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CONSENT SEARCH: WHAT MATTERS AND WHY

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“The constitutional right to privacy represents an integral part of the concept of freedom ... is the base for independent development of every individual”¹. The Constitutional Court of Georgia has stated on numerous occasions that “The right to private life implies the possibility of an individual to lead his/her private life according to his/her own will and be protected from interference by the State or other persons. It protects the choice of a person to exist independently from the outside world, be left alone, as well as to have freedom of choice while deciding the conditions and extent of the relations with other members of the society, ensures free development of a person and gives him/her opportunity to decide independently when, to what extent and by which form to make the facts of his private life public; to exchange and share opinions and impressions”².

The right to private life is guaranteed by Article 20 of the Constitution of Georgia and all the basic acts of International Law.³ However, it does not pertain to absolute rights. The legislation envisages the possibility to restrict it.

The right to privacy is composed of many components. It is linked to the personal autonomy and the so -called right to be let alone⁴, which implies ability of every individual to decide with what

¹ Citizens of Georgia Davit Sartania and Aleksandre Macharashvili against the Parliament of Georgia and the Ministry of Justice of Georgia, Decision of the Constitutional Court of Georgia # 1/2/458, 10.06.2009 2012, par.II-4.

² Georgian Young Lawyers' Association and the Citizen of Georgia Tamar Khidasheli against the Parliament of Georgia; Judgments of the Constitutional Court of Georgia # 2/1/484, 29.02.2012, par. II-2; See also Georgian Young Lawyers' Association and the Citizens of Georgia Ekaterine Lomtadze against the Parliament of Georgia, Judgment of the Constitutional Court of Georgia #1/3/407, 26.12.2007, par.II-4; Georgian Young Lawyers' Association and the Citizen of Georgia Tamar Chugoshvili against the Parliament of Georgia, Judgement #513 Decision of 24 October 2012 on the case, BVerfGE 65, 1[43]

³ Inter alia Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights and etc

⁴ See. Robert Ellis Smith: Sometimes what's public is "private": legal rights to privacy in public spaces, p. 378, in :*Eyes Everywhere. The global Growth of Camera Surveillance*, Aaron Doyle, Randy Lippert, David Lyon[eds], 2012; See. The Right to Privacy, Ellen Frankel Paul, Fred D.Miller, Jr., and Jeffrey Paul[eds] 2010, p.34

intensity to fall in the center of public attention.⁵ Accordingly, the main aspect of right to privacy is the person's interest to prevent revealing the information connected with private issues and control spreading of such information.⁶ Realization of the aforesaid right has particular importance in criminal proceedings, where protection of private information, as well as strict regulation of inviolability of one's home and restriction of the right to private communication; formation of the administrative practice pursuant to the requirements set by law shall be ensured. "Interference with the right can only be justified in case the legislation envisages the effective mechanisms for protecting from abuse of power. The aforesaid comprises the exhaustive and clear regulation, as well as provision of court control on the necessity and proportionality of restriction"^{7,8}.

The legislator is obliged to strike relevant balance between public and private interests. It shall determine the pre-conditions for restriction of the basic right as well as to whom and to how many individuals with what intensity and scale the rights will be restricted. ⁹ Any interference in the right shall serve the constitutional purpose, be necessary and represent a proportionate means to achieving such purpose.¹⁰

As mentioned above one of the aspects of the right to privacy represents inviolability of one's home and possession. "Inviolability of home is the basic right, which in the interests of human dignity and individual's personal development provides "elementary dwelling space".¹¹ First paragraph of Article 112 of the Criminal Procedure Code of Georgia regulates restriction of this very right and sets out that: "Conducting an investigative action, which restricts private ownership, possession or private life does not require Court decision in case it is conducted with the consent of a co-owner, co-possessioner, or a party to a communication".

The article discusses the issues connected to issuing consent for conducting a search. Particularly, preconditions for giving consent, its limits and the possibility to revoke it. The possibility to conduct a search in case the co-owners/co-possessioners have contradictory positions concerning giving consent and conformity of the Georgian legislation with the international standards of right to private life in such a case.

⁵ According to the Oxford Explanatory Dictionary right to privacy is interpreted as "a condition in which a person is not disturbed and observed by other persons". See. *Marios Koutsias*, Privacy and Data Protection in an Information Society : How Reconciled are the English with the European Union Privacy Norms? 2012, C.T.L.R., Issue 8, p. 262

⁶ See. K.Kublashvili Fundamental Rights, 2003, p.109.11

⁷ Gurgenidze v. Georgia; application #71678/01; 17.10.2006, para. 37; see also Georgian Young Lawyers' Association and the Citizens of Georgia Ekaterine Lomtadze against the Parliament of Georgia, Judgment of the Constitutional Court of Georgia #1/3/407, 26.12.2007, par. II-4; *M. Nowak*, UN Covenant on Civil and Political Rights. CCPR Commentary (Kehl am Rhein, Engel, 2005), pp. 401–402.

⁸ *I.Schwabe* Judgments of the German Federal Constitutional Court 2011, p 382

⁹ Ibid

¹⁰ Georgian Young Lawyers' Association and the Citizen of Georgia Tamar Khidasheli against the Parliament of Georgia" Judgment of the Constitutional Court of Georgia #2/1/484, 29.02.2012 ,par.II-9;

¹¹ BVerfGE 42, 212 [219] in: *I.Schwabe*, Judgments of the German Federal Constitutional Court, 2011, p 233

THE TERRITORY WHICH IS COVERED BY PROTECTION OF ARTICLE 20

Paragraph 2 of Article 20 of the Constitution of Georgia secures inviolability of “home and other possessions”.

Home is a physical space for developing private life by a person, the place of family and other types of relationships.¹² However, a concrete space shall not be said to pertain to home in abstract. “Protection shall be afforded only to the place which a person uses de facto and where he has a legitimate expectation that he will not be disturbed by officials and other persons”.¹³

“The decisive criterion for determination as to what constitutes home represents the subjective definition of the purpose of life and its objective cognizance”.¹⁴ Accordingly, dwelling represents any closed or roofed¹⁵ immovable-movable property which a person owns, possesses or makes use of. Particularly this may be an apartment, a house, a country-cottage, a yacht which is used for living or a wagon, a tent, a hotel room etc.¹⁶

Article 20, Para 2 of the Constitution of Georgia protects also any possession. The same formulation can be found in the first paragraph of Article 7 of the Criminal Procedure Code of Georgia, which protects “private ownership and other possession” as well as in paragraph 1, Article 112 of the same code.

The Georgian legislation does not define the meaning of other possession. However, it is clear that the aforesaid comprises dwelling as well the space which is directly connected to the dwelling¹⁷ e.g. auxiliary cellar, garage, yard etc. The issue is to some extent problematic in case of a cellar, auxiliary building or construction, garage that are not placed in the yard of the dwelling house and are territorially distanced from it, or a fenced but not a roofed territory.

There is an opinion expressed in legal literature that the protection envisaged by Article 20 covers a land plot only in case it is directly connected with the house. Therefore, e.g. a garden thrift, vineyard etc. on which the dwelling construction is not placed does not fall within the scope of Article 20.¹⁸ The aforesaid approach is rather questionable as the formulation of the Article itself differentiates the dwelling place from other possession. Accordingly it has to be defined what is meant

¹² Sh. Trechsel, Human Rights in Criminal Procedure, 2009, p. 619

¹³ Ibid p.620

¹⁴ See. J.-D. Kuhne, Art. 13, in: M. Sachs (Hrsg.), Grundgesetz: Kommentar, Munchen 2003, Rn. 2; B. Pieroth, B. Schlink, Grundrechte: Staatsrecht II, 18., neubearb. Aufl., 2002, Rn. 876 in: *Commentary to the Constitution of Georgia, chapter II, citizenship of Georgia. The fundamental rights and freedoms*, 2013

¹⁵ See. H. D. Jarass, Art. 13, in: H. D. Jarass, B. Pieroth, Grundgesetz für die Bundesrepublik Deutschland: Kommentar, 7. Auflage, 2004, Rn. 2 in: *Commentary to the Constitution of Georgia, chapter II, Citizenship of Georgia. The fundamental rights and freedoms*, 2013

¹⁶ See. *Stephanie Stern* Cornell L.Rev 905[2010], *State v Pruss* 181 P.3d 1231 [Idaho 2008]

¹⁷ See.J.-D. Kuhne, Art. 13, in: M. Sachs (Hrsg.), Grundgesetz: Kommentar, 2003, Rn. 3. cited from the: *Commentary to the Constitution of Georgia, chapter II, Citizenship of Georgia. The fundamental rights and freedoms*, p.187

¹⁸ See. Ibid, p.187

under other possession – possession which should have the dwelling character or should directly be connected with the dwelling, or any lawful possession notwithstanding its function. E.g. a store house, working space, garage and etc., which is not directly tied or connected with the dwelling house, protection covers only roofed space [and what type of roofing is meant? E.g. glazing?] or a possession which is fenced and protected from the eyes of the strangers by a fence.

Such an approach to some extent reflects the procedural legislation of the United States which envisages wide interpretation of a “dwelling house” and differentiates the adjacent territory to the house from the open space. In particular, a “dwelling house” implies dwelling units as well as the adjacent territory which is immediately connected with it, in which there are the kind of private relationships, which are associated with home, private life and expectation of privacy. Open space represents any unpopulated or less exploited space which is placed outside the adjacent territory of the house.¹⁹

As the topic of the Article is relatively narrow and does not concern the basis for restricting the right to private life in general, I will only note that in case of narrow interpretation of “other possessions”, in the sphere of regulation of Article 20 will not fall: working space, separately placed building and constructions, cellars and etc. which will unjustifiably curtail the scope of application of Article 20. Accordingly, for the purposes of Article 20 less importance shall be attached to separation of the property from the dwelling house or the actual distance from it, but rather primarily to the subjective and objective criteria of the owner/possessor’s expectation to be left alone towards this unit, in particular person’s subjective expectation of privacy and the readiness of the society to acknowledge such an expectation as reasonable.

Reasonableness of the expectation is to some extent connected to the intensity of the measures carried out to protect the space from interference by other persons. Accordingly if the space which is located in the adjacent fenced yard is not appropriately roofed or protected from the scrutiny of other persons it does not enjoy the right to privacy. The persons who expose property to the public, even if it is discernable only from the air space, cannot argue about the reasonable expectation to privacy.²⁰

¹⁹ See. E.g. J. Derssler, Alan C. Michaels, *Criminal Procedure: vol.1: Investigation*. 5th ed., 2010, LexisNexis, p. 64

²⁰ Julian A. Cook, III, “Inside Investigative Criminal Procedure: What matters and Why”, 2012, Wolters Kluwer, p. 34; *Florida v Riley* US445 [1989],- there is not violation when the police observes from the helicopter the damaged and open places of the greenhouse roof as there does not exist expectation of right to privacy if anything is visible for the public from the place of observation. See. Daniel J. Solove, Paul M. Schwartz, *Privacy Law Fundamentals*, 2011 IAPP, p 32. Deriving from the diversity of the methods and forms for interfering in the private life by a manner which equals to search, the issue was thoroughly examined in a separate article.

RESTRICTION OF THE RIGHT TO INVIOABILITY OF HOME AND OTHER POSSESSIONS WITH THE PERMISSION OF PRIVATE PERSONS

Article 20, Para 2 of the Constitution of Georgia links entering the dwelling apartment or other possession to one of following three preconditions: A court Judgment, urgent necessity prescribed by law or the consent of the possessors.

Article 112 of the Criminal Procedure Code of Georgia singles out as a precondition for absolving from the requirement of a court decision –a permission of certain category of persons, however it does not attach particular attention to the level of factual linkage of such person to a property. For example, consent of one of the co-owners is sufficient for searching a property in joint possession²¹ or property under lease or rent, as well as search of items in private ownership of other members of the family. Instead the purpose of the rule should be to guarantee the right to privacy of a specific person with regard to specific property. In particular, as a rule court permission is needed in case of searching a property transferred through rent or lease, this shall ensure the balance between the private and public interests. However, this is not necessary when the owner consents. In such a case at first glance the guarantee envisaged by the Criminal Procedure Code of Georgia can become devoid of sense, as its aim is to protect the private life of the specific individual possessing the property from interference by officials rather than the owner who does not directly use the property. In certain cases such an approach may be justified on the basis of the interests of the owner. For example, in order to check whether his/her immovable property is being damaged or misused or used for criminal activities. However the main purpose of the guarantee should be preserved in such cases as well.

Is it permissible to seize e.g. a computer found at the search place or to use the information obtained as a result of searching such a computer as evidence in court? Does a third party have a reasonable expectation of privacy in case when the information stored in a computer is seized?

It shall be taken into consideration that the consent of a person excludes interference in the right²². For that reason getting acquainted with files, hard drives and other electronic storages on the basis of person's consent as well as legitimacy of a search in general does not require approval by a court.²³

Accordingly while conducting a search based on consent the following 3 issues are important:

1. Legitimacy of the consent according to the level of association of the person giving such consent to the object of the search;

²¹ J.-D. Kuhne, Art. 13, in: M. Sachs (Hrsg.), Grundgesetz: Kommentar, Munchen 2003, Rn. 23. However, in such case decisive importance is attached not only to the legal authority of the person giving consent, but the level of practical and real connection to the concrete property for defining legitimacy of consent at the one hand and the limits of consent on the other.

²² Concerning the legal consequences of the consent to interference given by a person see *M. Morlok*, Grundrechte, 2. Aufl., Baden-Baden 2010, Rn. 534 ff.; *B. Pieroth, B. Schlink*, Grundrechte: Staatsrecht II, 18., neubearb. Aufl., Heidelberg 2002, Rn. 131 ff

²³ Does not require approval of a Court, however it does not exclude examination of lawfulness of the conducted search when one party appeals legitimacy of the information obtained through it

2. Voluntary nature of consent;
3. Limits of consent.

In light of the above mentioned the Courts should examine for at least 3 following circumstances with regard to the searches conducted on consent basis:

1. Voluntary nature of consent and its conscious nature
2. Whether the person has association of such an intensity with the property that bestows him a right to give consent
3. Whether consent has been revoked

According to the case-law when the prosecuting party refers to the court for ex post approval of the search, conducted on the bases of consent of owner or possessor, the court will not examine lawfulness of the search.²⁴

This type of a search is the most desired one for the investigation bodies for the following three reasons: 1. as a rule, while requesting consent for carrying out a search the investigative body is not obliged to prove existence of probable cause that the person may be involved in criminal activities 2. There are no administrative difficulties and risks connected with obtaining and enforcing an order 3. In certain cases consent on search is given by a person, who knows that he hides evidence of a crime. For these reasons in the opinion of the police such kind of a search has particular importance for the investigative purposes.²⁵ With regard to consent search the authority of the investigation is particularly wide. It gives possibility to require conducting a search of any person, at any time (as a rule except the night hours), for any reason. They are not obliged to indicate what they are searching for, nor where they expect to discover an item. They are not obliged to interpret the reason for believing that a particular person can possess accusatory evidences.²⁶ It suffices to explain for investigation of which crime, for what reason and with regard to what they are requesting consent to conduct a search.

From the perspective of private persons, such kind of search is problematic especially because of the following circumstances 1. The majority of the population does not know that they have a right to refuse 2. In most of the cases even the most informed persons feel unsafe in relationship with the police 3. While requesting consent for search by the police the situation frequently bears legal

²⁴ See e.g. Decision of the Tbilisi City Court of 24.09.2013 app. #118/7388. Court stated that according to Article 112 of the Criminal Procedure Code, an investigative action restricting private property or possession is conducted on the basis of court permission, unless one party to the communication or even one co-possessor or co-owner consent to conduct an investigative action. Accordingly in such a case, even the investigative action conducted under exigent circumstances, ex ante or ex post courts' permission is not required... the court noted, that as the possessor of a car voluntarily gives consent to search a car in his possession and present the items, examination of a search conducted on the basis of one of the parties to the communication does not require court control'.

²⁵ Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, *Craig Hemmens and Rolando V. Del Carmen* (eds.), Rowman and Littlefield Publishers, 2010, p.156 See. *Daniel J. Solove, Paul M. Schwartz*, Privacy Law Fundamentals, IAPP, 2011, p 35

²⁶ Mastering Criminal Procedure Vol. 1, The Investigation Stage/ *Peter J. Henning*.. [et.al] Carolina Academic Press, 2010, p. 156

coercion. In such a situation it is unrealistic that even the persons who are well informed about their right to refuse to consent actually do so.²⁷ The main problem is that appealing to the constitutional right to privacy can cause additional legal problems like exerting physical influence or administrative detention. For the aforesaid reasons the majority of population “voluntarily” gives consent to the police to conduct a search.²⁸

That is why particular attention should be attached to detailed regulation of such practice by legislation and establishing respective administrative procedure.

THE VOLUNTARY NATURE OF CONSENT

The Criminal Procedure Code of Georgia does not set out criteria for giving consent, accordingly it does not define any specific form of consent [verbal, written and etc], and therefore consent may be expressed in an explicit or implicit form. Conscious consent is not required nor is the obligation to verify legal capacity of a person, for that reason the fact that consent may be given under the influence of alcohol, narcotics, or by a person having psychiatric problems [if psychiatric disorder is not vividly expressed] or by a person being in agitated condition does not render consent unlawful.²⁹ For validity of consent legislation does not require giving it in a written form, accordingly if a person refuses to fix his/her consent in a written form this does not render illegal the legally obtained consent.

Consent is voluntary if there is no evidence of coercion or humiliation from the part of the police and the person understands the meaning of the asked questions.

While discussing the issue of voluntary nature of consent it shall be examined whether the person giving consent could freely express his will, or he/she merely obeys the requirement in order to prevent ensuing real or imaginary negative result. The voluntary nature of consent on carrying out a search largely depends on the circumstances in which the consent is requested. Accordingly the courts should discuss all the circumstances and facts regarding consent which took place prior to giving it. These circumstances can conditionally be divided in two groups: 1. the actions taken from the side of the State in order to obtain consent and 2. Personal characteristics of the person giving consent.

²⁷ See footnote 25.

²⁸ Ibid

²⁹ E.g. when consent is required from a driver or a possessor being under the influence of alcohol, who at his home welcomes the officer under the influence of alcohol. See. Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, *Craig Hemmens and Rolando V. Del Carmen (eds.,)* Rowman and Littlefield Publishers, 2010, p. 164

While deciding the issue, totality of the circumstances test shall be used.³⁰ The tactic used by the investigative bodies for obtaining consent shall be taken in consideration [using an unconscientious approach], as well as their statements made prior to getting consent and whether the person was arrested at the time of consenting. When consent is given by a person being under restriction of freedom [detained or arrested], the conditions of detention and questioning are also subject to re-examination. The fact of restricted freedom itself does not render consent involuntary.³¹

In case the representative of investigative body demonstrates power, exerts physiological influence on the person, e.g. intimidates him that in case of resistance he will be back with court warrant, deceives – when the investigator knowingly misleads the person and states that the investigative body possess enough evidence to obtain court permission on search and in case the person refuses he will be back with the court warrant, or deceives that he has a court warranty on carrying out a search. As a rule obtaining the consent through such means is illegal.³² At the same time the measures of influence used by the investigative body can bear different results for different persons depending on the individual characteristics of individuals³³ such as person's education, physical and mental condition, freedom of expression, emotional condition, motivation.³⁴ Among the factors which indicate on involuntary character of consent are: mental illness or injury and actions of the defendant prior to giving consent including primary refusal to give permission and requiring the right to lawyer³⁵. The consent given while having linguistic difficulties [e.g. foreigner] is generally considered as voluntary by courts.³⁶

To establish that consent was involuntary only presence of coercive tactic is not sufficient, as the coercive measure which can exert influence on a person with disabilities may not have the same effect with regard to a more powerful and self-confident person.³⁷

Unlike the Georgian legislation and court case-law, the legislation of United States differentiates consent from acknowledgement of investigator's authority. For example, when at 3 a.m. the policemen entered juvenile's room and asked him to follow them, "alright" said the boy, and this was considered as acknowledgement of the authority of the policemen rather than voluntary consent. Likewise, when 66 years old black lady was deceived by white policemen who told her, that they

³⁰ Julian A. Cook, III, "Inside Investigative Criminal Procedure: What matters and Why", 2012, Wolters Kluwer, p.108

³¹ See. Mastering Criminal Procedure Vol 1, The Investigation Stage/ Peter J. Henning.. [et.al] Carolina Academic Press, 2010, p. 161.

³² Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.), Rowman and Littlefield Publishers, 2010, p. 167

³³ Julian A. Cook, III, "Inside Investigative Criminal Procedure: What matters and Why", 2012, Wolters Kluwer, p.108

³⁴ Walter P. Singoreli, Criminal Law, Procedure and Evidence, 2011, CRC Press p. 234, see Robert M. Bloom, Mark S. Brodin, Criminal Procedure: The Constitution and the Police, 6th ed., 2010, Aspen Publishers, p. 162

³⁵ ob. Mastering Criminal Procedure Vol 1, The Investigation Stage/ Peter J. Henning.. [et.al] 2010, Carolina Academic Press, p.158

³⁶ United States v Cedano-Medina 366F.3d682[8thCir.2004]; Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.), Rowman and Littlefield Publishers, 2010, p. 165

³⁷ Mastering Criminal Procedure Vol 1, The Investigation Stage/ Peter J. Henning.. [et.al] 2010, Carolina Academic Press, p. 158

had a search order, was considered as acknowledgement of the authority of the policemen rather than voluntary consent.³⁸

Can silence or an ambiguous answer to a question be considered as consent? For example, when a person being in the apartment moves away while opening the door only to avoid the policemen bumping into him/her, when a person opens the door and lets the representatives of investigative bodies in, after they threaten to break-up the door or when a person answers to a question of an investigator, that “since you have a certificate of a policeman you are entitled to conduct a search”³⁹ and etc. Silence, nodding a head, giving way to the representatives of the police and etc. does not in itself a priori represent consent.⁴⁰

Notwithstanding the fact that in all the above mentioned cases the US Supreme Court considers that consent was not voluntary, taking a decision only according to the form of an answer will not be correct. The totality of the circumstance of the case test shall be used for defining legitimacy of consent. “... Supporting the voluntary consent through argument that a person unreservedly obeyed the requirement of investigative body does not suffice for the state to pass the burden of proving that the consent was voluntary.”⁴¹

Should a person know that he/she has a right to refuse to give consent, before giving it? The Criminal Procedure Code of Georgia (like the Procedural legislation of USA) does not include the obligation for the investigative body to explain that the individual has right to refuse to consent.⁴² The subjective understanding by a person of the right to refuse represents one of the factors, which shall be considered by court in conjunction with other circumstances while assessing voluntary nature of consent. Voluntary nature of consent does not depend on knowledge about the right to refuse. ... “investigators who do not have evidences supporting probable cause to conduct a search, but have a suspicion that a person is involved in criminal activities, would otherwise lack the only possibility to obtain important evidence. Even in case when there is no evidence supporting probable cause for search or detention, in court’s opinion consent search is still useful. In particular “if a person consents to conduct a search which proves to be useless, may convince the law enforcers in uselessness of arresting a person ... or on the base of order ... that conducting a large-scale search is unjustified”.⁴³

“in order for a search conducted on the basis of consent to be considered as voluntary, it would not be practical to use detailed requirements of effective warning” it would also be unrealistic to

³⁸ Robert M. Bloom, Mark S. Brodin, *Criminal Procedure: The Constitution and the Police*, 6th ed., 2010, Aspen Publishers, p. 162

³⁹ *Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights*, Craig Hemmens and Rolando V. Del Carmen (eds.), Rowman and Littlefield Publishers, 2010p.168

⁴⁰ Search And Seizure guide, p. 4

⁴¹ Julian A. Cook, III, “Inside Investigative Criminal Procedure: What matters and Why”, 2012, Wolters Kluwer; *Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights*, Craig Hemmens and Rolando V. Del Carmen (eds.), Rowman and Littlefield Publishers, 2010, p. 108

⁴² Like in case of enquiry

⁴³ Julian A. Cook, III, “Inside Investigative Criminal Procedure: What matters and Why” 2012, Wolters Kluwer, p. 109

oblige the policemen to explain to the detained persons that they are free to walk away before obtaining consent to a search”.⁴⁴

The court also interpreted that the detailed requirements set for refusing to remain silent and to avail oneself of the services of a defender are conditioned by the crucial importance of the right itself for the purposes of delivering justice, as to guaranteeing protection from willful search-seizure is of absolutely different character and is not connected with establishing truth while a court hearing on a criminal case.⁴⁵

The fact that a person was not informed about the possibility not to give consent on search does not render the consent illegal. However consent which is given by a person after informing him about the right represents a powerful factor for demonstrating voluntary nature of consent but not a decisive one.⁴⁶

Accordingly, consent shall be voluntary and not coercive; however unlike the rights guaranteed by other articles of the Constitution of Georgia, in this case it is not necessary for the refusal to be conscious and perceived one. Particularly, unlike waiving the right to a lawyer, which will be considered lawful only in case it is done after given warning regarding the right to the lawyer, in case of search legislation does not require such preconditions. Therefore, for lawfulness of consent it is not necessary for a person to be conscious that he has a right to refuse to conduct a search in absence of a court decision or a resolution of an investigator thereto.

“Consent cannot be a result of explicit or implicit coercion or intimidation”. There is no lucid and univocal answer to a question in what case is consent a result of such influence. For defining it the court uses the test of totality of the circumstances of the case. The fact of demonstration of power is taken into consideration, as well as age of the person, his mental condition, to what extent does his intellectual capacity gives possibility to realize the importance of consent., examination of the outside factors, whereabouts of the person while giving consent, whether his freedom was limited [e.g. he was detained/arrested], whether consent was given after declaring to him that the policemen have a search order.⁴⁷ While deciding the matter of voluntary nature of consent the main issue to be considered is morality of the methods and techniques used by the police for obtaining consent.⁴⁸

It is important that consent is lawful even if a person giving consent does not know that he has a right to refuse to give consent. Recently the aforesaid position has once again been supported by the court.⁴⁹

⁴⁴ Robert M. Bloom, Mark S. Brodin, *Criminal Procedure: The Constitution and the Police*, 6th ed., 2010, Aspen Publishers, p.162

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ John L.Worrall, *Criminal Procedure* 2013, Pearson, p. 92

⁴⁸ See. J. Dressler, Alan C.Michaels, *Criminal Procedure. vol1: Investigation*, 5th ed., 2010, LexisNexis, p.252

⁴⁹ Ibid p.93

Is it permissible to conduct a search in absence of a necessary probable cause? Taking into consideration the fact that Article 119 and Article 120 sets out the purpose, grounds and rule for conducting a search. As a rule they are applied to the cases where search was carried out on the basis of given consent.⁵⁰ The issue is differently regulated by the legislation of the USA, where conducting a search on the basis of consent is first and foremost considered as a simplified rule for conducting a search, which as a rule does not require probable cause and observance of formal requirements. Particularly, in case of a lawful refusal of a person to avail himself with the right guaranteed by the Fourth Amendment, the police have authority to conduct a search without order or any substantiation, limits of which are only defined by the person giving consent.⁵¹ The principle is that in case of such type of a search the probable cause is not decisive, it is decisive to obtain permission with lawful means.⁵²

LIMITS OF CONSENT

As a rule limits of consent and search depends on the essence of the search item. But in case of general consent to conduct a search limits are defined according to what a reasonable person would have implied in the given circumstances.⁵³

How lucid should the scope of permission be while requesting such permission? Whether the permission given to search a specific area [e.g. the trunk of a car, a suitcase etc.] extends to the right to search the containers found in that area? For example while giving consent on searching an apartment does an investigative body have a right to search all the places in it? Does the consent confer a right to a person conducting a search to search the electronic storages found in it? [E.g. a computer, a tablet computer or a mobile phone?]

The same standard of meticulousness is not required in case of a search on the basis of consent as in case of search warrant issued by a court. However it should be objectively possible for the person giving consent to set the limits of a search.⁵⁴ As a rule setting of limits becomes possible in case the search object is indicated, or it is stated with regards to which crime is search required or

⁵⁰ Criminal Procedure and the Supreme Court: a guide to the major decisions on search and seizure, privacy and individual rights, *Craig Hemmens and Rolando V. del Carmen* (eds.), Rowman and Littlefield Publishers, 2010.

⁵¹ Robert M. Bloom, Mark S. Brodin, *Criminal Procedure: The Constitution and the Police*, 6th ed., 2010, Aspen Publishers, p. 161

⁵² John L. Worrall, *Criminal Procedure* 2013, Pearson Pearson, p.92

⁵³ Criminal Procedure and the Supreme Court: a guide to the major decisions on search and seizure, privacy and individual rights, *Craig Hemmens and Rolando V. del Carmen* (eds.), Rowman and Littlefield publishers, 2010p. 164

⁵⁴ If the aim of the search – discovering narcotics, had been explained to the defendant before starting a search, accordingly consent was required for searching inter alia the places where logically narcotics can be hidden see. E.g. *Florida v Jimeno*, 500 U.S. 248[1991]).

when the item of particular search is being identified.⁵⁵ At the same time unlike the search conducted on the basis of a decision a search performed on the basis of permission gives possibility to a person giving permission to revoke his consent or restrict the scope of a search at any stage of a search. The so called open field doctrine represents an exception. Paragraph 5 of Article 120 represents a partial analogy of the doctrine. According to the aforesaid paragraph "all the other objects comprising information which may have the importance of an evidence for the case or which explicitly indicates to other crime. As well as an item, document or substance comprising such information and has been removed from civil circulation."⁵⁶

The limits of permitted search are defined pursuant to limits of the permission. Accordingly, limits of search cannot exceed the limit of consent.

The US Supreme Court has stated on numerous occasions that the correct standard for evaluating limits of consent is objective reasonableness, which implies that while defining the limits it shall be taken in consideration what a typical reasonable person would have concluded about the limits on the basis of the particular circumstances of the case. Will a "typical/ordinary reasonable person" while giving consent to conduct search of a particular area consider that consent comprises searching all the containers, electronic storages and etc.? If an investigative body requires permission to conduct a search in order to find a concrete type of computer and finds one with such outward characteristics will it be permissible to look through and conduct search inside the computer on the basis of the primary consent?

Pursuant to Article 119 of the Criminal Procedure Code of Georgia search is carried out in order to seize an item, a document or substance comprising information and having importance for the case, if there is a reasonable ground to believe that it is stored in certain place, certain person and search is necessary for finding it. Despite the fact that the Georgian legislation does not regulate this issue in details, deriving from the purposes enshrined by the case law of USA and Article 119 of the Criminal Procedure Code of Georgia consent on performing a search implies consent on searching of a specific area as well as of all the containers found in that area in which an object having importance for the case may be found. There should be an exception when a person giving consent explicitly and clearly consents to search a specific area without opening any container found in it.

Limits of consent are defined according to the legal status of the person giving consent and the boundaries which he sets to the investigative body. Accordingly a person cannot confer a right to search area which is outside the area under his ownership. At the same time this person can give permission to search the entire area or only a part of it. E.g. "you can look around" does not mean that the police can open everything and look into every corner.⁵⁷ It is impermissible when a representative of an investigative body indicates that he wishes to see specific type of items and on the

⁵⁵ E.g. while conducting a search in connection with the crime envisaged by Article 260 of the Criminal Code the police has a rights to seize the mutilated corpse found in the apartment (which clearly indicated to commission of other crime) and etc.

⁵⁶ E.g. while conducting a search in connection with the crime envisaged by Article 260 of the Criminal Code the police has a rights to seize the mutilated corpse found in the apartment (which clearly indicated to commission of other crime) and etc.

⁵⁷ John L.Worrall, Criminal Procedure 2013, Pearson, p. 93

basis of this consent avails himself of silence from the side of the person giving consent and carries out general search.

The Criminal Procedure Code does not explicitly define the limits of consent, however paragraph 7 of Article 120 of the Code envisages the authority of an investigator to open closed storage, dwelling and repository, when a person refuses to open them. Refusal may be conditioned by objective and subjective circumstances. Notwithstanding the fact that the aforesaid may derive from the legitimate purposes of investigation, the investigator should be obliged not only to make a note in the search record whether a person resisted ... but also to reflect the factual circumstances, which on the basis of urgent need establish a substantiated assumption for conducting a search of the area. In such a case it should be necessary for the entire search to be ex post confirmed by Court.

It is interesting to discuss the relation of paragraph 7 of Article 120 with the search conducted on the basis of consent given by persons defined in Article 112, particularly, how permissible it is to use the aforesaid authority while conducting search on the basis of consent. Article 120 stipulates a norm regulating a general rule of conducting a search. It applies to all types of searches of an area. However, with regards to the area, searching of which is refused by a person defined by Article 112, the investigative body shall ensure ex post examination of lawfulness of the conducted search by court. In case of a contrary interpretation consent given by persons envisaged by Article 112 would only have the meaning of conferring a right to enter the area and not the right to define limits of search.

CONSENT OF THE THIRD PARTIES

For the consent of the third party to be legitimate it shall be issued by an authorized person. As a rule the issue arises when consent is given by third party with regard to the area where defendant has expectation of privacy and as a result of the conducted search is found incriminatory evidence.

The case law of the USA, as well as that of the European Court of Human Rights strictly define the limits of authority of the third parties while conducting a search on the basis of given consent. As a rule the authority of the third parties is limited to the right to permit searching only the property which is at the same time in their active and immediate use. Particularly, in case of co- possession when a part of the dwelling is in the exclusive use of the co-possessor e.g. a private room, a store-room, a table and etc. It is prohibited to search this place on the basis of consent given by other co-possessor. For searching such an area a court order/investigator's resolution or consent of the person in whose exclusive use is the place/item is required.⁵⁸ Accordingly, the investigative body has

⁵⁸ See.e.g. United States v Davis ,332 F.3d 1163[9th Cir 2003]; United States v Jimenez 419,F.3d[1st Cir. 2005]

an obligation to use reasonable discretion. It is not permissible to search a handbag of a woman co-possessor with the consent of a man co-possessor, even in case the handbag is placed in the area of common usage.⁵⁹

Similarly a third party has a right to give consent on conducting search of a technique only in case he has a common interest or authority with regard to it. At that time search shall be limited to the area towards which the third party has the aforesaid authority. In case of searching a computer discovering encrypted or password protected files [or existence of other mechanism of security] abolishes the common authority concept. When a person had obtained password before the consent was given [or other possibility of opening the files] are exceptions. Networked computers may also enjoy immunity from permitted search as the system administrators may have access to the majority of files but not to all the files. The same principle applies to the members of the family. Consequently while deciding lawfulness of consent in such a case the most important issues are physical control and restricted accessibility. In other words if a computer is in common use of a family but the common use of the computer is limited with the initiative of suspected member of the family [e.g. encryption, using a stenography and etc.] other members of the family do not have right to give consent. At the same time for defining limits and lawfulness investigators are obliged to assess the totality of the circumstances of the case.⁶⁰

Accordingly pursuant to the case law of USA consent given by the third party is lawful in case the person giving consent enjoys factual and indisputable authority.⁶¹ While defining the authority of the third party to give consent the court first of all examines the nature of relationship between the defendant and the third party as well as the authority of the third party with regards to the property.⁶²

For the purposes of a search with consent common authority is defined not pursuant to the legal norms on ownership, but according to common usage by those persons who as a rule have common access to the property, can control it for the main purposes to the extent that there arises a reasonable assumption that any of the co-possessors have the authority to give consent and the others bear the risk that one of the co-possessors may give consent on searching the property in their common use. For the legitimacy of consent a right to enter the territory of the property does not suffice. For example consent of the porter, registrar to search a room at the hotel does not represent legitimate consent as the common use of the room is not present;⁶³ Consent of employees of a college to search the area where students live, consent of one lessee instead of other;⁶⁴ however

⁵⁹ *Walter P. Singoreli*, *Criminal Law, Procedure and Evidence*, 2011, CRC Press, p. 237

⁶⁰ *Marjie T. Britz*, *Computer Forensics and Cyber Crime- an introduction*, 3rd ed., 2013, Pearson: p. 242

⁶¹ *Mastering Criminal Procedure Vol 1, The Investigation Stage/ Peter J. Henning.. [et.al]* Carolina Academic Press, 2010, p. 158

⁶² *Ibid*

⁶³ *Robert M. Bloom, Mark S. Brodin*, *Criminal Procedure: The Constitution and the Police*, 6th ed., 2010, Aspen Publishers p. 164

⁶⁴ *John L. Worrall, Craig Hemmens, Lisa Nored*, *Criminal Evidence, an introduction*. 2nd ed., 2012, Oxford University, p. 150

consent of the driver of a car is lawful and sufficient for searching the entire car, even if a driver is not the owner of the car.⁶⁵

Therefore for giving consent the third parties should have “common authority” with regards to the area. They can give consent on searching e.g. common kitchen, bathrooms and etc but not the bedroom which is only under one’s use.⁶⁶ Accordingly, the third party can give consent on searching in case he enjoys common authority on the computer [e.g. it is in common usage].⁶⁷

As a rule the following regulations apply with regards to the thirds parties:⁶⁸

Spouses – spouses have equal rights on common property and each of them can give consent to search property acquired during their marriage, however the rule applies when both of the spouses physically attend the process of requiring consent and one of them refuses to consent. Unlike Article 112 of the Criminal Procedure Code of Georgia the police of the USA do not have a right to act on the basis of one spouse.⁶⁹ One spouse can give consent to search a personal computer of another spouse in case they jointly use it and it is not protected by password.⁷⁰

Parents and children – both parents can equally give consent to search items of their juvenile children, not vise-versa. At the same time, the case law is not consistent while deciding the issues with regards to consent given by parents to search items of their juvenile children, particularly in a number of cases court held that parents do not have a right to give consent to search items belonging to their children, in case they take part in common thrift - e.g. pay a rent of the room, expenses for nutrition and etc. and express reasonable expectation of privacy.⁷¹ In case parents give consent to search a computer of their juvenile child the location of the computer, degree of dependence of the juvenile upon parent and etc. is taken into consideration.⁷²

Room co-renters, co-owners and co-possessioners:- any co-renter/possessor of a room has right to give consent to search the entire house or apartment except the places towards which a person refusing to give consent has reasonable expectation of privacy, e.g. individual bedroom. The co-renter of the room who does not attend this moment bears the risk of a consent given by other co-renter. The burden of risk principle is also used in case of co-owners and co-possessioners.⁷³

⁶⁵ Ibid

⁶⁶ John L. Worrall, Craig Hemmens, Lisa Nored, Criminal Evidence, an introduction. 2nd ed., 2012, Oxford University, p. 150

⁶⁷ See United States v Mannion , 54 Fed Appx 372(4th Cir.2002) ; United States v Adjani 452 F.3d 1140[9th Cir 2006]

⁶⁸ Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.,) Rowman and Littlefield Publishers, 2010,p. 165

⁶⁹ Ibid. Georgia v Randolph 547 U.S.103[2006]

⁷⁰ See.E.g. United States v Mannion, 54 Fed. Appx. 372 [4th Cir 2002] , in: Orin S.Kerr, Computer Crime Law,2013, West p. 433

⁷¹ Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.,) Rowman and Littlefield Publishers, 2010, p.165

⁷² Marjie T. Britz, Computer Forensics and Cyber Crime- an introduction, 3rd ed., 2013, Pearson: p. 242

⁷³ Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.,) Rowman and Littlefield Publishers, 2010 p.166

Renter and tenant: - A renter can give consent to search only the area which is in common usage, however he cannot give consent to search the private residence of the tenant, even if he has a right to enter the property; fix it or check its damages/condition.⁷⁴

Hotel personnel and hotel guests – during the period a hotel room is rented, its status equals to the home of the guest. Therefore, the personnel of the hotel do not have a right to give consent to the police on searching a hotel room.⁷⁵

Employee and employer – employer can search the office of the employee for the purposes connected with work activities but cannot give consent to the police to search the area where employee has a reasonable expectation of privacy in the office or at his working desk. Whether the employee can give consent to search the property of employer depends on his working status and as a rule not on the limits of authority. However if he had been entrusted to manage the business of the employer for a long time, some courts consider that he has a right to give consent.⁷⁶

Accordingly, the less/seldom contact exists between the person and property; the less is the possibility to appeal to infringement of the right to privacy while searching the area.⁷⁷

REGULATION OF DIFFERENT POSITIONS CONCERNING GIVING CONSENT TO SEARCH

As a rule consent given by the third party is not disputable if the process of giving consent is not attended by other co-owner or co-possessor. But how is the matter settled in case a person who refuses to consent attends the moment of requesting it and other co-owner/co-possessor gives consent? For example is it lawful to search an apartment which is in common ownership of the spouses when: 1. Husband who is at work refuses to consent, and wife who is at home consents? ⁷⁸ 2. wife who is not at home gives consent, however husband who is at home does not;⁷⁹ 3. Both of the spouses are at home, the police had arrested husband in accordance with the rule prescribed by the criminal procedure code and placed him in a car of the patrol police car, asked him to give consent to search but he refused, as a result of which search was conducted on the basis of the

⁷⁴ Ibid

⁷⁵ Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, Craig Hemmens and Rolando V. Del Carmen (eds.), Rowman and Littlefield Publishers, 2010. P. 166.

⁷⁶ Ibid.

⁷⁷ Julian A. Cook, III, "Inside Investigative Criminal Procedure: What matters and Why", 2012, Wolters Kluwer, p.208

⁷⁸ See .e.g. United States v. Hudspeth, 518 F.3d 954[8th cir. 2088]

⁷⁹ United States v. McKerrell, 491 F. 3d 1221 [10th Cir. 2007]

consent given by wife;⁸⁰ 4. While requesting consent to search both spouses are at home, husband refuses to consent but wife consents, is a search conducted on the basis of such consent as well as the seized evidence lawful?

The US Supreme Court noted that refusal of the co-user who is physically present while requesting consent renders a search conducted without warrant unlawful and unreasonable.⁸¹ However it shall be mentioned that importance shall be attached to refusal only when it is explicitly and unequivocally expressed.

The issue is similarly resolved when the defendant does not consent to conducting a search, however other co-owners/co-possessors consent.⁸² However in such a case there should be present two preconditions: 1. Defendant should be present at the place where search is conducted; 2. Refusal of the defendant shall be explicitly expressed.⁸³ Defendant should unequivocally refuse giving consent. Standing in silence without clearly protesting the process of the search does not suffice for asserting that he was against conducting it.⁸⁴

Accordingly the refusal of the defendant is not taken into consideration in case he is detained and is in the place of restriction of liberty. In that case consent given by spouse is enough.

The issue of regulating consent of co-possessors, friend and “family” in a wide sense is particularly interesting. Giving consent by a girlfriend to search a bedroom who also uses it is permissible as the room is in common use. According to the court’s interpretation the co-possessors who have right to give consent are those who jointly use property, who have common access or control over the majority of purposes to the extent that it is reasonable to admit that any of the co-possessors has right to give consent on conducting a search and the other co-possessor envisage the risk that one of them can give consent to search the entire area.⁸⁵

How the matter is settled when the authority of each of the co-possessor with regards to the common area envisaged by Article 112 of the Criminal Procedure Code is not quite clear to the investigator? For example investigative body acquires consent from a lady who opens the apartment with her keys and explains to the investigator that she is there to take her items from the apartment of her ex-boyfriend. Is her consent effective?⁸⁶ The court held that in such a case a search conducted on the basis of consent without the court order shall be performed according to the doctrine of reasonably meant authority derived from the circumstances - i.e. search will be lawful in case consent

⁸⁰ On the basis of *State v. Martin*, 334 Wis.2d 290, 800 N.W.2d 858 [2011]

⁸¹ *John L. Worrall*, *Criminal Procedure* 2013, p. 94 *Georgia v. Randolph* [547 U.S.013[2006]p. 103]]

⁸² See. E.g. *United States v. Weston* [67 M.J.390] U.S.Armed Forces 2009

⁸³ *Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights*, *Craig Hemmens and Rolando V. Del Carmen* (eds.), Rowman and Littlefield Publishers, 2010, p.18

⁸⁴ See e.g. *Commonwealth v. Ocasio* 882 N.E.2d 341[Mass.App. 2008]; *Commonwealth v. Ware*, 913 N.E.2d 869 [Mass.App.2009]; *Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights*, *Craig Hemmens and Rolando V. Del Carmen* (eds.), Rowman and Littlefield Publishers, 2010, p.182

⁸⁵ *Leslie W. Abramson*, *Acing Criminal Procedure*, 3rd ed., West, 2013, p. 105

⁸⁶ *John L. Worrall*, *Criminal Procedure* 2013, Pearson, p. 93

is acquired from the person who has a right to give consent according to the reasonable belief of the policeman, even if the belief proves to be incorrect. The police are only required to reasonably assess the facts before them. In the Court's opinion the reasonableness test implies: whether the facts at hand of the police at the moment of entering property for conducting a search ... would have given a ground to believe that the person giving consent has authority on the property.⁸⁷ However such belief shall be based on prior examined and established information, as well as in the case of pressing need –on the reasonableness test with regards to particular circumstances and conditions. Therefore, the aforesaid approach facilitates to permissibility of a "reasonable mistake".⁸⁸

The question is to what extent should an investigative organ examine the authority of a particular co-possessor of a particular area? Is the fact of indicating a particular person as a co-possessor in a document [E.g. a renter in a rent contract, as a lessee and etc.?] or in the testimonies of the neighbors? Or indication of the person as an owner in extract from the public registry's office and etc.? Does the statement of the possessor or the fact of having a key of the respective area⁸⁹ suffice for checking the authority? Importance shall be attached to the length of possession by the moment of requiring consent or the real content of possession and the limits of practical usage of the respective area?

Therefore, the legislation regulating the rule for giving consent by the third party is still being developed. However, while discussing this issue the main factor for the court shall be objective reasonableness. The aforesaid excludes the standard of subjective intention and requires defining to what extent would a reasonable person have believed that the person giving consent had the authority to do so and whether the search conducted by the police was in line with the consent.

REVOCATION OF THE GIVEN CONSENT

A person giving consent can revoke it or limit its scope at any moment of the search before it is completed. It can be done before starting a search or in the process of conducting it without giving any reasons. Intention of revocation shall be expressed explicitly in words, by action or through both methods [e.g. refusal to open a container or a door]. In case consent is expressed in action or both in action and words, action shall be explicitly contrary to the consent given before.⁹⁰ Nonetheless refusal to sign consent in written form after giving consent orally does not represent revocation of

⁸⁷ Ibid, p. 94

⁸⁸ *Leslie W. Abramson*, *Acing Criminal Procedure*, 3rd ed., West, 2013

⁸⁹ See. e.g. *Illinois v Rodriguez* 497, U.S.177[1990]

⁹⁰ See. e.g. *State v Smith* 782 N.W.2d 913[2010]

consent.⁹¹ In case consent is revoked before completing a search, it shall be terminated forthwith.⁹² However, any evidence obtained before revoking consent can be used for prosecution purposes.

According to paragraph 3 Article 112 “decision on search or seizure is ineffective in case the investigative action has not been started in 30 days”. However, the procedural legislation does not set the period of operating consent for conducting a search on its basis. For what period is consent effective? Does the aforesaid imply that consent is given without any time limits and envisages possibility to conduct search during several days?⁹³

As a rule consent without indicating time limit comprises implied restriction of time: a search shall start and be performed forthwith at the first reasonable opportunity. At the same time as a rule consent is of one time character and implies conferring a right to the subject conducting search to perform a search of the property in his ownership/possession only once. Accordingly in case it becomes necessary to enter the same territory again for continuing-completing a search as a rule the consent shall be requested every time of entering the territory. However, as conducting such a search depends on the subjective will of the person giving consent, in some cases it may imply conferring right to conduct a search repeatedly, which shall explicitly be indicated in consent. E.g. while conducting a search in a drugstore when all the documents, medications/storages which are of interest to the investigation cannot be searched in one day.

CONCLUSION

“The will of a person to avoid the noise of the outside world, the conditions disturbing privacy and to go to a place where one can develop and find oneself accords with the condition that “interference and restriction shall be strictly interpreted when it is connected with home”.⁹⁴

Any restriction of the right enshrined in Article 20 of the Constitution requires particularly cautious approach. On its side the aforesaid requires strict and meticulous regulation of the restriction cases as well as clarity and scrupulousness of the legislation itself.

Unfortunately, the legislation of Georgia and the respective case law with regards to giving consent does not limit the third parties e.g. – the authority of the co-owners and co-possessioners according to intensity of using particular property. The aforesaid gives opportunity to acquire consent on

⁹¹ Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, *Craig Hemmens and Rolando V. Del Carmen* (eds.), Rowman and Littlefield Publishers, 2010, p. 165

⁹² See. e.g. *United States v Ho*, 94 F.3d932[5th Cir.1996]

⁹³ *Marc L. Miller, Ronald F. Wright*, *Criminal Procedures: Cases, Statutes and executive materials*, 4th ed. Wolters Kluwer, 2011, p. 225

⁹⁴ *I. Schwabe*, *Judgments of the German Federal Constitutional Court* 2011, p 231

search through a simplified rule, even in cases when the prime user of the search object is categorically against conducting it. [e.g. on the basis of consent of the second possessor of property]. At the same time notwithstanding the fact that the third party is conferred with the right to give consent to conduct a search, additional regulation is needed for cases when co-owners/ co-possessors of an area having equal rights, who at the moment of requesting consent are in the area of which is required by investigator [e.g. in an apartment] have different positions. For example one of them explicitly expresses that he is against giving consent.⁹⁵ Despite the fact that the investigative body shall not be obliged to require permission from all the co-owners/co-possessors having equal rights, the decisive importance shall be attached to refusal of one of the co-owners/co-possessors in case he also attends the process of giving consent. The investigative body shall bear the burden of proving the reason for disregarding requirement of a person having equal rights to protect inviolability of right to respect his home and privacy and what was the reason for not restricting this right e.g. on the basis of pressing need.

The cases where the process of requesting consent to conduct a search is attended by persons having different authorities [e.g. an owner and a possessor] and one of them gives consent to conduct a search and the other refuses are not regulated. On the basis of the formulation in force at present in such cases investigative body has a right to conduct a search; however it is disputable whether the purpose of the rule for requesting consent is observed in such a case.

The legislation in force at present discusses all these cases in single headed way and establishes that in any case [notwithstanding the position of the persons having right with regards to the area and the intensity of the right of ownership/possession towards a particular area] –despite any connection with the area or attendance of the moment of requesting consent – even if there are contrary positions, it is possible to conduct a search without a court order or a resolution of an investigator, if the investigative body succeeds in obtaining consent of one of the co-owners or co-possessors.

The deficiency of the existing legal regulation poses a real risk of restricting the right to privacy guaranteed by the Constitution of Georgia and the International acts, while not envisaging any effective mechanism of appealing the legitimacy of such restriction. Even if the admissibility of the evidence obtained on the basis of such a search or the search itself will be appealed, according to the wording of the criminal procedure code in force there will be no basis for granting a motion as Article 112 of the criminal procedure code blankly indicates to co-owner, co-possessor and the party to communication and does not make the requirement to inform about the right on refusing to give consent and legitimacy of consent [voluntary and conscious nature] obligatory. Such provision in the legislation creates a possibility to manipulate the owners/possessors and confers a right to the investigative body to ignore the persons who potentially could be against giving consent.⁹⁶ The legislation in force neither provides for the following:

⁹⁵ Criminal Procedure and the Supreme Court: a Guide to the Major Decisions on Search and Seizure, Privacy and Individual Rights, *Craig Hemmens and Rolando V. Del Carmen* (eds.), Rowman and Littlefield Publishers, 2010, p.175

⁹⁶ See. e.g. *State v Ransom* 212 P.3d 203[Kan.2009]; *State v Stark* , 846 N.E2d 673[Ind.Ct.App.2006]

1. The criteria for legitimacy of the consent given by the third parties;
2. Any indication to the permissible limits of search at all;
3. Any norms regulating a rule in case of contrary positions of the persons authorized to give consent and considers it possible to conduct a search on the basis of consent given by one of the persons envisaged by Article 112 of the criminal procedure code, notwithstanding the connection intensity of the latter with the property;
4. Any limits of consent given by the third parties. It implies the possibility to give consent with regards to any area in common usage or ownership. Inter alia consent of the owner in case of transferring on the basis of a rent or lease e.g. on searching an area in usage of the tenant, which contradicts not only the case law of the European Court of Human Rights but the purpose of this Article itself.