



GEORGIAN
YOUNG
LAWYERS'
ASSOCIATION

PREVENTIVE MEASURE USAGE STANDARDS



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*Promoting Rule of Law
in Georgia (PROLoG)*

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Georgian Young Lawyers' Association



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INTRODUCTION

The initial hearing on preventative measures is one of the most important stages in a criminal law proceeding. A preventative measure is a form of procedural coercion. According to the Criminal Procedure Code of Georgia (CPCG), a measure of restraint may generally become necessary to prevent the risk of the defendant absconding from justice, destroying evidence, exerting influence on witnesses or committing further crime. In each criminal case, the State shall bear the burden of proving that the threats from the defendant really exist and then make a decision on a specific measure of restraint. The restrictive measure should be of preventative nature aimed at minimizing the risk of interference with proper enforcement of justice rather than proving the guilt of a person.¹

Georgian legislation offers the following preventative measures: detention, bail, personal surety, an agreement not to leave and behave properly, supervision by the command of the behaviour of a military service member. In addition, the court shall be authorized to apply additional measures against the accused along with the main preventative measure, for example: obligation to surrender a passport or any identity document, prohibition to approach the victim, electronic monitoring. Nowadays, two types of preventative measures are applied in practice - detention and bail. Other alternative measures are not actually used.²

The aim of the study was to determine whether this is solely due to judicial practice or certain gaps ought to be searched for in the law. It was interesting to find out how flexible the legislation is and whether the judge has wide discretion to select an appropriate preventative measure for the defendant in each particular case to ensure an adequate conduct of the accused and achieve the goal of the restraining measure, neutralize existing risks and threats and at the same time, not to cause a disproportionate restriction on the defendant's liberty.

The purpose of the research was to analyze the national normative framework and practice in relation to preventative measures in common courts. We studied international standards, legislation in the USA and Euro-

¹ Protocol №6466 II-40 of the Constitutional Court of Georgia of 26/06/2015

² <http://www.supremecourt.ge/files/upload-file/pdf/2019w-statistic-7.pdf> - Data rate of imposed preventive measures.

pean countries and elaborated relevant recommendations for legislative amendments based on shortcomings existing in the legislation and court practice in the country. We hope this will help to improve the law and court practice regarding preventative measures.

METHODOLOGY

The research includes the **analysis of the local legislation**. One of the most important instruments of the study was to analyze the legislative framework relating to preventative measures, implemented reforms and practice. For this purpose, relevant normative acts, as well as public information obtained from corresponding state authorities, were processed and evaluated throughout the study.

The study provides an overview of international standards in relation to preventative measures in criminal proceedings and the synopsis of obstacles and best practices in national jurisdictions in terms of implementation of these standards.³ Alexandre Prezanti, an international expert, conducted a study about **international standards and practice**, which made it possible to develop recommendations corresponding to Georgian reality and international standards.

The research was carried out based on **qualitative methods**, in particular, in-depth interviews and focus groups. The interviews were conducted with 13 judges of Tbilisi, Kutaisi, Telavi City Courts, and Gurjaani District Court in the period from 19 April to 25 May 2019. In addition, a focus group was held with the Criminal Law Committee of the Georgian Bar Association. The interviews were held with 15 prosecutors and 6 lawyers as well.

The results of the interviews are not fully representative and they cannot be generalized to cover all judges, prosecutors, and attorneys working in Georgia. However, the answers and arguments offered by the focus groups are characterized by the tendency of similar comments, which served as the ground to conclude that the interviews and surveys in overall reflect common approaches.

For the purpose of the study, we requested from the courts across the

³ England and Wales, the United States of America, France, the Netherlands, Spain, Italy, Lithuania, Poland, Romania, Ireland, Hungary and Greece

country's large cities the **court judgments** which sentenced defendants to no more than one-year imprisonment, since all measures of restrictions envisaged by the Criminal Procedure Code can be applied in such cases. Some courts provided incomplete information or did not provide it at all. Ultimately, 37 court judgments of the period from July to December 2018 were studied.⁴

We obtained significant information about the given issue with the help of the research methodology and developed recommendations based on the findings. We hope that the recommendations and further legislative proposals will facilitate the development of the concept of the preventative measures system that will ensure the improvement of the legal rights of defendants and develop democratic standards for the preventative measures system.

KEY FINDINGS:

Detention

- According to international standards and Georgian legislation, detention - the ultimate restriction on liberty - must always be considered as a measure of last resort. Detention should never be the starting position in a decision on preventative measures, but rather may only be considered once all other measures for achieving one or more permissible ground have been ruled out.
- The statistics published by the Supreme Court of Georgia, criminal court monitoring annual reports by GYLA, court judgments studied and interviews conducted show that detention and bail are used as preventative measures in the absolute majority of cases.
- Most of the judges, prosecutors and lawyers point out in the interviews that the high rate of using bail and detention is due to the lack of alternative preventative measures, which deprives the judge of broad discretion.

⁴ From Kutaisi City Court and Gori District Court; Tbilisi City Court did not provide us with the judgments. We requested the judgments rendered in July-December 2018 in relation to the following articles of the CPCG: Article 126 par 1, Article 150 par 1, Article 151 par 1, Article 188 par 1, Article 238¹ par 1, Article 239 par 1, Article 273 and Article 273¹ par 1, par 2 and par 3).

- The statistics provided by the Supreme Court in relation to the use of detention show that the rate of imposing detention increased since 2016. In 2016, the court applied detention in 29% cases, in 2017 - 34%, in 2018 - 43%, in the first eleven months of 2019 - 47%.
- The judges in the interviews indicate that the increase in the application of detention is due to the rise in crime rate, domestic violence, especially, serious or most serious offences.
- The interviewed lawyers indicate that in practice periodical review of pre-trial detention is formal and in most cases judges leave detention in force and at a court hearing do not substantiate the necessity of leaving detention unchanged.

Problematic issues related to the application of bail

- International standards and practice of foreign countries have shown that monetary bail increases injustice between different socio-economic and racial groups and leads to a loss of confidence in the criminal justice system. Dependence on cash bail, as the main alternative to pretrial detention, may result in unduly restriction of the right to liberty.
- Some of the judges in the interviews note that they cannot often obtain at the hearing credible information from the Prosecutor's Office about the financial circumstances of the defendant, which eventually complicates for the judge to make a reasonable decision on the bail amount.
- The analysis of the legislation and interviews has shown that the current provision allows for the possibility to interpret the bail secured with detention in two ways. Most of the prosecutors and some judges indicated that in case of using bail against a detained person, the existing regulation requires to impose bail with detention guarantee. A small number of the judges believe that the provision is vague and the judge can decide to use bail or bail secured with detention.
- The evaluation of the public information obtained has proved that there are cases where the person is imposed bail secured with detention, yet the accused is remanded in custody because of the inability to

pay the bail amount, which *de facto* means that the court uses detention.

- The interviews revealed that the majority of the prosecutors, the absolute majority of the lawyers, and most of the judges are in favour of amending the legislation to equip the judge with the power to determine independently which type of bail to apply against each detained person.

Lack of workable alternative preventative measures

- International standards and the practice of foreign countries show that an inadequate number of alternatives to pre-trial detention unduly restricts the court's ability to assess the necessity of requested measures and leads to the imposition of disproportionate measures. The absence of effective alternatives repudiates the principle that preventative detention is a 'measure of last resort'.
- The majority of the prosecutors note in the interviews that the low rate of imposing a personal guarantee is due to the fact that it is perceived as a less effective measure and the defense counsel rarely requests personal surety and / or submits poorly-reasoned motions. Most of the judges note the passive participation of the defense and add that the court needs to receive substantiated motions to apply a personal guarantee.
- According to the lawyers, requesting a personal surety within the current court practice is devoid of sense as the court rarely grants it.
- The analysis of the legislation and interviews has shown that the low rate of application of the preventative measure - an agreement not to leave and proper conduct - is due to the fact that this measure of restraint can only be applied for offences which are punished with up to one-year imprisonment.
- The scrutiny of the court judgments has proved that in 37 cases the court had the possibility to use other types of preventative measures, yet in 3 cases only, the court imposed an agreement not to leave and proper conduct, while in all 34 cases, bail or detention was imposed. GYLA believes that the above preventative measure could have been

used in further 8 (22%) cases based on the circumstances of the case, the personality of the accused and the determined charge.

- The analysis of the court rulings has shown that the defense counsel requested an alternative preventative measure only in 4 cases out of 37.

Wide range of preventative measures

- International standards and the practice of foreign countries show that there is no internationally prescribed list of alternative preventative measures. Each domestic jurisdiction must provide a wide range of workable preventative measures that will give the court broader discretion to use them.
- The interviews have shown that a large number of the prosecutors, lawyers, and judges participating in the study advocate for removing the limitation from the preventative measure - an agreement not to leave and proper behavior- as it may be applied only for the offences which are punishable by imprisonment up to one year. Some consider that the measure of restraint must be applied against less serious crimes and/or offences committed with negligence, while others consider that the preventative measure should not be imposed only based on the gravity of the offence or number of charges.
- A small group of the interviewed judges and prosecutors and a large number of the interviewed lawyers support the idea that the ancillary preventative measures should be used independently as major preventative measures.
- The interviews have shown that the absolute majority of the judges and lawyers and a small part of the prosecutors advocate for the idea to extend the list of major preventative measures to give the court wide discretion to apply any types of preventative measures.
- Judges, prosecutors and lawyers in favor of increasing the types of main preventative measures offer the following sanctions: electronic monitoring; home arrest; police supervision; an obligation not to enter specified localities and a requirement to remain at the residence during specified times.

I. LEGISLATION AND PRACTICE IN GEORGIA

INTRODUCTION

The purpose of this chapter is to analyze the Criminal Procedure Code in relation to the types of preventative measures, provide a comparative study of the situation existing until 2009, outline the main principles of preventative measures and identify legislative gaps, as well as to assess the court practice and identify deficiencies therein through statistics, court monitoring reports and judgments. In addition, the research offers the analysis of issues mentioned by the prosecutors /judges and lawyers during in-depth interviews.

FUNDAMENTAL PRINCIPLES STRENGTHENED BY THE CONSTITUTION AND LEGISLATION OF GEORGIA IN CRIMINAL PROCEEDINGS

This section reviews the principles governed by the national law, which are the basis of criminal proceedings and the application of which is mandatory when imposing a preventative measure. In addition, it is noteworthy that the basic principles applied in criminal proceedings are enhanced by the Constitution of Georgia. Georgian legislation generally adheres to internationally recognized principles, among which the presumption of freedom and innocence, the principle of the adversarial process, and the right to a prompt, fair and well-reasoned decision by an independent court are particularly important with respect to preventative measures.

PRESUMPTION OF INNOCENCE

Presumption of innocence pursuant to the Constitution of Georgia provides that a person shall be presumed innocent until proved guilty in accordance with the procedures established by law and a court's judgment of conviction that has entered into legal force,⁵ and the same is reiterated by the Criminal Procedure Code of Georgia.⁶

⁵ Constitution of Georgia, Article 31 (5)

⁶ In accordance with Article 5, paragraph 1 of the Criminal Procedure Code of Georgia, a person shall be considered innocent unless his/her culpability has been established by final judgment of conviction.

The above principle means that it shall be inadmissible to hold a person guilty until a guilty verdict has been rendered by the court. The presumption of innocence prohibits both criminal prosecution authorities and high-ranking state officials to treat a defendant who is being prosecuted as a perpetrator until his or her culpability has been established based on a court judgment of conviction rendered through the process prescribed by law.⁷

According to the Constitutional Court of Georgia, the presumption of innocence shall be maintained after the finalization of criminal proceedings, even if the person has been acquitted. The purpose of the above is to dispel any possible misconceptions in the society about the culpability of the acquitted person and prevent his or her further unfair stigmatization.⁸

The presumption of innocence shall be secured with the commencement of a criminal proceeding and persevered throughout the proceeding until the res judicata judgment is delivered.⁹ It must also be applied to the initial appearance court hearing where a preventative measure against the accused is deliberated. The court shall implement its powers (including the examination of the lawfulness and reasonableness of the court judgment) with the belief of the defendant's innocence so that the accused can prepare and present his or her defence accordingly.¹⁰

THE RIGHT TO LIBERTY

The Constitution of Georgia guarantees the right to liberty.¹¹ According to the Georgian legislation, a person shall be free, except when the necessity of his/her arrest is established.¹² The right to liberty protects a person from

⁷ Laliashvili T., *The Criminal Procedure of Georgia*, General Part, Tb., 2015, p. 110

⁸ Decision of the Constitutional Court of Georgia into the case of *David Tsintsiskladzev. Parliament of Georgia*, No. 2/7/636, 29December 2016; Motivational part of the judgment. Par. 31.

⁹ X. v Federal Republic of Germany, ECtHR, 18/04/1964; Stefan Trechsel, *Human Rights in Criminal Proceedings*, OUP, 2006, 163; *Imbrioscia v. Switzerland*, ECtHR 24/11/ 1993, *Kraska v. Switzerland*, ECtHR, 19/04/1993; *Hornsby v. Greece*, ECtHR,19/03/1997.

¹⁰ *Barbera, Messegue and Jabardo v. Spain*, ECtHR, 13/06/1994, §77; *Janosevic v. Sweden*, ECtHR, 23/07/2002, §97.

¹¹ Constitution of Georgia, Article 13 (1)

¹² Criminal Code of Georgia, Article 5 (4)

unlawful and arbitrary restriction of liberty in the course of a proceeding.¹³

The deprivation or other restriction of liberty shall be only permitted on the basis of a court decision,¹⁴ which means that the right is not absolute but is subject to strict judicial control. On its part, the court must consider any measure of interference with a person's liberty in the light of the presumption of innocence and the person's right to a fair trial. Consequently, no anticipated dangers can outweigh the presumption in favour of freedom unless there is genuine, relevant and sufficient evidence to substantiate the necessity to interfere with a person's freedom. The court shall give preference to the most lenient form of restriction of rights and liberties.¹⁵

The Criminal Procedure Code provides for two forms of detention: the detention of a person with a prior court ruling or on the grounds of urgent necessity, where appropriate. In order to obtain a preliminary court ruling for the detention of a person, the prosecutor shall file a motion with the court, and the court shall render a relevant ruling without an oral hearing. The ruling may not be appealed.¹⁶ If there is an urgent necessity to arrest a person pursuant to the law, a person shall be detained without the court ruling, and at the initial appearance hearing, the court shall examine the lawfulness and reasonableness of the detention.¹⁷

The initial appearance court hearing of the accused shall be held within 72 hours after the detention and the prosecutor, within 48 hours after the arrest of the person, shall apply to the magistrate judge with the motion on a preventative measure,¹⁸ and the judge shall review the motion upon the lawfulness of the detention and a relevant preventative measure within 24 hours.¹⁹

¹³ See the Decision 06/04/2009 of the Constitutional Court of Georgia # 415, II-2, II-3

¹⁴ Constitution of Georgia, Article 13 (2)

¹⁵ The Criminal Procedure Code of Georgia, Article 6 (3)

¹⁶ The Criminal Procedure Code of Georgia, Article 171 (1)

¹⁷ The Criminal Procedure Code of Georgia, Article 171 (2)(3)

¹⁸ The Criminal Procedure Code of Georgia, Article 196 (1)

¹⁹ The Criminal Procedure Code of Georgia, Article 197 (1)

FAIR TRIAL AND EXPEDIENCY OF JUSTICE

According to Georgian legislation, the basic principle of a criminal proceeding is a fair trial and expedient justice.²⁰ Everyone has the right to apply to a court for the protection of his or her rights. The right to a fair and timely trial shall be guaranteed.²¹

The expediency of justice means that the national legislation envisages the limited timeframes for reviewing a motion on a preventative measure,²² determines a general imprisonment term against a defendant²³ that shall not exceed more than nine months, and the legislator obliges the court to prioritize cases in which defendants are detained.²⁴

The principle of expedient justice requires a fair balance to be maintained between the expediency of the litigation and the proper conduct of proceedings, helps to reduce the uncertainty of defendants, length of procedural coercive measures and minimizes the damage to the defendant's reputation.²⁵

THE PRINCIPLE OF ADVERSARIALITY IN CRIMINAL PROCEEDINGS

The principle of equality of arms and adversarial process between the parties is reinforced by the Constitution of Georgia²⁶ and the Criminal Procedure Code of Georgia.²⁷ The current Criminal Procedure Code is based on the principle of equality of arms and adversariality, which means that the collection and presentation of evidence to the court is the responsibility of the parties. The court shall be prohibited from independently obtaining

²⁰ The Criminal Procedure Code of Georgia, Article 8

²¹ Constitution of Georgia, Article 31 (1)

²² The Criminal Procedure Code of Georgia, Article 197(1)

²³ Constitution of Georgia, Article 31 (5); The Criminal Procedure Code of Georgia, Article 205(2)

²⁴ Criminal Procedure Code of Georgia, Article 8(3)

²⁵ Comments on the Criminal Procedure Code of Georgia, Authors, Ed: Giorgi Giorgadze, p. 70. Tbilisi, 2015. See here: <https://library.iliauni.edu.ge/wp-content/uploads/2017/03/ssssk-komentari.pdf>

²⁶ Constitution of Georgia, Article 62, paragraph 5.

²⁷ The Criminal Procedure Code, Article 9

and examining the evidence.²⁸

The above principle applies to the initial appearance court hearing of the accused when the court shall consider the issue of a preventative measure. The court shall hear the case on the basis of information provided by the prosecution and defense counsel. It is for this reason that the parties are required to appear before the court with substantiated arguments to assure that the court has a relatively accurate picture of the case. The prosecutor shall file a reasoned motion to the court regarding the application of a specific preventative measure. Otherwise, if the prosecution presents an unsubstantiated or poorly substantiated motion, the court shall be bound to obtain information independently. In such a case, the court shall refuse to grant the prosecutor's motion.

THE RIGHT TO RECEIVE A REASONED DECISION

The decision about a preventative measure must be substantiated. The right to a well-grounded court decision is not explicitly set forth in the Criminal Procedure Code, yet it derives from various articles of the Code. A court judgment shall be legitimate, well-reasoned and fair.²⁹

The Code also provides that after examining the reasonableness of the motion and the formal (procedural) and factual basis for the application of a preventative measure the judge shall render a well-substantiated decision.

Article 198 of the Criminal Procedure Code of Georgia defines the purposes and grounds for applying a restraint measure. First of all, it should be noted that the use of a preventative measure is of preventive-restrictive nature. The purpose of the preventative measure is not to prove a person's guilt. The reasoning shall be focused on whether the use of a preventative measure is appropriate. The purpose of a preventative measure is to ensure proper implementation of justice. At the initial appearance court hearing of the defendant, the court shall, among other procedures, consider which measures of restraint shall be imposed to prevent the defendant from absconding, to prevent his or her further involvement in

²⁸ The Criminal Procedure Code, Article 25(2)

²⁹ The Criminal Procedure Code of Georgia, Article 259(1)

criminal activities, and to ensure that the investigation is free from influence until a final verdict is delivered. The selected preventative measure shall be substantiated, which means that the use of a specific preventative measure must be consistent with the goals established by law.

The obligation to produce well-grounded reasoning shall apply to both court judgments and procedural decisions, for example, a court ruling on the application of a preventative measure, implementation of procedural and investigative actions provided for in Article 111 of the Criminal Procedure Code, etc.³⁰

Overall, any decision rendered by the court must be substantiated. Well-reasoned court decisions promote confidence of the parties and the public into the court; analyzing the parties' positions in the judgment and demonstrating that the parties' arguments and the circumstances of the case are heard and considered thereby renders court decisions more acceptable to the parties³¹ and allows them to effectively enjoy the right to appeal whenever the decision clearly indicates what the reasoning is based on.³²

TYPES OF PREVENTATIVE MEASURES AND COURT PRACTICE

DETENTION - A MEASURE OF LAST RESORT

Under the Criminal Procedure Code of Georgia, detention is the most severe preventative measure and means strict isolation of the defendant from the outside world for a fixed period of time based on a court ruling. Consequently, once the person is detained, his/her rights become restricted, the accused cannot realize his rights independently in the area of deprivation of liberty, such as free movement, the right of employment, communication with the outside world, etc.

The Criminal Procedure Code of 20 February 1998 provided for serious

³⁰ The Comments on the Criminal Procedure Code of Georgia, Authors, Ed: Giorgi Giorgadze, p. 75. Tbilisi, 2015. See here: <https://library.iliauni.edu.ge/wp-content/uploads/2017/03/ssssk-commentary.pdf>

³¹ *Boldea v. Romania*, ECtHR, 15/02/2007, §30,15; *Taxquet v. Belgium*, ECtHR, (GC),16/11/2010, §89.

³² *Hadjianastassiou v. Greece*, ECtHR, 16/12/1992, §33; *Kuznetsov and Others v. Russia*, ECtHR, 11/01/2007, §85.

limiting circumstances in the part of imposing the most severe type of restraining measures. According to Article 159(2) of the Criminal Procedure Code in effect back in 1998, pretrial detention was not applied for those offences not sanctioned by imprisonment for up to two years. As a rule, detention was not reasonable to apply against seriously ill persons, minor children, more than 12-week pregnant women, the elderly (female – 60 and more, male – 65 or more), a person with a child under 1, persons who committed an offence with negligence and if the charge for a specific offence did not envisage punishment for three or more years. The exception from the above rule was defendants violating the terms of a preventative measure.³³

According to the current Code, the above issue is regulated by Article 198(5) of the Criminal Procedure Code under which when deciding a measure of restraint, the court shall take into consideration the age, health status, marital status or material condition of the accused, yet these circumstances may not serve as an obstacle for imposing detention and the judge is not limited to a particular category of offences when ordering detention.

Detention, therefore, as a preventative measure, is applied when it is the only option to:

- prevent the risk of the defendant absconding from justice;
- prevent the risk of the defendant interfering with evidence;
- prevent the risk of the defendant committing further offences;

In practice, there are two problems in connection with pretrial detention: the high rate of application of preventative detention and unsubstantiated detentions. The official data dynamics of the common courts of Georgia shows that the number of detentions imposed in recent years has significantly increased.³⁴

According to the data of 2016 - preventative detention was used in 29% cases; in 2017 - 34%; in 2018 - 43%,³⁵ and based on the data of the eleven

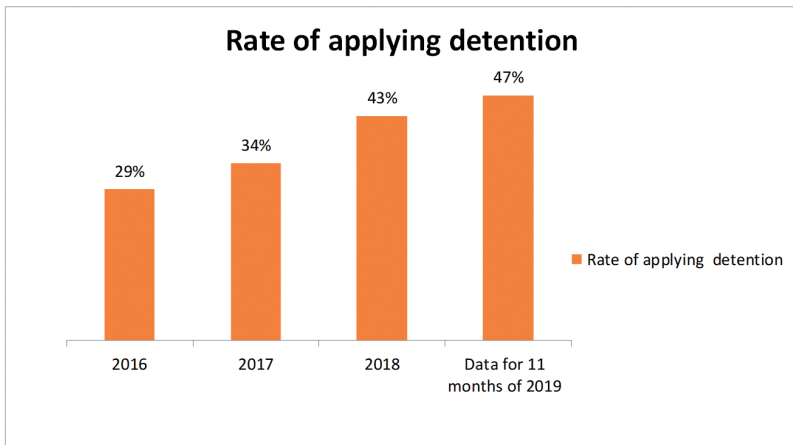
³³ Please see Article 159(2) of the Code of 20 February 1998

³⁴ <http://www.supremecourt.ge/statistics/>

³⁵ The statistics of 2017 and 2018 published by the Supreme Court of Georgia on the imposition of preventive measures - <http://www.supremecourt.ge/files/upload-file/pdf/2018w-statistic-7.pdf>

months of 2019 imprisonment was applied in - 47% of the cases.³⁶

The chart below shows the statistics published by the Supreme Court of Georgia on the application of detention.



A large number of the interviewed judges consider that the recent increase in the number of detention was due to the growth in crime rate, especially serious or very serious offences, as well as domestic crimes, in relation to which the State's policy has become harsh and the prosecution, in general, applies to the court for detention.

Judge: *“Actually the high rate of detention depends on the category of charge and the goals and grounds that the legislator has provided in the law if there is an obvious risk that the defendant will commit a new crime, flee, and exert pressure on witnesses. As a rule, the risk of pressurizing witnesses during proceedings is very high, particularly in domestic violence cases if the defendant was convicted of a similar offence in the past or there is a risk that he/she will be engaged in criminal activity again. We rarely refer to the risk of absconding (in the reasoning of preventative detention) and we cannot just depend on the gravity of the crime unless other circumstances are present, such as financial resources, contacts abroad or the possibility to flee immediately upon committing crime or resistance to*

³⁶ The statistics of eleven months of 2019 published by the Supreme Court of Georgia on the imposition of preventive measures <http://www.supremecourt.ge/files/upload-file/pdf/2019w-statistic-7.pdf>

the police, etc. The existence of the above-mentioned threats cumulatively is not necessary though, one of the above is enough to apply a preventative measure and even if that one is of high degree, then it is sufficient to use a strict measure ... “

In the interviews conducted within the study, the prosecutors note that they decide to apply for the detention if the permissible grounds provided for in Article 205 of the CPCG are present and that they take into consideration the specifics and nature of crime, high risk to public order, as well as the personality of the defendant, his/her past activities, a criminal record and the public interest of the State.

Prosecutor: *“The prosecutor makes a decision to apply for pretrial detention as a preventative measure against a defendant in extreme cases when no other stringent measures can guarantee the achievement of the goal of the preventative measure. Certainly, in this case, the prosecutor takes into account the goals of the preventative measure and whether a specific permissible ground for the use of detention exists. I think that in such a case the prosecutor is not required to have all permissible grounds for requesting pre-trial detention. If any of the permissible grounds are present, detention may be requested even after taking into consideration the personality and the crime committed by the accused. In practice, detention is applied against persons who were convicted in the past, persons on a suspended sentence, persons who committed serious or particularly serious crimes, as the risk that they will commit a new crime, abscond and pressurize witnesses is really high.”*

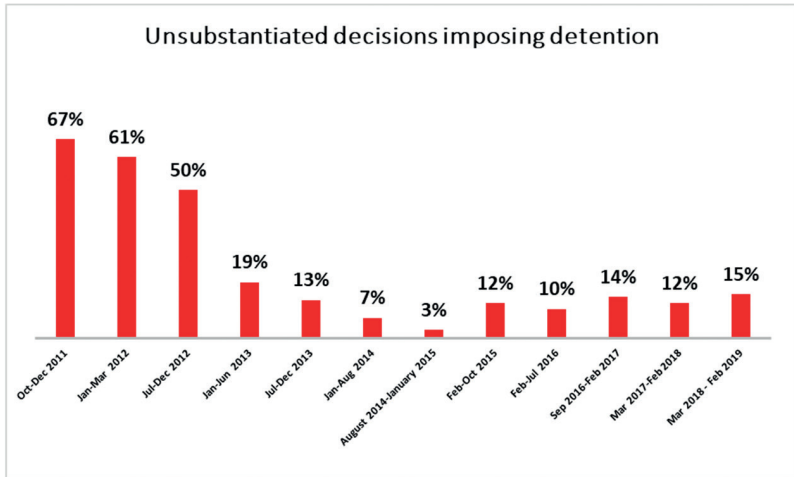
GYLA does not share the opinion of the judges and prosecutors that preventative detention is used only as a last resort. According to the Criminal Court Monitoring №12 report prepared by the GYLA, 12% of the decisions ordering pre-trial detention were unsubstantiated³⁷ and the rate of poorly-reasoned detentions was 15% according to the Criminal Court Monitoring report №13.³⁸ The organization believes that the use of detention by the court is unsubstantiated when the decision does not refer to specific factual circumstances of the case, provides an abstract assessment of risks

³⁷ Criminal Trials Monitoring Report N12, page 27, Period covered: March 2017 – February 2018 <https://gyla.ge/files/news/2008/Court%20monitoring%20N-12%20ENG.PDF>

³⁸ Criminal Trials Monitoring Report N13, page 32, Period covered: March 2018 – February 2019 <https://gyla.ge/files/news/30660/ტურნინი/angrishi%20sasamrtlo.pdf>

and specific goals may be achieved with other less lenient measures of coercion. Therefore, pretrial detention should never be used as a measure of last resort just based on the fact that a person committed a serious or particularly serious crime.

The following chart shows the number of unsubstantiated decisions on preventative detention identified by GYLA through the Criminal Court Monitoring Reports.



Article 6(3) of the Criminal Procedure Code of Georgia imperatively requires giving preference to less stringent measures of restriction of human rights and freedoms. Pursuant to Article 198 (4) of the CPCG, the Court may impose detention against the accused as a preventative measure only if the aim of the preventative measure is not possible to achieve with other less stringent measures of prevention. Article 13(1) of the Constitution of Georgia states: “Everyone has the right to liberty”. This provision protects the physical freedom of the person and aims at ensuring that no one is subjected to arbitrary, unlawful, unjustified arrest or deprivation of his/her liberty.

Using pretrial detention as a preventative measure is a heavy burden on the state. The cost of one-year imprisonment of an adult prisoner is the

state expenditure amounting to 12 520 GEL, 1043 GEL per month.³⁹ GYLA believes that detention should be applied with due caution based on solid arguments and reasoning only if other less stringent alternative measures prove to be ineffective.

REVIEW OF DETENTION AS A PREVENTATIVE MEASURE

As a result of the amendments of 8 July 2015, the Georgian legislation provides a new procedure mechanism for periodic and automatic review of pretrial detentions. With the amendment, the State expressed its will, raised the standard and undertook the responsibility to monitor the necessity and timeframes of detention to the maximum extent possible.

If at the preventative measure hearing the defendant is imposed detention, the latter shall be subject to review in the manner as follows:

- **If the term for holding pre-trial court hearing is extended** - in case of granting the motion for extending the period for holding pre-trial hearing, no later than 72 hours after the moment the motion is granted, the Court shall summon the parties to determine the necessity of leaving pre-trial detention used as a form of the preventative measure in force.⁴⁰
- **At the pre-trial hearing** - if the accused person has been sentenced to detention, the judge shall, on his/her own initiative, review, at the initial preliminary court hearing the necessity to leave the detention in force, regardless of whether the party has filed a motion for change or annulment of the remand. Upon that, the court shall, on its own initiative, review, at least once in two months, the necessity to leave the remand detention in force;⁴¹
- **At substantive court hearing** - if the accused is remanded in custody, prior to delivering the judgment, periodically, at least once in two months, the presiding judge shall, on his/her own initiative, review the necessity of leaving the accused in custody. The two-month pe-

³⁹ The reply №191438 / 01 of the Special Penitentiary Service of the Ministry of Justice of Georgia, date 28.06.2019. These data are given without capital expenditures.

⁴⁰ Criminal Procedure Code, Article 208(4)

⁴¹ Criminal Procedure Code, Article 219(4)(b)

riod shall start from the day when the pre-trial judge makes a decision to leave the detention in force.⁴²

Currently, the Georgian legislation is in line with international standards in terms of detention review but as the practice shows, the rate of leaving pre-trial detentions in effect is still high. The lawyers participating in the study point out that unfortunately in practice the review of detentions is formulaic and the court leaves the initial decision unchanged in most cases.

***Lawyer:** Very seldom detention is replaced by another measure of restraint, merely in 1-2% cases. Reviewing detentions at pre-trial and substantive court hearings is of formal nature only.*

GYLA's Criminal Court Monitoring Report №13 shows that the process of reviewing detentions by the court is superficial. GYLA attended 190 preliminary court hearings which reviewed the preventative measures. The court left in effect the imposed preventative measure – detention - in 182 (96%) cases; 137 (75%) of these were the cases where the court did not substantiate or inadequately substantiate why it was necessary to leave the detention unchanged.⁴³

PRACTICAL AND LEGISLATIVE ASPECTS OF USING BAIL

Bail is a monetary sum or immovable property. The cash shall be deposited by the accused or by another person on behalf of or in favour of the accused to the deposit account of the National Bureau of Enforcement – the legal entity under public law of the Ministry of Justice of Georgia - with the written undertaking given to the court that the accused will behave properly and that he/she will timely appear before the investigator, prosecutor, or the court. The immovable property deposited instead of a monetary sum shall be seized. A record shall be drawn upon the receipt of bail and one copy of the record shall be kept by the person who posted the bail.

Bail is a severe preventative measure, as it limits the property rights of the defendant. The purpose of the bail is to ensure the due conduct of the ac-

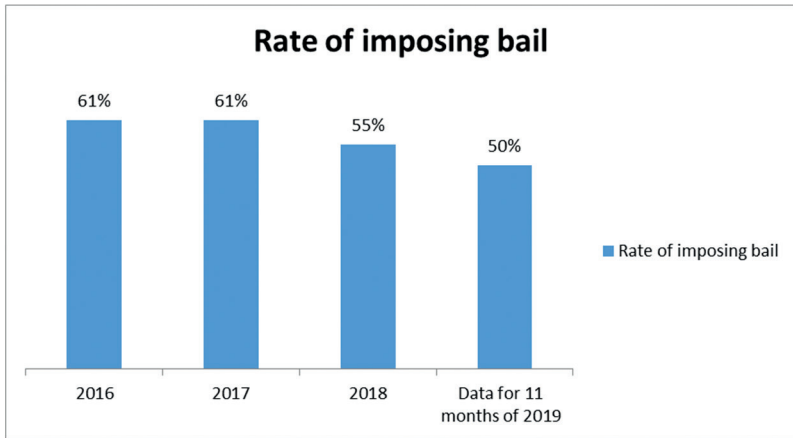
⁴² Criminal Procedure Code, Article 230¹(1)

⁴³ GYLA's Criminal Court Monitoring Report №13, 44-45. <https://bit.ly/2RiB5tw>

cused by limiting his/her ownership rights.⁴⁴In the period between 20 February 1998 and 13 May 1999, the law did not provide a specific amount of bail. Since 13 May 1999, the amount of bail could not be less than 100 minimum amounts of the salary. After 25 March 2005, the amount of bail could not be less than 2000 GEL. At present, the minimum amount of bail is 1000 GEL.

In practice, it is often a problem to impose bail as it depends on the financial situation of the defendant. The statistics of the common courts show that bail secured with detention is the most commonly used form of a preventative measure. In 2016, bail was used against 61% defendants; in 2017 it was 61%, in 2018, bail was used in 55% cases⁴⁵ and based on the data of the eleven months 2019 shows that the rate of applying bail amounted to 50% of the total preventative measures.⁴⁶

The chart below shows the statistics published by the Supreme Court of Georgia on the use of bail.



⁴⁴ Commentary on the Criminal Procedure Code of Georgia, Authors, Editor: Giorgi Giorgadze, p. 575. Tbilisi, 2015. See here: <https://library.iliauni.edu.ge/wp-content/uploads/2017/03/sssk-komentari.pdf>

⁴⁵ The statistics of 2017 and 2018 published by the Supreme Court of Georgia on the imposition of preventive measures- <http://www.supremecourt.ge/files/upload-file/pdf/2018w-statistic-7.pdf>

⁴⁶ The statistics of three months of 2019 published by the Supreme Court of Georgia on the imposition of preventive measures

In the light of the socio-economic situation in the country, where, under the official data, 467 284 subsistence allowance beneficiaries were registered in 2019 (more than 12.5% of the total population),⁴⁷ the high rate of application of the preventative measure raises certain doubts whether it is reasonable, relevant, and well-substantiated to apply the preventative measure given the financial situation of defendants.

IMPORTANCE OF PERSONAL CIRCUMSTANCES OF DEFENDANTS WHEN DETERMINING BAIL AMOUNT

The bail amount shall be determined by taking into consideration the gravity of the crime committed and the personal circumstances of the accused. Several problems exist in practice in relation to bail. One of the key issues is the court lacking the comprehensive information about the financial situation of defendants. When determining the amount of bail, the court shall take into consideration:

- Property owned by the accused and his/her close relatives;
- Whether the accused is registered as a socially vulnerable person;
- Income of the defendant;
- If the accused is employed, his/her occupation and salary;
- The marital status of the defendant and persons dependent upon him.

Even if the defendant has several immovable properties of significant value and a considerable and stable income, bail must be the amount of money that will serve as a real deterrent and will not be unjustifiably high.⁴⁸ The prosecution shall substantiate the proportionality and expediency of the requested preventative measure and furnish the court with well-founded reasoning regarding the amount of the bail requested. The Georgian Young Lawyers' Association has been noting for years in its criminal court trial monitoring reports that the prosecution often fails to provide infor-

⁴⁷ Statistics of the Social Service Agency http://ssa.gov.ge/index.php?lang_id=&sec_id=1449

⁴⁸ Commentary on the Criminal Procedure Code of Georgia, Authors, Editor: Giorgi Giorgadze, p. 578. 2015. See here: <https://library.iliauni.edu.ge/wp-content/uploads/2017/03/ssssk-komentari.pdf>

mation or appropriate argumentation on the amount of bail requested.⁴⁹

The prosecutors declare that the financial condition of defendants is not always examined thoroughly due to certain objective circumstances.

Prosecutor: *“The financial circumstances of defendants are studied to the extent possible, but sometimes it is difficult to obtain comprehensive information in the light of the existing reality. In particular, most citizens earn income through unregistered activities and for many people the source of revenue is cash transfers from their relatives living overseas. Another problem is that the prosecutor may easily obtain only the information about the real property and means of transportation owned by the accused, while obtaining the data about the defendant’s salary and bank accounts is related to legal barriers. In this case, the only option for the prosecutor is to rely on the information provided by the accused (which might not be true after all). Thus, we have to conduct a separate investigation in order to obtain comprehensive information about the financial condition of the defendant.”*

The judges in the interviews note that frequent are the cases when they are not able to obtain reliable information from the parties about the financial status of defendants, which complicates for them to render a well-reasoned decision.

Judge: *“I find it difficult to examine the personal circumstances of the defendant when determining a bail amount. The bail decision, as you know, should be based on the gravity of the offence committed as well as the property owned by the accused. Frequently, the prosecution focuses on the gravity and specifics of the charge but does not have information on the defendant’s financial situation at all. There are cases when an excerpt from the Public Registry on real property is presented, yet sometimes the document is outdated and it becomes the matter of a dispute whether the information about the real property is valid or the property is sold. Sometimes the accused says one in a personal conversation and declares the other at the trial.*

The party always encounters difficulties when required to present documented evidence. This may be due to some objective reasons. When a person is detained, the prosecution has to determine the charge within 48

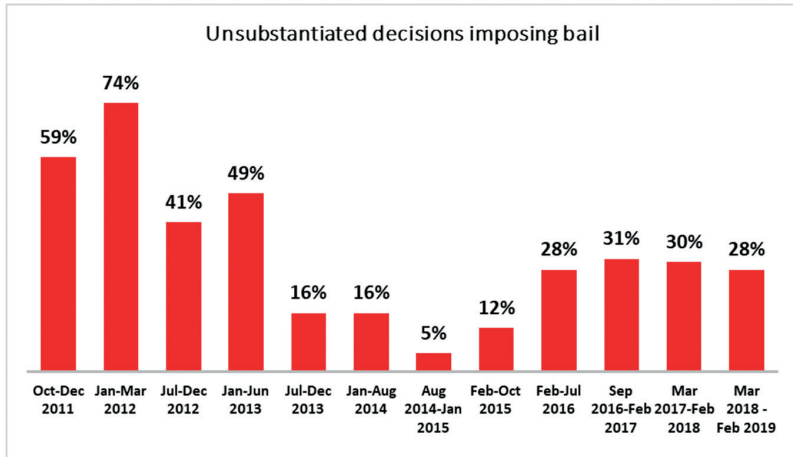
⁴⁹ See GYLA’s Criminal Court Monitoring Reports - №11 report p. 5; - №12 report p. 39

hours and submit a motion for a preventative measure, due to which the party has no sufficient time to examine the personal circumstances of the accused. Sometimes, even a simple extract from the Public Registry or the data from the social agency is difficult to produce. So, we get the prosecution which determines a specific amount of bail though fails to substantiate the same and the defense who runs to extremes and tries to hide all income of the accused, thus making it hard for me to keep the balance when rendering a decision.”

GYLA believes that the arguments of the judges and prosecutors about the prosecutor not having a possibility to study comprehensively the personal circumstances of the defendant and on the other hand the judge determining the amount of bail based on incomplete information may violate the interests of the defendant and result in an application of an unlawful and disproportionate measure of prevention. GYLA has been studying for years the rationale provided by the courts when using bail. GYLA's Criminal Court Monitoring reports show that the application of bail by the court is often unsubstantiated.

GYLA believes that bail must be deemed unsubstantiated when the judge, for instance, renders a decision to grant the prosecution's motion on the imposition of bail even if the prosecution fails to submit relevant arguments regarding the charge, personality of the accused, his/her financial capabilities and other important circumstances of the case. The failure of the judge to examine these circumstances is even more damaging when the defendant is not represented by a defense lawyer.

The chart below shows the rate of unsubstantiated judgments imposing bail identified by GYLA through its Criminal Court Monitoring reports.



Three judges interviewed see the US Probation and Pretrial Services as a solution to the problem. The US Probation Services cooperate with the court and furnish it with detailed information on the financial circumstances of defendants.

Judge: *“The American model of the Probation Services is acceptable to me. The Services are absolutely neutral, do not represent either party, only study the property situation of the defendant and produce evidence in case if either party is cheating. The judge cannot wish more comfort than to have this mechanism one day. If we have documents, it will be easier for the court to substantiate the bail by referring to specific evidence.”*

The institution (pre-trial services) referred to by some judges is a separate agency or a part of the Probation Services, whose employees are considered to be court representatives working for the judge. Both the probation agency as well as the separate service is included into the court system. In England, this service is a body independent from the Prosecutor’s Office and the defense, and its main function is to locate information, evaluate risks and supervise.

GYLA believes that the above service has its advantages and may be established in Georgia in the future. However, setting up the service will be

costly and gaining the confidence of the prosecution and defense thereto might be problematic as well. Besides, risk assessments and recommendations provided by the agency for the judge may result in the judge developing preliminary misconceptions in favour of either party leading to the violation of the adversarial principle.

BAIL SECURED WITH DETENTION

The legislation of Georgia envisages bail with and without detention. Bail secured with detention means that the defendant shall remain in a penitentiary facility until the bail amount (or 50% of the bail) is deposited. The bail with detention can be applied only against those defendants who appear at the preventative measure court hearing as detainees.

In practice, lawyers have divergent opinions regarding Article 200(6) of the Criminal Procedure Code of Georgia – “the court shall, upon a motion of the prosecutor or on its own initiative, in order to ensure the application of bail, impose remand on an accused who was subjected to arrest as a coercive measure of criminal procedure, until he/she deposits the bail in full or in part (but not less than 50%)”.

Most judges interpret Article 200(6) of the CPCG in a way that in case of imposing bail against a detainee, it must be secured with detention. This interpretation of the norm may result in the application of a disproportionate preventative measure against the accused as the latter may be remanded in custody if his/her relatives fail to deposit the bail. According to the information provided by the Supreme Court of Georgia, bail was used in 5804 cases in 2017, in 1951 (34%) of these, the bail was guaranteed with remand; in 2018, bail was applied in 5460 cases in total, 2175 (40%) of the cases were the bail secured with detention.⁵⁰ The data show that the rate of applying bail secured with detention is growing, which increases the risk that the number of those defendants who will not be able to post the bail and remain in custody will also increase.

The survey conducted for the purposes of the study revealed that majority of the prosecutors consider the current normative act does not allow for

⁵⁰ The reply №3-740-19 of the Supreme Court of Georgia of 16.04.2019.

the possibility to use non-custodial bail against detained defendants,⁵¹ yet several prosecutors still see in the regulation the authority of the judge to use bail without remand against a detained person. A small number of the prosecutors (4 of them) are in favour of amending the law to allow the judge to use non-custodial bail against a detained person. The opinions of judges are different in this regard. Here are their viewpoints:

Judge: *“Unconditional release of a detainee should be based on legal grounds. When we see that the grounds for the detention are neglected, we immediately release the detainee, but when we lack the legal mechanism for unconditional release, the accused has to be remanded in custody until the bail is secured. In this way, the legislator wished to provide some leverage to ensure the payment of the bail. I cannot see a particular problem with it ...”*

Judge: *“The provision is vague, not clearly formulated and foreseeable. It does not seem to me as an imperative norm. When it comes to my own initiative, I perceive it as my discretion and authority (of the judge) to use it or not. Perhaps, if guided by the logical line of the definition, it will be correct to interpret it as the discretion rather than an imperative provision.”*

Judge: *“The provision of Article 200, par 6, is unconstitutional. The wording “detention shall be used” directly violates the Constitution. It should be as follows: prior to depositing the bail, the prosecutor shall first substantiate detention and in the event that the prosecutor fails to do so, only the bail must be requested. There was a case when the judge delivered a different decision, released the detainee and imposed bail without declaring the detention unlawful. Consequently, in such cases, you actually use two preventative measures, which you do not or cannot prove. ”*

One of the respondent lawyers notes that despite the above provision, he/she has had a case in practice when the judge imposed bail against the detainee without remand guarantee but failed to acknowledge the unlawfulness of the detention. The Court of Appeals in one of its judgments overviewed this issue where the judge offered the following deliberation:

“... Article 200 does not prohibit to release a person from the custody and impose bail based on the decision of the first appearance and preventative measure court hearing, i.e. the judge has the right to impose bail on the

⁵¹ Out of the fifteen prosecutors participating in the survey, eleven expresses this opinion

*detainee, release him/her from detention and determine the period for posting the bail unless there are other circumstances that confirm that the detainee, once released, will not deposit the bail or commit an act that will prove the necessity of the arrest before the bail. I believe that the provision of Article 200 - "the court shall, upon the prosecutor's motion or on its own initiative, in order to ensure the application of bail, impose remand detention on an accused who was subjected to arrest as a coercive measure of criminal procedure" - must be interpreted in a way that the judge has the right to use detention to secure bail if the person is detained, and it is incorrect to define the norm as if in all cases where a person is arrested, the judge shall impose detention imperatively to secure the bail. We once again point out that a person in custody creates the authority and not the obligation to use detention for the purpose of securing the bail."*⁵²

GYLA shares the reasoning offered by the judge of the Court of Appeals. The organization thinks that in case of imposing bail as a pretrial measure against a detained person, it is not necessary to use detention as the guarantee of the bail. It is unclear why a detainee can be immediately released from the courtroom (regardless of the detention is illegal or not) when applying a personal guarantee, an agreement not to leave and due conduct or other preventative measures but not in case of bail. Supporting the idea that so-called detention secured with bail ensures the payment of bail cannot be deemed a valid argument. If the accused fails to deposit the bail amount within the specified timeframe, the prosecutor has a relevant legal mechanism and may submit an application to the court to request a more stringent measure of restraint.

GYLA believes that the provision should be amended not to allow various interpretations, to become more foreseeable and clear and provide that the judge is entitled to use bail with or without detention against the detainee. The majority of the lawyers participating in the focus group discussions and interviews within the study are in favour of amending and regulating the above provision.⁵³

⁵² Tbilisi Court of Appeals, Judgment #13/577-17 (2017-04-25)

⁵³ The focus group meeting was held with the Criminal Committee of the Georgian Bar Association and 5 more lawyers were interviewed.

POSSIBLE CONSEQUENCES OF NOT DEPOSITING BAIL (RISKS OF UNACKNOWLEDGED DETENTION)

In accordance with Article 200 (5) of the Criminal Procedure Code, if the accused fails, within the specified period, to deposit the bail amount to the deposit account of the National Bureau of Enforcement, or to deposit immovable property, the prosecutor shall file a motion with the court requesting a more severe measure of restraint.

The court should pay special attention to the determination of the period for the payment of bail, as not only the amount of the bail but the time-frame for the posting may become a deterrent factor for the defendant to deposit the bail, which may result in undesirable consequences. If the bail is not deposited, the detainee shall be automatically remanded in custody and if a person is imposed only bail the prosecutor may apply to the court and request a more severe measure of prevention. Violation of the timeframes determined for the bail posting (or securing the bail with real property) should not become for the court the only and imperative ground to review a preventative measure. The court must investigate whether the bail is not deposited intentionally or the defendant is unable to pay the bail. This paragraph of Article 200 of the CPCG must not be interpreted as if the prosecutor shall be obliged to request a more stringent measure of prevention and the court shall apply the more severe preventative measure requested if the bail is not posted. In each case of non-payment of bail, the prosecutor (and the court when reviewing the motion) must, prior to submitting an application to the court for a more stringent measure, find out whether the bail was not deposited due to any premeditated intent or objective reasons. Otherwise, the application of bail will acquire a formal character and the goal of so-called “unacknowledged detention” will be achieved through the formulaic use of bail.⁵⁴

With the view to finding out how often the non-payment of bail deteriorates the condition of defendants (are imposed detention or remanded in custody), we requested data from the courts of large cities⁵⁵ to learn about the number of persons in 2017-2018:

⁵⁴ See the Decision of Tbilisi Court of Appeals of 08/01/2015, case #18/19

⁵⁵ Kutaisi, Batumi, Tbilisi City Courts and Gori, Akhaltsikhe, Telavi, Zugdidi and Samtredia District Courts

- whose bail as a preventative measure was replaced with detention on the ground that the person was not able to pay the bail;
- who were imposed bail secured with detention but were remanded in custody because of the failure to deposit the bail;

In 2017, Zugdidi District Court replaced the bail and imposed detention in 1 case; in 2018, 3 motions (none of them was granted) were submitted requesting to change the bail with detention. In 2017-2018, Samtredia District Court imposed bail against 91 persons, and the bail with detention imposed as a preventative measure was changed in none of the cases. The bail secured with detention was imposed on 42 persons and 16 of them were remanded in custody.⁵⁶

Although the courts did not furnish us with the complete statistical data, the information obtained still shows that in practice quite often defendants who are imposed bail with detention are remanded in custody due to the non-payment of bail.

CIRCUMSTANCES PREVENTING THE USE OF PERSONAL GUARANTEE

A personal guarantee, a non-custodial measure, is governed by Article 203 of the CPCG. When providing personal surety, trustworthy persons shall assume a written obligation to ensure the appropriate behaviour of the accused and his/her appearance before the investigator, prosecutor, and the court. The surety shall be informed in written form of the legal consequences, in addition, the surety may be held responsible (up to 100-500 GEL) if he/she fails to ensure appropriate behavior of the accused.⁵⁷

A surety can be any person, a friend of a defendant, family member, relative, co-worker, and a person known to the public, a person enjoying a

⁵⁶ Kutaisi, Batumi, Tbilisi City Courts and Gori, Akhaltsikhe District Courts did not provide us with this information based on the argument that they do not record such statistics. As for the information received from Telavi District Court – Telavi District Court considered the motion on changing the bail with detention against only one person in 2017-2018 (although it was not possible to find out whether the motion was submitted due to the non-payment of the bail or any other reason, and Telavi Court did not provide us with information concerning the number of the defendants who were remanded in custody because of the failure to post the bail.

⁵⁷ Criminal Procedure Code of Georgia, Article 91 (8)

good reputation in the society, etc.⁵⁸ A personal guarantee may be selected only upon the consent of the surety, as well as with the consent of the accused and such request shall be granted by the Court. According to the statistics provided by the Supreme Court, the rate of applying the measure actually equals zero. In particular, in 2017, a personal guarantee, as a preventative measure, was used only in 34 (0.3%) cases out of 9459, and in 2018, the number decreased further as it was applied only in 19 (0.2%) out of 9935 cases.⁵⁹

Pursuant to the Criminal Court Monitoring Report 2018 of the Georgian Young Lawyers' Association, Tbilisi City Court applies a personal guarantee as an alternative preventative measure in a small number of cases, whereas other courts do not use the measure at all. According to the court hearings attended in 2018, Gori, Telavi, Kutaisi and Batumi courts did not use the preventative measure at all and Tbilisi City Court used personal surety only in 4 cases out of 186 preventative measure hearings.⁶⁰

The prosecutors think that the low rate of using a personal guarantee is due to its ineffectiveness; defense rarely submits an application for the personal surety and if they do, then in an unorganized manner. Another factor is low credibility, whether the personal surety can ensure proper behaviour of the defendant and the prosecutors mention the problem of enforcement as well.

Prosecutor: *“The reason for the low request of a personal guarantee is a certain specificity of the measure. Namely, the prosecutor must have information about the social circle of the defendant – his/her acquaintances and friends, as well as the complete information about a potential surety, whether he/she is a trustworthy person without any criminal record. The scrutiny of these circumstances requires a certain period and due to the limited procedural timeframes and workload of the prosecutors and investigators, time resource is not always enough to establish the above circumstances. Besides, in case of applying for a personal surety, additional procedures must be performed (inform the surety of a charge, obtain a writ-*

⁵⁸ Commentary on the Criminal Procedure Code of Georgia, authors' collective, Editor: Giorgi Giorgadze, p.585. Tbilisi, 2015

⁵⁹ The reply №3-740-19 of the Supreme Court of Georgia of 16.04.2019

⁶⁰ See GYLA's Reports of Criminal Court Monitoring in Tbilisi, Kutaisi, Batumi, Gori and Telavi District Courts; Monitoring period February 2017 - February 2018, Report №:12 p:19

ten statement, etc.), which also requires additional time. Apart from this, prosecutors fairly consider that the personal guarantee is a less effective preventative measure in the light of the social situation in the country. A vast majority of citizens do not even understand that if they are witnesses, they are obliged to appear before the court and give testimony. Presenting a witness to the court is the fruit of the prosecutor's great effort. Therefore, it is unreasonable to think that the same category people will ensure the appropriate behavior of the defendant (or at least try) unless they wish to do so. Considering the specifics of the personal surety, it is a preventative measure that is more practical for the defense to offer to the prosecutor or the court. In practice, even if the prosecutor requests the preventative measure without a direct involvement of the defense (expressed in communication with a potential guarantee), it is hardly ever granted."

Judge: "The main reasons are as follows: a reluctant defense counsel, who fails to present a personal surety. I have had a case where the personal guarantee had seen the defendant three times only in a year and how can such a person ensure an adequate behavior of the defendant?! Besides, the personal surety must clearly understand his/her responsibilities; in most cases, the sureties cannot explain how they are going to exercise the control. "

Judge: "The court finds it most difficult to apply personal surety. The defense is unprepared and surety is not presented, so the court cannot assign a non-existing person as a guarantee without trying such person at the court session to find to what extent he/she understands the consequences (penalty) if the terms are violated. Often the defense is not ready for this and the court inclines to bail."

The interviewed lawyers think that the inadequate use of the personal guarantee is due to the following circumstances: the lack of practice of using the preventative measure, the lack of understanding of the personal surety as an institute, judges fearing to apply the measure, as well as the fact that judges do not consider sufficient the scope of the liability of the surety. In the focus group discussions, one of the lawyers noted that applying for a personal surety is pointless, as the court almost never grants the motion."... The defense refrains from motioning for a personal surety because the court never grants it, and even if we bring 1000 guarantees, the court will not approve of them, so we choose a more workable measure i.e. bail ... "

To summarize, the inefficiency and the low rate of application of the measure in practice are due to the fact that neither the parties nor even the court consider the preventative measure a real alternative. Furthermore, according to the existing provision, a party shall submit a motion to the court for the use of the personal guarantee. A personal surety must be a trustworthy person who can control the defendant's behavior and guarantee that the defendant will not abscond, will not commit a new offence and will not exert pressure on witnesses. Consequently, the courts, as a rule, do not use personal surety as a preventative measure and do not consider it a real and workable alternative to detention and bail.

LIMITED USE OF AN AGREEMENT NOT TO LEAVE AND DUE CONDUCT

An agreement not to leave and due conduct is a non-custodial preventative measure. The measure was also included in the CPCG of 20 February 1998. According to the law at the time, the accused was obligated not to leave residence without permission of the investigator, prosecutor, judge and inform thereof about changing the residence. The current legislation has retained the agreement not to leave and due conduct with one exception though. Pursuant to the current law, the preventative measure is used only for the offences that are punishable with up to one-year imprisonment.⁶¹

According to the information provided by the Supreme Court of Georgia, in 2017, an agreement on not to leave and proper conduct was applied in 372 cases (4%) out of 9459, and in 2018, the application of the measure significantly reduced as it was used only in 148 (1%) out of 9935 cases.⁶²

With reference to the information in GYLA's Criminal Court Monitoring Report №13, Gori and Telavi Courts in single cases only applied an agreement on not leaving and proper conduct, Tbilisi Court did not use it at all. Telavi Court in three cases and Kutaisi Court in two cases imposed the above-mentioned preventive measures.⁶³

⁶¹ The same: Article 169 (the edition in effect until 16 December 2005)

⁶² Reply №3-740-19 of the Supreme Court of Georgia of 16.04.2019

⁶³ See GYLA's Reports of Criminal Court Monitoring in Tbilisi, Kutaisi, Batumi, Gori and Telavi District Courts; Monitoring period February 2017 - February 2018, Report №: 13 p:20-21

For the purposes of the study, we requested the court judgments rendered regarding the cases deliberated under the following articles of the Criminal Code: Article 126(1), Article 150 (1), Article 151(1), Article 188(1), 238¹(1), Article 239(1), Article 273 and 273¹(1)(2)(3). These are the articles that envisage imprisonment for up to one year and where the preventative measure - an agreement not to leave and due conduct- can be used. The analysis of the judgments has revealed that the defense counsel is obviously passive and does not always request an agreement not to leave and due conduct or other preventative measures as an alternative. The court as well did not show much willingness and the Prosecutor's Office did not submit an application for the use of the preventative measure.

In merely 4 (11%) cases out of 37 judgments, the defense counsel requested to apply the above measure. Even when the article selected for the committed offence allowed for the use of the preventative measure - an agreement not to leave and due conduct- the court applied it in just 3 (8%) cases.

GYLA believes that based on the circumstances of the case, the personality of the accused and the determined charge, it was possible to use the above preventative measure in further 8 (22%) cases, yet the court applied the minimum or close to the minimum amount bail (1000 or 1500 GEL), but not the agreement not to leave and proper behavior.

The interviews conducted for the study have shown that virtually all judges agree that an agreement not to leave and proper behaviour should not be restricted and be used not only for offences which are punishable with up to one-year imprisonment but also for less severe or negligent offences. According to one judge, *"... the measure should not be linked to the sentence, nor the category of crime, and be regulated by case-law ..."*

A judge believes that the agreement not to leave and proper conduct is the most lenient form of a preventative measure and almost formulaic. **Another judge agrees** that the measure should be used for less severe offences and negligent crimes. **Several prosecutors believe** that the measure should be imposed for other less serious crimes. However, most of the prosecutors think that the preventative measure should be applied only for the offences which are punished by imprisonment for up to one year. All the interviewed **lawyers** note that an agreement not to leave and proper behavior must not be used only for the offences which are pun-

ished for up to one year and should be applied against less severe and negligent crimes. One of the lawyers suggested that the measure should be also applied for non-violent crimes and less severe category offences.

The analysis of the court judgments has shown that the court and the parties, even if the legislation allows using this measure of restraint, refrain from requesting/using an agreement not to leave and due conduct and exhibit a kind of distrust to it. The interviews have shown that most of the practicing lawyers support the idea that the preventative measure should not be dependent on the gravity of the charge.

THE IMPORTANCE AND PRACTICAL USE OF ANCILLARY PREVENTATIVE MEASURES ENVISAGED BY GEORGIAN LEGISLATION

The current Criminal Procedure Code of Georgia provides for two categories of preventative measures: major and ancillary (additional). According to Article 199 of the CPCG, the major types of restraint are as follows: bail, an agreement not to leave and to behave properly, personal surety, supervision by the command of the behavior of a military service member and detention. Article 199(2) of the CPCG lays down the ancillary types of measures, which can be used along with the major preventative measures. The ancillary types are the following: a requirement to appear before the court at the specified time or upon summons; an obligation not to engage in specified activities or take up certain professions; a requirement to report to the court, police or any other authority daily or with other frequency; supervision by an agency designated by the court; electronic monitoring; a requirement to remain at a specified place during specified hours; an obligation not to leave or enter certain localities; an obligation not to contact specific persons without special permission; an obligation to surrender a passport or any other identity document; an obligation not to enter specified places and approach witnesses in cases where a person is prosecuted under charges relating to domestic violence or domestic crime.⁶⁴

The above list is not exhaustive and the judge has the right to use any other additional measures, which are not explicitly provided in the law. The judge can use the ancillary preventative measures only with the main preventative measures and not independently, which is why these mea-

⁶⁴ See Article 199(2)(3) of the Criminal Procedure Code of Georgia

asures along with the major preventative measures have the aiding function aiming to bring down the risks to a minimum.

The prosecutors note that in their practice they apply for the use of ancillary measures of restraint with varying frequency. A small part of the prosecutors (5 prosecutors) suggests transferring the ancillary measures into the list of the major coercive measures. The **judges** note that they often use ancillary measures. They point out that an obligation not to approach the victim in domestic violence cases is really important, as well as a requirement to show up at different times for a drug test and expert examination in drug-related offences.

***Judge:** "As you know, domestic violence cases have become very common. We often use non-custodial measures for such offences and reject the motion of the prosecution, as the risks are real to pressurize witnesses, destroy evidence important for the case proceedings and continue criminal activities, even if the previous actions of the offender were characterized by intensity and psychological, verbal or physical abuse was not an individual occurrence. In such cases, I completely forbid the defendant to enter the residence, approach the victim, have contact with the persons who have specific information against him (witnesses), and require appearing before the police at specific times, and this really works. As regards drug-related crimes, if the accused does not seem to be too much addicted to drugs and has a little chance to recover, I require from him/her to get drug tested once per week, also to appear once or twice a week before the police authority. This serves as a psychological factor as well, as the defendant knows that he/she must go to the police on Monday and the investigator will ask how he/she is doing ... "*

***Judge:** "I often use these measures such as night curfews, an obligation not to approach and communicate with the victim in domestic violence cases, an obligation to have drug tested periodically in the cases of minors, as well as in domestic violence cases, if a person is alcohol addict; in two cases, I have ordered the offender to take a medical and psychological treatment course to cure alcoholism ... "*

RESPONDENTS' OPINIONS ON EXTENDING THE TYPES OF PREVENTATIVE MEASURES

Five out of the fifteen interviewed prosecutors advocate for the idea of extending the list of the main types of preventative measures. The supporters of the reform nominate possible coercive measures that, to their belief, should be added to the list of preventative measures: a measure analogous to house arrest, electronic monitoring; an obligation not to enter specified localities and a requirement to remain at the residence during specified times (curfews);

Prosecutor: *"I think an obligation to appear before a law enforcement authority during specified times (preferably at short intervals, for example, once every two days or every day) should be added to the current measures of restraint because the measure is so restrictive that it amounts to and even exceeds the severity of the main preventative measure that ensures the defendant's proper behavior, such as an agreement not to leave and due conduct... "*

Some of the interviewed judges, namely 5 out of 13 judges, would appreciate if the number of the preventative measures increases, while 6 judges consider that if the limitation is removed from an agreement not to leave and proper behaviour applicable to offences punishable for up to one-year imprisonment, it will help to reduce the high rate of application of bail and detention, and no other additional preventative measures will be required to be added to the law. The judges in favour of expanding the types of preventative measures generally regard the following measures as relevant: electronic monitoring, house arrest, and police supervision.

Judge: *"Police supervision should be necessarily made a major coercive measure; also passport suspension and electronic monitoring - a little costly though - are the best options. A range of the alternatives would help, as proportionate and adequate measures will be selected in all specific cases. "*

According to the CPCG of 20 February 1998, **placement under police supervision** implied that the accused under police surveillance was forbidden to leave or change residence or move temporarily to another location within a particular jurisdiction without the prior consent of the court or a body conducting the criminal proceeding. The defendant was also obliged to appear before a law enforcement agency twice per week as summoned

by the police. Currently, under the new Code, this preventative measure is used as ancillary in addition to main coercive measures and not independently, as provided by Article 199 (2) of the CPCG.⁶⁵

Judge: "The electronic monitoring and house arrest can be introduced and used independently but it is important to ensure a relevant enforcement mechanism in place ..."

House arrest, compared to detention, was a less stringent measure of restraint used mainly against those persons whose complete isolation was not necessary. The Criminal Procedure Code of 20 February 1998 provided for a detailed list of specific circumstances based on which a court ruling or a judgment ordering a house arrest had to specify the rights which the accused would be restricted to exercise. This could have been the prohibition of communication with certain individuals, restriction of telephone use, a requirement not to leave the residence, and police surveillance of the defendant's residential house.⁶⁶ Today, house arrest, as a type of preventative measure, in the form that was in force until 2005 does not exist anymore and it is envisaged as one of the punishments based on the amendments entered into the Criminal Code in 2017.

The interviewed lawyers welcome the idea of extending the alternative preventative measures, yet some have different suggestions. According to one of the lawyers, it would be good if an electronic tag and house arrest were preventative measures. Placing the defendant under police supervision was also mentioned as the best major coercive measure. Another lawyer suggests that suspension of a driving license should be used as a preventative measure in transport-related crimes.

In summary, most of the interviewed respondents are in favour of increasing the types of preventative measures. The main argument of the supporters is that a wide range of alternative preventative measures will allow the judge to use the most appropriate measure of restraint that will therefore significantly reduce the use of poorly-reasoned, disproportionate and unreasonable penalties.

⁶⁵ The same: Article 167 (the edition in effect until 16 December 2005)

⁶⁶ Please see Article 166 of the Criminal Procedure Code of 20 February 1998 (the edition in effect until 16 December 2005)

II. INTERNATIONAL STANDARDS AND LESSONS FROM OTHER JURISDICTIONS

INTRODUCTION

This chapter comprises a brief overview of international standards on preventative measures in criminal proceedings, followed by a synopsis of lessons on key obstacles to and best practices for the implementation of those standards, drawn from 13 national jurisdictions. This comparative study is based on desk research, using primary sources (legislation, criminal procedure rules and jurisprudence) and secondary sources (academic articles, reports and other comparative studies) available in the public domain.

The purpose of this chapter is to provide a comparative benchmark for analysing Georgia's normative framework and practice in relation to preventative measures, and to highlight best practices in this area. The overarching principle guiding the use of preventative measures is that they must be seen as an exception to the right to liberty – applied only where it is necessary and proportionate to do so. In such circumstances, courts must apply the least intrusive measure available, for no longer than is strictly necessary. In practice, this requires a legally prescribed presumption of release; a broad range of alternatives to preventative detention (or release conditions); an independent, fair and informed judiciary with a wide discretion to apply non-custodial measures; full respect for fair trial rights (including the assistance of counsel and timely disclosure); fully reasoned decisions on measures; an automatic right to review such decisions; and systematic data gathering and analysis on this issue.

INTERNATIONAL STANDARDS APPLICABLE TO PREVENTIVE MEASURES IN CRIMINAL PROCEEDINGS

This section sets out international standards applicable to preventive measures in criminal proceedings. The standards are drawn from relevant provisions in the European Convention on Human Rights (ECHR) and European Court of Human Rights (ECtHR) jurisprudence, the International Covenant on Civil and Political Rights (ICCPR) and Human Rights Committee (HRC) jurisprudence and comments, as well as soft law instruments

such as the United Nations Standard Minimum Rules for Non-custodial Measures (the 'Tokyo Rules'). The key principles guiding this area are the presumption of innocence and the right to liberty. Compliance with international standards hinges on the courts' ability to issue prompt, fair, independent and fully reasoned decisions, and the defendants' right to have these decisions reviewed.

PRESUMPTION OF INNOCENCE

All suspects in criminal proceedings are presumed innocent until proven guilty beyond reasonable doubt by an impartial and independent tribunal, in the course of a fair judicial process.⁶⁷ Imposing coercive measures prior to a conviction based solely on a State's 'reasonable suspicion' that the person committed a crime, or as a form of pre-emptive punishment, is inconsistent with the presumption of innocence.⁶⁸ There is a narrow set of circumstances that permit restricting a suspect's liberty without violating his or her presumption of innocence – namely: safeguarding the administration of justice, protecting the public and ensuring that the defendant does not abscond from the judicial process.⁶⁹ The State bears the burden of proving that the proposed preventive measures are necessary for and proportionate to one or several of these aims.⁷⁰

B. RIGHT OF LIBERTY

Everyone has the right to liberty. No one shall be subjected to arbitrary arrest or detention or deprived of his/her liberty except on such grounds and in accordance with such procedure as are established by law.⁷¹ Prior to a conviction, the right to liberty confers a general presumption of release.⁷² This presumption may be rebutted in a limited number of excep-

⁶⁷ International Covenant on Civil and Political Rights (ICCPR), Article 14(2); European Convention on Human Rights (ECHR), Article 6(2).

⁶⁸ European Court of Human Rights (ECtHR), *Tomasi v France*, Judgment, para. 84, 89.

⁶⁹ ECtHR, *Tomasi v France*, Judgment, para. 84, 85-98.

⁷⁰ ECtHR, *Ilijkov v Bulgaria*, Judgment, para. 85.

⁷¹ ICCPR, Article 9(1); ECHR, Article 5(1).

⁷² ICCPR, Article 9(3); ECHR, Article 5(3); ECtHR, *McKay v. the United Kingdom*, Judgment, para. 41.

tional circumstances, namely for the purposes of bringing a suspect before a competent legal authority on reasonable suspicion of having committed a criminal offence, or to prevent the commission of an offence or absconding from justice.⁷³ It should not be the general practice to subject defendants to preventive detention.⁷⁴ Restrictions on a defendant's liberty must be lawful, reasonable, necessary and proportionate in the circumstances of the specific case.⁷⁵ Decisions on measures to restrict an innocent person's liberty must take the following into account:

Permissible grounds

The State may request, and a court may order, to restrict a person's liberty prior to a conviction on the basis of five permissible grounds:

- To prevent the risk of a defendant absconding from justice;⁷⁶
- To prevent the risk of a defendant interfering with evidence;⁷⁷
- To prevent the risk of a defendant committing further offences pending trial;⁷⁸
- To prevent the risk of the defendant's release causing public disorder;⁷⁹
- To protect the safety of the defendant.⁸⁰

The State bears the burden of proving that one or several of these grounds exist in the case in hand⁸¹ – based on credible evidence in relation to the defendant and/or to the specific circumstances of the alleged offence.⁸²

⁷³ ICCPR, Article 9(3); ECHR, Article 5(1)(c); Human Rights Committee (HRC) Comment 35, para. 38.

⁷⁴ HRC General Comment 35, para. 38.

⁷⁵ HRC General Comment 35, para. 12; 38; Human Rights Committee Decisions under the Optional Protocol (CCPR), *Kulov. Kyrgyzstan*, para. 8.3.

⁷⁶ ECtHR, *Smirnova v Russia*, Judgment, para. 59.

⁷⁷ ECtHR, *Smirnova v Russia*, Judgment, para. 59.

⁷⁸ ECtHR, *Muller v France*, Judgment, para. 44.

⁷⁹ ECtHR, *I.A. v France*, Judgment, para. 104.

⁸⁰ ECtHR, *I.A. v France*, Judgment, para. 104.

⁸¹ ECtHR, *Barberà, Messegué and Jabardo v. Spain*, para. 77.

⁸² HRC Comment 35, para. 38.

Detention is a measure of last resort

The right to liberty requires that detention – the ultimate restriction on liberty – must always be considered as a measure of last resort. According to the ECtHR, ‘detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained’.⁸³ Thus, detention should never be the starting position in a decision on preventive measures, but rather may only be considered once all other measures for achieving one or more permissible ground have been ruled out.⁸⁴

Subject to trial within a reasonable time

A detained person is entitled to be brought to trial within a reasonable time or to release pending trial.⁸⁵ Prolonged pre trial detention is incompatible with the right to liberty and the presumption of innocence.⁸⁶ The reasonableness of any delay to proceedings must be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities.⁸⁷ Understaffing and inadequate financial resources may not justify delays to proceedings where the defendant is in preventive detention.⁸⁸ Where delays are inevitable, the judicial authority must re-assess the appropriateness of preventive detention and consider alternatives.⁸⁹

Wide range of workable alternatives to detention

Qualifying detention as a measure of last resort requires the availability of, and active reliance on, alternatives to preventive detention that are

⁸³ ECtHR, *Ambruszkiewicz v Poland*, Judgment, para. 31.

⁸⁴ HRC Comment 35, para. 38; CCPR, *Smantsev. Belarus*, para. 10.3

⁸⁵ ICCPR, Article 9(3); ECHR, Article 5(3).

⁸⁶ HRC Comment 35, para. 36; CCPR, *Cagasv. Philippines*, para. 7.3.

⁸⁷ HRC Comment 35, para. 37; CCPR, *Tarightv. Algeria*, paras. 8.2–8.4.

⁸⁸ HRC Comment 35, para. 37; CCPR, *Fillastre and Bizouarnv. Bolivia*, para. 6.5.

⁸⁹ CCPR, *Tarightv. Algeria*, para. 8.3.

able to address the risks raised by the State to justify imposing preventive measures.⁹⁰ There is no internationally prescribed list of alternative measures – each domestic jurisdiction must decide on measures that best suit its socio-economic and cultural context.⁹¹ Nevertheless, the lack of workable alternatives could violate the right to liberty, as this would lead to the unnecessary and disproportionate reliance on pre-trial detention.

Alternative measures must be prescribed by law, based on an assessment of the offence and alleged offender, and be subject to judicial review. Although generally less coercive than pre-trial detention, some alternative measures may nonetheless constitute a serious restriction on an innocent person's liberty (e.g.: house arrest, geographic and temporal curfews and electronic monitoring).⁹² It is therefore crucial that non-custodial measures 'should be used in accordance with the principle of minimum intervention'.⁹³

Principle of necessity

A preventive measure may only be imposed if, and only if, it is necessary for achieving the permissible ground on which it is being sought.⁹⁴ According to the ECtHR, 'it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances'.⁹⁵ Consequently, the blanket application of a preventive measure to a certain situation or charge is incompatible with the right to liberty.⁹⁶ Ne-

⁹⁰ ECtHR, *Michalko v Slovakia*, Judgment, para. 145 - authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial.

⁹¹ UNGA Resolution 45/110, 'United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)', 14 Dec. 1990, Article 1.3: The Rules shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system.

⁹² HRC Comment 35, para. 5; See also: CCPR, *Gorji-Dinka v. Cameroon*, para. 5.4; HRC Concluding Observations: United Kingdom (CCPR/C/GBR/CO/6, 2008), para. 17 (control orders including curfews of up to 16 hours).

⁹³ Tokyo Rules, Article 2.6.

⁹⁴ HRC Comment 35, para. 38.

⁹⁵ ECtHR, *Ambruszkiewicz v Poland*, Judgment, para. 31.

⁹⁶ HRC Comment 35, para. 38: 'Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.'

cessity must be assessed on the specific circumstances of the defendant and the alleged offence in each case.⁹⁷

Principle of proportionality

Even if a preventive measure is considered ‘necessary’ to achieve the permissible ground on which it is sought, the State must also prove that the measure, and its impact on the defendant’s liberty, is proportionate to the purpose for which it is requested.⁹⁸ As such, the State should request the least stringent measures to achieve its aims, whilst the courts must decide whether the same objectives can be achieved by less coercive means.⁹⁹ It is therefore imperative that national legislation provides for a broad range of alternatives and a wide discretion in applying them.

Irrelevant considerations

Preventive measures may not be lawfully based on considerations other than those that demonstrate their necessity and proportionality in relation to the permissible grounds. Thus, the prosecutor’s suspicion that a defendant committed an offence (no matter how serious) may not in and of itself stand as a justification for imposing preventive measures.¹⁰⁰ Nor may preventive measures be ordered solely on the basis that the charge(s) against the defendant carries a lengthy prison sentence.¹⁰¹ The mere fact that the defendant is a foreigner does not justify preventive detention based on flight risk.¹⁰² Likewise, a person may not be kept in pre-trial detention ‘in the public interest’, unless the state can prove that this interest is genuine and outweighs the defendant’s right to liberty.¹⁰³

⁹⁷ HRC Comment 35, para. 38; HRC Concluding Observations: Argentina (CCPR/CO/70/ARG, 2000), para. 10.

⁹⁸ ECtHR, *Animal Defenders International v. UK*, Judgment, para. 108.

⁹⁹ ECtHR, *Ladent v Poland*, Judgment, para. 55.

¹⁰⁰ ECtHR, *Tomasi v France*, Judgment, para. 89.

¹⁰¹ HRC Comment 35, para. 38.

¹⁰² HRC Comment 35, para. 38; CCPR, *Hill and Hill v. Spain*, Judgment, para. 12.3.

¹⁰³ ECtHR, *Michalko v Slovakia*, Judgment, para. 149.

RIGHT TO A PROMPT, FAIR AND REASONED DECISION BY AN INDEPENDENT JUDICIAL AUTHORITY

Prompt decision

A person detained on suspicion of having committed a criminal offence must be promptly brought before a competent and independent judicial authority to determine whether there is a legal basis for continuing his or her detention or for imposing any other preventive measure(s).¹⁰⁴ The term ‘promptly’ has not been defined and will depend on the circumstances of the case,¹⁰⁵ however, 48 hours is generally regarded as the upper limit of the delay between arrest and judicial review in most cases.¹⁰⁶ The hearing and decision must take place in the defendant’s physical presence.¹⁰⁷

By a competent and independent judicial authority

The judicial authority reviewing the grounds for detention must be independent from the executive and any other parties to proceedings.¹⁰⁸ Moreover, it must have competence and legal authority to order the suspect’s release, remand in custody and/or any other preventive measure(s) provided for in applicable legislation.¹⁰⁹

Fully reasoned decisions

Decisions on preventive measures must be fully reasoned, demonstrating the necessity and proportionality of the measures imposed.¹¹⁰ A decision

¹⁰⁴ ICCPR, Article 9(3); ECHR, Article 5(3); HRC Comment 35, para. 32.

¹⁰⁵ ECtHR, *Rehbock v Slovenia*, Judgment, para. 84.

¹⁰⁶ HRC Comment 35, para. 33; ECtHR, *Brogan and others v. UK*, Judgment, para. 62; CCPR, *Kovshv. Belarus*, paras. 7.3–7.5: any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.

¹⁰⁷ HRC Comment 35, para. 34; CCPR, *Wolf v. Panama*, para. 6.2.

¹⁰⁸ HRC Comment 35, para. 32; CCPR, *Kulominv. Hungary*, para. 11.3; ECtHR, *Neumeister v. Austria*, Judgment, para. 24.

¹⁰⁹ ECtHR, *Singh v UK*, Judgment, para. 65.

¹¹⁰ ECtHR, *Moreira Ferreira v Portugal (No. 2)*, Judgment, para. 84.

should not be ‘formulaic’ or *pro forma*.¹¹¹ Courts must engage directly with the personal circumstances of the defendant and the particular circumstances of the offense,¹¹² rather than imposing preventive measures on the basis of general and abstract reasons.¹¹³ The measure of whether a decision is sufficiently reasoned is whether it contains reasons that are sufficient to appeal the essential aspects of the factual and legal – substantial or procedural – findings.¹¹⁴

RIGHT TO GENUINE AND REGULAR REVIEW OF PREVENTIVE MEASURES

Any person subject to a preventive measure must have the right to seek and obtain a review of that measure by a competent and independent judicial authority.¹¹⁵ This right should be available in addition to and independently of the right to appeal an initial decision on preventive measures. The defendant must be able to access this right regularly and periodically throughout the entire duration of the measures.¹¹⁶ According to the ECtHR, the review process must occur automatically, at reasonable intervals and without the need for the defendant to apply for them.¹¹⁷ Review hearings must be oral, adversarial and compliant with fair trial rights and equality of arms.¹¹⁸ Review decisions must be reasoned, engage with the arguments and evidence put forth by the parties and should not be *verbatim* copies of previous decisions rendered in the case.¹¹⁹

The legality of preventative measures requires the continuing existence of

¹¹¹ ECtHR, *Yagci and Sargin v Turkey*, Judgment, para. 52.

¹¹² ECtHR, *Buzadji v Moldova*, Judgment, para. 90.

¹¹³ ECtHR, *Smirnova v Russia*, Judgment, para. 63.

¹¹⁴ ECtHR, *Hadjianastassiou v Greece*, Judgment, para. 33; Council of Europe, ‘Protecting the right to a fair trial under the European Convention on Human Rights’, *Council of Europe human rights handbooks*, 2012, p.70, citing ECtHR, *Ruiz Torija v. Spain*, Judgment, paras. 29-30 and ECtHR, *Hirvisaari v. Finland*, Judgment, paras. 30-33.

¹¹⁵ ICCPR, Article 9(4); ECHR, Article 5(4); HRC Comment 35, paras. 4, 39-48.

¹¹⁶ HRC Comment 35, para. 38; ECtHR, *De Wilde, Ooms and Versyp v Belgium*, Judgment, para. 76; ECtHR, *Rakevich v Russia*, Judgment, para. 43; CCPR, *Tarightv. Algeria*, paras. 8.3–8.4.

¹¹⁷ ECtHR, *McKay v UK*, Judgment, para. 45; ECtHR, *Abdulkhakov v. Russia*, Judgment, para. 209.

¹¹⁸ ECtHR, *Singh v UK*, Judgment, para. 65.

¹¹⁹ ECtHR, *Ilijkov v Bulgaria*, Judgment, para. 84.

a reasonable suspicion that the defendant committed a crime.¹²⁰ A defendant must have an opportunity to challenge preventative measure where that suspicion no longer exists (or is no longer reasonable). Similarly, the reviewing body must re-consider anew the proportionality of the measure imposed in light of evolving circumstances and the overall duty to apply the least coercive measure.¹²¹ A defendant must be able to challenge measures, which are no longer necessary for or proportionate to achieving the stated grounds.¹²² The burden of proving the necessity and proportionality of a continuing measure during the review process must remain with the State.

KEY OBSTACLES TO IMPLEMENTING INTERNATIONAL STANDARDS

All reviewed national jurisdictions fail to live up to international standards to varying degrees. Violations of the right to liberty in the context of preventive measures account for approximately 14% of all cases decided by the ECtHR.¹²³ Key recurring obstacles to the implementation of international standards include incompatible legislation, inadequate or obstructionist procedures and practice, and/or cultural biases and gaps in the knowledge and understanding of international standards.

LEGISLATIVE OBSTACLES

Despite guidance from the UN Human Rights Council and the ECtHR, some jurisdictions continue to apply legislation on preventive measures that is incompatible with international standards. Legislative incompatibility can be found in the existence of impermissible grounds, failure to provide for

¹²⁰ ECtHR, *McKay v UK*, Judgment, para. 45.

¹²¹ ECtHR, *Darvas v Hungary*, Judgment, para. 27; ECtHR, *Abdulkhakov v. Russia*, Judgment, para. 209. HRC Comment 35, para. 43: 'Unlawful detention includes detention that was lawful at its inception but has become unlawful because [...] the circumstances that justify the detention have changed'.

¹²² E.g.: ECtHR, *I.A. v France*, Judgment, para. 104: Preventative measures imposed to protect public order must be lifted if there is no further threat to public order.

¹²³ Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision making in the EU', (Fair Trials), May 2016, para. 18, available at: <https://www.fairtrials.org/publication/measure-last-resort>: based on ECtHR annual reports for 2011-2015.

sufficient alternatives, legislative obstacles to judicial discretion and legal restrictions on the right to review decisions on preventive measures.

Impermissible grounds for imposing preventive measures

International standards limit the circumstances in which preventive measures may be imposed on suspects in criminal proceedings to a small set of permissible grounds. Whilst national legislation may diverge in the precise wording of permissible grounds, it must align with their essence and exceptional nature. National legislation that explicitly or implicitly allows courts to order preventive measures for reasons other than those set forth in permissible grounds is *prima facie* incompatible with international standards.¹²⁴

Protecting public order may only constitute a permissible ground for preventative detention in a narrow set of circumstances defined in law, and requires close supervision by the courts. Without such safeguards, this ground can be a tool for suppressing dissent and eliminating political opponents, and is therefore incompatible with the right to liberty.¹²⁵ In *Mokong*, the Human Rights Committee found that Cameroon violated the right to liberty by detaining the defendant – in accordance with domestic law – to take him out of the public eye to protect ‘national unity at a time of difficult political circumstances’.¹²⁶ In the Netherlands, ‘public order’ is broadly interpreted to justify imposing preventative detention on those charged with the most serious offences – without further need to demonstrate that the defendant’s release would actually disrupt public order.¹²⁷ In Italy, preventative detention is still all-but-mandatory in cases involving

¹²⁴ The State in question would need to justify the existence of this ground by demonstrating its compliance with the right to liberty.

¹²⁵ OHCHR, ‘Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers’, Chapter 5: Human Rights and Arrest, Pre-Trial Detention and Administrative Detention, p.194, available at: <https://www.ohchr.org/Documents/Publications/training9chapter5en.pdf>.

¹²⁶ CCPR, *Mukong v Cameroon*, para. 9.7-9.8.

¹²⁷ Leiden University, ‘Pre-trial detention in the Netherlands: legal principles versus practical reality: Research Report’, March 2016, p. 37, available at: <https://www.fairtrials.org/wp-content/uploads/j.h.-crijns2c-b.j.g.-leeuw-h.t.-wermink-pre-trial-detention-in-the-netherlands.-legal-principles-versus-practical-reality.pdf>.

mafia crimes, terrorism and subversion.¹²⁸

Lack of alternatives to preventive detention and restrictions on judicial discretion

National legislation must provide for a broad range of alternatives to preventive detention, and allow courts a wide discretion to apply them. An inadequate range of alternatives to preventive detention unduly restricts the courts' ability to assess the necessity of requested measures and leads to the imposition of disproportionate measures. The absence of effective alternatives repudiates the principle that preventive detention is a 'measure of last resort'.

Based on information available at the time of writing, house arrest with electronic monitoring is not available as an alternative to preventive detention under Polish and Spanish domestic laws.¹²⁹ This leaves judges with limited options in the most serious cases, and leads to higher rates of preventative detention.

Similarly, legislative restrictions on the courts' discretion and procedural obstacles for applying alternatives may lead to measures being imposed which are neither necessary for nor proportionate to the circumstances of each case. In practice, such restrictions may lead to a higher use of pre-trial custody and are incompatible with the right to liberty and the presumption of innocence.

Whilst the legislation of England and Wales is largely compliant with international standards, it includes a limitation to the presumption of release in certain cases. Under Section 25 the Criminal Justice and Public Order Act 1994, a court cannot grant bail to a defendant charged with murder, attempted murder, manslaughter, rape or attempted rape, or certain other sexual offences, if he or she has been convicted of any of these offences

¹²⁸ Antigone, 'The practice of pre-trial detention in Italy: Research Report', September 2015, p. 16, available at: <https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf>; citing law 47/2015.

¹²⁹ Helsinki Foundation for Human Rights, 'Pre-Trial Detention in Poland', 2015, p. 77, available at: http://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf; APDHE, 'La Practica de la prison provisional enEspaña', Noviembre 2015, p.49, available at: https://www.fairtrials.org/wp-content/uploads/INFORME_LA-PRACTICA-DE-LA-PRISION-PROVISIONAL.pdf.

in the past, unless the court is of the opinion that there are exceptional circumstances which justify it.¹³⁰ In practice, this creates a blanket presumption that custody is necessary in such cases, restricting the courts' discretion to assess the specific circumstances of the defendant and offence in question.

In Dutch criminal procedure, alternatives are framed as conditions for suspending preventive detention, requiring judges to consider the appropriateness of detention first before assessing non-custodial measures. This effectively reverses the principle of custody as a measure of last resort. In practice, this has led to an over-reliance on preventive detention and the neglect of alternative measures.¹³¹

Lack of genuine and regular review of preventative measures decisions

National legislation must provide defendants with genuine and regular opportunities to challenge preventative measures. Any legislative obstacles to the right to review constitute undue restrictions on the right to liberty.

In England and Wales, procedure for reviewing preventive measures is limited to two review hearings. After the second hearing, the defendant is obliged to show a material change in circumstances. In practice, the burden of establishing the necessity and proportionality of preventive measures is shifted onto the defense in breach of international standards.¹³²

Whilst regular review hearings are provided for in Spanish legislation, in practice review is often a confirmation of the initial decision, without examining the evolution in circumstances, done in writing and in the defendant's absence.¹³³

¹³⁰ The National Archives, 'Criminal Justice and Public Order Act 1994', Section 25, available at: <https://www.legislation.gov.uk/ukpga/1994/33/section/25>.

¹³¹ Leiden University, 'Pre-trial detention in the Netherlands: legal principles versus practical reality: Research Report', March 2016, p. 33 et seq., available at: <https://www.fairtrials.org/wp-content/uploads/j.h.-crijns2c-b.j.g.-leeuw-h.t.-wermink-pre-trial-detention-in-the-netherlands.-legal-principles-versus-practical-reality.pdf>.

¹³² University of West England, 'The Practice of Pre-Trial Detention in England and Wales', February 2016, p. 94 et seq., available at: <http://eprints.uwe.ac.uk/28291/>.

¹³³ APDHE, 'La Practica de la prison provisional en España', Noviembre 2015, p.51 et seq, available at: https://www.fairtrials.org/wp-content/uploads/INFORME_LA-PRACTICA-DE-LA-PRISION-PROVISIONAL.pdf.

In Poland, review hearings on preventive measures are not sufficiently regular to constitute a genuine review of the continuing necessity and proportionality of measures. Limited access to case file, restrictions on client-counsel meetings and inadequate time results in preventive detention being reversed in less than 3% of cases.¹³⁴

PROCEDURAL AND PRACTICAL OBSTACLES

Whilst most countries have brought national laws on preventative measures in line with international standards, a number of procedural and practical obstacles remain in place, significantly undermining the right to liberty and presumption of innocence in practice.

Insufficient time and resources to prepare for hearings

In practice, there is rarely sufficient time between an arrest and the initial hearing on preventative measures for lawyers to consult all available evidence, fully advise the defendant and take instructions. This results from a combination of short legal deadlines for bringing arrestees before a judge, poor listing and case management, late disclosure of prosecution materials, under-resourced courts and court officers, and inadequate fees for legal aid lawyers. Lack of preparation for preventative measures hearings undermines the defendant's ability to counter the prosecution's arguments, resulting in unnecessary and disproportionate preventative measures.

In Italy, lawyers typically gain access to case files between 10 and 30 minutes before the initial hearing on preventative measures. As a result, defence lawyers do not have adequate time to prepare for hearings and judges tend to place greater reliance on the prosecutors' arguments.¹³⁵

Foreign defendants in Greek courts are not provided with translations of

¹³⁴ Helsinki Foundation for Human Rights, 'Pre-Trial Detention in Poland', 2015, p. 60 et seq., available at: http://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf.

¹³⁵ Antigone, 'The practice of pre-trial detention in Italy: Research Report', September 2015, p. 27, available at: <https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf>.

case file documents, severely hampering their ability to prepare for hearings.¹³⁶

Issues with the disclosure of prosecution materials

Late or incomplete disclosure of relevant prosecution materials in advance of hearings on preventative measures undermines the defendant's ability to understand and effectively challenge the prosecution's case for imposing measures, resulting in unnecessary and disproportionate preventative measures.

In practice, defence lawyers in England and Wales receive very little information from the prosecution in advance of preventative measures hearings, often limited to police case summaries.¹³⁷ Consequently, half of all defendants remanded into custody are either acquitted or receive non-custodial sentences – indicating that necessity and proportionality are not adequately considered in initial bail hearings.¹³⁸

In Spain, the right to access case files in advance of preventative measures hearings is severely restricted by the frequently applied *secreto de las actuaciones* (secrecy of the proceedings) procedure under article 302 of the Code of Criminal Procedure.¹³⁹

¹³⁶ Centre for European Constitutional Law, 'The Practice of pre-trial detention in Greece: Research Report', December 2015, p.25-26, available at: <https://www.fairtrials.org/wp-content/uploads/The-Practice-of-pre-trial-detention-in-Greece.pdf>.

¹³⁷ University of the West of England, 'The Practice of Pre-trial Detention in England and Wales: Research Report', February 2016, section 3.2, 4.3, available at: <http://eprints.uwe.ac.uk/28291/>.

¹³⁸ University of West England, 'The Practice of Pre-Trial Detention in England and Wales', February 2016, p. 15-16 citing Ministry of Justice statistics, available at: <http://eprints.uwe.ac.uk/28291/>.

¹³⁹ APDHE, 'La Practica de la prison provisional en España', Noviembre 2015, p.31 et seq, available at: https://www.fairtrials.org/wp-content/uploads/INFORME_LA-PRACTICA-DE-LA-PRISION-PROVISIONAL.pdf.

Insufficient time allotted to preventative measures hearings

Lack of resources and inefficient case management often leads to inadequate time being allocated to hearings on preventative measures.¹⁴⁰ Such short time frames do not allow defendants to effectively challenge prosecution requests for preventative measures. Short hearings leave judges with insufficient time to consider the specific circumstances of the defendant and the alleged offence, leading to formulaic decisions that fail to engage with the principles of necessity, proportionality and adequately consider alternatives to custody. Short hearings in jurisdictions affected by cultural pro-prosecution bias are likely to result in routine acceptance of measures requested by the prosecution, even where this violates the right to liberty and the presumption on innocence.

Poorly reasoned and/or formulaic decisions

Short, formulaic, *pro forma* and otherwise inadequately reasoned decisions on preventive measures fail to reveal the basis on which measures are imposed. Such deficiencies make it impossible to understand what considerations were taken (or not taken) into account, and whether the necessity and proportionality of requested measures were properly assessed. This also makes it difficult to assess compliance with national legislation and international standards, and all but impossible to effectively appeal such decisions or seek a review of preventive measures. In jurisdictions with high rates of pre-trial detention and a culture of pro-prosecution bias, formulaic and poorly reasoned decisions raise a strong presumption that the rights to liberty and presumption of innocence were violated.

Decisions on preventive measures have been deemed too short, formulaic or devoid of proper reasoning in Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Romania and Spain.¹⁴¹ In Poland, judicial considerations of alternatives are generally limited to a *pro forma* single sentence

¹⁴⁰ E.g.: In Ireland, hearings on preventative measures last between 2 and 15 minutes with the average being 8 minutes: Irish Penal Reform Trust, 'The practice of pre-trial detention in Ireland: Research Project', April 2016, p.33, available at: http://www.iprt.ie/files/PTD_Country_Report_Ireland_FINAL_updated.pdf.

¹⁴¹ Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision making in the EU', (Fair Trials), May 2016, para. 61, available at: <https://www.fairtrials.org/publication/measure-last-resort>.

on their inability to protect the integrity of proceedings.¹⁴² In Lithuania, the vast majority of decisions on preventive measures in theft cases contain the same sentence justifying custody: “the criminal activity in question is likely to have become the suspect’s primary source of income and it will be pursued further if the person is not detained”.¹⁴³

CULTURAL OBSTACLES

Culture of pro-prosecution bias

Pro-prosecution bias is a cultural hangover of many post-Soviet jurisdictions.¹⁴⁴ Senior judges and court officers were educated and trained at a time when the prosecution represented State and Communist Party power, which subordinated the judiciary. In the context of preventive measures, this makes judges more likely to simply accept the measures requested by the prosecution, without properly considering the necessity and proportionality of such requests. In Romania, Poland, Lithuania and Hungary, judges apply measures requested by the prosecution in 98% of cases.¹⁴⁵ In Hungary, defense lawyers complain that courts pay no or little attention to arguments on preventive measures presented by the defense. This criticism is borne out by evidence of judges referring to prosecution arguments in 92.4% of all decisions, and to defense arguments in less than 50% of cases.¹⁴⁶ Such jurisdictions require additional safeguards to demonstrate that prosecution requests are being considered on their merits and in line with international standards. Most notably, such jurisdictions

¹⁴² E.g.: Helsinki Foundation for Human Rights, ‘Pre-Trial Detention in Poland’, 2015, p. 73, available at: http://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf;

¹⁴³ Human Rights Monitoring Institute, ‘The practice of pre-trial detention in Lithuania: Research Report’, 2015, p.33, available at: <https://www.hrmi.lt/uploaded/TYRIMAI/Pre-Trial%20Detention%20in%20Lithuania%20-%202015.pdf>.

¹⁴⁴ Queen Mary Law Journal, Anton Galushko, ‘Politically motivated justice in the former Soviet Union: the novel concept of ‘two-fold constitutionalism’ in post-Soviet states’, available at: <https://www.qmul.ac.uk/law/media/law/docs/undergrad/14-Galushko.pdf>.

¹⁴⁵ Fair Trials, ‘A Measure of Last Resort? The practice of pre-trial detention decision making in the EU’, (Fair Trials), May 2016, para. 38, available at: <https://www.fairtrials.org/publication/measure-last-resort>.

¹⁴⁶ Hungarian Helsinki Committee, ‘The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making’, October 2015, p. 45, available at: https://www.fairtrials.org/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf.

must address the prevalence of formulaic and inadequately reasoned decisions, unduly short hearings and the inequality of arms.

Improper motives and irrelevant considerations

There is evidence that in some jurisdictions, the threat of preventive detention is unofficially used as a means of extracting confessions or preemptively punishing defendants. For example, in a Lithuanian survey, eight out of ten defense lawyers stated that preventive detention is being used as a tool to extract cooperation from defendants.¹⁴⁷ Such practices are clearly incompatible with international standards and their use must be prevented and punished.

More commonly, courts base decisions on factors that do not fall within one of the permissible grounds – notwithstanding their legal duties. For instance, in Greece, preventive detention is often ordered solely on the basis of severity of the alleged crime.¹⁴⁸ In Hungary, some courts justify preventive detention solely on the basis of the defendant’s lack of regular income.¹⁴⁹ In Italy, homeless defendants are often placed in detention due to the lack of alternatives to house arrest.¹⁵⁰

Lack of knowledge, understanding and trust for alternatives to custody and international standards

Although they may exist in law, alternatives to custody are often underused in practice as prosecutors, judges and defense lawyers do not know about, understand or trust these measures as viable alternatives to pre-

¹⁴⁷ Human Rights Monitoring Institute, ‘The practice of pre-trial detention in Lithuania: Research Report’, 2015, para. 57, available at: <https://www.hrmi.lt/uploaded/TYRIMAI/Pre-Trial%20Detention%20in%20Lithuania%20-%202015.pdf>.

¹⁴⁸ Centre for European Constitutional Law, ‘The Practice of pre-trial detention in Greece: Research Report’, December 2015, p.29, available at: <https://www.fairtrials.org/wp-content/uploads/The-Practice-of-pre-trial-detention-in-Greece.pdf>.

¹⁴⁹ Hungarian Helsinki Committee, ‘The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making’, October 2015, p. 60 et seq., available at: https://www.fairtrials.org/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf.

¹⁵⁰ Antigone, ‘The practice of pre-trial detention in Italy: Research Report’, September 2015, p. 34, available at: <https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf>.

ventive detention.¹⁵¹ Without conducting in-depth studies into the effectiveness and impact of a variety of alternatives, the courts will continue to ignore them, inevitably resulting in a higher incidence of preventive detention.

BAD PRACTICES IN RELATION TO ALTERNATIVES TO PREVENTIVE DETENTION

Failure to account for the impact of release conditions on the right to liberty

All preventive measures impose some level of restriction on the right to liberty. In some cases, the restrictions are comparable to pre-trial detention. Release conditions such as house arrest, stringent curfews and electronic monitoring may have a significant impact on a defendant's life, economic activity and interpersonal relations. This impact will vary with each defendant's personal circumstances. Failure to take account of the full impact of preventative measures on the defendant may lead to the imposition of unnecessary or disproportionate measures.

In England and Wales, residence and curfew conditions on release are undermined by a dire lack of bail hostels for defendants without a regular place of abode.¹⁵² Persons without stable accommodation are routinely deemed a flight risk, leading to an increase in the use of preventative detention in situations where this measure may not be necessary or proportionate.

¹⁵¹ Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision making in the EU', (Fair Trials), May 2016, p.62 and para. 53, available at: <https://www.fairtrials.org/publication/measure-last-resort/>: 'Interviews undertaken with judges and prosecutors demonstrated a lack of awareness or understanding of ECHR standards and their application in the domestic context. All but two of the Greek judges interviewed reported not having direct knowledge of the ECHR standards that apply to pre-trial detention, due to time pressures and a lack of easy access to ECHR case law. Only one of the Irish judges interviewed were of the opinion that the case law of the ECtHR was relevant to Ireland in the bail context. None of the Polish prosecutors reported paying close attention to ECtHR rulings concerning Poland. Prosecutors and judges across the studied jurisdictions reported little to no access to specialised training in ECHR standards as they apply to pre-trial detention.'

¹⁵² Cite University of the West of England, 'The Practice of Pre-trial Detention in England and Wales: Research Report', February 2016, p.89, 116, available at: <http://eprints.uwe.ac.uk/28291/>

In some cases, it is not the release condition that creates injustice, but the modality of its application. For instance, Greek law requires defendants to bear the cost of release conditions such as electronic monitoring.¹⁵³ This limits the availability of this condition to those who can afford the cost, creating a socio-economic injustice and an unequal application of preventive measures.

Blanket imposition of release conditions

As previously stated – the impact of different preventive measures varies with the circumstances of each defendant. As such, the blanket imposition of a set of conditions in all cases where defendants are released pending trial fails to account for defendants’ individual circumstances, and constitutes a violation of their right to liberty.

In Ireland, *pro forma* decisions on conditional release have led to the routine imposition of a standard set of conditions on all defendants without further assessment of individual circumstances. The use of unconditional bail is virtually absent from decisions on preventive measures. In practice, this results in unnecessary and disproportionate restrictions on defendants’ liberty.¹⁵⁴

The social injustice of cash bail as a preventive measure

Money or cash bail is one of the most common alternatives to preventive detention in a majority of state jurisdictions in the United States of America. A routine application of cash bail as the main condition on release may effectively exclude indigent defendants from the right to liberty, and consequently induce deprived defendants to plead guilty notwithstanding their innocence.¹⁵⁵ Research has demonstrated that cash bail creates

¹⁵³ Centre for European Constitutional Law, ‘The Practice of pre-trial detention in Greece: Research Report’, December 2015, p.39, available at: <https://www.fairtrials.org/wp-content/uploads/The-Practice-of-pre-trial-detention-in-Greece.pdf>: the cost of 6 months of electronic monitoring is approximately €3000 EUR.

¹⁵⁴ Irish Penal Reform Trust, ‘The practice of pre-trial detention in Ireland: Research Project’, April 2016, p.35, 57, 73, available at: http://www.iprt.ie/files/PTD_Country_Report_Ireland_FINAL_updated.pdf.

¹⁵⁵ Stanford Law Review, Heaton et al., ‘The Downstream Consequences of Misdemeanor Pretrial Detention’, March 2017.

perceptive inequality of treatment between different socio-economic and racial groups, and leads to a reduction in trust in the criminal justice system as a whole.¹⁵⁶ It has become increasingly clear that reliance on cash bail as the main alternative to preventive detention may violate the right to liberty. Consequently, cash bail is rarely used in European jurisdictions and is currently being phased out across the United States – most notably in New Jersey, Alaska and California.¹⁵⁷

BEST PRACTICES IN EUROPEAN COUNTRIES

Whilst no one jurisdiction serves as a model of perfection in this area, some best practices and effective solutions may be extracted from elements of various countries' laws and practice. England and Wales has one of the lowest percentages of defendants remanded into preventive detention and one of the highest rates of unconditional release (prosecutors request unconditional release in nearly 50% cases).¹⁵⁸ According to research and analysis coordinated by Fair Trials International, this is largely due to judges' strict adherence to the legislative framework, as well as the broad range of available alternatives to preventive detention and a wide judicial discretion for applying them.¹⁵⁹

¹⁵⁶ Crime and Justice Institute, Holsinger, A. *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*. (2016)..Bushway, S. &Gelbach, J. Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model. (2011); Jones, Cynthia. "Give Us Free": Addressing Racial Disparities in Bail Determinations. (2014). Available at <http://www.nyuylpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyujlpp919.pdf>.

¹⁵⁷ ACLU New Jersey, 'Pretrial Justice Reform', <https://www.aclu-nj.org/theissues/criminaljustice/pretrial-justice-reform>; VOX, 'Bail reform, which could save millions of unconvicted people from jail, explained', 17 Oct. 2018, available at: <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality>; The Marshall Project, 'Bail Reform', 6 June 2019, available at: <https://www.themarshallproject.org/records/1439-bail-reform>.

¹⁵⁸ University of the West of England, 'The Practice of Pre-trial Detention in England and Wales: Research Report', February 2016, section 4.2, available at: <http://eprints.uwe.ac.uk/28291/>.

¹⁵⁹ Fair Trials, 'A Measure of Last Resort? The practice of pre-trial detention decision making in the EU', (Fair Trials), May 2016, para. 72, available at: <https://www.fairtrials.org/publication/measure-last-resort>.

LIMITATIONS ON THE USE OF DETENTION

Limits on the courts' power to order preventive detention in cases where such detention is never reasonably justified is an effective measure for reducing reliance on custody, and ensuring compliance with international standards. Legislators are encouraged to take a proactive approach in this areas, by eliminating or restricting preventive detention for offenses which carry short or non-custodial sentences.

For example, in England and Wales, preventive detention may not be imposed for the least severe category of criminal offences (known as 'summary only'), unless the defendant has absconded or committed offences on bail, or poses a risk to life and limb. Similarly, detention may not be ordered in most cases where there is no real prospect of a custodial sentence.¹⁶⁰ In Italy, preventive detention may not be applied to defendants charged with crimes that carry a maximum prison sentence of five years or less (except for the charge of illegal financing of political parties or if house arrest conditions are breached).¹⁶¹

THE RIGHT TO UNCONDITIONAL RELEASE INSCRIBED IN LAW

The right to liberty and the presumption of innocence translate into a general right to unconditional release. To give this right meaning, unconditional release must be the default starting position for all defendants in criminal proceedings (except those already in custody). In other words, following charge or first appearance, all defendants must be released without condition, unless it is necessary and proportionate to impose conditions on their release (or remand them in custody) based on one or more permissible grounds.

This default position should be inscribed in legislation on preventive measures – where any conditions on release or preventive detention should be described as an 'exception to the right to unconditional release'. This formulation gives clear instructions to the prosecution and the judiciary

¹⁶⁰ National Archives, 'Bail Act 1976, Schedule 1, Parts 1, 1A and 2', <https://www.legislation.gov.uk/ukpga/1976/63/schedule/1>.

¹⁶¹ Antigone, 'The practice of pre-trial detention in Italy: Research Report', September 2015, p. 34, available at: <https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf>.

that all preventive measures are exceptional measures, to be applied only in cases where they are necessary and proportionate in the specific circumstances. It also clarifies that the burden of proving the necessity and proportionality of such measures is on the State.

Unconditional release does not absolve the defendants from their obligations to appear before court when summonsed. A released defendant who fails to appear may be subject to additional criminal charges, as well as a review of his or her preventive measures. Similarly, should a defendant commit a crime or interfere with evidence pending trial, the State may request additional preventive measures.

A good example of the right to unconditional release inscribed into law is the England and Wales Bail Act 1976.¹⁶² According to Section 4, a person brought before a court accused of an offence must be granted unconditional release, unless any of the exceptions provided for in Schedule 1 to the Bail Act apply. The Bail Act exceptions mirror the permissible grounds set out in the international standards section above.¹⁶³ Unconditional release is requested and obtained in approximately half of all criminal cases in England and Wales.¹⁶⁴ Failing to attend court when summonsed is a criminal offense punishable by up to a year in prison.¹⁶⁵ Failure to attend also automatically triggers a right for the State to request preventive measures.

CONDITIONAL RELEASE

Where unconditional release is deemed insufficient to protect the public, safeguard the interests of justice or prevent the defendant from absconding, the next step is to consider the adequacy of conditional release. All

¹⁶² National Archives, 'Bail Act 1976: Section 4', available at: <https://www.legislation.gov.uk/ukpga/1976/63/section/4>.

¹⁶³ See Schedule 1 of the Bail Act 1976: National Archives, 'Bail Act 1976: Schedule 1', available at: <https://www.legislation.gov.uk/ukpga/1976/63/schedule/1>.

¹⁶⁴ University of the West of England, 'The Practice of Pre-trial Detention in England and Wales: Research Report', February 2016, section 4.2, available at: <http://eprints.uwe.ac.uk/28291/>.

¹⁶⁵ National Archives, 'Bail Act 1976: Section 6', available at: <https://www.legislation.gov.uk/ukpga/1976/63/section/6>.

conditions must be seen as a restriction on the defendant's right to liberty. Thus, any conditions imposed on the defendant must be both necessary for and proportionate to addressing any risks that would be inherent in granting unconditional release in the circumstances.

Supervision

The most basic condition and normal starting point for conditional release is some form of non-custodial supervision. This may take a number of different forms and should be tailored to the requirements of the specific case. A typical supervision condition involves the defendant regularly reporting to a local police station or magistrate. The basic aim of this condition is to provide a regular point of contact between the defendant and the authorities, and ensure that the defendant remains in the jurisdiction. The reporting intervals should fit the purported aims and should not be so onerous as to constitute a disproportionate burden in the circumstances (i.e. the defendant should be made to report to a location that is relatively close and accessible from his regular place of abode at intervals no more frequent than what is necessary to guarantee his presence during proceedings).

Broad range of conditions

Legislation on preventive measures should provide a broad range of release conditions to ensure that judges have the legislative tools to tailor their decision to the defendant and the alleged offence in question. The broader the range of measures, the greater the likelihood of a conditional release that is no more coercive than is necessary and proportionate in the circumstances.

Judges in England and Wales may order the following measures as stand-alone or cumulative conditions on release:

- Requiring the defendant to inform the competent authority of any change of residence;
- Preventing the defendant from entering certain localities, places or defined areas;
- Requiring the defendant to remain at a specified place during specified times;

- Limiting the defendant’s right to leave the UK;
- A requirement to report at specified times to a specific authority;
- An obligation to avoid contact with specific persons in relation to the alleged offence;
- An obligation not to engage in specified activities relating to the alleged offence, including work in a specified profession or employment;
- An obligation not to drive a vehicle;
- An obligation to provide a security or surety to the court;
- An obligation to undergo therapeutic treatment or treatment for addiction;
- An obligation to avoid contact with specific objects relating to the alleged offence;
- An obligation to wear an electronic tag; and
- An obligation to surrender travel documents and not to apply for any international travel documents.

Practical and cost-effective alternative measures

National jurisdictions should strive to create workable alternative measures that ensure an equal application of the right to liberty to all, and reduce the need for preventive detention along socio-economic divides. Lawmakers should commission research into using innovative information technology, with due regard to defendants’ rights to liberty and privacy. Lawmakers should also bear in mind the cost-effectiveness of measures at a time when many criminal justice systems are under the strain of austerity.

In Ireland, judges may impose a ‘mobile phone condition’ – where a defendant released on supervision is required to carry a fully charged mobile phone and to be available to answer it at all times. This measure has been effective in cases where defendants have no regular place of abode.¹⁶⁶

¹⁶⁶ Irish Penal Reform Trust, ‘The practice of pre-trial detention in Ireland: Research Project’, April 2016, p.35, available at: http://www.iprt.ie/files/PTD_Country_Report_Ireland_FINAL_updated.pdf.

Wide judicial discretion

Judges should have wide discretion to order the condition or combination of conditions that best suit the risks and circumstances of a particular case. The wider the judicial discretion, the more likely judges are to come up with solutions that minimize the coercive nature of preventive measures to that which is strictly necessary and proportionate in the circumstances.

Recent legislative reforms in Italy have broadened judicial discretion to allow cumulative applications of release conditions.¹⁶⁷ In England and Wales, the wording of section 3(6) of the Bail Act 1976 provides judges with the widest possible discretion to craft conditions for the case in hand (with exceptions relating to electronic monitoring – see below).¹⁶⁸

Hierarchy of measures

Legislation, jurisprudence or some form of authoritative guidance should provide judges with a hierarchy of measures in terms of their coercive nature and impact on a defendant's liberty. Whilst it should be borne in mind that some conditions may carry varying degrees of coercion for different defendants (e.g.: a night-time curfew is a bigger restriction on a defendant who works during night hours than a defendant who has a day job), there is a need for some general guidance on the impact of certain conditions.

In England and Wales, section 3AB of the Bail Act 1976 provides that electronic monitoring may only be ordered where the court is satisfied that but for the monitoring requirement, the defendant would not be released from custody.¹⁶⁹ This imposes a clear obligation on judges to consider whether any measures other than electronic monitoring are capable of mitigating the risks raised by the prosecution.

¹⁶⁷ Antigone, 'The practice of pre-trial detention in Italy: Research Report', September 2015, p. 16, available at: <https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf>.

¹⁶⁸ 'He may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary [...]': The National Archives, 'Bail Act 1976: Section 3', available at: <https://www.legislation.gov.uk/ukpga/1976/63/section/3>.

¹⁶⁹ The National Archives, 'Bail Act 1976: Section 3AB', available at: <https://www.legislation.gov.uk/ukpga/1976/63/section/3AB>.

Independent risk assessments

In deciding on release conditions, judges must assess the risk of releasing the defendant as well as the impact of release conditions on the defendant. To do so, judges typically rely on information presented by the prosecution and the defense in the course of an adversarial hearing on preventive measures. However, short time frames, insufficient resources and incomplete disclosure undermines the quality and completeness of information presented at such hearings. One solution is to commission an independent risk assessment from an impartial body, presented to the court alongside the parties' submissions. The defendant should have advance access to and the right to challenge the risk assessment.

Such assessments are routinely conducted in England and Wales (by the probation service)¹⁷⁰ and France (by APCARS)¹⁷¹ for the purpose of sentencing (but not currently in advance of preventive detention hearings). In 2018, California legislated for a new pre-trial risk assessment procedure for serious crimes.¹⁷² However, there are some serious reservations about whether algorithm-based risk assessment tools envisaged for this process are fit for purpose.¹⁷³ Critics point to the risk of the algorithm replicating and amplifying existing racial biases.¹⁷⁴ Risk assessment procedures must balance expeditiousness with the need for a fair and individualised approach.

¹⁷⁰ CPS, 'Pre-Sentence Reports', November 2007, available at: <https://www.cps.gov.uk/legal-guidance/pre-sentence-reports>.

¹⁷¹ Association de Politique Criminelle Appliquée et de Réinsertion Sociale, available at: <http://www.apcars.fr>.

¹⁷² California Courts, 'SB 10: Pretrial Release and Detention', available at: <https://www.courts.ca.gov/pretrial.htm>.

¹⁷³ Electronic Frontier Foundation, 'EFF Urges California to Place Meaningful Restrictions on the Use of Pretrial Risk Assessment Tools', December 2018, available at: <https://www.eff.org/deeplinks/2018/12/eff-urges-california-place-meaningful-restrictions-use-pretrial-risk-assessment>.

¹⁷⁴ The Guardian, 'Imprisoned by algorithms: the dark side of California ending cash bail', Sept. 2018, available at: <https://www.theguardian.com/us-news/2018/sep/07/imprisoned-by-algorithms-the-dark-side-of-california-ending-cash-bail>.

FULLY REASONED DECISIONS

National legislation should provide for all preventive measure decisions to be fully reasoned. Decisions should not be ‘formulaic’, but demonstrate the judges’ engagement with the facts of the specific case and the defendant’s personal circumstances. As a minimum, the decision must demonstrate the precise reasons why unconditional release is not appropriate in the specific case, as well as an assessment of necessity and proportionality of the preventive measure(s) ordered. Defendants should have the right to appeal poorly reasoned decisions on preventive measures on the ground that they fail to provide sufficient reasons.

Italy has recently amended its criminal procedure to impose a more onerous obligation on judges to provide reasons for decisions with reference to arguments raised by the prosecution and the defense.¹⁷⁵

GUIDANCE AND COMPULSORY TRAINING

Judges and prosecutors should be issued with authoritative guidance on conducting hearings and issuing decisions on preventive measures in line with international standards. The guidance should be clear and detailed enough to ensure the uniform application of national legislation and international standards across the jurisdiction. Guidance should set out the correct sequence of considerations, important principles and reminders with respect to key factors. Guidance should also be backed up by regular and compulsory training on key issues, new legislation, national and international jurisprudence as well as technological innovations that may have an impact on their decisions. Whilst guidance should be authoritative (requiring the need to justify any departure from it) and the training should be compulsory, judges and prosecutors should maintain a margin of appreciation to deviate from the guidance in cases where such deviation is necessary in the circumstances.

¹⁷⁵ Antigone, ‘The practice of pre-trial detention in Italy: Research Report’, September 2015, p. 32, available at: <https://www.fairtrials.org/wp-content/uploads/The-practice-of-pre-trial-detention-in-Italy1.pdf>: citing Law 47/2015 amending Article 274 of the Criminal Procedure Code.

Prosecutors in England and Wales are subject to the Code of Crown Prosecutors and are provided with detailed prosecution guidance on substantive and procedural matters.¹⁷⁶ All courtroom advocates and judges in England and Wales are subject to mandatory continuing education requirements.¹⁷⁷

SYSTEMATIC DATA COLLECTION AND ANALYSIS

To ensure that preventive measures procedures are fit for purpose, government departments and independent watchdogs must conduct systematic collection and analysis of data on preventive measures decisions and their impact. Good data will allow the legislature to translate international standards into procedures and measures that fit the cultural, political and socio-economic context of the jurisdiction. A key enabler of good data collection is a legislative requirement for judges to make a written record of all decisions on preventive measures.¹⁷⁸

CONCLUSION

International standards require courts to place the presumption of innocence and the right to liberty at the heart of preventative measures hearings and decisions. To this end, preventative measures may only be ordered on the basis of permissible grounds, clearly defined in law. Preventative detention must always be regarded as a measure of last resort, and to this end, judges must enjoy a broad discretion to consider a wide range of alternative measures. Unconditional release should be the starting point for all considerations: only once it is determined insufficient to

¹⁷⁶ CPS guidance on preventative measures is available online: CPS, 'Prosecution guidance: Bail', available at: <https://www.cps.gov.uk/prosecution-guidance/bail>.

¹⁷⁷ E.g.: see continuing education prospectus for salaried judges in England and Wales: Judicial College, 'Prospectus: April 2018 – March 2019', available at: <https://www.judiciary.uk/wp-content/uploads/2017/12/judicial-college-prospectus-courts-2018-2019.pdf>.

¹⁷⁸ The General Scheme of the Bail Bill laid before Irish lawmakers proposes to grant all defendants the right to receive a written record of the decision on preventative measures: Irish Penal Reform Trust, 'The practice of pre-trial detention in Ireland: Research Project', April 2016, p.66, available at: http://www.iprt.ie/files/PTD_Country_Report_Ireland_FINAL_updated.pdf.

meet the risks raised by the prosecution should other measures be considered. All measures should be subjected to the tests of necessity and proportionality, and only relevant facts and arguments should be considered. Alternatives to preventative detention must be viable, just and cost effective, and must not discriminate against members of certain socio-economic or racial groups.

The effective implementation of the above standards demands prompt, fair and fully reasoned decisions by competent and independent judicial bodies. Defendants must have access to effective legal assistance and must be afforded an equality of arms vis-à-vis the prosecution. Defendants should have an automatic right to seek and obtain the period review of preventive measures by fair and competent judges. In post-Soviet jurisdictions, particular efforts should be made towards tackling the culture of pro-prosecution bias. Prosecutors and judges should be provided with authoritative guidance and be required to participate in continuing education on, *inter alia* relevant international standards. Finally, rigorous data collection and analysis is necessary to improve judges, lawyers and prosecutors' understanding of and trust in alternative measures, and inform policy and legislative reform in this area.

III. THE CONCEPT OF EXTENDING THE RANGE OF PREVENTATIVE MEASURES

INTRODUCTION

The study of the Georgian legislation and court practice has shown that only detention and bail are perceived by the court and parties as workable alternatives to other preventative measures, as the courts hardly ever apply other types of preventative measures and even rare are the cases when the court resorts to an unconditional release. The study suggests that this is due to the lack of effective alternatives and low confidence of the court and parties to alternative measures. This chapter offers a range of alternatives elaborated by the GYLA based on international standards, best practices of European states and the interviews conducted within the study.

AN AGREEMENT NOT TO LEAVE AND DUE CONDUCT

The analysis of international standards and national legislation shows that the aim of the preventative measure is not to punish a person but to achieve the goals of the law such as to prevent further criminal activity, enforce a court judgment, etc. Consequently, the court should be eager to use less stringent measures that limit the rights of the person to the minimum extent and at the same time achieve the abovementioned goals. The preventative measure must not be linked to the charge and category of an offence, the judge must have broader discretion to determine independently which type of preventative measure would most likely ensure the achievement of the goals of the preventative measure. Therefore, the limitation attached to an agreement not to leave and due conduct should be removed and the measure be applied not only to crimes punishable by imprisonment for up to one year but also to all category offences.

BAIL

Application of bail as an alternative to detention creates social inequality, especially when it concerns a country like Georgia, where many citizens

are receiving social subsistence allowances.¹⁷⁹ It poses a risk that in the event of the failure to deposit disproportionate and inappropriate bail (*the minimum amount of 1000 GEL bail envisaged by the law can be an inadequately high amount in a specific case*), the bail may be replaced with the most severe sanction - detention. Therefore, it is expedient to remove the provision which envisages the minimum amount of bail 1000 GEL from the Code and equip the judge with the power to determine independently a relevant and proportionate amount of bail taking into consideration the personal circumstances of an accused.

As for **bail secured with detention**, the current case-law deems it obligatory to arrest a person when imposing bail, which disproportionately limits the court itself. It is important to provide a clear definition in the law that will prevent interpretation of the norm limiting the court to decide whether to use bail with or without detention.

HOUSE ARREST AS A PREVENTATIVE MEASURE

Under the existing legislation, it is actually possible to use **house arrest**, where the accused is controlled by electronic monitoring, as an additional preventative measure along with a main coercive measure. GYLA believes that home arrest must be a major preventative measure and deems it unreasonable to consider it as an ancillary one.

House arrest, night curfew or requiring the defendant not to leave the residence during specified times, which can be also controlled by means of an electronic device, is a strict preventative measure and the judge should deliberate whether it is possible to mitigate the risks indicated by the prosecution with other preventative measures rather than electronic monitoring. Actually, after detention, house arrest through electronic monitoring is the gross interference in the freedom of movement of a person, and it should not be considered an additional preventative measure. It is, therefore, necessary the house arrest to be defined as a major coercive measure.

¹⁷⁹ According to the data provided by the National Statistics Office of Georgia, in 2017, the number of subsistence allowance beneficiaries was 450423. http://pcaxis.geostat.ge/PXWeb/pxweb/ka/Database/Databas__Social%20Statistics_Social%20Protection/Beneficiaries_of_Subistence_Allowance.px/table/tableViewLayout2/?rxid=85999b07-769f-4cac-ae81-594234635249

FOLLOW-UP STAGES OF THE REFORM

Taking into account the results of the interviews as well as the current situation in Georgia, GYLA believes that the abovementioned amendments should be introduced at the first stage of the reform. After the comprehensive implementation of the amendments, the monitoring of practice may prove the necessity for a further increase in the judge's role. The next stage of the reform might require transferring the ancillary types of preventative measures to the list of major coercive measures.

Currently, the Georgian legislation envisages major and ancillary preventative measures. The ancillary preventative measures cannot be used autonomously but in conjunction with the major measures of restraint. GYLA believes that the judge should have the right to determine which preventative measure to apply for ensuring specific goals. Accordingly, we believe that the current "ancillary" preventative measures should be used as the major ones and the judge should decide which measure of restraint or multiple measures cumulatively to impose in each particular case.

Another issue that needs to be discussed in the later stage is forming an independent body with the duty of assisting the court. The independent agency will be authorized to obtain information, independently evaluate the risks to be submitted to the court along with motions of the parties, and supervise the enforcement of a preventative measure. GYLA believes that at this stage the body cannot be established as it might be related to considerable expenses and can cause some misunderstanding and distrust in judges and parties. Setting up the body needs a broader consensus of practicing lawyers, therefore, prior to its formation, debates should be held to determine whether it is necessary to have the institute.

IV. CONCLUSIONS AND RECOMMENDATIONS

CONCLUSION

The study of international standards and legislation of European countries has shown that there is no uniform approach to the types of preventative measures. Each jurisdiction, based on the cultural and socio-economic situation in the country, should come up with preventative measures that best suit the reality in the state. Consequently, the concept of the amendments proposed by the GYLA is not a precise analog of any country's legislation but is based on the current situation in Georgia. We believe that, compared to the existing reality, the abovementioned changes will raise the benchmark established by international standards.

The implementation of the above amendments will largely resolve the problems which the judiciary and the parties involved in criminal proceedings face in making decisions on preventative measures. A wide range of preventative measures will reduce to a minimum the cases of bail and detention where the court or parties resort to the argument that other alternative measures do not exist. In the event that the amendments are introduced, the standard of protection of the defendant's interests will increase to ensure that the accused is not imposed more severe and obviously disproportionate preventative measures than he or she deserves.

A wider range of alternative preventative measures will likely result in lowering the number of motions of prosecutors for bail unless they present adequate reasoning thereto, as the judge will have broader discretion in relation to preventative measures. This, in turn, will protect defendants living in social hardship against unlawful interference into their rights and the imposition of disproportionate preventative measures.

The study proved that the confidence of the parties and the court towards alternative preventative measures is problematic along with the existing gaps in the legislation. Therefore, in addition to the legislative amendments that will provide effective and workable alternatives, relevant agencies should train participants of criminal proceedings to raise their awareness of international standards and increase their confidence in alternative measures.

Furthermore, relevant bodies should develop a guideline for judges and prosecutors to ensure that court hearings reviewing and making decisions concerning preventative measures comply with international standards. The guideline should be clear and detailed to guarantee the uniform application of the national legislation and international standards throughout the country.

RECOMMENDATIONS

The issues identified through the study are complex touching the court, prosecution and defense counsel. There are shortcomings in the criminal procedure law, which the legislative body must address. GYLA has prepared the following recommendations:

To Parliament of Georgia:

- The Criminal Procedure Code of Georgia should be amended to exempt the preventative measure - an agreement not to leave and proper conduct - from the dependence on the category of a sentence or offence.
- The provision related to the amount of bail should be changed and the minimum amount be removed.
- The provision concerning the bail with remand detention provided for in the law should be modified so that it is an “empowering” and not a “binding” norm to the judge and to make non-custodial bail applicable to detained defendants as well.
- Home arrest should be determined as the main preventative measure. Consequently, electronic monitoring as an additional preventative measure should be removed.

To Common Courts:

- The courts should exercise the discretionary powers granted to them in relation to preventative measures. Judges should often apply less severe measures (alternative measures, other than detention and bail) or refrain from imposing preventative measures and use unconditional release if the prosecutor fails to substantiate the use thereof.

- The court must require from the Prosecutor's Office better substantiated motions on preventative measures and impose the burden of proof on the prosecution.
- At court hearings reviewing the detention as a preventative measure, the judge should allocate adequate time resources and prove the necessity to change or retain the measure of restraint;

To the Prosecutor's Office of Georgia:

- Prosecutors should better substantiate the necessity and expediency of a particular preventative measure and explain why other lenient measures cannot ensure the achievement of specific goals;
- Prosecutors should present relevant reasoning on the amount of bail requested and examine the personal circumstances of each defendant;
- The Chief Prosecutor's Office of Georgia develop guidelines on preventative measures and offer prosecutors regular and mandatory training sessions on how to present well-reasoned arguments when requesting preventative measures.

To High Council of Justice of Georgia:

- To develop guidelines on preventative measures pursuant to which court hearings and decision-making processes will be carried out in line with international standards. The guidelines should be clear and detailed in order to ensure the uniform application of national legislation and international standards all over the country.

To High School of Justice:

- To provide regular and mandatory training for judges on preventative measures.

To Georgian Bar Association:

- Regular and mandatory training on preventative measures should be provided. It will help lawyers to intensify their efforts to require more types of alternative measures and /or use unconditional release.