Protests Considered to be an Offence

Georgian Young Lawyers' Association
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INTRODUCTION

Since the date of its establishment, the Georgian Young Lawyer's Association has been applying different forms to protect the right to peaceful assembly and the freedom of expression in the country. This includes defending the rights of persons detained during peaceful assemblies in national courts.

This report overviews the administrative offence cases proceeded in 2015-2016 against persons who enjoyed the right to peaceful assembly and the freedom of expression. The report combines **9 episodes** administered by GYLA's Tbilisi and regional offices, which include administrative offence cases against **38 persons**. The report also touches **one case** as a success story, when the Tbilisi City Court established the infringement of the right of the participants of an action to peaceful assembly and granted the participants an opportunity to protest at the place and in the form selected by them.

The report aims to identify, through analysing the examined cases, gaps in the legislation and in the activities of the Ministry of Internal Affairs of Georgia and courts, which significantly impede the realisation of the right to peaceful assembly. The analysis of identified gaps and observance of recommendations issued on the basis of the analysis will considerably facilitate the enjoyment of the right to peaceful assembly in the country.

Despite the fact that the report does not include all administrative offence cases related to the right to peaceful assembly, we believe that the analysis of the cases represented in the report will still allow us to generalise the identified gaps and will clearly demonstrate a wide range of problems both in terms of legislation and actions of police officers and decisions delivered by courts in connection with such cases.

METHODOLOGY

In the process of working on the report, we identified the administrative offence cases related to the right to freedom of peaceful assembly and expression, administered by GYLA in 2015-2016, and analysed the decisions delivered by courts in connection with these cases.

In order to obtain additional information, we requested public information from the Tbilisi City Court, the Ministry of Internal Affairs of Georgia and the Tbilisi Municipality Sakrebulo [Assembly] and analysed the obtained information. In addition, we searched for information spread in mass media in relation to individual facts.

In the process of working on the report it became necessary to analyse the legislation and relevant international practice.

KEY FINDINGS

The cases examined within the scope of the report, and the analysis of the relevant legislation and public information, revealed the following problems:

- The legislation of Georgia mainly contains the appropriate guarantees for the enjoyment of the right to peaceful assembly; however, the facts of infringement of the right to assembly are frequent in real life;
- Actions applied by the Ministry of Internal Affairs of Georgia against the participants of assemblies and demonstrations remain outside the proper control and legal treatment by national courts;
- Neither the police nor the courts observe the internationally accepted standards for the protection of the right to assembly and the freedom of expression in administrative offence cases related to this right and freedom. It is not evaluated whether the infringement of the right is provided for by law, whether there is a legitimate reason to justify the infringement and whether such infringement is necessary and proportional;
- The practice of using mechanisms provided for by the Administrative Offences Code of Georgia in the course of assemblies and towards the individual participants of actions related to those assemblies raises doubts that the Ministry of Internal Affairs observes the principle of political neutrality in its activities;
- Measures applied on unlawful grounds by the police against part of the participants of a small action actually necessitate the full termination of the action, thus infringing the freedom of assembly of other participants of the action;
- When giving a definition of petty hooliganism, the courts define the limits of the administrative offence too broadly, in opposition of the right to freedom of speech and expression. An action is classified as petty hooliganism even when the person did not intend to insult a particular person/group of persons or the society and when there was not an immediate danger of counter reaction;

- Representatives of the Ministry of Internal Affairs as well as courts consider the restriction of place of assembly to be lawful without providing relevant reasons while according to the international standards, the place may appear as a significant component of expression;
- Courts confirm offences without having examined the lawfulness of actions of police officers, or if they do examine the lawfulness, such examination is of formal nature only. In such case, courts confine themselves to establishing if the police had a right to perform a particular action *in general* and fail to consider whether the police correctly exercised in the *particular* case the right granted under law. Such "standard" used by courts is vicious and increases the risk of wilful actions of police officers;
- Disputes actually yield no benefit and do not serve the purposes of the law when the lawfulness of actions of police officers is examined under a separate court action. While the court examines the lawfulness of the action of a police officer under a separate court action, a person held administratively liable will be known as an offender for the non-compliance with the demand the lawfulness of which has not been examined. This model offered by the courts brings an opportunity to recognise the person as an offender and impose a penalty (including an administrative detention) on him/her, consider him/her to be a person who has been imposed an administrative penalty (which constitutes an aggravating circumstance) for the non-compliance with the demand the lawfulness of which has not been confirmed yet;
- Neither the police nor the courts consider the probability of limiting the right to property to ensure the freedom of assembly and expression;
- The norm establishing prohibitions regarding the blocking of buildings is interpreted in real life in opposition of the right to peaceful assembly. Cases are considered nder "the blocking of entrances" even when such actions have not caused the interruption of the functioning of the institution;
- Article 150 of the Administrative Offences Code (Defacing the appearance of a self-governing unit) and its interpretations identified in practice represent a repressive mechanism in hands of police officers, which allows the police to classify as "defacing of appearance" the forms of expression undesirable for the government, and to punish activists. The placement of inscription and banners of political or social nature (intended to criticise the actions and policy of the government) in the public space, in contrast to every day advertisements, is immediately prevented by the police on the ground that the appearance of a self-governing unit is defaced;
- Courts fail to consider "the defacing of appearance" under Article 150 of the Administrative Code as a concrete form of the freedom of expression and its compatibility with the right guaranteed under the Constitution. The decisions studied do not reveal what kind of evidence the courts rely on when they do not consider the given place to be the one appropriate for the placement of inscriptions or banners. It is still unclear what is deemed to be a place appropriate for the placement of posters/inscriptions/banners;
- Both the police and the courts use a vague interpretation of Article 150 of the Administrative Offences Code. The cases, when the placement of a banner/poster, as a form of delivering a particular message to the addressee of critics, is of temporary nature and removing such banner/poster is associated with no difficulties (including financial difficulties), are considered as defacing of appearance;
- The interpretation of "a territory adjacent" to an administrative body within the meaning of Article 150 is still a problem in practice;
- Police fail to explain the concrete grounds for arrest. In some cases, arrest carried out without any substantiation continues for a maximum period of time. In the cases when police substantiated the period of arrest with the necessity of drawing up an administrative offence report, the arrest lasted for a longer period time than it would be necessary for drawing up the administrative offence report;
- Police uses arrests even when the law does not provide for arrest at all. For example, the law does not provide for administrative arrest in connection with Article 150 of the Administrative Offences Code; however, police still apply the mechanism of arrest in practice;
- The procedures for appealing against arrests is a problem. According to the current regulations, administrative offence cases are reviewed in tight deadlines established by law, and the lawfulness of arrest may be examined independently, in separate proceedings, which is ineffective. The detained person is not explained the right and the deadlines for appealing the arrest;
- When reviewing administrative offence cases, the courts issue verbal warnings even in the cases when the commission of an administrative offence is not proved. Such practice is probably necessitated by the fact that judges avoid delivering decisions opposing the position of law enforcement bodies and they classify as an administrative offence the facts considered by law enforcement bodies to be an administrative offence. This

new trend identified in the past years is a kind of continuation of malpractice when explanations provided by police officers to the person regarding the administrative offence case were considered by judges to be the only reliable evidence to hold that this person is an offender.

1. CONCEPT OF THE RIGHT TO ASSEMBLY

The right to assembly and demonstrations is one of the fundamental human rights, whose respect and realisation is vital in a democratic state. This right, similarly to the right of speech and expression, implies the right of a person to express his/her views and opinions and to be protected from unlawful, wilful and/or non-proportional interventions of third persons. Assemblies and demonstrations are an integral part of political activities in the period both between and after elections. If the election process is accompanied by significant restrictions of the right to peaceful assembly, the fairness of the results of elections at large may be challenged[1].

The freedom of assembly has two equally important aspects: the assembly and demonstration, as a *form* of expressing an opinion, and the particular *opinion*, for which the assembly and demonstration serve[2].

The right to peaceful assembly, as well as the freedom of expression, are recognised both by the Constitution of Georgia and the laws of Georgia and by international law. In the national legislation, the freedom of assembly and demonstration is guaranteed by the Constitution of Georgia (Article 25) and the Law of Georgia on Assemblies and Demonstrations. Certain regulations related to the right to peaceful assembly and demonstration are also included in the Administrative Offences Code of Georgia and the Law of Georgia on Police. The Guideline for the Conduct by the Employees of the Ministry of Internal Affairs of Georgia during Assemblies and Demonstrations[3] was also approved in the end of 2015 by an order of the Minister, which aims to ensure public safety and order during assemblies and demonstrations.

The decisions made by the Constitutional Court of Georgia significantly contributed to the improvement of the national legislation, which became the basis for making changes to the legislation[4]. However, still there are important issues (including the issue related to the right of spontaneous assembly), which necessitates respective changes to the legislation[5]. Maina Kiai, special rapporteur at the UN, in his report of 8 June 2012 on the right to freedom of peaceful assembly and association, issued a recommendation to revise the specific articles of the Law of Georgia on Assemblies and Demonstrations[6].

International standards for assemblies and demonstrations that are binding for Georgia are also of great importance. These standards are given in such international instruments as the International Pact on Civil and Political Rights (Article 21) and the European Convention on Human Rights and Fundamental Freedoms (Article 11). Guiding principles[7] have been developed at the international level, which should be followed by the states when the right to peaceful assembly is regulated in their national legislation and when this right is exercised in practice.

The right of assembly is not absolute and may be restricted; however, the restriction of this right is justified only when there are appropriate grounds for that. This right should be restricted on clear grounds and should be defined precisely enough to avoid unjustifiable restriction by the government of the right to expression and assembly[8].

The legislation of Georgia mainly contains the appropriate guarantees for the enjoyment of the right to peaceful assembly, but the facts of infringement of the right to peaceful assembly are frequent in real life.

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[1] See Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/68/299 7 August 2013 http://www.ohchr.org/Documents/Issues/FAssociation/A_68_299_en.pdf;

[2] Decision N2/482,483,487,502 of the plenum of the Constitutional Court of Georgia of 18 December 2011 on the Case of Political Association of Citizens 'Movement for Unified Georgia', Political Association of Citizens 'Conservative Party of Georgia', Citizens of Georgia Zviad Dzidziguri and Kakha Kukava, the Georgian Young Lawyers' Association, Citizens Dachi Tsaguria and Jaba Jishkariani, the Public Defender of Georgia v. the Parliament of Georgia, paragraph 4;

[3] Order No 1002 of the Minister of Internal Affairs of Georgia of 30 December 2015;

[4] Decision N2/482,483,487,502 of the plenum of the Constitutional Court of Georgia of 18 December 2011 on the Case of Political Association of Citizens 'Movement for Unified Georgia', Political Association of Citizens 'Conservative Party of Georgia', Citizens of Georgia Zviad Dzidziguri and Kakha Kukava, the Georgian Young Lawyers' Association, Citizens Dachi Tsaguria and Jaba Jishkariani, the Public Defender of Georgia v. the Parliament of Georgia; Ruling No 1/5/525 of the Constitutional Court of Georgia of 14 December 2012 on the Case of Citizen of the Republic of Moldova Mariana Kiku v. the Parliament of Georgia;

[5] See FINAL OPINION ON THE AMENDMENTS TO THE LAW ON ASSEMBLY AND MANIFESTATIONS OF GEORGIA Adopted by the Venice Commission at its 88th Plenary Session (Venice, 14-15 October 2011);

[6] http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27-Add2_en.pdf;

[7] http://www.osce.org/odihr/73405?download=true Guidelines on Freedom of Peaceful Assembly Prepared by the OSCE/ODIHR Panel of experts on the Freedom of Assembly;

[8] See Human Rights Committee General Comment 34, paragraph 27 http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf;

2. BRIEF OVERVIEW OF THE EXISTING PRACTICE

2.1. Cases of infringement of the right to peaceful assembly

In 2015-2016, there were no cases of breaking up assemblies and demonstrations, but there were many cases identified when the right to peaceful assembly was infringed. Actions applied by the Ministry of Internal Affairs of Georgia in these years against the participants of small assemblies and demonstrations remain outside the proper control and legal assessment by national courts.

In 2015, police kept actively applying the mechanisms provided for by the Administrative Offences Code of Georgia against the participants of actions, in contradiction to the right to assembly and demonstration. Just as in the past years, the participants of peaceful assemblies were detained on the basis of Article 166 (Petty hooliganism), Article 173 (Disobedience to a lawful request of police officer) and Article 150 (Defacing the appearance of a self-governing unit) of the Administrative Offences Code of Georgia.

The situation did not change in 2016. In the conditions when a particular group of the participants of a small action (including the organisers) is detained on the ground that an administrative offence was committed, this frequently affects the course of the whole action, and the participants who survived the arrest have to terminate the action in order to establish the location of the detained fellow-thinkers and shift to police station buildings and courts. As a result, measures applied by the police against the participants on the ground incompatible with law actually necessitate the termination of the whole action and infringe the right of other participants to assembly.

Apart from the cases that will be overviewed in the report, many other cases of restriction of the right to peaceful assembly were identified in 2015-2016.

For instance, on 12 June 2015 a group of citizens was not allowed to hold a peaceful assembly in the Heydar Aliyev Square in Tbilisi. The participants of the action with the Sports for Human Rights slogan responded to the opening of European Games in Azerbaijan and protested against the facts of infringement of human rights, persecution of human rights defenders and arrest, which reached mass levels in Azerbaijan in the past years. The participants of the action (about 15 people) were met by police officers circumscribing the square and not letting them enter the square. According to the police officers, they applied a police measure, but failed to explain the legal grounds for the restriction of entry into the square and to specify the type of the police measure applied[9]. The actions of the police demonstrate that the right of the participants of the action to assembly was restricted purposefully, without proper substantiation.

In the spring of 2015, the TV company Rustavi 2 encountered impediments in holding actions/concerts in various cities. The local self-government bodies limited the places of holding the concerts without providing substantiated grounds[10]. The freedom of choosing a place of assembly was also challenged on 19 July 2016 when the City Hall of the Akhaltsikhe Municipality notified in written the organiser of the action planned by the United National Movement that there was a particular place in the city allocated for assemblies, where they could hold their action[11]. The fact that the administrative body preliminarily allocated a particular place for holding assemblies contravenes the concept of the right to assembly.

Before the beginning of the Stop Russia action that was to be held near the Chancellery of the Government of Georgia on 18 July 2015, the organisers of the action were not allowed by police officers to build up the stage. Later, police officers detained one of the organisers under Article 173 of the Administrative Offences Code of Georgia. The location of the vehicle carrying the stage construction, which was driven in the direction specified by the police, was also unknown for a certain period of time. Although the action was eventually held, the events developed before the beginning of the action explicitly represented unjustified infringement of the right to assembly, which aimed to hinder or break the action.

On 16 October 2015, the police detained the head of the TV Company Tabula and other two persons accompanying him. The detainees were placing informational posters on the construction fence in front of the building of the Opera Theatre located in Rustaveli Avenue in Tbilisi. The posters contained information regarding the planned protest action against the occupational policy of Russia. The posters also contained the image of the former Prime Minister Bidzina Ivanishvili.[12] Despite of the fact that the arrest was not carried out during the action itself, this case should also be considered in the context of infringement of the right to assembly. Acts that are associated with the conduct of peaceful assemblies, including the distribution of action posters, is part of a peaceful assembly, and restrictive measures applied by the police before the action affected the conduct of the action.

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[9] Available at http://netgazeti.ge/news/41663/ (Date of access: 23.01.2017);

[10] Available at http://rustavi2.com/ka/news/22591; http://rustavi2.com/ka/news/23031 (Date of access: 23.01.2017);

[11] Letter No 1760/05 of the Akhaltsikhe Municipality of 19 July 2016: "The permanent place for holding assemblies is allocated by the City Hall of the Akhaltsikhe Municipality in the territory adjacent to the Meskheti Drama Theatre. We are kindly asking you to hold the planned event in the above mentioned territory and comply with the requirements of the Law of Georgia on Assemblies and Demonstrations;

[12] Available at http://www.tabula.ge/ge/story/100554-ghobeze-posteris-gakvristvis-tamar-chergoleishvili-da-studenti-daakaves (Date of access: 23.01.2017);

On 11 November 2015, the representatives of the Gori office of the political association "Alliance of Patriots" initiated a hunger strike in the territory adjacent to the Gori Theatre. The representatives of the "Alliance of Patriots" held a hunger strike in Tbilisi as well, demanding to change the electoral system and to dismiss the ministers participating in the elections. On 13 November 2015, at about 18:30, the police put down the flag of the "Alliance of Patriots" and dismantled the tent erected by the participants of the hunger strike. Before breaking up the action, the police officers demanded from the members of the "Alliance of Patriots" to voluntarily terminate the action. Two reasons were named for the termination of the action: bad climatic conditions and unauthorised erection of a tent. According to GYLA's assessment, the measures applied against the participants of the action constituted infringement of the right to peaceful assembly. The act performed by the participants of the action (erection of a tent) does not constitute an unlawful action, and the police did not have authority to interfere in the action on the grounds of bad climatic conditions due to which the participants of the action could harm their health.[13]

The actual enjoyment of the right to assembly by LGBT activists still remains a problem. Due to negative experience in the past years and absence of appropriate security guarantees from the State, a great part of LGBT activists refused to participate in a large-scale assembly on 17 May 2016 in connection with IDAHO days. A small group of activists (10 people), which were engaged in writing different messages near the building of the Patriarch's Office, was detained by the police under Article 173 (Disobedience to a lawful request of police officer) and Article 150 (Defacing of the appearance of a self-governing unit) of the Administrative Offences Code of Georgia.[14] This case demonstrates that the State fails to properly fulfil the undertaken obligations and to take reasonable and adequate measures in order to provide everyone with an opportunity to hold a peaceful assembly in such a manner as to exclude fear for expected physical violence.

On 10 December 2016, the police detained two participants of the action organised by the "White Noise Movement" in front of the building of the Parliament of Georgia in Tbilisi Detention was carried shortly after the participants of the action temporarily impeded the road traffic. The police did not take into account that the impediment of the road traffic was caused by the increase in the number of participants of the action and was of temporary nature.[15]

Actions of the Ministry of Internal Affairs of Georgia also give rise to questions when the police fails to (does not) effectively manage coercive actions during assemblies. This is evidenced by the ineffective actions of police officers during the massacres in the offices of the United National Movement carried out by persons assembled near the offices of the United National Movement in different parts of Georgia during 2015.[16] The police also failed to take measures during the assemblies held near the houses of the judges of the Constitutional Court of Georgia.[17] However, on 25 December 2015, the police detained Bezhan Gunava and Irakli Kakabadze in the course of the action held near the building of the Council of Justice of Georgia, who were protesting along with other participants of the action against the alleged appointment of judge Levan Murusidze.[18] Such actions raise doubt that the police is tolerant towards unlawful and coercive acts when the addressee of assembly is not the ruling authority. Such actions of the police create an impression that the Ministry of Internal Affairs of Georgia does not follow the principle of political neutrality in its activities.[19]

2.2. **Practice of using verbal warnings**

Legislation used in the review of administrative offence cases, as well as the practice of review, have been a target of critics for many years, and many organisations and experts have been discussing the necessity of implementing a reform in this direction.[20] Today, Georgia has the Administrative Offences Code survived from the Soviet era (adopted in 1984), which fails to meet the requirements of Due Process and its application in the existing form infringes the

[13] See GYLA's assessment https://gyla.ge/ge/post/saia-gorshi-patriotta-aliansis-tsevrebis-mimart-mshvidobiani-shekrebis-uflebis-gaumartlebeli-shezghudvis-faqts-ekhmianeba-08;

[14] See Statement of the Coalition for Equality regarding May 17 https://gyla.ge/ge/post/koalicia-tanastsorobistvis-ganckhadeba-17-maistan-dakavshirebit (Date of access: 23.01.2017);

[15] Available at http://netgazeti.ge/news/161008/ (Date of access: 23.01.2017);

[16] See Statements of non-governmental organisations https://gyla.ge/ge/post/arasamtavrobo-organizaciebis-ganckhadeba-qveyanashi-ganvitarebul-movlenebtan-dakavshirebit-38;
https://gyla.ge/ge/post/arasamtavrobo-organizaciebi-ertiani-nacionaluri-modzraobis-ofisze-tavdaskhmas-ekhmaurebian(Date of access: 23.01.2017);

[17] See Statement of the Coalition for an Independent and Transparent Judiciary -https://gyla.ge/ge/post/koaliciis-ganckhadeba-sasamartlo-khelisuflebis-irgvliv-ukanasknel-dgheebshi-ganvitarebuli-movlenebis-taobaze-02 (Date of access: 23.01.2017);

[18] Available at http://netgazeti.ge/law/87213/ (Date of access: 23.01.2017);

[19] See GYLA's assessment regarding the human rights situation in Georgia in 2015 https://gyla.ge/ge/post/saias-shefaseba-2015-tsels-saqartveloshi-adamianis-uflebata-dacvis-mdgomareobis-shesakheb (Date of access: 23.01.2017);

[20] See How to End Georgia's Unconstitutional Use of its Administrative Offences Regime, Judicial Independence and Legal Empowerment Project (JILEP), 2015 (Date of access: 23.01.2017);

fundamental human rights and violates the obligations undertaken by Georgia under international agreements. Thus, the legislation on administrative offences should be reformed substantially. However, we will not address this issue in detail in this report and will only overview in this chapter the practice of using verbal warnings in administrative offence cases, since the courts actively applied the form of verbal warnings both in the cases examined within the scope of this report and in other cases.

Article 22 of the Administrative Offences Code of Georgia allows the judges in the case of commission of petty administrative offences to release the offender from administrative liability with only a verbal warning. A verbal warning does not constitute a penalty and, accordingly, the person who received a verbal warning from the judge is not considered to be a person who has been imposed an administrative penalty, but the fact of committing an administrative offence is considered confirmed. The Tbilisi City Court applies the practice of using verbal warning more and more frequently. For instance, in 2012 only 5% of cases reviewed within the meaning of the above Articles 166, 173, 150, 174[1] resulted in verbal warnings, in 2015 the number of cases when verbal warnings were used equalled to 33%, and to 39% in 2016.

An increased number of warnings by the courts could be evaluated favourably, if not the doubt that the courts use verbal warnings appropriately. The cases examined within the scope of this report prove that the courts use verbal warnings even if the fact of commission of an administrative offence has not been confirmed. Such practice is probably necessitated by the fact that judges avoid delivering decisions opposing the position of law enforcement bodies and classify as an administrative offence the facts considered by law enforcement bodies to be an administrative offence. This new trend identified in the past years is a kind of continuation of malpractice when explanations provided by police officers to the person regarding the administrative offence case were considered by judges to be the only reliable evidence to hold that the person is an offender. Some judges go even farther and apply the penalties that are not provided for by any article at all. For instance, during 2015, the Tbilisi City Court issued warnings to 9 persons in connection with Articles 166 and 173 of the Administrative Offences Code of Georgia, even though neither Article 166 nor Article 173 provide for such penalties.

3. PETTY HOOLIGANISM (ARTICLE 166 OF THE ADMINISTRATIVE OFFENCES CODE OF GEORGIA)

3.1. Introduction

Petty hooliganism means swearing in public places, harassment of citizens or similar actions that disrupt public order and peace of citizens.

Customarily, many persons were restricted in the freedom of assembly and expression on the ground of petty hooliganism. One of the most rumoured case took place in 2015, when the court classified the freedom of expression by the participants of No to Panorama action as petty hooliganism.

3.2. Examined case

On 19 July 2015, No to Panorama action was held in front of the Sakrebulo building to protest against information spread regarding the permission issued for the construction of "Panorama Tbilisi." The participants of the action were carrying different posters to express their protest. One of the participants of the action was carrying a poster with an inscription which equated Panorama to male's genital organ, due to which the police detained him. His arrest was protested by other participants of the action with an inscription of the same content. As a result, the police detained 9 more participants. An administrative offence report was drawn up against 8 detained persons within the meaning of Article 166 (Petty hooliganism) of the Administrative Offences Code of Georgia, and with regard to other 2 persons an administrative offence report was drawn up within the meaning of Article 173 (Disobedience to a lawful request of police officer) in addition to Article 166.

This administrative offence case was reviewed by the Tbilisi City Court. According to the assessment of the Court, "the persons held administratively liable were carrying posters containing vulgar language", which constitutes petty hooliganism. "An expression containing foul and vulgar words mentioned in the case makes it impossible to shape public opinion with regard to the issue which was protested [...] This expression is pointless and only a vulgar word contained in it attracts attention; the expression has no political, cultural, educational or scientific value and it grossly violates the universally accepted ethical norms; this vulgar word is regarded by the society as an insult and by preventing it public morality is observed[21]." As a result, the court imposed a fine on 7 persons in the amount of GEL 100. Proceedings were terminated against 3 persons due to absence of evidence (it was not confirmed that they were carrying posters with similar content). The Tbilisi Appellate Court recognised the decision of the first instance court

[21] Decision of the Tbilisi City Court of 23 July 2015, Case No 4/4710-15;

to be lawful and substantiated, and upheld it[22]. By now, the case has been forwarded to the European Court of Human Rights for review[23].

3.3. **Assessment**

The analysis of the court decisions revealed three problems: the Court followed a very low standard of the freedom of assembly; the definition of obscenity and the grounds for its restriction were clarified incorrectly; and petty hooliganism was given a very broad definition.

When explaining petty hooliganism, the court defined the limits of the administrative offence very broadly, in contradiction to the freedom of speech and expression. An act may be classified as petty hooliganism when the offender aims at insulting a particular person/group of persons or the society and, naturally, there should be the particular person (circle of persons) whose honour and dignity was degraded and there should be an immediate danger of counter reaction.

When the participants of a demonstration do not resort to violent acts, the state authorities should show certain level of tolerance towards peaceful assemblies if they do not wish this right to absolutely lose its sense.[24]

According to the clarification of the Tbilisi City Court, the phrase used by the participants of the action "makes it impossible to shape public opinion with regard to the issue which was protested [...] This expression is pointless and only a vulgar word contained in it attracts attention[25]". The court justified the restriction by the requirement of "public morality" and considered to be petty hooliganism an action which constitutes the freedom of speech under the Constitution of Georgia and the Law of Georgia on the Freedom of Speech and Expression. According to the practice adopted by the European Court of Human Rights, each state defines the concepts of public morality and ethics based on cultural and historical values of the country, since no uniform European standard for these concepts exists. Accordingly, different states use different criteria, on the basis of which a different level of restriction is established. However, the European Court of Human Rights intervenes when the restriction is unnecessarily broad. The word used by the participants of the action may be really unacceptable for the society or its certain part but "the freedom of expression protects not only the information which is taken indifferently or neutrally by other persons but the ideas and information which are considered by the society and its certain part as insulting, disturbing or shocking. These are requirements of pluralism, tolerance and diversity of opinions in a democratic society"[26].

In order to fully enjoy the freedom of expression, the society itself should be tolerant towards the right of an individual to express his/her opinion freely and without fear. "In a democratic society, humans have an obligation of being tolerant towards the views they do not share, or even consider them immoral and inappropriate. It is inadmissible to impose moral norms or world view of a particular person or group of person on other groups of society through state institutions, including courts".[27]

In the process of assessing this case, it should be defined what is considered to be obscenity and when the State has the right to regulate obscenity. A phrase or an expression which has no political, cultural, educational or scientific value and which grossly violate the universally accepted ethical norms in the society is considered obscenity[28]. The State has the right to regulate obscenity[29]. However, the restriction of obscenity for protecting other persons' rights and reputation and, accordingly, intervention in the freedom of expression is admissible not always but only if this is necessary in a democratic society. "In a democratic society, the State should not have the right to purge the opinions and words (phrases) expressed in the public space for the purpose of retaining only refined expressions or those acceptable for the society, since what may be vulgar for one person, the same may be an ordinary expression for another. Establishing a principal difference between those two is a matter of personal taste and style for each person

[22] Decision of the Tbilisi Appellate Court of 7 September 2015, Case No 4/ა-600-15;

[23] On behalf of 10 participants of No to Panorama action, the Georgian Young Lawyers' Association, in cooperation with the partner organisation "European Human Rights Advocacy Centre (EHRAC)" applied to the European Court of Human rights within the meaning of Article 5 (Right to liberty and security), Article 10 (Freedom of expression), Article 11 (Freedom of assembly) and Article 18 (Limitation on use of restrictions on rights) of the European Convention on Human Rights https://gyla.ge/ge/post/saiam-ara-panoramas-aqciis-10-monatsilis-sakhelit-adamianis-uflebata-evropul-sasamartlos-mimarta;

[24] See Decisions of the European Court of Human Rights Bukta and Others v. Hungary, No 25691/04, 17 October 2007, paragraph 37; Oya Ataman v. Turkey, No 74552/01, 5 March 2007 , paragraphs 41-42;

[25] Decision of the Tbilisi City Court of 23 July 2015, Case No 4/4710-15;

[26] See Decision of the European Court of Human Rights on the case LINGENS v. AUSTRIA No 9815/82, 8 July 1989;

[27] Decision No 1/3/421,422 of the Constitutional Court of Georgia of 10 November 2009;

[28] Article 1(f) of the Law of Georgia on the Freedom of Speech and Expression;

[29] Article 9(b) of the Law of Georgia on the Freedom of Speech and Expression;

and is outside the competence of the State and state officials"[30].

The analysis of the decisions delivered by the first and second instance courts reveals that the court assessed the case in fragments.The court did not consider who the addressee could be, whose honour and dignity could be degraded with such expression. A legitimate interest of restricting obscenity, which is prevention of possible violent acts between the individuals, is absent in the case examined.

4. DISOBEDIENCE TO A LAWFUL REQUEST OF POLICE OFFICER (ARTICLE 173 OF THE ADMINISTRATIVE OFFENCES CODE OF GEORGIA)

4.1. Introduction

The police most frequently applies Article 173 (Disobedience to a lawful request of police officer) of the Administrative Offences Code of Georgia during assemblies and demonstrations. According to Article 173 of the Administrative Offences Code of Georgia, an administrative offence is deemed to disobedience to a lawful request of police officer. Accordingly, this article cumulatively establishes four conditions under which an action is considered to be an administrative offence. These conditions are as follows:

- the person issuing an order must be a law-enforcement officer;
- at the moment of issuing an order this person must be in the line of duty;
- his/her demand must be lawful;
- the person must not be complying with his/her demand.

For the purposes of this report, the examination of the lawfulness of the demand is particularly important when assessing the decisions delivered with relation to Article 173. If particular instructions issued by police officers to the participants of an action represent an unjustified infringement of the right to peaceful assembly, such demand of police officers may not be considered as a lawful demand and the obligation to comply with such demand will not arise either. Thus, while reviewing the case against the participant of a peaceful assembly under Article 173, the court must ensure examination of the lawfulness of police demand.

4.2. Examined cases

- **Action held on 7 May 2016** - On 7 May 2016, near No 4 of the new Kojori Highway, a peaceful protest action was held through the organisation of the public association "Together" (which united 24 public groups and non-governmental organisations) to protest against the construction of "Panorama Tbilisi", the alienation of 4 Ha of a land plot from the territory of the Botanic Garden and the sale through an auction of 30 Ha of land adjacent to the Botanic Garden. In the course of the action, police officers detained 6 participants within the meaning of Article 173 of the Administrative Offences Code of Georgia. According to the decision delivered by the Tbilisi City Court, their actions were classified as an administrative offence and each of them was imposed a fine in the amount of GEL 250. As explained by the court, an administrative offence manifested "in the failure to comply with the demand of the police officers to terminate resistance to the patrol police upon being prohibited to enter a particular territory." At the court hearing, it was established by the statement of a patrol police officer that the police took a decision to prohibit entry into the particular territory spontaneously without determining the purpose of such police measure. According to the statement of the police officer, the police officers learned from the participants of the action that the territory where the participants intended to proceed to was a private property, which is why they took a decision to prohibit the participants of the action from entry into that territory. No evidence was presented at the court hearing to confirm that the territory was a private property. The Tbilisi Appellate Court upheld the decision of the first instance court[31];
- **Protest against the transplanting of 100-year-old trees** - After it became known that Bidzina Ivanishvili, former Prime Minister of Georgia, purchased 100-year-old trees of endemic species planted in the village of Tsikhisdziri in Kobuleti District for their subsequent transplantation in his dendrological park, different groups of activists held protest actions in this regard. During the commencement of extraction of the trees on 10 February 2016, the police detained 5 participants of the action, including the members of the "Partisan Movement" and of the political party "United National Movement". Arrests of the participants of the action continued in parallel with the protest and on 12 and 26 February 4 more participants were detained. Administrative procedures have been carried out against each of them within the meaning of Article 173 of the Administrative Offences Code of Georgia. According to the statement of the police, the detained persons

[30] See Decision of the U.S. Supreme Court on the Case of Cohen v. California https://supreme.justia.com/cases/federal/us/403/15/case.html;

[31] Decision of the Tbilisi Appellate Court of 31 May 2016, Case No 4/ა-433-16;

were impeding the conduct of works by the company "Zimo" in the village of Tsikhisdziri, failed to comply with the demand of the police to leave the territory in order to allow Zimo Ltd. to continue the conduct of works connected with the transplantation of trees. The first instance courts considered the fact of commission of an administrative offence by all of them as confirmed, though the courts classified the committed administrative offence as a petty offence and contented themselves with issuing verbal warnings.[32] The Kutaisi Appellate Court upheld the appealed decisions. As explained by the Appellate Court, the police implements within its competence preventive measures such as issuing a demand to leave the site and prohibiting entry into a particular territory, in order to prevent a danger to or violation of public safety and order. The court specifies that the demand issued by the police to the participants of the action to leave the territory where Zimo Ltd. legally performed works was lawful. The acts of the participants of the action impeded the realisation by Zimo Ltd. of the powers to freely perform the assumed works[33].

- **Action held in the Batumi park on 6 May** - on 18 May 2015, the Prime Minister of the country was in Batumi in connection with the opening of the Hilton hotel. On 6 May, a small action was held near the hotel, in the Batumi park, to protest against the visit of the Prime Minister and the current situation in the region. Three participants of the action were detained by the police, against whom administrative offence reports were drawn up on the basis of Article 173 of the Administrative Offences Code of Georgia. According to the police officers, these persons did not comply with the lawful demand of the police and attempted to enter the Hilton hotel. The organiser of the action stated at the court hearing that the participants of the action did not attempt to enter the Hilton hotel. Through the action held on 6 May in the park territory, the participants of the action wanted to get the message across to the Prime Minister regarding the suspended projects in the city. The assembly was peaceful; the participants of the assembly were prohibited by people in citizens' clothes, who did not present their documents to the participants, to move in the territory adjacent to the Hilton hotel. As explained by the Batumi City Court, the police acted within the limits of its authority and the police has the right to implement preventive measures in order to protect the safety of the high officials of state authorities. All the three persons held administratively liable were recognised by the court to be offenders and were imposed a fine in the amount of GEL 250[34].

4.3. **Assessment**

- The analysis of the examined cases shows that the representatives of the Ministry of Internal Affairs of Georgia, as well as the courts, consider lawful the limitation of the places of assemblies without proper substantiation. According to paragraph 19 of the Guidelines on Freedom of Peaceful Assembly[35], the State should seek to facilitate public assemblies at the organiser's preferred location where this is a public place that is ordinarily accessible to the public. According to the same Guidelines, the conduct that temporarily hinders, impedes or obstructs the activities of third parties is included in the freedom of peaceful assembly. The right to peaceful assembly also involves the right to passive resistance.

  As a rule, organisers of actions choose particular places of assemblies with the purpose of conveying concrete messages to the addressees of critics. The holding of assemblies should be possible in such a way as to ensure that the target audience can see and listen to them. When the State decides to intervene in the regulation of the place of assembly and disallows the participants of an action to hold an action in a particular place or form, there should be a respective legitimate purpose and the measures applied should be proportionate to the purpose. In none of the cases examined did the court consider why the holding of a peaceful assembly in a particular place was not compatible with the right to assembly;

- Courts approve offences without having examined the lawfulness of the actions of police officers, or if they do examine the lawfulness, such examination is of formal nature only. In such cases, the courts content themselves with only establishing whether the police has the right in general to perform a particular action and does not consider whether the police appropriately uses the right granted by law in each case to be examined.

  We have already mentioned above that in order to approve the actions provided for by Article 173 there should be the demand of a police officer and the demand should be lawful. "An order or a demand of a police officer is considered lawful when it is directly based on the legislation, or on the norms of public or private law,

[32] Decision of the Kobuleti Magistrate Court of the Batumi City Court of 23 February 2016, Case No 4/31-2016; Decision of the Batumi City Court of 22 February 2016, Case No 4/200-16; Decision of the Batumi City Court of 29 February 2016, Case No 4/289-16;

[33] Decision of the Kutaisi Appellate Court of 14 April 2016, Case No 4/ა-92-2016; Decision of the Kutaisi Appellate Court of 8 April 2016, Case No 4/ა-83-2016;

[34] Decision of the Batumi City Court of 22 May 2015, Case No 4/733-15;

[35] Guidelines on Freedom of Peaceful Assembly, 9 July 2010 – Venice Commission, OSCE/ODIHR;

which set forth and regulate on a normative basis the public relations and the rules of conduct of citizens[36]".

Only establishing the fact that the legislation grants to the police officer the right to restrict the movement of a person/persons in a particular place within the scope of preventive measures is not sufficient for considering such demand to be lawful. With regard to one of the cases to be examined, the court explained that the examination of the lawfulness of a particular action of a police officer while he/she is in line of his duties does not represent the subject to be considered within the scope of this administrative offence case and this may become the subject of a separate dispute. Apart from the fact that such discourse of the court is unlawful, appealing the police officer's action under a separate court action is practically ineffective. If we consider that the examination of the lawfulness of the action of a police officer is indeed outside the limits of review of an administrative offence case, then the person, against whom an administrative offence report was drawn up and the court proceedings were conducted, has to file a separate court action for examining the lawfulness of the action of a police officer. As contrasted with administrative offence cases (which are reviewed in tight deadlines established by law), the appeal of the actions of police officers through common procedure takes longer, which may be 2-3 years or longer in Georgia's reality. While the court examines the lawfulness of the action of a police officer under a separate court action, a person held administratively liable will be known as an offender for the non-compliance with the demand the lawfulness of which has not been confirmed.

This model offered by the courts brings an opportunity to recognise the person as an offender and impose a penalty (including an administrative detention) on him/her, consider him/her to be a person who has been imposed an administrative penalty (which constitutes an aggravating circumstance) for the non-compliance with the demand the lawfulness of which has not been confirmed yet.

Such "standard" used by courts is vicious and increases the risk of wilful actions of police officers. If the police officer is sure that the court will not examine the lawfulness of his/her demand within the scope of an administrative offence case, the police will have an opportunity to restrict peaceful assemblies any time and in any place on the ground of implementing police measures;

- The court considered lawful the "preventive actions" that the police officers implemented for protecting the safety of the high officials of state authorities without having studied what danger could be caused to the high officials if a peaceful assembly was held in the particular place. Infringement of the right to peaceful assembly on the ground of applying police measures for the purpose of implementing preventive actions ensuring safety may not be justified if expected danger cannot be confirmed[37]. Otherwise, the police will always have grounds to prohibit the holding of peaceful assemblies due to hypothetical "danger";
- The analysis of the cases examined in this report shows that neither the police nor the courts seek a correct balance between the right to assembly and the property right. Restriction on the freedom of peaceful assembly and expression on the ground of protection of private property may not always be considered appropriate, all the more if the particular private property was an integral part of public space previously and the basis of protest is the alienation of this property.

  For instance, based on the practice of United States courts, the exercise of the freedom of expression is possible within the facilities of the private property that is accessible for the public. Thus, a positive obligation may arise for the State to limit the property right in order to ensure the exercise of the freedom of assembly and expression. In the Case of Appleby and Others v. the United Kingdom[38], which related to the distribution of leaflets in the part of private property located in the town centre, the court discussed the limits of the State's positive obligation. In this case, the court did not establish the infringement on the ground that the applicants were prevented from distributing their leaflets only in the particular limited place and they could communicate their views to the public through other means. However, judge Maruste in his partly dissenting opinion discoursed about the State's obligation to ensure a balance between the property right and the freedom of assembly and expression taking into account the increasing privatisation in modern society. In his opinion, the old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. In his view, the property rights of the owners of the shopping mall were unnecessarily given priority over the applicants' rights to freedom of expression and assembly.

[36] Decision of the Tbilisi City Court of 10 October 2014 (Case No 4/6297-14);

[37] For instance, the European Court of Human Rights established the infringement of the right to peaceful assembly in the Case of Makhmudov v. Russia (Makhmudov v. Russia *No 35082/04*). In this case, the representatives of local authorities did not allow people to hold an action to protest the urban planning policy on the ground of possible "activation of terrorist activities" The State failed to present evidence on the actual existence of such threat;

[38] See Decision of the European Court of Human Right on the Case of APPLEBY AND OTHERS v. THE UNITED KINGDOM, No 44306/98, 6 May 2003;

4.4. Good practice

On 25 August 2016, the Tbilisi City Hall did not allow the members of the "Partisan Gardening" to erect a tent in the park, in front of the building of the Tbilisi City Hall, the place chosen by the participants of action, and hold a peaceful assembly in such form. Several circumstances were named as the reason for imposing restriction: impeding the watering of trees in the park; blocking of the building; probability of threat

to the health of the participants of the action due to inappropriateness of the place. With the assistance of the Georgian Young Lawyers' Association, the participants of the action filed a complaint with the Tbilisi City Court requesting to find the decision of the Tbilisi City Hall unlawful and to allow them to erect a tent in the place chosen by them. The applicants also requested to review the complaint within a special time frame of 2 days (despite that fact that the law does not directly establish a two-day time frame for the review of such cases).

The Tbilisi City Court found that the right of the participants of the action to peaceful assembly was infringed and explained that "an administrative body, in the vicinity of the building of which an assembly or demonstration is held, may impose restrictions with regard to holding assemblies or demonstrations away from the building, but not more than 20 metres away, to prevent blocking of the building and interruption of the operations of the institution [...] The decision should be taken for each specific case, considering the current circumstances and public interest [...] so that the concept of the constitutional right to assembly and demonstration is not neglected.[39]"

As explained by the court, "when assessing the blocking of a building and interruption of proper functioning of the institution, the competent person should be guided with clear and explicit criteria. A state authority may intervene in an assembly (demonstration) when it is clearly evident that the number of participants, the form of assembly, the chosen place and others may cause the blocking of a building and hindrance to the proper functioning of an institution. In addition, if the decision made by an administrative body within its discretionary powers is appealed to the court, the burden of proof for the appropriateness and need of the restriction lies with the administrative body."

In this case, the court held that the Tbilisi City Hall failed to fulfil the burden of proof as determined by law and imposed the restriction by neglecting the purpose for which it was granted this power. Taking into account the number of the participants of the assembly and the form of the assembly, the court established that the place chosen by the participants of the action did not cause the blocking of the building and hindrance to the functioning of the administrative body, since the building was equipped with two entrances and the place chosen was not located on the footpath leading to the entrances. Thus, the court instructed the Tbilisi City Hall not to impede the erection of a tent by the participants of the action in the place chosen by them.

Also, the court applied a two-day time frame for the review of the case. It should be noted that the Law of Georgia on Assemblies and Demonstrations recognises the special time frame for the review of disputes only in two cases:

- the decision terminating an assembly or demonstration is appealed to the court. The case must be reviewed **at each instance within three business days**;
- the decision of an executive body of local self-government prohibiting the holding of an assembly or demonstration must be appealed to the court, which **delivers a final decision within two business days**.

Despite of the fact that the case in question did not fall within any of these two cases, the court shared the position of the applicant and, taking into account the principle of analogy, applied the norm regulating similar relations and reviewed the case within two business days. If the court did not apply the special time frame, the dispute would lose its point, since the review of cases usually takes several months or years.

Although the court used correctly the analogy of law in the given case and reviewed the dispute within a special time frame, it is important that the gap in the Law of Georgia on Assemblies and Demonstrations related to appeals be eliminated and a special time frame for the review of disputes related to restrictions of peaceful assemblies be directly prescribed in the law, including the possibility of appealing decisions of first instance courts to superior instance courts.

5. VIOLATING THE RULES FOR ORGANISING AND HOLDING ASSEMBLIES OR DEMONSTRATIONS (ARTICLE 174^1 OF THE ADMINISTRATIVE OFFENCES CODE OF GEORGIA)

5.1. Introduction

The Administrative Offences Code of Georgia establishes that the violation of the rules for organising and holding assemblies and demonstrations is an administrative offence and determines a respective liability for it. This article (Article 174^1) is rarely used in real life. From 2012 to 2016, only 5 cases were identified in the Tbilisi City Court, when an administrative offence report was drawn up within the meaning of this article.

[39] Decision of the Tbilisi City Court of 31 August 2016, Case No 3/6463-16;

5.2. Examined case

On 30 December 2014, at the meeting of the Tbilisi Municipality Sakrebulo, an issue of changing the zonal status of the Sololaki slope for the purpose of constructing "Panorama Tbilisi" was discussed. The "Partisan Gardeners" and other activists protested against the changing of the status of this territory and the construction of "Panorama Tbilisi" in the territory of Old Tbilisi. They planned to attend the meeting of the Sakrebulo. They also held entry permits issued by the Tbilisi Municipality Sakrebulo, which entitled them to attend the meeting. In spite of the existence of entry permits, they were denied by the security guards of the Sakrebulo permission to enter the meeting room. Afterwards, several participants of the action started a sit-in action at the central entrance of the Sakrebulo. Several crews of the patrol police came to the site within 3-5 minutes after the sit-in action started, and detained 4 participants of the action on the basis of Articles 166, 173 and 174^1(4) of the Administrative Offences Code of Georgia.

The court reviewed the case in 2015 and, under the decision of the first instance court, administrative proceedings in connection with the action provided for by Article 166 of the Administrative Offences Code of Georgia were terminated due to absence of an administrative offence. As for the actions provided for by Articles 173 and 174^1(4) of the Administrative Offences Code of Georgia, the court classified the actions of the participants of the action as an administrative offence and issued verbal warnings. The Tbilisi Appellate Court upheld the decision of the first instance court.

The court established that the hindrance to the functioning of the Tbilisi Sakrebulo is not confirmed by the evidence presented in the case; however, the court considered the action of the participants of the action to be the blocking of the Sakrebulo building. According to the assessment of the court, the central entrance of the Tbilisi Sakrebulo was closed in such a way as to prevent its intended use [...] The court finds that the persons held administratively liable blocked the entrance of the administrative building of the Tbilisi Sakrebulo, which is prohibited under Article 9(3) of the Law of Georgia on Assemblies and Demonstrations. [...] The demand of the police officer to unblock the entrance of the building was lawful, which is why the persons held administratively liable were obliged to comply with the demand[40]".

5.3. Assessment

Why this case is important is that it clearly demonstrates how the blanket norm establishing prohibition and its interpretation may cause the restriction of the right to peaceful assembly. The norm that the court relied on prohibits the blocking of the entrances of buildings, motorways and railways when assemblies or demonstrations are held[41]; however, the law does not specify what is meant under blocking.

When the norm of a law allows to give a mala fide explanation, the court, which has the power to explain such norm, is obliged to explain it with such an intention as to avoid the violation of the rights guaranteed under the Constitution. When drafting Article 9(3) of the Law of Georgia on Assemblies and Demonstration, the purpose of the legislature could not be the prevention of holding actions at the entrance of administrative bodies. Under "blocking of entrances" are understood cases when this action deprives an administrative body of the possibility to continue its functioning due to blocking; however, in order to justify the restriction on the right to assembly, the duration of an assembly should be taken into consideration, and if the participants of the action had enough opportunity to express their protest[42].

In conditions when, upon the instructions of the court, the Sakrebulo continued its operations concurrently when the action was held and the action did not cause the interruption of its functioning, the demand of the police to cease the sit-in action in a few minutes after the action started was not a lawful demand and constituted a disproportionate intervention in the right to assembly, which caused the infringement of this right.

6. DEFACING THE APPEARANCE OF A SELF-GOVERNING UNIT (ARTICLE 150 OF THE ADMINISTRATIVE OFFENCES CODE OF GEORGIA)

6.1. Introduction

The Administrative Offences Code of Georgia (Article 150) considers the following to be the defacing of the appearance of a self-governing unit: making various types of inscriptions, drawings or symbols on building facades, shop windows,

[40] Decision of the Tbilisi City Court of 16 January 2015, Case No 4/9035-14;

[41] Article 9(3) of the Law of Georgia on Assemblies and Demonstrations;

[42] For instance, in the Case of Cisse v. France, *No 51346/99* the European Court of Human Rights "found the evacuation of immigrants from the church, who had occupied it for two months, lawful and held that the State's actions did not constitute a disproportionate intervention in the right of assembly. The court criticised the form of intervention employed by the police, which was of sudden and indiscriminate nature. However, based on the lengthy period that the church was occupied, it noted that the immigrants had enough opportunity to express symbolic protest and that the intervention was reasonable due to health-related issues;

fences, columns, trees or other plantings without authorisation, also putting up placards, slogans, banners at places not allocated for this purpose. The following is considered as an offence and carries a higher fine: making various types of inscriptions, drawings, symbols on the facades of administrative buildings, or in the adjacent territory, including pavements and carriageways, without authorisation.

The Administrative Offences Code of Georgia grants the authority to draw up administrative offence reports on the facts of defacing of appearance to the Ministry of Internal Affairs of Georgia, as well as to persons authorised by the bodies of relevant municipalities[43].

6.2. Examined cases

- On 1 July 2015 the patrol police detained the member of Free Zone in Kutaisi. An administrative offence report was drawn up in connection with Article 150(2) of the Administrative Offences Code of Georgia, which includes the commission of the same act (making various types of inscriptions, drawings or symbols on building facades, shop windows, fences, columns, trees or other plantings without authorisation, also putting up placards, slogans, banners at places not allocated for this purpose) repeatedly. According to the administrative offence report drawn up by the patrol police, the detained person was making without authorisation an inscription ("Bidzina, go! My heart belongs to Georgia - Misha") on the carriageway of the road and on the facade of the building with a painting balloon. At the court hearing, the person held administratively liable stated that the inscription on the carriageway was made by him, but the one on the facade of the building was made by someone else.

  The Kutaisi City Court considered this act to be an administrative offence, though the court held that the act of the person held administratively liable was not committed repeatedly and imposed on him a fine in the amount of GEL 50 under Article 150(1) of the Administrative Offences Code of Georgia[44].

- On 14 July 2015, the members of Free Zone put up placards in Kutaisi reading: "Putin is Khuylo [swear word]". The patrol police drew up an administrative offence report against one of the persons under Article 150(2) of the Administrative Offences Code of Georgia, which includes the commission of the same act (making various types of inscriptions, drawings or symbols on building facades, shop windows, fences, columns, trees or other plantings without authorisation, also putting up placards, slogans, banners at places not allocated for this purpose) repeatedly. In this case as well, the court held that the act was not committed repeatedly and that this act constituted a violation under Article 150(1) of the Administrative Offences Code of Georgia. In this case the court held that the act was a petty offence and issued a verbal warning[45];

- During the visit of the Prime Minister to Ozurgeti on 15 September 2015, two members of the United National Movement and one member of Free Zone hung up a fabric banner on the facade of one of the buildings located in the town centre, which bore words "Liar Government". These persons was detained due to this act by the employees of the Guria Regional Main Administration of the Ministry of Internal Affairs in Ozurgeti and administrative offence reports were drawn up against two persons under Article 150(2) and against one person under Article 150(1) of the Administrative Offences Code of Georgia. The persons held administratively liable stated at the court hearing that their act fell within the freedom of expression and they did not agree with the administrative offence reports.

  The Ozurgeti District Court held that the place chosen for placing the banner by the persons held administratively liable is not a special place allocated by an administrative body for placing posters, slogans or banners and such act constitutes an offence. The court classified the committed offence as a petty offence and issued a verbal warning[46].

- On 16 April 2016, the police detained one member of the students' association "Auditorium 115" due to inscription "Let's Demand Educational Reform. Auditorium 115" made on the pavement in the territory adjacent to 28 Chavchavadze Avenue. An administrative offence report was drawn up under Article 150(2^1), which prohibits making inscriptions near administrative units.

  The person held administratively liable stated at the court hearing that the inscription was made by him but he evaluated this action as the freedom of expression and disagreed with the administrative offence report. The representative of the patrol police failed to specify which administrative building was located in the territory adjacent to 28 Chavchavadze Avenue and explained that any administrative building is implied, for

[43] See Article 239(13) and (14) of the Administrative Offences Code of Georgia;

[44] Decision of the Kutaisi City Court of 16 July 2015, Case No 4/783-15;

[45] Decision of the Kutaisi City Court of 14 July 2015, Case No 4/798-15;

[46] Decision of the Ozurgeti District Court of 1 October 2015, Case No 4-233-15;

example, the building of the Parliament located in the Rustaveli Avenue in Tbilisi may also be considered as the one located in the territory adjacent to 28 Chavchavadze Avenue. In this case, the Tbilisi City Court did not establish the fact of commission of an administrative offence and explained that the evidence presented did not confirm the fact of making an inscription in the territory adjacent to the administrative building[47].

6.3. Assessment

- Article 150 of the Administrative Offences Code of Georgia and its interpretations identified in practice represent an influential repressive mechanism in hands of police officers, which allows the police to classify as "defacing of appearance" the forms of expression undesirable for the government, and to punish activists. Pavements, facades of buildings, lamp posts and other public places are widely used for placing various advertisements. Even if such announcements or inscriptions of advertising nature are placed without authorisation, respective authorised persons, as a rule, do not apply restrictive measures and leave the public space open for unauthorised inscriptions of commercial nature. The analysis of the examined cases shows that in contrast to every-day advertisements, the placement in the public space of inscriptions or posters and banners of political or social nature (criticising the actions and policy of the government) is immediately prevented by the police on the ground that the appearance of a self-governing unit is defaced.
- In none of the examined cases did the courts consider "the defacing of appearance" to be a concrete form of the freedom of expression; neither did the court consider its compatibility with the right guaranteed under the Constitution. The decisions studied do not reveal what kind of evidence the courts rely on when they do not consider the given place as the one appropriate for the placement of inscriptions or banners. In contrast to persons authorised by municipality bodies, police officers cannot be fully informed when recording the fact of placing a banner or making an inscription if the particular place is the one "appropriate" for the above actions and whether such action was performed without authorisation. In all the four cases examined within the scope of this report, the administrative offence reports were drawn up by police officers; neither did the court decisions make it clear how an arbitrary nature of the action was established and how the place was considered inappropriate for this action.
- Both the police and the courts use a vague interpretation of Article 150 of the Administrative Offences Code of Georgia. The temporary placement of banners/posters, when such form is a means of delivering a particular message to the addressee of critics and is of temporary nature and when removing those banners/posters is associated with no difficulties (including financial difficulties), may not be considered as defacing of appearance.
- Article 150 attributes the existence of an offence to two circumstances: arbitrary nature of an action and the place of placement. The placement of inscriptions and posters/banners is not prohibited in the place appropriate for their placement; however, it is still obscure what is deemed to be a place appropriate for the placement of inscriptions/posters/banners. Also, it is obscure whether the placement of inscriptions, posters and banners in appropriate places automatically implies that such action is not arbitrary and performed without authorisation. In order to establish what place in Tbilisi is allocated for the placement of posters and making inscriptions, GYLA applied with a letter to the Tbilisi Municipality Sakrebulo. As informed by the Sakrebulo, "an action will be not be considered to be an administrative offence within the meaning of Article 150 of the Administrative Offences Code of Georgia if its form will be agreed in writing with the LEPL Tbilisi Architecture Service[48]".

  Based on the explanation provided by the Office of the Sakrebulo, the limits of the action prohibited under Article 150 become more obscure. According to the letter, the making of various inscriptions or placement of posters in the particular place is not considered to be an offence, rather than such action is deemed to be the defacing of appearance if the form of an inscription or poster has not been agreed with the LEPL Tbilisi Architecture Service;
- Despite of the fact that the decision of the Plenum of the Constitutional Court of Georgia[49] explains what standard should be used to consider the particular area to be a territory adjacent to an administrative body, the definition of "adjacent territory" still remains a problem in real life. As explained by the Constitutional Court of Georgia, territory adjacent to an administrative body "is attributed to the institution, its perimeter,

[47] Decision of the Tbilisi City Court of 7 July 2016, Case No 4/3644-16;

[48] Letter No 07/11651 of the Office of the Tbilisi Municipality Sakrebulo;

[49] See Decision No 482 of the Plenum of the Constitutional Court of Georgia of 18 April 2011 on the Case of Political Association of Citizens 'Movement for Unified Georgia', Political Association of Citizens 'Conservative Party of Georgia', Citizens of Georgia Zviad Dzidziguri and Kakha Kukava, the Georgian Young Lawyers' Association, Citizens Dachi Tsaguria and Jaba Jishkariani, the Public Defender of Georgia v. the Parliament of Georgia;

and is located in the immediate vicinity of the institution, and includes pavements and carriageways. It is virtually impossible to determine universal criteria for defining "adjacent territory" in the law. In each specific case, it can be defined taking into consideration the location of the institution, its architecture, urban planning and other important factors.[50]" For the purposes of this report, in one of the examined cases it was revealed that the police defined "adjacent territory" very broadly and, for example, considered the building of the Parliament located in Rustaveli Avenue to be a territory adjacent to No 28, Chavchavadze Avenue in Tbilisi.

7. PRACTICE OF USING ADMINISTRATIVE ARRESTS

7.1. Introduction

An administrative arrests represents an intensive intervention in the freedom guaranteed under the Constitution of Georgia and it may be used only if there is an appropriate ground provided for by law. It is important to assess how correctly the police uses administrative arrests. Also, when we speak about administrative arrests, we mean even those cases when an arrest report is not officially drawn up and when arrests lasts a few minutes, since in order to consider the person to be detained it is sufficient to actually restrict him/her in the freedom of movement even if no document confirming the arrest of the person exists at that moment.[51]"

7.2. When does the law allow to administratively detain a person?

The Administrative Offences Code of Georgia provides for the grounds and time frames of administrative arrest. According to Article 244 of the Administrative Offences Code of Georgia, a representative of a law enforcement body is authorised to detain a person:

- when other sanctions have been exhausted;
- to identify the person;
- to prepare an administrative offence report if its preparation is necessary but impossible at the scene;
- to ensure the timely and correct consideration of an administrative offence cases and the enforcement of the decision delivered on the administrative offence case.

Thus, the police is obliged to carry out the arrest only if there is at least one ground listed above. The police officer, who decides to use administrative arrest, is tied down by the principle of legitimacy and is obliged to use administrative arrest only when this police measure aims at achieving legitimate objectives and is fit, necessary and proportional in certain amount[52].

The examination of the cases revealed that the police, as a rule, does not specify which of the grounds for arrest were referred to, which complicates the examination of the lawfulness of the actions of the police. In some cases, arrest carried out without any substantiation continues for a maximum period of time. For instance, 6 participants of the No to Panorama action were detained without any legal grounds for more than 20 hours. In the cases when police substantiated the period of arrest with the necessity of drawing up an administrative offence report, the arrest lasted for a longer period time than it would be necessary for drawing up an administrative offence report. There were cases when the person arrested on ground of drawing up an administrative offence report were released so that the administrative offence report had not been drawn up at all.

Police uses arrests even when the law does not provide for arrest at all. More specifically, in the cases on the defacing of the appearance of a self-governing unit the police used administrative arrest as well, whereas in the case of an offence provided for by the article related to defacing of the appearance of a self-governing unit the police is not vested with an authority to detain. Administrative arrest, as an extreme restrictive form of intervention in human freedom, is not provided by the Administrative Offences Code of Georgia for all offences, based on the nature of offences. The Administrative Offences Code of Georgia determines who is authorised to detain a person and in which administrative offence case. Article 150 is not included at all in the list of offences[53], which will allow the Ministry of Internal Affairs of

[50] See Decision No 482 of the Plenum of the Constitutional Court of Georgia of 18 April 2011 on the Case of Political Association of Citizens 'Movement for Unified Georgia', Political Association of Citizens 'Conservative Party of Georgia', Citizens of Georgia Zviad Dzidziguri and Kakha Kukava, the Georgian Young Lawyers' Association, Citizens Dachi Tsaguria and Jaba Jishkariani, the Public Defender of Georgia v. the Parliament of Georgia, paragraph 118;

[51] See the decision of the Constitutional Court of Georgia of 29 January 2003 on the Case of Piruz Beriashvili, Revaz Jimsherishvili and the Public Defender of Georgia v. the Parliament of Georgia, (as explained by the Constitutional Court of Georgia, "the person may be considered to be detained from the moment when a person specially authorised to carry out detentions restricts the person in the freedom guaranteed under the Constitution of Georgia in cases and on the ground determined by law.);

[52] Article 12 of the Law of Georgia on Police;

[53] According to Article 246(a) of the Administrative Offences Code of Georgia, if there are grounds provided for by law, the employees of the Ministry

Georgia to detain a person. Thus, administrative arrest of a person by the employees of the Ministry of Internal Affairs of Georgia for the commission of an action provided for by Article 150 of the Administrative Offences Code of Georgia is unlawful.

7.3. Mechanisms for appealing arrests

Unlawful arrests entail the obligation to compensate for damage. Therefore, it is important that the procedures, under which the lawfulness of arrest of a person may become disputable and under which the person is allowed to demand compensation of damage, be clearly prescribed. Article 251 of the Administrative Offences Code of Georgia lays down the procedure for appealing administrative arrests, according to which "interested persons may appeal an administrative arrest […] to a superior body (official) or a prosecutor." The Constitutional Court of Georgia considered the constitutionality of this article in 2005. The complainant believed that this disputable provision entitled him/her to appeal the decision to court. The Constitutional Court of Georgia found the provision to be constitutional and explained that the disputable provision did not restrict the right of appealing to court, guaranteed under the Constitution of Georgia (Article 42), since "according to the legislation and based on the specific nature of administrative proceedings, certain relations may be regulated by appealing to a superior body or prosecutor, rather than to court. However, this does not mean that the person does not have the right to apply to court for protecting his/her rights, which is also confirmed by Article 178(3) of the General Administrative Code of Georgia, according to which "a person may apply to court without having filed an administrative complaint with an administrative body for protection of his/her rights and freedoms.[54]"

It should be noted that the Constitutional Court of Georgia gave this explanation before changes were made to the Administrative Procedure Code of Georgia. According to these changes, the court will not accept a complaint unless the complainant used the possibility of filing an administrative complaint once.

Thus, based on the changes made to the Administrative Procedure Code of Georgia, the explanation of the Constitutional Court of Georgia should be understood in a manner that administrative arrest may be appealed to court as well after it has been appealed to a superior administrative body.

In spite of the explanation of the Constitutional Court of Georgia, the procedures for appealing arrests still remain a problem; the fact that the detained person is not explained his/her right and the time frames of appealing arrest also constitutes a considerable procedural violation.[55] The form of an administrative offence report approved by the Ministry of Internal Affairs of Georgia does not contain at all the field specifying the right of appeal. At the moment when an administrative offence report is drawn up, the person is explained the administrative offence committed and the ground for his/her arrest; the right to a defence counsel; the right to communicate the fact of his/her arrest and location to a relative named by him/her if so desired; also the right to communicate the fact of his/her arrest and location to the administration at his/her place of work or study if so desired[56].

According to the current regulations, administrative offence cases are reviewed in tight deadlines established by law, and the lawfulness of arrest may be examined independently, in separate proceedings, which is ineffective. Legal proceedings for the restoration of an infringed right of a person should be conducted under as simple and fair procedure as possible. In the given case, if a court is the body reviewing an administrative offence case, it is important that the court examines the lawfulness of arrest apart from reviewing the case. This will save the resource of both the particular person and the court.

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of Internal Affairs of Georgia may administratively detain a person for petty hooliganism, violation of the rules for organising and holding assemblies or demonstrations, non-compliance with a lawful order or demand of a police officer or military service person, illegal purchase or storing of a small quantity of a narcotic drug, without the intention of selling it, and/or the use of narcotic drugs without a doctor's prescription, family violence, non-compliance with the requirements and obligations prescribed by protecting and restraining orders, prostitution, being at public places in an intoxicated state or in a condition that insults human dignity or public morals, violation of road traffic rules, violation of hunting, fishing and fish resource protection rules, other violations of the legislation of Georgia on the protection and use of flora and fauna, violation of military service regulations by a military service person of the Ministry of Internal Affairs of Georgia, also in other cases directly provided by the legislative acts of Georgia;

[54] Decision N2/1/263 of the Constitutional Court of Georgia of 4 February 2005 on the Case of Citizen Giorgi Chkheidze v. the Parliament of Georgia;

[55] See Article 245 of the Administrative Offences Code of Georgia;

[56] Order No 625 of the Minister of Internal Affairs of Georgia of 15 August 2014 "On determining the procedure for approving and completing the forms of documents to be drawn up by persons authorised by the Ministry of Internal Affairs of Georgia in connection with administrative offence cases", Annex No 9;

SUMMARY CONCLUSIONS AND RECOMMENDATIONS

In 2015-2016, the facts of infringement of the freedom of peaceful assembly and expression occurred frequently. Despite of the fact that the legislation of Georgia mainly contains the appropriate guarantees for the enjoyment of the right to peaceful assembly, the enjoyment of this right is still associated with difficulties in real life. In addition, up to now, Georgia has the Administrative Offences Code in the form which fails to meet the requirements of Due Process and which needs to undergo a substantial reform. It is against this background that the Ministry of Internal Affairs continues to improperly apply the legislation on administrative offences against the participants of assemblies and demonstrations, which remains outside the proper control and legal treatment by national courts; The practice of applying mechanisms provided for by the Administrative Offences Code of Georgia in the course of assemblies and towards individual participants of actions related to those assemblies raises doubts that the Ministry of Internal Affairs of Georgia observes the principle of political neutrality in its activities.

For the purpose of remedying problems identified within the scope of this report, the Georgian Young Lawyers' Association issues the following recommendations for relevant bodies:

For the Parliament of Georgia

- The norms of the Law of Georgia on Assemblies and Demonstrations that establish blanket prohibitions with respect to the place of assembly should be revised. The definition of blocking of entrances to buildings, motorways and railways should be made more specific;
- The Law of Georgia on Assemblies and Demonstrations should establish tight deadlines for appealing decisions restricting the holding of assemblies and demonstrations, similarly to decisions terminating or prohibiting the holding of assemblies and demonstrations. In addition, the right of appealing decisions of first instance courts on restricting the holding of assemblies and demonstrations should be defined;
- The definitions of Articles 150, 166 and 173 of the Administrative Offences Code of Georgia should be revised in such a manner as to ensure that the content of prohibited actions is more transparent and is based on clear criteria;
- The authority to draw up administrative offence reports within the meaning of Article 150 of the Administrative Offences Code of Georgia should be limited for the Ministry of Internal Affairs of Georgia and this authority should be retained only to persons authorised by relevant municipality bodies;
- Relevant changes should be made to the Administrative Offences Code of Georgia and, if an administrative offence case is reviewed by a court, the person held administratively liable should be granted the right to request the examination of the lawfulness of administrative arrest within the scope of the same legal proceedings;
- The procedures for appealing administrative arrests should be revised.

For the Ministry of Internal Affairs of Georgia

- The employees of the Ministry of Internal Affairs of Georgia should follow the international standards and the legislation of Georgia during assemblies and demonstrations and intervene in the freedom of assembly and expression only when there are appropriate grounds for that;
- Administrative arrest should be used only in extreme cases and when there are respective legal grounds for that. In all cases, administrative offence reports should specify the ground on which the arrest is carried out. After grounds for arrest are exhausted, the arrested person should be released immediately irrespective of whether the maximum period of arrest expired or not;
- The practice of using administrative arrests in connection with Article 150 of the Administrative Offences Code of Georgia should be eliminated;
- Respective changes should be made to Order No 625 of the Minister of Internal Affairs of Georgia of 15 August 2014 "On determining the procedure for approving and completing the forms of documents to be drawn up by persons authorised by the Ministry of Internal Affairs of Georgia in connection with administrative offence cases", and the relevant field regarding the right of appeal of arrest should be added in the form of an administrative offence report.

For common courts

- When reviewing the administrative offence cases related to the freedom of assembly and expression, the courts should follow the international standards associated with the protection of this right;
- When classifying an action as petty hooliganism, the courts should follow the high standard established by the Constitution of Georgia, the Law of Georgia on the Freedom of Speech and Expression and the international agreements of Georgia in order to protect the freedom of expression;
- When reviewing cases within the meaning of Article 173 of the Administrative Offences Code of Georgia (Disobedience to a lawful request of police officer), the judges should examine the lawfulness of the actions of police officers. The lawfulness of actions should be examined meaningfully, rather than formally;
- Verbal warnings should be issued only when an administrative offence was actually committed and not when the fact of commission of an administrative offence is not confirmed.