

საქართველოს ახალგაზრდა იურისტთა ასოციაცია GEORGIAN YOUNG LAWYERS' ASSOCIATION



Statement about the possible postponement of enactment of the new procedures for witness examination

On July 4, 2013, the Government of Georgia submitted to the parliament of Georgia draft amendments to the Criminal Procedure Code, postponing the date for enactment of new procedures for witness examination to December 1, 2014. Until then, old procedures envisaged by the 1998 Criminal Procedure Code will apply.

Regrettably, throughout recent years civil society representatives have been having an endless discussion with the authorities about importance of immediate enactment of the new witness examination procedures ([Opinion of the Georgian Young Lawyers' Association, May 14, 2012,](#)

[Open letter of the Coalition for Independent and Transparent Judiciary to the Chairman of the Parliament of Georgia](#)). It is rather unfortunate that the issue of postponement is still high on the agenda, particularly in view of the fact that several months ago, on January 18, 2013, current parliament amended Article 332 of the Criminal Procedure Code postponing the enactment date from December 1, 2013 to September 1, 2013. Under the circumstances, we deem it necessary to reiterate our position about the issue.

Clearly, the quality of criminal justice greatly depends on meaningful equality of arms. The principle of adversary criminal proceedings has been guaranteed by the Constitution and serves as grounds for a number of provisions of the Criminal Procedure Code. However, to secure a meaningful equality of arms and adversary proceedings, both parties should enjoy equal procedural rights.

The initiative now proposed by the Government of Georgia would be a step backwards, as by the extension of the term of the old procedures criminal proceedings will suffer a major blow. The existing procedures work at a clear disadvantage of the defense, thus violating the principles of equality of arms and adversary proceedings.

Under the applicable procedure, the defense has the right to examine witnesses in the course of investigation, implying witness' obligation to appear and testify. If a witness fails to fulfill the obligation, s/he will be forced to appear before the law enforcement authorities or will be imposed with a criminal liability. In contrast, a witness is not subject to the same obligation in favor of the defense; rather, it is up to him/her to decide whether to provide or not a defense attorney with necessary information. Notably, advantages that the prosecution enjoys in criminal proceedings are not limited to a witness' obligation to testify. In particular, interests of the defense also suffer by the fact that it has no right to attend and participate in witness examination, which constitutes an important procedural right.

~~The witness examination procedures pending enactment are nothing like the existing~~

procedures, as they allow witness examination only in court, before a judge. Further, both parties are equally involved in witness examination, which enables them to participate in the process, enjoy important procedural rights and protect their legitimate interests. The new procedures constitute not only “a higher standard”, as stated in the explanatory note of the draft law, but also a crucial procedural guarantee for the defense, as well as an important mechanism for defending interests of a witness.

A number of publicized cases have illustrated the ability of the prosecution to use mandatory and stressful process of examination to its advantage by pressuring a witness into giving a statement favorable to the prosecution, while if a witness changes his/her mind about the statement that s/he gave during investigation and decides to provide a different testimony during trial, s/he may be subject to criminal liability.

The explanatory note states that the purpose of the draft law is to reinforce the right to defense, which makes absolute no sense as clearly, extension of the term for enactment of the procedures will first and foremost be damaging to a defendant and his/her right to defense, and therefore, the proposed draft has nothing to do with reinforcement of the defense. To justify the amendments, initiators also argue that the law enforcement authorities are not ready yet for enactment of the new norms as they are not yet familiar with the type of procedures that will be applied. We have heard similar arguments before, as they have been impeding the achievement of meaningful equality of arms in criminal justice throughout the recent years.

The Government of Georgia cited similar arguments when discussing postponement of enactment of norms that apply to motions for search and seizure. Therefore, we would like to reiterate that this justification is completely unacceptable. Equality of arms and adversary proceedings, which are the key principles of the new proceedings, should not have to wait for the office of the prosecutor or other state authorities to catch up after unreasonably protracted process of preparation, as it is essentially harmful to the quality of justice and interests of the defense.

We would like to highlight once more that putting the prosecution at an unjustified advantage conflicts with the principle of equality of arms and adversary proceedings, guaranteed by the Constitution of Georgia (Article 85(3) of the Constitution of

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Georgia).

Therefore, we urge Georgian MPs to reject the proposed amendment and contribute to the process of improvement of the criminal justice system, first and foremost by ensuring meaningful equality of arms. Enactment of the new procedures for witness examination before court is the indispensable precondition for the equality of arms.