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Impact of the Position of the Victim on the Adjudication of Justice (Domestic Violence Cases)

Adjudication of justice in cases of domestic violence still remains a major challenge for the criminal justice system despite the abundance of international acts, the harmonization of national legislation with international standards, a number of mechanisms for the protection of victims, the availability of crime prevention and resocialization programs for criminals, awareness-raising campaigns, and a substantial change in the public attitude to the issue, the widespread use of restraining orders, the appeal of victims to law enforcement agencies, and a significant increase in the number of convictions¹. One of the major challenge is related to either the changed position of the victim during the trial or, depending on the nature of the crime, lack of evidence for the conviction despite the victim's incriminating testimony.

Keywords: domestic violence, victim's testimony, refusal to testify, restraining order, investigative experiment, standard of proof.

1. Introduction

“The obligation to conduct an effective investigation is an obligation which concerns the means to be employed, and not the results to be achieved”² yet, “deficiencies in the collection of evidence in response to a domestic violence incident may lead to an underestimation of the degree of violence taking place... adversely affecting the prospects for criminal investigation and discourage the victims of domestic violence (who are often already under pressure from the society) from reporting an abusive family member to the authorities in the future”³.

Article 55 of the Council of Europe Convention on “Preventing and Combating Violence Against Women and Domestic Violence”⁴ (hereinafter – the “Istanbul Convention”) obliges Georgia to provide *ex officio* proceedings, which should not be “fully dependent” on a report or complaint by the victim and should continue even if the victim, later, rejects to testify or withdraws his/her

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¹ During 2023, 2928 persons were convicted for family crimes, of which 1413 were convicted of domestic violence. Of these, 427 and 228 persons were acquitted, respectively; 988 and 438 persons (respectively) were sentenced to imprisonment. In 2022, 2375 people were sentenced for domestic violence and family crime, and 420 people were acquitted.

² *Tkheldze v Georgia*, no. 33056/17, [2021], ECHR, 50. See *Mižigárová v. Slovakia*, no. 74832/01, [2010], ECHR, 93.

³ *Tkheldze v Georgia*, *ibid*, 54.

⁴ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence Istanbul, 11.V.2011, CETS 210.

complain. The Criminal Procedure Code of Georgia⁵ (hereinafter – “CPCG”) does not provide for private/private-public prosecution institutions. For all crimes, the criminal prosecution is public and does not depend on a victim’s complain (whether victim reports to the investigative body) or on his/her reconciliation with the accused, the victim is not a party in the criminal proceedings and they cannot influence the investigation or the course of the court proceedings. Even if there is a document confirming the absence of the victim's claim against the accused in the case materials, the question of the accused's responsibility is decided on the basis of other evidence in the criminal case⁶. However, in some cases, the implementation of justice is still indirectly related to the position of the victim during the trial – will they testify in court against abusive family member, or either use the privilege granted under Article 49 of the CPCG or change the information provided at the investigation stage about the crime and the subject of the crime.

Since the interests of the victims and the accused/convicted are conflicted throughout the administration of justice, even though “in cases of domestic violence, the rights of the perpetrators cannot override the rights of the victim to life and physical and psychological integrity (see *Talpis v. Italy*, no. 41237/14, § 123, 2 March 2017, ECtHR),”⁷ the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸ (hereinafter – the “European Convention”) establishes the rights provided for in Article 6 for persons accused of any category of crime and, along with the protection of victims, requires ensuring a fair trial (fully/with all legal components) for accused/convicted.

2. The Importance of Victim Participation

The European Court of Human Rights and the Constitutional Court of Georgia⁹ indicate that Georgia has created an “adequate legislative and administrative framework aimed at combating domestic violence against women in the country.”¹⁰ However, despite the increased referrals to law enforcement and the widespread use of restraining orders, the position of the victim in court is, in most cases, crucial to the administration of justice.

“Sufficient victim participation provides certain benefits to the justice system as a whole, as victim involvement can be an important supporting factor in the investigation and can be helpful in the process of establishing the truth. they can, by participating in the trial/case hearing, in particular, by giving explanations to determine the circumstances relevant to the case, make a significant contribution to establishing the truth.”¹¹

⁵ Criminal Procedure Code of Georgia, 09/10/2009, № 1771-III (In Georgian).

⁶ Judgement of the Chamber of Criminal Cases of the Supreme Court of Georgia (hereinafter – the “Supreme Court of Georgia”) dated March 13, 2024 in case N959ს3-23, par. 6; Decision No. 766ს3-19 of the Supreme Court of Georgia of February 3, 2020; Ruling of the Supreme Court of Georgia of March 19, 2020, case №737ს3-19, par. 11 (In Georgian).

⁷ *Tkheldize v Georgia*, no. 33056/17,[2021], ECHR, 49.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4/11/1950 CETS 5.

⁹ See Decision № 1/2/1257,1280 of April 30, 2020, of the Constitutional Court of Georgia “Citizens of Georgia – Sofio Garuchava and Nino Khosroshvili against the Parliament of Georgia” (In Georgian).

¹⁰ *Tkheldize v Georgia*, *ibid*, 52.

¹¹ Decision of the Constitutional Court of Georgia of September 30, 2016 “Citizen of Georgia Khatuna Shubitidze v. Parliament of Georgia”, II-43 (In Georgian).

Considering the latent nature of domestic violence, since it is usually carried out in a private space, away from the eyes of strangers, and/or due to the eyewitness family members refusing to testify in court (based on Article 50 of the CPCG), or due to their age/physical or mental state as they cannot fully perceive and/or convey what they saw/heard, – the testimony of the victim is the key.

As a rule, at the investigation stage, witnesses and victims actively cooperate with the investigative authorities (on the basis of their report/statement, the investigation is started, within the scope of the medical examination/expertise – medical personnel/experts, as well as the patrol police officers/investigators at the scene of the incident) are provided with information about the injuries received and the underlying causes (about the subject), they describe the criminal case in detail during the inquiry, and express their readiness to testify in court, participate in the investigative experiment; when issuing a restraining order, they describe the incident in detail and confirm the correctness of the information specified in the restraining order/report (the fact/type of violence, the identity of the perpetrator, etc.) with a signature, etc.), however, during the hearing on the merits of the case in court, they refuse to testify or interpret the factual circumstances related to the case of the alleged crime differently (e.g., the injury was caused by the fall of the victim, and not by violence on the part of the accused; The investigator incorrectly reflected their testimony in the report of the inquiry, and they signed the report without reading it). With this, they aim to explain the cause of the damage indicated in the expert opinion on one hand, and on the other hand – exclude that the damage has been caused by the defendant.

Although the victim's changed position (different interpretation of the facts/refusal to testify) affects law enforcement, the most challenging issue for justice is the victim's use of the privilege provided for by Article 49.2 (d) of the CPCG.

3. Legal Consequences of Substantively Changed Testimony by a Victim in the Court for the Administration of Justice ¹²

Regardless of Article 3, Section 24 of the CPCG, the court is not obliged to share the testimony of the victim. The court must evaluate all the evidence in the case (including the testimony of the victim) as per the requirements established by Article 82 of the CPCG and take into account, *inter alia*, the consistency and categorization of the witness's testimony with other evidence and factual circumstances, the witness's perception, narration skills and memory, vulnerability of victims of domestic violence. Therefore, when the victim substantially changes their position during the testimony in court and does not confirm the information specified in the report/inquiry report (for example, testifies that neither in this case nor in the past, they did not blame the mother for beating them¹³), they explain the reason for providing incorrect information (for example, the mother often gave negative remarks for being friends with certain individuals) and the purpose (for example, preventing the conflict escalation), the interview report of the victim was examined in court on the basis of Article 243 of the CPCG and the victim was given the opportunity to explain the difference

¹² For this article, we will not consider the issue of criminal liability of the victim.

¹³ Ruling of the Supreme Court of Georgia of January 25, 2024, case №1072ს3-23, para. 14 (In Georgian).

between the statements (for example, they indicated that they did not have glasses during the interview and signed without reading the survey report), the reliability of the information provided during the survey was assessed based on a detailed analysis¹⁴ of all the factual circumstances and evidence in the case, the information specified in the survey report is consistent with other evidence (e.g., the restraining order/report, the statements of the patrols announced immediately at the scene of the incident about the psycho-emotional state of the victim, expert report, medical examination/investigative experiment/inspection reports, etc.), – the court shares the information provided by the victim during the inquiry, as the verdict must be based on a corresponding set of evidence.

For instance, the court changed the verdict of not guilty issued by the court of appeals and noted that although the victim did not confirm the factual circumstances indicated by them at the investigation stage, she stated that the injuries were caused by her health condition (epileptic attacks), noted that she signed the investigation report without even reading it, denied the circumstances indicated in the inquiry report and the violence (against her) by the accused, – the court considered that the veracity of the information provided during the inquiry should be assessed through detailed analysis of all the factual circumstances and evidence in case¹⁵. The court took into account, that the factual circumstances indicated in the victim's testimony essentially contradicted the set of evidence in the criminal case (the victim appeared at the police station with the witness and indicated physical violence against her by the convicted person; based on the information provided by her restraining order/report was issued, which was signed by both the victim and the convicted person, the restraining order/ report was not appealed by the abuser and no comment was made on it), the victim consistently and uniformly described the crime committed against her with the participants of the process (witnesses, within the framework of various investigative and procedural activities, medical personnel, etc.), there was no document presented that proved that the victim was suffering from epilepsy, it was not proved that the injuries were related to the aforementioned disease, vulnerability of the victims of the mentioned category of crime and the hearsays presented in the criminal case (to assess the reliability of the testimony of the victim)¹⁶.

4. Victim's Refusal to Testify v. Administration of Justice

The victim's refusal to testify during the hearing can be due to many reasons. Therefore, first of all, attention should be paid to the motives behind the victim's position and to find out whether there is an illegal influence on the victim's freedom of will.¹⁷ Concurrently, when the victim refuses to testify in court, the prosecution side tries to use other evidence presented in the criminal case to justify the

¹⁴ See Judgment of the Supreme Court of Georgia of February 20, 2018 on case No. 527ს3-17, II-8 (In Georgian).

¹⁵ Ibid., II-8.

¹⁶ Judgement of the Supreme Court of Georgia on March 11, 2024, case №1009ს3-23, II-19.1-19.5 (In Georgian).

¹⁷ See *Kochlamazashvili B.*, Peculiarities of Domestic Violence Case Hearings in Court, Current Issues of Criminal Law, N2, 2017, 51 (In Georgian).

charges presented. However, depending on the nature of the crime, as a rule, most of the presented evidence is either indirect in nature or is based on the information provided by the victim to the authorities throughout the investigation, and/or is not related to the subject.

In the event of the violence being carried out unnoticed by others (witnesses), the victim's testimony and the forensic medical report¹⁸/medical examination report are the main incriminatory evidence. In the case of the victim's silence, the expert report/medical examination report, although it can confirm the presence of injury on the victim's body, is uninformative in finding out who is the perpetrator. Hence, “the existence of the injury will be confirmed, but the identity of the person who caused it will remain unknown to the court, which will ultimately lead to the acquittal of the accused.”¹⁹ “At the same time, the testimony of a witness and/or the existence of traces of physical damage *per se* does not always confirm experiencing physical pain by the victim, which is a necessary sign of the crime under Article 126¹ of the Criminal Code of Georgia.

Although it is true that the refusal by the victim, based on Article 31 of the Constitution of Georgia²⁰ and Article 49.1 (d) of the CPCG, “does not mean that they deny the factual circumstances indicated in their testimony at the investigation stage, nor does it confirm the absence of a criminal act,”²¹ yet, *a priori* shall not lead to ignoring the results of the investigative/procedural actions conducted with their participation and does not automatically invalidate the facts established by these actions, however, it affects the evidentiary force of the investigative/procedural actions conducted with their involvement, where the primary source of the actions is a victim, and/or in fact (in substance) checking the information provided by the witness (victim).²²

Specifically, even though “the victim's refusal to testify does not exclude the examination of the reports of investigative/procedural actions carried out with their participation (the correctness of which is confirmed by the victim's signature) at the trial,”²³ if this evidence (the primary source of which is the victim) are not recognized by the defense as unchallenged (does not apply to the investigative experiment report, which is not related to the on-site examination of the victim's testimony) – it is not be used in justifying the judgment of conviction.²⁴

According to well-established judicial practice, when a victim refuses to testify in court, the use of the investigative experiment involving the victim, the report of the crime scene²⁵/visual examination

¹⁸ Which establishes the fact of physical injury/mental suffering.

¹⁹ *Kochlamazashvili B.*, *ibid*, 52 (In Georgian).

²⁰ Constitution of Georgia, 24/08/1995, with amendments of 2018, №786-6ლ (In Georgian).

²¹ Ruling of the Supreme Court of Georgia dated October 11, 2022, case № 714ს3-22 (In Georgian).

²² Ruling of the Supreme Court of Georgia on July 14, 2020, case № 97ს3-20 (In Georgian).

²³ Ruling of the Supreme Court of Georgia on February 21, 2020, case №721ს3-19, para. 12 (In Georgian.)

²⁴ Ruling of the Supreme Court of Georgia of December 28, 2022, case №909ს3-22, para. 10; see also, the decision of the Supreme Court of Georgia of August 9, 2022, case №619ს3-22; The ruling of the Supreme Court of Georgia of November 3, 2022, in case №845ს3-22 (In Georgian).

²⁵ Ruling of the Supreme Court of Georgia of October 26, 2023, case №856ს3-23, par. 16. If the victim refuses to testify, the incident scene inspection report taken separately shall not constitute independent evidence (direct and/or circumstantial) of the crime under the first part of Article 126¹ of the Criminal Code of Georgia, and it shall not be used for conviction (if it is challenged evidence). If the report contains only

of the victim/medical examination, and the victim's statement/report of the crime is also not allowed for sentencing purposes, as although the victim signs the report and the investigators questioned as witnesses in court (who carried out the said investigative activities) confirm the correctness of circumstances, the primary source of the information specified in all documents is the victim (defendant has not been allowed to challenge their interrogation and the reliability (reliability of the information provided by the victim), as per the established standard under Article 6 of the European Convention²⁶), therefore the mentioned procedural documents should not be considered as independent evidence either²⁷.

According to the procedural legislation of Georgia, the court is obliged to check the evidence presented in the criminal case from both formal-legal (observance of the rules of obtaining evidence) and content (reliability of the information indicated in them) perspectives, for which it is important to interrogate the primary source. The court has repeatedly noted that the mechanical and formal application of the requirements established by the CPCG cannot ensure the right to a fair trial. Accordingly, even though Article 78.1 of the CPCG relates to the admissibility of the document (the relevant procedural/investigative activity reports) as evidence, including the questioning of the person who obtained/created and/or with whom this document was kept before being presented to the court. To share the information established by the report of the investigative/procedural activity (if it is disputed evidence), which is fully based on the information provided by the victim (for example, the investigative experiment report, the notification/restraining order report), it is necessary to interrogate the primary source of the information, and not the investigator who compiled the relevant procedural document, as together with the purpose of Article 78 of the CPCG (establishing the authenticity of the document), Article 82 of the CPCG should also be taken into account, which, among other things, establishes the obligation to evaluate the veracity of the evidence (in this case, the victim), which includes the assessment of the credibility of the source of information – the victim. It should also be taken into account that, in contrast to interrogation, in the case of notification/application, the applicant is not warned about the expected liability for false testimony and false denunciation²⁸.

Hence, the investigative experiment report cannot be used as a basis for a judgment of conviction, if during the investigative experiment, the information provided by the victim/witness in the investigation report was practically checked on the spot and the situation was restored. In such cases, the report/content of the investigative experiment is to check the information provided by the

information provided by the victim. See the ruling of the Supreme Court of Georgia of November 7, 2022, case №953ს3-22, para. 2 (In Georgian.)

²⁶ Ruling of the Supreme Court of Georgia of October 24, 2023, in case №765ს3-23, Par. 15 (In Georgian.)

²⁷ For example, during the investigative experiment, the victim indicated the places where the son physically and verbally abused her, threatened to kill her, and damaged household items. See the judgement of the Supreme Court of Georgia of March 1, 2024, case № 910ს3-23; Ruling of the Supreme Court of Georgia of May 30, 2023, case N158ს3-23; Ruling of the Supreme Court of Georgia of October 2, 2023, case № 496ს3-23; Ruling of the Supreme Court of Georgia of May 30, 2023, case N158ს3-23; Ruling of the Supreme Court of Georgia of October 2, 2023 in case № 496ს3-23.

²⁸ Judgment of the Zugdidi District Court of November 12, 2020 (No. 1/160-20) (if the applicant was not warned about the criminal responsibility for giving false testimony, the mentioned, in appropriate cases, does not exclude the possibility of imposing criminal responsibility for perjury) (In Georgian).

victim/witness during the interview. Therefore, although the testimony of the witness/victim and the investigative experiment report are two different pieces of evidence, it is clear that the source of the information in both cases is the same person.²⁹

Similarly, the crime scene report, if it contains information provided by the victim, which they did not confirm in court,³⁰ taken independently/separately from the victim's testimony, does not constitute direct and/or circumstantial evidence, as it does not contain any information that would additionally corroborate the information on the crime taken place provided by the victim.³¹

The inspection report shall not be used for conviction either when it contains only the information provided by the witness/victim, which the witness/victim does not confirm in court (refuses to testify/denies the information provided by them during the investigation stage).³² Among them – the use of photographs (which show the injuries, but not the fact of violence directly) as well as the inspection report with the victim (for example, the photographs submitted by the victim for the investigation were viewed, which, according to the victim's explanation, show him with the injuries inflicted by their spouse on August 9 and 13, 2019), as the report determines the presence, quantity, and localization of the damage, but with the mentioned report and photographs it is impossible to determine without fail the fact of who caused it, or when and under what circumstances the victim got the said injuries; Whether the experienced violence caused them pain or not;³³ The correctness of the description provided by the victim when viewing the photographs.

Equally, even when the forensic medical expert's report is found irrefutable, the expert's report confirming the presence of injuries on the victim's body is not sufficient to issue a judgment of conviction, if it is not possible to determine who and under what circumstances caused the said injury to the victim³⁴ (no direct evidence is presented) exculpatory evidence). Since “even though the expert report confirms the presence of injuries on the victim's body, it is objectively impossible to determine the identity of the person causing the injury, if any, when the victim uses the right granted by Article 49 of the CPCG, and the case does not present any evidence that would confirm the occurrence of the injuries indicated in the examination report as a direct result of the action taken by the accused towards the victim³⁵”.

²⁹ For example, see Ruling of the Supreme Court of Georgia of July 7, 2020, case № 315სს-20; Ruling of the Supreme Court of Georgia dated October 18, 2023, case № 679სს-20; Ruling of the Supreme Court of Georgia of January 16, 2024, case №948სს-23, para. 14; Ruling of the Supreme Court of Georgia of January 29, 2024, case №1005სს-23, par. 16; Ruling of the Supreme Court of Georgia of February 29, 2024, case №1303სს-23, para. 15. (In Georgian.)

³⁰ Ruling of the Supreme Court of Georgia of March 20, 2024, case №1317სს-23, para. 16 (In Georgian.)

³¹ Ruling of the Supreme Court of Georgia of March 15, 2024, case № 1438სს-23, para. 17 (In Georgian.)

³² Ruling of the Supreme Court of Georgia of January 24, 2024, case №1071სს-23, para. 18. (The jacket presented by the victim was inspected, it had a twisted shoulder, which, according to the victim's explanation, was caused by the accused's hand-holding and shaking, which caused them physical pain) (In Georgian).

³³ The judgment of the Tbilisi Court of Appeals on November 24, 2020, case №18/1565-20 (In Georgian.)

³⁴ Ruling of the Supreme Court of Georgia of February 21, 2020, case №721სს-19, para.15 (In Georgian.)

³⁵ Ruling of the Supreme Court of Georgia dated October 26, 2023, case №856სს-23, para.18.1; Ruling of the Supreme Court of Georgia of February 21, 2020, case №746სს-19, para. 17; Ruling of the Supreme Court of Georgia on February 29, 2024, case N1303სს-23, para.16.1 (In Georgian).

5. Evidentiary Power of Restraining Order/Report

When proving domestic violence, the court increasingly uses the restraining order and its report as incriminatory evidence, although the use of said evidence for conviction is also related to certain prerequisites. In particular, when assessing the probative value of a restraining order/report for sentencing purposes, the court will first consider that the restraining order is usually based entirely on the information provided by the victim. Therefore, if the victim refuses to testify in court, and the restraining order/report is disputed evidence, the court is deprived of the possibility of using it for conviction³⁶, as during the hearing on merits the defense was not allowed to interrogate the primary source of information (in the case of a restraining order – the victim) and, accordingly, the opportunity to challenge the credibility of the information presented in the evidence and to investigate the credibility of the information provider.³⁷ Moreover, when considering the issue of using a restraining order/report for sentencing purposes, the court, along with the formal-legal aspects of the legality of the restraining order/report, pays attention to the detailing, concretization, and consistency of the restraining order/report, the accuracy of the description of the actual circumstances of the alleged incident of violence, whether the report is signed by the accused³⁸; the presence of a remark in the text of the report, whether it was appealed as per the law, was recognized irrefutable by the parties.

A restraining order/report is direct evidence if the information specified in it refers to the circumstances included in the subject of claim³⁹. In addition, – it is independent incriminatory evidence when the source of information specified in the restraining order/report (victim) confirms the information specified in the report during the hearing on merits, gives incriminatory testimony at the hearing on merits and/or the restraining report is recognized irrefutable by the parties⁴⁰; The report was signed by the accused⁴¹, the accused did not exercise the right to appeal the order, there is no reason to doubt the legality of the order/report and the authenticity of the facts reflected in them, and

³⁶ Ruling of the Supreme Court of Georgia of December 28, 2022, case N909სს-22, para. 11 (In Georgian).

³⁷ Ruling of the Supreme Court of Georgia dated October 27, 2023, case №858სს-23, para. 16; see Also: the judgment of the Supreme Court of Georgia of March 13, 2024, case №959სს-23, II-8.4.; Ruling of the Supreme Court of Georgia on August 9, 2022, in the case №619 სს.-22; Ruling of the Supreme Court of Georgia of October 31, 2023, case N855AP-23; Judgment of the Supreme Court of Georgia of July 7, 2020, case №315სს-20; Judgment of June 1, 2020, case №49სს-20; Judgment of January 16, 2024, case №948სს-23; Judgment of the Supreme Court of Georgia dated October 31, 2023, case №855სს-23, para. 15.1; Judgement of the Supreme Court of Georgia on March 13, 2024, case №959სს-23. (In Georgian.)

³⁸ The ruling of the Supreme Court of Georgia of November 3, 2022, case №845სს-22, para. 12; see Also: the ruling of the Supreme Court of Georgia on August 9, 2022, case N619სს-22 (In Georgian).

³⁹ Judgement of the Supreme Court of Georgia on March 13, 2024, case N959სს-23, par. II-8.1.; see also the judgement of the Supreme Court of Georgia of December 28, 2020, case №585სს-19; Ruling of the Supreme Court of Georgia of June 2, 2022, case №331სს-22; The judgment of the Supreme Court of Georgia of February 24, 2022, case №1051სს-21; Ruling of July 6, 2022, case №509სს-22 (In Georgian).

⁴⁰ See for example, the ruling of the Supreme Court of Georgia of February 6, 2024, case N1107სს-23, para. 9 (In Georgian).

⁴¹ See Judgment of the Supreme Court of Georgia of June 7, 2022, case №257სს-21, II-19 (In Georgian).

the parties had the opportunity to examine them at the court hearing⁴². However, at the court hearing, with the participation of the parties, only the public reading (disclosure)⁴³ of the mentioned documents by the prosecution and the questioning of the investigating officer (with whom the document was kept before being presented to the court) does not create a basis for their use for conviction, as on the one hand, the defense party is not allowed to check the reliability of the source of information in the documents (in the order/report), and on the other hand, – questioning the investigator cannot ensure the purpose of the first part of Article 78 of the CPCG, since the investigator has no information related to the events described in this document, nor to the correctness/accuracy⁴⁴ of the description of the actual circumstances, nor regarding the legality of signing the document. Therefore, the determination of the person to be questioned for the purposes of Article 78 of the CPCG depends on the specific circumstances of the case (including the form of the document, the circumstances of obtaining the document, the testimony of the person/source presenting the document, etc.), to achieve the goals of the questioning – to determine the authenticity and origin of the evidence.⁴⁵ In this case, it could be either the author of the restraining order or the primary source (provider) of the information in the disputed document.⁴⁶

In addition, it is important to detail the restraining order – it must describe in detail and specifically, the action taken (the actual circumstances of the violence)⁴⁷, the feeling of physical pain/suffering by the victim, the causes of it, the presence of bodily injuries, as in case of doubt, the record of the restraining order can be used as incriminatory evidence. It will be used only in relation to those episodes/circumstances where descriptions in the reports meet the above requirements.⁴⁸

Thus, the use of a restraining order/report for conviction depends on one hand on the relevance and pertinence of the information specified in the order/report (to what extent it indicates the circumstances included in the subject of proof); Upon the defendant's recognition of the circumstances specified in the restraining order/report (by recognizing it as irrebuttable and/or by signing the correctness of the content and *de facto* refusal of the right to appeal)⁴⁹, the victim's giving an incriminatory testimony.

⁴² See, for example, the judgment of the Supreme Court of Georgia of February 24, 2022, case №1051ს3-21, II-11; Judgment of the Supreme Court of Georgia of December 28, 2020, case № 585ს3-20, para. II-12-13; The judgment of the Supreme Court of Georgia of February 24, 2022, case №1051ს3-21; The verdict of the Supreme Court of Georgia of June 7, 2022, in case №257ს3-21; Ruling of the Supreme Court of Georgia of June 2, 2022, case №331ს3-22 (In Georgian).

⁴³ Judgement of the Supreme Court of Georgia on March 13, 2024, case № 959 ს3-23 (In Georgian).

⁴⁴ Judgment of the Supreme Court of Georgia of March 13, 2024, case № 959 ს3-23, par. II- 8.2.4 (In Georgian).

⁴⁵ For example: the Ruling of the Supreme Court of Georgia of July 7, 2020, case №99ს3-20 (In Georgian).

⁴⁶ Judgment of the Supreme Court of Georgia of March 13, 2024, case № 959ს3-23, par. II- 8.2.3 (In Georgian).

⁴⁷ Ruling of the Supreme Court of Georgia of January 9, 2023, case № 950ს3-23 (In Georgian).

⁴⁸ Ruling of the Supreme Court of Georgia of January 16, 2024, case № 948ს3-23, Par. 15 (In Georgian).

⁴⁹ See, for example, the ruling of the Supreme Court of Georgia of October 24, 2023, case № 793ს3-23, par.15 (In Georgian).

6. Probative Weight of Report of Crime

The use of the notification for conviction shall be allowed when the notification was made by a neutral person who, during questioning in court, confirmed the circumstances indicated in the notification.⁵⁰ The notification/application of the victim, which is the basis for the initiation of the investigation, cannot be the basis for a judgment of conviction not only when the evidence presented in the criminal case does not prove that the said statement/message belongs to the victim, but also if the evidence presented in the criminal case establishes that notification/application has been made by the victim (e.g. testimonies of eyewitnesses, phonoscopic examination report, record review report with the victim), – since the notification/application is the basis for the initiation of the investigation and the existence of the criminal actions described in it must be verified and confirmed by investigative and procedural actions,⁵¹ the victim's notification/application cannot replace the victim's testimony – The actual existence and correctness of the factual circumstances indicated in the notice must be confirmed by the criminal case materials.

After the legislative changes of May 24, 2022, the parties are given the right to request the audio recording of the message, but the use of said recording for conviction is still not allowed (even if the authenticity of the recording and the implementation of the call/oral or written notification directly by the victim are not disputed), when the reliability of the information specified in the message is disputed, and the defense did not have the opportunity to be questioned in the court of first instance. Based on the requirement of fairness of the proceedings and the obligation to ensure the right of defense, the defense party must have the opportunity to examine the credibility of the information specified in the notification and the reliability of the source (in this case, the victim) in court, which is why it is not allowed to use the victim's notification (oral/written form) for conviction.⁵²

However, there are exceptions. If the existence of the circumstances specified in the report is established as irrebuttable by the combination of the evidence presented in the criminal case, despite the victim's refusal to testify, the court may still use the report for conviction. For example, the court took into account the victim's phone message (*according to the crying victim, if her spouse found out about the notification, he would kill her*), the testimony of the witness (it was confirmed that the victim called the police and ambulance), personal examination data of the victim (the presence of blood stains on the victim's body was determined), medical examination report (the bruises on the victim's body were caused by the action of some dense blunt object and both individually and

⁵⁰ See, for example, the judgement of the Supreme Court of Georgia of March 11, 2024, case №1009ს3-23 (In Georgian).

⁵¹ The Ruling of the Supreme Court of Georgia of February 29, 2024, case №1303ს3-23, para. 13; Ruling of the Supreme Court of Georgia of January 29, 2024, case №1005ს3-23, par. 14; The Ruling of the Supreme Court of Georgia of March 5, 2024, case №1255ს3-23, par. 14; Ruling of the Supreme Court of Georgia of March 20, 2024, case №1317ს3-23, par. 14; Ruling of the Supreme Court of Georgia of October 24, 2023, case №793ს3-23; Ruling of the Supreme Court of Georgia of November 7, 2022, case №953ს3-22, para. 9 (In Georgian).

⁵² 16. See, for example, the Ruling of the Supreme Court of Georgia of October 31, 2023, case №855ს3-23, par. 16 (In Georgian).

combined belong to the light degree of physical injuries to the detriment of health (the period does not contradict the date indicated in the preliminary reports), the forensic psychological examination report (it was determined that the victim suffered psychological suffering due to the actions carried out by the spouse, and according to the expert's testimony, the victim had the highest level of anxiety, and their mental state was extremely severe) and practically immediately after the disputed incident and receiving the notification, the testimony of the investigator who appeared at the scene of the incident and inspected it confirmed the physical insulting of the victim beyond a reasonable doubt.⁵³

7. Proving Physical Pain/Suffering by the Victim

Another challenge is related to the question of establishing physical pain/suffering caused to the victim by the disputed action in case the victim refuses to testify or changes the incriminatory testimony.

The crime provided for in Article 126¹ of the Criminal Code of Georgia is of a material nature and is related to domestic violence, including causing physical pain or suffering to the victim. Accordingly, in order to qualify the action under Article 126¹ of the Criminal Code, such damage must be proven by the evidence presented in the criminal case.⁵⁴

To prove the infliction of suffering, the psychological examination report (determines both the fact of infliction of suffering and the cause of the suffering/person whose actions caused it) must be included in the materials of the criminal case. It is relatively problematic to determine the fact of inflicting physical pain when the victim is covered by the right provided for in subsection “d” of Article 49 of the CPCG, and in the criminal case there is no evidence that would objectively confirm the feeling of physical pain by the victim, independently of the testimonies of the victims⁵⁵, as despite the determination of the physical impact marks on the victim's body, the mechanism of the formation of the marks and the severity of the injury, according to the expert report/medical examination report, neither the identity of the person causing the injury nor the feeling of pain from the injuries received can be objectively determined.

To establish the fact of inflicting physical pain, subjective and objective tests are used (whether the person was objectively experiencing physical pain or suffering in the given case)⁵⁶.

“Feeling physical pain” depends not only on subjective but also on objective criteria – the intensity of the committed action and the injuries inflicted on the victim, based on the joint analysis of which it is determined whether the victim of violent actions experienced physical pain in a particular case⁵⁷. The presence of an expert opinion in the criminal case file does not *per se* confirm the feeling

⁵³ The judgment of the Supreme Court of Georgia of March 13, 2024, case № 959ს3-23 (In Georgian).

⁵⁴ Ruling of the Supreme Court of Georgia on January 16, 2024, case № 948ს3-23 (In Georgian).

⁵⁵ Ruling of the Supreme Court of Georgia of January 22, 2024, case №1048ს3-23 (In Georgian).

⁵⁶ Ruling of the Supreme Court of Georgia on the case of February 4, 2020, case № 627ს3-19, para.13; Ruling of the Supreme Court of Georgia on February 21, 2020, case №746ს3-19, para. 18 (In Georgian).

⁵⁷ For example, see the Ruling of the Supreme Court of Georgia of February 4, 2020, case № 627ს3-19; Judgment of the Supreme Court of Georgia of October 29, 2020, case № 443ს3-20; The judgment of the

of pain. Even if the expert's report establishes that the victim was injured during the alleged crime, the expert's report does not confirm the feeling of physical pain by the victim⁵⁸. Therefore, in some cases (taking into account the nature of the injuries provided for in this article⁵⁹), *inter alia*, the anamnesis/testimonies of eyewitnesses (what did the victim complain about after the violence/did she complain of pain)⁶⁰ are crucial, as the existence of an injury, without the feeling of pain, is not sufficient for action to qualify as per Article 126¹ of the Criminal Code of Georgia. At the same time, abuse may not leave visible traces and cannot be detected even by medical examination. Yet, this does not exclude the infliction of pain on the victim. Hence, along with the objective criterion, the court pays special attention to the subjective criterion. "The need for an objective assessment does not always exclude the need for a subjective assessment, and in some cases, without a subjective assessment of the victim, a correct assessment of the situation will be unthinkable. For example, during violence, which in some cases would cause physical pain, and in some cases – not, clarifying the position of the victim would be of crucial importance, e.g., twisting hands, grabbing an arm, etc., thus, without clarifying the position of the victim would make it impossible to make an objective decision."⁶¹ At the same time, making a decision based only on subjective factors cannot ensure the purpose of the law, due to the reason that "facts of violence where, taking into account the victim's age⁶², state of health or other objective factors, it is impossible to verbalize the pain experienced by the victim, would remain unpunished."⁶³ Hence, the victim's age, gender, state of health, duration of violence, type, intensity, placement, and method of committing the crime, means, whether injuries of the mentioned type and intensity objectively cause physical pain are considered.

Therefore, the victim's refusal to give a testimony practically invalidates the forensic medical examination report, which establishes the existence of various types of injuries on the victim's body, and deprives the court of the opportunity to establish a judgment of conviction, when the prosecution contests the sentence for inflicting physical pain by violence, while in the criminal case, neither objective nor subjective standard of physical pain/suffering by the victim is established by one evidence (for example, application by the victim to a medical facility/testimony of witnesses, restraining order/report).⁶⁴

Supreme Court of Georgia of February 3, 2021, case N1003s3-20; Ruling of the Supreme Court of Georgia of January 31, 2022, case №714s3-21 (In Georgian).

⁵⁸ An exception is the examination report, the descriptive part of which indicates that during the examination the victim complained of pain in a specific location.

⁵⁹ According to Article 126¹.1 of the Criminal Code of Georgia, domestic violence includes such violence that did not result in the consequences provided for in Articles 117, 118, or 120 of the Criminal Code of Georgia.

⁶⁰ Ruling of the Supreme Court of Georgia on the case of February 2, 2021, case № 1003s3-20, para.8 (In Georgian).

⁶¹ B. Kochlamazashvili, *ibid*, 55 (In Georgian).

⁶² For example, a minor victim

⁶³ Judgment of the Supreme Court of Georgia of October 29, 2020, case № 443s3-20 (In Georgian.)

⁶⁴ Similarly applies to the victim's perception of the reality of the threat; see Ruling of the Supreme Court of Georgia of March 15, 2024, case № 1438s3-23, para. 15 (In Georgian.)

8. The Use of Indirect Testimony for Sentencing

Another challenge is related to the decision of 22/01/2015 of the Constitutional Court of Georgia in “Citizen of Georgia Zurab Mikadze v. Parliament of Georgia”, where the court deemed as unconstitutional, *inter alia*, the normative part of the second sentence of Article 13.2 of the CPCG that provided for the possibility of establishing a judgment of conviction based on circumstantial evidence. Although the court did not rule out the possibility of using circumstantial evidence in exceptional cases, it ensured the clear rule provided by the law and proper constitutional guarantees, and not the general rule defined by the current CPCG. Therefore, the use of indirect testimony is not allowed for sentencing, however may be used for the evaluation of the credibility of the evidence (for example, the testimony of the victim) in the case of the criminal case⁶⁵.

Therefore, for the purposes of sentencing⁶⁶, the testimonies (hearsay) of the investigators/policemen, the doctors at the scene of the incident (who had direct contact with the victim), the victim's family members, – who know about the violence from the victim and who did not directly witness the violence themselves, are not admissible. At the same time, “the court must evaluate all the evidence individually and distinguish which testimony, or part of the testimony, is indirect,⁶⁷ – the testimony of persons mentioned above (medical personnel/investigators/patrols, etc.) at the scene of the incident is direct in the part of psycho-emotional state of the victim, the presence of damage, the health condition of the victim⁶⁸, the feeling of physical pain by the victim and the situation seen directly, and their use for sentencing is permissible.

9. Standard of Proof

Despite the special vulnerability of victims of domestic violence and the difficulties associated with obtaining evidence of a crime committed in a “private” environment⁶⁹, Georgian procedural legislation establishes the same evidentiary standard for delivering a judgment of conviction regardless of the category of crime. It does not provide for a lower evidentiary standard in cases belonging to the domestic crime category. Hence, the imperative provision of Article 31.7 of the Constitution of Georgia; Taking into account Article 13.2 of the CPCG, as well as – Article 82.3 and Article 269.2 – the judgment of conviction must be based on such a set of authentic and concordant evidence that beyond a reasonable doubt confirms the person's guilt⁷⁰. Even if the parties, under Article 73 of the

⁶⁵ Decision of the Constitutional Court of Georgia “Georgian citizen Zurab Mikadze v. the Parliament of Georgia” 22/01/2015, II-37, II-52 (In Georgian).

⁶⁶ See Ruling of the Supreme Court of Georgia dated October 24, 2023, case № 793ს3-23 (In Georgian).

⁶⁷ See Judgment of the Supreme Court of Georgia on July 14, 2020, in the case № 97ს3-20; Ruling of the Supreme Court of Georgia of December 28, 2022, case N909ს3-22; Judgement of the Supreme Court of Georgia on March 11, 2024, case № 1009ს3-23 (In Georgian).

⁶⁸ Ibid.

⁶⁹ Volodina v. Russia, N.41261/17, [2019], ECHR, 82.

⁷⁰ Ruling of the Supreme Court of Georgia of January 9, 2024, case № 950ს3-23; Ruling of the Supreme Court of Georgia of January 22, 2024, case N1048ს3-23; Ruling of the Supreme Court of Georgia of January 26, 2024, case № 920ს3-23, para. 9 (In Georgian).

CPCG, recognize the evidence in the criminal case as irrefutable, the court is tasked with evaluating them in terms of relevance, admissibility, and authenticity separately and jointly; Also – their sufficiency for establishing a judgment of conviction.⁷¹

The current legislation does not establish that a judgment of conviction shall be based only on direct evidence⁷², it does not determine what kind and amount of evidence is needed to establish a judgment of conviction, therefore the quantitative lack of evidence *per se* cannot be the basis for an acquittal. “Beyond a reasonable doubt standard should exclude the imposition of criminal liability on a person based on suspicions and assumptions”⁷³, “although such proof may be derived from an assumption based on fairly solid, accurate and congruent facts or from a presumption of similar indisputable facts”⁷⁴. Hence, “when the evidence is solid and there are no risks to its reliability, the need for additional evidence is, therefore, small”⁷⁵.” At the same time, access to the court for the victim in cases of the mentioned category of crimes is related,⁷⁶ *inter alia*, to the effectiveness of the protection of the victim under the criminal law, the rules of proof⁷⁷, giving special credibility and weight to the testimonies and arguments of female victims⁷⁸, easing the burden of proof in their favor (which is considered one of the prerequisites for access to the court)⁷⁹, and shifting the burden of proof to the victim is considered a denial of justice⁸⁰. Georgian criminal procedure legislation and judicial practice, along with giving special evidentiary weight to the testimony of the victim, places the burden of proof on the prosecution – the prosecutor/investigator (the victim is not the party), yet at the same time, the evaluation of the testimony is guided by Article 82 of the CPCG, since the European Convention, Article 31 of the Constitution, Articles 6 and 8 of the CPCG oblige the state to ensure a fair trial for the accused (sentenced/convicted). Neither national nor international legislation, depending on the nature of the crime, provides for the possibility of essentially limiting the right to defense⁸¹.

Despite the importance of victim testimony, when not corroborated by other evidence, is insufficient to establish a judgment of conviction. Similarly, when the testimony of the victim about

⁷¹ See For example, the judgment of the Supreme Court of Georgia of March 1, 2024, case №910s3-23 (In Georgian).

⁷² Ruling of the Supreme Court of Georgia of August 9, 2022, case N541s3-21, para. 20 (In Georgian).

⁷³ Decision of the Constitutional Court of Georgia of January 22, 2015, case №1/1/548 “Georgian citizen Zurab Mikadze v. the Parliament of Georgia”, II-44 (In Georgian).

⁷⁴ Dvalishvili v. Georgia, no. 19634/07, [2013], ECHR,39.

⁷⁵ Tortladze v. Georgia, no. 42371/08,[2021], ECHR,69; see also Lisica v. Croatia, No. 20100/06, [2010], ECHR, 49; Gäfgen v. Germany, No. 22978/05, [GC],[2010], ECHR,162-165;Prade v. Germany, No. 7215/10, [2016], ECHR,33-34; Kobiashvili v. Georgia, No. 36416/06,[2019], ECHR,56-58.

⁷⁶ See. Concept and Scope of Protection Against Domestic Violence as GBV under the CEDAW Convention, GR 35 and CEDAW Optional Protocol, and in the Practice of the UN SR VAW – Main Issues Identified, Recommendations and Guidance to SPs, Good Practices, 01/08/2023, OHCHR.

⁷⁷ GR 28, para 34; GR 35, paras 29(b); 31 (A)(iii); General recommendation No.33(2015) on Women’s access to Justice, para 17(a), UN CEDAW/C/GC/33, 03/08/2015.

⁷⁸ J.I. v. Finland, Communication No 103/2016, **CEDAW/C/69/D/103/2016**.

⁷⁹ S.L. v. Bulgaria, Communication N099/2016, **CEDAW/C/73/D/99/2016**.

⁸⁰ O.G. v. Russian Federation, No 091/2015, **CEDAW/C/68/D/91/2015**.

⁸¹ It does not entail the institution of a plea bargain, the use of which is allowed only by ensuring the right of defense and with the consent of the defense party.

the infliction of physical injury is not consistent with the medical paper/medical examination report presented in the criminal case (the existence of any objective signs of mechanical injury/suffering is not confirmed), in the absence of other direct and/or circumstantial evidence, it does not suffice the standard of proof to deliver a judgment of conviction.⁸²

On the other hand, when the victim refuses to testify, the court, on one hand, is deprived of the opportunity to use all the evidence where the mentioned victim is the primary source, while the other evidence in the case was evaluated both from relevance and admissibility, as well as from the sufficiency perspectives for establishing a judgment of conviction. Thus, if no other direct incriminating evidence is obtained in the criminal case, the use of the constitutional right by the eyewitness/victim in most cases practically excludes the possibility of establishing a judgment of conviction, as “the constitutional principle of authenticity requires not only that the judgment of conviction is based on authentic (reliable, unfalsifiable) evidence, but also that the evidence presented in the case proves without a doubt the guilt of the person in committing the crime”⁸³. Hence, the prosecution shall submit such a set of evidence to the court, which even if the victim/eyewitnesses refuse to testify, will establish a judgment of conviction, and will not lead to secondary victimization of the victims and mistrust of the effectiveness of the existing legal mechanisms, a feeling of impunity.⁸⁴

10. Conclusion

Article 45 of the Istanbul Convention imposes on the parties the obligation to take all legislative and other measures to ensure that the crimes under the Convention are punishable by effective, proportionate, and dissuasive sanctions.⁸⁵ The state's obligation to protect victims of domestic violence, and to provide appropriate legal guarantees and administrative practices is established by a number of international instruments and decisions of the European Court⁸⁶. However, the change of the victim's position, in some cases, has a significant impact on the rights of the victim, including security, life, and protection from humiliating and inhumane treatment or torture, and significantly endangers minors living with the perpetrator (creates a feeling of impunity and the danger of repeating the violence). Therefore, regardless of the acquittal due to insufficient evidence, the relevant state authorities (guardianship and care authorities) should be responsible for intensive monitoring to protect the best interests of minors and ensure the right of children to develop freely in a peaceful

⁸² Ruling of the Supreme Court of Georgia of January 26, 2024, case № 92053-23, para. 9 (In Georgian).

⁸³ The decision of the Constitutional Court of Georgia of December 25, 2020, № 2/2/1276, “Giorgi Keburia v. Parliament of Georgia”, II-77 (In Georgian).

⁸⁴ See *A. v. Croatia*, no. 55164/08, [2010], ECHR, 7; *Valiulienė v. Lithuania*, no. 33234/07, [2013], ECHR, 71; *Eremia v. the Republic of Moldova*, no. 3564/11, [2013], ECHR, 57; *Ž.B. v. CROATIA*, no. 47666/13, [2017], ECHR, 50; *Volodina v. Russia*, *ibid*, 78; *X and Y v. Georgia*, No. 24/2009, [2015], ECHR; U.N. Doc. CEDAW/C/61/D/24/2009, 2015, §§9.7; 9.6.

⁸⁵ Judgement of the Supreme Court of Georgia on March 13, 2024, in case № 95953-23 (In Georgian).

⁸⁶ See *Z.B. v. Croatia*, no. 47666/13, §§50-51, ECtHR, 11/07/2017; *Opuz v. Turkey*, no. 33401/02, §§ 72-86, ECtHR, 09/09/2009; *Hajduová v. Slovakia*, no. 2660/03, § 46, ECtHR, 30/11/2010; *Bevacqua and S. v. Bulgaria*, no. 71127/01, §§ 64-65, ECtHR, 12/06/2008.

environment. At the same time, considering the importance of the testimony of the victims and their vulnerability, their active cooperation with the investigative bodies at the initial stage of the prosecution of the criminal case, an amendment should be made to Article 114 of the CPCG and the opportunity of questioning them before the magistrate judge should be provided at the beginning of the criminal case, which will ensure procedural frugality and contribute to the permanence of testimony and prevention of re-victimization (they will have to testify in court only once).

In the case of a substantial change in the victim's position during the court testimony – the opportunity provided by Article 243.1 of the CPCG will be widely used – the testimony given by them at the stage of the investigation will be published.

At the same time, in order to reduce cases of victims refusing to testify in court, and to help vulnerable victims, special importance shall be attached to the widespread use of witness and victim coordinator⁸⁷ (hereinafter – “coordinator”) under Georgian criminal procedure legislation (especially in relation to adults, as the legislation does not determine the participation of a psychologist), which has been repeatedly indicated by the court⁸⁸, a clear separation of the functions of the coordinator from the duties of other subjects of the process (especially in relation to minor victims and witnesses, when the mandatory participation of a psychologist is provided), as well as a clear separation of the prerequisites for the participation of the coordinator of the Ministry of Internal Affairs and the coordinator of the prosecutor's office; The inclusion of the coordinator in the process *ex officio* taking into account the specificity of the said category of crimes (including the latent crime, which in many cases is still perceived as a “family problem”, the specificity of the relationship between victims-witnesses-violators and the desire to avoid the responsibility of the state, victim syndrome and other factors). Although the involvement of the coordinator by the prosecutor can be carried out at any stage of the proceedings, taking into account the interests of the witness/victim⁸⁹, the CPCG associates the invitation of the coordinator with the discretionary authority of the prosecutor and their subjective perception of the circumstances of the case and the needs of the victim/witness, which leads to an improper assessment of the needs (at the investigation stage of the victim /witness cooperation) leaves the victim/witness in a vulnerable position in front of the perpetrator and society, in some cases it forces the victim/witness to change their position in court essentially.

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⁸⁷ Although Article 58¹ of the CPCG grants the investigator/prosecutor the right to decide on the involvement of a coordinator in the case of a criminal offense, regardless of the wishes of the witness and the victim, – taking into account the interests of the witness/victim, the study of judicial practice indicates that the coordinator is rarely involved in the mentioned category of cases.

⁸⁸ See Ruling of the Supreme Court of Georgia of October 26, 2023, case №856სს-23, para. 21.1.; Ruling of the Supreme Court of Georgia of February 20, 2024, case 1123სს-23, para. 19.1; Ruling of the Supreme Court of Georgia of January 29, 2024, case 1005სს-23, para.21.1; Ruling of the Supreme Court of Georgia of January 25, 2024, case N1074სს-23, para.18.1 (In Georgian).

⁸⁹ Article 58¹ of CPCG.

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51. Judgment of the Chamber of Criminal Cases of the Supreme Court of Georgia of December 28, 2020, case N585სპ-20 (In Georgian.)
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