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Coalition for
an Independent and
Transparent Judiciary

Coalition views on the proposed amendments to witness interrogation rules

On October 31, 2015 the Ministry of Justice presented the updated draft legislation on witness interrogation at the criminal law reform interagency council. The Coalition believes that the updated version contains novations that considerably worsen the legal standing of the defense party and are overall threatening to the principles of adversarial proceedings and equality of arms. Unfortunately the problematic provisions on which the civil society has expressed sharply negative opinion at earlier stages of working on the draft, are retained unchanged.¹

The proposed vision does not fully address the witness interrogation problems and at the same time introduces substantially incompatible elements to the current procedural system, which will in the future create numerous important legal and practical problems.

It must also be noted, that the Minister of Justice once again affirmed clear political will at the coordination council meeting, that the existing formulation in the Criminal Procedure Code, which has been postponed for years, will not be enacted. The government representatives' rhetoric that forced the audience with a choice between the problematic rules adopted in 1998 and acting today, or the deficient draft proposed by the Ministry of Justice, is especially distressing for the Coalition.

The Coalition has expressed its position multiple times, that it supports enactment of the witness interrogation model that has been repeatedly postponed. Unfortunately, the government has at no point presented convincing evidence that enactment of this model would result in the collapse of the justice system. Hence, the Coalition believes that the Government's rigid and unyielding position is completely unjustified.

Contents of the Draft

In case of the witness's refusal to be voluntarily interviewed, the draft envisages the possibility of forced interrogation in the presence of a magistrate judge. This possibility is afforded only to the prosecution and for this it must show the magistrate judge that the person possesses important information on the circumstances of the case. The judge only satisfies the prosecution request only when the relevant standard – sufficient grounds for presuming that the person in question does indeed possess relevant information.

The draft only clarifies the above mentioned standard of proof and it is met when *there is a fact or information that would be sufficient for an objective*

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Coalition Members:

Article 42 of the
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person to conclude probable possession of information needed for ascertaining circumstances of a criminal case (Article 3.10¹). This definition shows that the new standard is set lower than the standard of *reasonable doubt* set for investigative activities and is met even when there is only one specific fact or information and not a set of facts and information.

According to the above mentioned procedure the defense party does not attend the witness interrogation in the presence of the magistrate judge, however s/he may make a motion at a pretrial hearing to make the witness testimony given before the magistrate judge inadmissible, if s/he considers that the process was conducted with substantial violations of the law (Article 114.13). At the same time, the legislation considers that if the witness who has been interrogated in front of a magistrate judge cannot be present at the main trial in court, his/her statement may be read aloud in the court, however basing a guilty verdict solely on this evidence is prohibited.

The Need for New Rules

The proposed draft is deficient in a number of ways and will cause significant problems in justice system, in case of adoption. However, before starting the discussion on its contents and problems, it must be noted that its authors have to this time failed to substantiate the need for new regulation. Specifically, they have not clarified why the edition of the Criminal Procedure Code, which is to enter into force on January 1, 2016 is dangerous to effectiveness of the law enforcement and why would it cause a collapse of the justice system.

It is worth noting that the existing norms of the procedural code allow for the prosecution to interview the witness in front of the magistrate judge if they prove that otherwise it will be impossible to proceed with the investigation and establishing the truth on the case will be in doubt (Article 114.1 para C of the Criminal Procedural Code). The existing provision also allows for not having the other side present during the witness interviewing at the investigative stage, if this would endanger the witness' safety or the interests of justice in general (Article 114.4 of the Criminal Procedural Code).

These two mechanisms ensure protection of the interests of investigation and protect the justice system from collapse, since if there is no other evidence in the case or their procurement would require unreasonable effort, the law enforcement bodies may interview a witness in front of a judge (including, without the presence of the other side). Hence it is unclear what specific flaws of these mechanisms are and why is it necessary to introduce systemically new regulation which substantially limits the defense party's rights to be present at interviewing and then casting doubt on validity of the testimony.

Ignoring the role of Voluntary Interviewing

The proposed draft creates real possibilities for turning the compulsory interrogation at the investigative stage into a general rule. The draft effectively ignores voluntary cooperation with the witnesses and the need for their consent. The voluntary interviewing procedure becomes ineffective and

nominal, which casts doubts on the need for such an investigative activity in general.

Retaining the compulsory nature of interrogation will hinder establishment of cooperation and trust based relations between citizens and law enforcement bodies, since in the cases of refusal to give information voluntary, the forcible mechanisms can easily be applied. Consequently, the law enforcement bodies will not have a professional interests to work on improving their skills, communication with the public and raising the trust towards them.

Violation of Adversarial Principles

Granting the right to witness interrogation in front of the judge to the prosecution side only significantly violates the principles of adversariality and party equality. The adversarial proceeding does not mean party equality only during the substantial hearings at the court; but rather equipping the parties with equal legal levers during the entire process of criminal proceedings. Clearly this principle does not mean that prosecution and defense parties must have identical legal instruments either. However, their various privileges must be overall balanced throughout the process.

Additionally, with the proposed draft the defense party may not be present at the interrogation in front of the magistrate judge, which means, that the party cannot check witness reliability. While the defense may cross-interrogate a witness during the substantive hearing and thus compensate the losses incurred by exclusion from the witness interrogation process during the investigative stage, however this too has illusory and formal character. This does not effectively ensure checking witness reliability, which damages party equality and adversarial nature of proceedings.

As already pointed out, the legislation allows for the public reading of the witness statement given during the interrogation in front of the magistrate judge, in case of his/her absence at the main trial (Article 243.1). Hence, the court may reach a verdict based on a testimony of a witness, who has not been cross-examined by the defense. The draft specifies, that the judge may not base the guilty verdict solely on this evidence, however, when other pieces of evidence are present, the judge may use this statement for substantiating his decision.

Even if the defense has a chance to cross-examine the witness during the main trial, this will not be an effective mechanism for questioning the witness' reliability, because giving a substantially contradictory or false testimony by a witness is a criminal offense. Consequently, the witness who has been interrogated in front of the magistrate judge knows beforehand that he/she will face criminal charges if he/she will give differing information during the cross examination conducted by the defense at the main trial (Article 113.7). In this situation cross examination effectively loses relevance, since the witness is tied by the testimony given during the investigative stage.

In this context it is also worth noting that the proposed draft also expands the circumstances in which a witness's testimony given during the investigation

stage can be read aloud at the main trial (Article 243.2). According to the draft, a party may request the main trial judge to read out the witness testimony given during the investigation stage even when the witness is present and is to be interrogated at the main trial. At a first glance, the purpose here is to create an effective mechanism for impeaching the witness, and in the circumstances of the 2009 witness interrogation rules, this would have indeed been an effective mechanism for witness impeachment. However, in the current circumstances this legislative proposal further limits the defense side in conducting effective cross-examination and obtain information from the witness that differs from the one provided at the investigative stage.

Incompatibility with the principle of immediacy

The proposed amendments are incompatible with the existing Georgian procedural code and contradict several procedural principles. Even in case of resolving various issues that have been identified (among them, abolishing criminal liability for giving contradictory and false testimony by a witness, or abolishing the possibility for reading out the witness testimony during the main trial), the proposal would still remain incompatible with the current system.

The current procedural legislation's emphasis on the principle of immediacy is no less than its emphasis on the principles of adversariality of proceedings and party equality, which means substantial review of all evidence and checking their reliability in front of the decision-making judge. Any diversion from this principle should be an exception and must be tied to extreme circumstances and not the ordinary process envisaged by the proposed draft – the witness' refusal to voluntarily give out information. In this regard it is critically important to hold witness interrogation in front of the judge, who makes the final decision on the case. In any other case, the witness will be tied by the previous testimony, which will also be in conflict with the principle of immediacy and will negatively affect the quality of justice.

Based on the above argumentation, the Coalition considers it impossible to improve the proposed draft in a way that would not result in diminishing adversarial nature of the proceedings, party equality and immediacy and would not create significant practical or theoretical problems. These objectives can only be met through fundamental review of the draft proposal, which the authors of the draft are precluding outright. Hence, the Coalition does not see a possibility for cooperation for improving the draft. If the Parliament supports the proposed draft, the Coalition plans to address the Constitutional Court and request it to consider Constitutionality of the norms.