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SUMMARY

On December 22 2013 Tbilisi City Court without verbal hearing suspended mayor of the capital Tbilisi and by that time accused George Ugulava from office based on Prosecutor's office motion; the suspension was valid till the final verdict of the court on the charges would have been adopted. The Tbilisi Court of Appeal upheld the decision.

On February 11 2014 lawyers of Ugulava submitted an application to the Constitutional Court of Georgia claiming that provisions that were used by Tbilisi City Court as the basis for the suspension from office were unconstitutional.

On May 23 2014 the Plenum of the Constitutional Court considered that the arguments submitted by the claimant were reasonable and ruled the clause of Criminal Procedure Code that allowed suspension from office of elected local self-government officials without verbal hearings unconstitutional.¹ The Court stated that taking into account the status of elected officials they should be subject to essentially different protection to ensure that they may perform their duties without obstacles.

This decision created a legal gap that has not been addressed up to now. The Parliament could not propose new regulation of this issue.

Is it acceptable or not to introduce different criminal proceedings for elected local self-government officials? If yes, up to what extent? Does their status (being elected) require a higher standard of protection? These are the questions that Georgian lawmakers will have to answer in the nearest future.

Taking into account the importance of the aforementioned issue and the practical needs facing law-enforcement it was suggested to implement a project "Protected voice - Guarantee of effective self-governance". This research was conducted within the framework of this project financed by the Fund "Open Society - Georgia" and implemented by non-commercial legal entity "Georgian Young Lawyers' Association and Local Democracy Agency Georgia.

The research process included review of international practice, reports, decisions and opinions of international organizations and structures (GRECO, European Court of Human Rights, Venice Commission) and experience of other countries concerning immunity from criminal jurisdiction. It is noteworthy that the research topic is discussed from the Georgian perspective - both regulatory framework and legal doctrine.

The research paper also includes the results of focus group meetings which were conducted to identify opinions of the society and local self government representatives concerning the status and immunities of local self-government officials.

As a conclusion, recommendations for the Georgian lawmakers will be developed that may promote creation of safeguards for elected officials, bring closer Georgian legislation to European standards and approaches while interests of criminal prosecution and justice are not hindered.

¹ Decision #3/2/574 of the Constitutional Court of Georgia dated May 23 2014 on case "Citizen of Georgia George Ugulava vs the Parliament of Georgia".

1. INTERNATIONAL REVIEW

1.1. Notion of Immunity

“Immunity” is a legal term that does not have universally recognized definition. In democratic societies its main purpose is to protect freedom of expression of elected representatives (for example, members of parliament) and independence of officials to safeguard that illegal obstacles do not enjoin them from performance of their functions. Recently the immunity has been subjected to scrutiny and discussions in the context of corruption.²

Immunity always means non-application of certain ordinary legal procedure over a specific person and his/her exclusion from such a rule. The earliest records of parliamentary and judicial immunity date from the 13th century; executive immunity is as old as Kings have been inviolable.³

Immunity may be absolute (excludes civil, administrative and criminal proceedings) and limited (only criminal); it can also be permanent or for specific time (for example, applies only during the official term of an official); it can be general or specific applicable to performance of predefined authorities.

Immunity is often divided into two categories: inviolability (narrow definition) and non-violability.⁴ Non-violability protects statements made by officials and prohibits criminal responsibility for voting. As a general rule, non-violability is permanent and is not limited with time. Unlike another category of immunity it is not subject of acute debates.

As for the inviolability (often referred to as procedural immunity) it protects certain officials from criminal proceedings – such as detention, arrest, prosecution - during their term in office. In some countries inviolability protects officials from operative actions, such research, wire-typing, etc. However, in the majority of cases inviolability does not apply on the stage of investigation and covers only detention and prosecution. Also, inviolability does not protect persons who committed grave crimes or who were identified in the process of committing a crime. Unlike non-violability, procedural immunity is limited in time and can be lifted based on the motion of a competent authority.

1.2. Immunity as a potential obstacle for fight against corruption

1.2.1. Recommendations issued by the Council of Europe Committee of Ministers and GRECO

In respect of immunities of public officials the main issue is a problem of identification and reduction of corruption. CoE Committee of Ministers addressed the immunities of public officials in its Resolution #97(24) “on the Twenty Guiding Principles for the Fight Against Corruption” dated November 6 1997. Namely, the Committee stated in the very preamble that Aware that corruption represents a serious threat to the basic principles and values of the Council of Europe, undermines the confidence of citizens in democracy, erodes the rule of law, constitutes a denial of human rights and hinders social and economic development.⁵

In the aforementioned document the Committee declared that “limit[ation of] immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society”⁶ is the milestone for fight against corruption.

It is noteworthy that 2003 the United Nations Convention against Corruption⁷ reiterates the same provisions and presents this issue more broadly. Paragraph 2 of article 30 of this Convention creates a straightforward obligation that:

Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.⁸

Paragraph 6 of the same article enshrines very interesting regulation concerning the suspension of authority, namely:

Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this

² „Group of States Against Corruption“ (GRECO), „Lessons learnt from the three Evaluation Rounds (2000-2010)“, thematic articles, 2011, 41-42. (https://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf, Last seen on 21.06.15).

³ http://tilman-hoppe.de/ICL_Journal_5_4_11.pdf (Last seen on 21.06.15)

⁴ This research mainly focuses on the first type of immunity – immunity in the criminal proceedings.

⁵ CoE Committee of Ministers Resolution #97(24) “on the Twenty Guiding Principles for the Fight Against Corruption” dated November 6 1997, Preamble (see. <https://wcd.coe.int/ViewDoc.jsp?id=593789> last seen on 21.06.2015).

⁶ *Ibid*, art. 6.

⁷ Ratified by the parliament of Georgia on December 9 2004 by Resolution 6333-II.

⁸ „UN Convention on Fight Against Corruption“, article 30 (http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf, last seen on 21.06.15). See also “UN Convention on Fights Against Corruption and Georgian Legislation”, American Bar Association, Central Europe and Euroasia Initiative, 2006, p. 111-115 (http://www.parliament.ge/files/484_14915_461116_REPORT_Final.pdf, last seen on 21.06.15).

Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence

Thus based on the proportionality principle the Convention creates an obligation for State Parties not to establish and use immunities from criminal jurisdiction for public officials extensively that may create obstacles to the implementation of legitimate interest of fight against corruption.

The Group of States Against Corruption (GRECO) – an organization established by CoE in 1999 - focused on this issue in its several reports. Namely, in report on Albania dated December 13 2002 GRECO referred to the broad circle of officials -the President of the Republic, Members of Parliament, Members of the Government (ministers), Judges of the Constitutional Court, Judges of the High Court, Members of the Central Commission of Elections, the Chairman of the High State Control, People’s Advocate, other judges and Prosecutors - enjoying immunities under the Constitution.⁹

GRECO evaluation team (GET) expressed their concern in relation to broad immunities enjoyed by public officials. “The GET ... was fully aware that a wide use of immunities in several transitional countries was considered an important tool for the protection of independence of particular institutions. This situation prevailing in young democracies like Albania could, however, have a negative impact on the fight against corruption and a fair balance between the two interests should be found. The GET took note of Albanian considerations to limit immunities and, recommended Albania to further consider a reduction in the list of categories of officials covered by immunity and/or to reduce the scope of immunity to a minimum.”¹⁰

1.2.2. GRECO recommendations on granting immunities to broad circle of persons in Georgia¹¹

In its report on Georgia within the first Evaluation Round dated 15 June 2001 GRECO was concerned about the broad use of immunities. The number of officials protected by immunity was quite broad, namely, high-ranking prosecutors, chairperson of Chamber of Control,¹² Public Defender and members of the Board of the National Bank. They enjoyed immunities during investigation and judicial review, as well as on the stage of preliminary investigation. As for members of parliament, immunities also covered break between the sessions.¹³

GRECO stressed that there was no list of crimes excluded from immunity coverage due to their gravity. Even if a person was caught in the process of committing a crime he/she would have been released if the competent authority does not give consent. GRECO also criticized the fact that the procedures of lifting immunity were not based on clear and objective grounds and therefore decision-making had political nature.

The main message of GRECO enshrined in the report was to decrease the number of officials protected by immunity. For example, GRECO clearly stated that granting immunity to applicant members of parliament should not be allowed.

It is noteworthy that over the years the Georgian lawmakers implemented the aforementioned recommendation and decreased both the number of persons protected by immunities and volume of immunity. Taking into account the aforementioned events and recommendations of GRECO it is reasonable that lawmakers only discuss the possibility to grant limited immunities of officials of local self-government.

1.2.3. GRECO Conclusive Evaluation

In 2011 GRECO published conclusive report of three evaluation rounds concluded in 2000-2011.¹⁴ In this document GRECO summarized the situation concerning immunities in Member States and reviewed the status of implementation of its recommendations.

Stressing the importance of article 6 of the aforementioned Resolution of the COE Committee of Ministers, GRECO differentiated persons protected by immunity and procedures of lifting immunity. It divided the States in three groups based on the first criteria (persons protected by immunity), namely: the largest group – more than half of Members – provides only a very limited range of immunities and the persons enjoying immunity are primarily parliamentarians (“non-liability immunity”) and Heads of State (“inviolability immunity”). The second largest group – almost half of

⁹ „First Evaluation Round Evaluation Report on Albania“, December 13 2002, Strasbourg (para. 127) ([http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1\(2002\)9_Albania_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1(2002)9_Albania_EN.pdf), last seen on 21.06.15). For example, in relation to prosecutors, the constitution stated that prosecutors may not be detained, searched or arrested, without the permission of the Prosecutor General, except in cases when caught committing a crime or immediately after its commission (para. 136)

¹⁰ „First Evaluation Round Evaluation Report on Albania“, December 13 2002, Strasbourg, para. 172.

¹¹ Even though the mentioned report was issued in 2001 a number of conclusions are still relevant. See this report on the following link: [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1\(2001\)5_Georgia_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1(2001)5_Georgia_EN.pdf) (last seen on: 21.06.15)

¹² Nowadays Chief Auditor of State Audit Office.

¹³ [https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1\(2001\)5_Georgia_EN.pdf](https://www.coe.int/t/dghl/monitoring/greco/evaluations/round1/GrecoEval1(2001)5_Georgia_EN.pdf) (last seen on 21.06.15) paras. 80-88.

¹⁴ „Lessons learnt from the three Evaluation Rounds (2000-2010), 2011 (https://www.coe.int/t/dghl/monitoring/greco/general/Compendium_Thematic_Articles_EN.pdf - last seen on 21.06.15).

Members – offers comprehensive immunity to Heads of State, members of parliaments and members of government, but also to candidates to parliament, judges, prosecutors, examining magistrates, bailiffs, court registrars, state auditors, officials of state banks, or even, in some cases, almost all heads of State authorities. GRECO criticized such approach and recommended to limit immunities. As for the third group (relatively small) in these States “inviolability immunity” is enjoyed by a relatively limited range of persons such as Heads of State, parliamentarians and some other specific categories of holders of public office, e.g. high-ranking judges or judges in general. Such model was positively evaluated by GRECO. At the same time, GRECO focused on the need of individual evaluation of each Member State and in some cases considered that it was reasonable to use less strict standards.

In respect of lifting immunity GRECO focused on the importance of existence of objective criteria of this process to avoid risks of politically motivated decisions. The decision-making procedure should be transparent and comprehensible to the public; they should be quick and clear and never complex.

Highlighting the importance of 20 Guiding Principles for the Fight against Corruption (namely, article 6) GRECO stated that its recommendations positively contributed to fight against corruption in member states as significantly decreased the number persons enjoying immunities and the scope of immunity.

1.3. Immunity in the practice of Venice Commission¹⁵ and European Court of Human Rights

Evaluations of Venice Commission and European Court of Human Rights (ECHR) concerning immunity of public officials are also interesting. Even though they have never discussed privileges of elected officials of local self-governments their evaluations contain recommendations that may help us to make relevant conclusions for this research.

1.3.1. Recommendations of Venice Commission

Review

This research focuses on Report of Venice Commission “the Scope and lifting of Parliamentary Immunities”¹⁶ adopted on 98th plenary session on 21-22 March 2014. In this document Venice Commission defined European standards on parliamentary immunity and issued recommendations on principles on how states should establish parliamentary immunities. The Commission divided immunity with narrow definition (inviolability) – immunity from criminal jurisdiction and indemnity protecting officials for statements, voting, etc. and thus safeguarding right to expression granted to public officials (non-violability).¹⁷

The Commission divided Anglo-Saxon and Continental-European models. In the first model immunity is very limited and protects officials from detention on the way to and from parliament; while in the second model immunity is understood in a broader sense and protects officials from any criminal proceedings and only relevant political body may lift immunity.¹⁸

The Commission stated that “any kind of criminal inviolability is per se a breach of the principle of equality before the law, which is a core element of the rule of law. The maxim “Be you ever so high, the law is above you” becomes “If you are a Member of Parliament, the law cannot touch you”.

At the same time there is a risk that immunity could be misused by persons who have broken the law and seek shelter behind their parliamentary status. Immunity may by its very existence contribute to undermining public confidence in institutions and to create contempt for politicians and for the democratic political system as such.

Procedures for lifting immunity may give rise to problems. If a political body reviews lifting immunity (for example parliament or Sakebulo (assembly)) there is a risk that such body will go into the details of the specific case, the merits of the criminal charges and form at least a preliminary opinion, etc. In practice this may come into conflict with the principle of presumption of innocence, under which it is for the courts alone (and certainly not for a political assembly) to assess individual cases of criminal responsibility.

¹⁵ Full title European Commission for Democracy through Law.

¹⁶ See on the following link: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)011-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)011-e) (last seen on 21.06.15).

¹⁷ For the purposes of this research we will mainly discuss immunity from criminal jurisdiction.

¹⁸ For Example, Section 6 of Article 1 of US Constitution “ The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony (crime that could lead to capital punishment or imprisonment for more than 1 year – author). and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.” (See US Constitution, Georgian translation, editor: Mindia Ugrekheldze; translators: Archil Kobaladze and Sandro Baramidze, 1992, 7,29). Compare with 1791 Constitution of France: „7. The representatives of the nation are inviolable; they may not be questioned, accused, or tried at any time for what they have said, written, or done in the performance of their duties as representatives. 8. For criminal acts they may be seized flagrante delicto, or by virtue of a warrant of arrest; but notice thereof shall be given to the legislative body immediately, and prosecution may be continued only after the legislative body has decided that there is occasion for indictment.” (See the first Constitution of France <https://web.duke.edu/secmod/primarytexts/FrenchConstitution1791.pdf>).

At the same time, naturally we cannot exclude political decisions (and not the objective ones) when, on the one hand immunity may protect persons who have committed a crime while immunity may be lifted even in relation of a person who is clearly subject of selective justice and political persecution.

Despite the aforementioned Venice Commission does not consider that existence of immunity contradicts with European traditions and legal principles. On the contrary, immunities existed for elected officials (including members of parliament) historically. Therefore it is the part of historical heritage.

On the other side, Commission considers that the fact that immunity as an institution was created due to historical preconditions can serve as a counter-argument of its existence.

Historically granting immunities to representatives of nation was the result of the fact that monarchs were trying to interfere in their activities. Biased detention and arrest was an important leverage in the hands of executive to persecute and paralyze unwanted persons.

The Venice Commission notes that nowadays when in modern European democracies it is not very likely that the executive will abuse their powers, fundamental changes were implemented to safeguard individual rights, including based on European Convention on Human Rights, and there is an independent judicial branch that may adjudicate criminal violations, it is questionable whether there is the need to keep immunity. In addition, one should not forget the negative effect of immunity from criminal jurisdiction in the course of investigation of corruption crimes.

Taking into account the aforementioned Venice Commission differentiates States with strong democratic institutions and States with so called transitional democracy that are not yet wholly free from their authoritarian past, and where there is real reason to fear that the government will seek to bring false charges against political opponents and that the courts may be subject to political pressure.¹⁹ However even in such cases rules on immunity should be construed in a restrictive manner; and they should not be applied in practice unless there are compelling reasons to do so in individual case.²⁰

As the commission considers, it is necessary that the functioning of immunity, as an institution is subjected to strictly defined regulations, in order to keep balance between legitimate purpose of preventing illegal interference in the process of democratic governance and interest of the fight against crime.

First of all, if the immunity exists, it is necessary to develop clearly defined procedures of waiving the immunity; despite this, the immunity must be temporary and the opportunity of renewing or starting the proceedings must exist, at least; immunity should not be enjoyed (used) on the so called preliminary investigation stage, when evidences are collected; immunity should not be enjoyed in the cases when the person is caught in the act of crime or when particularly serious crime is present; immunity should not be used for administrative offences.²¹

The following issues should be reviewed in the scope of immunity waiving procedure:

- Whether the accusation is clearly groundless and unfounded;
- Whether the alleged action is a result of political activity;
- Whether the accusation is clearly based on political motives and therefore, is it aimed to involve the subject in political activities;
- Whether the proceedings cause serious threat to the functioning of democratic institutions (such as Parliament, City Council, and any other organs).²²

If during review of the above-mentioned issues it is determined that there are the specified circumstances, according to the evaluation of the Commission, the immunity should not be waived. However, waiver of the immunity is permissible and even imminent in the following circumstances:

- If the request on waiver of the immunity is based on serious, sincere and fair arguments;
- If the Person is caught in the act of crime;
- If the possible violation is of extremely grave nature;
- When the request is concerning the criminal activity, that is not related to executing official functions, but rather to private/professional sphere of the subject;²³
- If the proceedings are necessary to ensure that implementation of justice is not hindered;
- If the proceedings are for protection of legitimacy and authority of the institution;

¹⁹ It is noteworthy that effective fight against political corruption is most problematic in these states that highlights the paradox nature of immunities: at the same time it may promote development of democracy and also create obstacles to it (see the mentioned Conclusion of the Commission, para. 29).

²⁰ *Ibid*, para 155.

²¹ *Ibid*. Paragraph 187.

²² *Ibid*. Paragraph 188.

²³ Traditionally, the actions committed within the service used to become the subject of political persecution against opponents, charging ad arbitrium for the crimes on common/personal grounds, generally, is very rare. We can say, the less the action committed by the person is related to his/her authority the broader scope of actions should be granted to law-enforcement (see paragraph 119).

- When a person requests waiver of immunity himself/herself.²⁴

Thus, according to the Commission, existence of immunity should not result in violation of one of the main principles – equality before the law. While introducing immunity from criminal jurisdiction legislators must always take into consideration the existence of clear and perceivable legitimate goals and the actions taken by the legislators to reach these goals should be purposeful and proportional measures.

1.3.2. Position of the European Court of Human Rights

The practice of the Court of Europe regarding granting privileges to the authorities developed in the light of indemnities

On one of the cases “a. Against United Kingdom”²⁵ during the Parliamentary debates the applicant was referred to as a “neighbour from hell” by the member of the parliament from its constituency. S/he could not initiate civil proceeding for defamation, because the member of the parliament was protected by the absolute parliamentary privilege. In this case, the court found that the immunity of the Member of Parliament served the legitimate aims of protecting freedom of speech in parliament and also maintaining the separation of the authority between legislative authorities and the court. Herewith, the more comprehensive the immunity was the grounds of its application should be more solid. On the given case European Court took into consideration the circumstance that the statement was made in the parliament and not outside, herewith there were inter-parliamentary procedures of sanctioning the member of the parliament, which is why the violation of any article of the Convention was not found.

Unlike the abovementioned, the violation of right of fair trial was found, on the ground of action of parliamentary immunity, on the case of “Cordova v. Italy”²⁶ An applicant, the state prosecutor, started civil proceeding for the damage to his reputation caused by the offensive letters addressed to him by the Member of Parliament. This proceeding was ceased as the Senate and The Chamber of Deputies found that they were protected by the parliamentary immunity. However, the European Court found, using the severe test, that the actions of the Member of Parliament was not directly related to the mandate of the Member of Parliament, but was more likely the personal feud. Only circumstance that specific political personnel were present was not enough argument for immunity against the actions committed. The court directed the attention to the circumstances that there were no effective inter-parliamentary procedures to react on the actions of the Member of Parliament. As a result, the right of the applicant of the fair court was disproportionately limited.

Thus, in accordance with the European Court, existence of the immunity should not cause disregard of other interests protected by the Convention and in order to protect them alternative mechanisms should be available. It is also important that the immunity does not apply (refer to) the cases that only indirectly relate the official activities of the persons protected by the privileges and are formed only on common/personal grounds.

1.4. The Immunity of Officials in Foreign Countries

As noted above, there are two types of immunity: immunity from criminal jurisdiction and indemnity. In absolute majority of 47 member states of European Council and 27 member states of EU, the Members of Parliament are protected by the immunity from criminal jurisdiction, however only few from these countries grants the mentioned protection to other officials²⁷:

Immunity from criminal jurisdiction in European countries	Member states of European Council (47 members)	Member states of European Union (27 members)
Members of Parliament	43	25
Head of the State	40	22
Prime Minister	19	11
Ministers	16	10
Public Defender etc.	10	3
Judges of the Supreme Court	20	8
Judge	16	4
General Prosecutor	5	0
Prosecutors	4	0
Council of Justice	3	0

²⁴ *Ibid*, para. 189.

²⁵ A. v. the United Kingdom, No. 35373/97, 17.12.02.

²⁶ Cordova v. Italy, Nos. 40877/98 and 45649/99, 30.1.03. See also Philip Leach “How to appeal to European Court of Human Rights”, Tbilisi, 2013, 331-332.

²⁷ Michael Sachs, Grundgesetz, Kommentar (Beck, Munich 2009), Art. 46 no. 20; Council of Europe’s Venice Commission, Opinion no. 361/2005 of 20 March 2006 on “The draft decision on the limitation of parliamentary immunity and the conditions for the authorization to initiate investigation in relation with corruption offences and abuse of duty of Albania”.

Statistical data shows that the majority of the States that grant immunity to the wide range of officials are East European countries. The only exemption is Italy. Some member states of European Council, e.g. Serbia, recognize the officials of 7 categories that are protected by immunity from criminal jurisdiction. These are: Members of Parliament, President, Prime Minister, Judges, Prosecutors, Public defender, Member of The Constitutional Court.²⁸ However, at the same time, the list of the officials, that are granted immunity, can be very limited. For instance, the countries, like Bosnia and Herzegovina, do not grant immunity to any of the public officials and the countries like Great Britain²⁹, Netherlands³⁰ and San Marino³¹ protect only the Head of the State, King or Queen with the immunity. In Germany and Hungary only the Members of Parliament and Presidents are inviolable.³² Other European countries have quite varied list of the officials protected by the immunity, that include, for instance, Ombudsman, members of the Audit Court, members of the Court of Justice etc. However, the mentioned list does not contain the immunity on the level of self-government representatives.

Most member states of Council of Europe regulate the issues of immunity from criminal jurisdiction on the Constitution level, states supreme law. The only exception is the Constitution of Switzerland that contains clause, that the law allows to define other forms of immunity and it can be granted to other officials (besides Members of Parliament and Government). On the basis of abovementioned clause the government of Switzerland widened the circle of the persons and granted the immunity to other civil servants, including judges.³³ Presence of this kind of clause is very problematic as required number of votes is always less than the constitutional majority; accordingly it is important opportunity for the authorities to widen the circle of persons who will be protected by immunity. Despite this, if the legislation does not imply the clause like this, developing new forms of immunity and spreading on other persons may be considered unconstitutional as an action that violates the principle of equality, as it for instance, happened in France.³⁴

The materials studied within the framework of the research (survey) shows that the belief in the society that immunity from criminal jurisdiction is one of the contributing factors of corruption, is strong enough. Most member states of Council of Europe knows the mentioned institution (45 member states out of 47), but not on the local level. Accordingly, in the frames of the survey we chose the countries that would allow us to study the attitude of states with different system and experience towards this issue. The states mentioned below are divided by several characteristics: monarchist and republican, countries with developed democracies and the countries of “young” democracy with post-socialist past. Accordingly, the legislation, the issues related to granting immunity, official status of persons granted criminal immunities and standards related to granting immunity and also the procedures that consider waiver of immunity of seven European countries – a) Belgium, Sweden and Spain, as monarchical countries, b) Germany and France, as the countries with developed democracy, c) Romania and Slovakia as post-socialist countries.

BELGIUM

Belgium is constitutional parliamentary monarchy and it is natural that the persons with absolute and limited immunity from criminal jurisdiction are within the scopes of state regulations. Let's discuss some of them:

King _ the legislation of Belgium considers the highest form of immunity from criminal jurisdiction, such as absolute immunity, is enjoyed by the King of Belgium. In accordance with article 88 of the Constitution of Belgium, the King is inviolable. Responsibility is imposed on the Cabinet of Ministers/Ministers. This universal approach does not imply that, the King is absolutely inviolable. The closest person to the King is a Prime Minister, the King has weekly consultations with, and moreover Kings every speech or the document to be issued is developed with his/her immediate involvement. If we discuss based on these givens, it is hard to imagine the King to conduct any actions that will not be agreed with the Cabinet of Ministers.³⁵ The given immunity, of course, is unacceptable form for the democratic country, although the existence of Monarchy implies many types of privileges for the King, including the abovementioned criminal privilege. Also, the constitution does not stipulate any kind of standards regarding waiving the immunity.³⁶

Member of Parliament _ In accordance with the Constitution of Belgium, Members of Parliament are protected by the classic form of immunity from criminal jurisdiction, that we encounter in cases of many non-monarchy democratic countries. The issues of waiver of immunity are decided by parliament even in non-monarchy democratic states. Its waiver is decided by the parliament based on the recommendation of chief prosecutor.³⁷

²⁸ Artt. 103, 119, 134, 138, 151, 153, 162, 164 Constitution of 30 September 2006: Constitution of Serbia

²⁹ Ministry of Justice, 'The Governance of Britain, Review of the Executive Royal, Prerogative Powers: Final Report' (2009), p. 34.

³⁰ Art. 42 par. 2 Constitution of 30 March 1814, revised 17 February 1983, last change 22 August 2008.

³¹ Art. 36 Law No. 21 of 11 March 1981.

³² Germany: Art. 46 par. 2, 60 par. 4 Constitution of 23 May 1949, last change 21 July 2010; Hungary: Art. 20 par. 3, 31/A par. 1 Constitution of 20 August 1949, last change 23 December 2002.

³³ Art. 14 Responsibility Law [Verantwortlichkeitsgesetz] of 14 March 1958.

³⁴ France: Constitutional Court, decision of 7 November 1989, no. 89-262 DC, '§ 6 Loi relative à l'immunité parlementaire' violates constitutional principle of equality; Italy: Constitutional Court, decision of 7 October 2009, no. 262, 'Lodo Alfano' (n 5), violates constitutional principle of equality.

³⁵ EJCL **POLITICAL AND CRIMINAL RESPONSIBILITY** <http://www.ejcl.org/64/art64-18.html>

³⁶ The Constitution of Kingdom of Belgium 17/02.1997. Article 88.

³⁷ The Constitution of Kingdom of Belgium 17/02.1997. Article 59.

Diplomats _ Diplomats from Kingdom of Belgium enjoy the immunity that are granted to the Ambassadors of Belgium, Consuls and other persons, that act on behalf and with status of Kingdom of Belgium. It should also be noted that the Constitution of Belgium does not consider regulations and specific systematic practice how to waive an immunity of the members of the diplomatic corps. Each given case should be discussed individually.

Members of European Parliament _ enjoy immunity from criminal jurisdiction and they can be detained or arrested only on the basis of special permission. The abovementioned does not apply to the cases, when the person was caught in the act of crime. Should also be noted that their cases are considered by the Court of Appeals of first instance and the investigation is held by General Prosecutors Office.

Members of Regional Council _ that are elected locally, enjoy immunity from criminal jurisdiction like the Member of the House of Representatives,³⁸ however the authority to waive their immunity is granted to the Senate/Parliament, that considers the cases, makes decisions on the charges with high standard validity and issues the document of waiving immunity. It should also be noted that the Prosecutors Office does not require any kind of permission to initiate investigation and proceeding against these persons, i.e. initiating and implementation of criminal investigation against them have low standards, accordingly the Prosecutors' Office and investigation bodies enjoy more freedom in the process of executing their activities.

The GRECO evaluation is also very important stating that system of waiving immunity in the Kingdom of Belgium does not interfere with disproportionate proceedings or investigation, whether the Member of Parliament, Member of the House of Representatives or the Member of Government.³⁹

GERMANY

As a federal republic Germany shows us a different picture with its legislative base. According to the German legislation the ruling branch is identified: Bundestag, President and Federal Government, that on its part consists of Federal Chancellor and Federal Ministers.

Accordingly, in the given case, the immunity is used as described below:

Member of Bundestag _ according to the Constitution of Germany⁴⁰, the Members of Bundestag enjoy the immunity from criminal jurisdiction and they cannot be detained without Bundestag permission, except the cases when the Member is caught in the act of crime or 24 hours have not passed since the crime. The standard of protection of immunity of German Federation MP is so high that restriction of Liberty of the MP is impossible without the permission of Bundestag. Likewise, in accordance with article 18 of the Constitution of Germany, that concerns protection of rights of speech, expression, correspondence, private life, right to education, in order to initiate criminal prosecution against MP the investigating organs also need the permission of Bundestag; the same article provides that in criminal prosecution is initiated Bundestag has the authority to suspend and/or terminate all investigatory and restrictive measures against a person under prosecution.

The immunity against criminal jurisdiction, according to the German legislation, covers all aspects of criminal process. It should also be noted, that German Bundestag gives general consent on initiating investigation before the start of each parliamentary term. Individual consent of Parliament is required in cases of restriction of personal freedom. In this case granting the immunity is guaranteed. However, the issue of constitutionality of this kind of "general consent" is problematic, as the Constitution requires consent on each individual case.⁴¹ Accordingly, Bundestag should be informed prior regarding every investigation and can re-grant immunity.

President _ also enjoys the immunity as described above. Bundestag gives permission to waive his immunity from criminal jurisdiction. It should also be noted, that Bundestag has the right to impeach the Federal President before the Federal Constitutional Court for wilful violation of this Basic Law or of any other federal law. For the waiver of immunity there is a need of consent of at least one quarter of the Members of the Bundestag.⁴²

As regards the Federal Government, that governs the country on the local level, they do not enjoy the immunity from criminal jurisdiction, however, high standard is used in criminal prosecution against them, namely, in this case the investigation is held by the main investigative body.

³⁸ The Constitution of Kingdom of Belgium 17/02.1997. Article 120.

³⁹ Strasbourg, 15 December 2000 Evaluation Report on Belgium adopted by the GRECO at its 4th Plenary Meeting.

⁴⁰ Constitution of Federal Republic of Germany 23.05.1949 Article 46.

⁴¹ Michael Sachs, Grundgesetz, Kommentar (Beck, Munich 2009), Art. 46 no. 20; Council of Europe's Venice Commission, Opinion no. 361/2005 of 20 March 2006 on "The draft decision on the limitation of parliamentary immunity and the conditions for the authorization to initiate investigation in relation with corruption offences and abuse of duty of Albania".

⁴² Constitution of Federal Republic of Germany, 23.05.1949. Article 61.

ROMANIA

Romania, as a democratic republic, defines the standard of using the immunity from criminal jurisdiction of state officials limited circle, namely only Members of Parliament and the President enjoy the immunity from criminal jurisdiction in Romania.

Let's discuss each of them:

Member of Parliament of Romania _ Immunity is presented in classic form, with one exception – the issue of waiving immunity is discussed not by the parliament in whole, but the specific chamber, the MP was a member of. If the MP is caught in the act of crime, the law enforcement agencies are authorized to detain him. The minister of Justice is obliged to inform the parliament regarding detention. The parliament is authorized to require releasing MP in case if the Chamber decides that there were no legal grounds for detaining the MP. In accordance with Romanian legislation, questioning, appearing as a witness in court and/or searching/taking does not relate to criminal prosecution. Accordingly, the immunity from criminal jurisdiction does not cover these types of procedures. Therefore, criminal investigation and exploration is much simpler towards the persons with immunity. The abovementioned is also discussed in GRECO evaluation. In accordance with their summary, The mentioned regulation positively reflects the process of preventing the growth of corruption and prevention.⁴³

The President of Romania _ also enjoys the immunity from criminal jurisdiction and, in given case, the Parliament is granted the authority to waive the immunity.

Romania Central Government/Cabinet of Ministers _ the ministers do not enjoy the immunity from criminal jurisdiction, but the authority to request the initiation of criminal prosecution for the crime committed while performing their functions has only the Chamber of Deputies, Senate and the President and the Supreme Court of first instance will consider their guilt.

The immunity from criminal jurisdiction does not protect neither elected nor assigned civil servants or officials of local self-government. Likewise, there is no specific standard regarding different regulations for criminal prosecution against them.

FRANCE

France as one of the democratic countries defines the standard of enjoying the immunity from criminal jurisdiction for the limited circle of persons with domestic legislation.

President – the President enjoys the immunity from criminal jurisdiction, the procedures of which are strictly defined.⁴⁴ The Constitutional Council defined the standards of criminal prosecution against President on 22nd of January 1999 and noted the President may be charged only by the both Chambers of the Assembly, via open voting. The issue of criminal responsibility against president is considered by the High Court of Justice.

Members of Parliament (National Assembly and Senate) _ enjoy the immunity from criminal jurisdiction. They are protected from liability based on their opinions and conclusions made while performing their functions. The immunity also protects former MPs, i.e. it has a permanent nature. The exception is corrupt practices, i.e. if the MP preformed his/her functions on the grounds of corrupt deal. In this case the immunity will not protect him from criminal jurisdiction. In accordance with paragraph 1 article 26 of the Constitution of France, the Members of Parliament should not be detained or arrested without special permission that is issued by Parliament appropriate commission. This rule is not used when caught in the act of crime, but in this case, the given request should immediately be sent to the abovementioned commission.

Members of Government _ the members of Government enjoy the immunity in regards the opinions and conclusions made by them while performing their functions, except treason and/or corrupt deal. Special Court carries out prosecution against them.

Diplomatic Corps - diplomatic agents also enjoy immunity from criminal jurisdiction that can be lifted by the parliament of France.

The legislation does not provide immunity for other categories of public officials, including local self-government officials.

⁴³ Strasbourg, 8 March 2002 First Evaluation Round Evaluation Report on Romania.

⁴⁴ Constitution of Republic of France 3.06.1958. Article 68 „ The President of the Republic shall not be held liable for acts performed in the exercise of his duties except in the case of high treason. He may be indicted only by the two assemblies ruling by identical votes in open ballots and by an absolute majority of their members; he shall be tried by the High Court of Justice“

SLOVAKIA

Quite a broad circle of public officials are protected by immunity in Slovakia. The standards of lifting immunity are enshrined in the Constitution. The following officials enjoy immunity in Slovakia:

President – is protected by immunity from criminal jurisdiction. The president can be prosecuted only on charges of disregarding the constitution and high treason. The indictment against the president is filed by the National Council of the Slovak Republic. The Constitutional Court of the Slovak Republic decides on the indictment.⁴⁵

Deputy of the legislative body of Slovak Republic – also enjoys immunity from criminal jurisdiction. If a deputy has been caught and detained while committing a criminal offense, the relevant authority is obliged to report this immediately to the chairman of the National Council of the Slovak Republic. Unless the Mandate and Immunity Committee of the National Council of the Slovak Republic gives its consent to the detainment, the prosecutor's office shall immediately release a deputy. It is noteworthy that the issue of lifting immunity shall be reviewed on the committee hearing and not on a plenary session; this represents the lower standard compared to the examples of other states.⁴⁶

Judges of the Constitutional Court – also enjoy immunity from criminal jurisdiction. Decision on lifting the immunity is made by the Court itself.

Prosecutor General - also enjoy immunity from criminal jurisdiction and the Constitutional Court gives consent to the criminal prosecution against Prosecutor General.⁴⁷

Despite the fact that Slovak Constitution grants immunity from criminal jurisdiction to quite a few of officials, those working in local self-governments and at federal level do not enjoy any immunity. The legislative body of Slovakia is considering initiatives on decreasing immunities from civil and criminal jurisdictions that is clearly a positive development. The foregoing was positively praised in preliminary reports of GRECO.⁴⁸

SWEDEN

King, Queen and Regent – as the head of state and hier of the throne enjoy absolute immunity from criminal jurisdiction. All privileges granted to the King are also amenable to the queen and the regent.

Member of the Riksdag/Parliament – being the members of the highest representative body members of Riksdag enjoy immunity from criminal jurisdiction. They are immune for act or statement made in the exercise of his/her mandate. Member of the Parliament can be detained, searched and questioned only in case the Riksdag gave prior consent except when a person was caught in the act. It is noteworthy that detention or remand are applied only if the minimum penalty for the offence is imprisonment for two years. The aforementioned immunity also applies to an alternate exercising a mandate as a member according to the law.

The Prime Minister and the Cabinet of Ministers – also enjoy immunity from criminal jurisdiction. Their immunity is the same as the one enjoyed by members of the Riksdag.

The Judges of the Supreme Court - enjoy immunity from criminal jurisdiction that can be lifted by the Supreme Court as provided in the legislation.

Local self-government – officials of local self-governments do not enjoy immunity from criminal jurisdiction. The legislation does not provide any specific regulations concerning criminal proceedings and/or judicial review of cases related to officials of local self-governments.

GRECO also discussed the rules on immunity from criminal jurisdiction in the Evaluation Report on Sweden and stated that the rules on use and lifting immunity from criminal jurisdiction granted to the members of the parliament and the Cabinet of Ministers would have constituted an insurmountable obstacle to the prosecution and punishment of crimes of corruption.⁴⁹

It is noteworthy that the systems of immunities are almost the same in all aforementioned states. The reason for that is binding international treaties and documents applicable in these states. A special attention should be drawn on absolute immunities and level of protection of persons enjoying such immunities in monarchy states; however the work is ongoing to change the scope of absolute immunities in these states. As for the immunities of local self government officials that constitute the primary purpose of this research, the legislation of all aforementioned states take the same approach – no immunities are available at this level.

⁴⁵ The Constitution of the Slovak Republic, 01.10.1992. Article 107.

⁴⁶ *Ibid*, article 79.

⁴⁷ *Ibid*, article 136.

⁴⁸ First Evaluation Round Evaluation Report on Slovak Republic adopted by the GRECO at its 4th Plenary Meeting (12-15 December 2000).

⁴⁹ Evaluation Report on Sweden Adopted by the GRECO at its 5th Plenary Meeting (Strasbourg, 11-15 June 2001) (para. 132).

2. DOMESTIC REVIEW

2.1. Local Self-Government – an Essential Element of the System of Democracy in Georgia

Strong self-government is an important foundation for a democratic and rule of law state. The Preamble of the European Convention on Local Self-Government⁵⁰ states that the right of citizens to participate in the conduct of public affairs is one of the democratic principles. „The safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and the decentralisation of power.“⁵¹

2010 amendments to the Constitution of Georgia also addressed issues related to local self-government. Namely, new chapter 7¹ was added that regulates major issues on self-government. In addition paragraph 4 of article 2 introduced the following regulation: “[t]he citizens of Georgia registered in a self-governing unit shall regulate the affairs of local importance through local self-government, without prejudice to the state sovereignty, according to the legislation of Georgia. State authorities shall promote the development of local self-governance. Paragraph 1 of Article 101¹ established a straightforward obligation of a state to define the establishment procedure and activity of representative and executive bodies of local self-government by organic law. The very same paragraph provides that executive bodies of local self-government shall be accountable to representative bodies of local self-government. As the Constitutional Court noted the aforementioned provisions guarantee independence of local self-government from central authority.⁵²

In its Opinion on draft amendments to the Constitution Venice Commission noted „Local self-government is an important feature of modern democracies. While the extent and form of self-government are left by international standards, notably the European Charter on Local Self-government, to the discretion of States, certain principles are essential: that public responsibilities should be exercised, by preference, by those authorities which are the closest to the citizens; that delegation of competences should be accompanied by allocation of sufficient resources; and that administrative supervision of local authorities’ activities should be limited.“⁵³

Elected officials of local self-government (elected Mayor/Gamgebeli and a member of Sakrebulo) carry out their authority based on the mandate granted by people. Therefore “suspension/termination from office of officials elected by people means suspension/termination of people’s mandate and represents the gravest interference in the autonomy of local self-government”.⁵⁴ Officials elected through general, equal and direct and secret election enjoy a special status that differs from the one of other civil servants. Based on the foregoing the Constitutional Court stated that it would not have been reasonable to consider that elected officials of local self-government enjoy the same constitutional safeguards as other civil servants. Thus, according to the Court’s interpretation, there is a need to have essentially different protection for officials of local self government to enable them unhindered implementation of their authority.⁵⁵

In this regard, the Law on Status of Members of Local Representative Body- Sakrebulo⁵⁶ is notable. The Law was declared void after official announcement of the date for the 2010 elections of the local self-government representative body. Initially the Law provided inviolability of Sakrebulo members within the constituency. Specifically, the clause 1 of the Article 17 of the Law stated: “on the territory under the rule of Sakrebulo it is prohibited to apply criminal prosecution against, detention, arrest, search of members of Sakrebulo unless the head of Sakrebulo gives his/her consent to the notification from the court save when the person was caught in the act of a crime that should be immediately notified to Chairperson of Sakrebulo”. Within a year from the adoption of the law, on July 20, 1999, at its plenary session, the parliament of Georgia has considered and adopted the amendments to the Law on Status of Members of Local Representative Body- Sakrebulo. The justification for invalidating this provision stated that it contradicted the process of creation of the democratic society, which in the first place, implies the equality of the citizens before the law. The legislators found it unacceptable to divide the society in two – one part of it having the legal immunity and another part – not having access to such legal immunity.⁵⁷

Based on the aforementioned it is logical to identify what is the scope and volume of safeguards enjoyed by officials of local self-governments and define their treatment in the criminal proceedings; while doing so it should be ensured that, on the one hand, the principle of equality before the law is not violated and interests of justice and other legitimate interests are not threatened and on the other side the constitutional status of these officials are not questioned.

⁵⁰ „ European Charter of Local Self-Government, Strasbourg, 15.10.85. ratified by the Parliament of Georgia by Resolution 515-II dated 26 October 2004 (<http://conventions.coe.int/Treaty/EN/Treaties/PDF/Georgian/122-Georgian.pdf>, last seen on 21.06.15).

⁵¹ *Ibid*, preamble.

⁵² Decision of the Constitutional Court of Georgia dated May 23 2014 # 3/2/574 on “Citizen Giorgi Ugulava vs the Parliament of Georgia”, II-15.

⁵³ Opinion of Venice Commission on the draft Constitutional Law on Changes and Amendments to the Constitution of Georgia (Chapter VII - Local Self-Government), Opinion № 543/2009, Strasbourg, March 15 2010, para. 48. (see, Volfgang Babek, Stiven Fish, Ceno Reichenbeher “Revision of the Constitution – Road to Europe of Georgia” 2012, 229-238).

⁵⁴ *Decision of the Constitutional Court of Georgia dated May 23 2014 # 3/2/574 on “Citizen Giorgi Ugulava vs the Parliament of Georgia”, II-14.*

⁵⁵ *Ibid*, II-16-17.

⁵⁶ Magazine “Sakartvelos Respublika”, #179 (2879), July 17 1998

⁵⁷ The July 23, 1999 Law on the Amendments in the Law on the Status of Members of Local Representative Body- Sakrebulo (N2335 - rs) (explanatory note).

2.2. Immunity from Criminal Jurisdiction and Its Scope according to Existing Legislation

Certain Officials

Both the Criminal Procedural Code of Georgia and the Constitution of Georgia do not address immunity of officials of locals self-government. Under the Georgian legislation the broadest immunity is granted to the President of the State. Article 75.1 of the Constitution provides “The President of Georgia shall enjoy personal immunity. No one shall have the right to arrest or bring criminal proceeding against the President of Georgia while holding the post.” The only possibility to begin criminal proceedings against the president and/or use of coercive measures (detention/arrest) is to launch impeachment procedures that is quite difficult according to the existing procedure.

It is noteworthy that *flagrante delicto* is not applicable to the president. In general in such cases immunity from criminal jurisdiction cannot prevent taking a person under the custody; however, according to the Georgian legislation, the need for compulsory consent of the relevant body is not eliminated and the consent is required after passage of some time. Thus even if the president is caught while committing a criminal offence he/she may be detained or presented criminal charges only after impeachment procedure.⁵⁸

Paragraph 2 of article 52 of the Constitution regulates the immunity of a member of the Parliament (MP) and provides that arrest or detention of an MP, search of his/her place of residence, vehicle, workplace, or any personal search shall be permissible only by consent of Parliament, except when the MP is caught at the scene of crime, in which case Parliament shall be notified immediately. Unless Parliament gives its consent, the arrested or detained MP shall be released immediately. Thus immunity of a MP does not include launching of criminal proceedings. However until amendments to the Criminal Procedural Code on April 4 2014 they also enjoyed such immunity.

Thus the modern immunity of MPs give possibility to terminate from office MP even against the will of the Parliament: through presenting a guilt (that does not require consent of the Parliament) and rendering a judgement of conviction (sub-paragraph “b” of article 54.2 of the Constitution states: “The office of an MP shall be terminated early if ...a judgement of conviction comes into force against the MP”).

Interference (suspension/termination from office) in the authority of MP due to criminal proceedings is prohibited in all other cases unless the Parliament gives its consent. According to article 21.1 of the Regulations, the consent of the Parliament on detention or arrest of MP results in his/her suspension from office until the decision on termination of criminal proceedings or a judgement of conviction.

According paragraphs 1 and 3 of article 20 the Regulations of the Parliament only a Chief Prosecutor has an authority to submit a request on arrest or detention of an MP, search of his/her place of residence, vehicle, workplace, or any personal search to the Parliament; only the Chief Prosecutor is entitled to begin criminal prosecution against MP. It seems that mandatory participation of the Chief Prosecutor in this process constitutes a prevention of use of procedural coercive measures against MP voluntarily.

Members of High Council of Autonomous Republic of Adjara enjoy quite limited immunities. According to paragraph 1 of article 17 of the Regulations of High Council of Autonomous Republic Adjara, if a member of the Council is detained the Council has to adopt a Resolution on his/her suspension from office until the decision on termination of criminal proceedings or a judgement of conviction. Thus the Council has only one option – to take a decision on suspension from office.

Immunities granted to the members of the High Council of the Autonomous Republic of Abkhazia are much broader. Paragraph 1 of article 101 of the Constitution of the Autonomous Republic of Abkhazia provides that criminal prosecution, arrest or detention of an member of the High Council, search of his/her place of residence, vehicle, workplace, or any personal search is not allowed unless the Council gives a consent; the same action shall be allowed upon the consent of the Presidium of the Council during the break between the sessions. Exception is the case when a member is caught while committing a criminal offence; however the notification should be immediately communicated to the High Council or to the Presidium of the High Council during the break between the sessions. Detained or arrested member shall be immediately released unless the High Council (or the Presidium of the High Council during the break) gives consent.

The national legislation also protects judges of common courts and the Constitutional Court. Article 87.1 of the Constitution provides protection of judges of common courts and states that a judge shall enjoy personal immunity. No one has the right to arrest, detain, or bring criminal proceedings against a judge, search his/her apartment, car, workplace, or conduct a personal search without the consent of the Chairperson of the Supreme Court of Georgia, except when he/she is caught at the scene of crime, in which case the Chairperson of the Supreme Court of Georgia shall immediately be notified. Unless the Chairperson of the Supreme Court of Georgia gives his/her consent, the arrested or detained judge shall immediately be released. As for a judge of the Supreme Court of Georgia relevant consent should be given by the Parliament of Georgia, as provided in article 90.4 of the Constitution.

Paragraph 5 of Article 88 of the Constitution provides that relevant decision in relation to member of the Constitutional

⁵⁸ Also see article 173 of the Criminal Procedure Code of Georgia (as of 21.06.15).

Court of Georgia should be made by the Constitutional Court itself that is a clear indication of a special constitutional status of this body.

The aforementioned procedures naturally result launching proceedings on suspension of an official from office. Article 45 of the Organic Law of Georgia on Common Courts defines the grounds of suspension from office of judges. Namely, according to paragraphs 1 and 2 of this article, from the moment a judge is prosecuted until the final decision the judge shall be recused from trials and other official powers. The chairperson of the Supreme Court shall make a decision to recuse a judge from trials based on a relevant recommendation.

According to paragraph 2 of article 15 of the Organic Law of Georgia on the Constitutional Court of Georgia If the consent is given to initiate criminal proceedings against, or arrest or detain a member of the Constitutional Court, his/her membership of the Constitutional Court shall be suspended until a final judgement is made by a court.

While the Constitution does not deal with the immunities of the Public Defender and General Auditor the relevant organic laws regulate this issue. Paragraphs 1 and 2 article 11 of the Law of Georgia on State Audit provide that Auditor General may not be prosecuted under criminal law, detained or arrested, his/her vehicle, work premises or personal belongings may not be searched without the consent of the Parliament of Georgia. This doesn't apply if the Auditor General is caught in the act, in case of which the Parliament is immediately notified. However, if the Parliament doesn't give its consent within 48 hours, detained or arrested Auditor General is immediately released. If the Parliament gives consent to the detention or arrest of the Auditor General, his/her authority is suspended by consent of the Parliament prior to the court decree terminating criminal prosecution or entry of sentence into force.

According to Paragraphs 2 and 3 of article 5 of the Organic Law of Georgia on Public Defender of Georgia the Public Defender may not be prosecuted, detained or arrested; he/she or his/her apartment, car, workplace may not be searched without the consent of the Parliament of Georgia, unless he/she is caught at the scene of crime, in which case the Parliament of Georgia shall immediately be notified. If the Parliament of Georgia does not give its consent, the detained or arrested Public Defender of Georgia shall be released immediately. The Parliament of Georgia shall make a decision on this issue not later than 14 days after application of the Chief Prosecutor of Georgia. 3. If there is consent to prosecute, detain or arrest the Public Defender of Georgia, his/her powers shall be suspended until the final court decision is issued.

It is noteworthy that Georgian legislation does not grant immunities from criminal jurisdiction to the members of the Government (including the prime-minister), Board Members of the National Bank and other high-ranking officials (i.e. members of regulatory bodies). Thus general rules on criminal proceedings are applicable to these officials save several exceptions when proceedings can be launched only by the Chief Prosecutor.

2.3. Mandatory participation in Criminal proceedings of High Ranking Officials of Prosecutor's Office and Judiciary

Article 9.3.d of the Organic Law of Georgia on Prosecutor's Office provides that "the Chief Prosecutor shall ...conduct criminal prosecution in the manner provided for by law, where a crime has been committed by the President of Georgia, the Prime Minister, any other member of the Government of Georgia, the Chairperson of the Parliament of Georgia, a member of the Parliament of Georgia, the Chairperson of the Supreme Court of Georgia, a judge of the common courts of Georgia, the Chairperson of the Constitutional Court of Georgia, a member of the Constitutional Court of Georgia, the Public Defender of Georgia, the General Auditor, the President of the National Bank of Georgia, a member of the Board of the National Bank of Georgia, an Ambassador Extraordinary and Plenipotentiary and an Envoy Extraordinary and Minister Plenipotentiary of Georgia, an incumbent high-ranking military or top special rank officer, or a person equated with him/her, a prosecutor, an investigator of the Prosecutor's Office or an advisor to the Prosecutor's Office". Article 162.2 of the Criminal Procedural Code of Georgia also provides that the Chief Prosecutor has the power to make recommendations on suspension from office of members of the Parliament, members of the supreme representative bodies of Autonomous Republics of Adjara and Abkhazia, Public Defender of Georgia, judge, General Auditor.

Thus, execution of all aforementioned powers rest with the Chief Prosecutor. It is straightforward that his/her mandatory participation in the criminal proceedings was introduced to safeguard the principle of legality. These regulations create a presumption that relevant bodies will not abuse their powers against certain officials. While the aforementioned cannot be an absolute guarantee of unbiased and objective criminal proceedings its existence together with other procedural safeguards is essential and should not be questioned.

The Georgian legislation provides same regulations in relation to other high-ranking officials. For example, amendments dated August 1 2014 introduced new regulations on conduct of secret action under operative-investigative measures in relation to state-political officials,⁵⁹ judges and other officials enjoying immunities. Thus paragraph 17 of article 143³ of the Criminal Procedure Code of Georgia provides that secret investigation measures against certain officials can be

⁵⁹ Paragraph 3 of article 1 of the Law of Georgia on Civil Service provides that state political positions are the following: president, member of the parliament, prime-minister and members of the government, Members of the supreme representative bodies of Abkhazia and Adjara, Heads of Governments of the Autonomous Republics of Abkhazia and Adjara.

conducted only if a Judge of the Supreme Court makes a decision based on the justified recommendation of the Chief Prosecutor or Deputy Chief Prosecutor.

Based on the aforementioned it should be considered whether participation of high-ranking officials of judiciary and Prosecutor's Office (Chief Prosecutor/Deputy Chief Prosecutor, a judge of the Supreme Court) in the criminal prosecution and operative-investigation measures against officials of local self-government can safeguard functioning of independent and strong self-government throughout the country.

It is clear that participation of high-ranking officials of Prosecutors' Office significantly decreases the risks of abuse of power and makes it difficult to represent politically motivated prosecution as ordinary proceedings; the latter could happen if proceedings can be initiated by ordinary prosecutors.

Participation of judges of the Supreme Court in the decision-making process will further ensure independence and professionalism in such proceedings. In such a case even the representatives of executive branch will show more diligence to use criminal proceedings against such officials.

In such circumstances, on the one hand, the constitutional status of officials of local-self government would have been duly protected and, on the other hand, legitimate interest of investigation and justice would have been safeguarded.

2.4. The Decision of the Constitutional Court of Georgia on case "the Citizen of Georgia Giorgi Ugulava vs the Parliament of Georgia"

Circumstances of the Case

On May 23 2014 the Constitutional Court of Georgia granted constitutional complaint of Giorgi Ugulava and stated that article 159 of the Criminal Procedure Code of Georgia is unconstitutional as long as it recognized that it was allowed to suspension from office officials of local self government who were elected through secret ballot of equal and direct elections. The Court also stated that the second sentence of article 160.1 of the Criminal Procedure Code providing that suspension from office can be decided without verbal hearings was unconstitutional.

Applicant Giorgi Ugulava was elected as a Mayor of Tbilisi for 4-year term in 2010; criminal prosecution against him was initiated on December 18 2013. On December 21 2013 Chief Prosecutor's Office submitted a motion to the City Court of Georgia to suspend from office Giorgi Ugulava until the final decisions on the case. As the applicant noted, taking into account high public interest towards the case, during that day he expressed his readiness to participate in the verbal proceedings concerning the motion on suspension from office to present his position and prove that the request of prosecution was groundless. However the Court did not uphold his request and on December 22 2013 rendered a decision on suspension of Giorgi Ugulava until the final decision. This decision was upheld by the Investigative Chamber of the Tbilisi Court of Appeals.

After examination of constitutional status of the mayor of Tbilisi and in general elected officials of local self governments, the Constitutional Court noted that suspension from office of the applicant did not satisfy the test of proportionality and stated that such a rule was unconstitutional in relation to paragraph 2 of article 29 of the Constitution of Georgia that safeguards the right of any citizen of Georgia to hold any public office provided he/she meets the statutory requirements.

The Decision of the Constitutional Court

In the decision the Constitutional Court reiterated its established practice in the case "Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili vs the Parliament of Georgia"; in the decision of the latter case the Court noted that "the constitutional standards of remedy available to any state official may derive from the constitutional status of this person. The need of high constitutional standard may be connected to the official functions. Based on their contents and purpose certain state positions require special constitutional protection. Without such safeguards, other constitutional-legal guarantees for some state positions would have been fictitious".⁶⁰

It is clear that public officials elected by people act on behalf of people by virtue of the fact that they have mandate of people. This function is granted to them by democratic state. "It is the requirement of democracy not to ignore the will of people and not to overcome the mandate given by them". Accordingly, in this case the level of protection of an applicant guaranteed by article 29 of the Constitution is supported by the fact that the ex-mayor of Tbilisi undertook his functions based on the will of the electorate.⁶¹

The Court underlined that unimpeded implementation of functions by officials of local self-government, their independence and inviolability within the Constitutional framework required essentially different protection. In addition

⁶⁰ The Decision of the Constitutional Court of Georgia dated April 11 2014 #1/2/569 on Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Gogvadze, Giorgi Meladze and Mamuka Pachuashvili vs the Parliament of Georgia", II, 27.

⁶¹ *Ibid*, II, 22.

to a private interest of persons protected by article 29 of the Constitution, important value was protection of interest of electorate and biased and arbitrary restriction of officials by them.

The Constitutional Court focused on the fact that the national legislation did not define timeframes for adoption of final decision; thus based on article 159 of the Criminal Procedure Code, a person could be suspended from function for quite a long time.⁶² It was also possible that the final decision would have been made after the expiration of official term in office that would have rendered restoration in position; thus the suspension from office would mean termination.⁶³ Accordingly, the longer suspension from official functions the stricter the criteria should exist for justifying intervention in the rights and the higher the risk of un-proportional restriction of this right.

In addition, the legislation existing during the constitutional review and now does not provide possibility to control the application of a measure (suspension from office) periodically – submission of a motion to a court in case of change of circumstances of any other method.

Based on the aforementioned, according to this provision, there is no possibility to repeal a decision in case the relevant grounds for the initial decision do not exist any more; thus this measure may continue to be applicable even if there is no need for its application.

Taking into account the aforementioned considerations and article 29 of the Constitution, the Court stated that the rule enabling suspension of an elected official from office for indefinite time was contrary to the principle of proportionality.

The Constitutional Court unanimously concluded that the rule established by the contested provision could not be considered to be least restrictive and proportional measure. This rule clearly had risks of unjustified restriction and ignoring the mandate granted by electorate

It clearly had signs of unjustified restriction of execution of power of elected mayor and risks of neglecting electorate's mandate.⁶⁴

2.5. Existing Regulatory Framework – the Level of Protection of Officials of Elected Local Self-governments

As already mentioned above, according to the Georgian legislation elected officials of self-government fall under the same regulations as other civil servants and general rules are applicable to them. The only exception from this rule is the aforementioned decision of the Constitutional Court that ruled unconstitutional provisions of the Criminal Procedure Code of Georgia that provided suspension from office of officials of local self government who are elected through secret ballot of general, equal and direct elections.

Thus legal gap exists as there is no legal regulation to dismiss/suspend from office these officials that might be reasonable and essential for the interest of justice in certain cases. The lawmakers have not made any attempts to address this gap since May 23 2014.

It is noteworthy that application of arrest against elected officials of local self-government is properly regulated. Article 43.6 of the Organic Law of Georgia “Code on Local Self-Government” provides that in the event of arrest or administrative imprisonment ordered by a court of the Assembly (Sakrebulo) member the authority of the Assembly (Sakrebulo) member shall be suspended for the period of arrest/imprisonment. According to paragraph 7 of the same article, in the event of termination of criminal prosecution, cancellation of pre-trial detention or entry into force of a verdict of not guilty authority of the Assembly (Sakrebulo) member shall be restored if the term of office of the Assembly (Sakrebulo) he/she is a member of has not expired and he/she shall be given compensation for unpaid salary. In other cases, the term of detention or imprisonment shall be counted in the total term of being the Assembly (Sakrebulo) member and the member is to be paid the appropriate compensation.

Sub-paragraphs “a” and “b” of article 56.1 of the Code have the same regulations and provide that authority of a mayor and Gamgebeli can be suspended in cases of arrest or administrative imprisonment. Sub-paragraph “c” thereof provides that authority may be suspended in the event of a verdict guilty until expiration of a appeal period.⁶⁵ Gamgebeli/Mayor will be restored to the office on the same grounds as the Assembly member.

Suspension of authority of a person who was detained or against whom guilty verdict entered into force should not be questioned and is logical. Article 161 of the Criminal Procedure Code of Georgia provides additional ground for suspen-

⁶² According to article 161 of the Criminal Procedure Code of Georgia, shall have the authority to issue an order dismissing the defendant from an occupied position (employment), before final judgment on the case is rendered by him/her. On July 8 2015 the Criminal Procedure Code was amended and new paragraph 6 added to article 185: “a court of the first instance shall make a decision no later than 24 months after a decision is made on merits review of the case by a judge of pre-trial hearing judge”. This rule will enter into force on January 1 2016.

⁶³ The Decision of the Constitutional Court dated April 11 2014 ##1/2/569 on “Citizens of Georgia – Davit Kandelaki, Natalia Dvali, Zurab Davitashvili, Emzar Goguaдзе, Giorgi Meladze and Mamuka Pachuaashvili vs the Parliament of Georgia”, II, 36-38.

⁶⁴ *Ibid*, II, 44.

⁶⁵ Final guilty verdict (despite the sanction) is the basis for termination from authority of the member of Sakrebulo and Mayor/Gamgebeli (articles 43.1.b and 56.2.c of the Local Self-Government Code). The authority of a mayor/Gamgebeli is terminated on the next day of making this decision (article 56.3 of the Local Self-Government Code).

sion of authority of officials who are neither detained nor found guilty with final verdict.

However as already mentioned, the provision of the Criminal Procedure Code of Georgia concerning suspension of authority of officials of local-self-government is now annulled. It seems that elaboration of a new regulation and finding balance between competing interests is the future perspective.

2.6. The Level of Protection of Elected Officials of Local Self-Government – the Results of Focus-Group Interviews⁶⁶

In this regard opinion of representatives of local self-government and general public on status and necessary immunities of elected officials is interesting.

As the focus group interviews revealed, the majority of interviewees did not approve the possibility to grant immunity from criminal jurisdiction to officials of local self-government;⁶⁷ however they think that legislation should introduce standards for criminal prosecution of such officials.

For the purposes to analyse the results of focus group meetings, it is important to note issues additionally identified during these meetings. The majority of interviewees consider that the legislation should also regulate suspension/termination of authority of elected officials of local self-government and vote of no confidence in mayor/gamgebeli.⁶⁸ The existing regulations do not specify grounds for initiating voting no confidence thus the interests of electorate is not duly protected;⁶⁹ this constitutes major obstacle for independence of local self-government and protection from influence of central authorities.

In conclusion, while the majority of interviewees do not support granting immunities from criminal jurisdiction to officials of local self-government, the majority consider that the legislation should be reviewed to introduce new standards for criminal prosecution of elected officials of local self-government.

⁶⁶ GYLA Agency of Development of Local Democracy – Georgia representatives organized focus groups in Kutaisi, Telavi, Rustavi, Gori, Poti, Ozurgeti, Zugdidi and Batumi (in total 19 focus groups). Representatives of local self-governments, CSOs and media, as well as active citizens participated in the focus groups (in total 279 persons were interviewed out of which 180 were representatives of local self-government). In each municipality 2 focus groups were organized; method of anonymous interviews was used; each group consisted of 10-15 persons; 1 group was filled in with representatives of local self-governments, while the second – with representatives of CSOs and media and active citizens.

⁶⁷ 56.1% of interviewed representatives of local self government and 66.6% of civil society representatives do not approve granting immunity from criminal jurisdiction to elected officials of local self government.

⁶⁸ 67.2% of local self-government representatives and 57.5% of civil society representatives consider that Assemblies should have the right to vote no confidence in elected mayor/gamgebeli; however 65.5% of local self government representatives and 76.6% of civil society representatives consider that the Code on Local Self-Government should specify the grounds for voting no confidence.

⁶⁹ 43.8% of local self-government representatives consider that the interest of electorate is not protected in case Assembly has the right to vote no confidence in elected mayor/gamgebeli; 66.6% of civil society representatives share the same opinion.

FINAL RECOMMENDATIONS

General Recommendations

Based on the decision of the Constitutional Court it could be concluded that there is a need for review of the legislation to introduce higher standards of protection of officials of local self-government who were elected through secret ballot of general, equal and direct elections; however new regulations should not constitute an obstacle for effective criminal prosecution and interest of justice.

The new regulations should consider the aforementioned Resolution of the COE Committee of Ministers on "the Twenty Guiding Principles for the Fight Against Corruption" and specifically its article 6 that urges the Member States to limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society. Immunity should be the last resort - ultima ratio and it should be used only in those cases when its nonexistence could shatter independence of specific state institutions and their normal functioning.

Accordingly, if a lawmaker decides to higher standards for elected officials of local self-government new regulation should be consistent with legitimate purpose of unhindered implementation of official duties. The possibility of granting of immunity should be considered from this perspective.

Recommendations

Based on the views and arguments presented in this research we would like to present several models of legislative amendments to the legislative body of Georgia – the Parliament that could positively promote guarantees of independence of elected officials. The recommendations presented below will help the lawmakers to ensure balance between competing interests.

- First of all it is reasonable to amend article 9.3.d of the Organic Law of Prosecutor's Office and add regulation that only Chief Prosecutor is entitled to initiate criminal prosecution against these persons. It is recommended that ordinary prosecutors do not have the authority of initiating prosecution against these officials to decrease risks of abuse of power.
- It is also recommended to amend parts 1 and 2 of article 162 of Criminal Procedure Code. Only Chief Prosecutor (or as an exception Deputy Chief Prosecutor) should have the power to recommend suspension from office of elected officials of local self-government.
- If a court considers suspension from office of such an official, it should define the time of suspension and the time should be limited. It should be prohibited to suspend from office for unlimited time until the final verdict is made. It is also possible to restrict the possibility to recommend suspension for certain period of official term (for example, beginning or end of the official term).
- The review procedure of the measure (suspension from power) should be specified enabling the accused to restore authority in case the relevant grounds are eliminated.
- It is also possible to limit to a certain limit use of pre-trial detention in respect of these officials as detention entails suspension of authority (for example, the law may provide shorter detention period, only Chief Prosecutor is granted with a power to recommend detention). This rule could be applicable to grave and less grave crimes.
- A lawmaker should differentiate official misconducts and other crimes. It is not reasonable to grant immunity from grave crimes such as torture, inhumane and degrading treatment, murder, etc. it is recommended that the lawmakers identify the list of crimes that could be potentially used for politically motivated prosecution and introduce special rules for them.
- Privileges should not create obstacles for investigation. It should be allowed to use ordinary investigative measures such as search, seizure, taking a sample, compelling to give evidence. These measures do not hinder implementation of official functions. It is straightforward that guilty verdict should entail termination of authority notwithstanding to the fact whether the sanction is imprisonment or not.

It is straightforward that the lawmakers are bound to observe requirements of the Constitution. The Parliament of Georgia has to take into consideration the aforementioned decision of the Constitutional Court and establish an effective mechanism for real independence of local self-government. Strengthening and protection of local self-governments is essential for development of democratic society and this process should also ensure protection of those officials who act on behalf of people from biased and illegal intervention. Granting limited guarantees in criminal proceedings to these officials should be considered as the part of this process.