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Inappropriateness of Prohibiting Appealing an Arrest Warrant

According to Paragraph One of Article 13 of the Constitution of Georgia, human freedom shall be protected. The XVIII Chapter of the Criminal Procedure Code of Georgia specifies the grounds for criminal prosecution, detention and recognition as an accused.

The present article deals with some problems related to a person's detention by a court decision. It discusses the following issues: the concept and essence of detention, the gaps associated with arrest warrants, in particular the lack of legal grounds for specifying the term of execution of an arrest warrant, lack of control over the execution of an arrest warrant, the constitutional claim filed by my colleagues and me related to the prohibition of appealing an arrest warrant and resultant legal problems.

The article also explores the court practice regarding a person's detention by a court decision, which demonstrates and illustrates the problems related to detention practices. Examples of some foreign jurisdictions for appeals of warrant orders that have chosen the principles of equality and adversariality of the parties as their primary guiding principle are also discussed.

The article describes the effective legal norm, reviews the judicial practice, gives conclusions and essential recommendations to improve the issue of legislative control.

Keywords: *detention, arrest warrant, appeal.*

1. Introduction

The goal of this article is to study an important and complex procedure regulated by the Criminal Procedure Code of Georgia, such as detention as a type of compulsory measure. The interest in this issue stems from the fact that the effective legal control does not allow a person to appeal an issued arrest warrant what creates a number of issues.

Based on reasonable assumption standard established by the court in its arrest warrant implying that there was a risk that the accused would flee, not appear before the court, destroy information relevant to the case or commit a new crime, the court, at the initial appearance of the accused in court, refers to the facts established in its arrest warrant as the grounds to apply the preventive measure and no longer examines these circumstances during the application of the preventive measure. According to Article 170(1) of the Criminal Procedure Code of Georgia, "Arrest is a short-term restriction of a person's freedom", while paragraph two of the same Article states: "A person shall be considered arrested from the moment when his/her freedom of movement is restricted. From the time of arrest, a person shall be recognized as an accused". The XVIII Chapter of the Criminal Procedure Code of Georgia deals with the grounds for criminal prosecution, detention and recognition as an accused.

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Article 3 of the Criminal Procedure Code of Georgia, which gives the definitions of basic terms, does not define *detention*. However, *detention* is defined in Article 170(1) of the same Code.

The article considers such important issues as: how logical and acceptable is the definition of detention in Article 170(1) of the Criminal Procedure Code of Georgia and if the concept of detention should be defined alongside other terms? Which norm is used to determine 30 days period for arrest warrant and give the prosecution this period to execute an arrest warrant? Whether the extension of 30 days period established for search and seizure is reasonable to detention, as to the type of compulsory measure? What are the issues with the execution of arrest warrants and should an arrest warrant issued by a court be appealable? Regarding the latter, the article considers different views what thus allowing a more complete analysis of the issue. Do the non-appealability of arrest warrants and non-examination of its lawfulness deprive the person of the opportunity to enjoy the right to claim damage caused by illegal arrest because his/her freedom is restricted?

2. Concept and Grounds for Detention

According to Paragraph One of Article 13 of the Constitution of Georgia, human freedom shall be protected. "Other paragraphs of the same article provide guarantees of human freedom, in which the procedural side of freedom is ensured. "Other paragraphs of the same article provide guarantees of human freedom, in which the procedural aspect of freedom is provided".[1] Interference with human freedom is more important, and the Constitution establishes special regulations against it.[2]

The XVIII Chapter of the Criminal Procedure Code of Georgia gives the grounds for criminal prosecution, as well as the issues of detention and recognition as an accused. Article 3 of the Criminal Procedure Code of Georgia, which gives the definitions of basic terms, does not define *detention*. However, *detention* is defined in Paragraph One of Article 170 of the Criminal Procedure Code of Georgia: "Arrest is a short-term restriction of a person's freedom", while Paragraph Two of the same Article states: "A person shall be considered arrested from the moment when his/her freedom of movement is restricted. From the time of arrest, a person shall be recognized as an accused." "In addition to restricting freedom of movement, a person's ability to contact the outside world is also restricted during his/her detention."[3] Noteworthy, the definition of term *detention* is given not among the definition of terms, but in private part of the Code. The effective Criminal Procedure Code of Georgia does not explain the procedural legal type of detention either. Article 134 of the previous Criminal Procedure Code of Georgia dated 20 February 1998 immediately explained that detention is a form of legal coercion in criminal proceedings. Paragraph 6 of Article 200 of the effective Criminal Procedure Code of Georgia states: "... who was subjected to arrest as a coercive measure in criminal procedure...". From this extract, one may conclude that the effective Criminal Procedure Code of Georgia considers arrest/detention as a measure of legal coercion in criminal proceedings.

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1 *Kublashvili K.,* Fundamental Right, Tbilisi, 2008, 133 (in Georgian).

2 Decision of the Constitutional Court of Georgia № 2/1/415 of April 6, 2009 in the case of the Public Defender of Georgia v. Parliament of Georgia, II-2.

3 *Tugushi T., Burjanadze G., Mshvenieradze G., Gotsiridze G., Menabde V.,* Human Rights and Judicial Practice of the Constitutional Court of Georgia, Tbilisi, 2013, 108 (in Georgian).

According to Paragraph 6 of Article 2 of the Law on Normative Acts: "A Code is a systematized normative act covering legal norms regulating particular (uniform) social relations", i.e. the advantage of the Code is that it has systematized norms. With this, it can be concluded that it would have been better if the concept of detention had been explained in the definition of basic terms given by Article 3 of the Criminal Procedure Code of Georgia, rather than in the private part of the Criminal Procedure Code of Georgia (Article 170 and Paragraph 6 of Article 200 of the Criminal Procedure Code of Georgia). In addition, for the sake of systematization of the Code, it might have been better to define the concept of detention in Article 3 of the Criminal Procedure Code of Georgia, entitled "Definition of basic terms for the purposes of this Code," and to write down that detention is a short-term restriction of freedom and a coercive measure. However, as the definition of detention is given in the V Chapter giving the grounds for initiating criminal prosecution, and the detention of a person automatically entails criminal prosecution, it is reasonable to explain the definition of detention as given in Article 170 of the Criminal Procedure Code of Georgia.

According to Article 171(1) of the Criminal Procedure Code of Georgia, a court decision for detention is not appealable, and the problem stems from the absence of the right to appeal. The fact is that the private norm of the Criminal Procedure Code of Georgia regulating the detention explicitly states that the decision to detain a person is not appealable. As a result, it is not possible to specify any other general norm for appealing an arrest warrant.

The Criminal Procedure Code of Georgia recognizes two types of a person's detention: with or without a court decision. In the case of detention, there are two opposing values: the person's freedom and the legitimate interest of the state in solving the crime.[4]

In case of detention without a court decision, the Criminal Procedure Code of Georgia does not give a norm that would expressly obligate the court to verify the lawfulness of detention without a court decision. Article 197 of the Criminal Procedure Code of Georgia regulates the procedure for the initial appearance of the accused in court and the issues to try. However, the given article does not expressly state that the court is obligated to check the lawfulness of detaining without a court decision and to clarify if it was necessary to detain a person without a court decision. Based on subparagraphs "g" and/or "h" of Article 197(1) of the Criminal Procedure Code of Georgia and the fact that the effective Criminal Procedure Code of Georgia uses a mixed court control model of limitation of human rights and freedoms, it may be said that the court is not only authorized, but also obliged to discuss and verify the lawfulness of detaining a person without his/her permission during the initial appearance of the accused in court. This obligation stems from Article 13(4) of the Constitution of Georgia, according to which: "A person shall be informed of his/her rights and grounds for arrest immediately upon being arrested. A person may request the assistance of a lawyer immediately upon being arrested. This request must be satisfied." Whether a detained person was explained his/her rights immediately after detention should be examined during the initial appearance of the accused in court, because it is at this stage that subparagraph "g" of Article 197(1) obliges the judge to inquire the accused whether he/she has any claims or motion regarding the violation of his rights. Even this

[4] Decision of the Constitutional Court of Georgia № 2/1/415 of April 6, 2009 in the case of the Public Defender of Georgia v. Parliament of Georgia.

argument is absolutely sufficient for the judge during the initial appearance to verify the lawfulness of a person's detention without a court decision, to verify if the person's rights were protected during the detention and whether the accused has any claims or complaints regarding the violation of his/her rights.

Judicial practice of verifying the lawfulness of detaining a person without a court decision is not uniform. Sometimes, a court, on its own initiative, even without a party's motion, considers and verifies the lawfulness of detaining a person without a court decision.[5] It is not uncommon for a court recognizing the detention without a court decision illegal during the initial appearance of the accused in court based on the motion of the defense.[6] However, judicial practice encounters cases when the court in its ruling does not consider or verify the lawfulness of detaining a person without court permission.[7] The court does not verify the lawfulness of a person's detention in cases of extreme necessity, even with the motion of the defense. Ruling № 10a/1629 of April 14, 2021 by the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court is an example.[8] It is reasonable to examine whether there were grounds for a person's arrest immediately by the court without a court decision, since the person's freedom is interfered.

In conclusion, it can be said that judicial practice in this regard is not uniform. Although the Criminal Procedure Code of Georgia does not explicitly obligate the court to verify the lawfulness of a person's detention without a court decision during the initial appearance of the accused in court, the analysis of the decisions of the Constitutional Court of Georgia and the European Court of Human Rights as well as articles of the Criminal Procedure Code of Georgia show that the court is not only authorized, but also obliged to verify the lawfulness of a person's detention without a court decision even without a motion of the defense.

3. Absence of Legal Grounds in Setting the Term of Execution of an Arrest Warrant

Part 1 of Article 171 of Georgia's Criminal Procedure Code, as the title suggests, should govern the term of execution of a court decision as well as the legal grounds for its determination. However, neither this standard nor the articles of the Criminal Procedure Code of Georgia that directly regulate detention issues, immediately define the term of execution of an arrest warrant issued by the judge.

Judicial practice in determining the term of execution of an arrest warrant is not uniform even here. Notwithstanding the absence of the legal grounds for an arrest warrant, the usual judicial practice for the court is to give the prosecution the time limit of thirty (30) days to execute an arrest warrant. However, this term was set to fifteen (15) days in exceptional cases.[9] Furthermore, in judicial practice, sentences where the judge does not specify the term of an arrest warrant execution are known. For example, with decision № 6244-19 of April 18, 2019 issued by the Criminal Case Investigation, Pre-

5 Decision of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 10a/2054 of May 8, 2021.

6 Decision № 10a/39-20 of Tetritskaro District Court dated November 18, 2020.

7 Decision № 10/a-14-21 of Tetritskaro District Court dated May 24, 2021.

8 Decision № 10a/1629 of April 14, 2021 by the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court.

9 Decision of Gurjaani District Court of July 22, 2020, № 10a/63-20.

Trial and Substantive Trial Panel of Tbilisi City Court, the judge did not specify any term of execution of the arrest warrant.[10] The determination of a thirty (30) day term of execution of the arrest warrant by the court, and general determination of this term, is based on Article 112(3) of the Criminal Procedure Code of Georgia, according to which "A decision ordering a search or seizure shall be invalid, unless the investigative action is initiated within 30 days". By analogy with this norm, court sets a 30 (thirty) days term for the prosecution to execute the arrest warrant.

According to Article 2(3) of the Criminal Procedure Code of Georgia, "In case of a gap in the legislation of Georgia, the criminal procedure rules may be applied by analogy, unless this limits human rights and freedoms provided for by the Constitution of Georgia and international treaties". Despite this, "The legislator explicitly and imperatively forbade the application of the law or justice by analogy, or extended interpretation of the law when using a criminal procedural legal enforcement measure, that is, it is allowed to interpret the law literally. This is because a criminal procedural legal enforcement measure directly limits some or other fundamental human right provided for by the Constitution, what, according to the Constitution, is allowed only in cases directly envisaged by law."[11] Besides this argument, it may be considered that the application of the rule of analogy of Article 112(3) of the Criminal Procedure Code of Georgia when determining a 30-day term violates the principle of lawfulness. The latter is a special norm governing the invalidation of a search and seizure decision unless this investigative action is initiated within 30 days. The extension of this clause to detention is rather problematic due to the particular nature of the norm. Furthermore, Article 112 of the Criminal Procedure Code of Georgia is not the norm regulating the validity period of detention and its application depends on the opinion of the judge.

Article 5(3) of the Organic Law "On Normative Acts" expressly prohibits the application of special (exceptional) norms by analogy. Furthermore, Article 7 of the same Law gives the classification of normative acts, stating that an organic law has greater legal power than a law. As a result, the Organic Law "On Normative Acts" has greater legal power than the Criminal Procedure Code of Georgia, which means that the 30-day period given in Article 112(3) of the Criminal Procedure Code of Georgia should not be used by analogy, because it is a special norm, while the Organic Law prohibits using a special norm by analogy, despite the fact that Article 2(3) of the Criminal Procedure Code of Georgia allows the application of analogy.

There is a second argument, in addition to the one stated above. In particular, Article 112 of the Criminal Procedure Code of Georgia regulates the conduct of investigative actions by court decision. Searches and seizures are investigative actions, and the 30-day period specified for them can be applied to investigative actions only, whereas detention, unlike them, is a coercive measure. Consequently, the 30-day period specified by a legislator for investigative action is intended for such actions only, and depending on the definition of the norm, can be applied to the investigative actions, but not to detention, which is a type of coercive measure, not an investigative action.

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[10] Decision of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 4230-19 of April 18, 2019.

[11] *Meishvili Z., Jorbenadze O.,* Comments to the Criminal Procedure Code of Georgia, Tbilisi, 2007, 309 (in Georgian).

From the foregoing, it is clear that the current Criminal Procedure Code of Georgia lacks an article that allows the court to determine the period of execution of an arrest warrant, while the Law of Georgia "On Normative Acts" forbids the use of a special norm by analogy.

For the reasons stated above, it is advisable to add the following clause to Paragraph One of Article 171 of the Criminal Procedure Code of Georgia: "The court shall determine the period of execution of an arrest warrant for individual cases based on the facts of the case, which will be nullified unless the given coercive measure is carried out within 15 days of the judgment's release".

A logical question arises as to the time limit: why not, for example, the 30-day period specified for the search and seizure, but 15 days? "The released judgment must be enforced as soon as possible because reasonable assumption may disappear if too much time passes between the judgment's release and enforcement."[12] Not only might the standard of reasonable assumption disappear, but so might the grounds on which the arrest warrant was issued.

Grounds for arrest, such as the threat of fleeing, not appearing before the court, destroying evidence relevant to the case, or committing a new crime, are high-risk situations that require immediate action to ensure that the investigation is not obstructed while obtaining relevant evidence, and delays can cause irreparable harm to the investigation in contrast to a search or seizure, where a warrant may be issued on the grounds that "the item to be seized will be delivered to the site of the seizure/search in the future".[13]

Based on the foregoing, the 15-day period is a reasonable time frame within which the prosecution can effectively enforce the judgment. Furthermore, the legislator should give the court the authority to further examine the procedure of execution of its judgment and determine whether the grounds for the court issuing the arrest warrant were still valid at the time of execution of the judgment. It is also necessary to verify whether the arrest warrant was issued lawfully and in accordance with the requirements of Article 171(1) of the Criminal Procedure Code of Georgia.

4. Lack of Control over the Execution of an Arrest Warrant

According to Article 171(1) of the Criminal Procedure Code of Georgia, upon the prosecutor's motion, the court, without oral hearing, shall try the motion to decide whether to release a decision to detain a person. According to 4-year statistics of Tbilisi City Court, in 2017, 307 prosecutor's petitions to issue a decision of detention were filed before Tbilisi City Court, which satisfied 263 petitions; In 2018, 581 petitions were filed, with 555 petitions granted; In 2019 and 2020, the number of such petitions was 796 (709 granted) and 661 (548 granted), respectively.[14] The statistics evidence that the court mostly grants the prosecutor's petition and issues an arrest warrant, while according to the study: "The groundlessness of the judges' decisions on prosecutors' petitions to the court regarding person's detention is actually that they lack specific, reasoned or supported references to relevant factual

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12 *Papiashvili L., Tumanishvili G., Akubardia I., Gogniashvili N., Ivanidze M.,* Criminal Procedure Law of Georgia, Tbilisi, 2017, 453 (in Georgian).

13 Ibid.

14 Statistics of Tbilisi City Court, <https://tcc.court.ge/ka/Statistics> [10.04 2021].

materials explaining why a person should be arrested and what circumstances should be considered, or why a person should not be arrested."[15]

In some cases, the court sets a 30-day deadline for the prosecutor's office to execute an order and delivers a decision on a person's detention due to the risk of destroying important case materials. The prosecution, despite being given a 30-day period to execute the order, executes it on, say, the twentieth or twenty-fifth day, when one of the grounds for issuing the arrest warrant is an immediate threat of destroying important case information. This threat is immediate when any delay may result in the destruction of information critical for the investigation. As a result, when the threat of destroying important case information is the sole reason for issuing an arrest warrant and the prosecutor's office detains a person on the twentieth or twenty-fifth day, the court must examine whether the risk existed on the twentieth or twenty-fifth day from the arrest warrant release. Even this reason should be sufficient for one-time appeal of an arrest warrant.

On one occasion, on April 18, 2019, the judge of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court issued an arrest warrant on the grounds that there was a risk that the person would flee.[16] Due to the risk of fleeing, the prosecutor's office executed the order as soon as on May 8, 2019 and in fact detained the person on the twentieth day after the order was issued.[17]

It is true that the court issues an order for detention on the prosecutor's motion when the term of the warrant execution is beyond the court control and the warrant enforcement is the competence of the law enforcement machinery, but when the order is issued on the grounds that there was a risk of person's fleeing in the given period and is executed by the prosecution, e.g. on the twentieth day after issuance and detains the person on the grounds of the risk of fleeing, the court should at least be able to examine the fact of execution of its order, especially when the defendant contests it.

Furthermore, the court issues an order for detention without oral hearing, based solely on the information from the prosecutor's motion and without being aware of the opposing party's position. The target of the arrest is not even notified when the arrest warrant is judged. Accordingly, at this stage, both the judgment and decision of the court are based entirely on the position of one party (the prosecution), and a person may be arrested by court decision. However, after the arrest, the accused should have the right to one-time appeal of the court decision on detention and have his arguments heard.[18] In its decisions, the Constitutional Court emphasized the importance of protecting the right to oral hearing.[19]

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15 *Sulakvelidze D., Dzebniauri G., Chomakhashvili K., Tomashvili T., Mataradze T.,* Study of The Detention Standards and Practice in Accordance with the Criminal Procedure Code of Georgia, Tbilisi, 2017, 30 (in Georgian).

16 Decision of the judge of the Criminal Case Investigation, Pre-Trial and Substantive Trial Panel of Tbilisi City Court № 6244-19, dated April 18, 2019.

17 See Detention Protocol of 08.05.2019 on Criminal Case № 009200219001.

18 When considering the constitutional claim "Mikheil Haindrava v. Parliament of Georgia," the Parliament representative explained that the review of the order of detention takes place during the revision of the preventive measure what is not true and does not correspond to the reality. I will talk about this issue in Chapter Three.

19 Decision of the Constitutional Court of Georgia of February 27, 2014 in the case of Georgian citizen Ilia Chanturaia v. Parliament of Georgia, № 2/2/558, II, 42.

When the court makes a decision for detention, the facts and grounds once established by reasonable assumption are no longer examined, because the arrest warrant is not appealable. This deprives a person of the right to contest and verify the validity and lawfulness of the court's assessment of the grounds presented by one party only. He should be given the opportunity to prove a different reality and have an illegal decision reversed.

Furthermore, a person may have absolute evidence (e.g., evidence of being abroad at the time the crime was committed in Georgia) to overturn the verdict passed solely on the basis of the prosecution's information. If so, as the appeal is filed with the court of a higher instance, the arrest warrant issued against him will be cancelled and he will be released without having to prove any new substantive circumstances. Here, we deal with the lack of right of appeal, what, in turn, deprives a person of the right to allege his position and protect his freedom.

Aside from the foregoing, Article 13(6) of the Constitution of Georgia states: "A person whose freedom has been restricted unlawfully shall have the right to compensation". The fact that an arrest warrant is not appealable and its lawfulness cannot be verified deprives the person of even a theoretical possibility of exercising the mentioned right. If a person does not have the right to contest unlawful restriction of his freedom, he will never be able to prove an unlawful act against him as a fact.

Since the lawfulness of the court's decision is subject to re-examination by the court, without the right to apply to court, a person is deprived of the opportunity to verify the lawfulness of an arrest warrant and prove illegal restriction of his freedom, what is the grounds for claiming compensation under Article 13(6) of the Constitution of Georgia. The person will not be able to claim compensation unless the fact of illegal detention is established by the court. The mechanism of appeal gives a person the legal grounds to contest the lawfulness of detention and claim compensation as a result.

Paragraph "g" of Article 197(1) of the Criminal Procedure Code of Georgia deserves attention. According to it, a magistrate judge shall, at the initial appearance of the accused in court, ask the accused whether he/she has any complaint or motion with regard to the violation of his/her rights. It is a common practice to interpret this norm as a detainee's right at his initial appearance in court to appeal an arrest warrant before a magistrate judge that was issued by a judge of the same instance. This is a misinterpretation of the norm, because at the initial appearance, the court is looking at possible violation of the rights, degrading treatment, or torture against the accused during the enforcement of the court decision, rather than judging the lawfulness of the decision. Furthermore, different judges of the same instance have no authority to judge the correctness of each other's decisions.

A number of issues arise when a person is detained by a court decision, and one of the most important is the issue discussed above. Thus, the court must have the right to examine the execution of an order of detention issued by it, and an accused must have an opportunity to prove an unlawful restriction of his/her freedom in order to claim compensation later on.

5. Decision of the Constitutional Court Regarding the Opportunity to Appeal an Arrest Warrant

On June 17, 2022, the Constitutional Court of Georgia dismissed constitutional claim № 1464 (Mikheil Khaindrava v. Parliament of Georgia), which challenged the constitutionality of the second sentence of Article 171(1) of the Criminal Procedure Code of Georgia (the said decision is not appealable) in relation to the first sentence of Article 31(1) of the Constitution of Georgia. The decision of the Constitutional Court does not stand up to criticism.[20]

The above-mentioned decision of the Constitutional Court of Georgia is hardly adequate. Obvious gaps stem from the misinterpretation of the norm what is a dangerous precedent because it seems that the aim and the purpose of the norm of the Panel of the Constitutional Court are not understood properly. In paragraph 16 of the decision, the Constitutional Court states that detention is an investigative act. Such judgment cannot be considered right, since detention is not an investigative act. Under Article 200(6) of the Criminal Procedure Code of Georgia, detention is a coercive measure in criminal proceedings. Furthermore, in addition to this argument, the IV Chapter of the Criminal Procedure Code of Georgia considers investigation and investigative acts, without mentioning detention. The legislator regulates this issue in the V Chapter of the Criminal Procedure Code of Georgia seeing detention precisely as a measure of criminal coercion. Moreover, in the annual statistics of the City Court, detention is listed among coercive measures.

In Paragraph 20 of the said ruling, the Constitutional Court clarifies that a decision to detain a person is not completely beyond the court control, and in support of this opinion refers to Paragraph "g" of Article 197 of the Criminal Procedure Code of Georgia: "whether the accused has any complaint or motion with regard to the violation of his/her rights" and relying on this clause, judges as follows: "at the initial appearance of the accused in court, during the establishment of the above-given questions, if the accused presents a complaint regarding his/her detention, or mediates regarding the violation of his/her rights, of which the court is sure, the court may consider such detention ungrounded and/or illegal, with the reason for detention being insufficient, and refuse to apply arrest as a preventive measure against the detainee." This judgment of the Constitutional Court does not stem from the requirements of the Criminal Procedure Code of Georgia, or from the instructions of Article 197 of the same Code. The fact is that in case of violation of rights, the court may (but not necessarily) not apply imprisonment as a preventive measure what does not make the applied measure of detention illegal. This is natural, because a person may be detained lawfully, but his rights may be violated by degrading treatment during the detention. The unlawful act committed during the enforcement of this measure is a crime of its own, although it does not automatically mean that the preventive measure should be considered unlawful. The lawfulness of an arrest warrant, no matter how unlawful or ungrounded it is, will not be tested at the initial appearance of the accused in court, even though a judge will inquire of the accused at trial whether he/she has any complaints or motions regarding the violation of his/her rights. Rather, the court only evaluates whether the defendant's rights were

[20] See special opinion of the judge of the Constitutional Court Giorgi Kverenchkhiladze regarding the decision of the First Panel of the Constitutional Court № 1/4/1464 of June 17, 2022.

violated in the execution of the order by e.g., inhuman or degrading treatment, torture, etc. Furthermore, different judges of the same instance are not allowed to judge the appropriateness of each other's decisions. A judge of the first instance (magistrate judge) may not judge the lawfulness of an arrest warrant issued by another (magistrate) judge of the same court or revise it, as this is expressly forbidden by the Criminal Procedure Code of Georgia and this is how the court practice has developed. [21]

According to Article 95(1) of the Criminal Procedure Code of Georgia: "A participant in criminal proceedings may, in cases directly provided for and in the manner prescribed by this Code, appeal an action or decision of a court, prosecutor or investigator". Following the instructions of this norm, the legislator immediately specifies that the Criminal Procedure Code of Georgia must explicitly state where a court decision/ruling shall be appealed. Otherwise, it will not be judged by the court. Another proof is found in the clarification of the Investigative Panel of Tbilisi Court of Appeals: "According to Article 95(1) of the Criminal Procedure Code of Georgia, a court decision may be appealed only in cases directly provided for and in the manner prescribed by the Code, and what a party is not entitled to according to the procedural legislation may not be granted by the court and such explanation may not have legal force".[22] Besides, Article 20(3) of the Criminal Procedure Code of Georgia explicitly states that a complaint against a judgment received within the jurisdiction of a magistrate judge of a district (city) court shall be tried by the Investigative Panel of the Court of Appeals. Therefore, no matter how illegal or unreasonable the judge trying the preventive measure considers the arrest warrant, he/she is not authorized to judge it. This means that the revision of a decision of a judge of the first instance is possible only by a judge of a higher instance, since a court of the same instance is not authorized to judge the same issue twice.

The fact that the legislator does not allow a (magistrate) judge during the initial appearance to judge the lawfulness of an order issued by a judge of the same instance is also proved by Article 206(8) of the Criminal Procedure Code of Georgia, which clarifies that when judging a preventive measure by the first instance court, substantially new information/facts must be presented if imprisonment as a preventive measure is to be changed. It is clear that here, no detention is meant, but a reservation about the preconditions for changing the kind of preventive measure.

Notably, the above-mentioned Decision № 1/4/1464 of June 17, 2022 of the First Panel of the Constitutional Court of Georgia is supplemented by the special opinion of the judge of the Constitutional Court Giorgi Kverenchkhiladze stating that the Constitutional Court assessed the legal facts incorrectly. He fully agreed with the authors of the constitutional claim and explained that the Constitutional Court should have fully satisfied the claim and recognized unconstitutional the second sentence of Article 171(1) of the Criminal Procedure Code of Georgia in relation to Clause One of Article 31 of the Constitution of Georgia.[23]

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21 See Decision № 1g/1362-17 of November 29, 2017 of the Investigative Panel of Tbilisi Court of Appeals.

22 Decision № 1g/1362-17 of November 29, 2017 of the Investigative Panel of Tbilisi Court of Appeals.

23 Special opinion of the judge of the Constitutional Court Giorgi Kverenchkhiladze regarding the decision of the First Panel of the Constitutional Court № 1/4/1464 of June 17, 2022.

6. Comparative Legal Analysis

Article 14 of the Code of Criminal Procedure of Estonia refers to the adversarial court procedure.[24] The Code of Criminal Procedure of Estonia distinguishes between the status of a suspect and an accused. According to Article 34(6) of the Code of Criminal Procedure of Estonia, the suspect has the right to take part in the hearing of an application for an arrest warrant in court. Article 131(2) of the same Code regulates the case in which, on the order of a Prosecutor's Office, an investigative body shall convey a suspect or accused with regard to whom an application for an arrest warrant has been prepared to a preliminary investigation judge for the hearing of the application. Article 385 of the Code of Criminal Procedure of Estonia lists the matters, which are not appealable. Paragraph 28 of this article prohibits appealing a decision to arrest a person. However, it should be noted that despite not appealing such a decision, a person has the opportunity to be heard by the court before the court makes a decision of detention.

Article 4 of the U.S. Federal Law deals with the detention of a person.[25] The Law recognizes two cases of detention: one by a police officer and the other by a court. A police officer detains a person provided there is a probable cause standard. A police officer who detains a person without a court decision must prove before the court that probable cause existed and that it was necessary to detain the person.

Probable cause is a reasonable belief based on the facts and information, which existed before the arrest. This is the standard used by the judge when issuing an arrest warrant. There is a discussion with the defendant about the issuance of an arrest warrant. Article 37 of U.S. Federal Law lists the matters that cannot be appealed. Section 37(c) of the U.S. Federal Law deals with an arrest order that is not appealable, but even here the person's right to be heard is compensated by judging his arrest in his presence.

The Criminal Procedure Code of Georgia of February 20, 1998, in contrast to the current Criminal Procedure Code, regulated the issues related to detention more effectively. Article 12(3) of the Criminal Procedure Code of Georgia of February 20, 1998 expressly prohibited a person's detention for more than 48 hours. Article 134 of the same Code listed the types of coercive measures in criminal proceedings, and the list given in subparagraph "b" of the same article specified term *detention*, thus recognizing detention as a type of coercive measures, unlike the present Criminal Procedure Code of Georgia.

Article 146^1 of the Criminal Procedure Code of Georgia of February 20, 1998 regulated the issue of verifying the lawfulness of detention. According to Clause One of this article, a person released from custody was entitled to file a motion to the court on the location of investigation requiring the verification of the lawfulness and validity of his/her detention. Within ten days from the date of motion, the judge considered the question of the lawfulness and validity of the detention once. Clause Two of the given article dealt with recognizing the detention unlawful, a case where the

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[24] Code of Criminal Procedure of Estonia, <https://www.riigiteataja.ee/en/eli/530102013093/consolide> [04.05.2021].

[25] U.S. Federal Law, enforced on March 21, 1946, as amended to December 1, 2020.

procedure for detention under Article 145 of this Code was essentially violated, or where the detention did not serve the purpose of detention under Article 141 of this Code. Clause Three explained when the detention was unreasonable, and Clause Four stated that if the judge determined that the detention was unlawful or ungrounded, he/she would recognize this fact and immediately order compensation to the person released from custody.

7. Conclusion

A number of problematic issues arise in practice when the court issues an arrest warrant, in particular, there is no legal basis to determine the period of execution of an arrest warrant. The 30-day period specified in Article 112(3) of the Criminal Procedure Code of Georgia is set by the court by analogy of a special rule, the action it is not entitled to under the Organic Law "On Normative Acts".

Besides, the court should have the right to verify the execution of the arrest warrant issued by it, especially when the warrant is issued due to the threat of fleeing and, based on the above, the prosecution's order is executed with some delay (e.g. after 20 days).

The inability to appeal the arrest warrant deprives the defendant of the right to claim damages later on, but most important problem is the lack of a leverage to protect one's freedom, since the current legal norm, despite the interpretation of the Constitutional Court, does not give a defendant (defense) the right to appeal a court order. Without the right to appeal an arrest warrant, an accused is deprived of his/her right to challenge the lawfulness of the factual and formal grounds established by the court against him.

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