level.

4.4. Consideration of the Issue of Requesting Consent From a Foreign State in Accordance with Article 16(4) of the Law of Georgia on International Cooperation in Criminal Matters

According to the Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia"[60] of July 20, 2018, Article 171 of the Criminal Procedure Code of Georgia was amended for the first time since the entry into force of the current version, which referred to the first and second parts of this article.

In particular, one formal ground was added to the first part "or if the issue of requesting consent from a foreign state in accordance with Article 16(4) of the Law of Georgia on International Cooperation in Criminal Matters is under consideration".[61]

According to Article 16(2) of the Law of Georgia "on International Cooperation in Criminal Matters", a person extradited to Georgia may not be prosecuted for or convicted of any other crime committed by him/her before the extradition, other than the crime for which he/she has been extradited to Georgia. Consequently, we cannot initiate criminal proceedings against a person and we cannot sentence him for a crime he has committed in the past, the law allows this only for the crime for which the person was extradited to Georgia. However, there is exception to this rule, in particular, in order to prosecute such a person, the Ministry of Justice must first withdraw the consent from the foreign state carrying out the extradition. At the same time, according to international treaties and agreements of legal force for Georgia, it is obligatory to attach to the motion for consent an original or certified copy of the court decision and ruling (in case of a convicted person), or an arrest warrant or other warrant of the same force (in the case of an accused person). In the second case (in respect of a person who has not been convicted yet), in accordance with the current legislation of Georgia, the requested document is (1) a court ruling imposing detention on a person as a measure of restraint and (2) a court ruling on detention.[62]

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58 Matznetter v. Austria, [1969], ECtHR, 2178/64.

59 *Mchedlidze N.,* Standards of Application of the European Convention on Human Rights by Common Courts of Georgia, Tbilisi, 2017, 71 (in Georgian).

60 See Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia".

61 See, Article 171 (1) of the Criminal Procedure Code.

62 See, Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia".

The second extreme is the fact that, according to the current version of the Criminal Procedure Code, a court cannot consider the issue of applying a measure of restraint unless a criminal prosecution has been initiated against him. First proceeding of the accused before the court, where the application of the measure of restraint against the person is considered, is the next stage in the initiation of criminal proceedings. Based on the above, only the court decision on the arrest of a person remains a legal lever. Accordingly, in its essence, an "arrest warrant or other warrant of the same force" under Georgian law may be only a court order on the arrest of a person, which must be accompanied by a motion to be sent to a foreign state requesting consent to prosecute an extradited person for a crime committed prior to extradition.[63]

This was the reason for the change in the first part of Article 171 of the Criminal Procedure Code. This, in turn, will enable the competent Georgian authorities to withdraw the consent from a foreign state in accordance with the rules established by law, in order to enable the extradition to be prosecuted for a crime for which it has not been extradited to Georgia before.[64]

5. Form and Procedure for Rendering a Ruling

If there are both factual (evidential) and formal (procedural) grounds for the arrest of a person, in such a case, the prosecutor, depending on the place of investigation, should apply to the court with a motion to issue a decision on the arrest of the person. It is interesting how this is carried out in the Georgian investigative practice. For example, if the investigation is conducted by the First Department of the Isani-Samgori Division of the Tbilisi Police Department, then the said Division is headed by the Isani-Samgori District Prosecutor's Office of Tbilisi.[65] Therefore, if at the stage of the investigation of a given criminal case, there is a probable cause against a specific person, both in the commission of a crime punishable by imprisonment and on any of the grounds listed in the law, then the specific prosecutor of the Isani-Samgori District Prosecutor's Office of Tbilisi, who is leading the case to the investigator of the criminal case, submits a motion for arrest of the person. After that, the given motion and the materials of the criminal case are usually submitted to the Tbilisi City Court by the investigator of the case. Accordingly, the Court Chancellery will receive the motion and the case file, after which the motion will be referred to one of the judges of the Tbilisi City Court, who will consider the motion without an oral hearing and makes a decision on grant the motion and arrest the person and / or on refuse to grant the motion (to arrest the person).

In a single motion for arrest, the prosecutor may request the arrest of more than one person, and the court ruling will be rendered to all persons together. But, both in the ruling and in the motion, the grounds and necessity of using the arrest in respect of each person must be independently substantiated.[66]

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63 See, Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia".

64 Ibid.

65 Human Rights Training and Monitoring Center (EMC), Georgian Law Firms Association (SIFA), Investigation System Analysis, Tbilisi, 2018, 22 (in Georgian).

66 *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 503 (in Georgian).

At the same time, a judge's decision to arrest a person will obviously not be issued for life. In the motion, the prosecutor must indicate the approximate period of the arrest, which must be determined individually in each case, but must not exceed 30 days (maximum period for the enforcement of the judgement). If the judgement is not / cannot enforced and the person is not/cannot arrested within the time period specified in the judgment, after the expiration of the judgement, the prosecutor may re-apply to the court with a motion for arrest the same person, but must indicate the reasons why the judgement could not be enforced in a timely manner.[67]

The hearing without an oral hearing of the motion is valid insofar as it facilitates the speedy administration of justice. In the current situation, when the Georgian judicial system is overloaded, the oral hearing of these types of motions would put the judiciary in an even more difficult situation. Apart from the above, as a rule, a motion for arrest is filed at the stage of the criminal case, when the criminal prosecution against the person has not started yet, therefore, there is no other party in the case – the defence. It is therefore quite reasonable to consider the said motion without an oral hearing.

After receiving a judge's decision on arrest of a person, law enforcement body must ensure the planning of the arrest procedure, which requires the analysis of a number of circumstances. The main actors in the development of the arrest plan are the investigator and the heads of the relevant department, who must first determine the place and time of the arrest. It is necessary for this to take into account the person to be detained and the expected situation at the place of custody. Also, it is necessary to be identified the person conducting the arrest and personal search (if it is necessary) and the need to summon other persons involved in the arrest (interpreter, attorney). In addition, at the time of arrest, the relevant persons must be equipped with the necessary equipment (investigative and other procedural protocols, technical means, handcuffs, if necessary – firearms, seals, packages, etc.), which, if appropriate, also must be determined by the investigator or / and his immediate supervisor.[68] The thorough implementation of all the above-mentioned issues together ensures the successful implementation of the process of arrest, as well as the unwavering protection of human rights and freedoms.

The decision made by the judge on the arrest of the person may not be appealed. With regard to the institution of appeal in this case, it should be noted that this issue is not so urgent as, in general, the period of the arrest is very short – procedural law requires from law enforcement bodies to make a specific decision within about 72 hours, i.e. The person must be sentenced to a measure of restraint, or must be released. Consequently, it does not matter how much a person will have the right to appeal in this case, especially since he then has all the guarantees to receive the compensation that he received as a result of the illegal arrest.[69] It should also be noted that under German law, if an arrest warrant is issued by an official other than a judge, a prosecutor or a police officer, the mentioned decision can be appealed in court.[70]

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67 Ibid, 503-504.

68 *Jankarashvili M., Merabishvili N., Naghebashvili D., Dzneladze R., Ratchvelishvili G.,* Investigative Methodology Manual, Tbilisi, 2017, 292-293 (in Georgian).

69 *Melkadze Z.,* Criminal Procedure Code of Georgia, Tbilisi, 2012, 190 (in Georgian).

70 *Vingart K. (ed.),* Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 164.

In addition to receiving compensation, even though the person has no right to appeal, the lawfulness of his or her arrest is discussed by the judge hearing the first proceeding of the accused before the court. Accordingly, the court has the right to consider the arrest of a person illegal in the event of a substantive procedural violation. This applies to both lawful and unlawful arrest, although it is less likely that a person will be arrested illegally on the basis of a judge's ruling, unless there has been a direct violation by the arresting person during the process of the arrest. Obviously, in such a case, the preconditions, grounds, etc. of the arrest are not checked. But the legality of the process of arrest must be checked directly – the proportionality / use of force, the definition of rights, etc. As for urgent necessity, this requires more judicial control, even with regard to the grounds for arrest. Indeed, in the judgment of the Tbilisi City Court of 9 February 2015,[71] we read: "the court finds that there is a substantial violation of the requirement of Article 171 of the Criminal Procedure Code of Georgia, in particular, the arrest of a person without a court ruling, when there was no need for arrest in case of urgent necessity, which is the basis for release from detention".[72]

In addition, although a person may not appeal the ruling for his/her arrest, he has the opportunity to appeal the ruling for the application of a measure of restraint in the investigation panel of a Court of Appeal. He can also appeal the lawfulness of his arrest with the same complaint and this will already be discussed by the investigative panel of the Court of Appeal. Indeed, according to the ruling of the Investigative Panel of the Tbilisi Court of Appeal of 22 January 2015,[73] "Only the fact that the arrest was made 24 hours after the creation the grounds for arrest in case urgent necessity will not become a ground for declaring the arrest illegal and satisfying the complaint. The court finds that there were no substantive procedural irregularities permissible in the arrest and indictment process".[74]

The practice of the Supreme Court of Georgia is also interesting. There are cases when the cassation point out the illegality of the arrest in their cassation appeal and then the Supreme Court discusses the correctness of the decisions made by the previous instances. Indeed, according to the decision of the Supreme Court of Georgia of 26 October 2017 on the admissibility of the cassation appeal,[75] "The Chamber of Cassation notes that the decision of the Judge of the Investigative and the preliminary hearing of the Tbilisi City Court of September 21, 2016 on the arrest of a person discusses in detail the circumstances, why the court considered it appropriate to arrest M.K., namely: there was a combination of facts and information which gave rise to the presumption that M.K. committed a crime; While being at the police department, he deceived the investigator and left the building of the investigative body, after which his whereabouts were unknown and he himself did not voluntarily report to the police; There was speculation that he would still commit a new crime as he had been convicted of a crime of a similar nature, which indicates his personality as prone to violence. Due to all the above, the court considered it appropriate to issue a ruling for arrest of M.K. In view of the above, the Supreme Court considered the decision on arrest a person to be legally justified and correct, which ruled that "the judge's decision of 21 September 2016 was lawful and well-founded, as there

71 Ruling № 10a / 536 of the Tbilisi City Court 9/02/2015.
72 Ibid.
73 Ruling № 1c-63 of the Investigative Panel of the Tbilisi Court of Appeal 22/01/2015.
74 Ibid.
75 Ruling № 289 ap-17 of the Supreme Court of Georgia 26/10/2017.

were sufficient grounds for arrest other than a reasonable suspicion of a crime, which were fully taken into account and assessed by the court".[76] In view of all the above, even the Supreme Court discusses and enters into the context of the legality of arrest in the context of legal reasoning.

Notwithstanding all the above, the prosecution should be able to appeal a ruling of a judge refusing to arrest. There is a danger that the judge will refuse to arrest the person without solid legal justification, which is why such a ruling should allow to go to a higher instance. At the same time, refusing to arrest a person may cause significant problems for the investigation of a particular criminal case and / or cause irreparable damage, which will ultimately lead to ineffective justice. In view of the above, it is advisable to determine at the legal level the right of the prosecution to appeal a judge's refusal to arrest a person.

6. Conclusion

Restriction of a person's liberty based on a court ruling, as well as unlawful arrest and related provisions or approaches, are actively discussed / debated in theory and disputed / controversial in practice.

The present study is an attempt to improve the mechanisms of protection of rights at the legislative level, as well as investigative and case law, in order to promote the unwavering protection of the rights of individuals and to prevent cases of the arbitrary arrest.

The exceptional nature of the detention and its "Ultima Ratio" nature should not have only a written character, but should be effectively implemented in practice.

State institutions must be able to strike a so-called "golden balance" between the interests of investigation and public safety on the one hand, and the protection of the rights of particular individuals on the other.

Due to the theoretical issues or practical solutions discussed in the article, there is a problem both in terms of protection of rights and in terms of heterogeneous case law.

Therefore, the identification of shortcomings in the study and the proposed solutions should ensure the effective protection of the rights of the individual – the main actor in determining the constitutional order, as well as the development of law and the establishment of a uniform investigative / judicial practice.

Bibliography:

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, 16/11/1999.
2. Law of Georgia "On Amendments to the Criminal Procedure Code of Georgia", № 3157, 20/07/2018.
3. Criminal Code of Georgia, 41(48), 13/08/1999.
4. Criminal Procedure Code of Georgia, 31, 03/11/2009.
5. Explanatory Card on the Draft Law of Georgia "on Amendments to the Criminal Procedure Code of Georgia", 2018, <https://info.parliament.ge/file/1/BillReviewContent/181659?> [22.01.2022].

[76] Ibid.

6. Human Rights Training and Monitoring Center (EMC), Georgian Law Firms Association (SIFA), Investigation System Analysis, Tbilisi, 2018, 22 (in Georgian) (in Georgian).
7. *Anderson J.F.,* Thompson B., American Criminal Procedures, Durham, North Carolina, 2007, 178.
8. *Gutsenko K.F., Golovko L.V., Filimonov B.A.,* Criminal Procedure of Western States, translation from Russian, *Gogshelidze R. (ed.),* Tbilisi, 2007, 281-285 (in Georgian).
9. *Jankarashvili M., Merabishvili N., Naghebashvili D., Dzneladze R., Ratchvelishvili G.,* Investigative Methodology Manual, Tbilisi, 2017, 292-293 (in Georgian).
10. *Kamisar Y.,* Lafave W.R., Israel J.H., King N.J., Basic Criminal Procedure, Cases, Comments and Questions, 11th, Thomson West, 2005, 4.
11. *Mchedlidze N.*, Standards of Application of the European Convention on Human Rights by Common Courts of Georgia, Tbilisi, 2017, 51, 71 (in Georgian).
12. *Melkadze Z.,* Criminal Procedure Code of Georgia, Tbilisi, 2012, 190 (in Georgian).
13. *Meurmishvili B.,* Initiation and Implementation of Criminal Prosecution in the Georgian Criminal Process, Tbilisi, 2015, 83 (in Georgian).
14. *Papiashvili L.,* Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015, 502-503, 597-598 (in Georgian).
15. *Papiashvili L. (ed.),* Collective of Authors, Georgian Criminal Procedure Law Private Part, Tbilisi, 2017, 209 (in Georgian).
16. *Tumanishvili G.,* Criminal Process, General Part Review, Tbilisi, 2014, 43 (in Georgian).
17. *Trexeli Sh.,* Human Rights in Criminal Procedure, Constitutional Court of Georgia, Tbilisi, 2009, 452 (in Georgian).
18. *Vingart K. (ed.),* Criminal Procedure Systems in EU Countries, London, Brussels, Dublin, Edinburgh, 1993, 79, 164, 260 (in Georgian).
19. Ruling № 10a/4502-21 of the Tbilisi City Court 18/10/2021.
20. Ruling № 19341 of the Tbilisi City Court 19/10/2021.
21. Ruling № 6137 of the Tbilisi City Court 8/05/2018.
22. Ruling № 10a / 2221 of the Tbilisi City Court 12/05/2018.
23. Ruling № 1044 of the Tbilisi City Court 4/02/2017.
24. Ruling № 6209-17 of the Tbilisi City Court 30/06/2017.
25. Ruling № 10a / 536 of the Tbilisi City Court 9/02/2015.
26. Ruling № 1c-63 of the Investigative Panel of the Tbilisi Court of Appeal 22/01/2015.
27. Ruling № 289 ap-17 of the Supreme Court of Georgia 26/10/2017.
28. Ruling № 1/8/696 of the Constitutional Court of Georgia 13/07/2017 "Citizen of Georgia Lasha Bakhutashvili v. Parliament of Georgia", II-12.
29. Ruling № 1/4/592 of the Constitutional Court of Georgia 24/10/2015 "Citizen of Georgia Beka Tsikarishvili v. Parliament of Georgia, II-75.
30. Criminal Case № 001230521008 , Motion for Arrest 19/10/2021.
31. Criminal Case № 007290918005, Motion for Arrest 15/02/2019.
32. Criminal Case № 092310819001, Motion for Arrest 8/05/2018).
33. Criminal Case № 092310819001, Motion for the Application of a Measure of Restraint 11/05/2018.
34. Criminal Case № 092130916001, Motion for Arrest 3/02/2017.
35. Criminal Case № 001150617003, Motion for Arrest 29/06/2017.

36. United Nations, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, New York, Geneva, 2003, 174.
37. Kosenko v. Russia, [2020], ECtHR, 15669/13, 76140/13.
38. Idalov v. Russia, [2012], ECtHR, 5826/03.
39. I. E. v. Moldova, [2020], EctHR, 45422/13.
40. Mkhitaryan v. Russia, [2013], ECtHR, 46108/11.
41. Sopin v. Russia, [2012], ECtHR, 57319/10.
42. Mikiashvili v. Georgia, [2012], ECtHR, 18996/06.
43. Aleksandr Makarov v. Russia, [2009], ECtHR, 15217/07.
44. Bykov v. Russia, [2009], ECtHR, 4378/02.
45. Ilijkov v. Bulgaria, [2001], ECtHR, 33977/96.
46. Clooth v. Belgium, [1991], ECtHR, 12718/87.
47. Letellier v. France, [1991], ECtHR, 12369/86.
48. Matznetter v. Austria, [1969], ECtHR, 2178/64.
49. Wemhoff v. Germany, [1968], ECtHR, 2122/64.