The Special Report of the Public Defender of Georgia

The practice of Disciplinary Proceedings Against Prisoners in Georgia

Drafted in accordance with Article 21.g) of the Organic Law of Georgia on the Public Defender of Georgia

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Contents

Introduction

The adequate protection of the rights of persons with restricted freedom or deprived of their freedom – accused and convicted persons (hereinafter referred to as "prisoners") – implies the elimination of any arbitrariness against them. To this end, it is necessary to have both legal and practical safeguards in place. One of the possible manifestations of arbitrariness is punishing prisoners or subjecting them to various illegal pressures without any statutory ground. Punishing a prisoner for a minor violation in a penitentiary establishment should be exclusively based on clearly established facts and the imposed sanction should be proportionate.

On the other hand, the administration of a penitentiary establishment should have sufficient means for ensuring order and security. Discharging functions by prison authorities should be regulated in detail to the maximum extent. Meticulously accurate regulations, with which prisoners are also familiar, will generate accurate expectations regarding the outcomes of their own conduct. Therefore, resentment and aggression among prisoners, threat to order and risk of violation of prisoners' rights will be reduced to the minimum.

The monitoring conducted by the Public Defender's Office for years[1] has identified problems regarding the arbitrary imposition of disciplinary sanctions on prisoners. Shortcomings have been found in the legislation as well since the law does not specify the categories of violations or the implications of these very violations; examination procedures do not meet the standards of a fair trial[2] as they fail to incorporate the key components necessary for the exercise of this right. It is noteworthy that the practice of imposition of disciplinary penalties was also highlighted within the scope of the regional monitoring conducted by the Committee for the Prevention of Torture (hereinafter the "CPT") as early as in its report prepared as a result of the visit to Georgia in 2014.[3] Apart from the ambiguity of the legislation, it also pointed out the severity of the sanctions and the high rate of their application.[4] It is noteworthy that this very practice was considered to be one of the reasons for the strained relationship between prisoners and the prison authorities.[5]

[1] See The 2018 Parliamentary Report of the Public Defender of Georgia, pp. 42-44; The 2017 Parliamentary Report of the Public Defender of Georgia, pp. 46, 51; The 2016 Parliamentary Report of the Public Defender of Georgia pp. 22–23; and The 2015 Parliamentary Report of the Public Defender of Georgia, pp. 21–22.

[2] The European Prison Rules require that the prison authority uphold the minimum standards of a fair trial, Rule 59.

[3] Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2014 and published in 2015; paras. 119-124; available at: https://rm.coe.int/16806961f8, (accessed 07.06.2019).

[4] *Ibid.,* para. 120.

[5] Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2014 and published in 2015, pp. 63–64, available at: https://rm.coe.int/16806961f8, (accessed 07.06.2019).

The CPT report on the visit to Georgia carried out in 2018 was published when the present report was being drafted.[6]

The committee emphasised the recommendation made in 2014 concerning disproportionality of restrictions of contacts with the outside world – restrictions/bans on short and long visits, phone calls, correspondence and access to media (TV/radio) as part of the catalogue of disciplinary sanctions. The CPT paid particular attention to the practice of placing prisoners in de-escalation rooms and observed that the frequent use of the de-escalation rooms amounts to *de facto* punishment of prisoners. The committee called upon the state to ensure that the use of these rooms is limited to the shortest period possible and serves the legitimate necessity.[7]

It is noteworthy that the Public Defender also has been discussing for years the problem of the use of de-escalation rooms.[8] However, this report does not discuss this issue since the placement of prisoners in a de-escalation room does not constitute a category of a disciplinary punishment from the legal point of view; whereas, this document aims at analysing exactly the disciplinary procedures.

It is noteworthy that the desk-research conducted by the NGO Rehabilitation Initiative for Vulnerable Groups was published in 2018.[9] The report identified a number of legislative and related practical shortcomings. Namely, the research discusses the non-uniform approach, wide discretion of the administration of penitentiary establishments, inadequate processing of statistical data, documenting information about disciplinary proceedings in an inadequate manner, etc.

Stemming from all the abovementioned, the Public Defender of Georgia expressed her interest in the practice of conducting disciplinary proceedings against prisoners as well as more detailed analysis of the legal regulation and developed this special report on the shortcomings existing in both practice and legislation and gave respective recommendations aimed at redeeming them.

Methodology

The Office of the Public Defender of Georgia requested information and documents, from the Penitentiary Department of the Special Penitentiary Service of the Ministry of Justice of Georgia, about prisoners regarding the application of disciplinary measures in all penitentiary establishments throughout Georgia during the following periods: 20 January – 30 January 2018; 1 April – 10 April, 2018; and 17 July – 27 July 2018 (hereinafter the "reporting period"). The Penitentiary Department

[6] Available at: https://rm.coe.int/1680945eca, (accessed 07.06.2019).
[7] Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2018 and published in 2019, para. 101, available at: https://rm.coe.int/1680945eca, (accessed 07.06.2019).
[8] The 2018 Parliamentary Report of the Public Defender of Georgia, p. 43.
[9] The report is available at: https://bit.ly/2KyyEA7, (accessed 07.06.2019).

supplied the Public Defender's Office with statistical data and presented to it 307 decisions about the application of disciplinary measures.[10]

As a result of the study of the said decisions, the Public Defender's Office identified the spots where prisoners allegedly committed disciplinary violations. In order to identify whether the respective spots were covered by video recording, the Public Defender requested and received information about the placement of video cameras.[11] The indicator of the possibility of the use of video recordings as evidence and their actual use by prison administrations during the procedure of establishing a disciplinary violation was analysed based on this information.

The Public Defender's Office also became interested as to how frequently the duty of paying the court fee is an obstacle for prisoners in terms of appealing a decision about the application of a disciplinary measure; prisoners often raise this problem when meeting with the Public Defender's representatives.

To this end, the Public Defender's Office applied to the Tbilisi City Court, Rustavi City Court, Kutaisi City Court, Batumi City Court and Mtskheta District Court. Prisoners placed in penitentiary establishments throughout Georgia have the right to appeal the disciplinary penalties imposed on them before these five courts according to their jurisdiction.

The Public Defender's Office requested and received[12] the data from 1 May throughout October 2018 regarding the number of disciplinary measures appealed in a particular court and, out of this number, the percentage of complaints that were discarded/dismissed due to the failure to pay the court fee. The analysis of the information received from the courts will also be presented in this report.

The Public Defender's Office analysed the domestic legislation as well and identified its relevant shortcomings in terms of international principles and best practices of other countries.

As a result of conducting a general overview of the legislation, presenting existing practical trends, legislative and practical shortcomings, the Public Defender gives concrete recommendations in this special report, the fulfilment of which will ensure the compliance of the disciplinary procedure involving prisoners with human rights principles.

[10] Letter no. MOC 5 18 00935736 of the Penitentiary Department, dated 12 October 2018.

[11] Letter no. 15-8/14733 sent by the Public Defender's Office on 26 November 2018 and Letter no. MOC 0 18 01075186 received from the Penitentiary Service on 5 December 2018.

[12] Letter no. 954 C/K of the Batumi City Court, dated 27 November 2018; Letter no. 2729628 of the Tbilisi City Court, dated 26 November 2018; Letter no. 121 of the Mtskheta District Court, dated 26 November 2018; Letter no. 704/C of the Rustavi City Court, dated 22 November 2018; and Letter no. 13715-3 of the Kutaisi City Court, dated 22 November 2018.

General Overview of the Legislation of Georgia on Disciplinary Proceedings

The categories of disciplinary violations committed by prisoners as well as disciplinary sanctions and disciplinary proceedings are regulated by the Imprisonment Code. Apart from the code, more detailed procedures are laid down in the statute of each penitentiary establishment. The procedures determined in the statutes are identical. There are certain discrepancies in the statutes according to risk or establishment type, which are mostly related to the duration of the application of a disciplinary penalty.[13]

The code[14] determines those acts that can be considered to be disciplinary violations and sets out the cumulative preconditions according to which an act can only be deemed to be a disciplinary violation if it breaches the internal regulations of a facility, undermines the order and safety, and does not involve elements of a crime. For the commission of a disciplinary violation, a proportionate[15] penalty[16] is imposed on a prisoner individually[17] after it is established that the prisoner concerned has committed the disciplinary violation.[18]

The code determines the safeguards for an accused/convicted person who has allegedly committed a disciplinary violation:[19] prisoners have the right to be informed of the nature and grounds of the violation; to have adequate time and facilities for defence; to benefit from legal aid in cases established by the law; to request questioning of witnesses and to have an interpreter's assistance.

The director of a penitentiary establishment or a person authorised by the former examines the case of a disciplinary violation. The case can be examined by an oral hearing or without it.[20] The Imprisonment Code determines the rules for adopting a decision about the application of a

[13] For comparison, see Article 77[1] of the Statute of Penitentiary Establishment no. 16 of the Ministry of Corrections and Probation of Georgia approved by Order no. 71 of the Minister of Corrections and Probation of Georgia of 15 July 2015; Article 76 of the Statute of Penitentiary Establishment no. 17 of the Ministry of Corrections and Probation of Georgia approved by Order no. 110 of the Minister of Corrections and Probation of Georgia of 27 August 2015; and Article 79 of the Statute of Penitentiary Establishment no. 6 of the Ministry of Corrections and Probation of Georgia approved by Order no. 108 of the Minister of Corrections and Probation of Georgia of 27 August 2015. These provisions establish categories of disciplinary penalties and determine the limit of the period of the application of these penalties, under which it is possible to restrict certain rights for up to 6 months in semi-open and closed as well as detention and special risk facilities (for instance, the right to work, the right to receive parcels and other correspondence) and the same is allowed for 1 month in low-risk facilities.

[14] The Imprisonment Code, Article 80.

[15] *Ibid.*, Article 81.1.

[16] The categories of penalties are determined by Article 82.1 of the Imprisonment Code.

[17] *Ibid.*, Article 81.3.

[18] The Imprisonment Code, Article 81.2.

[19] *Ibid.*, Article 83.

[20] *Ibid.*, Article 84.

disciplinary measure, its communication to the prisoner concerned, its enforcement[21] as well as appealing it.[22]

The legislation also expressly stipulates that the decision about a disciplinary measure should be **lawful, substantiated, and fair and it should be serving a legal aim. The imposed disciplinary penalty should be corresponding to the seriousness and nature of the committed violation**.[23]

The statutes of the penitentiary establishments determine the disciplinary procedure in more detail; in case of commission of alleged disciplinary violation by the prison staff, the statutes establish the authority of using photo, video and audio materials/equipment for collecting evidence.[24] Furthermore, the statutes also lay down the rules of gathering and sealing off material evidence.[25] The same orders that approve the statutes also approve the forms of documents – reports and decisions to be drafted in disciplinary proceedings (annexes to orders).

It is noteworthy that, under the Imprisonment Code,[26] an applied disciplinary measure shall not humiliate an accused/convicted person and degrade his/her honour and dignity. This wording complies with international standards. However, the practical implementation of general principles requires compatible legislation, on the one hand, and meticulous implementation of the existing regulations, on the other hand.

Trends in the Application of Disciplinary Measures

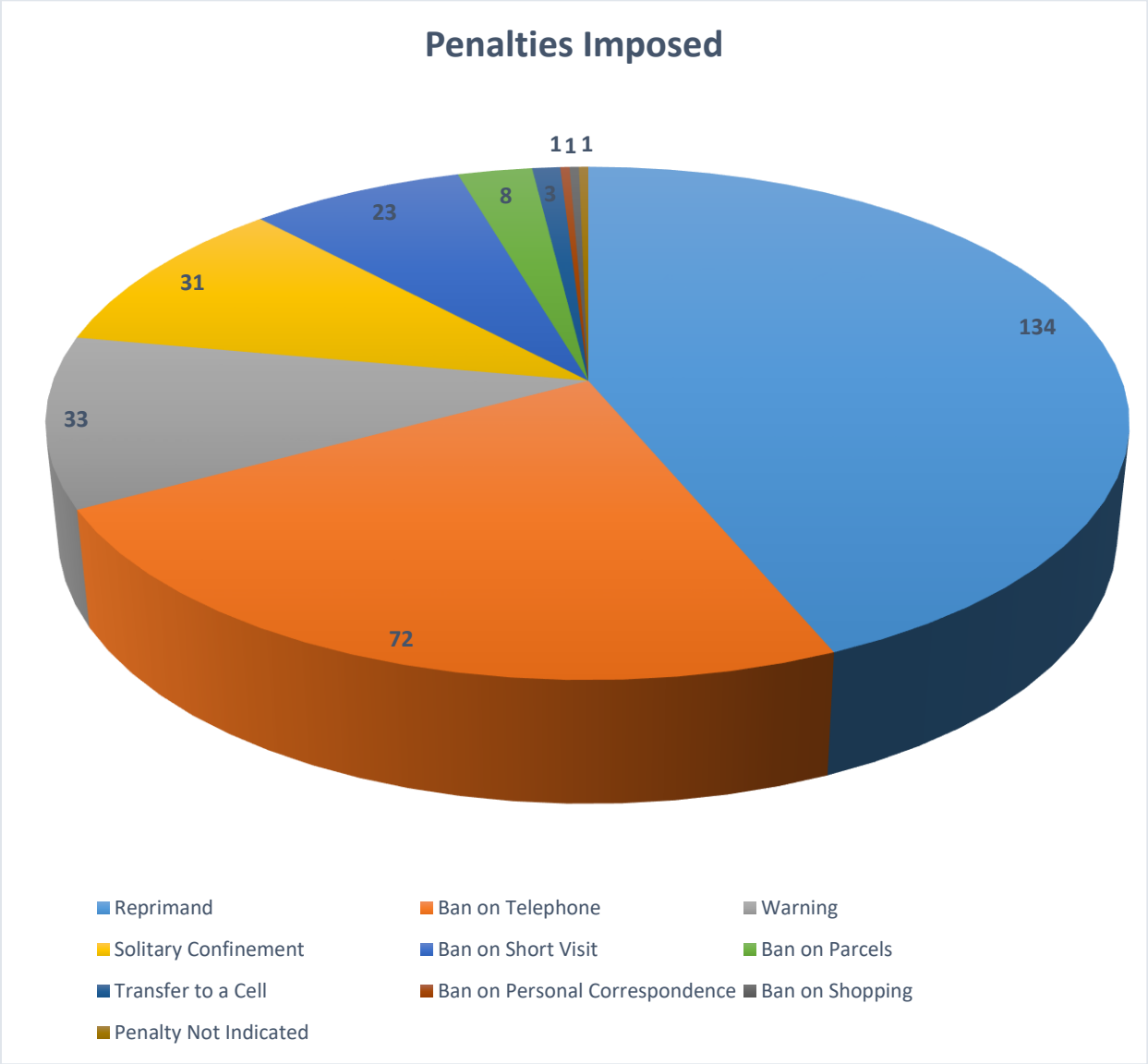
The Office of the Public Defender of Georgia, as already mentioned, requested from the Penitentiary Department of the Special Penitentiary Service and received 307 decisions in total. Out of this, 120 disciplinary measures were imposed within the period of 20 January – 30 January 2018; 82 disciplinary measures were imposed within the period of 1 April – 10 April 2018; and 105 disciplinary measures were imposed within the period of 17 July – 27 July 2018.

The most frequently applied penalty was "reprimand" – 134 cases; the second most used penalty was "ban on telephone" – 72 cases; "warning" – applied 33 times; solitary confinement – 31 times; banning short visits – 23 times; restricting the right to receive parcels – 8 times; transfer to a cell-type

[21] *Ibid.*, Article 85.
[22] *Ibid.*, Article 86.
[23] *Ibid.*, Article 85.5.
[24] For instance, see Article 80.3 of the Statute of Penitentiary Establishment no. 8 of the Ministry of Corrections and Probation of Georgia approved by Order no. 117 of the Minister of Corrections and Probation of Georgia of 27 August 2015; also, Article 78.3 of the Statute of Penitentiary Establishment no. 6 of the Ministry of Corrections and Probation of Georgia approved by Order no. 108 of the Minister of Corrections and Probation of Georgia of 27 August 2015.
[25] For instance, see Article 80.4 of the Statute of Penitentiary Establishment no. 8 of the Ministry of Corrections and Probation of Georgia approved by Order no. 117 of the Minister of Corrections and Probation of Georgia of 27 August 2015; also, Article 78.4 of the Statute of Penitentiary Establishment no.6 of the Ministry of Corrections and Probation of Georgia approved by Order no. 108 of the Minister of Corrections and Probation of Georgia of 27 August 2015.
[26] The Imprisonment Code, Article 87.2.

accommodation – 3 times; the right to personal communication and the right to shopping were restricted on one occasion each; in one case, it was not indicated at all which penalty had been applied against a prisoner (see diagram no. 1).

Diagram no. 1.



It should be pointed out that as of today, as during the reporting period, in total, there have been 15 penitentiary establishments functioning throughout the country. The statistics on disciplinary measures applied against prisoners in the indicated periods are as follows:

Establishment	Disciplinary Penalty Imposed
No. 2	46
No. 3	66
No. 5	5
No. 6	25
No. 7	0
No. 8	154
No. 9	0
No. 11	0
No. 12	0
No. 14	2
No. 15	5
No. 16	0
No. 17	2
No. 18	2
No. 19	0

As showed by statistical data (see diagram no. 2), no disciplinary penalty was imposed in the reporting period in 6 penitentiary establishments out of 15: no. 7, no. 9, no. 11, no. 12, no. 16, and no. 19.

Several isolated cases were identified in 5 penitentiary establishments: no. 5, no. 14, no. 15, no. 17, and no. 18. Disciplinary measures were most frequently used in the following establishments: no. 2, no. 3, no. 6, and no. 8. In total, during the 32-day reporting period, the prison administration applied 291 disciplinary measures in these four establishments.

Diagram no. 2.

The presented statistics identify several trends regarding the reporting period:

- **Disciplinary measures are either not applied at all (no. 19) or applied very rarely (no. 18);**
- **There are no cases of the use of disciplinary penalties identified in the rehabilitation establishment for juveniles (no. 11);**
- **A disciplinary penalty is applied against women five times in total (no. 5)**
- **No disciplinary measure was used against prisoners placed in the low-risk and pre-release prison facility (no. 16);**
- **No disciplinary measure was used in the detention and closed-type prison facility, where former officials and/or law-enforcement officers are held according to the established practice (no. 9);**
- **Disciplinary measures are not or rarely applied in semi-open and closed type prison facilities (no. 12, no. 14, no. 15, and no. 17). These prisons are among the five largest establishments according to the number of prisoners;[27] despite this, 9 disciplinary measures were used in total during 32 days in these three establishments. It is interesting to see what facts influence the**

[27]For instance, see Order no. 106of the Minister of Corrections and Probation of Georgia of 27 August 2015 on Penitentiary Establishments of the Ministry of Corrections and Probation of Georgia, approving the capacity limits of the establishments under which establishment no. 14 is designed for 1362 prisoners; establishment no. 15 for – 1,388, and establishment no. 17 for 2,000 prisoners.

conduct of prisoners; does a relatively lighter regime/type of the prison have an impact or is it possible to make parallels with the informal criminal rule within the prisons;[28]

- **Disciplinary penalties are frequently used in detention and closed-type, higher-risk prison facilities (no. 2 and no. 8). It is noteworthy that prisoners are placed in this very establishments right after detention and, therefore, they can be considered to be as the so-called "reception establishments". The movement/escorting occurs relatively more often from these establishments;**
- **Disciplinary penalties are often used in detention and special-risk prison facilities (no. 3 and no. 6); and**
- **No disciplinary measure was imposed in the establishment that accommodates the highest risk prisoners in the special risk prison facilities although the establishment has the smallest number of prisoners**[29] **in entire Georgia (no. 7).**

Practical Shortcomings Identified

Analysis of the Practice of Imposition of Disciplinary Penalties

The study of the requested 307 decisions on the application of disciplinary measures numerous shortcomings were identified in the disciplinary proceedings, namely:

- The incident of a disciplinary violation is only confirmed by prison staff;
- Prison directors do not rely on neutral evidence in the process of disciplinary punishment of a prisoner;
- No visible attempts to obtain neutral evidence;
- There are formulaic and stereotypical statements regarding disciplinary violations in the decisions; no detailed information is given about the incident that was considered to be a disciplinary violation on the part of a prisoner;
- Not a single decision mentions the reasons that caused the commission of a disciplinary violation by the prisoner; no causal link is established between the situation before the violation and a specific violation committed by the prisoner;
- There are no arguments given regarding the proportionality of a particular sanction imposed;
- The decisions contain no information about aggravating and mitigating circumstances;

[28] See also Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2018 and published in 2019, para. 99, footnote 164, available at: https://rm.coe.int/1680945eca, (accessed 07.06.2019).

[29] For instance, see Order no. 106of the Minister of Corrections and Probation of Georgia of 27 August 2015 On Penitentiary Establishments of the Ministry of Corrections and Probation of Georgia approving the capacity limits of the establishments under which establishment no. 7 is designed for 29 prisoners.

- There seem to be different sanctions imposed on prisoners in the cases of the commission of the same disciplinary violation; the ground for such an irregular approach is not clear;
- There was no oral hearing in any of the cases and accordingly, the prisoner was not given the possibility to defend himself/herself before the competent official examining his/her case;
- In the great majority of the cases, there are no documents containing a written explanation of the prisoner's position;
- No information is given in any of the cases about the prisoner's health condition or other relevant individual circumstances;
- Lawyers were not involved in any of the cases;
- It does not show in any of the cases that the prisoner was informed about the disciplinary charges;
- It does not show in any of the cases that the prisoner was given a reasonable time and/or the facilities to adduce evidence to corroborate his/her position; and
- Not a single decision was handed to the prisoner.

Each of the above circumstances is examined separately.

The Incidence of a Disciplinary Violation is Only Confirmed by Prison Staff

The assessment of the evidence referred to in the decisions allows us to conclude that prison authorities practically do not obtain evidence.

The only source of information is the legal regime officer. The same officer is also the witness confirming the incidence of the violation during the proceedings.

Out of the studied cases, it is indicated only in 7 cases that a concrete person was interviewed as a witness. However, it is impossible to know whether this witness was again the legal regime officer or another person.

Prison Directors Do Not Rely on Neutral Evidence in the Process of Disciplinary Punishment of a Prisoner

Video Recordings

Through the study of the case-files, the Office of the Public Defender of Georgia assessed the possible circumstances where it was fully possible to obtain additional neutral evidence[30] such as video recordings that would allow the administration of a penitentiary establishment to examine the incident in an objective manner. The Public Defender's Office requested information about the placement of video cameras in those areas where, according to the decisions, violations had been committed.

[30] Evidence is neutral if it excludes any factors of bias or partiality and objectively proves the fact.

The supplied information confirmed that violations were video recorded in 41 cases. Despite this, video recordings were not used as evidence, which would either prove or disprove the incident, in any of the cases.

For instance, in one case,[31] a prisoner was punished for breaking a TV set in a cell. According to the Penitentiary Service,[32] the cell was under video surveillance during the commission of the alleged disciplinary violation; however, no video recordings have been obtained.

In another case,[33] a prisoner refused to leave the cell which led to the imposition of a disciplinary measure. In this case too, there was a video camera installed in the cell although no recordings have been retrieved.

In a third case,[34] the disciplinary violation involved a prisoner banging on a cell door. Again, the cell was under video surveillance; however, no recordings have been obtained.

Material Evidence

Apart from video recordings, the examination of material evidence is also problematic as this source is not used to verify the incident. In particular, in 14 cases out of the studied decisions, even though it was possible to obtain relevant material evidence, such as damaged furniture or items (radio, T-shirt, etc) or photos depicting these items and relevant reports, it was not done so in any of those cases.

For instance, while a disciplinary sanction was imposed in one case for breaking a window, neither photos depicting the damaged window nor reports examining and depicting the damage were adduced in the proceedings.[35] In one case, a prisoner was disciplined for tearing a controller's T-shirt.[36] The torn T-shirt was not sealed off and stored in the case-files as evidence.

Interviewing Witnesses

Apart from the absence of video recordings or material evidence in case-files, interviewing witnesses is also problematic. In 49 out of the studied decisions, apart from the legal regime officer of the Penitentiary Department, another staff member, for instance, a social worker or another accused/convicted person also witnessed a prisoner's actions. This objectively allows that these persons could have been interviewed; however, no statements of an additional witness are given in any of the cases.

[31] Penitentiary establishment no. 8, decision no. 305326.
[32] Letter no. MOC 0 18 01075186, dated 5 December 2018.
[33] Penitentiary establishment no. 3, decision no. 654565.
[34] Penitentiary establishment no. 2, decision no. 118 00054262.
[35]Penitentiary establishment no. 2, decision no. 11800667451.
[36]Penitentiary establishment no. 3, decision no. 310582.

No Visible Attempts to Obtain Neutral Evidence

Not a single case shows any attempt on the part of the administration to obtain neutral evidence proving the occurrence of disciplinary violation by a prisoner. The absence of neutral evidence in the case-files is not explained by any objective circumstances that could have dispelled the misgivings regarding the legality of the application of a disciplinary measure against a prisoner.

For instance, not a single case contains a request by a prison director or an official authorised by the former to the Penitentiary Department regarding archiving relevant video recordings. There are no indications in any case that it was impossible to obtain video recordings due to some objective, or even technical, reasons. There is not a trace of attempt that the administration attempted to obtain material evidence and it proved to be impossible.

There are Formulaic and Stereotypical Statements Regarding Disciplinary Violations in the Decisions

There is usually a general reference to the type of a disciplinary violation and no information is given about the objective demonstration of the fact in the decisions.

For instance, in 60 cases involving the imposition of a disciplinary sanction by prison authorities on prisoners, which is approximately 20% of the total number of cases, the act is described with the following words only: "noise in the cell".

Formally speaking, noise can amount to the breach of order and therefore be categorised as a disciplinary violation. However, it is impossible to establish what constitutes making noise. Similarly, the decisions are reticent about the causal link as to how the noise disrupted the normal functioning of the establishment.[37] In some cases, if a prisoner calls loudly at a prison controller for a legitimate reason (for example, a prisoner raises the voice because voice does not carry clearly through a metal door), this could formally be noise. However, it is impossible to understand from the decisions whether such noise would be deemed as a disciplinary violation breaching the prison order and security.

Not a Single Decision Mentions the Reasons that Caused the Commission of a Disciplinary Violation by the Prisoner; No Causal Link is Established Between the Situation Before the Violation and a Specific Violation Committed by the Prisoner

It is important to underline in the decisions the circumstances which contributed to the commission of a disciplinary violation by a prisoner and the reasons and motives behind his/her actions that ultimately led to instituting disciplinary proceedings; the manner in which the prisoner was informed

[37] Under Article 80.j) of the Imprisonment Code, "A disciplinary violation is an act that breaches the internal regulations of a facility, undermined the order and safety, and does not involve elements of crime, namely: … making noise or other actions that disturb order and interfere with the normal functioning of a facility…"

about stopping the said action and the possibility of imposing responsibility. The information about such circumstances cannot be found in the documentation supplied by the Penitentiary Department.

The analysis of the causal link between the pre-incident circumstances and the disciplinary violation will render decisions more substantiated and would convince an objective observer that the prisoner was punished in accordance with the law and based on relevant and sufficient reasons and not by referring to a formal statutory ground alone.

For instance, there could be a situation where a prisoner has been requesting legitimately for several days to meet a social worker to give correspondence to be dispatched and the social worker has not been visiting him/her. This would cause annoyance and resentment in the prisoner; or, for instance, a prisoner could suffer from mental health problems or be under strong emotional stress. These factors and not the desire to breach the order could be causing the prisoner's disruptive behaviour. It is also possible that a prisoner experiencing a health problem could be loudly requesting to be seen by a doctor; it is possible that a prison officer could have committed an illegal act against the prisoner that caused his/her reaction.

Obviously, the breach of order by a prisoner cannot be positively assessed but unless a prison director does not examine the circumstances that preceded the prisoner's behaviour and does not establish the prisoner's goal and motive, his/her decision about punishing the prisoner will not meet the principle of fairness as required by the legislation in force.[38]

There Are No Arguments Given Regarding the Proportionality of a Particular Sanction Imposed

None of the decisions provides reasons as to why the use of a particular sanction was considered to be necessary and proportionate for a particular violation and why the use of a more lenient sanction would not be sufficient.

It is evident that the imposition of a disciplinary penalty further restricts the rights of the persons deprived of their liberty as the additional restrictions are not an integral part of the punishment of the deprivation of liberty. The application of disciplinary measures, accordingly, requires additional justification. It is, therefore, necessary to verify how justified and reasonable the use of a particular measure is.

For instance, the CPT reiterates that any restrictions on family contacts as a form of punishment should be used only where the offence relates to such contacts and only for the shortest time possible (days, rather than weeks or months).[39] Despite the said recommendation, the study outcomes

[38] The Imprisonment Code, Article 84.5.

[39] Report to the Georgian Government on the visit to Georgia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2018 and published in 2019, para. 100, available at: https://rm.coe.int/1680945eca, (accessed 07.06.2019); Report to the Georgian Government on the visit to Georgia carried out

revealed the opposite approach taken by prison authorities. In particular, in 60 cases, prisoners were disciplined for making noise but were banned from having short visits as a disciplinary punishment in 7 cases, which resulted in the restriction of contacts with their families.

The Decisions Contain No Information About Aggravating and Mitigating Circumstances

In order to achieve the proportionality of a disciplinary measure, it is necessary to assess the previous record of disciplinary penalties and the nature of the previous violations committed before a disciplinary measure is applied in a given case; for instance, if a prisoner committed this type of a violation for the first time or has been committing it systematically; whether he/she was disciplined before and what measure was applied and how the prisoner is characterised; whether he/she was given incentives in the past; whether he/she takes part in educational activities or works for the penitentiary establishment, etc.

It is noteworthy that not a single decision studied refers to these circumstances. It is necessary to discuss these issues so that the prisoner did not experience the feeling of injustice. If in the past the prisoner always respected the order in good faith and obeyed the administration's legal orders, received incentives, participated in educational programmes and only once breached the order, it is important that the prisoner knew that director would take it into account as a mitigating circumstance.

Non-Uniform Approach

There are cases when one and the same violation by two prisoners is differently assessed and disciplined by the administration. It is impossible to understand from the decisions whether there was any aggravating or mitigating circumstance or whether there was a discrepancy in terms of the degree of the violation.

The similar problem was identified in the 60 cases mentioned above, where "making noise in the cell" was considered to be a disciplinary violation. In particular, prisoners were banned from having short visits for making noise in 7 cases; in 10 cases, the use of the telephone was prohibited; in 6 cases, prisoners were placed in solitary confinement; and they were reprimanded in 37 cases. There is no reasoning regarding the proportionality of the penalty concerned and it is absolutely unclear why penitentiary establishments resorted to such varied practices at different times.

Furthermore, in 32 cases, prisoners were disciplined for refusing to leave the cell. Out of this, in 3 cases, a prisoner was placed in a solitary confinement; in 1 case, the right to receive a parcel was restricted; in one case, the right to a short visit was restricted; in 2 cases, the right to a telephone

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by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in 2014 and published in 2015, para. 119, available at: https://rm.coe.int/16806961f8, (accessed 07.06.2019).

conversation was restricted, prisoners were warned in 12 cases and reprimanded in 13 cases. In these cases too, it remained unclear why prison directors took different approaches when dealing with similar incidents.

There Was No Oral Hearing in Any of the Cases

An oral hearing is one of the efficient safeguards for the effective exercise of the right to defence; however, not a single decision shows that an oral hearing was held in disciplinary proceedings.

The cases studied by us show that 81.3% (249 cases) of the proceedings were conducted without an oral hearing; it is undetermined in 18.7% (58 cases) of the cases as to what procedure was employed since there are no indications in this regard in the decisions. Decisions about the use of a disciplinary penalty are based on staff members' statements and reports. Prisoners practically do not take part in proceedings. Therefore, decisions are adopted by prison directors without hearing a prisoner's position and examination of evidence by the parties.

Under the legislation in force, cases or disciplinary violation are examined without oral hearings only if the director of the facility or a person authorised by him/her considers that additional information is required to decide about the matter.[40] The studied cases show that disciplinary violations are practically confirmed only through the statements of prison staff and there is no neutral evidence adduced in any of these cases. It is unclear what other need for the information about additional circumstances and the degree of the lack of information should warrant the examination of a case in an oral hearing.

In the Great Majority of the Cases, There Are No Documents Containing Written Explanation of the Prisoner's Position

In 5 out of 307 cases, there are prisoners' written statements in the case-files. This is 1.6% of the total number of cases. In other 302 cases, a prison director adopted the decision about punishing a prisoner without hearing his/her position. This gives rise to a misgiving whether the prisoners were aware of disciplinary proceedings pending against them in the remaining 302 cases.

No Information is Given in Any of the Cases About the Prisoner's Health Condition or Other Relevant Individual Circumstances

As already mentioned, it possible that a disciplinary violation by a prisoner was triggered by his/her state of health. On the one hand, the prisoner could be suffering from mental health problems and be unable to fully control his/her actions. In this case, it is relevant and vitally important for categorising a prisoner's actions as a disciplinary violation to have his/her state of health checked. On the other

[40] The Imprisonment Code, Article 84.1.

hand, an assessment of the prisoner's medical condition could be significant for determining the category and degree of a disciplinary sanction itself. For instance, if a prisoner is disabled and wheelchair-bound, cannot move independently and solitary confinement cells are not adapted, then the placement of a prisoner in such a cell can give rise to the risk of degrading or inhuman treatment. A prison director should have these circumstances appraised and addressed accordingly in a decision about the use of a disciplinary sanction.

Therefore, a written statement of a doctor about a prisoner's state of health is important with regard to a number of disciplinary penalties for determining whether a specific sanction is appropriate physically and mentally for a particular prisoner.

The reasoning given by the Tbilisi City Court's Section of Administrative Cases in one of the cases clearly indicates the abovementioned need.[41] During 11 months, a disciplinary measure was imposed 16 times on a convicted person and a safety measure was applied 4 times against the same person (the use of a safe room).[42] The court observed that the convict showed non-psychotic mental disorder, *i.e.* borderline personality disorder and could not fully appreciate his/her actions, its unlawfulness and could not control them (limited imputability).[43] This subjective circumstance is clearly relevant for the degree and nature of the sanction as it fully excludes the need for its application. In this case, it is reasonable to apply a medical measure and not a disciplinary sanction. Stemming from all the abovementioned, it is obvious that the outcomes of a medical examination would be key evidence in disciplinary proceedings as it would have a direct effect for its final outcome, *i.e.*, the reasonableness of a disciplinary penalty.

Lawyers Were Not Involved in Any of the Cases

Out of 307 cases, a lawyer was not involved in a single case to defend a prisoner's rights. Against the background that there seems to be virtually no involvement of a prisoner either, it is possible to assume that prisoners are not even aware of disciplinary proceedings pending against them and, therefore, they are unable to defend their legal interests in person or with the help of a lawyer.

Notification of Disciplinary Charges

A person deprived of his/her liberty in a penitentiary establishment charged with a disciplinary violation has the right[44] to know in advance who and regarding which incident is going to charge him/her and what evidence exists against him/her. It does not seem, from any of the cases, that a prisoner was notified regarding this or explained how to prepare a defence strategy. This completely excluded the reasonable possibility of effective defence for a prisoner.

[41] Decision no. 3/3342-17 of the Section of Administrative Cases of the Tbilisi City Court, dated 1 February 2018.
[42] *Ibid.,* para.3.1.5.
[43] *Ibid.,* para. 6.4.
[44] The Imprisonment Code, Article 83.

Reasonable Time and Facilities for Defending One's Legal Interests

Under the legislation, a prisoner should be given sufficient time and facilities for defence.[45] Apart from a reasonable time, a prisoner should be allowed to adduce evidence corroborating his/her position either by himself/herself or by a lawyer.

Unfortunately, the analysis of the proceedings demonstrates that neither a prisoner nor his/her lawyer is involved in the proceedings instituted against the prisoner; the prisoner is not given time to present his/her defence; the administration does not hand over information/documentation for planning defence strategy and it has not established that evidence is handed over to prisoners concerned.

Handing a Reasoned Decision

The study of the decisions revealed the failure of submitting decisions on the application of disciplinary measures. There is no indication in 49% (151 decisions) of decisions on the use of disciplinary measures that the document was submitted to the prisoner concerned. In 51% (156 decisions) of the decisions, there is a comment by the legal regime officer of the Penitentiary Department stating that the accused/convicted person concerned refused to receive the case-files.

This data gives rise to misgivings that prisoners were probably not given the decisions and therefore they could not even be aware of a disciplinary sanction imposed on them. These misgivings stem from the numerous statements or reports drafted as a result of interviews with the Public Defender's representative, which have been studied by the Public Defender's Office where prisoners allege that they were completely unaware of a disciplinary sanction imposed on them and they were only informed about it when applying for early release or discussing other issues.

It is important to inform a prisoner fairly and consistently about the charges and grounds of the sanctions imposed.

The Practice of Appealing a Decision on a Disciplinary Measure in Court

The circumstances studied by the Office of the Public Defender of Georgia revealed that it is problematic for prisoners to defend their rights in court when disciplined due to the obligation to pay court fees.

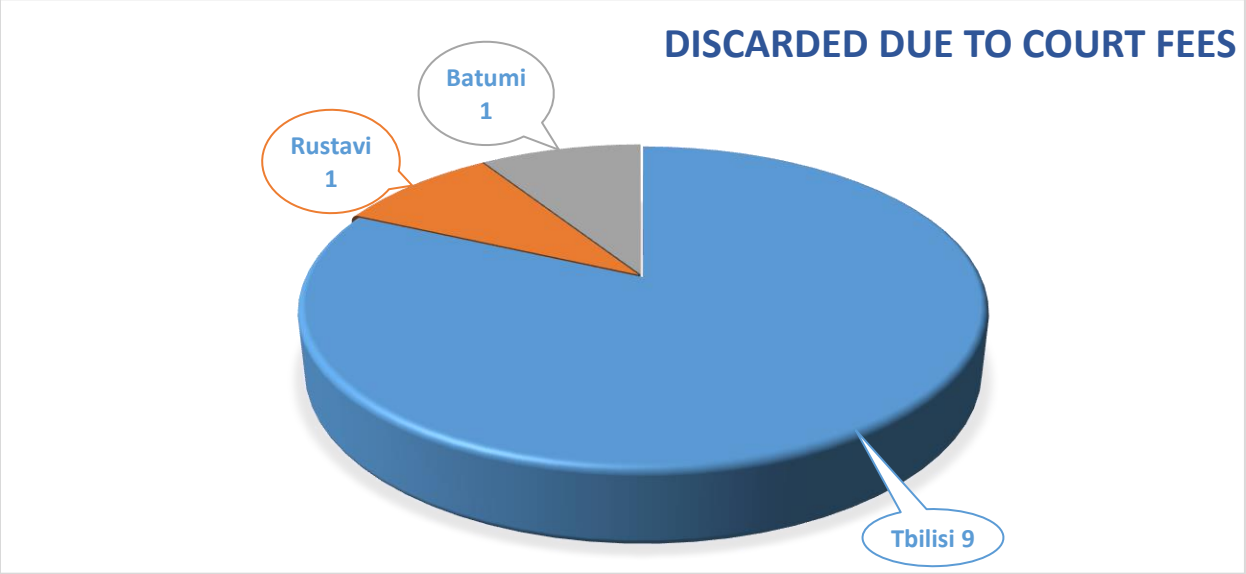
According to the data received by the Public Defender's Office from courts from 1 May to 31 October 2018, decisions about the imposition of a disciplinary measure were challenged before courts in 24 cases. Out of this, in 11 cases, a complaint was discarded due to the failure to pay court fees (see diagram no. 3). Complaints about impugned decisions were discarded by the court due to the failure

[45] *Ibid.*, Article 83.b).

to pay court fees as follows: Tbilisi City Court 100% (9 cases); Rustavi City Court 25% (1 case); Batumi City Court 11% (1 case). There were no such applications filed with the Mtskheta District Court.[46]

The response received from the Kutaisi City Court was strange.[47] According to it, an applicant challenging a disciplinary penalty through an administrative complaint is not obliged to pay a court fee.

Diagram no. 3.



The Public Defender examined a case[48] where one prisoner was disciplined twice for the same violation. In particular, on 10 and 26 June 2016, under the prison director's order, disciplinary penalties were imposed on convict Z.K., which were enforced immediately, as per legislation in force. The convicted person challenged the decisions and the Rustavi City Court, on 22 September 2016, found that the director's decision was unsubstantiated and invalidated it and the case was sent back to the penitentiary establishment for the examination *ab novo.* The establishment examined the case again; for those actions for which disciplinary sanctions had already been imposed and enforced, the director imposed new sanctions on 25 November 2016. The new disciplinary sanctions were again enforced.[49]

[46] Penitentiary establishments nos. 15 and 19 are under the jurisdiction of the Mtskheta District Court.
[47] Letter no. 13715-3 of the Kutaisi City Court, dated 22 November 2018.
[48] This case is not among the 307 cases supplied by the Penitentiary Department for the purposes of the present report.
[49] As a result of the examination of the case, on 19 July 2017, the Public Defender of Georgia submitted proposal no. 15-6/10104 to the Minister of Corrections and Probation of Georgia requesting institution of disciplinary proceedings against the prison director for punishing the prisoner twice for the same action. Based on the application of the Public Defender, on 7 November 2017, disciplinary sanctions were imposed on the prison director and controlling inspector of the unit of the legal regime.

Shortcomings of the Legislation and Comparative Overview

The regulatory framework about disciplinary proceedings in penitentiary establishments is discussed at the beginning of the report. This chapter aims at highlighting the shortcomings existing in the legislation. Furthermore, this part of the report discusses the relevant best international practices.

An appropriate and effective disciplinary mechanism in penitentiary establishments is essential for achieving the main goals of the penitentiary system. Determining a disciplinary penalty correctly and making the appeal procedure effective are fundamental protection measures in the process of fighting ill-treatment in prisons.

The study of the practice of imposing disciplinary measures in penitentiary establishments of Georgia revealed numerous shortcomings, which is allowed, in the first place, by the legislation.

It is noteworthy that it is in the interests of both prisoners and prison authorities that clear and express disciplinary procedures are formally established and applied in practice. Otherwise, there is the risk of human rights violations in penitentiary establishments. Disciplinary procedures should provide prisoners with the right to be heard regarding the offences they allegedly committed and appeal to a higher authority against any sanctions imposed.[50]

This chapter discusses the legislative shortcomings identified by the Public Defender's Office and the issues ultimately leading to practical problems and human rights violations.

In this regard, the following issues should be pointed out:

- There are no mechanisms for exempting a prisoner for a minor violation and no procedures of mediation;
- When assessing a prisoner's behaviour, intent or negligence is not scrutinised;
- The is no standard of proof in disciplinary proceedings;
- There are no stages of disciplinary enquiry and procedural time-frames are not determined;
- Disciplinary charges are not notified;
- Effective means of defence are not determined;
- The ground for an oral hearing is not appropriately worded;
- The problem of examination of a case individually and lack of regulation of recusal/self-recusal of the decision-making official;
- The law does not provide for the reasoning standard for a disciplinary decision;
- Aggravating and mitigating circumstances are not determined;

[50] Extract from the 2nd General Report of the CPT, para. 55, available at: https://rm.coe.int/16806ce96b, (accessed 25.05.2019).

- There is no structural and detailed scheme for the use of types of sanctions that would contribute to the imposition of a proportionate sanction being individually determined; and
- Duration of placing in solitary confinement and absence of the test for its application are problematic.

Under the legislation, a disciplinary violation is an act that breaches the internal regulations of a prison facility, undermines the order and safety and does not involve elements of the crime.[51] However, the law does not make a reservation if a minor violation can still be deemed to be a disciplinary violation.

For instance, violation of hygiene and sanitation standards is a disciplinary violation.[52] However, if a prisoner does not tidy up his/her cell for a day, can this be considered to be a violation of hygiene and sanitation standards warranting his/her punishment?

Under the European Prison Rules, prison authorities shall use mechanisms of restoration and mediation to resolve disputes with and among prisoners.[53] Conduct that is likely to constitute a threat to good order, safety or security may be defined as a disciplinary offence.[54] Under the rules, disciplinary procedures shall be mechanisms of last resort.[55]

In the Georgian reality, no matter how minor a violation is, the official responsible for the legal regime in an establishment unit is obliged to draft a report and submit it to the director.[56] The latter, within 10 days, adopts a decision about imposing a disciplinary penalty.[57]

Unfortunately, the legislation does not envisage the possibility of not starting/discontinuing proceedings due to the minor nature of a breach, neither does it provide for a mediation procedure. Accordingly, the issue between the administration and the prisoner always ends with certain conflict and there is a perception that prison directors or persons authorised by them do not attempt to mediate/make up with the prisoner that would enhance the prisoner's trust in the authorities' best intentions.

When Assessing a Prisoner's Behaviour, Intent or Negligence is Not Considered

The legislation is reticent as to whether a prisoner's negligent act can be categorised as a disciplinary violation. If a prisoner damages an establishment's property by accident, does it exclude his/her responsibility, a more lenient disciplinary punishment will be imposed on him/her or he/she will be punished the same way as the prisoner who intentionally damages prison property?

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[51] The Imprisonment Code, Article 80.
[52] *Ibid.,* para. a).
[53] European Prison Rules, Rule 56.2.
[54] *Ibid.,* Rule 57.1.
[55] *Ibid.,* Rule 56.1.
[56] For instance, see the statute of penitentiary establishment no. 6, Article 78.6.
[57] The Imprisonment Code, Article 85.2.

There Is No Standard of Proof in Disciplinary Proceedings

The legislation does not determine the minimum standard of proof that would be necessary for disciplinary charges or sufficient for imposing disciplinary responsibility.

There Are No Stages of Disciplinary Enquiry and Procedural Time-Frames are not Determined

The legislation does not determine the stage of a disciplinary enquiry or lay down procedural time-frames. For instance, under the statutes of penitentiary establishments,[58] when a disciplinary violation is identified, the official responsible for the legal regime of the establishment drafts a report, and indicates specific circumstances, evidence, witnesses and victims in the report. Furthermore, when drafting the report, as well as at later during the proceedings, prison authorities may use photographic, video and audio equipment and materials for gathering evidence.

Besides, the Imprisonment Code determines the term within which a disciplinary penalty can be imposed, viz., no later than 10 days after identifying the violation.[59] However, the code is reticent about more specific time-frames within the ten-day period: out of these ten days, in what time should the official responsible for the legal regime of the establishment gather evidence; in what time should the evidence and other information be adduced to the person examining the case – the prison director; in what time the disciplinary charges should be notified to the prisoner; what time-frames are afforded to the prisoner to gather evidence; if there is no oral hearing, when this evidence should be adduced; does the director have the authority to obtain evidence corroborating disciplinary charges independently or should it be done by the official responsible for the legal regime of the establishment who drafted the report and the director as the decision-making administrative authority should only decide and assess; what time is given to the director for the examination of the case out of the maximum term of ten days; what is the time-frame for adopting a substantiated decision, etc.

Without specifying time-frames, stages as well as clearly separating functions, we face the reality where a prison director acts in advance, with the cooperation of the prosecution (the official responsible for the legal regime of the establishment), to punish the prisoner within the unilaterally established time-frames (within the 10-day limit). For instance, based on the prison officer's report, the director can take a decision on the same day, without affording the prisoner any reasonable time or facilities.

The cases studied by the Public Defender's Office demonstrate that it is not such a rare practice after all. **For instance, on 10 April 2018, at 19:40, the director of establishment no. 15 disciplined a convict for an act committed on the same day at 18: 30. It took the director only an hour and 10 minutes to**

[58] For instance, see Article 78.3 and Article 78.4 of the Statute of Penitentiary Establishment no. 6 of the Ministry of Corrections and Probation of Georgia approved by Order no. 108 of the Minister of Corrections and Probation of Georgia of 27 August 2015.

[59] The Imprisonment Code, Article 85.2.

conduct disciplinary proceedings and adopt a decision.[60] Exactly an hour and 10 minutes were necessary in another case to punish a prisoner. **The act committed by a prisoner on 10 April 2018, at 20:20, was considered to be a disciplinary violation on the same day, at 21:30.**[61] One day was enough for penitentiary establishment no. 8 as well: for an act committed on 1 April 2018, the prisoner concerned was punished on the same day. However, unfortunately, the decision is not time-stamped and it is impossible to make out what time it took the administration to conduct disciplinary proceedings.[62] The similar situation, namely conducting the full disciplinary proceedings within a one-day period was revealed in penitentiary establishment no. 2, where a prisoner committed a violation on 21 January 2018, at 15:55, and the director took the decision on the same day.[63]

Disciplinary Charges Are Not Notified

It is important to have clearly stipulated statutory obligation to notify a prisoner concerned about disciplinary charges and to have detailed list of the data to be referred to in the notification given to the prisoner regarding disciplinary charges. The statutes of penitentiary establishments of Georgia determine the forms of communicating legal rights to prisoners but they do not have any reference to the information that should be communicated when a prisoner is charged with a disciplinary violation.

No Effective Means of Defence are Determined

Neither the Imprisonment Code nor the secondary legislation provides for detailed rules for obtaining evidence by a prisoner; there are no provisions about the time-frames within which a prisoner could obtain evidence and there is no form established as to how this should be done. For instance, if a prisoner is placed in a closed-type prison facility and assumes that other prisoners heard or saw or know about the circumstances that are favourable for him/her, how this prisoner should verify the existence of possible witnesses; how to determine the group of relevant witnesses; or if a prisoner deems that the video recordings made in his/her cell can exclude the assumption of commission of a disciplinary violation by him/her how he/she can obtain and study them to verify whether the impugned action indeed took place[64] (whether this evidence can be useful). Similarly, the law does not determine how a prisoner should obtain, seal off or record by a technical means material evidence, whereas the same authority is given to the prison authorities in express statutory terms.[65]

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[60] Decision no. MOC 6 18 00316220.
[61] Decision no. MOC 5 18 00316283.
[62] Decision no. 288882.
[63] Decision no. MOC 3 18 00054723.
[64] Procedure on Surveillance and Control through Visual and/or Electronic means, as well as the Storage, Deleting and Destroying of the Recordings as approved by Order no. 35 of 19 May 2015 of the Minister of Corrections and Probation of Georgia does not entitle a prisoner to request archiving video recordings or see these recordings.
[65] For instance, see Article 78, Article 78.3 and Article 78.4 of the Statute of Penitentiary Establishment no. 6 of the Ministry of Corrections and Probation of Georgia approved by Order no. 108 of the Minister of Corrections and Probation of Georgia of 27 August 2015.

Accordingly, the legislative provision which gives the right to a prisoner to adduce evidence[66] is illusory and cannot be exercised in practice.

The Ground for Oral Hearing Is Not Appropriately Worded

Under the Imprisonment Code,[67] cases or disciplinary violations are examined without an oral hearing by the director of the facility or a person authorised by him/her. If the director of the facility or a person authorised by him/her considers that additional information is required to decide about the matter, he/she may examine the case by an oral hearing. The comparative legal experience shows the importance and necessity of an oral hearing.[68] There is not even the obligation in Georgian practice to have an oral hearing at least in those cases which could possibly involve a strict disciplinary measure.

The Problem of Individual Examination of a Case and the Absence of Regulation of Recusal/Self-Recusal of the Decision-Making Official

Under Article 84.1 of the Imprisonment Code, "Cases of a disciplinary violation are examined without an oral hearing by the director of the facility or a person authorised by him/her. If the director of the facility or a person authorised by him/her considers that additional information is required to decide about the matter, he/she may examine the case by an oral hearing."

This wording clearly indicates that disciplinary cases are examined individually and not by a panel in the penitentiary establishments of Georgia.

It is better to take decisions through disciplinary proceedings not by an individual but by a commission. This would ensure more impartiality (proportionately diminishing the probability of adopting an arbitrary decision) and the risk of error is reduced. At the same time, it is possible that prison authorities could have known a prisoner for a long time and held biased views about him/her which would also affect the final decision.

Furthermore, there are no provisions about recusal by the person examining the case. For instance, there is no statutory regulation against such a scenario, where the director of a penitentiary establishment is involved in an incident concerned or the director was the recipient of verbal abuse from a prisoner. It is not governed by the statutory regulation as to who is supposed to examine the issue towards which the director already formed a subjective opinion.

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[66] The Imprisonment Code, Article 84.2.

[67] *Ibid.,* para. 1.

[68] For instance, the Supreme Court of the US in the case of *Wolff v. McDonnell* determined due process standards in disciplinary proceedings against prisoners. The court highlighted three rights which must be respected and guaranteed in each case, namely: 1) Right to due process;2) Written notice of charges must be given to the prisoner, no less than 24 hours before his/her oral hearing; 3) After the oral hearing there must be a written statement by the fact finders as to the evidence relied on and reasons for the disciplinary action.

Despite the fact that the law provides for the possibility of a director authorising another person to decide about a disciplinary case,[69] the law does not determine the preconditions as to when it is obligatory for a director to do so; it does not determine the grounds for recusal/self-recusal. This creates the likelihood of the examination of a disciplinary case by a biased official.

The Law Does Not Provide for the Reasoning Standard for a Disciplinary Decision

Under the Imprisonment Code, a decision on the application of a disciplinary measure shall be substantiated.[70] The code details the issues that should be addressed in the decision. Under the law, apart from the regular formal data, the decision should also contain information about the gist of the violation, data on the witness or on the victim, if any,[71] and reference to other evidence, if any, that is required to decide about the case.[72]

Consequently, the analysis of the above legal provisions shows that it is possible to indicate merely the above circumstances in a disciplinary decision; whether there are witnesses in the case, other evidence, prisoner's statements, etc. However, decisions are reticent about the following issues: what was found as a result of the cross-referencing the indicated circumstances; whether the act was actually committed; was this act committed by a particular prisoner; was the act deliberate or negligent; what was the objective and motive behind the prisoner's actions; were there either mitigating or aggravating circumstances; when establishing a particular fact, what evidence was relied upon by a prison director; which evidence is considered to be credible, which is not and for which reasons. This, in fact, is not required by the legislation from a decision-making official and we could not identify in the cases studied by us the practical examples that would strive towards higher standards than those set by the legislation.

It should be an obligation of decision-making officials to provide written justification for the assessment of examined facts and particular decisions. This practice would clearly contribute to adopting reasonable decisions as it would compel the competent official to contemplate and assess the reasons underlying the imposition of a disciplinary penalty and its outcomes. Furthermore, the examination of facts and adopting reasoned findings would contribute to developing uniform practice. A substantiated decision would enable a prisoner to decide whether it is worthwhile to appeal and at the same time the superior body would be able to have a better understanding of the case and assess the investigative actions conducted to ensure comprehensive examination of the case.

Aggravating and Mitigating Circumstances Are Not Determined

[69] The Imprisonment Code, Article 85.1.
[70] *Ibid.,* para. 5.
[71] *Ibid.,* para.3.f).
[72] *Ibid*., para. 3.g).

Under the Imprisonment Code, when imposing a disciplinary measure on an accused/convicted person, his/her personality and conduct, and the circumstances in which the disciplinary violation has been committed shall be taken into account.[73]

However, the law does not elaborate as to what can be considered as mitigating and aggravating circumstances. For instance, can the disciplinary penalty that is statutorily barred and has been extinguished be still deemed to be an aggravating circumstance; or if a prisoner was commended 5 years ago as an incentive, can this issue be taken into account when deciding about the type and degree of the disciplinary measure? The law fails to answer these questions.

There Is No Structural and Detailed Scheme for the Use of Types of Sanctions That Would Contribute to the Imposition of a Proportionate Sanction that is Individually Determined

It is noteworthy that numerous laws regulate the grounds for the disciplinary responsibility of various subjects in Georgia. All these laws determine the gravity of a violation and the rules for the imposition of proportionate penalties. For instance, a public official's disciplinary violations are divided into minor and serious violations and the law thereby determines the gradation of the seriousness of violations as well as respective responsibilities.[74] The gravity of violations and proportionality of the penalties to be used are also determined by the Organic Law of Georgia on General Courts as well, viz., the law establishes the gravity of each violation and possible results it could entail.[75]

A structural scheme of sanctions is used in many states of the US. It describes in detail when it is possible to use lenient and strict sanctions. For instance, Washington State Department of Corrections has a structural scheme of disciplinary violations and sanctions where there are categories of administrative violations, on the one hand and, on the other hand, there is a range of sanction options that can be used for respective violations.[76]

The Georgian legislation does not contain any classification or guidelines about disciplinary violations or sanction options that would be used as a reference when deciding about the use of a type of a sanction for a particular type of a disciplinary violation. Similarly, there is no structural scheme on the use of a range of sanction options for example, how to use a stricter penalty; whether the intensity, duration and repetition have relevance for the imposition of the sanction for the same violation, etc. The abovementioned shortcomings increase the risk of arbitrariness by a penitentiary establishment's authorities; they contribute to non-uniform practice and adopting unsubstantiated decisions in disciplinary proceedings. The present regulations allow different assessments of the same violation by a prison director and punishing prisoners with punishments of different degrees. This

[73] *Ibid.*, Article 84.6.
[74] The Law of Georgia on Public Service, Article 85.
[75] The Law of Georgia on General Courts, Article 75^{1} and Article 75^{48}.
[76] The information is available at: https://bit.ly/2Z70nvA,

does not meet the requirements of the principle of fairness and this practice has been confirmed by the analysis of the existing practice.

Duration of Solitary Confinement and Absence of the Test for Its Application are Problematic

Solitary confinement of a prisoner for up to 14 days is the strictest disciplinary penalty under the current legislation,[77] which should be imposed only in exceptional cases.[78] There is no definition of "exceptional cases" either in the Imprisonment Code or any secondary legislation/statutes of the penitentiary establishments. It is impossible to identify, based on the studied practice, what was considered to be an exceptional case in a particular situation which warranted the necessity of placing a prisoner in solitary confinement.

An accused/convicted person placed in a solitary cell may not enjoy short and long visits, telephone conversations or purchase food products; also, he/she may not enjoy the right to participate in the educational process.[79] It is, thus, clear that a prisoner is in maximum isolation when in solitary confinement. At the same time, the disciplinary penalty of this intensity is not subject to any precondition, reservation, rule or procedure. The legislation does not determine the violations for which this ultimate punishment can be used and does not establish the gradation as to what intensity and degree of a violation can warrant the imposition of solitary confinement and for how long.

For instance, based on this regulatory framework, it is possible that a prisoner keeps the TV's volume up on in a cell at night and makes noise, which in turn could be assessed by the prison authorities as disruption of the normal functioning of the establishment and the prisoner could be placed in solitary confinement for 14 days. On the other hand, a prisoner could indeed commit some serious disciplinary violation, damage furniture, disobey the authorities, breach order and it would be possible that he/she was placed in solitary confinement just for a few days or not at all.

In order to prevent the disproportionate and non-uniform practice, it is necessary to determine statutorily in express terms the types of disciplinary violations that could entail placement in solitary confinement as a disciplinary penalty. Similarly, the law should establish the maximum number of days for which a prisoner can be placed in solitary confinement for each violation.

Furthermore, strangely the legislation provides for the restriction of certain rights in the form of disciplinary penalties and states that these restrictions should not exceed 6 months in a year,[80] whereas there is no statutory limit to the duration of a prisoner's placement in solitary confinement. Theoretically, a prisoner may be placed in a solitary cell practically for a year and for the entire period of serving the sentence.

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[77] The Imprisonment Code, Article 82.1.g).
[78] *Ibid.*, Article 88.1.
[79] *Ibid.* 2.
[80] *Ibid.*, Article 82.1.g).

The rules for the imposition of solitary confinement should be assessed separately from the general rules of imprisonment since placing a prisoner in a solitary cell implies further restriction of his/her rights that are already restricted. The following test should be used for assessing each case of the use of solitary confinement to establish whether it is justified, namely:[81]

1) *Lawfulness*: Provision should be made in domestic law for each kind of solitary confinement which is permitted in a country, and this provision should be reasonable. It should be communicated in a comprehensible form to everyone who may be subject to it. The law should specify the precise circumstances in which each form of solitary confinement can be imposed, the persons who may impose it and the procedures to be followed by those persons. The law should specify the right of the prisoner affected to make representations as a part of the procedure, the requirement to give the prisoner the fullest possible reasons for the decision, the frequency and procedure of reviews of the decision and the procedures for appealing against the decision.
2) *Proportionate*: Given that solitary confinement is a serious restriction of a prisoner's rights which involves inherent risks to the prisoner, the level of actual or potential harm must be at least equally serious and uniquely capable of being addressed by this means. This is reflected, for example, in most countries where solitary confinement as a sanction is used only for the most serious disciplinary offences, but the principle must be respected in all uses of the measure. The longer the measure is continued, the stronger must be the reason for it and more must be done to ensure that it achieves its purpose.
3) *Necessary*: The rule that only restrictions necessary for the safe and orderly confinement of the prisoner and the requirements of justice are permitted applies to prisoners undergoing solitary confinement. During solitary confinement, there should be no automatic withdrawal of rights to visits, telephone calls and correspondence or access to resources normally available to prisoners. Each restriction should be separately reasoned and it should not be automatically tied to the placement in solitary confinement.
4) *Accountable*: Full records should be maintained of all decisions to impose solitary confinement and of all reviews of the decisions. These records should evidence all the factors that have been taken into account and the information on which they were based. There should also be a record of the prisoner's input or refusal to contribute to the decision-making process. In addition, full records should be kept of all interactions with staff while the prisoner is in solitary confinement, including attempts by the staff to engage with the prisoner and the prisoner's response.

As already mentioned, under Article 88.1 of the Imprisonment Code, placement in a solitary cell shall be imposed as a disciplinary measure only in exceptional cases. An accused/convicted person placed

[81] Extract from the 21st General Report of the CPT, 2011, CPT/Inf(2011)28-part 2, para. 55, available at: https://rm.coe.int/16806cccc6, (accessed 07.06.2019).

in a solitary cell may not enjoy short and long visits, telephone conversations, or purchase food products; further, he/she may not enjoy the right to participate in the educational process.

The phrase "exceptional cases" is problematic in the above provision. On the one hand, it is not foreseeable what is implied under exceptional cases and, on the other hand, a prisoner placed in solitary confinement is automatically deprived all the rights enjoyed by other prisoners. While placement in solitary confinement is a punitive measure, the automatic deprivation of a number of rights, based on a legal ground, is not reasonably necessary. The law should allow prison authorities to make a choice in each case and decide which right should be additionally restricted for a particular prisoner.

Both the reasons and the duration of a prisoner's solitary confinement should be fully documented and attached to the case-files of an oral hearing conducted within disciplinary proceedings. Such a document should be accessible for supervisory bodies. It is also necessary to have an efficient appeals procedure in place.

Furthermore, it is necessary that prisoners undergoing disciplinary punishment should be visited on a daily basis by the prison staff and the latter should be authorised to give an order to terminate solitary confinement when this step is called for on account of the prisoner's condition or behaviour. Records should be kept of such visits and of related decisions.[82] In our reality, the duration of a prisoner's solitary confinement can be reduced based on a doctor's findings;[83] there is no statutory possibility of motioning/initiating the release from solitary confinement by prison staff.

Conclusion

The present report pointed out clearly the problems existing in the practice of disciplinary proceedings conducted against prisoners in penitentiary establishments as well as legislative shortcomings. The defects in disciplinary procedures involving prisoners undermined the protection of the rights of prisoners; it contributes to stressful relations between prisoners and prison authorities and gives rise to conflicts. Against the background where there are no legal safeguards, prisoners are deprived of the possibility to exercise their legal rights.

The Public Defender observes that the state should make timely and effective steps in this regard and pay attention to the improvement of the legislation and practice. Furthermore, we hope that the present special report will be a good orientation guideline for the relevant state agencies and assist the state in achieving the goals on the way towards protecting the legitimate interests of prisoners.

[82] *Ibid.,* para. 57.
[83] The Imprisonment Code, Article 88.6.

In conclusion, the summary of the existing practical problems, which can be redeemed directly by penitentiary establishments within their resources upon the publication of the report and that do not require legislative amendments, is submitted below:

- To obtain relevant neutral evidence:
    - To obtain video recordings;
    - In those cases, where it is impossible technically to obtain video recordings, to interview officers responsible for electronic and visual surveillance;
    - To interview all persons who witnessed the incident, both prison officers and other prisoners;
    - To obtain material evidence; and
    - To use photo, video and audio materials/equipment for obtaining evidence;
- In those cases where it is impossible to obtain neutral evidence, to provide information/documentation about objective reasons thereof in the case-files;
- To describe facts surrounding a disciplinary violation in disciplinary decisions;
- To examine and provide information in disciplinary decisions about the reasons that could possibly be behind a prisoner's actions;
- To provide justification for the proportionality of the use of a particular sanction;
- To take into account aggravating and mitigating circumstances when imposing disciplinary responsibility on a prisoner;
- To employ a uniform approach when imposing disciplinary sanctions on prisoners;
- To conduct an oral hearing in each case, where neutral evidence has not been submitted and enable a prisoner to defend his/her own interests himself/herself;
- To enable prisoners to present written statements in all cases;
- To give prisoners a reasonable time for adducing evidence corroborating their version of events;
- To provide information about the individual characteristics of a prisoner in case-files, including information about his/her health condition, if appropriate;
- To enable prisoners to engage a lawyer and to give him/her reasonable time for defence;
- To notify disciplinary charges to a prisoner fully before the competent authority decides about the case; and
- To hand the disciplinary decision to a prisoner concerned in all cases.

We also present recommendations about legislative amendments, part of which only require further improvement of legal procedures and some of them imply the development of completely new regulations:

Recommendations

To the Parliament of Georgia:

- To determine the possibility of exempting a prisoner from responsibility for a minor violation;
- To introduce the mechanism of mediation with the view of exempting a prisoner from responsibility;
- To determine the need for examining whether intent or negligence is behind a prisoner's actions;
- To determine the standard of proof in disciplinary proceedings;
- To determine stages and time-frames in disciplinary proceedings;
- To determine a minimum time-frame of no less than 24 hours between the incident of an alleged disciplinary violation and disciplinary examination;
- To introduce the duty of notification of disciplinary charges, *inter alia,* notification of information corroborating the charges;
- To determine the rights and duties of officers of a penitentiary establishment participating in disciplinary proceedings;
- To introduce means to ensure effective defence, namely, those of obtaining evidence (video recordings, among them);
- To amend the regulation on an oral hearing in disciplinary proceedings (Article 80.1 of the Imprisonment Code) and indicate that disciplinary proceedings shall be conducted by an oral hearing if there is no neutral evidence adduced before a director proving the commission of a disciplinary violation by a prisoner. Furthermore, to determine the duty to hold an oral hearing on serious disciplinary violations and/or when there is a possibility of the use of solitary confinement;
- To determine the procedure of adopting a disciplinary decision against a prisoner collectively;
- To determine the procedure for recusal/self-recusal of officials examining prisoners' disciplinary responsibility;
- To introduce the reasoning standard of disciplinary decisions;
- To determine mitigating and aggravating circumstances of disciplinary responsibility;
- To introduce the structural scheme of the degree of disciplinary violations and the use of proportionate sanctions, including, the duration of a particular sanction;
- To determine in express and exhaustive terms the types of those violations for which solitary confinement can be imposed as a disciplinary penalty;
- To amend Article 88.2 of the Imprisonment Code, under which an accused/convicted person placed in a solitary cell is automatically banned from having short and long visits, telephone conversations, purchasing food products and participating in the educational process;
- To introduce a rule according to which restrictions on family contacts as a form of punishment may be used only where the offence relates to such contacts;
- To introduce alternative measures to the use of disciplinary penalties; and
- To determine the obligation of a court to exempt a prisoner from paying court fees, provided the prisoner submits his/her bank statement on the financial turnover during his/her stay in the

penitentiary system proving that his/her monthly income for the last half a year was less than 100 GEL.

To the Minister of Justice

- To add a mandatory entry to the form of a decision about the use of a disciplinary measure which will contain information whether a prisoner concerned was given the document;
- To determine the form of a report on disciplinary charges which will contain information about who instituted disciplinary charges, regarding what incident and based on what evidence, against a particular prisoner; and
- To introduce an internal mechanism of supervision of disciplinary responsibility for the daily monitoring of disciplinary proceedings, its analysis and elaboration of respective recommendations.