Main Tendencies And Challenges Outlined Through Four Year Criminal Trial Monitoring

Georgian
Young
Lawyer's
Association

Georgian Young Lawyers' Association

MAIN TENDENCIES AND CHALLENGES OUTLINED THROUGH FOUR YEAR CRIMINAL TRIAL MONITORING

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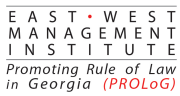

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EXECUTIVE SUMMARY

The aim of the report is to identify practical and legislative flaws, as well as positive trends, as a result of attending criminal court trials and analyzing identified cases. The given four-year monitoring report covers issues relating to criminal proceedings from March 2016 to February 2020 and key trends revealed since the launch of the monitoring to the present day.

The Georgian Young Lawyers' Association (GYLA) originally started monitoring criminal proceedings in October 2011 at Tbilisi City Court. In the subsequent period, the scope of the monitoring was further expanded on December 1, 2012, to involve Kutaisi City Court, and in March 2014 - Batumi City Court therein. The Telavi and Gori Courts have been added to the monitoring project since September 2016 and Rustavi City Court since September 2019. GYLA has prepared 14 court monitoring reports after the commencement of the monitoring.

Judiciary

The formal or insufficient role of the judge in exercising judicial control over the protection of human rights has been problematic for years. Formal approaches and frequently insufficient powers of judges failed to ensure proper judicial control in several cases where the prosecution presented inadequately substantiated motions demanding a certain form of preventive measure. Positive instances were observed in the decisions rendered by individual judges demonstrating individual approaches to specific defendants, taking into account their characteristics, and the potential impact of the verdict on the accused.

At the initial appearance court hearings, the judges, in majority cases, fail to publicly review the lawfulness of the remand detention. The court mainly touches upon the legality of the detention if the defense counsel challenges the lawfulness of the arrest. The problem becomes even more acute when the defendant is not represented by a lawyer at the first appearance court trial. The court judgments studied show that even in the court ruling judges do not provide proper reasoning as to why the court considered the detention lawful, what circumstances the court relied on, and to what extent there was a need for remand detention as per the evidence presented. Actually, court decisions delivered after reviewing the above matters at the court hearing and the oral hearing of opinions will gain a higher legitimacy, further ensuring equal conditions for the parties.

Judges show reluctance to a periodic revision of detention and in almost all cases, leave the custody in force. In most cases, the courts do not substantiate why it is necessary to extend the term of the detentions.

The Prosecutor's Office, almost always, even when the need to conduct an investigative action in urgent necessity is not apparent, carries out urgent searches/seizures by averting the court. The court, on its part, without exerting proper judicial control, usually declares the interference with the private life of individuals without prior permission of the court to be lawful.

The court still formally reviews the fairness and lawfulness of the sentence in the court-

room when signing a plea agreement. The court must show more diligence regarding the matter during the court hearing and explicitly declare whether it agrees with the qualification of the crime and punishment or not.

Delayed court hearings persist to be a problem. In some cases, defendants are deprived of the opportunity to fully enjoy the right to have their cases heard within reasonable timeframes. Neither the workload of the court nor any other circumstances that hinder the enforcement of the law may be referred to as a valid argument to justify the delay in a case proceeding.

The Prosecutor's Office of Georgia

The standard employed by the Prosecutor's Office in substantiating a motion for a certain preventive measure has barely changed. Even though employees of the Prosecutor's Office regularly take a number of training courses according to the professional development standards, their approaches to substantiating the motions for a particular measure of restraint fail to be specific-case oriented relying on specific circumstances of the case, are often general and formulaic in nature. This, in a number of cases, is due to an abundance of cases, the lack of interest in the personal characteristics of defendants or their property status, the inadequate examination of their psychological profiles, and the personality of the accused.

It is also noteworthy that when it comes to periodic review of remand detention applied as a measure of restraint, the Prosecutor's Office in rare exceptions asks the court to replace the detention with another measure of restraint, even if the threats referred to by the Prosecutor's Office at the first appearance court hearing have already been neutralized.

Sadly enough, the trend in the rate of searches/seizures conducted by the Prosecutor's Office under urgent necessity is increasing from year to year. Besides, the analysis of the court rulings has shown that the quality of substantiation of motions has not significantly improved over the years.

In the last three reporting periods, approaches of the prosecution to domestic crimes have become harsh. Plea agreements are rarely signed for the type of crime. Moreover, the efforts of the Prosecutor's Office demonstrated in recent years in terms of identifying intolerance as a motif of the crime more often should be highly appreciated.

Defense counsel

In 2016-2018, GYLA monitors more frequently attended the first appearance court hearings of the accused at which the defense counsel was either passive or insufficiently prepared. During the reporting period from March 2019 to February 2020, the defense was more involved in case proceedings and the situation improved in this regard. However, there were cases when the lawyer agreed with the prosecutor's position in anticipation of a plea agreement while the court did not consider the reasoning presented by the prosecution to be sufficiently substantiated.

The monitoring over the years has shown that the defense counsel does not effectively employ alternative measures to bail and detention. Even in cases where the current legislation envisages the possibility to conclude an agreement on not to leave and to behave properly as a measure of restraint, the attorneys fail to submit motions requesting it and merely ask for the minimum amount of bail.

The monitoring has also identified cases of inadequate communication between the accused and the defense lawyer at the moment of entering into a plea agreement, namely: not well-discussed positions, improper legal consultation, etc. There were instances of a defense lawyer meeting his or her client for the first time in the courtroom or enquiring which of the persons was the defendant.

Parliament of Georgia

GYLA has been arguing for years about the lack of types of restraining measures, which ultimately leads to the imposition of only two types of preventive measures (bail and remand detention) in practice. GYLA believes that the Parliament of Georgia must timely improve the legislation concerning preventive measures and introduce a wider range of preventive measures through a reform allowing both the parties to case proceedings and the court to apply alternative measures more often.

An amendment to the Criminal Procedure Code (CPC) introduced by the Parliament of Georgia in 2019 should be highly appreciated, according to which in case of any suspicion of torture, degrading and/or inhuman treatment of the accused/convict, the judge is entitled to apply to relevant investigative authorities for an appropriate response at any stage of the criminal proceedings.

Another significant step taken by the Parliament of Georgia was the adoption of the Law on State Inspectorate setting up the Service of the State Inspector instead of the Personal Data Protection Inspector's Office on July 21, 2018. The State Inspector's Service has the right to investigate cases of ill-treatment perpetrated by law enforcement officers. We appreciate the establishment of the institution although the scope of the authority of the Service is problematic; in particular, conducting the case proceedings still falls within the powers of the Prosecutor's Office, and it is the latter who can initiate criminal prosecution into the cases investigated by the Inspector's Service.

Legislation relating to domestic violence and domestic crimes has improved during the four-year reporting period. Major changes were targeted at tightening penalties for domestic violence; the imprisonment as a punishment for a crime under Article 126^1, Paragraph 1 of the Criminal Code was changed to 2 years instead of 1 year. The penalty in the form of the restriction of firearm-related rights has been added to the articles on domestic violence and domestic crimes.

For ensuring an effective fight against domestic violence, on January 11, 2018, the Ministry of Internal Affairs established a special department - the Department of Human Rights Protection and Quality Monitoring aiming at reducing and preventing the above-mentioned crimes. The activities of the department have relatively improved the efficiency of the investigation of these crimes, which was also manifested in the rate of crime detection.

The GYLA's monitoring of criminal proceedings over the years has reported the practice of imposing apparently disproportionate and incommensurable penalties for drug-related offenses, which is due to overly strict legislation. For five years, the Constitutional Court of Georgia delivered a number of decisions/rulings on drug-related offenses, which should have led to relevant legislative changes, yet no fundamental amendments have been introduced by the Parliament of Georgia in this respect.

The Law of Georgia on Amnesty passed on January 11, 2021, according to which the amnesty covered a large number of individuals accused and convicted of drug-related crimes, should be positively assessed. With the amnesty law, the state tried to alleviate the years-long harsh unbalanced drug policy through a single humanitarian act. Amnesty, as a humane act, has a positive effect on the legal status of convicts, but the legislators must take immediate steps to define the list of narcotic drugs, provide an adequate legal framework for sentences envisaged for drug-related offenses, and develop a drug policy oriented on taking care for drug addicts.

METHODOLOGY

All the information presented in the monitoring reports has been obtained as a result of attending and observing the court hearings. The GYLA's monitors did not communicate with the parties nor did they review case materials or final decisions delivered by the courts.

The monitors used questionnaires specifically designed for the project. The questionnaires include closed-ended questions requiring "yes" or "no" answers as well as open-ended questions that allowed the monitors to interpret and record the results of their observations in detail. Besides, the GYLA monitors, in some cases, made transcripts of court hearings and particularly important motions to add more clarity and context to their observations. Through the process, the monitors were able to collect impartial, measurable data and, simultaneously, identify other important facts.

The information obtained by the monitors as well as the compliance of the court's activities with the international standards, the Constitution of Georgia, and the applicable national laws were evaluated by GYLA's analysts.

The reports do not review or process all court proceedings or hearings, yet the information presented contains important and noteworthy data for members of the judiciary, the Prosecutor's Office, and the Bar Association of Georgia, as well as for members of the legislative and executive branches of the government. Furthermore, the factual circumstances of cases, the statements made by the participants of court trials, and the content of case materials did not fall within the scope of the court monitoring. In particular, GYLA did not analyze the circumstances concerning specific criminal cases to determine the guilt or innocence of the individuals.

Given the length of criminal proceedings and the various stages therein, the GYLA observers attended individual trials on a random basis rather than all hearings. However, there were several exceptions:

- The so-called "high-profile" cases that concerned former political officials;
- The cases involving gross violations of human rights, cases of high public interest, or other specific factors.

The given document reflects the challenges and positive trends identified by the GYLA monitoring in criminal justice in recent years, in particular from February 2016 to February 2020. During the period, GYLA prepared five criminal court monitoring reports - №10, №11, №12, №13, №14.

For the purposes of the given report, significant changes in criminal law over the last five years have been analyzed. GYLA requested relevant statistical data[1]and other important information from the General Prosecutor's Office of Georgia, the Ministry of Internal Af-

[1] The rate of investigation and prosecution into **domestic violence and domestic crimes** (all crimes in combination with Articles 126^1 and 11^1 of the CC and/or in conjunction with these Articles), **drug-related offenses** (crimes under Articles 260-274 of the CC (separate statistics for each article) and/or crimes in combination with these articles) and **cases of ill-treatment** (crimes under Articles 144^1-144^3, Article 332, paragraph 3(b)(c), Article 333, paragraph 3(b) (c), Article 335 and/or Article 378 (2) of the CC, and/or crimes in combination with these Articles).

fairs of Georgia, and the State Inspector's Service to further analyze the findings of the problematic issues and to scrutinize them in more depth.

For determining the degree of substantiation of court decisions, we requested relevant information from five courts, Tbilisi, Kutaisi, Batumi, Rustavi City and Telavi District Courts as well as studied court rulings and verdicts provided by the above-mentioned courts.[2]

The report analyzed key statistical data of the common courts that are publicly available. The voluminous and impartial information presented demonstrates the overall picture of criminal proceedings in recent years.

[2] In particular, court rulings concerning the imposition of the **measure of restraint**; court rulings on the use of **remand detention** as a measure of restraint; court rulings ordering **searches and seizure**; court rulings delivered as a result of merits hearing into Article 260, Paragraph 3 as well as those concluding plea agreements on the same article.

KEY FINDINGS

Court hearings determining preventive measures:

- Access to criminal court hearings is problematic. In the majority of cases, information about the courtroom and time of the first appearance court hearings is not published. Some courts do not at all publish information on first appearance court trials, in some others bailiffs make announcements concerning the hearings, while in most cases, interested parties obtain information about the initial appearance court sessions through the communication with court staff (secretaries and assistants to judges);
- During the four-year monitoring period, GYLA attended 1628 first appearance court hearings. From 1332 court hearings the court applied personal surety in merely 8 cases, the agreement on not to leave and proper conduct in 28 cases, no restraint measures in 51 cases. In the rest of the cases, the court imposed bail or remand detention as a measure of restraint;
- The last three reports prepared by GYLA have highlighted the growing rate of the unsubstantiated imposition of remand detention. For example, in the reporting period from March 2018 through February 2019, 49 (15%) out of 322 detention were unsubstantiated, while in the reporting period 2019-2020, 69 (21%) remand detention out of 334 were unjustified;
- The monitoring shows that the rate the Prosecutor's Office is requesting detention is increasing. In particular, in the reporting period from March 2017 through February 2018, the rate of motioning for remand defendants in custody was 45%, in subsequent years, it increased by 15 percent, then by 6 percent, finally accounting for 66%;
- The analysis of the approaches demonstrated by the court and the Prosecutor's Office creates the impression that the gravity of the crime committed and the severity of the sentence still serve as the basis for the application of the measure of restraint, which is contrary to Criminal Procedure Law and international standards;
- Based on the analysis of court rulings, in the motions submitted by the Prosecutor's Office for a custodial measure, we often meet the cases where the prosecutor refers to all grounds simultaneously for the use of remand detention while merely one ground can be provided with genuine reasoning;
- The analysis of the requested court rulings rendered concerning the measure of non-custodial preventive measures shows that, in particular, in the 62 court rulings on the application of the non-custodial measure of restraint,[3] the Prosecutor's Office requested bail in almost all cases (61 cases), and only in 1 case the Prosecutor's Office agreed to use an agreement on not to leave and proper behaviour.

[3] Telavi District Court forwarded 2 court rulings, Rustavi City Court - 9, Kutaisi City Court – 51.

Proper judicial control:

- In the last two reporting periods, the number of defendants appearing before the first court hearing with the status of the detainee has been significantly rising. In particular, 518 (76%) out of 686 defendants appeared in court as detainees, which is 8 percent higher than in the previous reporting period, and it is 20 percent more if we compare the data to the statistics prepared two years ago.
- The proper judicial control over the lawfulness of arrests is still an issue, which might be due to legislative flaws. In the majority of cases, judges did not examine the lawfulness of detention.
- The analysis of information provided by the courts revealed that the rate of searches/seizures by the Prosecutor's Office without a prior warrant of the court is increasing, as well as the rate of legalization of the procedural actions by the court has risen;
- The formality of reviewing the two-month remand detention prescribed by the law is still a problem. The court rarely replaces the detention with a lenient form of preventive measure even in the cases where the risks identified at the moment of imposing the remand detention as a measure of restraint have been minimized. During the reporting period from March 2018 through February 2019, the court left the custody unchanged in 195 (92%) out of 213 cases, while in the reporting period of the following years, the judges did not replace remand detention in 182 (96%) out of 190 cases at the court hearings reviewing the detention.

Plea agreements

- As per the statistics of the Supreme Court of Georgia, most of the cases deliberated are finalized by the plea agreement. The official data show that 63% of criminal cases reviewed and resolved by the courts in 2016 were settled by plea agreements; in 2017 – the rate was 70%; in 2018 - 66%; in 2019 - 67%; according to the data of 9 months of 2020, 66% of cases;
- According to the GYLA monitoring, the largest share of cases finalized through a plea agreement falls on drug-related offenses (30%) and property crimes (27%), as well as traffic violations (18%);
- The court approves a plea agreement during a court hearing mostly in a way that the judge does not discuss how lawful and fair the sentence stipulated in the plea agreement motion is. According to the data of the last year, the monitoring shows a slight improvement in this regard. In particular, if in previous years the lawfulness and fairness of the plea agreement was examined in 2-3% of cases, in the reporting period of March 2019 through February 2020, the rate amounted to 9%;
- Concluding plea agreements in a very short period without considering the factual circumstances of the case and/or only as a result of announcing the summary part of the motion is problematic;
- The plea agreement court hearings have demonstrated an increasing rate of proper communication between state-funded lawyers and defendants. If in 48% of the case

hearings, according to the report №12, the communication between the defense lawyer and his or her client was problematic, according to the report №13– the rate was 23%, and during the reporting period №14, the problem of communication between the public lawyer and the accused was observed only in 6% of cases;

Merits hearings:

- The information concerning preliminary court trials and merits hearings is generally made available through the website of the court and/or posted on the electronic board in courts, although there are cases when the information is inaccurate or incomplete;
- Prolonged criminal court hearings are a significant shortcoming identified by the GYLA's court monitoring. The monitoring has identified a number of cases that have been deliberated for years without a specific legal outcome. There are also cases of violation of the timeframes provided by the legislation, as well as cases when there is no direct violation of the timeframes prescribed by the law, yet the objective observer may develop the impression that the case is reviewed without adhering to reasonable timeframes;
- In 2016-2020, hearings on the merits were postponed in an average of 44% of cases. The postponement of court trials is mainly due to the failure of the prosecutor to present witnesses (32%) or the non-appearance of the parties (defense or prosecution) (28%). There are also frequent cases when the hearing is adjourned for the purpose of negotiating a plea agreement (22%);
- According to the data of 2016-2020, practically every third court hearing was delayed. Most of the court sessions were suspended due to the judge's reason (40%), and there were frequent cases when the hearing started late because another case was being reviewed in the same courtroom (21%), or the court hearing was not launched on time due to the late appearance of the parties (15%);
- The GYLA's court monitoring of the last four years has revealed a growing trend of acquittals. Furthermore, according to the official statistical data provided by the common courts, the rate of acquittals has increased, in particular, in 2016 the number of acquittals was 3%, in 2017 - 4%; in 2018 - 8%; in 2019 - 10%, and in the 6 months of 2020 - in 9% of cases;

Domestic crimes

- The analysis of the monitoring reports as well as official statistics retrieved from the Ministry of Internal Affairs of Georgia, the Prosecutor's Office and the courts have shown that the rate of reporting domestic violence and violence against women has increased;
- The identification of discrimination has also significantly improved, and for the last four year period, the Prosecutor's Office is demonstrating the increasing trend in in-

vestigating cases committed under the above motif; in 2017, crime committed due to gender intolerance was identified in 25 cases, in 2018 - 111, in 2019 – was committed by 120 accused, and in 2020 – by 178 accused;

- The Prosecutor's Office, in the majority of cases, appeals to the court for remand detention whenever a person is charged with domestic violence or domestic crime. During the court monitoring, in the period from February 2017 to February 2018, the Prosecutor's Office requested the imposition of remand detention as a measure of restraint in **79%** of cases, in the period of March 2018 - February 2019 – in **90%** cases, and in March 2019 - February 2020 - in **87%** cases;

Drug-related crimes

- Preventive measures requested for drug-related offenses, compared to other types of crimes, are more frequently unsubstantiated and/or insufficiently substantiated;
- The court verdicts studied in relation to offenses under Article 260, Paragraph 3 of the Criminal Code of Georgia (CC) show that most of the filed indictments result in a guilty verdict; in merely 3(4%) cases out of 86 verdicts, three defendants were acquitted. The conviction verdicts for drug-related offenses are primarily based on a combination of statements given by law enforcement witnesses and the findings of a chemical and narcotic drugs expertise;
- Strict sanctions envisaged for drug-related offenses in terms of legal consequences lead to individuals being placed in substantially unequal conditions when sentencing them with or without merits hearing (through a plea agreement);
- The results of the court monitoring and the judgments examined also demonstrate that real imprisonment is rarely used as a punishment for drug-related offenses resolved with a plea agreement, and if imposed, it is used for a short period of time and together with other additional penalties.

Crimes committed due to social hardship

- The court monitoring has confirmed that the prosecution and the judiciary do not pay proper attention to crimes committed due to social background, and their response is more focused on punishing the accused rather than on their subsequent rehabilitation/re-socialization;
- The GYLA's reports have identified a number of insignificant offenses concerning which the court could have maintained a more humane policy or refused to approve a plea agreement on the ground that the offense was of minor importance (as referred to in Article 7, Paragraph 2 of the CC) or terminated criminal proceedings during the pre-trial hearing;
- For its part, as per the discretionary power granted under the Procedure Code, the prosecutor was also entitled to refuse to prosecute or resort to an alternative prosecution mechanism - diversion, to avoid having a person convicted.

COMPARATIVE ANALYSIS OF TRENDS IDENTIFIED DURING THE FIRST APPEARANCE COURT HEARINGS - GENERAL OVERVIEW

INTRODUCTION

The exercise of an accused person's procedural rights in court begins with the first appearance court hearing.[4] The court reviews the lawfulness of the detention, assesses the goal and proportionality of the measure of restraint requested by the prosecution, and makes a decision on whether to impose a measure of restraint on the accused or to leave him or her without a preventive measure.

The first court hearing is important as the judge informs the accused of his or her rights, including the essence of the charge, qualification, type and size of the sentence to be imposed. Receiving information about the rights is especially important for defendants who are not represented by lawyers. Besides, at the first court hearing, the defense lawyer is given the opportunity to challenge the lawfulness of the detention and speak about the rights violated during the investigative stage.

The findings obtained as a result of the GYLA's criminal court monitoring conducted over the years or other studies[5] show that more types of alternative measures of restraint are needed. The restraining measures offered by the Criminal Procedure Code of Georgia at this stage do not provide a variety of choices. The court is entrapped within a strict framework established by the legislation and can impose only the following preventive measures - bail, agreement on to leave and to behave properly, personal surety, supervision by the commander of the behaviour of a military service member and remand detention.[6]

GYLA's recent report shows that even within the limited options, the court predominantly opts for only two types of preventive measures, bail and remand detention,[7] even in cases when the goals of the restraining measure[8] can be achieved through other lenient measures.[9]

Analysis of Court Trials

From September 2016 through February 2020, the GYLA monitors attended 1628 first appearance court hearings of the accused in court. Throughout the period, the court im-

[4] The Constitution of Georgia, Article 31.

[5] GYLA's research "Preventive Measure Usage Standards" (2020), pp. 41-42. Available at: https://bit.ly/3qFiJ46 [last viewed: 12.02.2021]

[6] The Criminal Procedure Code of Georgia, Article 199.

[7] According to the GYLA's Criminal Court Monitoring Report №14, the rate of imposing bail and remand detention as a measure of restraint in the reporting period of March-February 2020, as in the previous reporting period, was 98% in total.

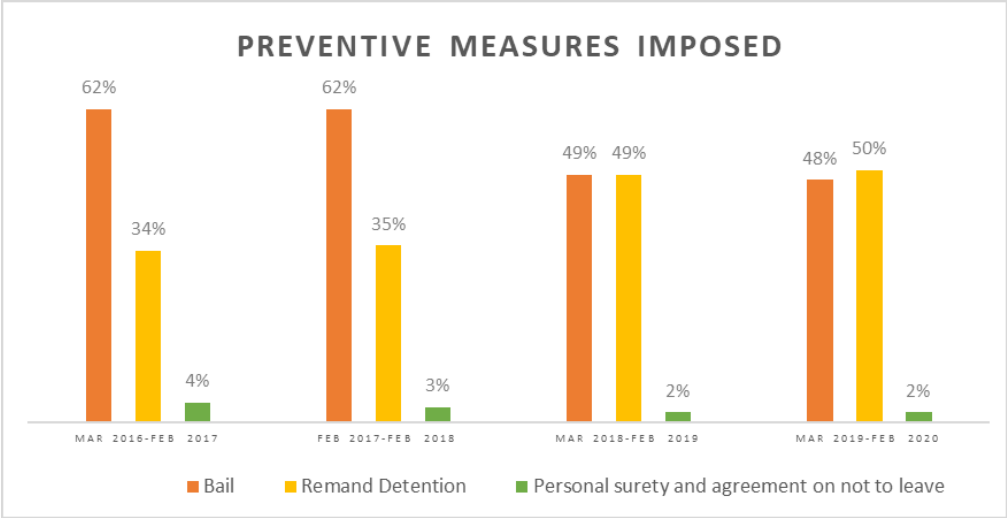
[8] The Criminal Procedure Code, Article 198 (1).

[9] According to the GYLA's Criminal Court Monitoring Report №14, in the reporting period of March-February 2020, out of 334 remand detentions imposed against defendants, 69 (21%) were unsubstantiated, and 98 (31%) of the 320 bail – were unjustified. Available at: https://bit.ly/2OmMWYO [last viewed: 15.02.2021].

posed mainly two types of restraining measures, bail and remand detention.[10] During the entire period, the rate of using alternative preventive measures did not exceed 4 percent, proving once again that bail and detention are deemed by the court as having no alternative. It should be also noted that the rate of imposing remand detention as a measure of restraint increased by 14 percentage from March 2017 through February 2018 compared to the following reporting period, which is rather high growth.

The chart below shows the rate of preventive measures imposed during the period from March 2016 through February 2020.

Chart №1



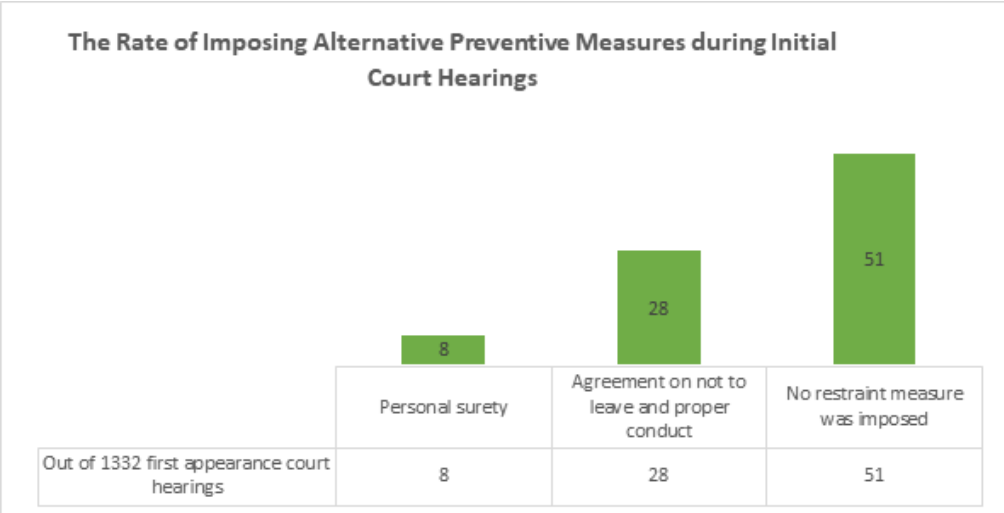
GYLA's monitoring shows that the judicial approaches vary by cities, and this difference is often revealed in the application of two types of alternative prevention measures. During the given reporting period, only the **Tbilisi City Court** imposed **personal surety**. It is unclear why other district or city courts refused to use personal surety even in the cases of insignificant or negligent crimes, given that the personal guarantee can be applied for all categories of crimes. The Kutaisi, Batumi, Gori, and Telavi Courts left the accused without a measure of restraint in only 18 cases in total.[11]

[10] GYLA's Criminal Court Monitoring Report №14 (2020), p.17.

[11] See GYLA's Criminal Court Monitoring Report №12, p. 16-17; Report №13, p. 20-21 and Report №14, p. 18.

The following chart shows the rate of restraint measures imposed on defendants during the first appearance court hearings from March 2017 through February 2020.[12]

Chart №2



The above figures vividly show the extent to which the court resorts to bail and remand detention, rarely imposing alternative measures of restraint even when there are relevant legal grounds and circumstances to do that.

DURATION OF INITIAL APPEARANCE COURT HEARINGS

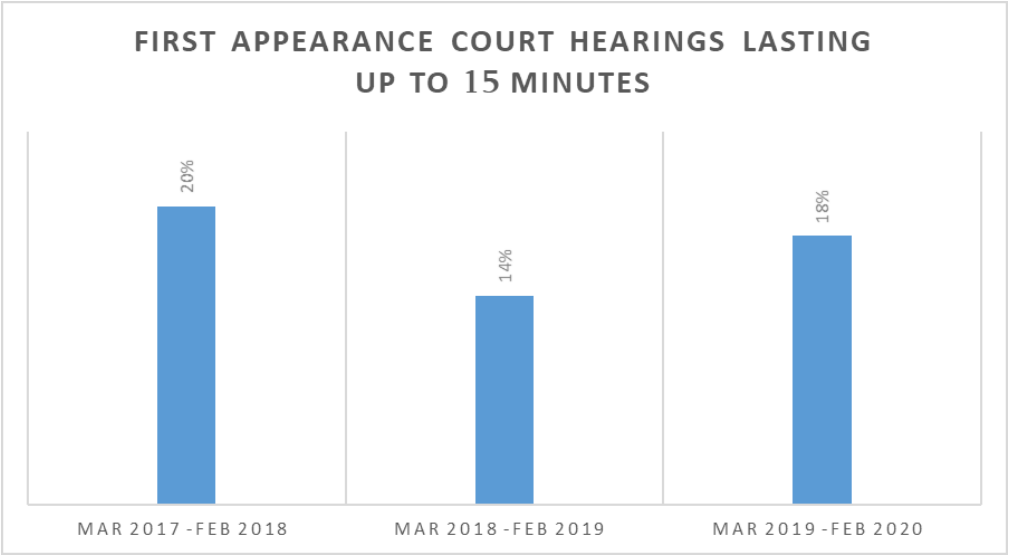
The active participation of the judge, the circumstances to be established and informed by the judge grants special importance to the initial court hearing of the accused.[13] The judge is obliged to inform the accused of the essence of the accusation, the type and size of the expected sentence, to review a motion submitted by the prosecution requesting a measure of restraint and the opinion of the defense, to listen to the accused, and in the case of the arrested defendant, to consider the lawfulness of the remand detention. Communicating all these procedures in a language attainable to the accused and hearing his or her opinion naturally requires time. Defendants seldom have a good command of legal terminology or criminal law, which is why it is important to inform them of their rights or other procedural issues in a language they understand during the court hearing, which is virtually impossible to be done within 15 minutes.

[12] Does not contain data from Criminal Monitoring Report N11 (269 first appearance court sessions).

[13] The Criminal Procedure Code, Article 197.

The following chart shows the length of first appearance court hearings not exceeding 15 minutes from March 2017 through February 2020.

Chart №3



KEY TRENDS IN THE IMPOSITION OF DETENTION AS A MEASURE OF RESTRAINT

An overview of the legislation

Imprisonment, given the degree of interference with a person's right to liberty, is the most severe form of preventive measure, since it isolates the accused from society. Remand detention is used only if it is the only way to neutralize the long-term threats[14] posed by the person. To confirm the existence of the risks, the prosecution must substantiate the appropriateness of detention at all times by the standard of reasonable doubt.

The court, on its part, must adequately assess the motion submitted by the prosecution, take into account the degree of risks and dangers, and substantiate the decision concerning the use of detention. Ordering a person to remand in custody by the court must be deemed unreasonable when the decision is not based on specific factual circumstances, the threats are abstractly assessed, and relevant goals can be achieved by other lenient measures of coercion.

Due to its restrictive nature, remand detention shall be used for a period strictly defined by law, the decision of the court shall be subject to appeal, and if the decision of the first instance court remains in force, the detention shall be subject to a periodic review.[15]

[14] According to Article 205, Paragraph 1 of the CPC, "remand detention as a measure of restraint shall be applied only if it is the only means to prevent: a) the accused from hiding and from interfering with the rendering of justice; b) the accused from interfering with the collection of evidence; c) the accused from committing a new crime.

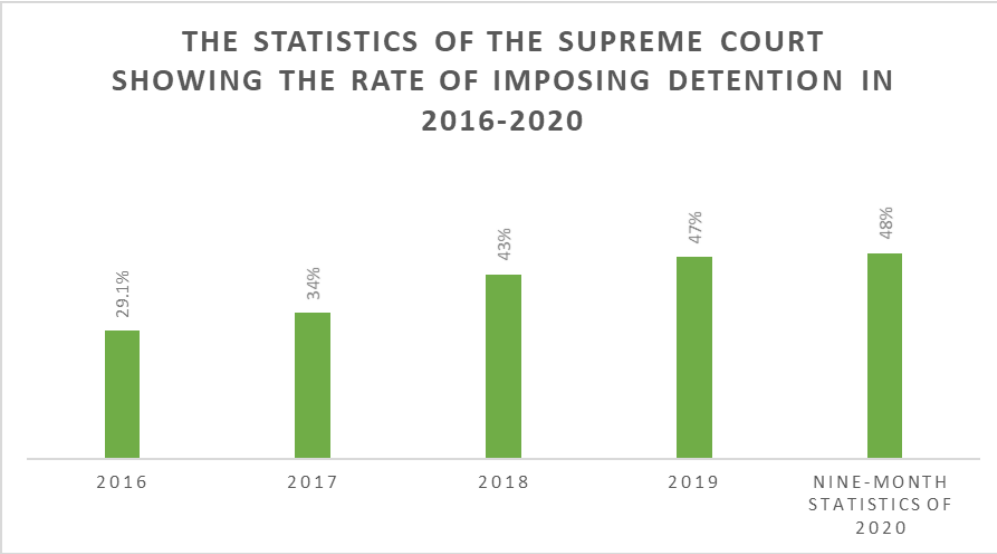
[15] The Criminal Procedure Code, Article 206.

Comparative analysis of court hearings

The GYLA's monitoring revealed that the imposition of detention as a measure of restraint is accompanied by two problems from a practical point of view. One is the high rate of detentions applied each year not supported by balanced reasoning and the other is ordering a person to be jailed without offering relevant substantiation for the detention.[16]

The following chart shows the statistics of the Supreme Court, statistics on the application of remand detention by the Courts in 2016-2020.[17]

Chart №4

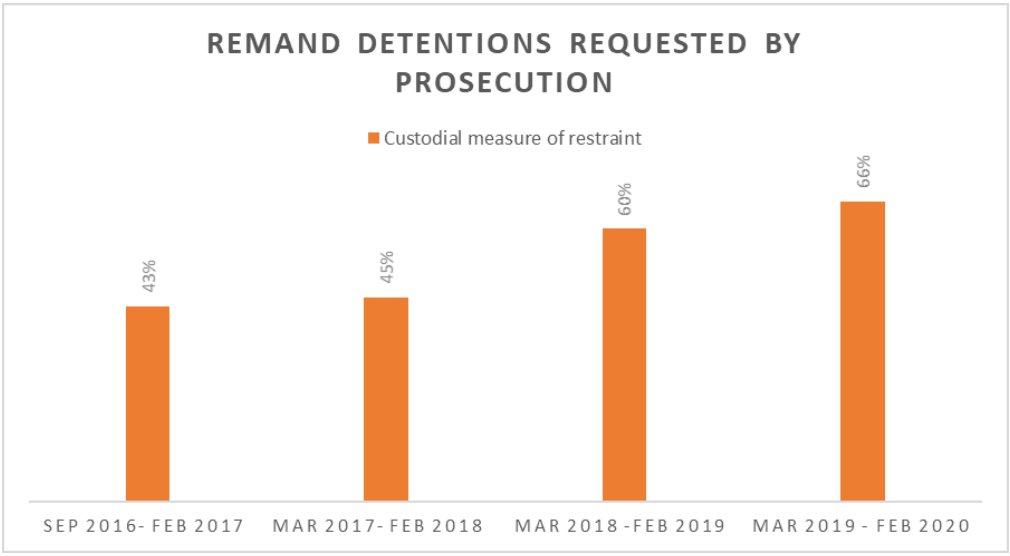


[16] GYLA's Research "Preventive Measures Usage Standards" (2020), p. 19.

[17] According to the data of the Supreme Court of Georgia, in 2016, out of 10598 preventive measures imposed by the courts, detention was used in 3082 (29%) cases, in 2017, 3249 (34%) out of 9501 preventive measures were detentions, in 2018, in 4308 (43%) of 9997 cases detention was imposed as a preventive measure, in 2019, out of 11031 restraint measures, detention was used in 5205 (47%) cases. According to the data of 2020, out of 7322 restraint measures, detention was used in 3510 (48%) cases. See the statistics of the Supreme Court of Georgia on the imposed restraint measures from 2016 to 2020 inclusive, available at: http://www.supremecourt.ge/statistics/ [last viewed: 15.02.2021].

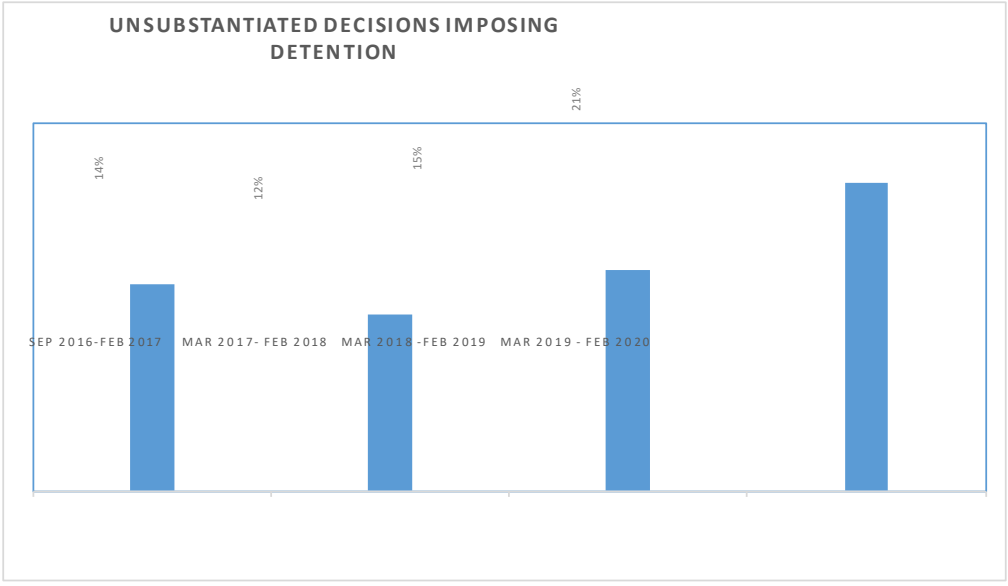
The chart below shows the frequency of detentions requested by the prosecution (September 2016 through February 2020)

Chart №5



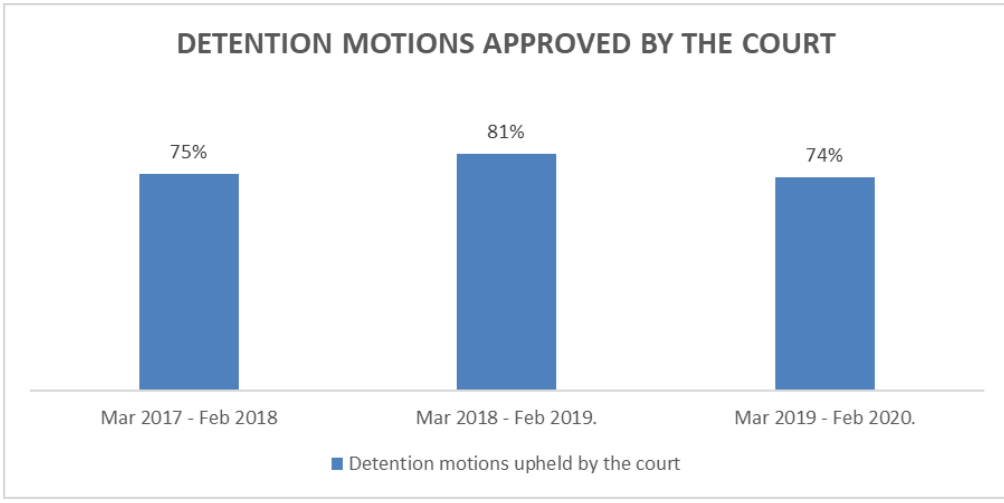
The chart below shows the rate of unsubstantiated decisions ordering detention as a measure of restraint (September 2016 through February 2020).

Chart №6



The chart below shows the rate of granting by the court the motions requesting remand detention as a measure of restraint (September 2016 through February 2020)

Chart №7



As a result of the GYLA monitoring, it was revealed that the rate of requesting detention by the Prosecutor's Office was increasing every year during the reporting period. The most alarming in terms of the growing trend was the data recorded in the last 2019-2020 reporting period, according to which the rate of demanding jail for the accused persons by the Prosecutor's Office increased by 6 percent compared to the previous reporting period. The Prosecutor's Office requested custody against 454 (66%) out of 686 defendants, of which the court refused to allow the detention in the case of 116 (26%) offenders. On a positive note, compared to the period from March 2018 through February 2019, the rate of allowing detention requested by the Prosecutor's Office reduced by 8 percent, although it should be also noted that the percentage of unsubstantiated detentions increased by 6 percent during the reporting period 2019-2020.[18]

GYLA welcomes the trend towards decreasing the number of granting the motions for detention, however, the growing rate of unsubstantiated detentions suggests that the court still does not view imprisonment as the strictest form of restraint, which must be resorted to only in exceptional cases.

Analysis of court rulings ordering detention

GYLA studied 83 court rulings[19] provided by various courts ordering remand detention, in which the prosecution requested and the court granted the detentions in all requested cases. The review of the court rulings further verified the existence of problems men-

[18] GYLA's Criminal Court Monitoring Report №14, (2020) p. 26.

[19] Tbilisi City Court – 14 court rulings, Kutaisi City Court - 49 court rulings, Rustavi City Court - 17 court rulings, Telavi District Court - 3 court rulings.

tioned in GYLA's annual reports - in relation to requesting and granting unsubstantiated or inadequately substantiated motions demanding custody.

During the court monitoring, we are often deprived of the opportunity to hear in the courtroom detailed substantiation of the measure of restraint imposed by the court. The court rulings studied showed as well that the court does not pay much attention to the reasoning part in the court judgments. For example, the judge does not examine the **lawfulness of an arrest** at all at a court hearing unless it is challenged by the defense and the review of the court rulings has shown that the situation in this respect is not better in the court judgments either. Here as well, if the defense does not file a complaint about the arrest, the judge resorts to a few words and formally explains that there were no procedural violations during the arrest.

It is also noteworthy that in most parts of the court judgment the judge does not refer to the circumstances brought by the defense counsel, does not expand on why the court did not agree with the measure of restraint proposed by the defense, yet provides extensive reasoning why the court considered the prosecution's opinion to be more valid.

It is problematic that in 37 (44%) cases the court did not provide the description of the factual circumstances of the case in the court verdicts, in 27 (32%) cases the judge failed to pay proper attention to the personality of the accused. In most of the decisions delivered by the court, we can identify cases where the prosecutor indicates all the grounds for the use of detention while only one threat is actually confirmed by the evidence and merely a general reference is offered regarding the others. One can get the impression that the above serves only the purpose of supplying the motion with diverse legal terminology rather than explaining the grounds for the actual use of detention.

Of the 83 court judgments studied, remand detention requested by the prosecution and granted by the court was substantiated in 68 (82%) cases, while unsubstantiated or inadequately substantiated cases were found in 15 (18%) of them.

We deem detention unsubstantiated when it is not used as a last resort for the restriction of the defendant's right to liberty, as well as in cases where the judge does not focus on the personal characteristics of the accused, does not discuss the specific threats posed by the defendant, makes only abstract reference to risks and imposes detention even when the prosecution fails to substantiate the necessity to isolate the defendant from society and to impose the most severe form of restraining measure.

KEY TRENDS IN THE APPLICATION OF BAIL AS A MEASURE OF RESTRAINT

An overview of the legislation

The bail is a strict form of restraint in which the accused, in order to ensure his or her proper conduct, shall pay a specific amount of money to the state budget. According to Article 200 (2) of the CPC, the amount of bail is calculated taking into account the gravity of the crime and the financial condition of the accused. The minimum amount of bail shall be 1000 GEL. The defendant or a person posting the bail or equivalent property shall be refunded the amount paid in full or the property shall be released within one month after the enforcement of the court judgment. The above provision shall apply if the accused thoroughly fulfills the obligation forced on him or her and the measure of restraint imposed has not been replaced with a more severe measure of restraint.[20] Furthermore, the law also allows other persons to deposit bail in favour of the accused. However, it should be expressly noted that in determining the amount of bail, the prosecution has the obligation to first assess the property status of the accused, the gravity of the crime committed and based on these factors request a specific amount of bail rather than refer to the assets of the close relatives of the accused.

There are two types of bail: bail with and without remand detention. Custodial bail means that the accused shall remain in a penitentiary facility until he or she deposits the bail amount (or 50% of the bail).[21]

Therefore, an unreasonable and excessively large amount of bail is, in fact, equivalent to the detention of the person (the so-called "unacknowledged detention"). Imposing an unsubstantiated or excessive amount of bail, whenever it is secured with custody, poses a particularly high risk.[22]

Analysis of court hearings

The GYLA's monitoring revealed that often the prosecution requested unsubstantiated bail without obtaining adequate information about the financial status of the accused. In such cases, the prosecution limited itself to justify the imposition of bail and avoided substantiating the amount of bail. It is true that the court tried to determine the property capabilities of the defendants, yet in many cases, the bail imposed on the accused was neither a proportionate nor appropriate measure.

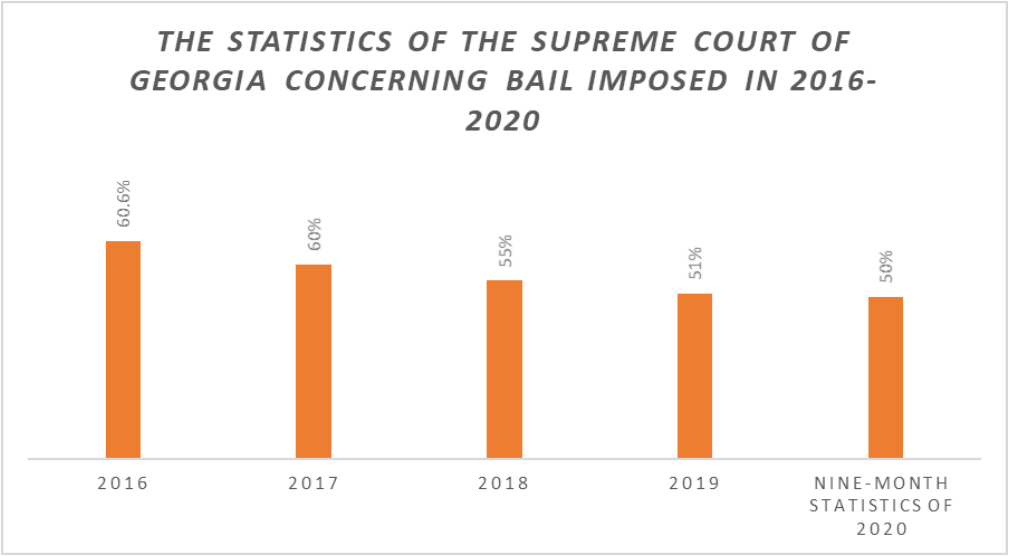
[20] The Criminal Procedure Code, Article 200.

[21] The Criminal Procedure Code, Article 200(6).

[22] GYLA's Research "Preventive Measure Usage Standards" (2020), p.30-31.

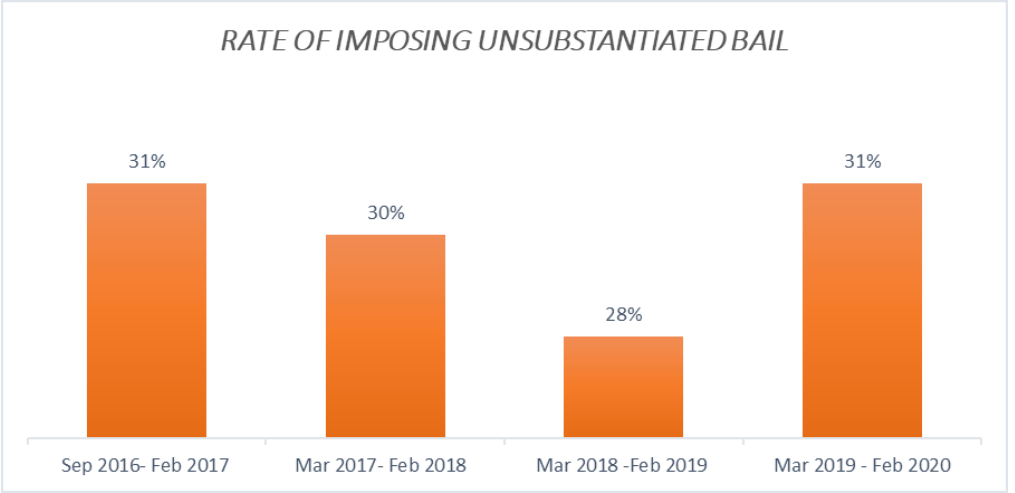
In the following chart, you can see the statistics provided by the Supreme Court of Georgia regarding the application of bail as a measure of restraint in 2016-2020.[23]

Chart №8



The chart below shows the rate of the unsubstantiated amount of bail identified by the GYLA's monitoring from 2016 through 2020.

Chart №9

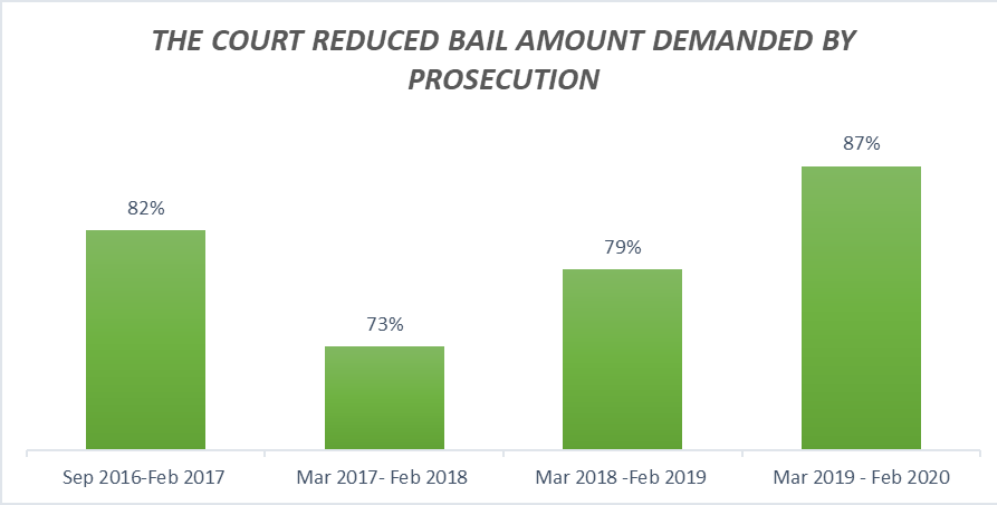


[23] According to the statistical data of the Supreme Court of Georgia, in 2016, out of 10598 preventive measures imposed by the courts, bail was used in 6419 (61%) cases, in 2017, 5804 (61%) out of 9501 preventive measures were bail, in 2018, in 5460 (55%) of 9997 cases bail was imposed as a preventive measure, in 2019, bail was used in 5613 (51%) out of 11031 cases. According to the data of the nine-month period of 2020, out of 8228 restraint measures, bail was used in 4071 (49%) cases. See the statistics of the Supreme Court of Georgia on the imposed restraint measures from 2016 to 2020 inclusive, available at: http://www.supremecourt.ge/statistics/ [last viewed: 18.02.2021].

The prosecution allocates less time to reasoning the amount of bail and obtaining relevant documentation. Often the prosecution refers to abstract dangers and fails to substantiate why the bail of 2000 GEL can ensure the proper conduct of the offender and the amount of 1000 or 1500 GEL may fail to achieve the same goal. It should be noted that the question was raised by defense lawyers and judges in a range of court trials, which should be highly appreciated. The chart below clearly shows that the amount of bail demanded by the prosecution is largely unsubstantiated.

The following chart demonstrates the tendency of the court in reducing the amount of bail requested by the prosecutor during the monitoring period from 2016 through 2020.

Chart №10



Bail secured with remand detention

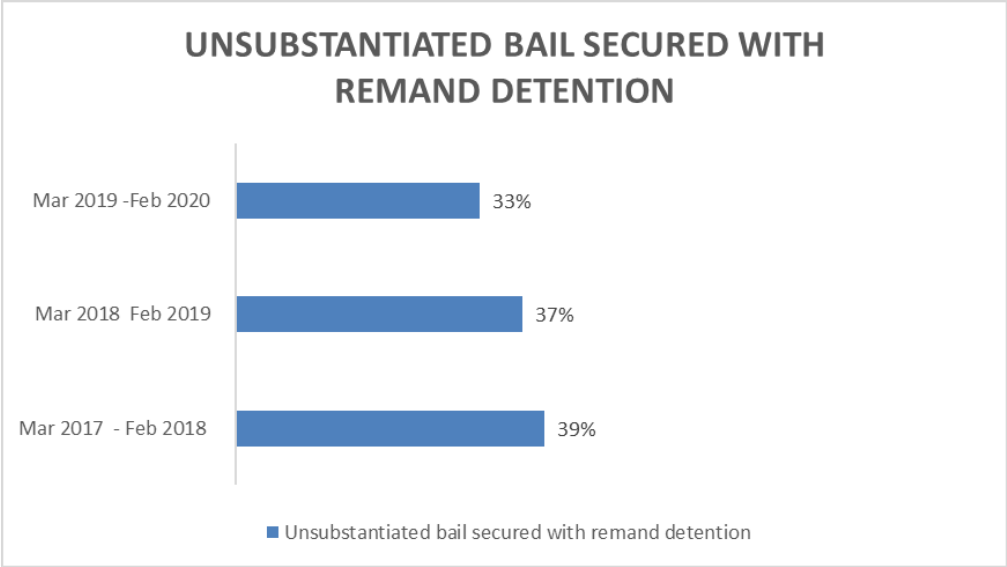
The rate of unsubstantiated or inadequately substantiated bail requested and granted by the court becomes a much bigger problem when the accused person appears before the court as a detainee. Given the vague legislation and case-law, judges impose, except for rare cases, detention to secure bail in all cases. The problem is further exacerbated by the annual increase in the number of persons appearing in court as detainees. For example, in the reporting period from March 2016 through February 2017, 48% of defendants appeared in court as detainees, in the following years the figure increased even further to reach 76% percent in the reporting period from March 2019 to February 2020 inclusive.

In the event of detainees, we often encounter a case where there is no ground for a person to remain in custody, although the amount of bail disproportionate to the property of the accused transforms the remand detention into a long unjustified imprisonment. In cases of detained defendants, the court should better assess the defendant's paying capacity when imposing bail, as the bail ordered by the court might not be posted, converting the bail into unacknowledged detention. These are the cases where both the prosecution and the court unanimously agree that there are no grounds for applying the most

severe measure of restraint, they request and impose the bail against the accused, yet in reality, the person not posing any threats remains in custody due to the lack of financial resources to secure the bail.

In the chart below, you can see the rate of imposing unsubstantiated custodial bail during the period from March 2017 through February 2020.

Chart №11



It is necessary to regulate the legislation so that the court is obliged to ensure predominantly the right of the individual to liberty rather than turn the person into a prisoner due to lack of required material resources. However, the current case-law shows that the court often imposes custodial bail on the detainee, even when it is apparent to the court that the detainee will not be able to post the bail while locked up in the detention facility. Examples of good practice can be deemed the decisions delivered by individual judges in favour of the right to liberty and imposing bail in the case of detained defendants. However, such decisions are scarce and may not alter the whole picture.

PERSONAL SURETY

When providing personal surety, trustworthy persons shall assume a written obligation to ensure the appropriate behaviour of the accused and his or her appearance before an investigator, prosecutor, and court.[24] The legislators do not limit the circle of guarantors; the personal surety can be any person who will be able to fulfill the above obligations. The number of guarantors is determined by the court, and apart from persuading the court, the consent of the guarantor and the accused shall be sought for the use of the personal surety. In addition, the guarantor shall be informed of the essence of the charge, the pun-

[24] The Criminal Procedure Code, Article 203 (1).

ishment that may be imposed on the accused, and the liability imposed on the guarantor if the latter fails to ensure the proper behaviour of the accused.

It should be noted that in practice the parties to the proceedings do not view personal surety as a real alternative to the restraint measures, and the rate of requesting personal guarantee is virtually zero. It is important that personal surety does not depend on the category of a crime.

Even in cases of less serious crimes, the prosecution very rarely motions for the use of personal surety, and the reluctance of the defense in this regard is further promoted by the frequency the court rejects personal surety. This was evidenced by the reporting period of GYLA from March 2019 through February 2020, during which the court applied personal surety only based on the motion of the Prosecutor's Office. In the previous reporting period, only the Tbilisi City Court used the measure three times, from March 2017 through February 2018, the GYLA's court monitoring recorded the application of personal surety by the Tbilisi City Court in 4 cases.

According to statistics of the Supreme Court,[25] the rate of applying a personal guarantee, in fact, equals zero. Specifically, in 2017, personal surety as a measure of restraint was used in only 34 (0.3%) out of 9459 cases, while in 2018 the figure was further reduced amounting to only 19 (0.2%) of 9935 defendants.

In summary, the ineffectiveness and infrequent use of the measure in practice is due to the fact that neither the parties nor the court consider the measure of restraint a real alternative. Furthermore, according to the current provision, the court needs to receive a motion of a party to apply personal surety. Besides, the personal guarantor must be a person trusted by the court to control the conduct of the accused and to ensure that the accused does not abscond, does not commit a new crime, and does not influence the witness. Therefore, courts do not typically use personal guarantee as a measure of restraint, since they do not deem it a real and effective alternative to detention and bail.[26]

AGREEMENT ON NOT TO LEAVE AND TO BEHAVE PROPERLY

An agreement on not to leave and to behave properly is applied only in crimes that do not envisage imprisonment for a term of more than one year.[27] The framework provided by the legislators is one of the reasons why the measure is not used proactively.

Nevertheless, even in cases of violations for which the law does not restrict the application of the measure of restraint envisaging an agreement on not to leave and appropriate behaviour, the parties rarely submit motions for and the court barely imposes the measure. The court monitoring shows that during the reporting period from March 2017 through February 2018, the court applied the restraining measure only 7 times.[28] Dur-

[25] GYLA's Research "Preventive Measure Usage Standards" (2020), p. 35.

[26] Ibid. p.44.

[27] The Criminal Procedure Code, Article 202.

[28] GYLA Criminal Court Monitoring Report №12, (2018) p.16-17. Available at: https://bit.ly/3tcaYog [last viewed: 18.02.2021].

ing the subsequent reporting period, the court could have used an agreement on not to leave and due conduct, yet applied it only in 7 cases, and in the remaining cases imposed bail or remand detention on the defendants.[29] During the reporting period from March 2019 through February 2020, the Prosecutor's Office and the court could have applied the above measure of restraint in 57 cases but used it merely in 13 cases.[30]

As part of a study by GYLA on standards of applying preventive measures, researchers examined 37 court rulings concerning the use of restraining orders in criminal cases envisaging imprisonment for up to one year. It was found that in only 4 (11%) out of 37 cases did the defense counsel submit a motion for the application of the above measure, and the court granted it in 3 cases. Furthermore, the organization believes that the agreement on not to leave and due conduct could have been used in 8 more cases given the circumstances of the case and the personality of the accused. The analysis of the court judgments confirms that the defense is unequivocally passive and usually does not request the agreement on not to leave and proper behaviour or any other alternative measures of restraint. For its part, the court does not either show due diligence in this respect, nor has the Prosecutor's Office demanded the use of the above measure in any cases.[31]

ANALYSIS OF COURT RULINGS IMPOSING NON-CUSTODIAL MEASURES

The results of the court monitoring are further supported by the analysis of the court judgments requested for the purposes of this study. In total, GYLA reviewed 62 rulings imposing non-custodial measures.[32] In almost all cases (61 cases), the Prosecutor's Office demanded bail, and only 1 case was reported where the Prosecutor's Office requested an agreement on not to leave and appropriate conduct. In all 62 cases, the court granted the prosecutor's request to apply the specific restraining measures.

The court rulings in some cases are worded in such a similar and blanket manner that one may develop the feeling that they have been rendered into individual cases.

According to GYLA, a motion submitted by the Prosecutor's Office must be deemed unjustified when the prosecution only superficially refers to the threats and fails to discuss the specific circumstances of the case, as well as when the prosecutor at the moment of requesting bail does not examine the defendant's financial capabilities and solvency.

The analysis of the court rulings showed that the **motions presented by the Prosecutor's Office** in 36 (58%) cases were unsubstantiated or insufficiently substantiated. The impression is created that the prosecution makes less effort to substantiate less stringent preventive measures other than detention. However, the law obliges the prosecution to substantiate the necessity and expediency of using any type of preventive measure.

The court rulings analyzed proved that the threat of absconding is quite problematic to

[29] GYLA Criminal Court Monitoring Report №13, (2019) p.42. Available at: https://bit.ly/3rG3sl9 [last viewed: 18.02.2021].

[30] GYLA Criminal Court Monitoring Report №14, (2020) p. 35.

[31] GYLA's research "Preventive Measure Usage Standards," (2020), pp.37-38.

[32] Telavi District Court provided 2 court rulings, Rustavi City Court - 9, Kutaisi City Court - 51.

substantiate. The Prosecutor's Office mainly refers to the fear of the accused of imminent punishment when reasoning over the threat of hiding. Two instances were reported where the prosecution irrelevantly indicated the threat of committing a new crime. The prosecutor was referring to the threat of continuing criminal activity while the offender was accused of a negligent crime, namely, the offense under Article 276 of the Criminal Code – violating traffic safety or operation rules.

In another case, when substantiating the threat of committing a new crime, the prosecutor referred to the diversion previously used against the accused, indicating that the defendant committed the same offense despite the leniency showed towards him.

The information about diversion is confidential and it is inadmissible for the prosecution to disclose the information known to it at the court hearing and even to use it to characterize the accused or as a likely precondition for committing a new crime. Persons under diversion are not considered to be convicts, thus any act committed by them in the past for which they were subjected to diversion must not be used against them in any way in the future.

Similar to court monitoring, the analysis of the court rulings also shows that generally the court does not grant the motion of the Prosecutor's Office in the part of the bail amount and in most cases (84% of cases)[33] reduces the amount requested, which is the indicator of the unreasonableness of bail.

On its part, measures of restraint in 15 (24%) cases **imposed by the court** were unsubstantiated or improperly substantiated.[34]

In 28 (45%) court judgments studied, the judge did not pay attention to the individual characteristics of the accused. In 17 (27%) cases of these, the judge generally noted that the personal characteristics of the accused were taken into consideration, yet the judge did not specify what was meant by that, while in 11 cases, the judge did not refer to the circumstances at all.

[33] In 51 out of 61 cases, the judge reduced the amount of bail demanded by the prosecution.

[34] We consider the decision rendered by the court to be unsubstantiated when the court imposes a more severe form of restraint on the accused than required, also does not take into account when making a decision the nature of crime committed and personal characteristics of the accused such as the personality, his/her occupation, age, health condition, marital and property status, compensation for the inflicted damage, violation of a previously imposed restraining order and other circumstances.

COMPARATIVE ANALYSIS OF IMPLEMENTATION OF JUDICIAL CONTROL OVER THE LAWFULNESS OF DETENTIONS

AN OVERVIEW OF THE LEGISLATION

The right to liberty and inviolability of personal life is one of the most important rights, the protection of which shall be provided with no distinction of territorial, political, legal or international status[35] and all states are equally obliged to ensure the right to liberty of the person. The right to liberty[36] is guaranteed by the Constitution of Georgia,[37] as well as by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Nevertheless, all these documents also provide the rules of restriction of liberty and a body authorized to restrict liberty.

For the purposes of the Criminal Code of Georgia - an arrest is a short-term restriction of a person's liberty.[38] The Criminal Procedure Law recognizes two rules for detaining a person: arresting a person with a prior warrant of the judge or under the grounds of urgency if the appropriate grounds do really exist. In order to obtain a prior ruling of the court to detain a person, the prosecutor shall apply to the court, which shall issue a relevant ruling without an oral hearing. The decision of the court shall not be appealed.[39]

The legislators determine the period of detention of a person, which shall not exceed 72 hours. No later than 48 hours after the arrest, the detainee shall be handed an order of conviction, and any violation of the period shall become the basis for the immediate release of the detainee.[40] The lawfulness of the detention of persons arrested without a court ruling shall be reviewed by the court at the first appearance court hearing, which is very important for revealing the facts of gross interference with the person's right to liberty and reducing such risks. Judicial control enables the accused to speak in public about the lawfulness of the detention. The decision delivered by the court after hearing the positions of both parties is highly legitimate, as the judge does not rely solely on the arrest protocol submitted by the prosecution. It is of paramount importance that the court should also check the lawfulness of the arrest conducted with a prior warrant of the court, given that the court decision on detention cannot be appealed. In the event that the court deems an arrest unlawful, the accused has the right to request and receive compensation for the damage sustained as a result of unlawful procedural actions through civil/administrative proceedings.[41]

[35] The Universal Declaration of Human Rights, Article (2).

[36] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article (5).

[37] The Constitution of Georgia, Article (13).

[38] The Criminal Procedure Code, Article 170 (1).

[39] The Criminal Procedure Code, Article 171 (1).

[40] The Criminal Procedure Code, Article 174 (5).

[41] The Criminal Procedure Code, Article 38 (11); Constitution of Georgia, Article 18 (4).

ANALYSIS OF COURT HEARINGS

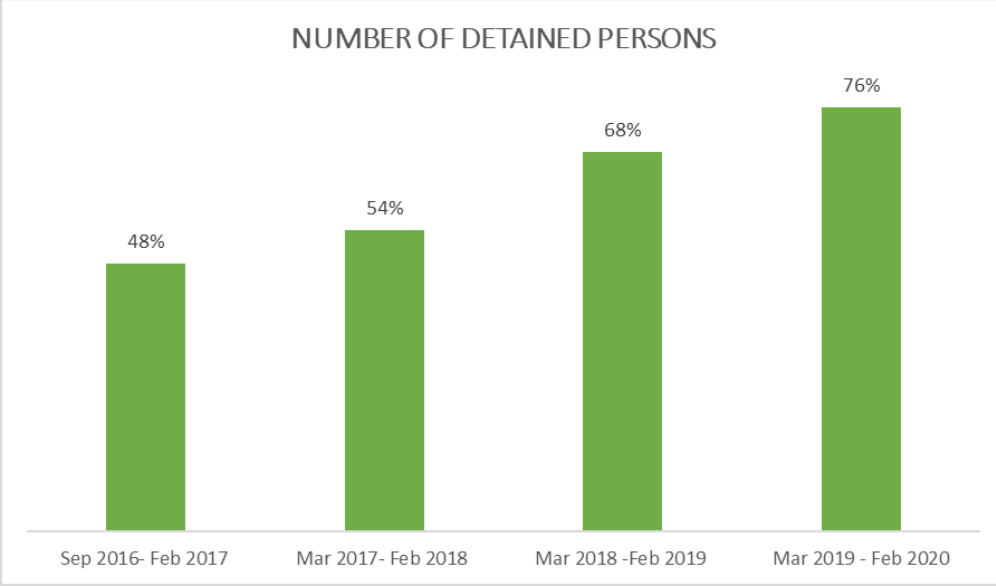
The GYLA's monitoring has found that the number of persons appearing before the court as detainees is growing annually,[42] and despite this, the rate of reviewing the lawfulness of arrests during public court hearings is slightly increasing.

According to the case-law, the lawfulness of the detention is reviewed directly in the courtroom only if the party challenges it. In other cases, with rare exceptions, the court does not consider the matter. With respect to debating over the necessity to examine the lawfulness of the detention in the courtroom, the court always brings the argument that the legislators do not oblige the court to discuss the matter publicly, and even with this reservation in effect, the court always reviews the lawfulness of the detention prior to a public hearing. Nevertheless, one of the most important principles of the criminal process is publicity and its impact on the credibility of court decisions.

Reviewing the lawfulness of an arrest is a problem at the legislative level as well, and this is why judges often do not examine in public whether the detention was lawful or not. We believe that the court should always strive to resolve the issues improperly regulated at the legislative level in the best interests of the accused.

The following chart shows the percentage of persons appearing as detainees at the first court hearings during the reporting period from September 2016 through February 2020.

Chart №12

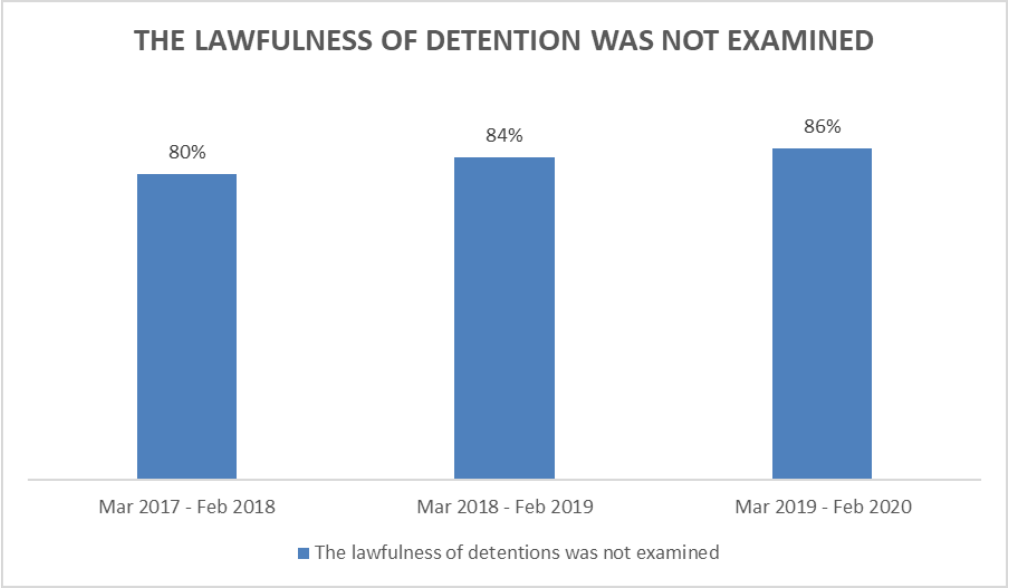


[42] During the reporting period from March 2016 through February 2017, 140 (48%) out of 290 defendants appeared before the court as detainees. In the next reporting period, 218 (54%) of 402 accused and 452 (68%) out of 668 accused in the subsequent reporting period were detainees. From March 2019 through February 2020, 518 (76%) out of the 686 defendants were arrested during the reporting period.

The results of the court monitoring show that the rate of detainees is increasing from year to year. The current practice allows us to conclude that the above-discussed issue is not examined during court trials.[43]

In the following diagram, you can see the number of cases the judge did not review the lawfulness of arrests at the court hearing, from September 2016 - February 2020.

Chart №13



Generally, the court focuses on the lawfulness of the arrest once the defense lawyer submits a motion to the judge to do so. This proves to be a problem as in many cases defendants are not represented by a lawyer at the first appearance court hearing. During the pre-trial stage where the accused persons were provided with a lawyer, the cases were reported when the accused had been challenging the legality of the detention but did not say anything about it at the first court hearing. The ambiguity of the law relating to the issue of reviewing the lawfulness of arrests affects the interests of the accused and deprives them of the opportunity to be heard in case of interference with their right to liberty.

The inequality between the prosecution and the defense counsel in relation to the detention is embedded in the sentence of the provision holding that the court's decision on the arrest shall not be appealed. The detainee is deprived of the opportunity to have the decision of the court of the first instance against him or her examined by the court of higher instance. We believe that the right to liberty of a person is a fundamental right and any interference with the right must be subject to strict judicial control, revision by a higher court.

[43] See GYLA Criminal Court Monitoring Report №11, (2017) p. 37.
GYLA Criminal Court Monitoring Report №12, (2018) p. 60.
GYLA Criminal Court Monitoring Report №13, (2019) p.47-48.
GYLA Criminal Court Monitoring Report №14, (2020) p. 39.

During the given reporting period, a case was reported in which the accused was arguing that his arrest had taken place much earlier than it was indicated in the arrest record. The circumstances provided by the detainee confirmed that the law had been breached, in particular, no arrest report was drawn up upon the arrest of the person, nor was he taken to the nearest police unit or other law enforcement facility after the detention.[44] Moreover, the arrestee noted that the police had been driving him in the city for some time and no arrest report had been handed to him. The judge inquired whether the accused had been handcuffed and whether he had wished to leave. After receiving a negative answer, the judge considered that the actions of the police officers were lawful. The judge explained that the restriction of freedom of movement when the real will of the accused is suppressed and he is not handcuffed may not be considered an arrest.[45]

In GYLA's opinion, it does not matter whether the person was handcuffed or not to confirm the fact of arrest. The judge must find out the purpose of placing a person under the control of the State, how long the person was restricted in his freedom of movement until the arrest report was drawn up and what legitimate goals the restriction strived to achieve. It should be also assessed each time whether the expression of the will to freedom of movement was suppressed by the environment created by law enforcement.

Court rulings

The examination of the court judgments requested from the courts revealed that in the majority of cases, in addition to not reviewing and assessing the lawfulness of arrest at public court hearings, the courts fail to adequately substantiate the legality of detention in court rulings as well. The court rulings do not clarify why the court considered the arrest lawful, what circumstances the court relied upon, and whether there was the necessity to detain a person based on the evidence presented.

In **28** (34%) out of the **83** court judgments examined imposing remand detention, the judge did not examine the detention at all. In **4** (5%) cases, the defense lawyer filed a motion challenging the lawfulness of the arrest and the court reviewed the existing circumstances in detail. In the remaining **51** (61%) cases, the reasoning of the court offered is almost identical and is limited to only one sentence offering the following template wording: "Any doubt that any substantive procedural violations occurred during the arrest of the person, recognizing him as a defendant, as well as during other procedural actions, which could have led to the refusal to the measure of restraint has not been confirmed by the case materials."

The court mentions the arrest only in this part of the judgment and nowhere else offers the grounds based on which the judge established that there had been no violation of the procedural norms at the time of the arrest and that there had been any preconditions required for the detention as provided by law.

In one of the court rulings, we can read that "the accused did not express any complaint

[44] The Criminal Procedure Code, Article 174.

[45] GYLA Criminal Court Monitoring Report №14, (2020) p. 40.

regarding the procedure of the detention." Merely with this one short sentence, the judge explains why he or she deemed the arrest lawful. Referring to the complaint or the absence of the complaint of the defendant when providing reasoning about the lawfulness of the detention in the court ruling once again highlights the importance of scrutinizing the lawfulness of the arrest in court, as some detainees are not represented by a defense counsel and they might not understand the narrow interpretation offered by the court that the defendant is allowed to speak during the first appearance court hearing about any violations occurring during the arrest.

COMPARATIVE ANALYSIS OF ALLEGED ILL-TREATMENT CASES BY LAW ENFORCEMENT OFFICIALS

AN OVERVIEW OF THE LEGISLATION

The prohibition of torture is considered to be an imperative norm of international law, meaning that the obligation is of binding nature. The fundamental importance of the prohibition of torture is indicated by numerous international documents that make it a mandatory task for countries to provide legislative mechanisms to respond to cases of torture, inhuman and/or degrading treatment in their jurisdiction, and to prevent and eradicate such cases.

No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.[46] This vision of the Universal Declaration of Human Rights is shared by the European Convention for the Protection of Human Rights and Fundamental Freedoms,[47] the Constitution of Georgia.[48]

The Criminal Code criminalizes torture and ill-treatment and imposes severe penalties. The prohibition seeks to protect the individual from torture and inhuman, degrading treatment. However, the prohibition provided solely at the legislative level is not sufficient and it is important for a person to be aware of his or her rights in order not to fall victim to torture. Particularly vulnerable to the above-mentioned crimes are persons deprived of their liberty, fully under state control, who do not have the ability to respond immediately to an inappropriate action and defend themselves in a prompt manner.

During the first appearance court hearing, the court explains to the accused, among other rights, the right to file a complaint (claim) regarding torture and inhuman treatment and at the same time finds out whether the accused has any complaint or motion regarding the violation of his or her rights.[49] Informing defendants not represented by a defense lawyer of their rights is particularly important.

The GYLA's monitoring of criminal proceedings over the years has shown that the role of the judge in identifying cases of torture/ill-treatment was insufficient. It is a welcoming fact that Article 191^1 of the Criminal Procedure Code entered into force on May 10, 2019, according to which if the judge at any stage of the criminal proceedings develops a suspicion that the accused/convict had been subjected to torture, degrading and/or inhumane treatment, or if the accused/convict declares about the above to the court, the judge shall refer to the relevant investigative bodies to respond.[50] In addition, if the life or health of an accused/a convict placed in a penitentiary institution is threatened, and/or if a judge

[46] The Universal Declaration of Human Rights, Article 5.

[47] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3.

[48] The Constitution of Georgia, Article 9.

[49] The Criminal Procedure Code of Georgia, Article 197 (Paragraph 1, "c" and "g").

[50] The crimes under Articles 144^1 – 144^3 of the Criminal Code of Georgia committed since November 1, 2019, are investigated by detectives of the Investigative Department of the State Inspector. See the Order №3 of the Prosecutor General of Georgia of August 23, 2019, on the Determination of Territorial Jurisdictions for Investigation of Criminal Cases", available at: https://matsne.gov.ge/ka/document/view/4638682?publication=0 [last viewed: 22.02.2021].

suspects that an accused/a convict has been or may be subjected to torture, degrading and/or inhuman treatment, the judge shall be authorized to task the General Director of the Special Penitentiary Service to take special measures necessary for providing security to such an accused/a convict.[51]

The amendment introduced is significant in the sense that if the court previously did not have an effective response mechanism in cases of torture and/or ill-treatment of the accused and depended on the prosecutor to launch an investigation, now the judge can officially initiate an investigation. Frequently defendants avoid talking about the above matters for fear or other circumstances, so an important lever in this regard is the court's power to apply to an investigating body without the necessity to obtain a complaint from the accused, merely based on a subjective suspicion.

Furthermore, the establishment of the State Inspector's Service in November 2019 and granting it the authority to investigate cases of ill-treatment committed by law enforcement officers should be positively assessed.[52]

ANALYSIS OF COURT HEARINGS

In recent years, not many cases have been reported where a person speaks about the violence inflicted by law enforcement officers or penitentiary institutions. Nevertheless, in the event of identification of any such incidents, a timely, effective and impartial investigation must be required.

In the last three reporting periods, in a total of 39 court hearings monitored by GYLA, the defendants or other participants to the proceedings filed complaints regarding alleged ill-treatment.[53]

In the last reporting period, in 12 out of 15 cases, the judge called on the prosecutor to respond. In two cases, the court declared that it would refer to the relevant authorities for a response, while in the case of one defendant it was confirmed that the defense counsel had already referred to a relevant authority.

Compared to previous years, the court was more active in terms of urging prosecutors to respond during the reporting period. Although the court had been entitled to appeal to the State Inspector independently concerning the cases of ill-treatment identified after November 1, 2019, the State Inspector's report 2019 noted that the court applied to the Service of the State Inspector about an alleged crime in one case only.[54]

From November 1, 2019 through August 2020, the investigative department of the State Inspector' Service launched the investigation into 256 criminal cases, 11 criminal cases

[51] The Criminal Procedure Code, Article 191[1] (2).

[52] GYLA's report "Forms and Prevention of Torture and Degrading Treatment, (2020), p.28. Available at: https://bit.ly/38wnWFv [last viewed: 22.02.2021].

[53] GYLA Criminal Court Monitoring Report №12, (2018) p.57.
GYLA Criminal Court Monitoring Report №13, (2019) p. 51.

[54] The State Inspector's Activity Report 2019, p.119 Available at: https://personaldata.ge/ka/press/post/6359 [last viewed: 22.02.2021].

were forwarded to the State Inspector's Service by other bodies. During the above period, there were 290 alleged victims in the cases investigated by the State Inspector. During the given period, criminal proceedings were initiated against five persons and 18 criminal cases were terminated.[55]

It is important to note that the prevention and response to cases of torture and ill-treatment is the responsibility of all public officials and citizens, including defense lawyers, who should tirelessly call on the court or investigative bodies to utilize all mechanisms to respond to such incidents. The perpetrator of the mentioned crime can be a representative of the law enforcement body. In such cases, in order for the victim to overcome the fear of impending retaliation or other barriers, it is important that he or she feels the support of the investigating authorities or the court.

[55] Letter №SIS 72000015037 of the State Inspector's Service dated September 15, 2020.

ADMISSIBILITY OF EVIDENCE AT PRELIMINARY COURT HEARINGS

INTRODUCTION

Any information presented in court at the pre-trial stage acquires the power of evidence. Evidence known to be admissible by the judge of the pre-trial stage decides the fate of the accused during a merits hearing, determines the outcome of the judgment, and determines the guilt or innocence of the accused. The evidence presented shall, with a high degree of probability, give rise to the presumption that it was the accused who committed the crime incriminated against him or her[56] otherwise the court has the right to terminate the criminal proceedings against the accused. In addition, the prosecution and the defense are given the opportunity to recognize all or a part of the evidence undisputed at the pre-trial hearing, after which the court grants the evidence judicial notice, and it is no longer examined during the hearing on the merits.

In reviewing the motions submitted by the parties at the pre-trial hearing, the court must be objective and impartial, protecting the equality and adversariality between the parties.[57]

Comparative analysis of pre-trial court hearings

During the reporting, the court did not show any biased attitudes towards the parties during the pre-trial court hearings. The judges mostly upheld the motions submitted by the prosecution for the admissibility of relevant evidence obtained pursuant to the law as well as the evidence presented by the defense.[58]

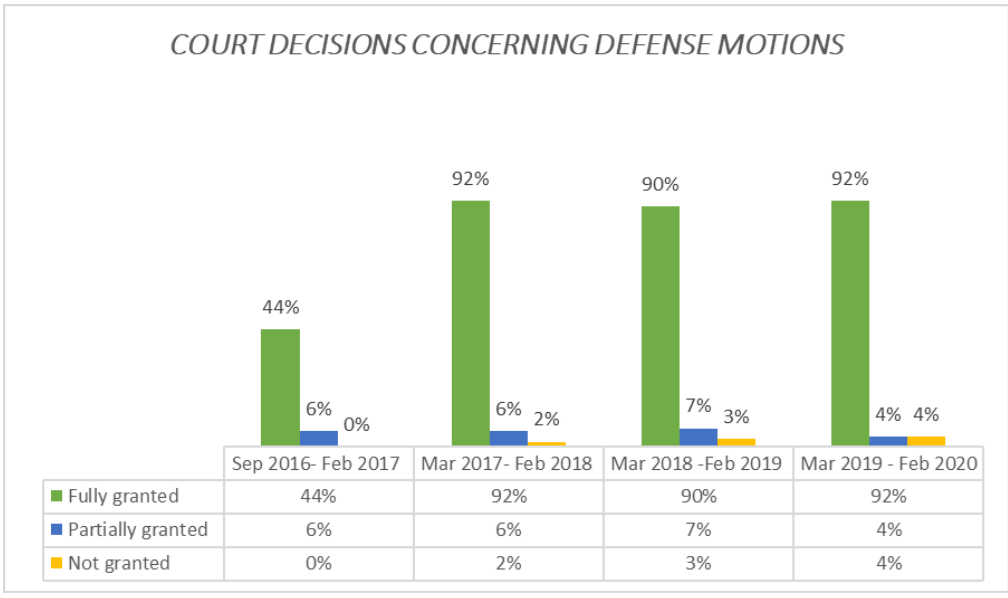
[56] The Criminal Procedure Code, Article 219 (6).

[57] Constitution of Georgia, Article 62 (5).

[58] For detailed information, see Annex №1.

The following chart shows the percentage of decisions delivered by the court during this reporting period regarding the admissibility of the evidence submitted by the defense from September 2016 through February 2020.

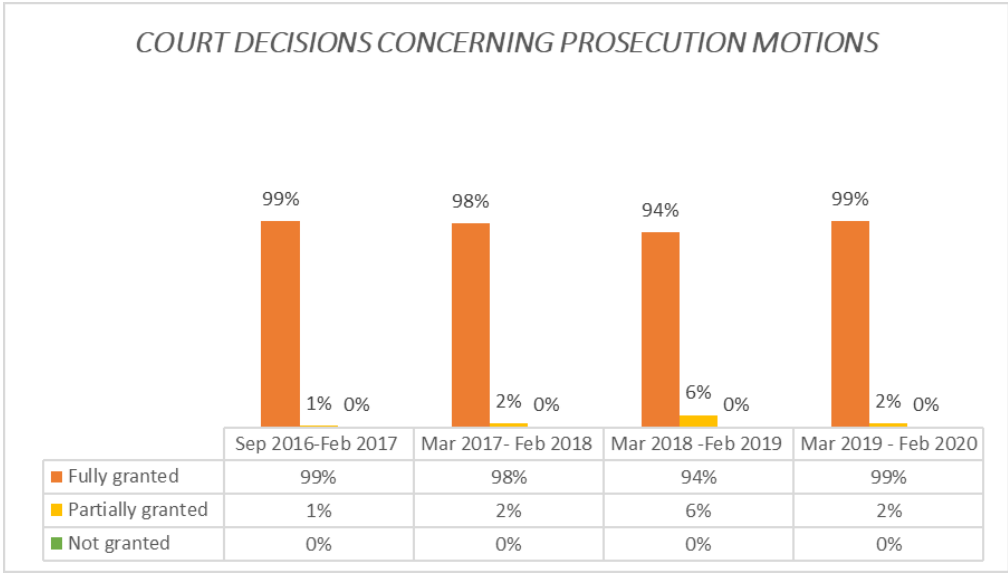
Chart №14



	Sep 2016- Feb 2017	Mar 2017- Feb 2018	Mar 2018 -Feb 2019	Mar 2019 - Feb 2020
Fully granted	44%	92%	90%	92%
Partially granted	6%	6%	7%	4%
Not granted	0%	2%	3%	4%

The following chart shows the percentage of decisions delivered by the court during this reporting period regarding the admissibility of evidence submitted by the prosecution from September 2016 through February 2020.

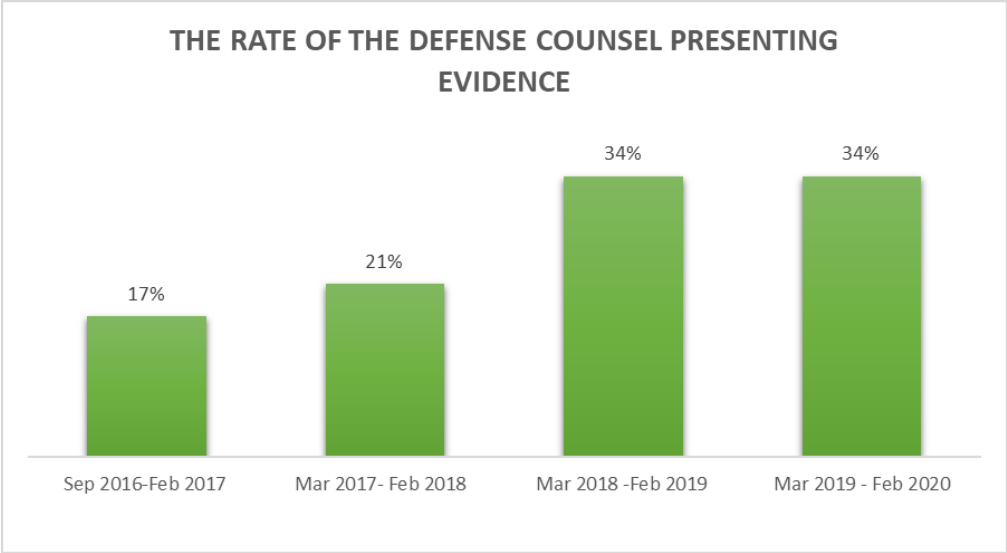
Chart №15



	Sep 2016-Feb 2017	Mar 2017- Feb 2018	Mar 2018 -Feb 2019	Mar 2019 - Feb 2020
Fully granted	99%	98%	94%	99%
Partially granted	1%	2%	6%	2%
Not granted	0%	0%	0%	0%

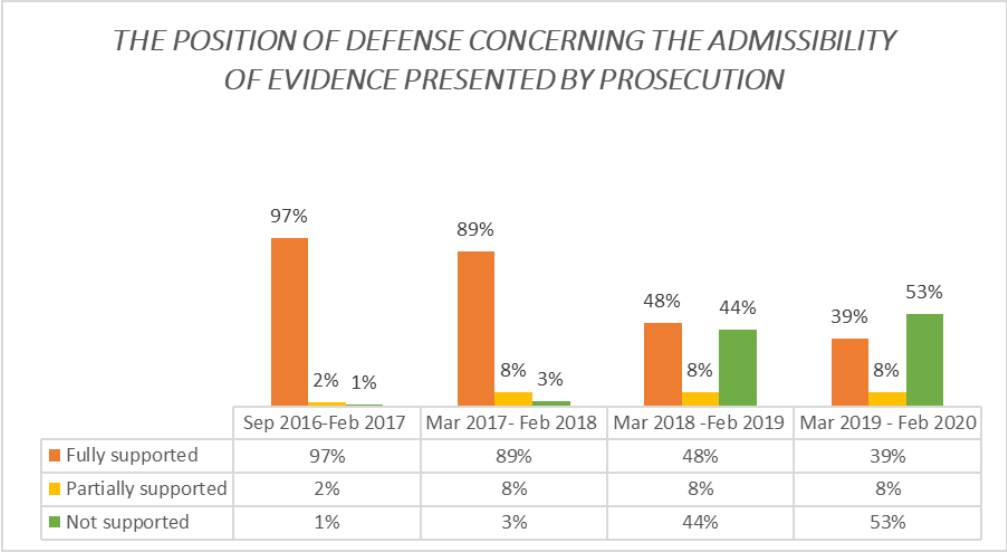
In the following chart, you can see the percentage of evidence presented by the defense at the pre-trial court hearings from September 2016 through February 2020.

Chart №16



The following chart shows the position of the defense counsel on the evidence presented by the prosecution from September 2016 through February 2020.

Chart №17



	Sep 2016-Feb 2017	Mar 2017- Feb 2018	Mar 2018 -Feb 2019	Mar 2019 - Feb 2020
Fully supported	97%	89%	48%	39%
Partially supported	2%	8%	8%	8%
Not supported	1%	3%	44%	53%

As can be seen from the charts above, the efforts of the defense in the presentation of evidence have sharply increased in the last two reporting periods as well as the rate of demanding the inadmissibility of evidence submitted by the prosecution improved, indi-

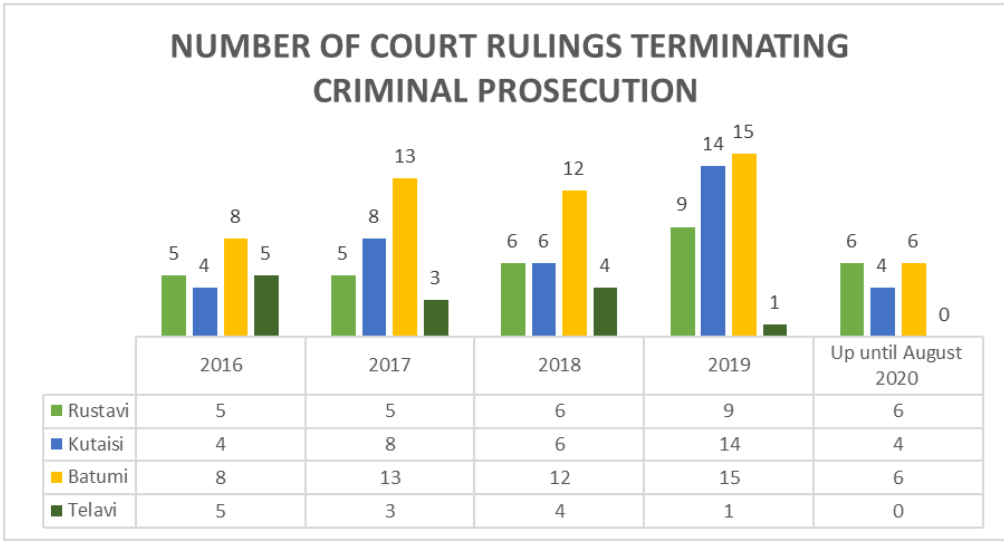
cating an increase in the activity of the defense. Although the burden of proving rests with the prosecution, the defense lawyer's active performance in obtaining evidence in accordance with the adversarial principle while controlling the compliance of the evidence obtained by the prosecution with the law is essential to the outcome of the case, which enables the court to deliver an impartial and unbiased decision.

The prosecution presented evidence at the pre-trial court hearings whenever necessary and requested deeming it admissible. During the reporting period from March 2016 through February 2017, GYLA identified two cases where the criminal prosecution was suspended, among them one based on a forensic psychiatric report.

In the current monitoring process, as the facts of termination of criminal prosecution have not been reported, GYLA appealed to the Tbilisi, Kutaisi, Batumi, Rustavi City and Telavi District Courts and requested the data concerning the rate of termination of the criminal prosecution and referring the case to the prosecutor for diversion.[59]

The following chart shows the court rulings terminating criminal prosecution from January 2016 through July 2020.

Chart №18



	2016	2017	2018	2019	Up until August 2020
Rustavi	5	5	6	9	6
Kutaisi	4	8	6	14	4
Batumi	8	13	12	15	6
Telavi	5	3	4	1	0

[59] We were informed by Tbilisi City Court that the data we requested is not processed. The reply №3901308 provided by Tbilisi City Court on September 4, 2020.

COMPARATIVE ANALYSIS OF KEY TRENDS IN CONDUCTING THE INVESTIGATIVE ACTION - SEARCH AND SEIZURE

INTRODUCTION

Everyone has the right to respect for his private and family life, and there shall be no interference by a public authority with the exercise of this right, except such is in accordance with the law and is necessary for a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of rights and freedoms of others.[60] This is enshrined in the Constitution of Georgia[61] and the principles of the Criminal Procedure Code.[62] Any interference in accordance with the law may be carried out through a search and seizure if there are grounds for doing so provided by law.[63] The purpose of a search is to locate a person, an item, to establish the circumstances or to search a person to find an item. The search and seizure shall be conducted under a court warrant, and if there are relevant grounds for urgent necessity, based on a decree of an investigator. Before the seizure or search begins, the investigator is obliged to present a court ruling, and in case of urgent necessity – a decree to a person subject to the seizure or search. The ruling or decree shall be confirmed by the signature of the person subject to search or seizure.[64] The court shall issue a prior warrant for a search and seizure, and if an investigative action is carried out on the grounds of urgency, the court shall review the lawfulness of the investigative action carried out without the court's permission.[65]

The prosecution must substantiate in each particular case as per the given circumstances what legal urgency the operation had been based on and what substantial harm obtaining the court's order would have caused. The court must protect the personal life of an individual to a high standard.

ANALYSIS OF COURT HEARINGS

Over the years, the motions submitted by the prosecution requesting the admissibility of evidence and circumstances voiced during pre-trial court hearings show that in most cases searches and seizures are carried out without a prior ruling of the court, which the court recognizes as lawful.[66]

The chart below shows the situation identified by the GYLA's monitoring in connection with the lawfulness of searches and seizures conducted under urgency, from September 2016 through February 2020.

[60] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8.

[61] Constitution of Georgia, Article 15.

[62] The Criminal Procedure Code, Article 7.

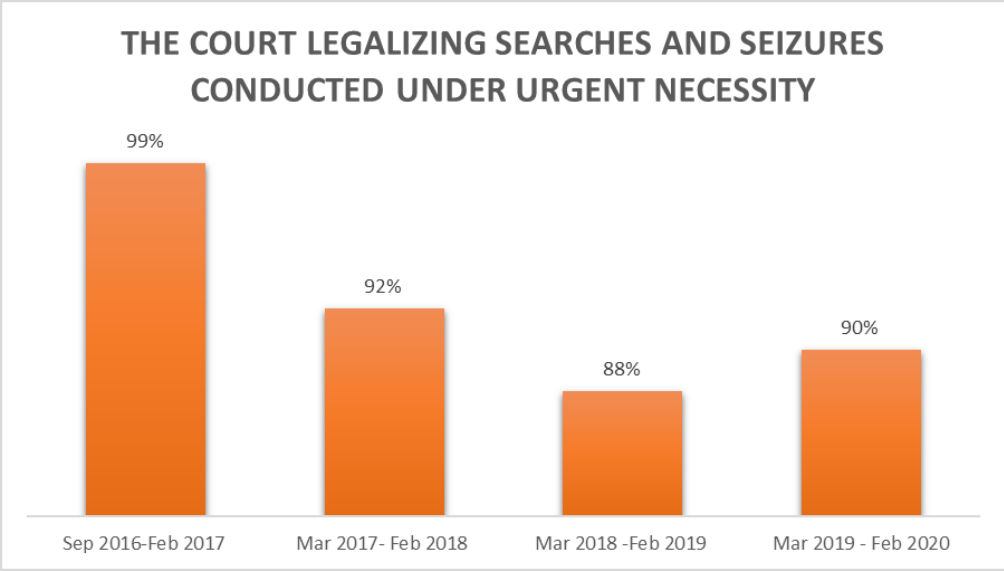
[63] The Criminal Procedure Code, Article 119.

[64] The Criminal Procedure Code, Article 120(1,2).

[65] The Criminal Procedure Code, Article 112.

[66] See the results of the GYLA monitoring in Annex N2.

Chart №19



The chart above shows how often searches/seizures are carried out without a prior warrant of the court. The high rate of allowing the operation by the court encourages bypassing the court and undermines the right to private life and inviolability.

SEARCHES AND SEIZURES CARRIED OUT WITHOUT A PRIOR RULING OF THE COURT

With the view to embracing a full picture in relation to the above type of investigative actions, we requested from Tbilisi, Kutaisi, Batumi, Rustavi City and Telavi District Courts the court rulings admitting searches and seizures issued from January 2016 through July 2020 and annual statistical data.

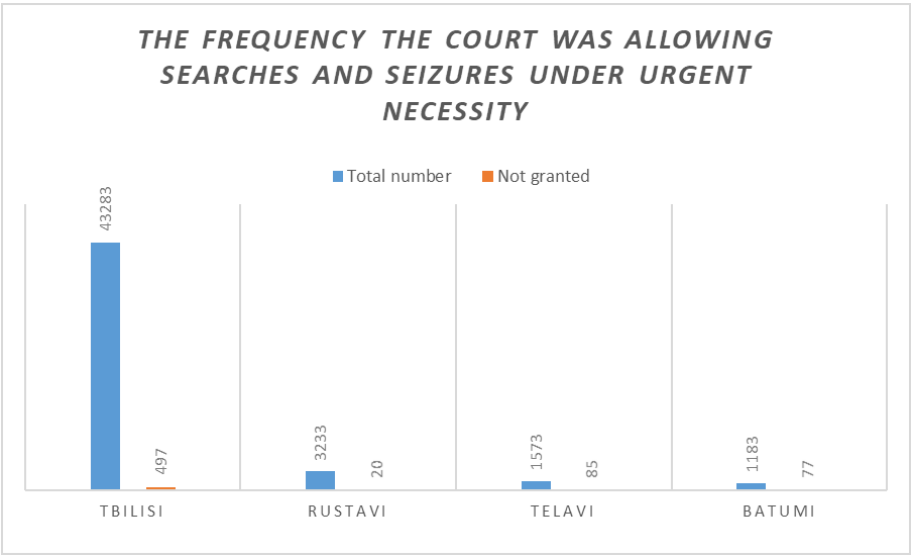
The statistics show that motions submitted for urgent searches/seizures are granted by the courts almost in all cases. The data provided by the Tbilisi, Kutaisi, Rustavi City and Telavi District Courts show that the rate of refusing the warrant did not exceed 1% in any of the mentioned courts during the five-year period.

It is also noteworthy that the number of searches/seizures conducted under urgent necessity is increasing every year, whereas the statistics of the court rejecting such motions are decreasing. In 2016 the court was refusing the motions in 11% of cases and in the period from 2017 to 2019, the percentage did not exceed 0.5%.

In the chart below, you can see the rate the court was reviewing and granting searches/seizures carried out under urgency in the period between 2016 and July 2020, by cities.[67]

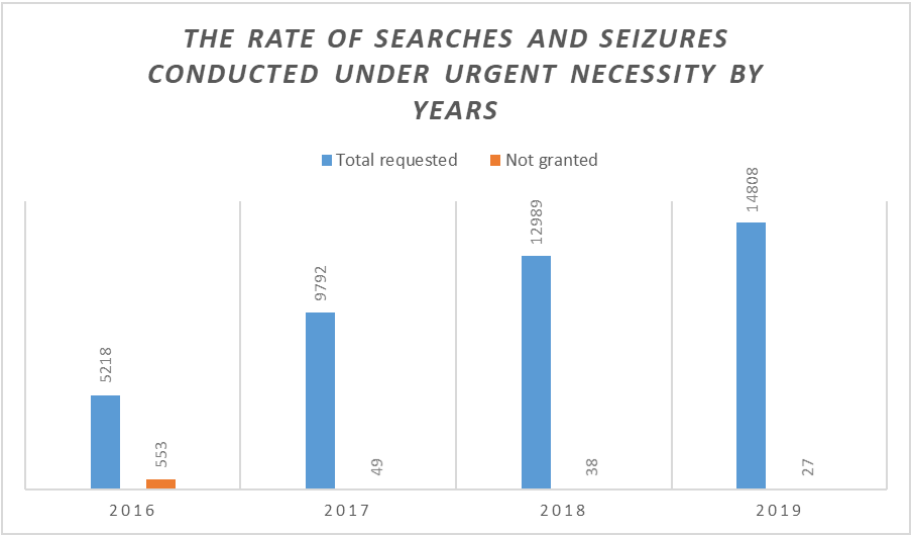
[67] In 2016, the prosecution applied to the Tbilisi City Court with a request to declare the lawfulness of the search and seizure carried out without a prior ruling of the court in 4655 cases; the court rejected the motions in 431 cases, in 2017, 29 out of 8495. In 2018, 10 out of 11364, 18 out of 12767 in 2019, and 9 out of 6002 in June 2020.

Chart №20



The following chart shows the information by years in relation to motions requesting and the court confirming the lawfulness of urgent searches/seizures, as per the data presented by the four courts mentioned above.

Chart №21



The data of Rustavi City Court are as follows: 15 out of 238 motions were rejected in 2016, 1 out of 588 in 2017, 3 out of 913 in 2018, 1 out of 983 in 2019, and all 511 motions were granted as of June 2020.
The data of Telavi District Court: In 2016 - 81 out of 148 motions were not granted, only 1 out of 455 in 2017, only 2 out of 379 in 2018, all 350 were granted in 2019, and according to the data of June 2020, 1 motion out of 241 was rejected.
The data of Batumi City Court: In 2016 - 26 out of 117 were not granted, in 2017 – 18 out of 254, in 2018 – 23 out of 333, in 2019, 8 out of 308. According to the data of June 2020, only 2 out of 171 motions were rejected.

ANALYSIS OF COURT RULINGS

GYLA studied 81 court rulings issued by Tbilisi City Court approving the searches and seizures, of which the prosecution was refused to the lawfulness of the search and seizure in 24 (29%) cases. Randomly chosen court rulings on searches and seizures carried out without a prior warrant of the judge often tend to be identical in the reasoning part. The majority of the rulings do not indicate the need for urgency and almost nothing is said about the dangers or risks that might have been caused if the operation had been delayed.

An example to illustrate: *The prosecution urgently seized the medical records concerning a person from one of the clinics, yet the court ruling does not clarify what purpose the conduct of the investigative action without a prior ruling of the court served. It is well known that the medical records in the database of clinics are not stored for such a short period of time that they might have been destroyed until prior permission of the court was obtained. The court nevertheless deemed the seizure lawful.*

In four cases, the 24-hour timeframe prescribed by law was breached, so the court did not grant the motion. Adhering to the procedural time limits by the court should be assessed positively although it would be highly appreciated if the court considered all motions in terms of proportionality and relevance.

A number of court rulings ordering seizures failed to specify what item and from where the prosecution had removed. The court may find out what the prosecution seeks to legitimize on the basis of the evidence presented, yet the motion must provide a detailed description and location of such items.

In 11 cases, the prosecution had the permission of the person, owner or possessor to seize and search the item, yet the prosecution still requested approval of the investigative action. The court rejected such motions and explained to the prosecution that if consent is obtained, the prosecution does not need to apply to the court. In 9 cases, the court refused to declare the motion concerning the search and seizure lawful due to various circumstances, for example, in one case, an interpreter was not provided despite the need, in another case, the court concluded that the search was conducted in violation of the procedural law, as the essential requirements of the law in relation to carrying out and reporting the search were breached. In several other cases, the court refused to approve the search and seizure with the argument that the prosecution had no grounds for conducting the urgent investigative action. For example, in one case, the prosecution searched the apartment, which was attended by no one but the investigators. The court ruling states – ***"The owner of the residence was notified only after the investigative action was completed and he/she arrived at the house. This violated the person's fundamental constitutional rights. Furthermore, one cannot ignore the fact that neither the search report nor any other information confirms the existence of specific grounds for conducting the investigative action under urgency in the conditions where no one was present in the house at the moment of the investigative action and therefore no one could destroy or hide any item important to the case. It remains also obscure and unclear what goal the investigator was pursuing to achieve when issuing a search order permitting to conduct the operation under urgent necessity."***

There was an interesting case where the prosecution had tried to seize a moped through a personal search and the court certainly rejected the motion. The ruling of the Tbilisi City Court can be read as follows – ***"The court notes that given the named evidence and the factual circumstances established by the standard of the reasonable doubt, the investigation had full grounds to obtain material evidence – the moped from the moment of receiving the information until finding and identifying the person. At the same time, during the entire period, there was no basis for speculating that a search was required, especially in the form of a personal search. Not only the files of this particular case can substantiate but also it remains beyond any reasonable judgment that the investigator may need to search for the moped "on the person's clothing, into an item he was carrying or the vehicle, on or inside the body."***

There was another fact of searching the apartment, which lacked not only a factual but also logical basis. The judge's decision can be read as follows -

"... As mentioned, a search is conducted in order to locate an item, document, substance or other object containing information relevant to the case. Against this background, it is unclear what the police officer conducting the search was looking for when the case concerned an individual punched by another individual. Besides, conducting the search for an illegal item in …'s apartment, as the investigator indicated in the report, is practically inexplicable. If the police had any information about any unlawful items in the apartment, it ought to have been recorded in a relevant document, which in accordance with applicable law and case-law is a report drawn up by a police officer, transcript of an interview with him/her or another witness, etc. In the given case, there is no such thing indicated and therefore there was no ground for conducting the search. "

The analysis of 100 judgments of the Kutaisi City Court revealed that the court is guided by a lower standard in assessing the investigative actions carried out without a prior warrant of the court and limits itself to a uniform formulaic-manner of reasoning. In 74% of cases, the court rulings concerning searches and seizures without prior permission of the court are not substantiated by the factual circumstances, the goals of the investigative activity, and any possible consequences of the delay.

The nine judgments of the Rustavi City Court examining the lawfulness of the search and seizure carried out without a prior warrant of the court are almost equivalent to the approaches shown by other cities. Merely reflecting the information describing the conduct of investigative actions in the rulings is not sufficient since it does not clarify what information the court relied on, or which evidence the judge considered to be a weighty argument for interfering with the private life of an individual. This problem derives from motions filed by the prosecution, which sometimes do not provide in detail the grounds for urgency, do not describe an item to be seized or already seized. Nevertheless, the court still legalizes the investigative action conducted by the prosecution or issues a ruling ordering the action.

The high standard employed by individual judges to assess urgent searches and seizures in the reasoning part of the court judgments should be highly appreciated. It should be noted, however, that the court mostly tends to provide substantiation concerning the motions the court rejects and explains to the prosecution why the motion was turned

down, yet the same is not provided regarding the sustained motions. For the most part, the court finds it less important to explain to citizens on what grounds the motion of the prosecution was granted and why the court considered the interference with their private life in the form of the above-mentioned investigative actions lawful.

DECISIONS OF THE CONSTITUTIONAL COURT CONCERNING THE INVESTIGATIVE ACTIVITY - SEARCH AND SEIZURE

The need for exercising strict judicial control over searches and seizures has been highlighted by judgments rendered by the Constitutional Court. The Constitutional Court of Georgia has repeatedly reiterated that exclusively under a relevant court warrant and judicial control a person, his or her body, clothes or personal belongings can be searched or examined.[68]

The ruling of the Constitutional Court of December 25, 2020, further increased the standard applied to searches and seizures.[69] The Court, among other matters, reviewed the lawfulness of the urgent searches and ruled that even if law enforcement officers seized an illegal item as a result of the search, this cannot become the ground for deeming the search carried out without a court's warrant lawful. The Constitutional Court emphasized that the outcome of the search cannot be a relevant argument to assess the extent to which the search conducted under urgency is substantiated.

Besides, the Court noted that the possibility of conducting a search solely based on information provided by an unofficial or anonymous source should be precluded, as the reasonable doubt requires at least one more piece of information or fact in order for an authorized person to develop an adequate degree of reasonable suspicion. Thus, carrying out a search lawfully merely based on information provided by an unofficial or an anonymous source should be ruled out pursuant to the Criminal Code.

The Constitutional Court held that given the complexity of the investigative action, in all cases, due to objective circumstances, the search may not be corroborated with neutral evidence, yet it must be confirmed that the authorized person took every reasonable step to ensure obtaining unbiased evidence. According to the Court, the advances in modern technologies make it possible to record the process of the search on a video camera in order to reinforce the position of the prosecution. Significant doubts concerning the credibility of the evidence are raised when there is a real possibility to videotape the search within the safe environment provided by the police but the police fail to do so. Obtaining operative information does not always require urgent actions, an authorized person may have sufficient time and resources to prepare for the search, become equipped with appropriate technical means and, where possible, ensure a video recording of the activity.

[68] See for example, the Judgment №1/2/458 of the Constitutional Court of Georgia of June 10, 2009, into the case of "Citizens of Georgia - Davit Sartania and Aleksandre Macharashvili v. Parliament of Georgia and Ministry of Justice of Georgia", II-17 or Judgment №1/2/503/513 of the Constitutional Court of Georgia of April 11, 2013, into the case of "Citizens of Georgia - Levan Izoria and Davit-Mikheili Shubladze v. Parliament of Georgia", II-70.

[69] The Judgment №2/2/1276 of the Second Panel of the Constitutional Court of Georgia of December 25, 2020, - a Constitutional lawsuit №1276 "Giorgi Keburia v. Parliament of Georgia," available at: https://matsne.gov.ge/ka/document/view/5071269?publication=0. [last viewed: 23.02.2021].

In addition, even in an emergency, it is usually not an insurmountable difficulty to record a search on a mobile phone camera, which is now virtually an everyday item.

GYLA believes that recording the process of the search under urgent necessity by a police officer using his or her personal mobile phone, considering that no procedures are designated for storing and destroying video recordings taken by a personal mobile phone, carries the risks that the information may become accessible to third parties. Therefore, it is important to equip the criminal police with adequate technology means so that they can film the process of the search.

COURT HEARINGS REVIEWING MEASURES OF RESTRAINT

AN OVERVIEW OF THE LEGISLATION

The Criminal Procedure Code of Georgia was amended on July 8, 2015, according to which the judge is obliged to review the remand detention used as a measure of restraint against the accused at the pre-trial court hearing. If there is no longer a need to detain the person, the judge has the right to replace the detention of the accused with another measure or leave the accused without a preventive measure. Apart from the pre-trial hearing, the judge is obliged to review the expediency of detention on his or her own initiative every two months.[70]

A COMPARATIVE ANALYSIS OF COURT HEARINGS

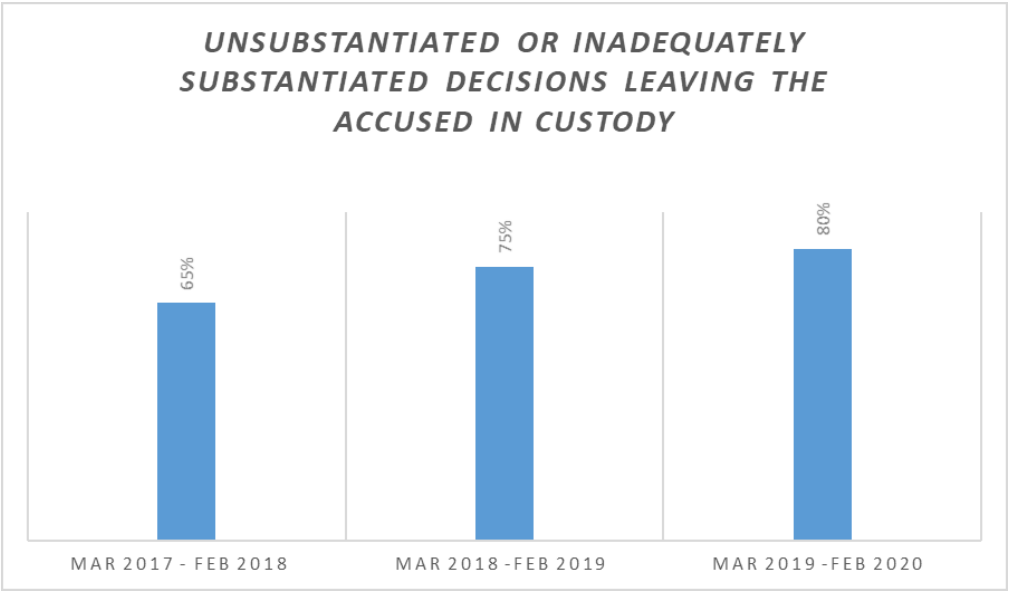
GYLA attended a total of 527 pre-trial court hearings reviewing preventive measures. Of these, in 483 (92%) cases, the court left the remand detention imposed as a measure of restraint unchanged, and in 44 (8%) cases replaced the custody with a less severe preventive measure. The court must make efforts not to turn the right of defendants to have their remand detention reviewed as prescribed by law into a mere formality and in each specific case substantiate why there is a need to remand the accused in custody. The chart below is a clear demonstration of the fact that reviewing detentions by the court does not prove that defendants are genuinely given the opportunity not to remain in continued custody.

A decision made by the court during the revision of custody is often based on the opinion of the prosecution. GYLA believes that the prosecution, a representative of the state, should be eager to ensure that the accused persons do not spend even one more single day in custody than it is envisaged by the goal of the measure of restraint. Given that the prosecution has more information about the accused, his or her behaviour, and the threats posed by him or her, if the prosecution, upon assessing all the specific circumstances, considers that there is no longer a need to detain the accused, it should appeal to the court with a motion to replace the measure of restraint.

In the following chart, you can see the number of unsubstantiated or inadequately substantiated remand detentions left unchanged by the court after reviewing the custody imposed as a measure of restraint.

[70] The Criminal Procedure Code, Article 219.

Chart №22



There were cases when the court changed the detention of the accused to bail, as well as the so-called bail secured with remand detention was replaced with an agreement on not to leave and due conduct. These instances certainly should be deemed as the best practice of the court, when the issue of the expediency of detention is fully examined by the judge at the court hearing and, after the thorough examination of the matter, the remand detention is replaced with a less stringent measure of restraint based on strong reasoning.[71]

[71] GYLA Criminal Court Monitoring Report №12, (2018) p.38.

PLEA AGREEMENT

INTRODUCTION

Resolving a case through a plea agreement is a demonstration of speedy justice, as the plea agreement is an efficient and low-cost mechanism saving the state resources and time. One of the grounds allowing the court to render a verdict into a case without a merits hearing is the plea agreement, pursuant to which the accused pleads guilty and agrees with the prosecutor to a sentence proposed, to mitigation or partial removal of charges. When entering into a plea agreement, the accused may agree with the prosecutor to collaborate and/or to indemnify damages.[72]

With the view to ensuring the fairness of the sentence, the judge must review the existing circumstances, the individual characteristics of the offender, the circumstances within which the offense was committed, and the negotiated sentence. The law does not specify how the fairness of the sentence should be ensured, however, according to the general principles of sentencing, this criterion can be substantiated. For example, when imposing a fine, the judge should find out the financial capabilities of the accused, whether he or she can pay the penalty, whether the amount of the fine is commensurate with the damage inflicted, the circumstances in which the offense was committed and the size of the imminent sentence.

Before the case is referred to the court, the negotiation is in the hands of the prosecution who has the discretion to agree and/or offer the accused the above form of regulation. In deciding on a plea agreement, the prosecutor shall take into account the public interest, which he/she shall determine based on the legal priorities of the State, the crime committed and the gravity of the potential sentence, the nature of the crime, the degree of culpability, the public danger posed by the accused, personal characteristics, the record of conviction, collaboration with the investigation, and the assessment of the conduct of the accused with respect to the indemnification of damages caused as a result of the crime.[73]

The institute of plea agreement plays an important role in the criminal justice system of Georgia. Most of the cases studied are settled by plea agreements. Official data show that of the criminal cases reviewed by the courts in 2016, **63**% of them were settled with plea agreements; in 2017 - **70**%**,** in 2018 - **66**%**;** in 2019 - **67**%**;** and according to the data of nine months of 2020, **66**% of cases.[74]

MONITORING RESULTS

The GYLA's monitoring shows that the largest share of cases concluded through plea agreements falls on drug-related crimes (30%) and property crimes (27%), as well as traffic crimes (18%). Other offenses for which the plea agreement is signed are carrying/stor-

[72] The Criminal Procedure Code, Article 209 (1,2).

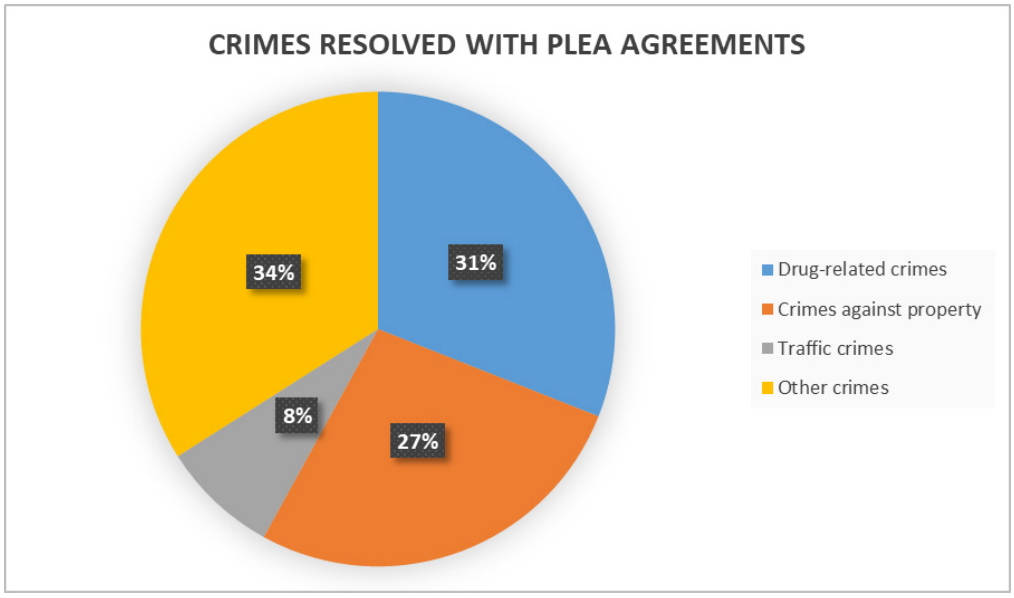
[73] The Criminal Procedure Code, Article 210 (3).

[74] The basic statistics of the common courts, available at - http://www.supremecourt.ge/statistics/ [last viewed: 23.02.2021].

ing a firearm or a cold weapon, non-fulfillment of a sentence, crimes against the authorities, crimes against life and health, etc.[75]

The chart below shows the cases finalized by plea agreements according to crime categories, data for the period from February 2017 to February 2020 inclusive.

Chart №23



Informing defendants of their rights to plea agreements

The judge delivers a decision on a plea agreement based on law and is not be obliged to approve the agreement reached between the accused and the prosecutor.[76]Prior to approving a plea agreement, the judge shall inform the accused of the rights provided by law. The need for clarification of the rights and providing convincing answers to the judge's questions is also reinforced by the fact that the judge may refuse to approve a plea agreement unless he or she receives credible answers from the accused concerning the circumstances provided for in the law.

Prior to the conclusion of the plea agreement, the court is obliged to investigate all the circumstances provided for in Article 212 (2) of the Criminal Procedure Code, namely, whether the plea agreement is voluntary and the accused pleads guilty, the accused had not been subjected to torture, inhuman or degrading treatment or other forms of violence, threat, deception or any unlawful promise, he or she received qualified legal assistance at the moment of signing the plea agreement, etc.

[75] The data of the criminal court monitoring reports №12, №13, №14 are shown.

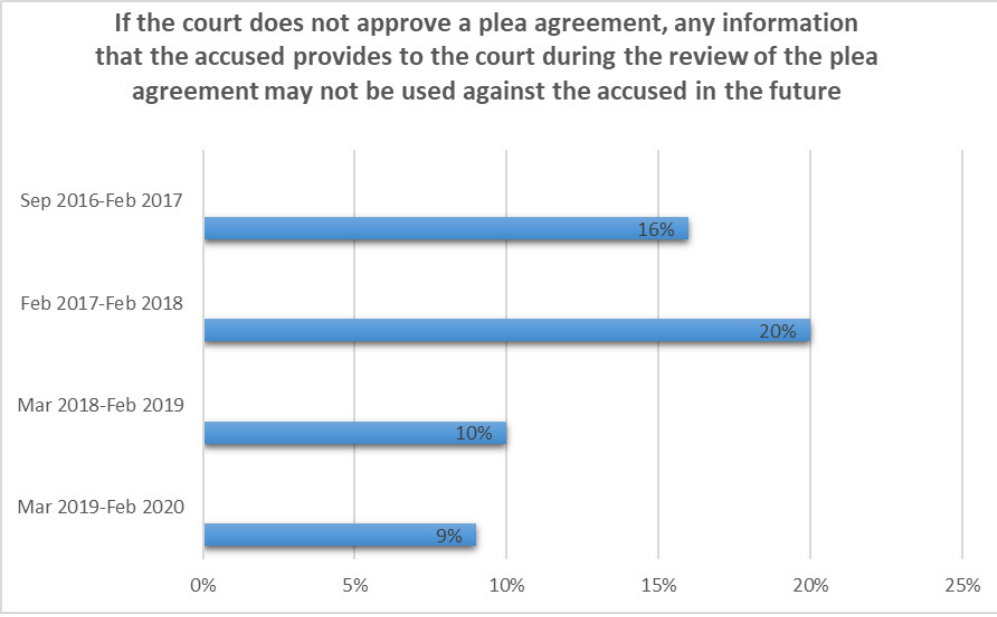
[76] The Criminal Procedure Code, Article 212 (5).

Identified results

The analysis of the court hearings shows that over the years there have been challenges in terms of informing the accused persons of their rights to the plea agreement by the court. In the reports prepared as a result of GYLA's criminal court monitoring in 2016-2020, there were multiple cases reported where the judge did not fully inform the accused of the rights stipulated in Article 212 of the CPC. For example, during the GYLA's criminal court monitoring period from March 2019 through February 2020, the judge failed to fully inform the accused of his or her rights to the plea agreement in 34% of cases.

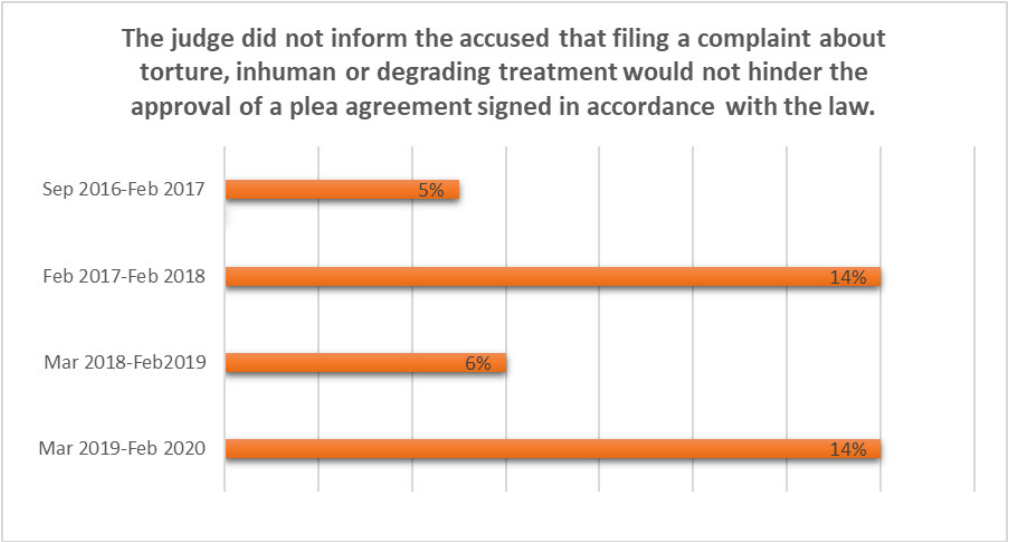
The following chart offers the data for 2016-2020 showing the number of cases where the judge did not inform the accused of each specific right.

Chart №24



The following chart offers the data for 2016-2020 showing the number of cases where the judge did not inform the accused about another specific right.

Chart №25



Considering the fact that approving a plea agreement is the prerogative of the court, and it is the judge who guarantees that the rights and legitimate interests of the accused are fully protected in the process, judges are required to pay due attention to informing the defendants of their rights to the plea agreement provided by law and approve the plea agreement only after receiving exhaustive and convincing answers.

Neglecting the above obligation by the judges creates the impression that they are formally viewing the issue of approving the plea agreement and do not exercise due control over the proceedings.

The court's role in approving the plea agreement

When entering into a plea agreement, the court renders a judgment of conviction without direct and oral examination of the evidence.[77] The court shall scrutinize the negotiations between the prosecution and the defense and only then make a decision on its approval.

Statistics on cases concluded through the plea agreement point out the need for strict judicial control over this institution. It is therefore important that the actions of the court in this process be strictly corresponding to the law and in full compliance with the rules of procedure. Although the plea agreement means a "shortened process," it leads to a significant result, delivering a verdict into a case according to the relevant standard.[78]

[77] The Criminal Procedure Code, Article 210 (1^2).

[78] The evidentiary standard to rule on a case without a merits hearing envisaged under Article 3 (11^1) of the Code of Criminal Procedure implies the evidence which can convince an objective observer that the accused has committed a crime, given that the accused pleads guilty, does not challenge the evidence presented by the prosecution and refuses the right to have his case heard at a merits hearing.

The court is entitled to deliver one of the following decisions after reviewing a motion to render judgment without a main hearing of the case – to deliver a verdict without a merits hearing, to return the case to the prosecutor, or to hear the case on the merits. The court may amend the plea agreement only with the consent of the parties.[79]

The case-law shows that there are challenges in exercising judicial control over signing the plea agreement. The court mostly grants the motions filed by the prosecutor. According to the monitoring results,[80] the court approved the motions submitted by the prosecutor regarding the plea agreement in 99% of the cases. In the remaining 1% of cases, the motions were not sustained mainly due to the questions the judge had concerning the lawfulness of the sentence; the judge considered the qualification incorrect and/or deemed that the accused was insufficiently informed about the potential consequences of the plea agreement.

The GYLA reports have identified the cases where the judge should not have approved the plea agreement. For example, in one of the cases, the defendant did not clearly express his or her willingness to enter into a plea agreement, yet the judge did not examine the matter at the court hearing.

To illustrate this, please see the following example:

> The judge approved the plea agreement submitted by the prosecutor. The defendant was hesitating throughout the whole hearing and then said: "I am forced to agree to this agreement because of the prosecutor ... I cannot admit to what I have not done ... well, I agree with the motion to be approved." The accused repeatedly expressed his dissatisfaction at the court hearing and sometimes pleaded guilty and sometimes not. The judge approved the motion without any doubt. After the court hearing, the accused told the prosecutor: "You are responsible for this action."

Judicial control over the conclusion of plea agreements must not be a formal procedure, the court should be more diligent, review all the prerequisites for the conclusion of the plea agreement, assess the voluntariness of the accused, and resolve the case after taking into account all the circumstances provided by law.

Court's approach to examining the lawfulness and fairness of the sentence

A significant demonstration of judicial control over the plea agreement is when the court examines, among other circumstances, whether the sentence indicated in the prosecutor's motion requesting to render a judgment without the main hearing is lawful and fair.[81]

Pursuant to this provision, the judge is equipped with important leverage and a mechanism to examine the terms of the plea agreement and refuse to approve it if he or she detects a threat that the plea agreement is abused and applied in bad faith. It is true that

[79] The Criminal Procedure Code, Article 213 (1,6).

[80] The data from September 2016 through February 2020.

[81] The Criminal Procedure Code, Article 213 (3).

the court does not have the right to independently change the sentence proposed by the prosecutor, yet the judge may offer different terms to the parties if he or she considers that the sentence is not fair and lawful.[82]

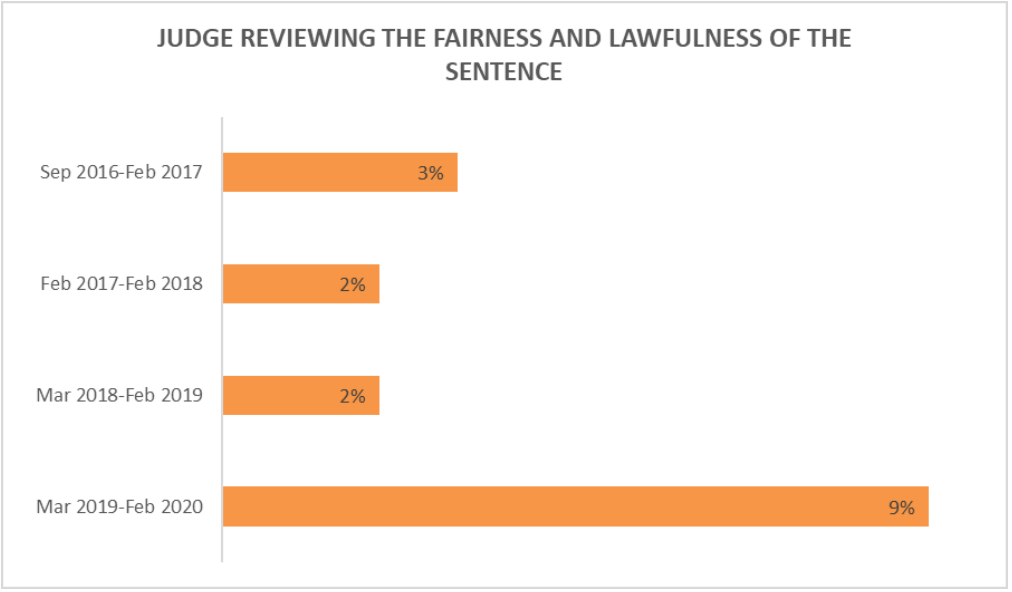
Although the Code of Criminal Procedure does not give the judge the right to reduce or change the sentence autonomously, this does not necessarily justify the judge approving a plea agreement with an overly lenient or severe sentence merely on the ground that the prosecution filed such a motion. One of the most important components of a fair trial is to receive an adequate sentence. The judge should therefore observe the sentencing process carefully and refuse to approve an irrelevant sentence.[83]

Identified results

The monitoring has shown that the court mostly approves the plea agreement without showing interest in whether the sentence indicated in the plea agreement motion is lawful and fair. However, the data of the last year have revealed a slightly improved trend.

The following chart shows the frequency the judge reviews the fairness and lawfulness of the sentence from March 2016 through February 2020.

Chart №26



A serious challenge is rendering a guilty verdict and imposing disproportionate sentences despite the insignificance of the action (for more on this topic, see the chapter on crimes due to social hardship).

[82] "Refusal of an Accused on the Right of Hearing a Case on Merits, the analysis of the legislation and practice on plea bargain," the author: E. Tsimakuridze; P. 51, Tbilisi, 2019; available at: https://bit.ly/3lanm5p [last viewed: 23.02.2021].

[83] Guidelines on the form, substantiation and stylistic correctness of judgments into criminal cases, P.63. Tbilisi, 2015, available at: http://www.supremecourt.ge/files/upload-file/pdf/krebuli.pdf [last viewed:23.02.2021].

Duration of plea agreement court hearings and the practice of reading only the resolution part

As a rule, a criminal case is heard and the evidence examined in an open court session. This general rule also applies to the scrutiny of a plea agreement report and a motion requesting to render a judgment without a merits hearing.[84] The case must be heard in full compliance with the rules of procedure, openly and publicly.

According to the recommendation 1987 of the Committee of Ministers of the Council of Europe, the following basic requirements are set for a plea agreement:

1) The procedure for a plea agreement must be carried out in a court at a public hearing;

2) The offender must admit the charge brought against him;

3) The judge should have the opportunity to hear both sides before deciding to sentence an offender.[85]

Identified results

As the case-law shows, approving plea agreements within a short period of time and/or only as a result of presenting the summary part of the motion is a problem. Multiple such cases have been reported in recent years. For example, in one case, the judge did not inform the accused of any rights provided by law and approved the plea agreement within 10 minutes.[86] As the GYLA's report №12 shows, 46% of plea agreements are concluded within 1-15 minutes. Within the same timeframes, 43% of the cases monitored during the reporting period №13 were approved.[87]

In 5-15 minutes, the court cannot fully inform the defendant of the rights under Chapter XXI of the CPC, make sure that the accused consents to the plea agreement, consider the proportionality/form of the sentence indicated in the plea agreement, and make a relevant decision after that. Judges often formally explained rights. Attending the court hearings, one could develop the impression that it was frequently incomprehensible to the defendants the explanations provided by the judge and they did not understand what the judge was speaking about. Besides, there were cases where the accused did not clearly express their will to enter into a plea agreement and the judge did not find out the reasons thereof at the court hearing.[88]

Concluding the plea agreement within the shortest period is also due to the fact that in some cases only the summary part of the motions submitted by the prosecutor is read out at the court hearing. In the reporting period №13, there were 43 such cases (9% of

[84] Commentary on the Criminal Procedure Code of Georgia, the authors, Ed: Giorgi Giorgadze, p. 639. Tbilisi, 2015. Available at: https://library.iliauni.edu.ge/wp-content/uploads/2017/03/ssssk-komentari.pdf [last viewed: 23.02.2021].

[85] RECOMMENDATION No. R (87) 18 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING THE SIMPLIFICATION OF CRIMINAL JUSTICE. https://rm.coe.int/16804e19f8 [last viewed: 25.02.2021].

[86] GYLA Criminal Court Monitoring Report №11, p.42. Available at: https://bit.ly/3cpItwm [last viewed: 25.02.2021].

[87] GYLA Criminal Court Monitoring Report №13, (2019) p.59.

[88] GYLA Criminal Court Monitoring Report №12, (2018) p.65.

the monitored cases) when the prosecutor presented only the resolution part of the motion at the court hearing. In 23 (53%) of these, the prosecution read only the operative part at the judge's initiative. This contradicts the essential right of the accused to have his case heard openly and publicly, which is a cornerstone of Article 6 of the European Convention on Human Rights. It is the right of the accused to have the interested third parties provided with information about the transparency and impartiality of the trial. The fact that the court asks the prosecution to present only the operative (summary) part of the motion is in direct conflict with the right to a fair trial, as the defendant is deprived of the opportunity to have his case heard, which, on the one hand, reduces the degree of credibility with the court and, on the other hand, prevents the accused from exercising his or her rights appropriately.[89]

The aforesaid harmful practice has further evolved in the recent period. In 98 (18%) out of 558 cases during the reporting period №14, the factual circumstances of the case were not reviewed at the court hearing and only the resolution part was presented. In 85 cases, the court encouraged the prosecution to present merely the summary part of the motion, while in 13 cases the initiative came from the prosecutor. There were 11 (2%) cases reported where the judge approved the plea agreement in less than 5 minutes with procedural violations and without hearing the opinions of the parties. In such cases, the judges formally deal with the matter and do not exercise proper control of the proceedings.

Several judges believe that a speedy justice means reviewing the plea agreement within a short period at the court hearing, during which in some cases, they do not fully inform defendants of their rights, nor do they examine important procedural issues openly and publicly in the courtroom, thereby violating the interests of the accused and neglecting the fundamental principle of the criminal law- the right to a fair trial.

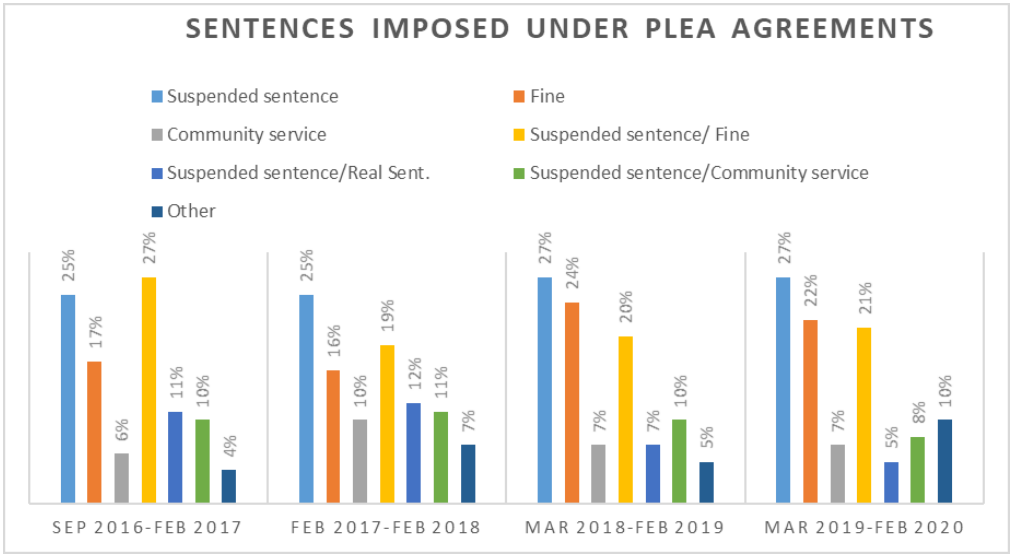
Sentences imposed under plea agreements

The dynamics of the past years show that as a result of the plea agreement most frequently a suspended sentence, a suspended sentence with a fine, or only a fine is imposed as a punishment. A real sentence along with a suspended sentence is relatively rare. In particular, as the monitoring results show, in the period of September 2016- February 2017 - **11**%, in February 2017-February 2018 - **12**%, March 2018-February 2019 - **7**%, March 2019-February 2020 - **5**% of convicts were sentenced to serving a part of imprisonment imposed as a punishment in a penitentiary institution.

[89] GYLA Criminal Court Monitoring Report №13, (2019) p.59-60.

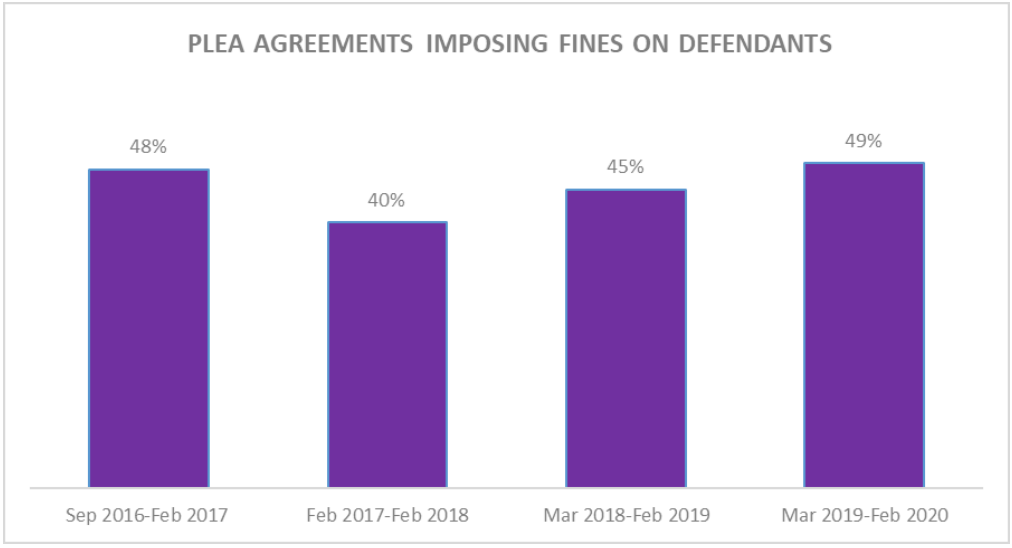
The following chart shows the sentences imposed as a result of plea agreements in the period from March 2016 through February 2020.

Chart №27



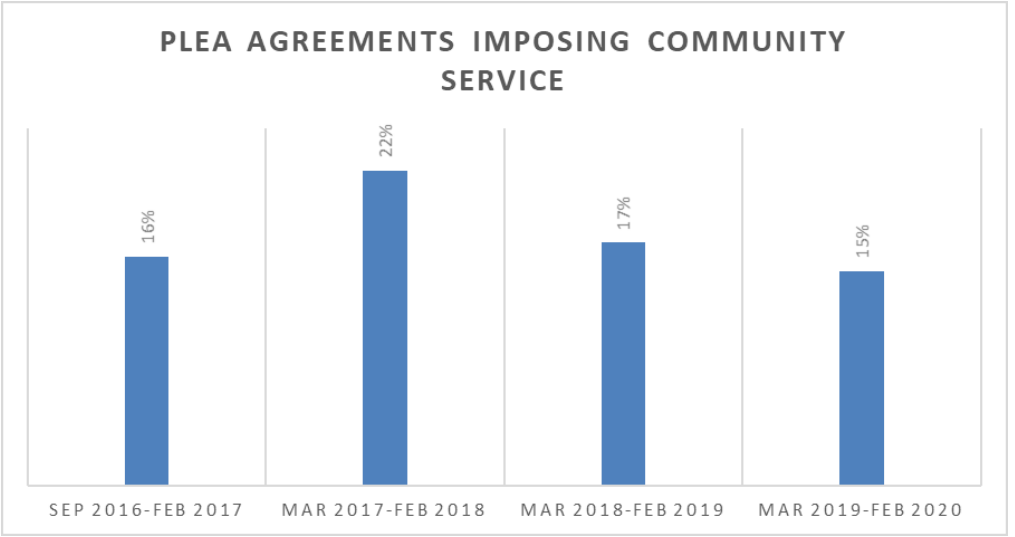
In the diagram below, you can see the amount of the fine imposed under plea agreements between March 2016 through February 2020.

Chart №28



In the following chart, you can see the percentage of community service imposed under plea agreements from March 2016 through February 2020.

Chart №29



Imposing fines under the plea agreement does not yet lose its relevance. The fine is used as a basic as well as an additional punishment. The last two reporting periods have seen an increase in the imposition of fines and a decrease in sentencing the accused to community service.

Participation of defense in concluding the plea agreement

The right to protection is the most important right of the accused. When concluding a plea agreement,[90] the law deems it obligatory for the defendant to be represented by a defense lawyer because sometimes the accused person is not able to properly oppose the prosecution. From the very moment the plea agreement is offered, the main duty of the defense lawyer is to provide qualified legal advice to the accused. It is true that the lawyer is deprived of the opportunity to prove the innocence of the accused or to demand any preferential terms for the accused at the court hearing, yet the support of the lawyer means the provision of legal aid and qualified advice. The lawyer is obliged to inform the accused in a timely and comprehensive manner of his or her rights, the potential sentence, or other legal consequences.

However, the question is whether in practice the defense lawyer ensures that the best interests of the accused are guaranteed in all cases. The GYLA's monitoring observed the cases when the lawyer entering the courtroom was enquiring which of the individuals present was the accused and/or met his or her client for the first time.

The GYLA monitoring, in the reporting period from February 2017 - March 2018, identi-

[90] The Criminal Procedure Code, Article 45 (subparagraph (f)).

fied the problematic communication between state-funded lawyers and defendants. In particular, the lawyers were appointed at the expense of the state in 150 (52%) cases. In 72 (48%) of these, the problem of communication between the public lawyer and his or her client was obvious.[91]

It is of particular importance that individuals who are protected at the expense of the state and provided with a public attorney should enjoy the full right to protect their rights, primarily through effective communication with the lawyer and qualified legal services. The mandatory appointment of the defense lawyer should not create the impression that this is merely done for the enforcement of the law. The inadequate communication between a lawyer appointed at the expense of the state and the accused cannot be justified by a busy schedule of public attorneys or processing multiple cases at the same time.

Further, during the reporting period (March 2018 - February 2019), challenges in the interaction between budget-funded attorneys and defendants were identified in 56 (23%) of 247 cases, which is a greatly improved figure compared to the previous reporting period.[92]

As to the last reporting period (March 2019 - February 2020), the above figure has further decreased and inefficient communication between the state-appointed lawyers and their clients was reported in merely 18 cases (6%) out of 293.[93]

We appreciate the recent improvement in the provision of legal services and communication by budget-funded attorneys. As for lawyers hired by the accused at their own expense, the monitoring identified few communication problems, namely, in the period from March 2017 through February 2020, on average in 5% of cases only, the communication between the defense lawyer and the defendant was assessed as inadequate.[94]

The role of the victim in concluding the plea agreement

The prosecutor is obliged to consult with the victim before concluding a plea agreement and notify him or her about the conclusion of the plea agreement, upon which the prosecutor shall draw up a relevant report.[95]

Although **the victim's refusal** may not legally create an obstacle to signing a plea agreement, his or her opinion is very important for the prosecutor in the decision-making process, especially in criminal cases as a result of which the victim has sustained physical or serious financial damage, which is not reimbursed. The position of the victim is one of the important circumstances to be considered when entering into a plea agreement.[96]

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[91] GYLA Criminal Court Monitoring Report №12, (2018) p. 78.

[92] GYLA Criminal Court Monitoring Report №13, (2019) p. 67.

[93] GYLA Criminal Court Monitoring Report №14, (2020) p. 58.

[94] The communication between the defendant and the lawyer was not effective in 5 (**3%)** of 147 cases in the reporting period of February 2017 - March 2018. During the reporting period (March 2018 - February 2019), in 11(**9%)** out of 120 cases, and in the reporting period (March 2019 - February 2020), in 4 (**3%)** out of 162 cases.

[95] The Criminal Procedure Code, Article 217 (1).

[96] Commentary on the Criminal Procedure Code of Georgia, the Authors, Ed: Giorgi Giorgadze, p.648. Tbilisi, 2015. Available at: https://library.iliauni.edu.ge/wp-content/uploads/2017/03/ssssk-komentari.pdf [last viewed: 28.02.2021].

The victim shall have no right to appeal the plea agreement reached between the parties, yet he or she may inform the judge in writing or orally of the damage inflicted on him or her as a result of the crime committed.[97]

Identified results

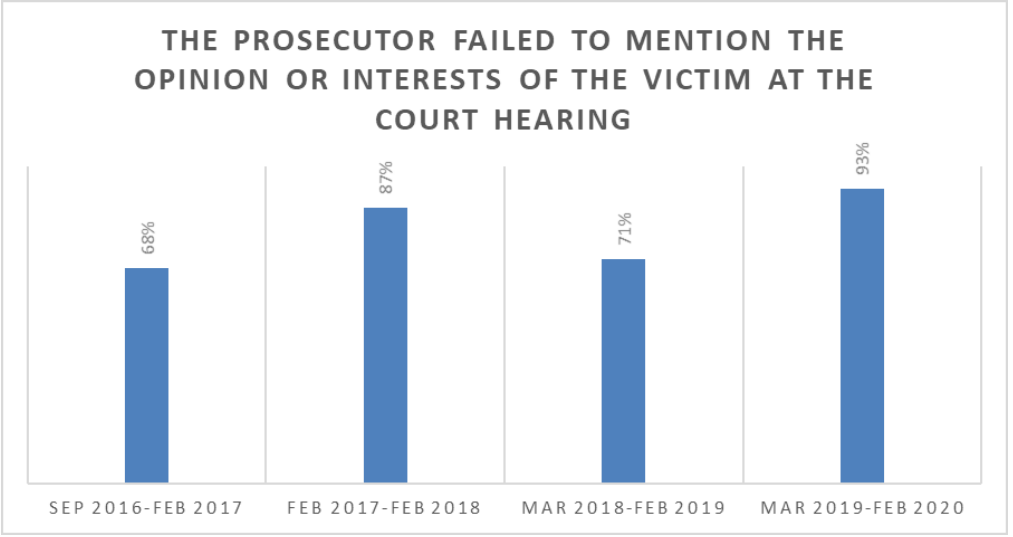
Ensuring the rights of victims in adjudicating crimes against life, health and property has been highlighted as an important matter by the monitoring.

The observations over the plea agreement court hearings have confirmed that the interests of the victim and his or her participation in the case proceeding are in some cases neglected, which is due to the legal framework as well as the judicial case-law.

According to the GYLA's monitoring of criminal court hearings, the plea agreement in cases involving crimes against life, health and property is often approved in such a manner that the prosecutor does not even mention the position or interests of the victim at the court hearing. The prosecution rarely presents a protocol of consultation with the victim or voices his or her opinion regarding the punishment of the offender.

The following chart shows how often prosecutors mention the victim's opinion and/or their interests at the plea agreement court trials deliberating the crimes against life, health and property.

Chart №30



According to GYLA, the cases that result in the loss of human life require sensitive approaches by the prosecutor and the court. GYLA is aware of the position of the Prosecutor's Office that a plea agreement is not concluded if the victim or his/her legal representative does not consent. However, due to the principle of publicity, despite the fact that

[97] The Criminal Procedure Code, Article 217 (1^1,2).

the Prosecutor's Office is not legally obliged to accept the opinion of the victim when signing a plea agreement, GYLA deems it important to state the position of the victim's legal successor concerning such cases and to find out what motivated him or her to change the opinion if initially he or she did not agree to the plea agreement.

TRENDS IDENTIFIED AT COURT HEARINGS ON THE MERITS

THE RIGHT TO A PUBLIC HEARING

The right to a public hearing is one of the components of a fair trial, which is an important right not only of the accused but also of the public. The publicity of the case proceeding is guaranteed at the constitutional level. According to the Constitution of Georgia, the case shall be considered in an open court hearing. The hearing of the case in a closed session is allowed only in cases provided by law. A decision of the court shall be announced publicly.[98]

The above principle is reinforced by international instruments - the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention for the Protection of Human Rights and Fundamental Freedoms.[99]

The requirement to publicize court trials and publicly announce all decisions delivered by the court is indicated in the Criminal Procedure Code of Georgia[100] and the Organic Law of Georgia on Common Courts.[101] Notwithstanding this, the right to a public hearing has legitimate limitations, in particular, the national legislation allows a court hearing to be closed on the following grounds: for the protection of personal data, professional or commercial secrets, for the safety of the participant to the case proceedings, for the maintenance of order, and in other cases stipulated by law.[102]

An oral hearing strengthens the confidence of both the parties and the public in the administration of justice, ultimately, leading to greater transparency and legitimacy of court decisions and a reduction in the likelihood of errors.[103]

IDENTIFIED TRENDS

The monitoring has revealed that the right to a public hearing is ensured in the majority of cases. However, publishing information about the place and time of the **first appearance court hearing** seems yet to be problematic. Despite a number of recommendations developed by the GYLA based on the reports, the judiciary has failed to address the issue. Today, as in previous years, the issue is not homogeneously regulated in the courts. Some courts do not publish information about the first court hearings at all, while in some courts bailiffs provide for the announcements, and in most cases, interested parties have to communicate with court staff (secretaries and assistants to judges) to obtain information about the trial.

[98] Constitution of Georgia, Article 62 (3).

[99] UDHR, Articles 10 and 11 (1); ICCPR, Article 14 (1); ECHR, Article 6 (1).

[100] The Criminal Procedure Code, Article 10.

[101] Law of Georgia on Common Courts, Article 13.

[102] The Criminal Procedure Code, Article 182.

[103] Resolution №3/1/574 of the Plenum of the Constitutional Court of Georgia of May 23, 2014, (par. 65).

The absence of accurate information concerning the date, time and venue of court hearings complicates access to criminal justice for civil society.

For example, the GYLA Criminal Court Monitoring Report №13[104] shows that the information about the place and time of the first appearance court hearing was published only in 123 (21%) cases out of 594.

The situation is much better with respect to **pre-trial** and **merits hearings.** The information on the trials is usually available (published on the court website and/or posted on the electronic boards in the court hall), yet there were cases when the information provided was either inaccurate or incomplete.[105]

In the reporting periods from March 2018 through February 2020, in 322 (11%) out of 2738 pre-trial and merits hearings, the date and time of the trials were not announced. As to the possibility to attend the hearing, GYLA identified 9 cases/court trials where all persons interested to be present at the hearing were not allowed to do so because the hearing was held in a small courtroom.

There was also a case reported where the court hearing was closed in order to maintain public order and the interested persons were restricted from exercising their right to a public hearing.[106] The court should make every effort to ensure that those wishing to be present at the court hearing have, on the one hand, information about the court trial and, on the other hand, the physical possibility to attend it. The court should take timely measures to guarantee the publicity and transparency of court hearings, as the latter directly affects the public's trust in the judiciary.

DELIBERATING CASES WITHIN REASONABLE TIMEFRAMES

Introduction

The efficiency and credibility towards justice depend to a large extent on the consideration of cases within a reasonable period of time, especially when it comes to criminal cases, which are the most severe and restrictive instrument in the exercise of state authority. The right to prompt justice and a trial within a reasonable timeframe is an important right enshrined in a number of international treaties or acts. The right is guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms,[107] the International Covenant on Civil and Political Rights[108] and the Universal Declaration of Human Rights.[109]

[104] The reporting period from March 2018 through February 2019.

[105] The schedule does not show all court hearings to be held during the day; the courtrooms are incorrectly indicated, etc.

[106] During the hearing, the judge found it difficult to maintain order in the courtroom. There were frequent inappropriate shouts made generally by 2-3 individuals. Upon several warnings, the judge, on his or her own initiative, closed the session in order to secure order. There was a high public interest in the case. Against this background, the judge should have initially taken other measures - instead of the full closure of the hearing, he/she ought to have fined and/or expelled those who were breaching the order. In such cases, the publicity of the hearing should be a priority.

[107] The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 (1).

[108] International Covenant on Civil and Political Rights, Article 14 (3) (c).

[109] The Universal Declaration of Human Rights, Article 10.

The OSCE participating states committed to "pay attention [...] to the efficiency of justice and the proper administration of the judiciary."[110] To prevent delays in deliberating cases and restriction of the rights of defendants beyond what is necessary, the legislators provide a range of timeframes in the Criminal Procedure Code. The law sets a nine-month time limit for custodial cases,[111] although the problem is the lack of timeframes for cases where defendants are already sentenced to non-custodial measures. On July 8, 2015, an amendment was introduced to the legislation setting a 24-month (2-year) deliberation timeframe for non-custodial cases,[112] which aimed at eliminating the risk of unjustified delays in hearing cases. The explanatory note states: "Delivering a conviction or acquittal verdict is linked to the effective exercise of a number of rights, including the right of a person to be released of the status of a convicted person after a certain period of time. However, in the absence of a review period, the accused is not guaranteed that he or she will obtain the status of acquitted or convicted in a timely manner, which, in turn, will enable him to exercise other rights reasonably. Waiting for a verdict to be handed down for months (sometimes years), especially in criminal cases where the accused faces imprisonment, significantly undermines the rights of the accused. In addition, the passage of time minimizes the possibility that the parties can present evidence in the primary form before the court, which, in turn, threatens the effective implementation of the principle of a fair trial. "[113]

The date for the enactment of the amendment passed on July 8, 2015, was set for January 1, 2016.[114] Yet, it was determined that the court of the first instance would issue judgments in the criminal cases pending by the moment of the enactment of Article 185, Paragraph 6 of the Criminal Procedure Code no later than 36 months after the amendment entered into force (since January 1, 2016). This means that the cases ought to have been resolved by January 1, 2019, at the latest.

Identified trends

Delaying criminal proceedings can be considered a significant shortcoming identified by the GYLA's court monitoring. The observations have revealed several cases, including high-profile cases[115] that have been deliberated for years without reaching a specific legal

[110] The Decision of the Council of Ministers 5/06, the Fourteenth Meeting of the Council of Ministers in Brussels, (2006), par. 4.

[111] The Criminal Procedure Code, Article 205 (2).

[112] The Criminal Procedure Code, Article 185 (6).

[113] Explanatory note on the Draft Law of Georgia on Amendments to the Criminal Procedure Code of Georgia," available at: https://info.parliament.ge/file/1/BillReviewContent/72166. last viewed: 28.02.2021].

[114] The Criminal Procedure Code, Article 333 (8, 9).

[115] The so-called "**November 7th Case**," Giorgi Ugulava (former mayor of Tbilisi), Ivane Merabishvili (former Minister of Internal Affairs), Davit Kezerashvili (former Minister of Defense), Zurab Adeishvili (former Chief Prosecutor, later Minister of Justice), Mikheil Saakashvili (Ex-president of Georgia) are accused in the case. The charges - Article 333(1) of the CC, Articles 25, 182(2) and (3) of the CC, Article 25, Article 194 (3) of the CC; Article 333(3) of the CC; Article 333(2) of the CC, Article 194(3) of the CC; Article 333(3) of the CC; Article 333(2)(3) of the CC.
In the so-called "**Jackets Case**", Mikheil Saakashvili and Teimuraz Janashia are known as defendants under Article 182(3) of the CC.

outcome. Several cases of violation of the timeframes set by the legislation have been reported,[116] as well as the cases in which there is no direct breach of the timeframes provided for in the law, yet an impartial observer may develop the impression that the case is reviewed within an unreasonable time period.

In contrast to the delays, the monitoring identified the cases of the court reviewing specific cases during the first stage[117]hastily and in an intensified manner, refusing to take into account the opinions of the defense and setting the dates of the trials single-handedly.[118] The above occurred in the cases of the so-called "non-custodial" proceedings that are not strictly limited in time. The non-homogeneous approaches to the deliberation of cases within a reasonable time raised questions whether there was a specific interest towards such cases.

Case proceedings are delayed due to the late commencement and/or postponement of court hearings, to which the court does not always respond adequately. No cases were identified where the judge took appropriate measures against late appearance or non-appearance of the parties or imposed a sanction provided by law.

[116] In the so-called "**Batumi Prison Former Heads Case,"** the former director and his deputy of the Batumi Prison №3 are defendants.

[117] The so-called "**TBC Case**" (case of Mamuka Khazaradze, Badri Japaridze and Avtandil Tsereteli) and the so-called "**Rustavi 2 Case**" (case of Nika Gvaramia, Kakhaber Damenia and Zurab Iashvili).

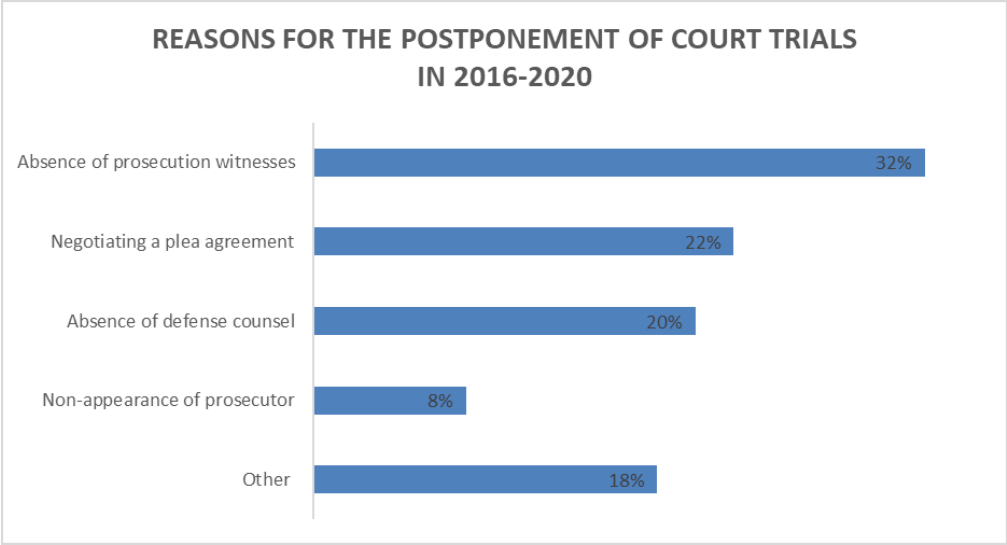
[118] The judge in conjunction to the case of the so-called "**TBC Case**" announced the dates of the following hearings on December 27, 2019 as follows: January 9, January 14, January 15, January 17, January 20, January 22, January 27, January 29, January 30, February 3, February 6, February 10, February 12, February 17, February 19, February 25, February 28, March 4, March 6, March 10, March 12, March 17, March 19, March 23, March 25. The court trials were to start at 11 a.m. and continue throughout the day. The defense side objected to the scheduling of the hearings with such intensity, although the judge, at the initial stage, did not change the dates; In the so-called case of **Rustavi 2**, the judge scheduled the dates of the court hearings at the trial of January 3, 2020, as follows: January 6, January 10, January 13, January 20, January 23, January 24, February 7, the judge later filed for self-recusal and another judge got involved in the case, after which the intervals between trials were increased.

POSTPONEMENT OF COURT HEARINGS

According to the GYLA's criminal court monitoring, court hearings are often postponed. In particular, in 2016-2020, the main hearing was adjourned in an average of 44% of cases.[119]

See the following chart for the reasons for delaying the case proceedings in 2016-2020.

Chart №31



In the majority of cases, court trials are postponed due to the fact that the prosecutor fails to present witnesses before the court hearing (32%); it is often the case when the court hearing is adjourned for the purpose of negotiating a plea agreement (22%) or due to the non-appearance of the parties (defense or prosecution) (28%); Other reasons for postponing the court trials include the absence of defense witnesses, postponement of the hearing due to the unpreparedness of the party, etc.

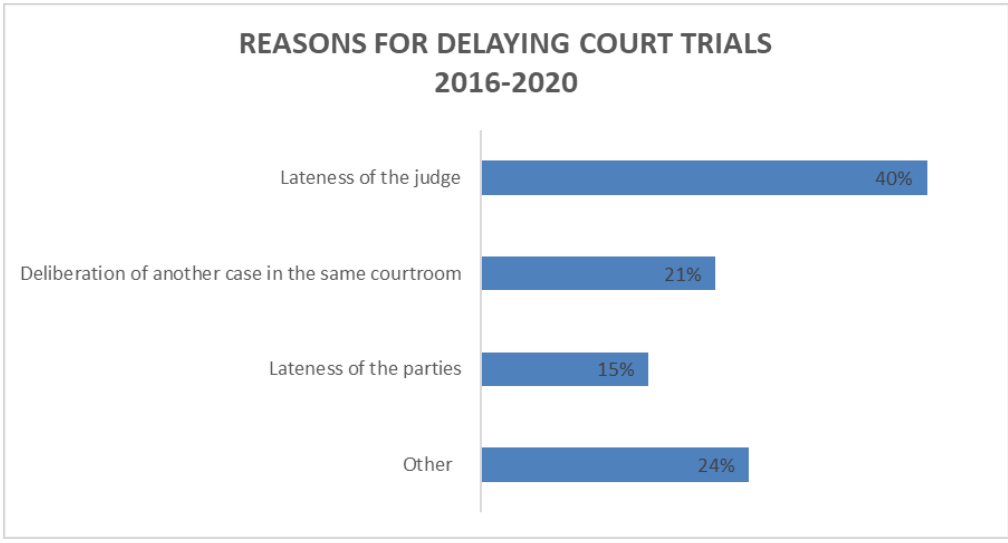
DELAYED OPENING OF COURT HEARINGS

The delayed opening of court hearings has been named a problem. According to the data of 2016-2020, virtually every third court trial starts with a delay. The percentage of the late commencement of court hearings amounted to **40**% in the №11 reporting period, **31**% in the №12 reporting period, **30**% in the №13 reporting period, and **29**% in the №14 reporting period.

[119] During the reporting period №11, 48% of the proceedings were postponed upon the opening, so that none of the procedural actions provided by law were carried out. During the reporting period №12, 47% of the court hearings were adjourned, according to the №13 report, 40% of the trials, and during the reporting period №14, 41% of the court hearings were postponed.

The following chart shows the reasons for the delayed opening of court trials in 2016-2020.

Chart №32



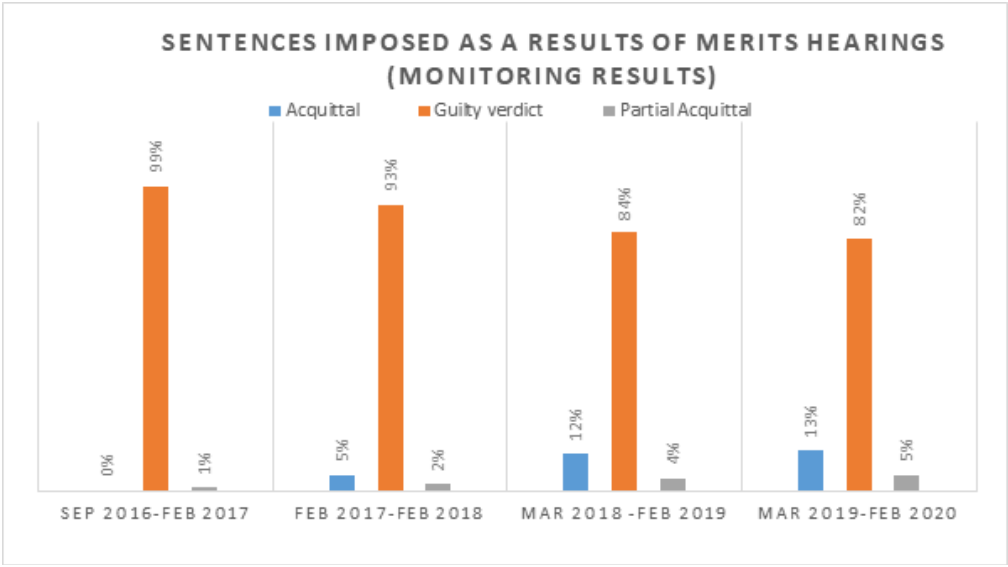
Most frequently, the court hearing is suspended due to the judge's reason (40%), and it is also often the case when the court hearing starts with a delay because another case is deliberated in the same courtroom (21%), sometimes the trial cannot be launched on time because the parties appear late (15%).

THE STATISTICS OF COURT RULINGS RENDERED AS A RESULT OF THE MERITS HEARING

According to the GYLA court monitoring, there is a certain tendency regarding the judgments rendered as a result of the main hearing. The dynamics of the last four years show an increasing rate of acquittals while the number of guilty verdicts is decreasing proportionally. The reason for the above trend is quite interesting. As per the GYLA's court monitoring, this is mainly due to domestic crimes, where the victims exercised their legal rights and refused to testify, as a result of which the Prosecutor's Office was deprived of direct evidence and left with no consolidated evidence into the case ensuring the relevant standard that could have confirmed the guilt of the accused beyond a reasonable doubt, which ultimately led to a decision in favour of the defendants.

In the chart below, you can see the data of the GYLA's court monitoring covering the court rulings rendered after hearings on the merits (September 2016-February 2020).

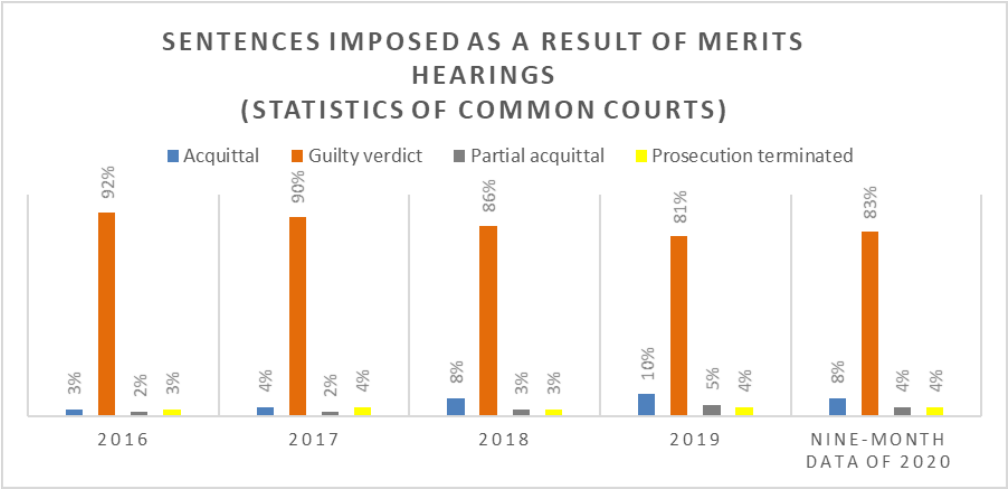
Chart №33



The official statistics of the common courts[120]are practically similar to the figures presented by GYLA, showing the same increase in the rate of acquittals.

In the chart below, you can see the statistics of the common courts on the judgments rendered as a result of main hearings in 2016-2020.

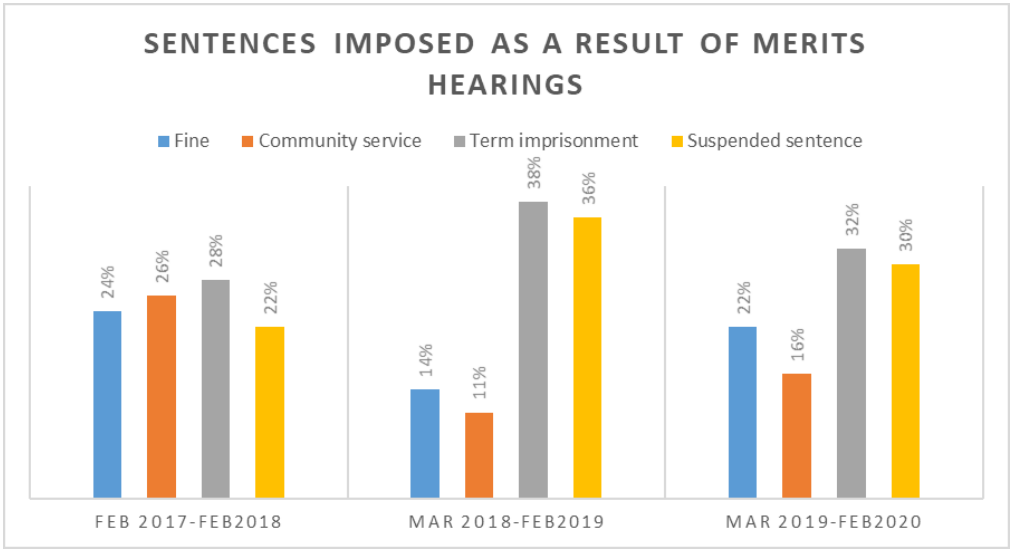
Chart №34



[120] The general statistics of the common courts, available at: http://www.supremecourt.ge/statistics/ [Last viewed: 28.02.2021].

The following chart shows the data of the GYLA court monitoring concerning the sentences imposed as a result of merits hearings (February 2017-February 2020).

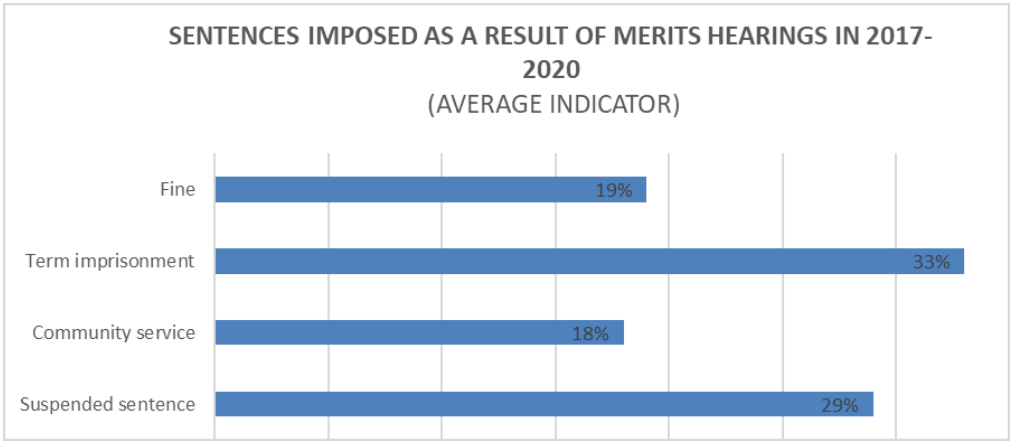
Chart №35



The analysis of the GYLA-monitored court hearings resulting in the guilty verdict in 2017-2020 shows that the court most often (33%) imposes imprisonment as a form of the sentence, the suspended sentence is frequently used as well (29%).

The chart below shows the data obtained as a result of the GYLA court monitoring, the average percentage concerning the sentences imposed during the merits hearing (February 2017-February 2020).

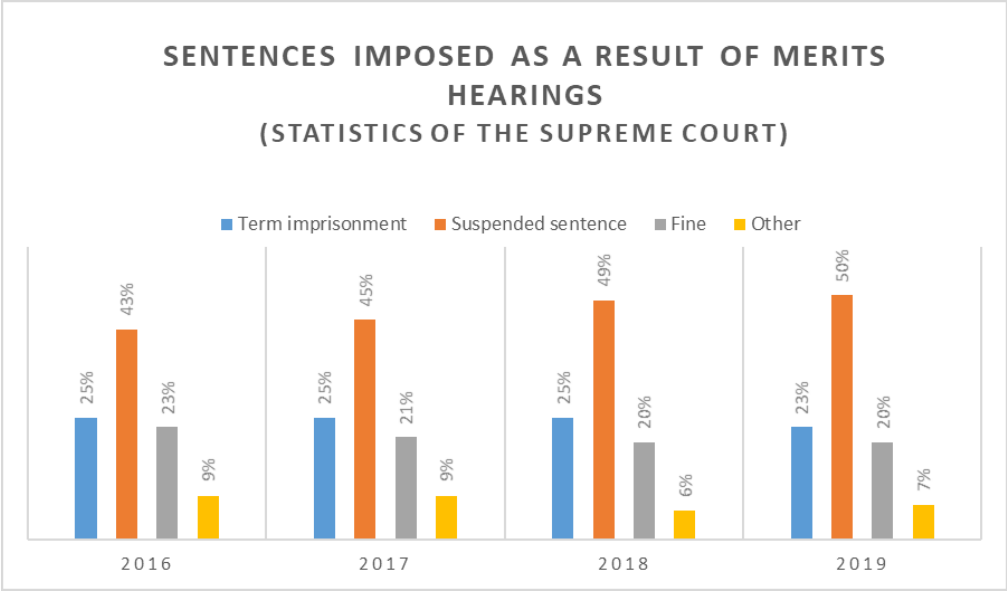
Chart №36



The statistics presented in the official data of common courts are practically similar to the results obtained as a result of the GYLA court monitoring in relation to imposed sentences.[121]

The following chart shows the official statistics of the Supreme Court of Georgia regarding the sentences imposed in 2016-2019.

Chart №37



[121] The number of convicts according to sentencing measures, available at - http://www.supremecourt.ge/files/upload-file/pdf/2019-weli-wigni-sisxli.pdf. [Last viewed: 28.02.2021].

DRUG-RELATED OFFENSES

INTRODUCTION

In all reports prepared in the last five years, GYLA has noted gaps within the legal framework relating to narcotic drug offenses. For years, we have been arguing that the state is combating drug trafficking by isolating drug-addicted individuals from the public and imposing harsh and disproportionate sanctions on them.

During the four-year reporting period, citizens appealed to the Constitutional Court multiple times to protect their rights, yet none of the decisions rendered by the Constitutional Court has been used so far to bring the chapter of the Criminal Code on drug-related crimes[122]in full compliance with human rights and the principle of proportionality.

In the reporting period of 2017-2018, the chapter on drug-related offenses in the Criminal Code was amended based on the rulings of the Constitutional Court of Georgia. The following provisions were declared unconstitutional:

- The penalty envisaged in Article 260 (1) of the CC - deprivation of liberty for illegal purchase/storage of raw marijuana (up to 100 grams) for personal consumption.[123]
- The normative content of Article 260 (3) of the CC allowing the deprivation of liberty as a preventive measure for manufacturing, purchase, and storage of Desomorphine (0,00009 grams).[124]
- The normative content of Article 265 (2) of the CC envisaging the deprivation of liberty for illegal cultivation or breeding of cannabis (plant) (up to 10 grams) for personal consumption. [125]
- The normative content of Article 265 (2) of the CC allowing for the deprivation of liberty for illegal cultivation or breeding cannabis (plant) (up to 64 grams; up to 151 grams) for personal consumption. [126]
- The normative content envisaged in Article 265 (3) of the CC allowing the deprivation of liberty from 6-12 years for illegal cultivation or breeding of cannabis (plant) (up to 266 grams) for personal consumption. On July 26, 2017, in response to the decisions of the Constitutional Court, the Parliament of Georgia added Article 273[1] to the Criminal Code (illegal purchase, storage, transportation, forward, sale and/or consumption of the plant of cannabis or marijuana without a medical prescription), a special norm covering only the plant of cannabis or marijuana. This Article combines Articles 273 and 260 of the CC in the part of the plant cannabis/marijuana and envisages a relatively lenient regulation for cannabis/marijuana, unlike other narcotic drugs.[127]

[122] The Criminal Code, Chapter XXXIII.

[123] Judgment №3 /1/855 of the Plenum of the Constitutional Court of Georgia of February 15, 2017, 21.02.2017.

[124] Judgment №1/8/696 of the Constitutional Court of Georgia of July 13, 2017, 20.07.2010.

[125] Judgment №1/9/ 701,722,725 of the Constitutional Court of Georgia on July 14, 2017, 20.07.2010.

[126] Judgment №1/9/701,722,725 of the Constitutional Court of Georgia of July 14, 2017, 20.07.2010.

[127] GYLA Criminal Court Monitoring Report №12 (2018), p.41.

- On November 30, 2017, the Constitutional Court of Georgia delivered a precedent ruling according to which imposing criminal liability for the consumption of marijuana was considered unconstitutional.[128]
- As of November 30, 2017, Article 273[1] of the Criminal Code of Georgia had already existed which regarded the consumption of marijuana without a medical prescription as a criminal offense. Therefore, the Criminal Code still retained the norm which the Constitutional Court of Georgia declared as unconstitutional with the above ruling.
- In the reporting period 2019-2020, with another court ruling, the Constitutional Court indicated the need to amend the Criminal Code as well as the necessity to regulate the list of small, large, and especially large amounts of narcotic drugs and psychotropic substances seized from unlawful possession or drug trafficking. The Constitutional Court, in its judgment of August 2, 2019,[129] differentiated between the purchase, storage, manufacture of other drugs of the same amount and the cases when the amount of a narcotic drug is intended for more than single use, and also noted down the drugs the consumption of which does not result in rapid addiction and/or aggressive behaviour. The Constitutional Court deemed unconstitutional deprivation of liberty in cases where the following conditions cumulatively occur: 1. Purchase, storage, manufacture of an amount of narcotic drug needed for a single consumption, and 2. Consumption of this substance does not cause rapid addiction or aggressive behavior.[130]

The above-mentioned positive interpretation offered by the Constitutional Court to drug-addicted persons caused great confusion among the prosecution and the common courts in August-September 2019, as it was not specified anywhere in the law, for example, whether a specific narcotic drug seized as evidence for charging a person with Article 260(1) of the CC had the potential to cause rapid addiction and/or aggressive behavior. Furthermore, the list of quantities of narcotic drugs (psychoactive substances) has not been regulated so far; the amounts required for a single consumption are not defined, nor are the small amounts designated in relation to a range of narcotic drugs.

The quantities provided in the classification are not based on the principle of individualism and the possession and effect of such drugs are equally assessed for all persons who possess any narcotic drug in the quantity than above the determined limit. The ruling of the Constitutional Court on narcotic drug crimes attached even more importance to

[128] Resolution №1/13/732 of the First Panel of the Constitutional Court of Georgia of November 30, 2017.

[129] The lawsuit: Public Defender of Georgia v. Parliament of Georgia; 1/6/770; 2.08.2019; A) the normative content of the words of Article 45 of the Code of Administrative Offenses of Georgia "... or, in exceptional cases, if the use of this measure is considered insufficient given the circumstances of the case and the personality of the offender - administrative detention for up to 15 days" (in effect until July 28, 2017), which provides for the possibility of imposing administrative detention as a sanction for the use and storage of narcotic drugs and the amount needed for single use, the consumption of which does not lead to rapid addiction and/or aggressive behavior. B) the normative content of the words "... or imprisonment for a term of up to one year" of Article 273 of the Criminal Code of Georgia (effective until July 28, 2017), which provides for the possibility of imposing imprisonment as a punishment for the consumption of narcotic drugs, their analogues or precursors, and for the manufacture, purchase and storage of the required amount for single use, the consumption of which does not lead to rapid addiction and/or aggressive behavior.

[130] GYLA Criminal Procedure Monitoring Report №13 (2019), p. 86.

the expertise, which on its part raised the issue of professional qualification of experts, emphasized the role of human rights guaranteed by the constitution in determining guilt, and imposed an even heavier burden of proving on the prosecution. In addition, the judgment provided more possibilities to pursue a care-oriented drug policy through the development of the case-law in the process of administering justice.

On June 4, 2020, the Constitutional Court rendered another precedent ruling, which declared unconstitutional the normative content of the following phrase of Article 260, Paragraph 3 of the CC "… shall be punishable by imprisonment for a term of five to eight years," which allows for the imprisonment for the illegal purchase of even a minuscule amount of drugs.[131] The amount of a usable narcotic drug must be determined in respect of each specific substance by the court adjudicating a criminal case.

The decision of the Constitutional Court of December 25, 2020, is of great significance as well.[132] Most often in drug-related offenses, we meet the cases where police officers, without providing any additional information, narrate secret operative sources and the court refers to such evidence as to the grounds for rendering a judgment of conviction. With the decision, the Constitutional Court proposed a higher standard for a judgment of conviction rather than the existing standard ensures and declared unconstitutional the normative content of the second sentence of Article 13, paragraph 2 of the Criminal Procedure Code of Georgia, which stipulates the possibility for the court to pass a judgment of conviction based on the evidence provided by an enforcement officer based on a secret source ("Confidant," "Informant") or information submitted by an anonymous source.

With the decision, the Constitutional Court stressed the need to adhere to the principle of equality of arms to ensure the high legitimacy of a judgment of conviction and noted that the defense has no opportunity to directly interrogate an informant, question the credibility and reliability of the person whose testimony is used by the court to deliver a guilty verdict. The fact that the defense lacks the above possibility obviously poses a risk that a judgment of conviction can be rendered on the basis of not indisputable evidence.

The problem with drug-related offenses over the years has been not only unsubstantiated decisions imposing bail and imprisonment and severe sentences in most cases, but also post-conviction rehabilitation. After serving a sentence as per a judgment of conviction pursuant to the Law of Georgia on Combating Drug-Related Crimes, a person is deprived of the right to drive a vehicle, the right to work and communicate knowledge,[133] which naturally makes it difficult for individuals to integrate into society after serving their terms. For example, a significant portion of employed persons[134]in Georgia provides taxi services, while the law and its link to punishment deprive the persons convicted of drug-

[131] Judgment №1/19/1265,1318 of the First Panel of the Constitutional Court of Georgia of June 04, 2020.

[132] Decision №2/2/1276 of the Second Panel of the Constitutional Court of Georgia of December 25, 2020 - Constitutional lawsuit №1276 "Giorgi Keburia v. Parliament of Georgia" available at: https://matsne.gov.ge/ka/document/view/5071269?publication=0 [last viewed: 28.02.2021].

[133] See the Law of Georgia on Combating Drug-Related Crimes, Article 3,5 for the confiscated rights and the terms of their deprivation, available at: https://matsne.gov.ge/ka/document/view/22132?publication=12# [last viewed: 28.02.2021].

[134] According to the data of 18.12.2020, there are 17712 active permits issued for providing taxi services in Tbilisi. Updated data available at: https://taxi.tbilisi.gov.ge/public/welcome/login [last viewed: 28.02.2021].

related crimes of the opportunity to be employed even in this sector, whereas in cases of crimes against sexual freedom and inviolability, the judge exercises discretionary power and when rendering a judgment depriving an offender of the rights defined by the Law of Georgia on Combating Crimes against Sexual Freedom and Inviolability, takes into consideration the personality, marital status, record of conviction, the convict's attitude to the crime committed by him, the circumstances and methods of committing the crime, the consequences, risk of continuing criminal activity, the relationship between the victim and the convict, and other circumstances.[135] With regard to drug-related crimes, the court however lacks such a mechanism and when rendering a judgment as a result of the merits hearing, the judge is obliged to deprive the convict of the rights stipulated in Article 3 of the Law of Georgia on Combating Drug-Related Crimes. When delivering a court decision without a substantial hearing, the prosecution can determine the term of deprivation of the above-mentioned right in agreement with the defendant, which may often become one of the motivating factors for concluding the case proceeding with a plea agreement, yet there is always a risk that with the lure of receiving a more lenient term, the defendant sentenced to a fine, for example, may agree to a more severe penalty. Besides, in the modern world, the enjoyment of the right to drive a vehicle is so important that individuals are forced to or violate the above-mentioned restriction becoming offenders again.[136]

THE LAW ON AMNESTY

On January 11, 2021, the Parliament of Georgia passed the Law of Georgia on Amnesty,[137] mostly covering persons accused and convicted of drug-related crimes. The convictions of persons accused and convicted of custodial or non-custodial (except for fines) crimes under Article 260(1)(2) of the CC, Article 261(1)(2) of the CC (did not apply to the sale), Articles 265, 271, Article 273 (1) of the CC, the first to seventh paragraphs of Article 273[1] of the CC and Article 274 of the CC were fully expunged.

As per the amnesty law, the sentences were halved for persons convicted and accused of Article 260 (3) and Article 261 (3) who are not convicted for other crimes (does not apply to the conviction stipulated under articles of the chapter covering narcotic drug offenses), the sentences were reduced by ¼ for persons accused or convicted under Article 260 (6) (a) (does not apply to the sale) of the CC, Article 261(4)(a) (does not apply to the sale) and Article 265(2)(3) of the CC. It is important that those convicted and accused under the articles envisaged by the Law on Amnesty will be reinstated in the rights which they had been deprived of based on the Law of Georgia on Combating Drug-Related Crimes (except for the right to manufacture, purchase, store and carry firearms).

With the Law on Amnesty, the state tried to alleviate the years-long harsh unbalanced drug policy with a one-time humane act. Amnesty, as a humane act, has a positive impact

[135] Article 3 of the Law of Georgia on Combating Crimes against Sexual Freedom and Inviolability, available at: https://matsne.gov.ge/ka/document/view/4792146?publication=1 [last viewed: 28.02.2021].

[136] Article 381 of the Criminal Code stipulates criminal liability for non-execution of a judgment that has entered into force.

[137] The Law of Georgia on Amnesty, 11.01.2021, available at: https://info.parliament.ge/file/1/BillReviewContent/266879 [last viewed: 04.03.2021].

on the legal status of convicts, yet amnesty is not a way out of the situation. The legislators should take immediate steps to regulate the list of narcotic drugs, bring the sentences for drug-related offenses within an adequate legal framework, and pursue a care-oriented policy for drug-addicted persons.

PREVENTIVE MEASURES IMPOSED FOR DRUG-RELATED OFFENSES

The measures of restraint demanded in relation to drug-related offenses are mostly unsubstantiated or insufficiently substantiated and of a more template nature compared to other types of crimes.[138]In the cases where bail was demanded, the principle of proportionality was violated more often, the amount of bail was often disproportionate to the property owned by the accused. The Prosecutor's Office, even when it had the opportunity to do so, was reluctant to submit a motion for an agreement on not to leave and appropriate conduct into drug-related offenses.[139]Frequently, when demanding remand detention as a measure of restraint, the prosecution was referring to the threat of destruction of evidence and influencing witnesses, while the witnesses into the case were merely two or three police officers and the evidence had already been removed. Furthermore, the prosecution noted the existence of possible accomplices but could not present any evidence to confirm it. In most cases, the prosecution declared that a number of investigative actions were required to be conducted to identify the origin of a narcotic drug or a drug dealer, yet the investigation into the majority of such cases was finalized during the initial stage of the proceedings and no substantial new evidence was identified thereafter.

[138] During the reporting period from March 2017 through February 2018, a total of 92 (22%) unsubstantiated decisions on preventive measures were identified, of which 31 (33%) were related to drug-related offenses. In the next reporting period, 46 (33%) out of 140 cases were related to narcotic drug offenses, and 69(41%) out of 167 decisions from March 2019 through February 2020.

[139] In the reporting period 2019-2020, GYLA attended 23 hearings of the accused charged under Articles 273 and 273[1] of the Criminal Code, in 19 of which the agreement on not to leave and proper conduct could have been applied, however, the Prosecutor's Office never requested the measure of restraint and the court applied it only in 3 cases.

The following charts show preventive measures applied to drug-related offenses. The charts do not contain information on the number[140] of restraining measures imposed in relation to Articles 273 [141]and 273[1] [142] of the CC.

Chart №38

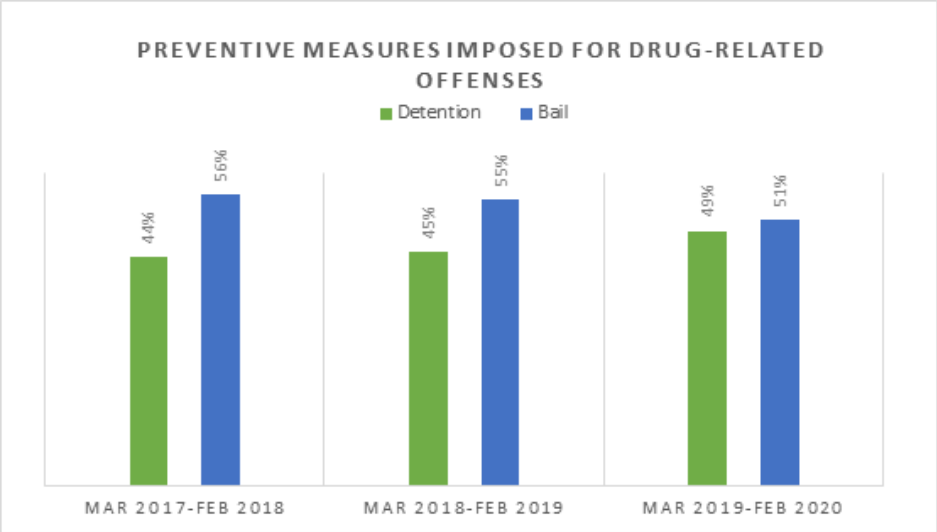
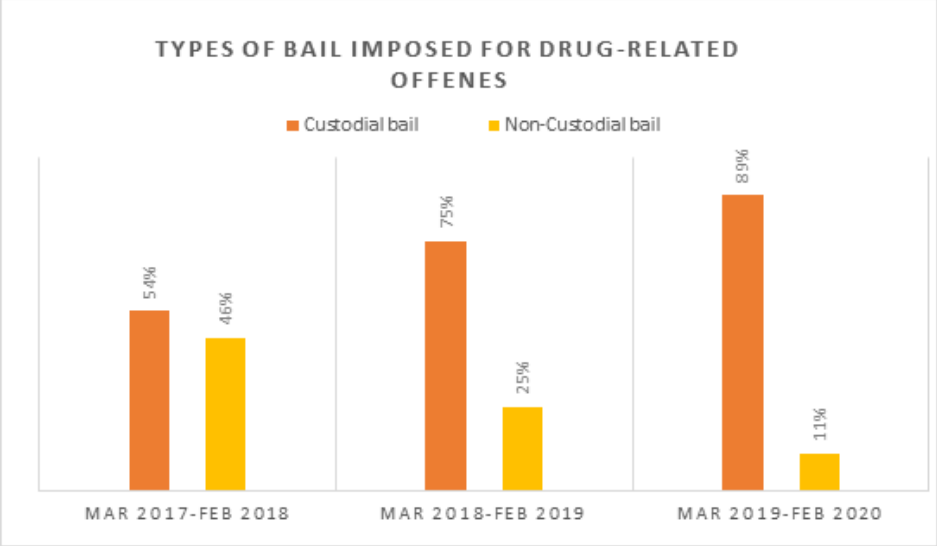


Chart №39



[140] See more detail in Annex №3 .

[141] Illicit manufacture, purchase, storage, transportation, forward and/or illegal consumption of a small amount of a drug, its analogues or precursor without a medical prescription.

[142] Illicit purchase, storage, transportation, forward and/or sale of small quantities of the plant of cannabis or marijuana.

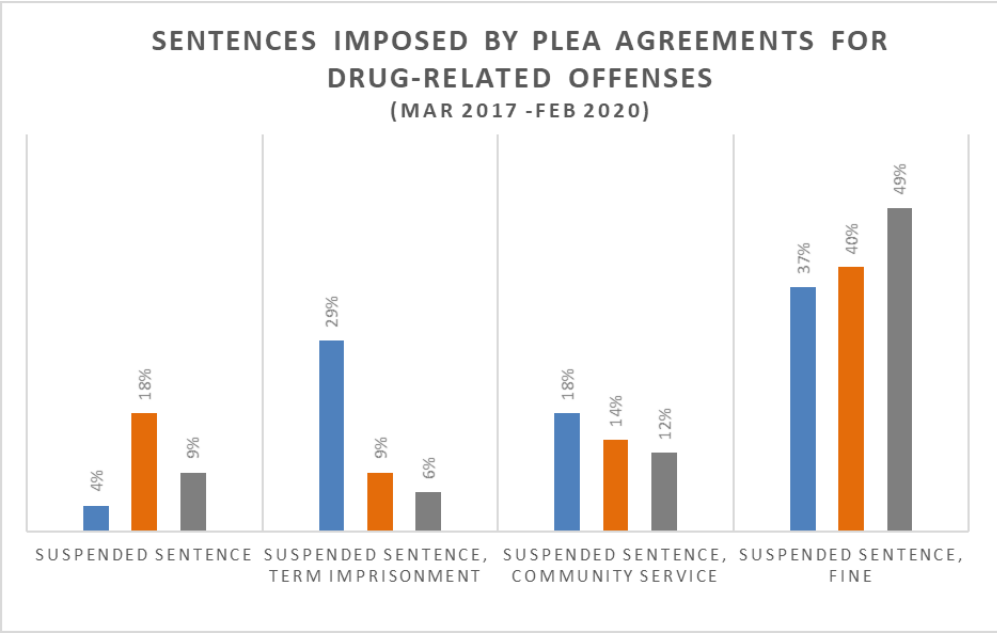
MONITORING RESULTS

Sentences imposed for drug-related offenses during plea agreement hearings

According to the results of the court monitoring, more than half of the persons accused of committing drug-related offenses enter into the plea agreement imposing a fine.[143]

The chart below shows the types of sentences determined in the plea agreements for drug-related offenses from February 2017 through February 2020, the data are shown separately for each year (the chart does not show the sentences provided for crimes under Articles 273 and 273[1] of the Criminal Code).

Chart №40



The results of the monitoring, as well as the judgments studied, show that real imprisonment is rarely imposed as a sentence for drug-related offenses concluded with the plea agreement and whenever it is imposed, it is used for a short period and together with additional punishments.

SENTENCES RENDERED AFTER HEARINGS ON THE MERITS

Similar to the data obtained as a result of analyzing court rulings, the court monitoring has shown as well that drug-related crime cases are largely finalized with a judgment of conviction. In the period from March 2018 through February 2020, the GYLA monitors attended 10 court trials deliberating narcotic drug offenses (Article 260 of the CC), where the judge handed down the verdict. In all ten cases, a guilty verdict was rendered: in 9 of

[143] See more detail in Annex №3.

these, the court sentenced the defendants to term imprisonment, and in 1 case – imprisonment that was deemed conditional.

As regards the crimes provided for in Articles 273 and 273[1] of the CC, a total of 2 court judgments were delivered sentencing the accused to a fine in the amount of GEL 2,000 in one case and GEL 2,500 in the other.

In one case, the court found the person guilty of purchasing and storing a large number of narcotic drugs (Article 260 (3)(a) of the CC) and sentenced him to a minimum of 5 years in prison. Under the plea agreements, those accused of the above crimes were mostly sentenced to non-custodial sentences – a suspended sentence, fines, community service.[144]

ANALYSIS OF COURT RULINGS

With the purpose of determining the extent to which sentences for drug-related offenses in **the terms of legal consequences lead to the placement of individuals in substantially unequal circumstances in cases adjudicated with and without the main hearing (through a plea agreement),** GYLA requested from five courts, Tbilisi, Kutaisi, Batumi, Rustavi City and Telavi District Courts the judgments rendered as a result of merits hearing and those resolved with the plea agreement concerning the offense under Article 260(3) of the CC.[145]

Ultimately, we received 86 court judgments against 92 persons[146]delivered as a result of merits hearings into the crime under Article 260(3) of the CC in 2016-2020, and 44 verdicts against 44 persons as a result of the plea agreement.[147]

The analyzed court rulings show that the cases of individuals accused of narcotic drug crimes are mostly resolved by conviction, in only 3 (4%) of the 86 verdicts, 3 defendants were acquitted. In the above cases, the court held that the evidence presented could not confirm the guilt of the accused beyond a reasonable doubt. The conviction into drug-related offenses is mainly based on a combination of testimonies provided by law enforcement witnesses and the findings of a chemical and narcotic drug examination.

The review of the court judgments revealed that the most common violations were illicit manufacturing, cultivating, purchasing, storing, forwarding, or transporting narcotic drugs like Buprenorphine, heroin, and marijuana.

The chart below shows the types of narcotic drugs seized during the proceedings of criminal cases under Article 260(3) of the Criminal Code of Georgia.

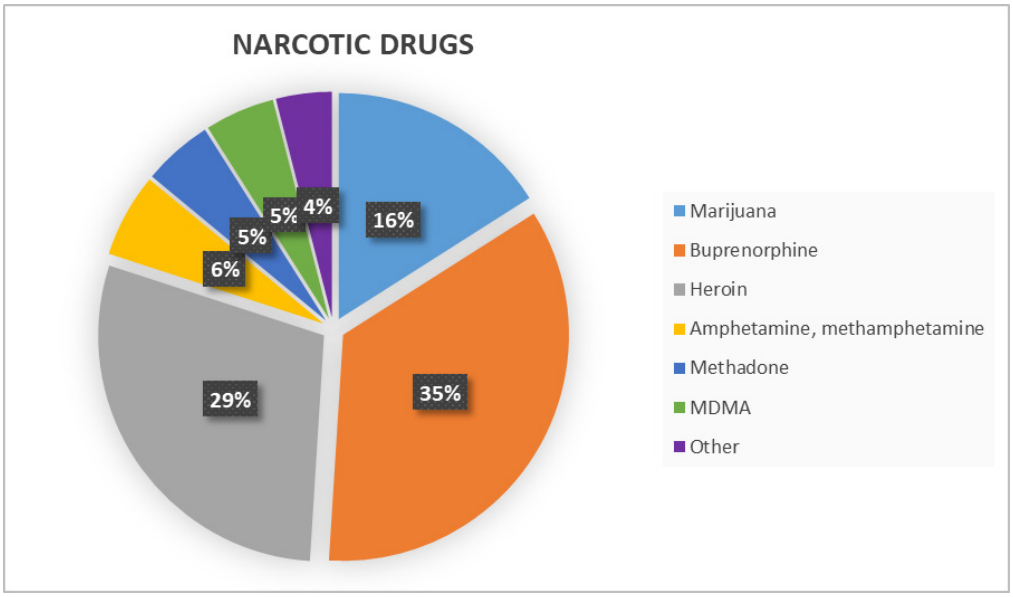
[144] For example, in the reporting period of March 2018-2019, 27 plea agreements were concluded for this type of crime, and in most - 24 cases the defendants were sentenced to probation, fines, community service, etc. Only 3 of them were sentenced to term imprisonment not exceeding 1 year.

[145] The crime under Article 260 of the Criminal Code involves the illicit manufacture, production, purchase, storage, forward or transportation of a narcotic drug, its analogue or precursor or a new psychoactive substance a) in large quantities; b) by prior agreement of the group; c) by abusing official position; d) repeatedly; e) by a person who has previously committed any of the offenses under the chapter of drug offenses.

[146] Five verdicts were handed down by Telavi District Court, 23 verdicts rendered by Tbilisi City Court; Batumi City Court - 35 verdicts; Rustavi City Court - 10 verdicts and Kutaisi City Court - 13 verdicts.

[147] Telavi District Court delivered 14 verdicts; Kutaisi City Court - 30 verdicts.

Chart №41



It is quite noteworthy that during the main hearings, the majority of the accused individuals pleaded guilty to committing drug offenses. In 53 (58%) cases, the defendants pleaded guilty and did not challenge the evidence presented by the prosecution, which certainly was reflected in the sentences determined by the court, however, they were sentenced to much harsher penalties than those convicted of a similar article but having signed the plea agreement.

The offense under Article 260(3) of the CC provides for imprisonment for a term of 5-8 years as the form and size of the sentence and is therefore considered a serious crime, and during the merits hearing, the judge is deprived of the opportunity to count the sentence suspended,[148] due to which in all cases the defendants were punished with real sentences, on average 5-6 years in prison, while those charged with similar offenses but having signed the plea agreement in 23 cases (62%) out of 37 were sentenced to non-custodial measures, and in the remaining 14 cases (38%), the offenders were imposed on imprisonment with partial probation.

Processing the court judgments has revealed two cases with virtually identical circumstances where the persons charged with drug-related offenses were placed in substantially unequal conditions. In both cases, the individuals were charged with illicit purchase and possession of a large amount of the narcotic drug Buprenorphine, a crime under Article 260(3)(a) of the CC. As a result of the merits hearing, one defendant was sentenced

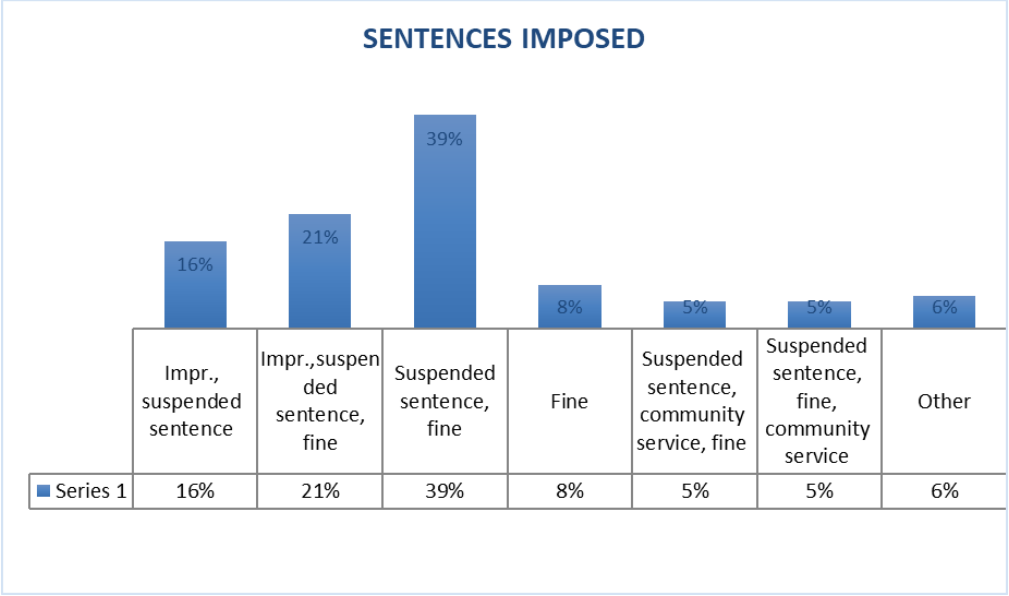
[148] Pursuant to Article 63(3) of the Criminal Code, if a convicted person has committed an intentionally less serious or negligent offense and he or she pleads guilty and/or cooperates with the investigation, the court has the right to determine the sentence to be considered suspended if the convicted person had not been convicted for committing a severe crime or an intentional felony in the past.

to 6 years of imprisonment,[149] while in a similar case, the other person who signed a plea agreement was sentenced to 5 years of prison that was completely deemed suspended with the same probation period.[150]

As the court monitoring and the analysis of court rulings show, due to the severe sentences envisaged for drug-related offenses, defendants find themselves in an apparently inadequate and unequal condition despite similar charges if the Prosecutor's Office refuses to enter into a plea agreement and the court considers the case on the merits. Although the court imposes the minimum penalties, the defendants are exposed to a much harsher punishment than those with similar charges but entering the plea agreement.

The following chart shows the sentences imposed as a result of the plea agreement court rulings (concerning Article 260 (3) of the CC).

Chart №42



Consequently, when the prosecution is reluctant to show good will to conclude the plea agreement, the accused persons are held more accountable in terms of punishment unlike other defendants and are placed in a substantially unequal position.

The study of the **court judgments** has also shown that the delay on the part of Parliament in amending the law as per the decisions of the Constitutional Court on drug-related offenses has caused perplexity in judicial practice.

In particular, according to the court ruling №1/4/592 of the Constitutional Court rendered on October 24, 2015 (case - Georgian citizen Beka Tsikarishvili v. Parliament of Georgia), the Constitutional Court deemed unconstitutional the imprisonment of the person for

[149] Judgment №1-1364 / 15 of Batumi City Court of May 16, 2016.

[150] The Judgment of Rustavi City Court of October 2017 (the number of the case and date were classified).

purchase/storage of up to 70 grams of dried marijuana for personal use. Following the resolution №3/1/708, 709, 710 of the regulatory session of the Plenum of the Constitutional Court of Georgia of February 26, 2016, the normative content of Article 260(1) of the Criminal Code of Georgia that stipulates the possibility of imposing imprisonment as a criminal punishment for "illicit purchase and storage for the personal use of dried marijuana, the narcotic drug indicated in Annex №2, item №92, of the Law of Georgia "On Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance" was declared invalid."[151]

Prior to the moment when the Parliament reflected the decisions of the Constitutional Court in the legislation and introduced a special provision on July 26, 2017, regarding the plant of cannabis and marijuana – namely, Article 273[1] of the CC (illegal purchase, storage, transportation, forward, sale and/or consumption of the plant of cannabis or marijuana without a medical prescription),[152] the court had been forced to determine the sentences in such cases independently. Any legal norm through which a judgment of conviction could have been rendered by the court in the absence of the penalty was not prescribed by law. Judges of the Common Court considered this as a flaw of the Criminal Procedure Code, which was substantially improving the situation of specific defendants, and left the accused unpunished in all such cases, albeit through different procedures. Of the court judgments of the named period that we studied, 18 cases concerned marijuana, of which the judge did not impose a sentence on the accused in 15 cases, and in 3 cases the court first sentenced and then acquitted the convict.

[151] The resolution №3/1/708, 709, 710 of the Regulatory session of the Plenum of the Constitutional Court of Georgia of February 26, 2016, available at: https://matsne.gov.ge/ka/document/view/3224060# [last viewed: 04.03.2021].

[152] This article includes Articles 273 and 260 of the Criminal Code and provides for a relatively lenient regulation concerning the plant of cannabis/marijuana, unlike other drugs.

DOMESTIC CRIMES

INTRODUCTION

On June 19, 2014, Georgia signed the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the so-called "Istanbul Convention"[153] and ratified it on September 1, 2017. The Convention obliges the Contracting Parties to prevent and eliminate any incidents of domestic violence, to expand the victim's legal space, to ensure the safety of victims, and to introduce relevant legislative changes.

For years GYLA has deemed monitoring domestic violence and domestic crime cases as a priority since it provides a basis for assessing the activities of the state, prosecutors, and the judiciary in this respect. In parallel with the legislative amendments, the efforts of the investigative bodies and the Prosecutor's Office, as well as the court, in identifying and responding to domestic violence and domestic crimes in practice have yielded significant results. However, the analysis of official statistics and the results of the GYLA's court monitoring show that challenges in the area are still reported.

Domestic violence is violence, systematic abuse, blackmail, or humiliation by one member of a family[154] against another member of the family, which resulted in physical pain or suffering not causing the consequences provided for in Articles 117, 118 or 120 of the Criminal Code.[155]

Pursuant to Article 11^1, **domestic crime** is the commission of a crime by one family member against another member of the family.[156] Criminal liability for domestic crimes is defined by the relevant article of the Criminal Code of Georgia, with reference to this article.

In 2016-2020, the legislation related to domestic violence and domestic crimes was further improved. The major changes were targeted at tightening penalties for domestic violence. For the purposes of Article 126^1, Paragraph 1 of the Criminal Code, imprisonment for a term of two years instead of one was determined as a punishment.[157] An additional penalty in the form of the restriction of firearm-related rights was provided for the articles on domestic violence and domestic crimes,[158]and a provision was added making it

[153] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the so-called Istanbul Convention. Available at: https://matsne.gov.ge/document/view/3789678?publication=0 [last viewed: 04.03.2021].

[154] Pursuant to the first part of the note concerning Article 11^1 of the Criminal Code, for the purposes of the Criminal Code, the following are considered family members: mother, father, grandfather, grandmother, spouse, a person in unregistered marriage, child (stepchild), foster child, foster parents (foster mother, foster father), stepmother, stepfather, grandchild, sister, brother, parents of the spouse, a parent of the person in an unregistered marriage, son-in-law, daughter-in-law, (including those in an unregistered marriage), former spouse, persons in a previous unregistered marriage, guardian, caregiver, supporter, custodian, a person under foster or guardianship, recipients of support or also any persons who are or were permanently engaged in a common family household.

[155] The Criminal Code, Article 126^1 (1).

[156] The commission of the offense provided under Articles 109, 115, 117, 118, 120, 126, 133^1, 133^2, 137- 141, 143, 144 -144^3, 149 -151^1, 160, 171, 187, 253 -255^1, 381^1 and 381^2 of the Criminal Code,

[157] See the amendment 3772-Iს dated 30/11/2018.

[158] See the amendment 2395-IIს dated 30/05/2018.

possible to punish offenders committing the crime with a discriminatory motivation and committing a crime by one member of a family against another member of the family with relatively severe sentences.[159]

Besides, the amendments were introduced to the definition of family members, which further expanded and clarified the concept of a family member as it is in the current form now.[160] Moreover, the recurrence of a crime was added to domestic offenses.[161]

Another important step forward was setting up the Human Rights and Quality Monitoring Department of the Ministry of Internal Affairs to ensure a timely response and investigation into the above crimes. The Department of Human Rights was established on January 11, 2018, to monitor ongoing investigations and administrative proceedings into allegations of discrimination against women, violence against women, trafficking and hate crimes, trafficking, and crimes committed by and against minor children.[162] Later, the scope of the department was further increased, it was renamed to the Department of Human Rights Protection and Quality Monitoring of Investigations, with the jurisdiction covering crimes against life and health.[163]

[159] In particular, Article 53^1 of the Criminal Code has been added paragraph 3, according to which the term of imprisonment for committing a crime in the presence of aggravating circumstances provided for in Article 53^1, paragraphs 1 or 2 of the Criminal Code shall be at least 1 year longer than the minimum term of punishment provided by the relevant article or part of the article of the Criminal Code. See the amendment 3772-Iს dated 30/11/2018.

[160] See the amendments 17/03/2020 -5750-IIს and 13/07/2020- 6760რს.

[161] See the amendment 30/11/2018-3772-Iს.
It was found that domestic crime under Articles 109, 115, 117, 118, 120, 126, 126^1, 137 – 139, 141, 143 and 144-144^3 of the Criminal Code shall be deemed to have been committed more than once if it was preceded by the commission of a domestic crime under Article 126^1 of the same Code or any other above-mentioned articles.

[162] Decree № 1 of the Minister of Internal Affairs of Georgia of January 12, 2018, "On the Approval of the Statute of the Human Rights Department of the Ministry of Internal Affairs of Georgia," available at - https://matsne.gov.ge/ka/document/view/3999709?publication=0 [last viewed: 04.03.2021].

[163] Decree №11 of the Minister of Internal Affairs of Georgia of February 4, 2019, "On the Approval of the Statute of the Human Rights Protection and Investigation Quality Monitoring Department of the Ministry of Internal Affairs of Georgia; available at: - https://police.ge/ge/ministry/structure-and-offices/adamianis-uflebata-datsvis-departamenti?sub=11451 [last viewed: 04.03.2021].

DOMESTIC CRIME STATISTICS

GYLA requested from the Ministry of Internal Affairs of Georgia[164] and the General Prosecutor's Office of Georgia[165] the data concerning the number of cases investigated and the number of persons prosecuted for domestic violence and domestic crimes under Article 126^1 and all articles in combination with Article 11^1 of the Criminal Code of Georgia and/or in conjunction with these Articles in 2016, 2017, 2018, 2019 and in the period from January 1 through July 31, 2020 (separate data for each year).

According to the statistics of the Ministry of Internal Affairs of Georgia,[166] the number of initiation of investigations has been increasing every year since 2016.

The statistical data provided by the **Prosecutor General's Office** of Georgia[167] concerning the number of persons prosecuted under the specific articles also show that the annual rate of the crime is rising.

The following table shows the rate of launching the investigation and prosecution into domestic crimes and domestic violence cases in 2016-2020.

Table №1

The Rate of Initiation of Investigations and Prosecution into Domestic Crimes and Domestic Violence Cases		
Year	**Rate of Initiation of Investigations**	**Rate of Initiation of Prosecution**
2016	2011 cases	1356 persons
2017	2878 cases	1986 persons
2018	5666 cases	3955 persons
2019	6188 cases	4579 persons
January –July 2020	3535 cases	2762 persons

[164] Statement №c-04 / 139-20 of the Georgian Young Lawyers' Association dated September 22, 2020.

[165] Statement №c-04/124-20 of the Georgian Young Lawyers' Association dated August 31, 2020.

[166] Note: In the Information-Analytical Department of the Ministry, data on the initiation of investigations under the articles of the Criminal Code of Georgia and registered crimes are processed through the relevant reports of the statistical-analytical module of the Unified Electronic Criminal Procedure System (Crimcase) created in coordination with the Ministry of Justice. Processing the data according to the mentioned reports is carried into separate articles of the Criminal Code of Georgia and not in combination with the articles of the Criminal Code of Georgia; According to the methodology employed by the Ministry of Justice of Georgia, criminal statistics review the indicators of the initiation of investigations statically, only within the framework of primary qualification, without dynamically considering further changes.

[167] Letter №13/54082 of September 18, 2020, of the General Prosecutor's Office of Georgia.

The official data published by the Supreme Court is also noteworthy.[168]

See the table below for the statistics of the common court on domestic violence statistics.[169]

Table №2

The number of cases deliberated by the district (city) courts of Georgia under Articles 11[1] (Liability for a domestic crime) and 126[1] (Domestic violence) of the CC into which court verdicts were rendered.		
Year	**Cases**	**Persons**
2018	2346	2384
2019	2642	2694
The first quarter of 2020	518	521

All three sources confirm that the rate of identification of the crime has increased in recent years, which is the result of a relevant response by state institutions. Analysis of the statistical data reveals another important fact that the victims of domestic violence and domestic crime cases are mainly women, and the average number of women victims in these types of crimes is 93%.[170]

DISCRIMINATORY MOTIVE

A positive trend has been observed in the direction of revealing a discriminatory motive. Investigating and analyzing sex and/or gender-motivated crimes was a significant challenge for prosecutors and the judiciary in 2016-2017. Although it was found in a number of cases that the crime was motivated by inequality, prejudiced views, and stereotypes about the woman's role, these factors were not adequately addressed by the prosecution and the court.[171] The monitoring identified cases with the accused noting to have abused the victim (ex-spouse) because she was acting inappropriately after the divorce. A father physically abused his daughter because she posted a photo on social media not suiting the girl. There have been cases with the offender manifesting a proprietary attitude towards his ex-wife, etc. In such cases, there were direct indications of discrimination on the grounds of sex, however, the prosecution failed to elaborate on it.[172]

[168] Statistics of the common courts on domestic violence, available at: http://www.supremecourt.ge/ojaxshizaladobisstatistika/ [last viewed: 09.03.2021].

[169] It should be noted that the given statistics show only the data related to individual articles and do not cover the cases deliberated on a combination of articles, which could further increase the number of crimes of this type.

[170] Statistics of the common courts on domestic violence, available at: http://www.supremecourt.ge/ojaxshizaladobisstatistika/ [last viewed: 09.03.2021].

[171] GYLA Criminal Court Monitoring Report №10 (2017), p.29.

[172] GYLA Criminal Court Monitoring Report №12 (2018), p.96.

In the following years, certain progress in identifying discriminatory motivations was noticed. If the GYLA revealed merely 2 cases during the reporting period from March 2017 through February 2018, in the following year, the Prosecutor's Office indicated the discriminatory motivation 9 times.

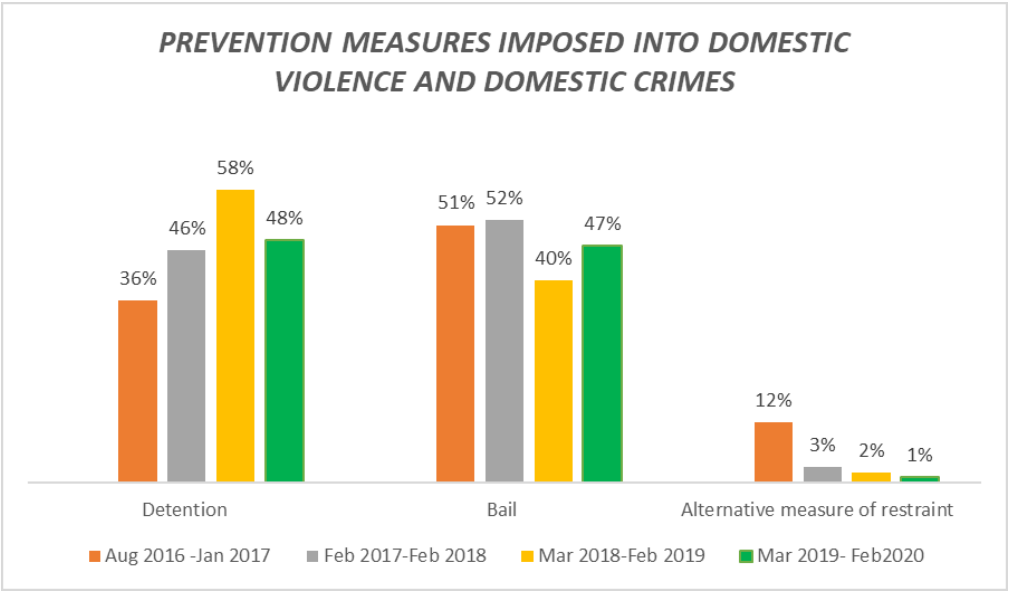
Recently, the data of the Prosecutor's Office have also confirmed the improved approaches in the activities of the Prosecutor's Office in this respect. Referring to gender intolerance in the rulings on criminal charges by prosecutors in the cases of violence against women and domestic violence is increasing every year. The gender intolerance-motivated crimes were committed by 25 offenders in 2017, in 2018 - 111, and in 2019 - 120. According to the 2020 data, the gender discrimination motivation was identified against 178 defendants, and 184 women were recognized as victims.[173]

PREVENTION MEASURES IMPOSED INTO DOMESTIC VIOLENCE AND DOMESTIC CRIMES

The GYLA's court monitoring confirms that, just like other categories of crimes, two types of restraint measures- remand detention and bail- are used in domestic violence and domestic crime cases.

The chart below shows the results of the GYLA's court monitoring concerning the prevention measures applied to domestic violence and domestic crimes, data of 2016-2020.

Chart №43



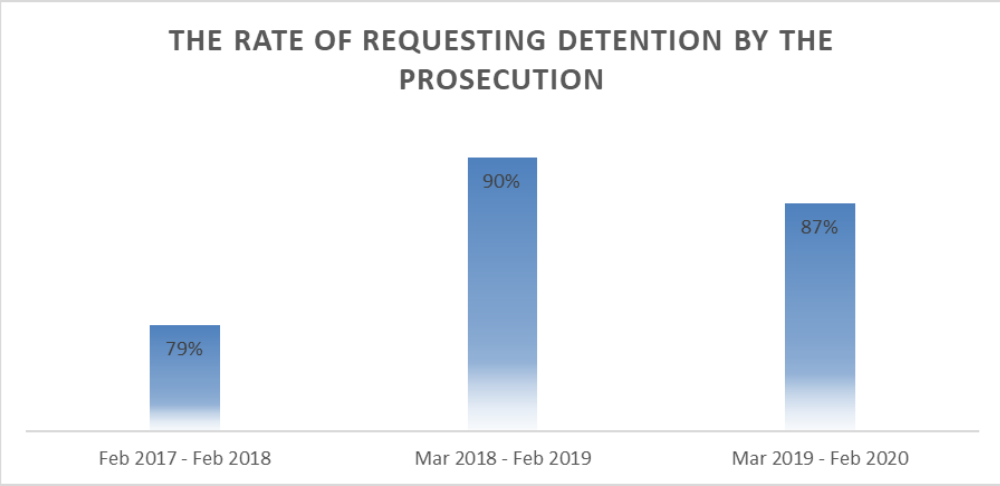
The observation of court trials has proved that in recent years the prosecution has mainly submitted the motion demanding remand detention for the above crimes. The standard

[173] The Prosecutor General's report 2020, available at: http://pog.gov.ge/uploads/c7c23efb-generaluri-prokuraturis-saqmianobis-angarishi-2020-compressed.pdf [last viewed: 09.03.2021].

of substantiation of the preventive measure requested by the Prosecutor's Office has also improved.

The following chart offers the rate of custody requested by the prosecution as a measure of restraint for domestic violence and domestic crime cases from February 2017 through February 2020.

Chart №44



JUDGMENTS/STATISTICS INTO DOMESTIC CRIMES

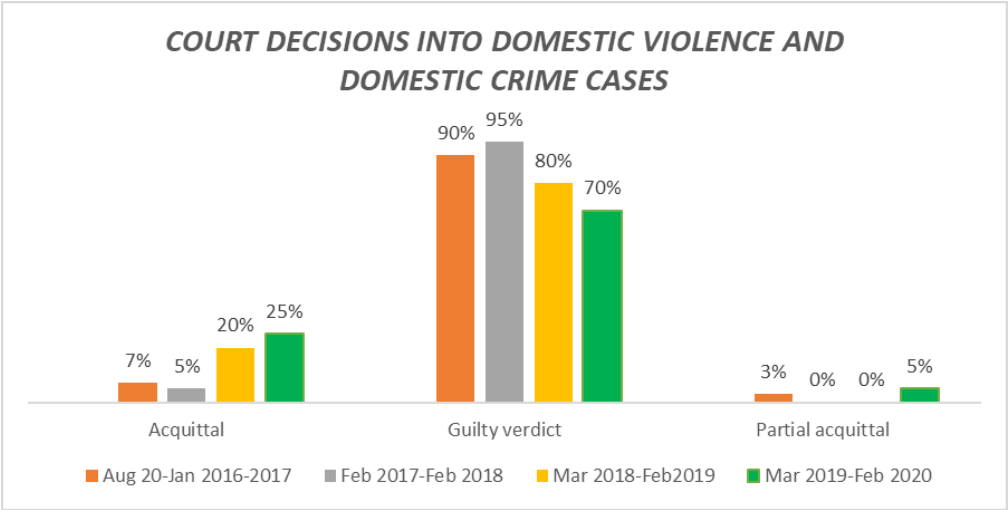
Cases relating to the above category of crime are mostly finalized with a guilty verdict, yet the court mostly limits itself to relatively lenient sentences. It should be noted that the number of acquittals has increased significantly in the last two years, mainly due to the fact that the victims exercise their right prescribed by law and refuse to testify against their family members, which results in the judge acquitting the offenders due to the lack of required evidence.

In such cases, the Prosecutor's Office and law enforcement authorities should work effectively, locate other witnesses, evidence, and should not rely solely on the statements of victims.[174]

[174] GYLA Criminal Court Monitoring Report №12 (2018), p.97.

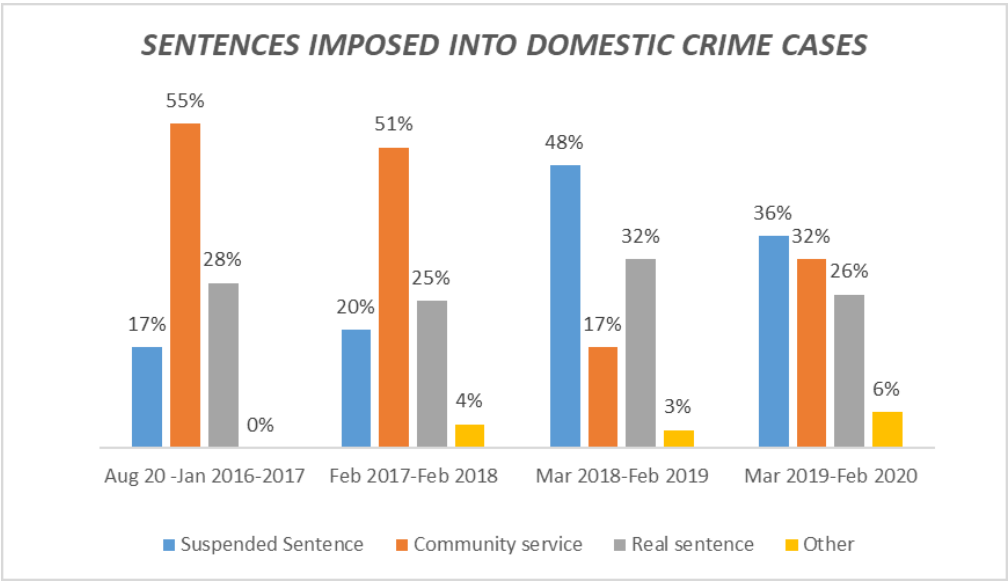
The chart below shows the verdicts delivered into domestic violence and domestic crime cases from August 2016 through February 2020.

Chart №45



In the chart below, you can see the sentences imposed into domestic crime cases in the period from August 2016 through February 2020 (monitoring results).

Chart №46



During the four-year period, the imposition of custody as a punishment amounted to 28%. Basically, real punishment was used for crimes where the violence was systematic, a restraining order had been issued in the past, and/or the person had been prosecuted several times.

PLEA AGREEMENTS

In previous years, concluding a plea agreement was a common practice for the given type of crime but the recent reports have shown that the cases of resolving the domestic crime and domestic violence cases with the plea agreement have significantly reduced.

If such cases were frequently observed in the past years, the monitoring period from March 2017 through February 2018 recorded only 19 cases where individuals accused of domestic crimes entered into a plea agreement,[175] which is 6% of the plea agreements signed during the mentioned reporting period.[176] In the following years, the number of plea agreements decreased even further. In the period from March 2018 through February 2019, the plea agreement court hearings of 534 defendants were monitored, of which only 9 (2%) of them were accused of committing the domestic crime (Articles 11^1 and/or 126^1 of the CC).[177]

The period from March 2019 through February 2020 proves that the plea agreement is practically no longer entered into in relation to domestic crimes. During the reporting period, out of 523 cases (against 558 offenders), the plea agreement was signed with the defendants in only 7 (1%) cases.

The situation with the plea agreement once again highlights that the Prosecutor's Office has tightened its approach and less frequently imposes lenient measures on those offenders who are accused of the above crimes.

OPINIONS OF VICTIMS AND THE PUBLIC

Merely the efforts of the Prosecutor's Office or law enforcement are not sufficient to fully protect victims of domestic violence. In such cases, the state should take preventive measures as well. In some cases, the tolerant and loyal attitude of the victims and members of the public due to their lack of awareness, fear of cooperating with the investigating authorities, leads to the perpetrator developing a sense of impunity, which further motivates him.

The enforcement of the laws adopted to combat domestic violence is hindered by public attitudes and deep-rooted patriarchal views and stereotypes, leading to a tolerant attitude towards gender-based violence and deeming domestic violence as a very private rather than a public issue in most parts of the country.

The case-law analysis shows that victims of domestic violence do not seek assistance from the state until the situation becomes extremely complicated and the intervention by law enforcement is the only way to save lives and protect the victims against harm to their health. Often the victim's free will is paralyzed by many factors, such as love-induced forgiveness, pressure by the close relatives, the reaction of the public or fear of the abuser, the fear of losing children or the residence, which are the key factors discouraging the

[175] GYLA Criminal Court Monitoring Report №12 (2018), p.71.

[176] In 19 (6%) out of 303 cases, the defendants were charged with a domestic crime.

[177] GYLA Criminal Court Monitoring Report №13 (2019), p.80.

victims to speak up, which they ultimately regret and experience the consequences of being passive on their health, in some cases leading to fatal results. The safety of the victim and her children are exposed to a repeated and possibly high-intensity risk when they are forced to return to the conflicting situation due to hard socio-economic conditions, fear or inability to discern the seriousness of the problem, which seems as if the victims voluntarily refuse to escape from the violent environment.[178]

The following is a specific example identified by the court monitoring where the victim's tolerant attitude toward the offender had a detrimental effect on her.

An example to illustrate

> The person was charged with violence against his wife in the presence of minor children, two counts of physical and systematic verbal abuse over the years as well as two counts of threats of killing and non-compliance with a court order. The defendant fully pleaded guilty.
>
> Given the fact that the victim did not testify against the accused, a plea agreement imposing 9 months in prison as the form and size of the sentence, based on the consolidation of the crimes, was signed that was ultimately approved by the court.
>
> The offender left the penitentiary institution shortly after signing the plea agreement. Two days after the release, he went to the house of the victim – the residence of his ex-wife and smashed a window of the house with stones, following which he fled. He was later arrested by law enforcement.[179]

For the purpose of combating domestic crimes and violence against women, it is necessary to further raise public awareness. Investigators, prosecutors, and the judiciary must gain credibility so that the victims of crime or ordinary citizens who decide to cooperate with the authorities develop the feeling that they are protected by the state bodies.

[178] The Court judgment №1/4119-19 of the Tbilisi City Court dated April 7, 2020.

[179] GYLA Criminal Court Monitoring Report №14 (2020), p. 71.

CRIMES COMMITTED DUE TO SOCIAL HARDSHIP

INTRODUCTION

A significant finding of the GYLA's criminal court monitoring reports is crimes committed due to the grave social reality, where the hardship the accused persons are experiencing, on the one hand, provokes them to commit a crime, and on the other hand, poverty becomes an even more aggravating factor for their legal status. The dire social situation in the country is reflected in the actions committed by certain individuals. The average number of families receiving subsistence benefits from the state due to their poverty level in Georgia amounts to 12-13% per year.

The following table shows the number of families receiving subsistence allowance according to official data provided by the Social Services Agency.[180]

Table №3

The number of families receiving subsistence allowance		
Year	Citizens	Data in percentage
2016	47608	13%
2017	455813	12%
2018	435450	12%
2019	427373	11,5%
2020	510434	14%

GYLA attended the court hearings during which it was identified that the severity, motive, and goal of the offense committed by the accused stemmed from social hardship. However, the approaches of the prosecution and the judiciary to such crimes were not always adequate. The court monitoring has revealed specific cases where the prosecution and the courts did not take the above circumstances into account when rendering decisions.

TRENDS IDENTIFIED AT COURT HEARINGS CONSIDERING PREVENTION MEASURES

The GYLA's monitors attended the first appearance court hearings that subjected the defendants to far more severe measures of restraint regardless of their financial situation than it was necessary to ensure due conduct of the offenders.

Examples for illustration:

[180] Official data of the Social Service Agency, available at - http://ssa.gov.ge/index.php?lang_id=GEO&sec_id=610 [last viewed: 10.03.2021].

- A person was charged with theft (Article 177(2)(a) and (3)(b) of the CC), namely, stealing items from two different vehicles, the damage inflicted totaled up to 120 GEL. The prosecutor requested remand detention with the argument that the accused committed the said act while serving a suspended sentence, he had been convicted of a similar offense and there was a risk of committing a new crime. The accused is 18 years old, homeless, lives on the street and has no income. The offender pleaded guilty and supported the prosecutor's motion. The court granted the motion for the detention.
- A person was charged with breaking into a chicken coop in the yard of a church to steal 21 chickens (Article 177(2)(a)(b) and (3)(b) of the CC), the price of each chicken was - 20 GEL, the total damage inflicted amounted to 420 GEL. The prosecutor petitioned for the use of custody, arguing that that the defendant had been convicted of a theft in the past, there was a risk of absconding and committing a new crime. The defense lawyer clarified that the offender had a severe social background, was pleading guilty, and requested bail in the amount of GEL 1,000. The court granted the prosecutor's motion.

In the examples above, the judges were not able to impose a larger amount of bail given the financial capabilities of the accused, nor did they assume that the existing threats would be neutralized with a minimum amount of bail. Therefore, as the circumstances of the cases did not allow imposing alternative restraint measures (a personal guarantor was not provided in either of the cases, and an agreement on not to leave and proper behaviour could not have been applied due to the number of counts against the accused[181]), the judges were forced to impose the most severe form of restraint - detention.

See another example where the prosecution and the court did not take into consideration the social factor and demonstrated less sensitivity towards the defendant in hardship.

An example for illustration:

- The prosecutor demanded bail in the amount of GEL 2,000 concerning a case of theft. According to the prosecution, the accused secretly took possession of the wallet, causing **15 GEL damage** to the victim. The prosecutor only noted the threat of absconding and continuing criminal activities, which he/she substantiated by the nature of the crime and the expected severe punishment. The defense lawyer requested personal surety and presented four guarantors at the court hearing who were ready to assume the responsibility for the proper conduct of the accused. The trial also established that the offender had committed the crime due to hardship and his family was socially vulnerable. Ultimately, the judge accepted the prosecutor's arguments and ordered the defendant to pay a bail of GEL 1,000. The decision is unsubstantiated, as the personal surety could have achieved the goals of the restraining order.[182]

[181] Pursuant to Article 202 of the Criminal Procedure Code, an agreement on not to leave and behave properly may be applied only in the case of a crime which does not envisage imprisonment for a term exceeding one year.

[182] GYLA Criminal Court Monitoring Report №11 (2017), p. 24-25.

CONCLUDING PLEA AGREEMENTS INTO CASES OF MINOR SIGNIFICANCE

In practice, delivering guilty verdicts in relation to minor offenses and imposing sentences disproportionate to the inflicted damage persists to be a problem.

According to Article 7, Paragraph 2 of the Criminal Code, an act, although containing the signs of an action provided for in the Criminal Code, has not caused, due to its minor significance, such harm that would have necessitated criminal liability against the person shall not be deemed a crime.

In determining the insignificance, it should be assessed whether a specific act for the public is of such significance that it can be considered a socially dangerous action - a crime.

The court monitoring confirms that the prosecution and the judiciary do not show due diligence to socially motivated crimes, the response is more focused on punishing the accused rather than on their subsequent rehabilitation, re-socialization.

Examples for illustration:

- The person was charged with an attempt to steal 21 GEL worth of scrap metal (Article 19; Article 177(1) of the CC). The court hearing established that the accused had a difficult social background, had not been convicted in the past, his daily activities were to carry luggage by cart. A plea agreement was approved with the following terms: 6 months imprisonment considered suspended and a one-year probation period.
- The factual circumstances of a case confirmed that the accused tried to steal various items from one of the stores near a metro station, the amount totaling up to 7 GEL (Article 19, 177(1) of the CC). The judge requested a break, went to the deliberation room and upon the return asked the defendant whether a fine of GEL 1,000 would be a fair sentence for what he had committed (an attempt to steal items worth GEL 7). The defendant declared that he was ready to enter into a plea agreement.

GYLA believes that state resources should not be spent on the above type of crimes and more compassionate practice should be promoted. In the above cases, the court could have refused to approve the plea agreements with reference to Article 7(2) of the Criminal Procedure Code (insignificance of an act) or could have terminated the prosecution at the pre-trial hearing. However, the monitoring, unfortunately, has not identified such cases.

On its part, based on the discretionary power granted under the Procedure Code, the prosecutor was entitled to refuse to prosecute the person or resort to an alternative mechanism - diversion,[183] which means not sending a person to prison.

[183] The Criminal Procedure Code, Article 168[1].

DIVERSION

A decision on applying diversion is made by the prosecutor at the stage of the investigation, however, when the case is subsequently referred to the court, the parties may apply to the court requesting to return the accused to the prosecutor for further investigation and diversion. In such cases, the court is entitled and not obliged to return the case to the prosecutor who shall offer diversion to the accused.[184]

In order to find out how often the Prosecutor's Office applies the alternative mechanism of prosecution - diversion, we requested relevant information from the General Prosecutor's Office of Georgia – concerning the number of adults in whose case diversion was used in the period of 2016-2019 and July 31, 2020, inclusive (separate data for each year). The Prosecutor's Office replied[185] that the agency does not record the requested information.

With the view to assessing how frequently diversion is applied in practice once the case is referred to the court, we requested information from major courts -Tbilisi, Kutaisi, Batumi, Telavi, Rustavi City Courts, and Telavi District Court for the period of 2016-2019 and July 31, 2020, inclusive on the number of cases and persons[186] in whose case the judge returned the cases to the Prosecutor's Office for diversion.

Tbilisi City Court did not forward the information, noting that the court does not record / process the requested statistical data.[187]

The table below shows the number of cases the court returned to the Prosecutor's Office for diversion, the data of the four courts for the seven month-period in 2016 to 2020:

Table №4

Number of cases returned by the court to the prosecution for diversion					
The court returned to the prosecution for diversion	**In 2016**	**In 2017**	**In 2018**	**In 2019**	**Data of the seven-month period of 2020**
Kutaisi City Court[188]	39 cases against 51 persons	27 cases against 30 persons	12 cases against 13 persons	15 cases against 16 persons	None of the cases
Batumi City Court[189]	3 cases against 3 persons	3 cases against 3 persons	12 cases against 12 persons	3 cases against 3 persons	1 case against 1 person

[184] According to Article 168², Paragraph 4 of the Criminal Procedure Code.

[185] Statement №13/54082 of the Georgian Young Lawyers' Association of September 18, 2020.

[186] The requested information covers both adults and minor children.

[187] Reply №3901308 of Tbilisi City Court, dated September 4, 2020.

[188] Reply №9698-2 of Kutaisi City Court, dated September 4, 2020.

[189] Reply N616 c/i of Batumi City Court dated September 14, 2020.

Rustavi City Court [190]	2 cases against 2 persons	2 cases against 2 persons	None of the cases	1 case against 1 person	3 cases against 3 persons
Telavi District Court [191]	6 cases against 7 persons	None of the cases	4 cases against 5 persons	None of the cases	1 case against 1 person

The frequency **the court** allows individuals to exercise the mechanism of diversion should be positively assessed.

For its part, the prosecution has used the diversion mechanism in a number of cases, yet the percentage of cases referred by the court to the Prosecutor's Office for diversion and the results of the court monitoring suggests that the Prosecutor's Office opts for harsh prosecution approaches and shows reluctance to use the discretion-based humane act towards individuals in whose case diversion possibilities do exist.

According to GYLA, each branch of the state and the government has significant responsibility for the crimes caused by the dire social reality. The authorities participating in case proceedings should therefore assume an individual approach to each case in making decisions in the public interest and take into consideration the motive of the crime and the degree of risk the accused poses.

[190] Reply №883/c of Rustavi City Court dated September 11, 2020,

[191] Reply №358 of Telavi City Court dated September 14, 2020.

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The results of five-year-long monitoring of criminal proceedings and the analysis of relevant information have produced an overall picture of the implementation of criminal justice, positive trends and improved approaches to a range of matters, as well as flaws in criminal proceedings persisting over the years. Problems with the law, the judiciary, and the parties to the proceedings often affected the proper exercise of the procedural rights of the accused.

The lack of alternative measures to bail and remand detention proved to be a problem still at the **first appearance court hearings**. The court frequently imposed bail and remand detention, even in the cases where the prosecution was not able to substantiate the need for the use, and the court did not leave the accused without a measure of restraint. Another challenge is the court's dependence on the size of a sentence due to which the court could not often impose an agreement on not to leave and due conduct, however, the practice shows that the court rarely resorted to the given measure even when it could do so.

In the last two reporting periods, the number of persons appearing as **detainees** at the first appearance court hearings has significantly increased. The situation gets further complicated when, due to the ambiguity of the legislation, the court imposes bail secured with detention on detainees who lack the financial capabilities, ultimately turning them into the so-called "unacknowledged prisoners." The problem, along with the growing number of detainees, is the non-examination of the lawfulness of detention during the court hearing.

The analysis of the data requested by GYLA from the common courts has vividly shown the extent of the problem concerning the conduct of investigative actions without a prior ruling of the court, which leads to the breach of the right to private life. Court rulings are mostly blanket, citing procedural code and as a rule failing to indicate the preconditions that served as the basis for carrying out the investigative actions under urgent necessity.

The efforts of the defense at the **pre-trial hearings** have improved compared to 2016-2017 in terms of presenting evidence and submitting motions challenging the admissibility of evidence presented by the prosecution. On the positive side, the court does not show biased attitudes to either party when considering motions. A significant problem is the **revision of remand detention** imposed as a measure of restraint. We believe that the court should be guided by a higher standard when reviewing the detention imposed at the initial court hearing and better substantiate the need to leave the accused in custody.

There are frequent cases of delays or postponements of **merits hearings,** to which the court responds ineffectively and does not impose relevant sanctions. The monitoring has identified delaying of case proceedings over the years, including a violation of the statutory timeframes.

A systemic approach to **domestic crimes** has yielded significant results. The strict policy of the state in this regard, the legislative reforms, and the largely adequate approaches of

the relevant authorities has resulted in an increase in the detection rate of the category of crimes. A positive trend is observed as well with regard to the identification of discriminatory motives, yet more efforts are needed to reveal the actual data. The court monitoring confirms that an important lever in the fight against domestic crimes is to constantly raise public awareness.

The prosecution's strict approaches to **drug-related crimes** have barely changed. The court in the majority of cases grants the remand detention requested by the Prosecutor's Office, even though motions filed by the prosecution in relation to drug offenses are often unsubstantiated or inadequately substantiated. Despite a number of decisions rendered by the Constitutional Court, updating the list of amounts of narcotic drugs and revising the current sentences still seems an acute problem, which fails to ensure that accused/convicted persons for the above category of crimes are not subject to inappropriately harsh treatments. An impediment to rehabilitation and re-socialization of convicts is the automatic deprivation of the accused of the rights envisaged under the Law of Georgia on Combating Narcotic Drug Crimes without an individual assessment of relevant circumstances. The court must be conferred the discretion to determine whether to deprive the accused of these rights and for what period.

The case-law annually identifies crimes motivated by the **dire social conditions** in the country and such actions are mostly manifested in crimes of minor significance but offenders are imposed on criminal liability. The report highlights the need for a more humane approach by prosecutors and the judiciary to ensure that individual cases are not prosecuted at all or an alternative prosecution mechanism – diversion- is used.

GYLA hopes that the flaws and challenges identified in this report will be addressed in a timely manner just like a part of the recommendations provided in the periodic reports, eventually guaranteeing the implementation of more humane rights-oriented justice.

RECOMMENDATIONS

For Common Courts:

- Judges should exercise their discretionary powers when selecting a preventive measure in order not to impose a form of restraint that is not properly substantiated.
- Mostly the alternative measures to bail and detention should be used whenever relevant grounds exist.
- In reducing the amount of bail, the courts should take into consideration the financial situation of the accused.
- In the cases of custodial bail, the proportionality of the interference with the right to liberty should be taken into account to the maximum extent possible.
- Judges should inform the accused of their rights in a language they understand and provide them with information about guarantees for the protection of their rights.
- The court should pay more attention to obtaining information about torture and inhuman treatment from the accused, if any, and respond immediately.
- The court should exercise strict control over the motions demanding searches and seizures. As a result of the assessment of the specific circumstances of each individual case, judges should scrutinize the lawfulness of any investigative action already carried out and employ a particularly high standard for the assessment of the lawfulness of the investigative actions carried out with a prior ruling of the court.
- Judges should review the lawfulness of detention at a public hearing to ensure that the principle of equality of arms and adversarial proceedings is adhered to in relation to the legality of a detention.
- Courts should focus on all newly identified circumstances during the review of a measure of restraint and when reviewing the remand detention, assess whether there is a necessity to leave the accused in custody in that particular case.
- The judge must exercise strict judicial control over motions demanding searches and seizures, examine the relevance and proportionality of the conduct of the action in each specific case, and prevent any unlawful interference with a person's right to private life.
- The court should ensure proper control over the conclusion of the plea agreement. Judges must pay more attention to hearing cases at public court sessions in accordance with comprehensive procedural rules so that the plea agreement court trials do not become a mere formality.
- In order to avoid delays in case proceedings, the court must respond to lateness or non-appearance of the parties at the court hearing by imposing adequate sanctions stipulated in the law.

For the General Prosecutor's Office of Georgia:

- Prosecutors should devote more time to discussing the personality of the accused, the real threats posed by him, assess the property status of the accused, and in all specific cases, be guided not only by the gravity of the offense but also by the personal characteristics and the degree of risks the accused might be posing.

- Prosecutors must substantiate to a high standard the appropriateness of imposing a particular measure of restraint and, if a severe preventive measure is required, provide relevant reasoning why a more lenient measure of restraint can fail to meet the goals of the measure of restraint requested.
- The prosecution should obtain more information about the financial capabilities of the accused and consider the property conditions of the offender along with the gravity of the crime when determining the amount of bail.
- The Prosecutor General's Office of Georgia should develop guidelines on preventive measures and, at the same time, introduce regular and mandatory training courses for prosecutors on how to substantiate motions for preventive measures.
- The Prosecutor's Office must ensure a high standard for the cases where a person is required to be arrested.
- In the event that the threats existent at the moment of imposing remand detention as a measure of restraint are no longer present, prosecutors should file a motion to replace the detention with a less severe measure of restraint.
- With the view to avoiding delays and adjournment of merits hearings, prosecutors should take more efforts to ensure that prosecution witnesses appear on time in the court.
- In the cases of violence against women, the Prosecutor's Office should investigate by all possible means whether the crime was committed on the grounds of intolerance, and if so, the Prosecutor's Office should indicate at the court hearing the discriminatory motive of the offender;
- The Prosecutor's Office should be motivated to acquire more humane approaches to cases of minor significance, use discretionary powers and apply an alternative mechanism of prosecution - diversion;

For Parliament of Georgia:

- It is necessary to introduce legislative changes to Article 199, Paragraph 1 of the CPC, and increase the number of types of major preventive measures.
- The Criminal Procedure Code of Georgia should be amended and the measure of restraint - the agreement on not to leave and appropriate conduct – should be exempted from the dependence on the category of a sentence or a crime.
- The provision in the law with respect to "bail secured with remand detention" should be modified in such a way so that it is "equipping" rather than "obligatory" for the judge. In addition, non-custodial bail should be applied in the cases of detained defendants as well.
- The mechanisms and procedures for reviewing the lawfulness of detention should be regulated at the legislative level. The obligation of the judge to always examine at the first court hearing the legality of the arrest, both carried out with a prior warrant of the court or in urgent necessity, should be expressly stipulated;
- The Criminal Procedure Code of Georgia should be amended making it possible to appeal a court decision on remand detention to a higher instance court.

- An amendment should be introduced to the Criminal Procedure Code of Georgia deeming it mandatory to record on a video camera the process of an arrest and search/seizure, to equip law enforcement officers with technical means to ensure that personal information is protected.
- The chapter on narcotic drug-related crimes in the Criminal Code should be regulated to provide adequate, proportionate sentences in accordance with the decision of the Constitutional Court.
- The Law of Georgia on Combating Drug-Related Crimes should be amended so that a person convicted of a narcotic drug crime is no longer deprived automatically and compulsorily of the rights provided for in the law. It should be up to the judge to decide whether or not to deprive a person of his or her rights and for what period of time.

For Georgian Bar Association:

- The Georgian Bar Association should pay more attention to cases of violation of the Code of Professional Ethics in terms of providing a prompt response.
- Regular and mandatory training on prevention measures should be provided. This will encourage the lawyers to request the use of alternative types of restraint measures more frequently and/or to release the accused without a restraint measure.
- The Georgian Bar Association should ensure the continuous training of lawyers so that they can exercise the right to a fair trial in a highly qualified, active and convincing manner at all stages of case proceedings.

For High Council of Justice of Georgia:

- The guidelines on prevention measures should be provided to ensure that judicial review and decision-making processes are conducted in accordance with international standards. The guidelines should be clear and sufficiently detailed to ensure uniform application of national law and international standards across the country.

ANNEXES

ANNEX №1

Results of the GYLA court monitoring and the practice identified at preliminary court hearings

During the reporting period from March 2016 through February 2017, the prosecution submitted the motion concerning the admissibility of evidence in 273 cases, which the defense fully supported in 266 (97%) cases, partially supported in 2 (4%) and rejected in one case. The defense presented the motion requesting the admissibility of evidence in 47 (17%) cases, which the prosecution fully accepted in 32 (68%) cases, partially accepted in 9 (19%) cases, and did not accept in 6 (13%) cases.[192]

During the reporting period from March 2017 through February 2018, the prosecution submitted the motions for the admissibility of evidence in 426 cases. During 426 pre-trial court hearings reviewing the admissibility of evidence, 283 (66%) defendants were represented by defense lawyers. In 377 (89%) cases, the defense fully supported the admissibility of the evidence, in 35 (8%) cases the defense partially agreed with the prosecution on the admissibility of the evidence, and in 14 (3%) cases, the defense did not fully support the prosecutor's motion. The defense presented evidence in court and requested it to be declared admissible in only 88 (21%) cases. Of these, in 68 cases (77%), the prosecution fully supported the defense on the admissibility of the evidence, in 12 (13%) cases - partially supported, and in 8 (10%) cases filed a motion for the inadmissibly of the defense evidence. As the above data show, unlike the previous reporting period, the efforts of the defense counsel in the part of requesting the admissibility of evidence have slightly increased.[193]

During the reporting period from March 2018 through February 2019, the prosecution filed a motion for the admissibility of evidence in 420 cases. 323 (77%) defendants were represented by defense lawyers. In 201 (48%) cases, the defense fully supported the admissibility of the evidence, in 32 (8%) cases, partially supported, and in 187 (44%) cases, did not fully support the motion submitted by the prosecutor. The defense submitted the evidence to the court and requested to have it declared admissible in 141 (34%) cases. Of these, in 90 (64%) cases the prosecution fully supported the defense that the evidence was admissible, in 7 (5%) cases partially supported, and in 44 (31%) cases the prosecution filed a motion demanding the inadmissibility of the defense evidence.[194]

During the reporting period from March 2019 through February 2020, the prosecution raised the issue of admissibility of evidence at 470 preliminary court hearings. At the moment of considering the matter, 387 (82%) defendants were represented by defense lawyers. In 184 (39%) cases, the defense fully supported the admissibility of the evidence. In 39 (8%) cases, the defense partially agreed with the prosecution on the admissibility of

[192] GYLA Criminal Court Monitoring Report №11 (2017), p.69-70.

[193] GYLA Criminal Court Monitoring Report №12 (2018), p. 83.

[194] GYLA Criminal Court Monitoring Report №13 (2019), p.53-54.

the evidence. In 247 (53%) cases, the defense did not fully support the prosecutor's motion. The defense submitted the evidence at 141 (34%) court hearings and requested to have it declared admissible. Of these, in 94 (66%) cases, the prosecution fully challenged the evidence presented by the defense, in 12 (9%) cases partially challenged, and in 35 (25%) cases, the prosecution agreed to have the evidence presented by the defense declared undisputed.[195]

[195] GYLA Criminal Court Monitoring Report №14 (2020), p.42.

ANNEX №2

Results of the GYLA's monitoring concerning searches and seizures

In the reporting period from March 2016 through February 2017, only one out of 78 searches and seizures was conducted with a prior ruling of the court. In the remaining 77 (99%) cases, the searches and seizures were carried out without a warrant of the court, which was fully deemed by the court as lawful.[196]

In the reporting period from March 2017 through February 2018, in 245 cases out of 426 pre-trial hearings, the prosecutor produced the report of the search and seizure and requested it to be added to the case files as evidence. In 90 of these cases, it remains unknown under what procedure the searches and seizures were conducted. However, based on the motions of the prosecution and the circumstances voiced during the court trials, it was established that out of 155 cases of searches and seizures, only 13 (8%) were conducted with the prior permission of the court, whereas 142 (92%) - on the grounds of urgent necessity. The court rejected the evidence and did not grant 2 (1%) motions of the prosecutor requesting a seizure.[197]

During the reporting period from March 2018 through February 2019, in 198 out of 420 pre-trial hearings, the prosecutor presented a report of the search and seizure and requested it to be added to the case files as evidence. In 26 of these cases, it is unknown how the search and seizure were conducted. However, based on the motions of the prosecution and the circumstances voiced during the court trials, it was established that only 21 (12%) out of 172 cases of searches and seizures were conducted with the prior warrant of the court, whereas 151 (88%) on the grounds of urgent necessity. During the reporting period, the court did not accept the evidence and did not grant the prosecutor's motion requesting a search in 1 case, in 23 cases the monitors were unable to find out what decision was rendered by the court.[198]

In the reporting period from March 2019 through February 2020, during 470 pre-trial court hearings, the prosecutor presented the search and seizure reports in 191 (41%) cases and requested to have them added to the case files as evidence. In 24 of these cases, it remains unknown how the search and seizure were conducted. Based on the motion of the prosecution, it was found that only 17 (10%) seizures out of 167 were conducted with a prior ruling of the court, and in 150 (90%) cases, the seizures and searches were conducted under the ground of urgent necessity. The motions requesting searches and seizures under the above ground were granted by the court in 143 (95%) cases, while in 7 (5%) cases it is unknown whether they were granted or rejected. The searches and seizures under an urgent necessity concerning drug-related offenses were conducted in 53 (35%) cases, during the investigation of property crimes in 29 (19%) cases, crimes against life and health in 40 (27%) cases, crimes envisaged under other chapters of the Criminal Code in 28 (19%) cases.[199]

[196] GYLA Criminal Court Monitoring Report №11 (2017), p.34.

[197] GYLA Criminal Court Monitoring Report №12 (2018) p.85.

[198] GYLA Criminal Court Monitoring Report №13 (2019), p.55.

[199] GYLA Criminal Court Monitoring Report №14 (2020), p.44-45.

ANNEX №3

Results of the GYLA's monitoring concerning drug-related crimes

From March 2017 through February 2018, the GYLA's monitors attended 97 court hearings determining prevention measures concerning drug-related crimes.[200] Of these, 31 (32%) trials concerned offenses incriminated under Articles 273 or 273[1] of the CC. During the reporting period from March 2018 through February 2019, 111 first appearance court hearings were held against 123 offenders, of whom 23 were charged with committing an act incriminated under Articles 273 or 273[1] of the CC.[201] From March 2019 through February 2020, GYLA attended 136 first-appearance court hearings against 147 defendants accused of drug offenses. Of these, only 9 were charged with committing an act incriminated under Articles 273 or 273[1] of the CC.[202]

In the period from March 2017 through February 2018, the prosecutor requested remand detention in 31 cases, and the court granted the motion in 29 (94%) cases, while for other crimes the court granted the motions of the Prosecutor's Office in 75% of cases.[203] In the following reporting period, the court upheld the motion of the Prosecutor's Office demanding detention as a measure of restraint in 48 (100%) cases, while this year the rate of sustaining the motions concerning other crimes amounted to 81%. Besides, 86 (86%) out of 100 persons appeared before the court as the detainees, of which 45 were sentenced to detention and 41 – bail secured with detention,[204] while in the reporting period from March 2019 through February 2020, detentions requested against 71 offenders were upheld in 67 (94%) cases. During the same reporting period, the rate of requesting detention by the prosecutor for other crimes was 73%. Out of 143 defendants, 127 (89%) appeared as detainees, which is not a small number. The court imposed bail in 71 cases, 56 (79%) of which were custodial bail.[205]

Practice concerning the plea agreement

From March 2017 through February 2018, 91 defendants charged with narcotic drug crimes signed the plea agreement. Of these, 51 were charged under Articles 260-272 of the CC (all drug-related offenses, except for a small amount of illegal production, purchase, storage…), and the other 40 offenders were charged with the commission of crimes under Articles 273 and 273[1] of the CC(purchase, storage, consumption of a small amount of a narcotic substance…).

From March 2018 through February 2019, GYLA monitored 171 court hearings considering plea agreements for the offenders accused of drug-related offenses. Of these, 117 defendants were charged with committing an offense under Articles 260-265 of the CC,

[200] GYLA Criminal Court Monitoring Report №12 (2018), p.42.

[201] GYLA Criminal Court Monitoring Report №13 (2019), p.86-87.

[202] GYLA Criminal Court Monitoring Report №14 (2020), p.75.

[203] GYLA Criminal Court Monitoring Report №12 (2018), p.42-43.

[204] GYLA Criminal Court Monitoring Report №13 (2019), p.88.

[205] GYLA Criminal Court Monitoring Report №14 (2020), p.76.

while the remaining 54 were charged with the crimes under Articles 273 and 273[1] of the CC.

From March 2019 through February 2020, plea agreements were signed with 153 defendants. Of these, 115 were charged with crimes under Articles 260-267 of the CC, and the rest were accused of offenses under Articles 273 and 273[1] of the CC.