Unethical Drug Policy

The analysis of national legislation and practice

Introduction

Human Rights Education and Monitoring Center (EMC) conducted a research of the national policies against drug crimes within the frameworks of a project funded by Open Society Georgia Foundation. Together with the analysis of declared drug policies, the research presents a review of recent practices and trends in criminal law against drug crimes. The aim of the research was also to review all the important political documents, legal regulations and practical aspects endorsed against drug crimes.

The proposed study revealed how repressive the drug policies continue to be in Georgia. Instead of being targeted towards rehabilitation, treatment and re-integration of drug users, they are only oriented at their punishment, which, on its hand, inevitably, causes the total marginalization of them for an extended period of time and deterioration of their social or economic conditions. The research does also present the analysis of Georgian legislation with respect to international practices. Despite the fact that Georgia took obligations to approximate its national mechanism of fight against the drug crimes to internationally set standards via implementing the Visa Liberalization Action Plan or the EU-Georgia Association Agreement, the study reveals how the enacted policies against drug crimes diametrically differ from those mentioned within the given agreements.

1. The State drug policy and its priorities

Since 2006 Georgia has made numerous substantial attempts to enact key anti-drug strategies. The strategies have been assuming in themselves the fight against drug crimes and particularly, the proceedings oriented at policing, healthcare, treatment and rehabilitation. Although, as the study has revealed, all the moves were particularly active and determined to target the implementation of only policing methodologies. This was eventually causing the hypertrophy of criminal policies and unjustified restriction of drug users. Despite the fact the amount of resources allotted from the budget to treatment and -rehabilitation programs for the drug abusers has been increasing with each year, the total sum has always been much less than the income collected as fines from the drug users. For instance, the sum collected as fines from drug users during 2008-2009 years amounted to 44 million Gel, while the amount allotted to treatment and -rehabilitation programs was only 2 million Gel. It

was almost 5 million Gel for the mentioned programs in 2014. But due to the fact that since 2010 the supreme court does not disclose the statics on the amount of sanctioned fines, it is impossible for us to determine what was the total sum of collected fines for criminal punishments and their ratio with respect to rehabilitation programs. Although, due to the fact that fines are a very topical issue up until now, it is easy for us to say that the state policies towards drug abusers have not changed substantially and remain to be oriented on punishment rather than treatment.

The legislative changes of the period of 2006-2007 have substantially worsened legal environment for drug dependent persons. For judging the priorities of state policies it is worth discussing the so called order of 5th December, that states the doctor's obligation to report to the law-enforcement organs about the patients who were brought to medical institutions in unconscious state. In such occasions, we can say that the drug dependent persons (and other people around them) necessitating urgent medical treatment are made to make a tough choice between self-incrimination and saving the life.

2. The influence of drug policy over the national substantive legislation and the outcomes

The analysis of the national legislation did once again prove those priorities of the state in fight against the drug crimes that were set yet in 2006 by the head of the state when the so called "zero tolerance" policy was introduced resulting in the judiciary powers to shrink.

According to the legislative changes of 2006:

- Drug crimes (Article 260 of Criminal Code) received the qualification of especially grave crimes;
- The court was deprived of the authority to apply conditional sentences in cases of aforethought grave and especially grave crimes. Plea bargain became the necessary precondition for applying the conditional sentence;
- The sentence for drug crimes (Article 260 of Criminal Code) is 11 years of imprisonment; For similar acts in large quantities – from 7 to 14 years; and for the most severe ones – from 8 to 20 years or life in prison, which supersedes the punishment for theft, murder, rape, etc.;
- Based on factual circumstances and inner belief, the court does not have the authority any more to sentence a person with the lowest possible charges or charges lower than stated by the law if there is no plea bargain made among the parties;
- It became possible to apply fine as an additional sentence even when this is not foreseen by the Criminal Code for a specific crime;
- There was the law on fight against drug crimes adopted in 2007, which introduced additional inevitable sanctions for people charged with drug crimes (this includes the deprivation of driving license). Applying these charges became obligatory for the court even in those cases

where the former doesn't see the need of resorting to them after studying individual circumstances.

A good example to demonstrate how strict the state drug policy is to show that there is no differentiation made between using different types of narcotic drugs and acquiring, storing or selling them. This makes it possible to judge a person who purchased narcotic substances for personal use and a person who did this for distribution on equal legal grounds and to sentence them with penalties of equal severity.

The national procedural regulations provide the explicit demonstration of the fact that policies are ultimately targeted at punishment. Besides, the research revealed that there are gaps within the regulations themselves – they either don't respond to international standards or are constantly being interpreted and implemented in the wrong way.

3. The influence of drug policies on the national procedural regulations and its relation to international practice

- Stopping a person and conducting the drug test

According to the law on police, if there exists "sufficient reason for assuming" that a person is under the influence of narcotic drugs the police, upon its decision, can stop the person and ensure the person undergoes narco-check. Despite the fact that the term "sufficient reason for assuming" was defined in an objective scale by the Constitutional Court, as well as the legislators at the later stage, (that once again proved the objective orientation of the national legislation as well as the law on police), observing the actual practices we can say that the reasons to making people undergo the checks are subjectively defined by the police and only serving to the goals of reinforcing their intuition and prejudice.

The necessity of providing objective interpretation of "reasonable doubt" is pointed out by the European Court of Human Rights too. It defines "reasonable doubt" as a collection of facts and information on the commitment of a crime [violations] by the person.

Naturally, it is impossible to present an exhaustive list of what can be argued as an "objective circumstance", nonetheless, the court has in numerous occasions pointed out what can't qualify as an "objective circumstance". The research has shown that usually the reason for stopping and detaining a person is the person's previous conviction and nothing more. The European Court of Human Rights says "even though the previous conviction for similar acts reinforces the assumptions, it can't be regarded as sufficient reason for detainment".

The statistical data of 2007-2012 presents the proof of the abuse of official authority from the side of the police. Out of the 216 215 people brought before respective institutions for narco-checks only

78 501 of them were proven using narcotic drugs. This means, the examination discovered the facts of using drugs in only 36% of the cases.

This directly speaks of irrational usage of time and resources from the side of the law-enforcement agencies, as well as of the unjustifiable intervention in human rights of those persons who were tested without the existence of sufficient grounds for conducting such checks.

- Narco-tests

According to the law, a person will be charged for drug abuse if the medical and/or laboratory (chemo-technological) examination proves the person has been using narcotic substances. Thus, the narcological examination results represent necessary proof for charging a person with crime. In the absence of such results it is impossible to prove drug abuse – due to the imperative nature of the provision.

Georgian legislation says nothing about what happens when a person refuses to undergo the narcological check, which means refuses to submit the sample of urine or saliva. Georgian legislation does not specify what coercion methods are used in such cases. Coming from the analysis of relevant legislative acts we can conclude that there are no internal regulations that concern the use of coercion methods for conducting narcological test (getting urine or saliva by force). It is important to mention that the judicial oversight does not spread over the process and the targeted person has the right to *post factum* file a complaint against the illegal acts by the given official authority towards him.

European Court of Human Rights has, not once, pointed out that taking a sample of a body represents an intervention in private life, for the justification of which legal regulations must exist that will permit the use of specific forms of intervention in person's private life. In addition, the regulations themselves must be satisfying qualitative criteria, particularly, they should be accessible for a person concerned and the latter should be able to foresee expected legal outcomes. The legislation should be be guaranteeing one's protection from willful acts of government organs.

The analysis of Georgian legislation shows that in the cases when the targeted person refuses to undergo drug test, there are no mechanisms on administrative and legal stages for coercion. However, it is possible to use medical intervention by coercion after the investigation is initiated. Although, as the practice shows, in cases of presumable drug abuse, the police reacts with administrative mechanisms first and starts the investigation only after the facts are proven.

4. Starting the investigation based on secret information received and organizing procedural actions

- The inception of investigation and persecution based on secret information

The analysis of given practices has shown that the majority of drug abuse cases are generated from the information received from secret informants. It is important to notice that the procedural legislation does not prohibit starting *investigation* on this basis, what is more, this is connected to the

discretionary power of the investigative body. However, the legislation strictly prohibits initiating *prosecution* based on the information received from a secret informant. Although, despite the legal guarantees, the analysis of the practice has shown that very often police detains people on the basis of secret information and only then it conducts individual searches and other investigative or procedural activities.

- Conducting search and seizure on the basis of secret information

According to the legislation, when the assumption that a person is carrying drugs is well-founded, it is possible to conduct search and seizure to find and remove the narcotic substance upon the order of the judge or without it (**in cases of emergency**). Despite the fact that the actual basis for starting the investigation is a **well-founded assumption** (the collection of facts and information, which would be enough for an unbiased observer to see the necessity of their provision), in practice (as the analysis of the retrieved public information has shown) the secret information provided by an informant is perceived as sufficient for conducting the search, which on its hand is concealed from the court as well as the supervising prosecutor.

Coming from this, any person can be subject to search based on the information that is only known to the police and can't be checked by anyone. The search, as a rule, is followed by detainment of the person and consequently by his/her persecution. The search record, discovered material proof (in this case drugs), expert conclusion and police testimony – altogether, as a rule, are perceived sufficient at all stages of the process or satisfying the standard of proofs provided by Criminal Code, that in the end, results in conviction of the person.

- The urgent necessity

When legalizing the search under the provision of urgent necessity, ***"while reviewing the motion judge checks legality of the action conducted without court order"*** and not only the reason creating the urgent necessity. However as practice proves, review of the legality by judge is interpreted in a limited way and only covers urgent necessity of the action conducted by the prosecutor.

This means that in practice the judge checks the grounds on which the **urgent necessity** was created (what were the reasons that conditioned the conduct of search without warrant) and not the factual reasons for conducting the search. Although, in the conditions when the original information is hidden from the judge, it is impossible for the person to sophisticatedly check how urgent it was to conduct the search at the given moment.

It is of particular importance that the judge is provided indispensable information so that he/she is *post factum* given the opportunity to do the objective check for undertaking urgent and well-grounded restriction of person's freedom. But in those cases where the search is conducted on the grounds of secret information, it is impossible for the judge to check the legality of the investigation.

Therefore, the judges should be refusing to legalize such acts and should not be accepting the acquired evidences.

5. *In dubio pro reo*

The majority of convicting verdicts start with the following words: "the person illegally acquired and possessed narcotic drugs during the time and circumstances not uncovered by the investigation". This is a violation of law on several grounds: **first –**the case receives incorrect qualification when the time and circumstance for drug acquisition is not uncovered by the investigation, because in the case when the illegal purchase is not confirmed it is possible that this is the case of only illegal possession. **The second –**qualifying an act as a crime should not be happening based on logic but rather based on presented set of evidences, which is not the case in such cases. Therefore, we see a violation of the *in dubio pro reo principle*, the identification of which and decision in favor of a person is the court's obligation. According to the procedural legislation the convicting verdict should be based on beyond reasonable doubt standard.

6. The disclosure of especially small amount of narcotic drugs and acts in reaction to it

The research has revealed such cases too where the person was convicted of illegal purchase and possession of narcotic drugs (Article 260 of Criminal Code) on the grounds of the drops discovered inside a syringe. The amount of narcotic drugs discovered on the walls of an empty syringe was so small that the examination was unable to define its amount. Although, no obstacle was created for the judge to do so, due to the fact that the discovered substance was a large amount by itself according to the list.

In order for an act to be qualified as "possession of narcotic drugs" it is necessary that a person be keeping the drug in such a place that its consumption is possible, otherwise the act ceases to be of public threat – a feature which conditioned it to be qualified as a crime initially. In the mentioned case, the amount of drug discovered within the syringe was so small that it posed no threat of being consumed after. Besides, it was discarded as a trash and there was no threat of it being used the second time. Possession, on the other hand, means to keep a substance at such a place that it allows you to use it later, this is the only reason why it is can be containing public threat.

In such cases the court should be ending the criminal case with acquittal, or be quitting persecution at an earlier stage, according to the procedural as well as the substantive legislation. Although, the research has not revealed a single case of this type.

7. Passive role of the defense

Credibility requirement was not satisfied in some of the cases studied throughout the research. Although, among the 29 cases deliberated during 2013 the credibility of factual circumstances were questioned only in 5 occasions by the defense. In all the rest of the cases the defense was agreeing on the authenticity of evidences presented by the persecutor, due to which no investigation of evidences were taking place during the main trial. In the cases where the presented testimonies are not disputed and the cases are deliberated without main trial, it is unclear why plea bargains are not made for saving time and costs. We can only guess what conditions such nihilism and inertia among the defendants. The guess is endorsed by the interviews conducted with convicts who have refereed to intimidation cases and threats of canceling plea bargains and punishment with high sentence.

8. The sentences for drug abuse and the diminished role of the judiciary

When applying a sentence the court is directly pointing to the requirement set out by the Criminal Code regarding to what should be taken into consideration when sentencing a person but in the end, it applies the punishment without analyzing the circumstances around the individual case. During 2013 the court has been sentencing people for possession and purchase of big amounts of narcotic drugs with the minimum sentence of 7 years in prison. In particular cases, the court was referring to the Criminal Code which, on its hand, is not applying the conditional sentences for especially grave crimes (besides the occasions when there is a plea bargain made among the parties).

There were some positive trends detected among the verdicts of 2013 regarding the rule of determining the sentences:

- Compared to the practices in 2013 the year of 2012 marked a tendency of stricter punishments. For example if it was 7 years of prison punishment for the possession and purchase of large amounts of narcotic drugs in 2013, in 2012 the court was applying 9 years of sentence to the convicts for the similar crimes. If for the possession and purchase of particularly big amounts the court was applying 9 year sentence in 2013, this was 15 years in 2012. It is also important to mention here that the court was not avoiding to apply high sentences when there were cases of multiple crimes, despite the fact that back then the punishment absorption principle was not yet operating.
- It should also be mentioned as a positive fact that cases heard at the main trial, where a person was sentenced to imprisonment the court did not apply additional punishment – the fine, even though it is formally equipped with the power do so (out of 29 cases in 2013 only 2 received additional punishment, and only 1 out of 13 in 2012.)

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Recommendations

To the Parliament of Georgia

- Imprisonment as a punishment for the crime committed under the Article 273 of the Criminal Code should be abolished
- A new chapter with regard to drug crimes should be added to the Criminal Code about taking measures for medical treatment and harm reduction
- The Criminal Law should differentiate among drug crimes according to the motivations – for distribution and not for distribution. If the purchase of the narcotic drug happens snot for distribution purposes the act should fall under the Article 273 – despite the amount of the discovered narcotic substance. But if the act happens with the purpose of distribution it should be qualified as a crime of the Article 260.
- The minimal punishment for the acts qualifying as crimes under Part 2 of Article 260 should be reduced, so that this allows the judge to individualize the sentence based on factual circumstances; or the Article 55 of General Part of Criminal Code should be amended which will allow the judge to apply lower sanctions than stated by the law;
- The imperative nature of sanctions against drug crimes should change, this concerns their amount as well as the type;
- The provisions under the Article 45 of Administrative Code and the Article 273 of Criminal Code should come into compliance with each other; in addition, the age of crime should be precisely determined for crimes defined under the Article 273.
- Narco-tests and the extraction of samples from people should happen under the control of the judiciary throughout the administrative as well as the criminal process. The law should precisely state legal proceedings and all coercion methods used for acquiring the sample from a person by force.
- Search and other investigative actions conducted on the basis of secret information should be legalized only in special cases and under the strict control of the judiciary.
- The Attendant Institute should be re-established within the Code of Criminal Procedure, whose participation will ensure transparency of the investigation.
- The plea bargain proceedings should be made more concrete for protecting the defendant's interests;
- The Law on Operative Investigative Activity should come into compliance with Criminal Procedure Code in order to eliminate different factual basis from that of the procedural legislation standard when conducting investigative and procedural activities;
- "Law on narcotic drugs, psychotropic substances, precursors and narco-care" should be refined – the amount of the substance should be determined fairly; in addition the law should state how should be the amount of the "analogue" be determined.

To Common Courts of Georgia

- When legalizing the search due to urgent necessity the Common Courts should not only be verifying the urgency of action and the narrowly interpreted legal basis for it – which is the resolution, but the factual basis for conducting the search as well;
- When evaluating the set of presented evidences the Common Courts should go beyond the standards of the Code of Criminal Procedure - the definition of "reasonable doubt"; it should not be literally interpreting the norm and copying it in into the verdict.

To the Ministry of Internal Affairs of Georgia

- The factual basis for conducting any investigative or procedural activity according to the Code of Criminal Procedure is the "reasonable doubt" standard; in practice, it should be defined according to the will of the legislator in good faith.
- The factual basis for undertaking coercive measures according to the administrative law is the "sufficient reason to believe"; it should be enacted in practice according to the definitions provided by the Constitutional Court of Georgia and the law on police of Georgia.
- Joint decree should come into compliance with the Code of Criminal Procedure of Georgia

To the Ministry of Labor, Health and Social Affairs of Georgia

- "The order of 5th December" should be abolished, so that, on one hand, the doctor is not kept responsible for reporting to the police about the patient with narcotic overdose, and on the other – the person who overdosed is not forced to make a choice between self-incrimination and saving his/her own life.
- Ensure to train experts and criminalists working at narcological institutions for enhancing their qualification;
- Ensure adequate implementation of treatment and rehabilitation programs for drug dependent people;
- Programs targeting harm reduction, treatment and rehabilitation should be formed based on the information regarding the individual needs and circumstance into consideration: it is important to take into consideration what type of drug addiction is the person dealing with and what the psychological or mental condition of the patient is.

To the Academy of Ministry of Internal Affairs of Georgia

- The Academy should continuously be organizing training courses for the acting policemen regarding the factual standards for undertaking administrative and criminal law actions when restricting Constitutional rights.

To the Chief Prosecutor's Office of Georgia

- The results of medical check should not become the basis for person's criminal persecution due to the fact that it does not come into compliance with the Procedural Code;

- The supervising prosecutor should ensure searches and other investigative measures are not initiated based on secret information only;

To the Government of Georgia

- The government of Georgia should take into consideration the approaches of international organization towards drug users and their ways of fighting drug dependence through harm reduction, treatment and rehabilitation policies rather than through tightening penalties.
- Educational activities should be facilitated for prevention purposes; this will be aimed at raising public awareness regarding drug-dependency;
- Ensure the implementation of the strategy document developed by the Interagency Coordinating Council Fighting Drug Abuse.