Police Power to Stop and Search: Beyond Counterterrorist State

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Abstract

In the recent period, the countries engaged in aggressive policing strategies that included widespread and often unjustified use of stop and search measures. The range of powers granted to police for carrying out such activities, and accordingly the level of protection of the individual rights, varies considerably from country to country. These differences have related to domestic contexts, such as actuality of terrorist threats, which has led to emergence of suspicionless stop and search powers. Originally, in Anglo-American models stop and search powers were used as counterterrorist tools, however, comparative analysis illustrates that these, in form conceived to tackle terrorist threats, has transformed to general crime preventive measures. The research will compare examples of the UK and Georgia from the perspective of the standards of the European Court of Human Rights (ECHR).

The thesis is a reflection on the developments of a counter terrorist state in the context of stop and search powers. The central argument is that powers originally designated against terrorist threats, now has been normalized as a general preventive measure in the fight against regular crime. In this process, the stop and search powers have been adopted from counterterrorism legislation and brought to policing legislation with similar, and in extreme cases, with wider discretion.

Introduction

In the recent period, the countries engaged in aggressive policing strategies that included widespread and often unjustified use of stop and search measures. Police discretion in relation to stop and search powers, without sufficient safeguards, is arbitrary, endangers individual rights and freedoms and thus, affects the state-individual [state represented by police] relationships. This research does not aim to cover all types of stop and searches, it only extends to suspicionless searches in the UK and Georgia (every reference to stop and search powers hereinafter is limited accordingly). This kind of search is not a one-time measure towards concrete individuals, it more resembles declaration of a regime on a territory, during which and where, everyone has restricted rights.

The range of powers granted to police for carrying out such activities, and accordingly the level of protection of the individual rights, varies considerably from country to country. These differences have related to domestic contexts, such as actuality of terrorist threats. Originally in Anglo-American models stop and search powers were used counterterrorist tools, however, comparative analysis illustrates that these, in form conceived to tackle terrorist threats, has transformed to general crime preventive measures.[1]

The research will compare examples of the UK and Georgia from the perspective of the standards of the European Court of Human Rights (ECHR). The thesis is a reflection on the developments of a counter terrorist state in the context of stop and search powers. The central argument is that powers originally designated against terrorist threats, now has been normalized as a general

[1] Andras Sajo, From Militant Democracy to the Preventive State, Cardozo Law Review, Vol. 27, Issue 5, 2006, pp. 2265-2266

preventive measure in the fight against regular crime. In this process, the stop and search powers have been adopted from counterterrorism legislation and brought to policing legislation with similar, and in extreme cases, with wider discretion.

Point of departure in the thesis is the actuality of abuse of police powers in Georgia, namely overbroad and arbitrary use of stop and search measures in the framework of a "special police operation", which has become a subject of legitimate public criticism. Individuals have addressed the constitutional court to challenge the legal basis of these powers, which subject everybody in a specific territory to a stop and superficial search without demonstration of reasonable doubt standard and practically with no effective restrictions or safeguards. Georgia is a good example as a state with less actual challenges related to terrorism, where these special police powers are included as a kind of general preventive measures. On the other hand, U.K has had problematic practice of using stop and search powers, which was considered by ECHR in the landmark case Gillan and Quinton v. the UK. Comparative legal research will be used to address this domestic issue in a broader context, in particular, legal frameworks in the UK and Georgia will be analyzed from the perspective of European Standards.

As far as the structure is concerned, Chapter one will address developments of stop and search powers in the conceptual framework of a counterterrorist state and beyond. Chapter two will analyze relevant developments in the ECHR jurisprudence in relation to article 5 and 8 standards. In Chapter three, legislative frameworks in the UK and Georgia will be compared. Analyzing the shortcomings in legislative frameworks, the thesis will try to identify appropriate safeguards.

1. Key concepts and development of stop and search power

1.1. Police powers

In a democratic society based on the principle of the rule of law, police plays a crucial role in creating an environment within which fundamental rights and freedoms (the right to life, right to liberty and security etc.) can be enjoyed.[2] In seeking to protect the rights of its citizens, the police are takes preventive measures to protect individuals, among others by avoiding real and immediate risks.[3] While doing this, police may infringe certain individual rights of others (liberty, privacy etc.).[4] In the footsteps of scientific and technological advancement, the special operational powers and discretion in the fight against wider range of threats due to unpredictable human conduct more characteristic to modern societies have also expanded.[5] One such kind of important tool is the power to "stop and search" an individual either walking or driving a car. It includes the power to verify the identity, to question about his/her destination or to restrict freedom temporarily in order to search for illegal articles/articles used for crime. These powers are used for combating petty crimes, as well as more serious ones.[6] As a less severe measure, which does not amount to arrest, it is a means to verify suspicions about individuals without criminal procedure rules. Provided that it is exercised diligently, it can have a positive effect on the relationship between police and

[2] Jim Murdoch and Ralph Roche, The European Convention on human Rights and Policing, A handbook for police officers and other law enforcement officials, Council of Europe Publishing, 2013, p. 7, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[3] Human Rights Guidance for Police Authorities, Monitoring Compliance with the Human Rights Act 1998, Guidance from the Association of Police Authorities, 2009, p. 18

[4] Equality and Human Rights Commission, Stop and think: A Critical Review of the Use of Stop and Search Powers in England and Wales, 01 Mar 2010, https://www.equalityhumanrights.com/en/publication-download/stop-and-think-critical-review-use-stop-and-search-powers-england-and-wales, p. 3

[5] Jim Murdoch and Ralph Roche, The European Convention on human Rights and Policing, A Handbook for Police Officers and Other Law Enforcement Officials, Council of Europe Publishing, 2013, p. 7, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[6] Without Suspicion: Stop and Search under the Terrorism Act 2000, Human Rights Watch, 2010, p. 6, available at: https://www.hrw.org/sites/default/files/reports/uk0710webwcover.pdf

community, also may create feeling of security.[7] However, recently these powers have lost its reactive nature and become increasingly preemptive.[8]

Suspicionless stop and search is associated with the concept of preventive state - specific form of paternalistic welfare state that is directed against non-political security threats[9] and acts as a "preventer of crime and disorder generally"[10]. Such state has reflected the move from having reactive policies focusing on crimes which already happened towards precautionary strategies that aim to detect potential threats and react before it has been committed.[11]

1.2. Counterterrorist state

The tendency to base criminal justice system on assumptions of risk has become visible before 2001 (9/11), however the emergence of a new threat of "terrorism" gave this concept more flesh. In this vein, the United States President George W. Bush suggested confronting threats prior to their occurrence.[12] Merging the concept of preventive state with the "militant democracy"[13] model

[7] Giles A Barrett, Samantha MG Fletcher and Tina G Patel, Black minority ethnic communities and levels of satisfaction with policing: Findings from a study in the north of England, Criminology & Criminal Justice 2014, Vol. 14(2), p. 209

[8] Jude McCulloch and Sharon Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror, British Journal of Criminology, Vol. 49, Issue 5, 2009, p. 629

[9] Andras Sajo, From Militant Democracy to the Preventive State, Cardozo Law Review, Vol. 27, Issue 5, 2006, p. 2266

[10] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 440

[11] Jude McCulloch and Sharon Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror, British Journal of Criminology, Vol. 49, Issue 5, 2009, pp. 628-629, see also p. 640

[12] Ibid. pp. 628-629

[13] Militant democracy is constitutionally legitimized departure from "ordinary" constitutionalism, which aims to protect democracy from non-democratic groups, particularly by adopting prohibitive norms against totalitarian ideologies. Because of the intimate relation between terror and fundamentalist political movements, it is to make parallels among these two forms of deviation from constitutionalism. See in: Andras Sajo, From Militant Democracy to the Preventive State, Cardozo Law Review, Vol. 27, Issue 5, March 2006, p. 2255; Vakhushti Menabde, Counterterrorist State - Modern Emergency and Fate of Transitional Democracy in Light of Georgian Example, Konstantin Korkelia (ed.), National and International Mechanisms of Protection of Human Rights, Tbilisi, 2016, pp. 20-22

changed its still limited[14] form and aims and became the justification for undermining and denying civil liberties. Thus, wartime or emergency powers were adapted to everyday life use ("normalcy"[15]).[16] The merger of these two concepts creates the most severe threat to the democratic process in the form of a counterterrorist state. Contrary to original crime prevention model, counter-terrorism measures proactively assume what crimes may be committed and then target those who may execute these potential crimes, while disregarding more comprehensive aspects of crime and offending generally (e.g. social and environmental causes).[17] The justification for changing the approach is that terrorist incidents pose a major threat to core human rights (rights to life, physical integrity, etc.) therefor implying that previous methods are "unreasonable and unaffordable".[18] It is undeniable that in times of terrorism, the need for security in societies grows, however additional pre-emptive police measures adopted in the name of security creates an obvious tension between the rights and freedoms of all individuals and the security of the overall society.[19]

[14] "The magnitude of restrictions in a counter-terror state far exceeds those measures contained in the toolkit of militant democracy which is a party (movement) and election-centered concept. In a counter-terror state, the uncertainty regarding the occurrence of an attack is greater and different. At the same time, at least in the operative stage of counter-terror measures, the restrictions on freedoms are much less prone to public discussion." – see in András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 441

[15] "Exceptional powers become routine and normalized" – see in: Alpa Parmar, Stop and Search in London: Counter-terrorist or Counterproductive?, Policing and Society, 21:4, 2011, p. 376

[16] Andras Sajo, From Militant Democracy to the Preventive State, Cardozo Law Review, Vol. 27, Issue 5, March 2006, p. 2261; see also: Jude McCulloch and Sharon Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror, British Journal of Criminology, Vol. 49, Issue 5, 2009, p. 637; Alpa Parmar, Stop and Search in London: Counter-terrorist or Counterproductive?, Policing and Society, 21:4, 2011, p. 376

[17] Jude McCulloch and Sharon Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror, British Journal of Criminology, Vol. 49, Issue 5, 2009, p. 629

[18] Ibid. p. 640

[19] Christina Binder, Liberty versus Security: A Human Rights Perspective in Times of Terrorism, Anuario Espanol de Derecho Internacional, Vol. 34, 2018, pp. 575-576, see also: Paul Quinton, The Formation of Suspicions: Police Stop and Search Practices in England and Wales, Policing and Society, 21:4, 2011, p. 357; Office of the United Nations High Commissioner for Human Rights, Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32, p. 1

This development is a huge threat to liberty – the groups threatening democracy by terrorist acts are not easily identified, therefore, it applies "coercive measures before the fact" on everybody[20] until the absence of a concrete connection with terrorism is not proven, while the standards of constitutionality (or at least permissibility) of these measures disappear.[21] This is the shift of presumption of innocence and clearly the opposite of the fundamental assumption of ordered liberty.[22] Other consequence that follows from implementing preventive approach contrary to reactive criminal justice policies is the increased possibility of ethnic or racial profiling, which is prone to become more widespread while using special police measures.[23] As the developments after 9/11 counterterrorist policies show, ethnic profiling has become a "common-sense response" to national security threats.[24]

Such kind of vague boundaries opens door to fishing expeditions through secret surveillance measures, stop and search, etc. Experience of using secret surveillance measures shows that the measures originally designated for the fight against terrorism are now used against ordinary citizens, hoping that it will uncover crimes, as a rule of a minor nature.[25] Frequently, stop and search powers are used to gain intelligence, or more generally for "social control".[26] Then, the security of the government understood as state security substitutes individual security. This conflicts with the vision of constitutionalism built on suspicion about accumulated government

[20] Andras Sajo, From Militant Democracy to the Preventive State, Cardozo Law Review, Vol. 27, Issue 5, March 2006, p. 2269

[21] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 440

[22] Andras Sajo, From Militant Democracy to the Preventive State, Cardozo Law Review, Vol. 27, Issue 5, March 2006, p. 2291

[23] Daniel Moeckli, Stop and Search under the Terrorism Act 2000: A Comment on R (Gillian) v Commissioner of Police for the Metropolis, Modern Law Review, Vol. 70, Issue 4, 2007, p. 669

[24] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, pp. 745-755

[25] Tom Sorell, Preventive Policing, Surveillance and European Counter-Terrorism, Criminal Justice Ethics, Vol. 30, No. 1, 2011, pp. 9-10

[26] Ben Bowling and Coretta Phillips, Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search, Modern Law Review, Vol. 70, Issue 6, 2007, p. 938

power and the belief that all men, including good men will have basis to fear exercises of this power.[27] In this scenario, counterterrorism laws themselves threaten democracy.[28]

Counter terrorist state like militant democracy, ridicules constitutional democracy as a platform of rational political deliberation that seeks to replace it with political emotionalism.[29] To make parallels, draconian measures to deal with street crime adopted from counterterrorist state models contains the features of populism. The public expects the government to guarantee social security on a preventive basis and seems to be increasingly ready to trade freedom for a promise of security.[30] On the other hand, counter-terrorist approach gives the appearance of a bold action and the illusion of greater control over criminal activity, by which government seeks the support of the public. Directing the preventive measures towards minor crimes also is an attempt to show the public that the police are interested in community problems reflected in minor and widespread crimes.[31]

The methods used in the fight against terrorism, are not a historical novelty, but the novelty is that crossing the boundary line has become an ordinary event.[32] What is accepted in the terrorism context, shall not travel to the domain of general preventive state. The special problem is that the intelligence collected by such kind of preventive measures are often used for criminal justice

[27] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 441

[28] Sabrina Engelmann, Barking Up the Wrong Tree: Why Counterterrorism Cannot Be a Defense of Democracy, Democracy and Security, 8:2, 2012, pp. 168-169

[29] Andras Sajo, From Militant Democracy to the Preventive State, Cardozo Law Review, Vol. 27, Issue 5, March 2006, p. 2264; see also: András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 435

[30] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 440

[31] Tom Sorell, Preventive Policing, Surveillance and European Counter-Terrorism, Criminal Justice Ethics, Vol. 30, No. 1, 2011, p. 3

[32] Vakhushti Menabde, Counterterrorist State - Modern Emergency and Fate of Transitional Democracy in Light of Georgian Example, Konstantin Korkelia (ed.), National and International Mechanisms of Protection of Human Rights, Tbilisi, 2016, p. 132

purposes. Once a measure can be couched in terms of being preventive and administrative, once gained elevated protection against criminal punishment becomes inapplicable.[33]

The police have faced and needs to continue to face certain limitation in the fight against terrorism.[34] Stop and search, even outside the context of a counterterrorist state, indeed has been an area, in which the need for constant control and oversight is recognized. Because of the fact that the stop and search measure is applied by the individual police officer without the oversight of the supervisors it is very difficult to control it.[35] Therefore, one example of a necessary control is the requirement to have a legal justification, such as reasonable doubt before the measures are taken, and in a broader sense to make sure that these measures are rational, proportionate.[36] This limitations guarantee that potential positive outcomes will not be tainted by loss of public confidence and that the latter will not reduce the potential for positive outcomes.[37]

In the face of these challenges, to protect avoid arbitrariness, especially in the context of stop and search powers as part of a counterterrorist state, constitutionalists recognize the outstanding role of political checks. However, potential of political check is diminished because of the party discipline, as opposing the executive's decision to enhance security by adopting additional measures, especially to react to a terrorist attack which happened prior to this decision is highly

[33] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 440

[34] Cormac Mac Amhlaigh, Revisiting the Rule of Law under the European Convention of Human Rights: Gillan and Quinton v The United Kingdom, University of Edinburgh School of Law, Working Paper Series, No. 2010/24, 2010, p. 7, available at: http://ssrn.com/abstract=1649995

[35] Genevieve Lennon, Stop and Search Powers in UK Terrorism Investigations: A Limited Judicial Oversight?, The International Journal of Human Rights, Vol. 20, No. 5, 2016, p. 634

[36] Equality and Human Rights Commission, Stop and think: A critical review of the use of stop and search powers in England and Wales, 2010, https://www.equalityhumanrights.com/en/publication-download/stop-and-think-critical-review-use-stop-and-search-powers-england-and-wales, p. 3

[37] The report of the Advisory Group on Stop and Search Chaired by John Scott, Q.C., Solicitor-Advocate, Convenor, Howard League Scotland To Michael Matheson, MSP, Cabinet Secretary for Justice, August 2015, p. 13, http://www.statewatch.org/news/2017/may/scotland-stop-and-search-advisory-group-report-8-15.pdf

unpopular and unexpected.[38] An illustration of this would be the swift and not deliberated decisions to pass, by a unanimous vote in the Senate and with one sole objection in the House of Representatives, far-reaching presidential anti-terror measures three days after the attack on the Twin Towers, and later adopt the legal framework known as the USA PATRIOT ACT, roughly six weeks after the attacks.[39] In addition, due to the nature and purpose of relevant powers - to operate in conditions of uncertainty, preventive measures require more vague drafting from the legislature, at the same time granting inevitable discretion to the police officer.[40]

Therefore, some scholars hold that judicial review is the only tool for objective evaluation of counterterrorism measures.[41] The primary responsibility to define the boundaries of governmental actions to comply with the human rights obligations rests with judicial branch, even when these actions relate to terrorism.[42] On the other hand, courts' capacity to rule depends on the individual's decision to initiates legal proceedings.[43] As a rule, stop and search powers are reviewed by the court only after it is imposed on a concrete individual. Because of the wider discretion granted to the police in its preventive activities, the scrutiny is not as robust as in criminal proceedings.[44] Because on the one hand, this branch may not have data relating to the necessity of counter-terrorism measures or possible threats and on the other hand, weak legitimacy results in less

[38] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p.756

[39] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 442

[40] Genevieve Lennon, Stop and Search Powers in UK Terrorism Investigations: A Limited Judicial Oversight?, The International Journal of Human Rights, Vol. 20, No. 5, 2016, p. 642

[41] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 755

[42] Daniel Moeckli, Stop and Search under the Terrorism Act 2000: A Comment on R (Gillian) v Commissioner of Police for the Metropolis, Modern Law Review, Vol. 70, Issue 4, 2007, p. 669

[43] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 756

[44] Bérénice Boutin, Administrative Measures in Counter-terrorism and the Protection of Human Rights, Security and Human Rights, Vol. 27, Issue 1-2, 2016, p. 145

effective and strict judicial review.[45] That security issues belong to the province of the executive government and arena of political deliberation and are less characterized as judicial matters is obvious. However, experience shows that with time and more exposure to risks and defects related to ever expanding counter terrorist state, courts may depart from deferential inclinations and grasp the momentum to step in.[46] Example of such "major departure" has been the case Public Committee Against Torture in Israel v. State of Israel, considered by the Israeli Supreme Court, after previous deference to the interrogation practices used by the security forces (GSS) in the occupied territories.[47] Similar process may be discerned from Hamdi v. Rumsfeld to Boumediene v. Bush, in which the Supreme Court "was ready" to say that removing the jurisdiction of the federal courts to hear habeas petitions from Guantanamo detainees, would only be permissible if it was substituted with an appropriate alternative safeguard.[48] Indeed, when the political process displays an institutional failure, namely it is not capable of providing a proper venue for deliberation, which it is designated for, then the only branch to respond to this process, and maybe even trigger public deliberation once again, is the judiciary.

1.3. Transformation of stop and search beyond counterterrorist state

In the UK adopting stop and search powers is directly linked to terrorist threats. The United Kingdom has a history of fighting terrorism on its own territory. The English legislature has adopted counter-terrorist measures in the fight against the Irish Republican Army starting from

[45] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 756

[46] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, pp. 442-443

[47] Ibid. p. 442

[48] Ibid. pp. 443-444

1922. For instance, emergency legislation in those years concerned internment and preventive detention.[49] After the Birmingham pub bombings on 21 November 1974, in the UK the police was granted wide discretion of arrest and border security checks by first Prevention of Terrorism (Temporary Provisions) Act.[50] Through amendments of 1994 and 1996 to the said law, powers of supsicionless stop and search was added in the aftermath of terrorist attacks (car bombings). In 1996 Lord Lloyd in his report on counter-terrorism legislation noted importance of stop and search power and recommended their inclusion in permanent counterterrorism legislation.[51] Based on this recommendation, the Terrorism Act 2000 incorporated all the above anti-terrorism powers into a unified and permanent code intended to increase and improve the ability of law enforcement agencies to prevent terrorist activity and provide the police with a wider discretion as to how, when, and against whom to use these powers.[52] Thus, powers that "were once viewed as exceptional and temporary have become permanent and unexceptional".[53] Whilst this act was built on previous anti-terror laws, it was the first time that such legislation took a direct account of human rights following the adoption of the Human Rights Act in 1998. A key police power under Section 44, which allowed a senior police officer to issue an authorization for the use of stop and search powers within a defined area if she/he thinks it "expedient for the prevention of acts of terrorism", illustrates this clash between security and individual rights.[54]

[49] Elies van Sliedregt, European Approaches to Fighting Terrorism, Duke Journal of Comparative & International Law, Vol. 20, Issue 3, 2010, p. 422

[50] David Anderson, The Independent Review of Uk Terrorism Law, New Journal of European Criminal Law 5, no. 4, 2014, p. 432

[51] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 730

[52] David Anderson, The Independent Review of Uk Terrorism Law, New Journal of European Criminal Law 5, no. 4, 2014, p. 433

[53] Richard A. Edwards, Stop and Search, Terrorism and the Human Rights Deficit, Common Law World Review, Vol. 37, Issue 3, 2008, p. 212

[54] Fiona Donson, Introductory Note to European Court of Human Rights: Gillan & Quinton v. United Kingdom - Decision Regarding Stop and Search Powers under U.K. Anti-Terrorism Legislation, International Legal Materials 49, no. 2, 2010, p. 321

Special counterterrorism powers increased even more after the attacks of 11 September 2001. It is true that that the Terrorism Act 2000 already envisaged power of suspicionless stop and searches, however, since 2001 such authorizations increased to an unprecedented scale. This increase illustrated a similar shift that to the model used in the US, when anti-terrorism policing, instead of reactive to specific threats had become increasingly preventive.[55]

In parallel, examples from different countries show that "stop and search powers" lose its primary function to be used for preventing grave breaches of law, such as terrorism. The traits of this trend are also visible in the UK. During the recent decades the powers were used in nearly every police authority area of the country. Moreover, powers were used in a way that the entire area of Greater London was subjected to searches on a "rolling basis", that is authorizations were continuously renewed so that the powers operated over a number of years.[56]

Thus, stop and search police powers, even where it started as a counterterrorist measure, are not any more limited to the functions of a counterterrorist state. Georgia is a good example of this transformation as a state with less actual challenges related to terrorism, however new law of Georgia "on Police" was adopted by parliament in 2013, which established the opportunity to use this power despite the gravity of the expected crime. Overall, practice shows that the authority now is more and more used to tackle petty crimes. This means that polices more often takes preventive measures to fight crime and meets set goals of general crime prevention.[57]

[55] Daniel Moeckli, Stop and Search under the Terrorism Act 2000: A Comment on R (Gillian) v Commissioner of Police for the Metropolis, Modern Law Review, Vol. 70, Issue 4, 2007, pp. 659-660

[56] Fiona Donson, Introductory Note to European Court of Human Rights: Gillan & Quinton v. United Kingdom - Decision Regarding Stop and Search Powers under U.K. Anti-Terrorism Legislation, International Legal Materials 49, no. 2, 2010, pp. 321-322

[57] Elies van Sliedregt, European Approaches to Fighting Terrorism, Duke Journal of Comparative & International Law, Vol. 20, Issue 3, 2010, p. 426

1.4. Conclusion

As scholars characterize it, counter-terrorist policies implemented by the government reproduce terror, now experienced by the whole society. This means that law becomes a tool of reproduction of terror. In the context of police powers, it establishes a "continuum with stop and search at one end and shoot to kill practices at the other extreme". [58] Therefore, we can say that the preventive measures introduced to enhance security, in reality destabilizes it, with most suspicion directed to minority groups.[59] Counter-terrorism measures, namely those adopted as a result of 2001 attacks in the United States, have seen transformation of criminal justice system, in which a dividing line between The scope of domestic criminal justice and general national security faded.[60] This process resembled previous developments, such as wars on drugs, organized crimes and zero tolerance policies. These predecessors and related political technologies have then shaped a favorable platform for the war on terror. This totality of internal and external threats with the presumed need to have a similarly all-encompassing response in the form of a war, implied involvement of all visions of state, including the preventive one and accordingly, meant increased police powers.[61]

It is hard to formulate a final solution to this dynamic process. Some scholars have suggested that emergency powers and like powers are better understood as suspension of the judicial order or as an extra- or supra-constitutional by nature to save the premises of constitutionalism and the rule of law.[62] However, it is also clear that yet, we do not have a better tool to constrain unreasonable

[58] Christina Pantazis and Simon Pemberton, From the Old to the New Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation, British Journal of Criminology, Vol. 49, Issue 5, 2009, p. 654

[59] Ibid.

[60] Jude McCulloch and Sharon Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror, British Journal of Criminology, Vol. 49, Issue 5, 2009, p. 640

[61] Jude McCulloch and Sharon Pickering, Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror, British Journal of Criminology, Vol. 49, Issue 5, 2009, p. 638

[62] András Sajó and Renáta Uitz, Constitutions Under Stress, in "The Constitution of Freedom: An Introduction to Legal Constitutionalism", Oxford: Oxford University Press, 2017, p. 417

politics, than the tools of legal constitutionalism. More focus has to be directed to adapting the current constitutional models to these new phenomena and challenges, that threaten the purposes that traditional legal constitutionalism was capable of accomplishing.[63]

In Europe, accountability before the law has to be observed in terms of complying both with domestic and European standards. As a response to the potential of abuses by the police equipped with these new modified powers, the principle underlying Convention that fundamental objective of policing is protection of human rights has to be recalled.[64] To analyze the prospects of European guarantees in curbing these scary developments in preventive police powers, minimum standards established by the ECHR will be discussed in the next chapter.

[63] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 755

[64] Jim Murdoch and Ralph Roche, The European Convention on human Rights and Policing, A Handbook for Police Officers and Other Law Enforcement Officials, Council of Europe Publishing, 2013, p. 10, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

2. Standards of European Court of Human Rights

The European Court of Human Rights, in its capacity as a supervisory body over compliance with human rights obligations set by the Convention for member states,[65] protects individuals from arbitrary coercive power of the state by balancing, among others public goals such as security and public order vis a vis individual freedom. The idea that powers exercised by the state, including investigative and preventive powers, shall be based in law and not be more than necessary, is an expression of the rule of law and accountability principle. In this context, authorization of stop and search police powers in a defined territorial unit (territoriality principle), because of its potential of arbitrariness, reversed presumption of liberty, and conflicted with fundamental rights, namely right to liberty and right to private life.[66]

As true for all qualified rights, including the above mentioned, the Convention sets out conditions under which the restrictions will be justified (provided for by law, legitimate aim, proportionality). For the court's determination of a violation, nature of the right, potential of arbitrariness in the power and existence of safeguards, will matter.[67] Before moving on to particular ECHR standards behind the specific rights, legality principle, as a component of rule of law relevant to restriction of any qualified right, will be discussed.

[65] International Standards and Decisions From the European Systems, Case digests, Open Society Foundations, November 2013, p. 8, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

[66] Jim Murdoch and Ralph Roche, The European Convention on Human Rights and Policing, A handbook for Police Officers and Other Law Enforcement Officials, Council of Europe Publishing, 2013, p. 42, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[67] Christina Binder, Liberty versus Security: A Human Rights Perspective in Times of Terrorism, Anuario Espanol de Derecho Internacional 575, Vol. 34, 2018, pp. 588-589

2.1. Rule of law: prescribed by law and substantive legality

Although ECHR recognizes primary role of the national courts to interpret and apply domestic law, the Convention does maintain its power over the "quality" of the laws, namely the power to disregard its formal existence, as long as it conflicts with substantive requirements, such as rule of law principle proclaimed in the preamble of the Convention. This power is derived from the requirement of the Convention that interferences with rights have to be "in accordance with the law". Thus, a finding that interference with rights is not "in accordance with the law" is a sufficient ground for determining that there has been a violation of the Convention.[68] "Lawfulness" seems to represent the initial and basic scrutiny over the arbitrariness and proportionality of an interference. It is true that many more arbitrary reasons will not survive when they are not explicitly provided in a published, accessible law. This also expresses the idea that certain issues, such is human rights of an individual, have to be resolved in legislation, rather than administrative decisions. This also bears relation to a general idea of separation of powers, namely that a legislative has to be an effective check on the operation of the administration. This point is well illustrated in the case Timishev v. Russia[69], in which a person was prevented from crossing the border, based on an instruction to stop "Chechens", leading to court's conclusion that it was impermissible, because it was not based on a pre-existing laws to restrict rights of movement of Chechens, and that this constituted a specific form of arbitrariness, namely discrimination of a person.[70] The seemingly formal requirement related to existence of domestic law, as already noted extends to substantive standards for domestic laws to be accepted by the European Court.[71] These

[68] Katayoun Baghai, Privacy as a Human Right: A Sociological Theory, Sociology 46(5), 2012, p. 960

[69] Timishev v. Russia, nos. 55762/00 and 55974/00, ECHR 2005-XII

[70] International Standards and Decisions From the European Systems, Case digests, Open Society Foundations, November 2013, p. 27, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

[71] Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, Council of Europe, Updated on 31 December 2018, pp. 11-12, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

standards equally apply to rules of a lower hierarchy or judicial interpretation attached to a particular norm. This approach resembles the rationale behind the doctrine of "autonomous concepts"[72], based on which ECHR does not have to blindly except domestic classification, including the one that recognizes a rule as law in the domestic system.[73]

The substantive standards recognized by the ECHR can be summarized as requirements of clarity, foreseeability and accessibility. Foreseeability both relates to individuals' ability to act in accordance with the law, as well as determines the boundaries of state discretion.[74] The law has to specify the circumstances which allow authorities to take measures interfering with the rights of individuals.[75] Such limitation of the discretion prevents arbitrary interference. For instance, any provision which is not clear and overbroad and may cause confusion will fall short of the substantive requirement. However, absolute certainty is not expected.[76]

It is also important that based on the ECHR, "quality of law" will depend on the content of the law, the sphere it covers, and to what circle of persons it targets.[77] In Malone v the United Kingdom[78], where state powers of somewhat similar potential of arbitrariness as stop and search were at stake, the ECHR found that the scope and manner in which communications could be intercepted were not sufficiently clear, which deprived the law necessary "quality" and contradicted the rule of law.[79] Political expediency may make large-scale surveillance appealing

[72] See: George Letsas, Autonomous Concepts, Conventionalism, and Judicial Discretion. In (Ed.), A Theory of Interpretation of the European Convention on Human Rights, Oxford University Press, 2007

[73] Monica Macovei, The Right to Liberty and Security of the Person, A Guide to the Implementation of Article 5 of the European Convention on Human Rights, Human Rights Handbooks, No. 5, Council of Europe, 2002, p. 12

[74] Shimovolos v. Russia, no. 30194/09, § 68, 21 June 2011

[75] Fernández Martínez v. Spain [GC], no. 56030/07, § 117, ECHR 2014

[76] Katayoun Baghai, Privacy as a Human Right: A Sociological Theory, Sociology 46(5), 2012, p. 960

[77] Gillan and Quinton v. the United Kingdom, no. 4158/05, §77, ECHR 2010

[78] Malone v. the United Kingdom, 2 August 1984, Series A no. 82

[79] Jim Murdoch and Ralph Roche, The European Convention on Human Rights and Policing, A Handbook for Police Officers and Other Law Enforcement Officials, Council of Europe Publishing, 2013, p. 70, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

for the state authorities dealing with urgent and difficult security challenges, however this will be the precise rationale for limiting it.[80] In Rotaru v Romania, ECHR held that "since the implementation in practice of measures of secret surveillance of communications is not open to scrutiny …, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of unfettered power".[81]

These cases indicate two things, first that rule of law requires, that legislation concerning spheres characterized by elevated state interest susceptible to political expediency, has to satisfy higher standards to be considered law in the first place and that this will be the case despite the importance of the state interest involved. Because stop and search powers are a sphere to be characterized this way, namely because it has tendency to be governed by political expediency and the decision whether to stop and search is predominantly subjective, Convention requirements for laws regulating it will be stricter. Precisely for this reason, in the landmark Gillan case discussed below in more details, the ECHR required not only that the law is clear and precise, but that it effectively limits the relevant discretion of all public figures involved, including the individual officers entrusted with power to implement the measure on the ground.[82]

2.2. Right to liberty

This section aims to present general principles related to the right to liberty relevant to police identity checks or stop and searches. In practice, police stops vary, it can be very short or relatively longer, it can also lead to lengthy detentions in the street during which the person is subject to

[80] Jim Murdoch and Ralph Roche, The European Convention on Human Rights and Policing, A Handbook for Police Officers and Other Law Enforcement Officials, Council of Europe Publishing, 2013, p. 72, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[81] Rotaru v. Romania [GC], no. 28341/95, § 55, ECHR 2000-V

[82] Cormac Mac Amhlaigh, Revisiting the Rule of Law under the European Convention of Human Rights: Gillan and Quinton v The United Kingdom University of Edinburgh School of Law, Working Paper Series, No. 2010/24, 2010, p. 6, available at: http://ssrn.com/abstract=1649995

searches, identity checks and questioning. Even outside formal detention, it is clear that liberty is at stake, when persons are not free to go without the permission of the officer.[83]

"Right to liberty and security of person" under article 5 covers physical liberty of the person and in the specific subsections provides a non-exhaustive list of circumstances when the deprivation of liberty will be permissible. Specifying such circumstances, the Convention also provides complementary rights, for instance judicial review of detentions under article 5-1 (c).[84]

It has to be explained from the outset that terms, such as "deprivation of liberty", "arrest" and "detention", "freedom of movement" are so-called autonomous concepts.[85]The protection under article 5 does not extend to mere restrictions on liberty of movement,[86] which is governed by Article 2 of Protocol No. 4 and is meant to guarantee a person's right to liberty of movement within a territory and to leave that territory.[87] As scholars point out, the distinction between the two provisions seems to be that art.5 is "an extreme form of restriction upon freedom of movement".[88] As for freedom of movement, prior jurisprudence has found that though mere police identity checks by themselves may not constitute a restriction on liberty of movement, they could constitute such a restriction where there are "special circumstances" related to the stop.[89] Special circumstances have not been defined. However, it was in the context of freedom of movement that

[83] International Standards and Decisions From the European Systems, Case digests, Open Society Foundations, November 2013, p. 9, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

[84] Jim Murdoch and Ralph Roche, The European Convention on Human Rights and Policing, A handbook for Police Officers and Other Law Enforcement Officials, Council of Europe Publishing, 2013, p. 45, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[85] Ibid, p. 47; see also: Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, Council of Europe, Updated on 31 December 2018, p. 8, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

[86] Engel and Others v. the Netherlands, 8 June 1976, § 58, Series A no. 22

[87] Baumann v. France, no. 33592/96, §61, ECHR 2001-V

[88] Harris, O'Boyle and Warbrick cited in Richard Stone, Deprivation of Liberty: The Scope of Article 5 of the European Convention of Human Rights, European Human Rights Law Review, 2012 (1), pp. 47-48

[89] Filip Reyntjens v. Belgium, ECommHR, Decision of 9 September 1992, par.153

the ECHR issued merit judgment on ethnic profiling, finding a discriminatory violation of the right to freedom of movement where a person was stopped at a checkpoint based on an oral order to prevent anyone of Chechen origin from passing. Thus, an arguable showing that the stops are "based exclusively or to a decisive extent on a person's ethnic origin" could amount to such a "special circumstance."[90] Here, the widespread pattern of discriminatory identity checks and the awareness amongst young men from visible minorities that they may be checked affects their movement on a daily basis.[91] Nevertheless, despite the delineation of the scopes of right to liberty and freedom of movement, the ECHR explains that the "distinction between a deprivation of, and a restriction upon, liberty is merely one of degree and not one of nature or substance".[92]

Deprivation of liberty is not mere restriction of freedom of movement, nor does it have to necessarily constitute detention following arrest or conviction. It can be manifested in various forms,[93] including stop and search powers by police officers. This topic is precisely the main concern of the thesis, and accordingly below analysis will only point out standards relevant to stop and search powers.

It is important to analyze when article 5 will be invoked, namely when will the inconvenience caused by stop and search powers will be regarded as a deprivation of liberty.[94] For this

[90] Timishev v. Russia, nos. 55762/00 and 55974/00, §§ 57-58, ECHR 2005-XII

[91] Open Society Justice Initiative, Equality Betrayed: the Impact of Ethnic Profiling in France, September 2013, p.13, https://www.opensocietyfoundations.org/reports/equality-betrayed-impactethnic-profiling-france

[92] International Standards and Decisions from the European Systems, Case digests, Open Society Foundations, November 2013, p. 8, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

[93] Guzzardi v. Italy, 6 November 1980, § 95, Series A no. 39

[94] Monica Macovei, The right to liberty and security of the person, A guide to the implementation of article 5 of the European Convention on Human Rights, Human rights handbooks, No. 5, Council of Europe, 2002, p. 17

determination, the ECHR will consider the concrete situation, context and criteria such as "the type, duration, effects and manner of implementation of the measure in question".[95]

Deprivation of liberty has objective and subjective elements, which relate to the fact of confinement and absence of consent to this fact respectively. [96] In assessing whether liberty was deprived, as a rule, relevant factors, such as possibility to leave the place of confinement, the degree of control over the person's freedom to move and of isolation, are considered.[97] The short length of detention[98], absence of physical restraints such as handcuffs[99], does not necessarily rule out that deprivation of liberty took place. The degree of compulsion will be a significant consideration. Despite short duration of the detention, including for the duration necessary for completing certain formalities (which as a rule does not amount to deprivation of liberty)[100], "element of coercion" can lead to deprivation of liberty.[101]

In the landmark Gillan case apart from uncontested relevance of article 8 (discussed below in details), the ECHR did not omit to elaborate on the interpretation of deprivation of liberty and the relevance of "element of coercion" discussed in previous cases. The ECHR observed that even though neither applicants' stop and search lasted longer than 30 minutes, both of them "were entirely deprived of any freedom of movement" during the police conduct and "were obliged to remain where they were and submit to the search," otherwise they could have faced arrest, detention and criminal charges.[102] The ECHR stated that "[t]his element of coercion [was]

[95] International standards and decisions from the European Systems, Case digests, Open Society Foundations, November 2013, p. 8, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

[96] Storck v. Germany, no. 61603/00, § 74, ECHR 2005-V

[97] Guzzardi v. Italy, 6 November 1980, § 95, Series A no. 39

[98] Rantsev v. Cyprus and Russia, no. 25965/04, § 317, ECHR 2010

[99] M.A. v. Cyprus, no. 41872/10, § 193, ECHR 2013

[100] Foka v. Turkey, no. 28940/95, §§75-79, 24 June 2008

[101] Gillan and Quinton v. the United Kingdom, no. 4158/05, § 57, ECHR 2010

[102] Ibid.

indicative of a deprivation of liberty" under Article 5(1)". This was different from searches of passengers at airports, for instance, as passengers might be seen as giving advance consent to searches, whereas in this case the police had the powers to stop people "anywhere and at any time, without notice and without any choice as to whether or not to submit to a search".[103]

The underlying reasons why authorities decide to deprive individuals of their liberty does not determine whether deprivation of liberty has taken place. These factors, as a rule, are considered at a later stage, when it is examined whether the measures comply with Article 5 § 1.[104] However, in X v Federal Republic of Germany[105], the court held that liberty was not deprived when school students were questioned in a police station for two hours to obtain information from them about minor crime because the objective was collection of information rather than restriction of freedom. This similar tendency of integrating the analysis of a proper purpose into the determination of the scope of liberty was demonstrated in the case Austin v UK[106]. The ECHR in this case found the use of the "kittling" tactic during the demonstration over a period of several hours outside the scope of article 5 protection considering the context and purpose of such measure.[107] In the court's words, context matters, "since situations commonly occur in modern society where the public may be called on to endure restrictions on liberty" for the community interests.[108]

The key rationale behind Article 5 is prevention of arbitrary or unjustified deprivations of liberty, which is not limited to conformity with national law.[109] This points to a presumption of liberty,

[103] Gillan and Quinton v. the United Kingdom, no. 4158/05, § 64, ECHR 2010

[104] Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, Council of Europe, Updated on 31 December 2018, p. 9, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

[105] X v Federal Republic of Germany, no 4653/701, April 1970 [ECtHR]

[106] Austin and Others v. the United Kingdom [GC], nos. 39692/09 and 2 others, ECHR 2012

[107] Richard Stone, Deprivation of liberty: the scope of article 5 of the European Convention of Human Rights, European Human Rights Law Review, 2012 (1), pp. 52-53

[108] Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, Council of Europe, p. 8, Updated on 31 December 2018, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

[109] Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, Council of Europe, p. 13, Updated on 31 December 2018, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

namely that nobody shall be deprived of it, other than in exceptional circumstances[110] for no longer than is absolutely necessary, where other, less severe measures are insufficient to safeguard the relevant legitimate interest,[111] meaning that the burden of proof will rest with the officials taking away liberty. In terms of specific permitted instances of deprivation of liberty under subsections of article 5, this means that more is required than the fact that deprivation of liberty falls within one of the grounds specified in Article 5, namely that it was necessary and non-arbitrary.[112]

2.3. Right to private life

"Private life" under article 8 at minimum, covers personal autonomy, physical and psychological integrity of a person, and their "interaction with other persons in a public context".[113] It is not contested that stop and search, at least where an element of coercion is present, and it is not explicitly or implicitly consented, constitutes an interference with the person's private life. Also, it is held that the "element of humiliation" which may be part of a public search may, in certain cases, indicate the seriousness of the interference.[114] In turn, the states are granted certain margin of appreciation when the measures are claimed to pursue security and public safety purposes.

While the former European Commission of Human Rights did not find that a routine identity check was an interference with private life, the European Court of Human Rights has not addressed this

[110] Monica Macovei, The right to liberty and security of the person, A guide to the implementation of article 5 of the European Convention on Human Rights, Human rights handbooks, No. 5, Council of Europe, 2002, p. 8

[111] Jim Murdoch and Ralph Roche, The European Convention on human Rights and Policing, A handbook for police officers and other law enforcement officials, Council of Europe Publishing, 2013, pp. 58, available at: https://www.echr.coe.int/Documents/Handbook_European_Convention_Police_ENG.pdf

[112] Monica Macovei, The right to liberty and security of the person, A guide to the implementation of article 5 of the European Convention on Human Rights, Human rights handbooks, No. 5, Council of Europe, 2002, p. 8

[113] International standards and decisions from the European Systems, Case digests, Open Society Foundations, November 2013, pp. 12-17, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

[114] Gillan and Quinton v. the United Kingdom, no. 4158/05, par. 63, ECHR 2010

question directly and has held that an associated search will be an interference with private life (at least when there is an element of coercion, and especially when conducted in public).[115]

The ECHR has emphasized that whenever discretion with the potential of infringing a human right is involved, it will pay particular attention to availability of procedural safeguards within the set legislative or policy framework to determine if margin of appreciation was overstepped.[116]

2.4. Individual failure to comply with police instructions

In the admissibility decision Filip Reyntjens v. Belgium[117], the commission held established that "the obligation to carry an identity card and to show it to the police whenever requested to do so, in this particular case during a routine identity check, and holding a person in a police station for several hours for the failure to comply [did] not as such constitute an interference in a person's private life within the meaning of Article 8".[118] As for the claims under article 5, the Commission held that the failure to carry and show one's identity card, when foreseen in the domestic law, was a sufficient basis for lawful detention under section 1 (5), which permits detention when this is necessary for the purpose of securing the fulfilment of any obligation prescribed by law. The commission explained that as detention in this case had only lasted for a short period, it could be held necessary, meaning a fair balance between liberty and the said purpose was struck. Although

[115] International standards and decisions from the European Systems, Case digests, Open Society Foundations, November 2013, p. 12, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

[116] Guide on Article 8 of the European Convention on Human Rights, Right to respect for private and family life, home and correspondence, Council of Europe, p. 9, Updated on 31 December 2018, available at: https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

[117] Filip Reyntjens v. Belgium ECommHR, Application no. 16810/90, Decision on admissibility of 9 September 1992

[118] International Standards and Decisions From the European Systems, Case Digests, Open Society Foundations, November 2013, p. 13, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

decided by the Commission and not explicitly affirmed by the ECHR, the case suggests, that as a rule statutory obligation to comply with routine identity check, without the need to demonstrate reasonable suspicion relating to an offence, in itself does not violate private life and liberty.

In another case, Foka v. Turkey,[119] the ECHR although found that liberty of an applicant was deprived, held it justified because detention followed her obstruction to police actions, considering that her deprivation of liberty had not been excessively lengthy.[120] Gillan and Quinton v. the United Kingdom (below) further refines the standard specifically for people who have not been taken to a police station.

2.5. State failure to comply with internal regulations

In Wainwright v. the United Kingdom,[121] the ECHR held that interference with private life, when family members visiting their incarcerated relative at a detention facility, were searched constituted a violation, because the officers did not comply with procedures laid down for the proper conduct of the measure. Namely, the police "had demonstrated sloppiness" by giving the applicants consent forms after the searches instead of beforehand, searching the applicants fully naked instead of half-naked, and exposing one applicant by failing to close window blinds in the room where she was searched. However, it is important that the court rejected the argument non-compliance with internal procedure also constituted violation of a legality principle, more precisely for the Convention understanding the conduct was still lawful, although it demonstrated lack of necessary caution by concerned officers.[122] On the other hand, the court emphasized that absence

[119] Foka v. Turkey, no. 28940/95, 24 June 2008
[120] Ibid, paras. 85-87
[121] Wainwright v. the United Kingdom ECtHR, Application no. 12350/04, Judgment of 26 September 2006
[122] Ibid, paras. 45-47

of reasonable suspicion as to commission of a criminal offence by concerned individuals, did not exclude the possibility that searching of visitors could have been a necessary preventive measure against the endemic drugs problem. However, the fact that potentially debasing procedure was against innocent visitors, required strict compliance to procedural requirements, despite otherwise decent conduct (absence of verbal abuse or touching of the applicants).

The decision did not explicitly impose the relevant procedural requirements, only to an extent that they were already imposed, officials were accountable for lack of precautions taken (48). The standard could be relevant in the context of stop and search measures as well. This interpretation can hold police officers accountable for the failure to comply, among others with non-binding guidance, and practically equip those with a mandatory nature.

2.6. Stop and Search powers in Gillan and Quinton v. the United Kingdom

Gillan decision has to be seen in the context of the court's previous positions about interference with rights based on a general preventive policy which entails restriction of fundamental rights. The European Court in Shimovolos v. Russia, while discussing the right to liberty, noted that the Court can not allow to spread general prevention policy towards a person or group of persons about because of an assumption, either correct or mistaken, that they are threatening the safety of society. In this particular case there was violation of the right to liberty, even though arrest did not last long, since the treatment towards the person was not necessary to prevent a concrete and specific threat coming from him.[123] The court in Guzzardi v. Italy has similarly defined the provisions of the Convention and declared that the detention of a person is considered inadmissible for general preventive purposes, even when these people are identified generally as the heads of the mafia, but

[123] Shimovolos v. Russia, no. 30194/09, 21 June 2011, Par. 54-55

there is no proof of it.[124] The court generally holds that detention is not permissible only for the purposes of gathering information or intelligence.[125]

In Gillan and Quinton v the United Kingdom, applicants attending a protest against an arms fair had been searched by police and detained for approximately 20-30 minutes. After their claims were unsuccessful in the UK domestic courts, they complained that these stop and search measures violated Articles 5, 8, 10 and 11 of the ECHR. Their complaints raised complaint regarding the "general compatibility of the stop and search powers" of the police with the legality requirement of the Convention rights.[126] The court adopted this approach and assessed the legal framework in its totality, namely whether discretion and the provided safeguards satisfied substantive standards of lawfulness and accordingly the rule of law. This is particularly interesting, as the practically exercised power of judicial review similar to an abstract review by constitutional courts, based on the potential of the "legality" requirement under the Convention.

UK legislation envisaged use of these powers based on the principle of territoriality without applying the reasonable doubt standard. According to the 2000 Act on Terrorism, a senior police officer was authorized to give permission to any law enforcement officer to stop a car and conduct a search on the territory or place specified in the permit. However, to use this authority, it was necessary to have a special legal basis. In particular, a permit may be issued only for the prevention of terrorist acts.[127] The law was directed only to a serious and immediate threat to terrorism. The authorization had to be verified by the Minister of Interior within 48 hours. Based on the authorizations, measures had to be limited to twenty-eight days, however the extension procedure

[124] Guzzardi v. Italy, 6 November 1980, Series A no. 39, Par. 102

[125] Christina Binder, Liberty versus Security: A Human Rights Perspective in Times of Terrorism, Anuario Espanol de Derecho Internacional, Vol. 34, 2018, pp. 587-589

[126] Gillan and Quinton v. the United Kingdom, no. 4158/05, ECHR 2010

[127] Ibid.

was also included in the provisions, which meant that it could be renewed after the authorization's expiration. On the one hand, the regulation was problematic because there was very wide discretion, to authorize and initiate the process, on the other hand there was no threshold standard for individual policeman to base his/her decision of stopping and searching a particular individual in concrete situation.[128] persons failing to submit to a search were liable to imprisonment, a fine, or both. Apart from the requirement of the Minister's authorization, the mechanism of an Independent Reviewer monitored the activities, in addition there existed Code of Conduct for the officers to prevent abuse of power. The guiding rules in the Code of Conduct stipulated that these powers have to be used on an exceptional basis; geographical area of the permits should be clearly defined; it should aim to avoid terrorist acts; moreover its impact on society has to be a consideration for issuing a permit; in the area where the powers are used, brochures must be available to the population; the officers should carefully carry out protocols.

Despite this guidance in the Code, and the protective mechanisms in the Act, namely that it was possible to border the acting area of the police officer, also there were clear and restrictive grounds for its use - the expediency of avoiding a terrorist act, the Court reasoned that arbitrary potential of the measure itself could not be saved, which extinguished the entire legal quality of the regulation. The court emphasized that despite the ostensible limitations of the powers, that it was not required for the authorization to be necessary, but only "expedient" for preventing terrorist acts, undermined the necessity standard. The court also drew attention to the practice, according to which the Minister had never rejected to approve the request to use stop and search powers received from the senior police officer. The court stated that "although the exercise of the powers of authorization and confirmation is subject to judicial review, the width of the statutory powers

[128] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 731

is such that applicants face formidable obstacles in showing that any authorization and confirmation are ultra vires or an abuse of power".[129]The court also put emphasis on the absence a reasonable suspicion requirement to be demonstrated by the relevant police officer and declared that such a low standard, which permitted purely subjective judgment of the officer, was unacceptable[130]. The court found that the the "fishing" purposes for the ground of "terrorism threats" based on the Terrorist Act cannot be justified for the restriction of the right of liberty of the individual based on the territoriality principle. The Court then applied practice and statistics again to see the radical change of the presumption of liberty (during two years, 117278 searches were conducted). The statistics, which showed that during thousands of stop and search measures many real crimes were uncovered, but those never actually concerned terrorism, provided another consequentialist argument against the legal framework.

The Court made clear that the rule of law and the legality principle contains a substantive requirement that there are safeguards against arbitrary interferences, that the scope of the discretion, the manner of its exercise, and powers impacting fundamental rights are not unfettered.[131] The suspicionless stop and search powers were regulated in a statute and Code of Practice, however, these formal features were not real curbs against arbitrariness and sufficient for guaranteeing the quality of the law in this context, namely it contained inherent risks of abuse of powers in the face of insufficiently unfettered discretion. In this regard, even clear, but ineffective measures regulating executive discretion will not satisfy the requirement of legality under the Convention.[132]

[129] Gillan and Quinton v. the United Kingdom, no. 4158/05, par. 80, ECHR 2010

[130] Ibid, par. 86

[131] Gillan and Quinton v. the United Kingdom, no. 4158/05, paras. 76-77, ECHR 2010

[132] Cormac Mac Amhlaigh, Revisiting the Rule of Law under the European Convention of Human Rights: Gillan and Quinton v The United Kingdom University of Edinburgh School of Law, Working Paper Series, No. 2010/24, 2010, p. 4, available at: http://ssrn.com/abstract=1649995

Despite the fact that the complaint itself was not related to the ethnic minorities, towards whom "racial profiling" is a widespread practice, the court went deeper upon its own initiative and declared that such wide discretionary powers raise risk for the discriminatory acts. The practice confirmed that that the black and Asian origin was more frequently subject to police actions. The absence of effective mechanisms to control police not to apply these powers in concrete arbitrary form - discriminatory manner, led the Court to emphasize the danger of using such unbalanced legislation against freedom of expression/assembly.[133]

2.7. Case-law after Gillan

The inadmissibility decision in Ferdinand Jozef Colon v. the Netherlands[134], the court accepted the Government's argument that a complementary preventive measure, based on which search for weapons was allowed in security risk areas for set time periods, was permissible. More specifically, referring to rise of violence in Amsterdam, most of the old city center was designated by the mayor as a security risk area, and subsequently the public prosecutor was empowered to issue orders, valid for twelve-hour periods, permitting searching every individual for weapons in the area. The applicant who objected to a search in the designated security risk area was arrested and held in a police station. Eventually, he was convicted for disobeying the search order. The court held that his freedom of movements right was not restricted because he in no way was prevented to enter and leave the said area.[135]

[133] Gillan and Quinton v. the United Kingdom, no. 4158/05, ECHR 2010, Paras. 80-87

[134] Ferdinand Jozef Colon v. the Netherlands ECtHR, Application no. 49458/06, Decision on admissibility of 15 May 2012

[135] International standards and decisions from the European Systems, Case digests, Open Society Foundations, November 2013, p. 16, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

As for article 8 complaint, the court found the interference in accordance with the law given the availability of sufficient safeguards even in the absence of prior judicial control.[136] Next, the Court balanced the applicant's right against protection of individuals from violence, both interests protected by Article 8[137]. The Court accepted that the measure was complementary to other preventive measures; were part of a broader strategy to combat crime in the area, and that the government was actively reviewing the effectiveness of its strategy in achieving the objective; that there were geographical and temporal restrictions on security risk area designations; and that no single executive authority could order stop and searches alone.[138] Moreover, the Court had regard to the level of crime in the area concerned and to evaluation reports which indicated that the preventive searches were effective in reducing violence.[139] Thus, while there was always a possibility the applicant might be subjected to a preventive search he considered "unpleasant" and "inconvenient" in the area again when the order was in effect, the domestic authorities were permitted to hold that public interest prevailed over the subjective discomfort to the applicant's private life[140].

The case illustrates the importance of statistics, other evaluation reports and consequentialist arguments. On the one hand, demonstration of the greater impact of stops and searches on the targeted community, on the other hand evidence that the practice is ineffective for the purpose it serves, could affect court's scrutiny.[141]

[136] Ferdinand Jozef Colon v. the Netherlands ECtHR, Application no. 49458/06, Decision on admissibility of 15 May 2012, paras. 74-79

[137] Ibid, par. 85

[138] Ibid, paras. 91-93

[139] Ibid, par. 94

[140] Ibid, par. 95

[141] International standards and decisions from the European Systems, Case digests, Open Society Foundations, November 2013, p. 17, https://www.opensocietyfoundations.org/sites/default/files/case-digests-ethnic%20profiling-european-systems-110813.pdf

2.8. Conclusion: Prospects of European Scrutiny

The landmark decision in the Gillan case has been a major "departure" from deferential domestic scrutiny in the UK. Apart from the fact, that the case found a violation because of unfettered stop and search powers permitting lengthy emergency-like regimes almost throughout the whole city, it made a symbolic statement that what the UK did on the legislative level was in conflict with the rule of law. This meant that the law created threats of arbitrariness of an extent, that it was a violation on its face. Of course, statistical information played an important role in confirming court's conclusions, but in the end the court based its finding on the law as it was, not as it was applied. This can be seen as the court's elevated scrutiny of a modified legal regime combining preventive and emergency powers and turning into a powerful counterterrorist state, which could reproduce terror of its own. Here, the European court successfully performed its role to respond to institutionally failing legislature and the domestic courts to perform its function of executing and defending democracy, that in its substantive understanding has to envisage at least minimal guarantees against arbitrariness of the state.

However, this positive turn was followed by the Court's judgement in the inadmissibility decision of Ferdinand Jozef Colon v. the Netherlands. It is important that the regime here did not target terrorist threats but was part of a broader strategy to combat crime. Although it was true that the regime had more restrictions in terms of its temporal and geographical application, the court failed to pay due regard to the fact that in this case, the measure once characteristic to counterterrorist state, now had been applied as a regular measure in the fight against crime in general. In this regard, it is important to note, that the government reports about the effectiveness of the measure, even if true, shall not have been unequivocally accepted. As effective as it is to fish for evidence and criminals, it has long been rejected as an acceptable method of policing by the Convention. Moreover, an argument positively assessed by the Court that no single executive authority could

order the measure, was equally applicable in Gillan, however, understandably did not satisfy the court because the check came from the same branch and to no surprise in practice authorizations were never rejected. Indeed, any part of the executive similarly interested in meeting its target of crime prevention, cannot serve as deterrent to its own powers. This, among others, goes against the underlying principles of separation of powers, which does not rely on the trust towards executive, but looks for functional mechanism to sustain accumulation of power.

Apart from these cases more specifically related to stop and search powers, both applied as part of counterterrorist state in Gillan, and as part of regular preventive state in the case against Netherlands, the Court's standards in connection with the scope of the right to liberty, also provides some insight in terms of the court's possible scrutiny over similar preventive policing measures. Although, the court did not rule on merits under article 5 in Gillan, it did emphasize the role that the coercive element plays in determining the degree of restriction of freedom. Despite the fact that neither of the applicants had been held for more than 30 minutes, the fact that they were under the obligation to comply with police instructions made it an article 5 case along with article 8. Applicability of article 8 in this case was uncontested, because the applicants were searched, however, if the state policing does not include the search element, for instance, during restrictive identification measures, or in the context of policing demonstrations, it can be argued that the right to liberty has more potential of providing a guarantee.

Moreover, the emphasis on "coercive element" component is important in terms of the court's other strand of case-law, which demonstrates the objectively limited possibility of the court to question domestic classifications of offences relating to disobeying police officers. It is true, that it will be unlikely for the European Court to know whether detention for disobeying official instructions, was in reality an instance of abusing powers by police officer, however, the least the court can do is recognize the danger of all coercive regimes, that entail a risk to all citizens to come

in conflict with law in the absence of any such intention, which would not have taken place without such involuntary interaction. Moreover, quite naturally, as the policing measures move closer to reproduction of terror by the state, distrust towards police, the potential frustration, and chances of disobeying, rise.

Although the standard in Gillan and previous cases is promising in terms of defining the scope of article 5 under the Convention, later interpretations in Austin, showed that the coercive element is less decisive, more like a basis of rebuttable presumption of deprived liberty. The court conflated the scope and coerciveness analysis with the larger contextual considerations, such as the purpose of restriction, which belonged to the part of proportionality (this view was also supported by dissenters). Although the final outcome may be defensible considering the same arguments, it is important that the Court upholds its principled position, about when the liberty will be considered restricted, even if justified. This again will pay due regard to the arbitrary potential of coercive constraints and harmful consequences of not complying with them.

In sum, the Gillan court was correct, the change of paradigm, reflected in counterterrorist, preventive state requires a change of response from a human-rights approach by requiring clear regulations not only for holding the measures proportional, but for accepting the domestic law as the permissible basis for such change of paradigm. Indeed, as territoriality principle turns into a suspect category from a human rights perspective, anything falling short of necessity shall not be acceptable. On the other, it is time that another suspect category, overlooked by the European Court in the case against Netherlands, of counterterrorist measures becoming general policing strategies in times of normalcy and reversing the presumption of liberty and innocence (sometimes as a matter of fact, when persons become liable for individually disobedience) attracts the concern it deserves.

3. Legal framework and Safeguards

The UK and Georgia, as signatory countries of the Convention, are obliged, to bring their legislation and policy in compliance with the fundamental rights and freedoms envisaged by the Convention. This obligation extends to preventive police law and legislation. According to the constitutional principles of separation of powers, only legislative branch is authorized to define the competences of the governmental bodies. In light of the principle of rule of law, the laws adopted by the legislature have to create basic institutional guarantees against undue interference with individual rights.

3.1. Stop and search powers in the UK

As already discussed, in the landmark Gillan decision, the Court found suspicionless stop and search powers and practices in UK in breach of article 8 of the Convention, namely powers under sections 44 to 47 of the Terrorism Act[142] were held to violate right to private life. The decision led to a series of revisions to the UK law. As discussed in chapter 2, under the framework before Gillan, police officers were permitted to stop and search persons and vehicles without demonstrating reasonable suspicion towards them in the broad geographical area covered by the authorization for up to 28 days. It is worth noting that, before this judgement (from 2001, and dramatically after 2007) the use of Section 44 increased gradually.[143] It was heavily criticized both on the domestic and international level, namely by The Independent Reviewer of Terrorism

[142] Terrorism Act 2000, CH11, 21.07.2000, https://www.legislation.gov.uk/ukpga/2000/11/pdfs/ukpga_20000011_en.pdf

[143] David Anderson Q.C., Independent Reviewer of Terrorism Legislation, The Terrorism Acts in 2011: Report of the Independent Reviewer of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, 2012, p. 90, https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/12/TERRORISM-ACTS-REPORT-1-Dec-2016-1.pdf

Legislation at the time, the Joint Committee on Human Rights (JCHR)[144], the United Nations Human Rights Committee and NGOs such as Human Rights Watch. The criticism concerned the law's potential arbitrariness, among others in terms of racial profiling and suppression of peaceful protests. Despite the wide criticism, the litigation before the domestic court system against using these powers in such an abusive way was not successful.[145]

In response to Gillan decision, in March 2011 the interim guidance was incorporated in a Code of Practice, according which "authorizations to search vehicles were only permissible if such searches were considered by a senior police officer to be necessary to prevent acts of terrorism". To authorize use of stop and search towards individuals was banned wholly. It was only permissible under section 43 regime, which required existence of suspicion. Suspicionless stop and search could only be carried out on vehicles if it was reasonably doubted that in the vehicle there was the articles that could be used in connection with terrorist activities. In practice during this period previous regime was not used anymore, however it was not the part of permanent legislation and the future of this powers was partially dependent on the independent reviewers' report. Ultimately, the Review recommended To substitute this suspicionless stop and search power with a much more limited one, without sacrificing the operational advantages related to absence of reasonable suspicion requirement.[146] With this objective, in 2011 the Home Secretary issued a remedial

[144] The Joint Committee on Human Rights consists of twelve members, appointed from both the House of Commons and the House of Lords, to examine matters relating to human rights within the United Kingdom. See at: https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/

[145] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 730; For the statistics see Ibid. p. 732 – "Among those stopped and searched using Section 44 were photographers, train-spotters, and children in 2008, for example, the MPS stopped and searched 2,331 persons under the age of fifteen years, including fifty-eight children under the age of ten years. Section 44 was used to stop and search a senior retired cabinet minister and a sixty-four-year-old Queen's Counsel. There were also anecdotal reports of stops and searches conducted in order to achieve "racial balance in the Section 44 statistics"".

[146] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, pp. 740-741

order[147] repealing Sections 44 to 47 of the Terrorism Act.[148] After this interim measure, the Protection of Freedoms Act[149] in May 2012 inserted in the place of remedial order more circumscribed powers (Sections 47A to 47C). Based on the changes, the maximum duration for an authorization was reduced to fourteen days, geographical constraints were defined, and authorizations was limited to powers that are reasonably held necessary for preventing terrorist act.[150] In contrast to previous Section 44 regime, which only required that articles searched were the ones which could be used in connection with terrorism, the current statutory proviso introduces a more circumscribed standard, based on which search can be conducted only "if a vehicle is being used for the purposes of terrorism or a person is involved in terrorism".[151] On the other hand, the new legal framework still does not establish the requirement of the reasonable suspicion for the authorization.

Apart from the fact, that stop and search measures have narrower purposes, in terms of actual police behavior, more detailed instructions are available in a Code of Practice (reissued under the Protection of Freedoms Act) about how to use stop and search powers. Such internal guidelines can have the primary role in limiting the discretion of police officers. The standard of authorization process stays the same as it was with the remedial order. Namely, the senior police officer's views about necessity of such measures must be reasonable. This standard is much more burdensome for

[147] The Terrorism Act 2000 (Remedial) Order 2011, No. 631, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97940/terrorism-act-remedial-order.pdf

[148] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, pp. 741-742

[149] Protection of Freedoms Act 2012 (c. 9), available at: https://www.legislation.gov.uk/ukpga/2012/9/pdfs/ukpga_20120009_en.pdf

[150] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, pp. 742-743

[151] Ibid, p. 745

police officers than the requirement of expediency which was the main shortcoming and indicated the undue width of the discretion as argued by the appellant in the Gillan case.[152]

The Code limits not only authorization process, but also encompasses several further restrictions on the duration of these powers and territorial boundaries. For example, the Code states that general risk of terrorism can not justify initiation and exercise of stop and search powers. These powers should not aim only gathering of some intelligence. Moreover, widely defined territories for authorizations can only be used in exceptional circumstances. The renewal of authorization should be based on careful assessment of newly collected data. These constraints aimed to reduce the chance of repetitive authorizations spreading on entire police units, which prior to these changes was the recurring practice. As it was expected the effect of this modification appeared to be significant. From March 2011 to June 2012, there was not instances when suspicionless stop and search was used, despite the fact that this period (because of the many important events, such as royal wedding, the visit of the President of the United States, and the Queen's Diamond Jubilee) had potential to justify applying strict counterterrorist measures in the past. This shows that limiting the discretion in terms of authorizations has resulted in several actual improvements in practice.[153]

It is true, that the 2012 Code contains more restrictions than previous versions, such are guidelines to avoid discrimination and racial profiling, for instance, the Code provides that "the use of ethnicity or appearance is permissible where it forms part of a suspect description",[154] however, in essence it has the same meaning as the prior guidance. Therefore, it is not clear whether such guidelines can act as a real safeguard to limit the abuse of wide discretion. The Code still falls

[152] Ibid, pp. 742-743
[153] Ibid, pp. 743-744
[154] Ibid, p. 746

short of bringing more clarity about the standard which will be sufficient for directing measures to individuals. We can argue that more limitations are needed to really make a change and have a positive impact on the practice.[155]

To some up what was discussed above in details, the new amendments can be seen as a step forward to improvements contrary to the previous stop and search measures. The Independent reviewer of terrorism legislation correctly called it the "correction in favour of liberty".[156]

3.2. Legal framework of stop and search powers in Georgia

Law of Georgia "On Police"[157] (adopted by parliament) defines basic principles of the Georgian police activities and defines their preventive powers, among those is the so-called "special police operation", as a separate regime from regular stop and search powers.[158] Designation as a special police operation implies that in this case individual freedoms are restricted more intensively during a special police operation in comparison to other preventive measures, and shall imply that this measure must be applied in exceptional circumstances - when public interest to be protected is higher. This resembles the rationale behind certain provisions of the Criminal Procedure Code of Georgia, for example, secret investigative action can be carried out only in relation to specific and serious crimes, apart from that there must be prosecutorial and judicial review of its legality.[159]

[155] Ibid, p. 745

[156] Ibid, p. 755, see also: David Anderson Q.C., Independent Reviewer of Terrorism Legislation, The Terrorism Acts in 2011: Report of the Independent Reviewer of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, 2012, https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/12/TERRORISM-ACTS-REPORT-1-Dec-2016-1.pdf

[157] Law of Georgia "On Police", 2013, 1444-I

[158] Law of Georgia "On Police", 2013, 1444-I, Section 1 of Article 1

[159] Criminal Procedure Code of Georgia, 9 October 2009, No 1772 – II

The general scope of the police law has to be distinguished from the scope of the Criminal Procedure Code from the outset. The measures aiming to prevent threats to public safety are defined by the Law of Georgia on Police (preventive measures) and the police measures aimed at reacting to offense are defined by criminal procedure code (reactive measures). Thus, according to the Law of Georgia "on Police" special police control is a preventive measure. This classification is important because as a rule, the standard applied for initiating reactive police measures is higher and the procedures set – more detailed.

Specific norms on stop and search powers have to be discussed in the context of general principles in the law. Based on the law, the policeman as a public officer should strictly respect the basic human rights and freedoms, obey the principles of lawfulness, non-discrimination, proportionality, political neutrality and transparency of the police activities.[160] This means that police action aimed at protecting public security and legal order, shall not infringe the fundamental rights and freedoms, among others honor and dignity of a person, human life, physical inviolability and property rights and shall not cause unjustifiable damage to the environment. Apart from that, Article 10 (2) of the Law establishes the principle of rule of law in the activities of the police, according to which police preventive and reactive measures should comply with the requirements of the law. Implementation of police measures that constrain the limitation of human rights and freedoms recognized by the Constitution of Georgia is permissible only based on law. Moreover, article 12 of the Law establishes the principle of proportionality, meaning that each restrictive police measure has to serve a legitimate purpose and be proportional to the potential harm thereof. The law establishes basis of legitimacy for each police measure and places them within the scope of the police competence to prevent or eliminate the danger towards public security and legal order,

[160] Law of Georgia "On Police", 2013, 1444-I, Section 1 of Article 8

which is supposed to serve against arbitrariness. These principles shall underlie every police activity, including the special police measure, and is a precondition for their lawfulness.[161]

Based on article 24 of the Law, during special police control measure, the person, item or means of transport can be visually inspected and superficially searched by police officers.[162] Superficial search implies that only the external surface of a person's clothes can be searched by touching with hand or other special tools.[163] In case necessary conditions are in place (discussed in more details below), the Minister of Internal Affairs issues an ordinance on special police control, in case of urgent necessity, the ordinance will be issued orally and filed in a written form within 24 hours.[164] According to article 24 of Georgian law "on Police" the measure may be carried out by the police on the pre-selected territory during appropriately defined time period.[165] In practice, the Minister's ordinance is not substantiated. It does not have spatial or temporal restrictions.

Legal basis of initiating the special control operation is another problematic issue. This measure can be carried when, there are sufficient grounds to believe, that a crime or administrative misdemeanor has been or will be committed, which means that the police power can be used for prevention of crime/administrative offense, as well as for reacting to already committed crime/administrative offense.[166] The basis for the implementation of a special police measure is not the fact/risk of committing unlawful action by a particular person, but the assumption of high rates of a crime/administrative offense in general on the specific territory. Thus, this standard of

[161] Law of Georgia "On Police", 2013, 1444-I, Section 2-3 of Article 12
[162] Ibid, Section 1 of Article 24
[163] Ibid, Section 1 of Article 22
[164] Ibid, Section 3 of Article 24
[165] Ibid, Section 2 of Article 24
[166] Ibid, Section 1 of Article 24

sufficient grounds applies not to specific persons but to the territory. Namely, in a specifically defined territory each person entering it can become subject to a special regime.

As noted, special police measure will be initiated for the protection of the legal order and public security. The law “on Police” establishes that the threat should be assessed objectively - the decision must be based on the fact and/or information that will satisfy the objective observer to make a conclusion (“sufficient grounds for the assumption”). The mere assumption is not enough. Article 24 does not guarantees automatic judicial review to guarantee that any of the above provisions were observed. Moreover, there is no possibility for the person to defend their right proactively in the court.

3.3. Threats to privacy and liberty of individuals through arbitrary use of the measures in Georgia and UK

Generally, every criminal procedure code contains provisions for a regular use of search measures. Consequently, due to logical interpretation of the law, the special stop and search measure envisages access to a relatively lower standard in special circumstances. By using stop and search powers for preventive purposes on a particular territory, the state creates a regime where "fishing" is possible, by circumventing the special grounds and safeguards enshrined in the Criminal Procedure Code.

Absence of temporal and spatial limits for using these powers are problematic in both jurisdictions. Throughout the 9 times that police control measures based on identical ordinances of the Ministers were carried out in 2016-2017 in Georgia, it spread throughout the whole country for the duration of 2-3 days. Thus, the term used in article 24-2 of the law - "pre-selected territory", is devoid of

any restrictive interpretation, and can mean the whole country. Similar logic applies to the duration - it is fully subject to the discretion of the minister in each individual case.

Therefore, the Minister of Internal Affairs has a formal legal (though presumably unconstitutional) opportunity, to justify the need for the measure in respect of the whole country for the time period he/she believes fit. On the other hand, none of the Minister's identical ordinances link the specific duration of the measure to prevention needs of a particular threat. Moreover, the law directs the regime against administrative offenses along with crimes, regardless of their gravity, for the purpose of prevention and investigation. For instance, the regulation permits use of the special police control measure, to fight such minor administrative offences, which impose a fine of 15 Euros as a sanction.

Current regime, entails risks of concentration and abuse of powers, including using them for political purposes, not strictly for exceptional security risks. Further, exceptionality related to the territorial principle also disappears, as the measure is used throughout the whole country.

Secondly, the important issue is standards in national law about what will be the appropriate standard for directing such stop and search measures to individuals. The threshold standard of reasonable suspicion is an appropriate basis for ensuring that powers are exercised fairly and without discrimination,[167] The threshold standard of reasonable suspicion is an appropriate basis for ensuring that powers are exercised fairly and without discrimination.[168]

In UK under the new regime, the measure can be initiated irrespective of the fact that "the constable reasonably suspects that there is such evidence". The legislator did not state explicitly that the

[167] Thomas Crofts and Nicolette Panther, Changes to Police Stop and Search Laws in Western Australia: What Decent People Have to Fear, The Western Australian Jurist, Vol. 1, 2010, p. 64

[168] Paul Quinton, The Formation of Suspicions: Police Stop and Search Practices in England and Wales, Policing and Society, 21:4, 2011, pp. 366-367

police officer "must have a certain level of subjective belief or suspicion", instead the provision states that they do not have to necessarily have the reasonable suspicion.

This is not only problematic because reasonable suspicion requirement is absent, but also because there remain uncertainties about what is actually required, even if this is not the latter standard – at least subjective suspicion (described as an intuition or a hunch, without reasonable grounds) or no suspicion at all.[169] The 2011 Code of Practice subjected the use of the Section 47A stop and search powers to existence of "objective factors" or "random" selection of individuals or vehicles. Applying this standard to either search everyone, or according to a numerical interval, contradicts the underlying rationale behind permitting "intuitive stop" as the idea of exercising this power on the basis of individual officer's intuition by carefully assessing the situation on the field. This subjective level of suspicion was held by Law Lords in Gillan as a minimum requirement if the standard fell short of reasonable suspicion.[170] Critics also argue that undertaking "blanket or random searches" to rule out discrimination can be a root for other kind of unfairness, namely that of targeting innocent people randomly identified like potential offenders.[171]

If we look at a bigger picture, we can assume that the drafters of this amendment had the intention to limit the use of the new suspicionless stop and search regime on priorly defined and limited territory.[172] For example, according to this approach, The use of stop and search powers would be justifiable if law enforcement agencies have some trustworthy data that terrorists plan to bomb the Parliament Square and they will use those powers towards any car which enters this particular

[169] John Ip, The Legality of "suspicionless" Stop and Search Powers under the European Convention on Human Rights, Human Rights Law Review, Vol. 17, Issue 3, 2017, pp. 530-531

[170] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review,13:4, 2013, pp. 747-753

[171] Katerina Hadjimatheou, The Relative Moral Risks of Untargeted and Targeted Surveillance, Ethical Theory and Moral Practice 17, no. 2, pp. 198-199

[172] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 751

territory. In these circumstances, the necessity can be proven due to the fact that car is moving within the specific territory during the time when and where terrorist attack is expected.[173]

As the use of the powers still depends on the assumption made by a particular officer, after the reform there is still high chance that racial and ethnic minorities will be disproportionately affected.[174] It is true that the Code of Practice, limits such use of powers, however disproportionate effect will still follow as long as it is sufficient that individual characteristics are complemented with other more objective factors. However, as scholars correctly note, this will not necessarily be against the principles held by ECHR in Gillan, because the court there stated that cumulation of several factors converts otherwise discriminatory treatment to a justifiable police action.[175]

Public searches can cause embarrassment even towards an ordinary law-abiding citizen when there is no reasonable suspicion standard. Disproportionate stop and search practices can decrease confidence in the police[176] and give rise to conflict because law-abiding citizens feel unfairly targeted.[177] It is argued that "the use of these powers has become the "litmus test" for determining the state of community police relations".[178] Absence of reasonable suspicion means that a person

[173] Ibid. p. 752

[174] Daniel Moeckli, Stop and Search under the Terrorism Act 2000: A Comment on R (Gillian) v Commissioner of Police for the Metropolis, Modern Law Review, Vol. 70, Issue 4, 2007, pp.667-669; see also: Vani K. Borooah, Racial Disparity in Police Stop and Searches in England and Wales, Journal of Quantitative Criminology 27, no. 4, 2011, pp. 453-457

[175] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, pp. 754-755

[176] Rebekah Delsol and Michael Shiner, Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales." Critical Criminology, vol. 14, no. 3, Dec. 2006, p. 241; see also: Ben Bowling and Coretta Phillips, Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search, Modern Law Review, Vol. 70, Issue 6, 2007, pp 936-961.

[177] Thomas Crofts and Nicolette Panther, Changes to Police Stop and Search Laws in Western Australia: What Decent People Have to Fear, The Western Australian Jurist, Vol. 1, 2010, p. 64; see also: Shaka Yesufu Discriminatory use of police stop and search powers in London, UK, International Journal of Police Science & Management, Volume 15, No. 4, 2013; John Topping and Ben Bradford, Now you see it, now you don't: On the (in)visibility of police stop and search in Northern Ireland, Criminology & Criminal Justice 00(0), 2018, p. 375

[178] Rebekah Delsol and Michael Shiner, Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales." Critical Criminology, vol. 14, no. 3, Dec. 2006, p. 251

is devoid of all legal protections, and is perceived as such by the affected public, despite the fact that there may be territorial and temporal restrictions. [179]

Statistics show that the existing laws are resulting in very rear instances when the persons are actually carrying dangerous articles or when it results in arrest, thus there is no evidence that wider police powers increase effectiveness in fighting violent crime.[180] The offenses identified during these 9 operations in Georgia are mainly related to purchase and posession of drugs, in some cases sale of drugs, illegal purchase and posession of firearms and more commonly administrative offenses (mainly related to minor hooliganism, disobedience and alcohol abuse in public places). The high rate of administrative offenses has to be emphasized. Particularly important is the fact that a big portion of identified offences is disobedience and petty hooliganism against police. These are offences which are provoked during the operation and could not have had any links with any prior information.

On the other hand, even when there are increased threats, while using the proportional preventive measures (to stop, identify, search) sufficient protection guarantees must be provided. The requirements of accountability as a safeguard requires that an officer who decided to stop and

[179] Alpa Parmar, Stop and Search in London: Counter-terrorist or Counterproductive?, Policing and Society, 21:4, 2011, p. 375; see also: Shaka Yesufu, Discriminatory Use of Police Stop and Search powers in London, UK, International Journal of Police Science & Management, Volume 15, No. 4, 2013; John Topping and Ben Bradford, Now you see it, now you don't: On the (in)visibility of police stop and search in Northern Ireland, Criminology & Criminal Justice 00(0), 2018.

[180] "The MPS figures show that between January 2008 and April 2009 s44 was being heavily used for example, the highest number of stops during this period was in December 2008 with a total of 21,594 searches. From these stops, only one arrest was related to terrorism, though it is not known whether this resulted in a successful prosecution. Five hundred and sixty-three people were 'advised' and 20,388 resulted in no further action. Between January 2008 and July 2010, cannabis warnings were given to an average of 14 people per month resulting from a s44 stop and search. Other outcomes included dispersal of groups under the Anti-Social Behaviour Act 2003, verbal warnings and alcohol confiscation. The power was being essentially used in speculative intrusions and the governance of less serious crime. In light of the fact that, in 2007/08, over 1 million persons in England and Wales, and any vehicles in which they might have been travelling, were stopped and searched by the police, such stops must be viewed as a major instrument of policing". See also: Vani K. Borooah, Racial Disparity in Police Stop and Searches in England and Wales, Journal of Quantitative Criminology 27, no. 4, 2011, P. 468; Daniel Moeckli, Stop and Search under the Terrorism Act 2000: A Comment on R (Gillian) v Commissioner of Police for the Metropolis, Modern Law Review, Vol. 70, Issue 4, 2007, p. 668; Thomas Crofts and Nicolette Panther, Changes to Police Stop and Search Laws in Western Australia: What Decent People Have to Fear, The Western Australian Jurist, Vol. 1, 2010, p. 65

search an individual, will have to support his/her suspicion with objective reasons. Such accountability is best guaranteed in the framework of an ex post review of the police officer's actions, particularly if the law provides for a reasonable suspicion standard.[181]

Nowadays in the UK and Georgia officials that carry out the stop are not required to explain the legal basis or reasons for the stop to the individual checked nor to keep a record of the stop, which provides law enforcement officials with almost unlimited discretion.[182]

As it was discussed above, the most problematic issue is weak judicial review, which was illustrated in the case of Gillan v. Commissioner of Police for the Metropolis, particularly towards the issue of the rolling authorization, restrictions on duration and territory.[183] In Georgia no prior and automatic judicial supervision exists, moreover the domestic courts did not even examine the legal framework for identity checks in an individual complaint submitted by a person subject to such stop and searches.

Overall, we can say in Georgia police powers envisaged by the law are much wider, than in the UK. In the Georgian context, any person, regardless the existence of suspicion towards she/he, can be targeted. Officials that carry out the stop are not required to explain the legal basis or reasons for the stop to the individual checked nor to keep a record of the stop, much less provide a copy of that record to the individual concerned. The law has not struck a balance between rights and public safety interests in any of the aspects (seriousness of the risk/offence as the legal basis, territory or time limits), does not contain any effective safeguards, which opens the door to arbitrary and also discriminatory application of these powers. Even before Gillan and the reform, the U.K law had set a higher standard in terms of the crimes targeted, namely the powers could have been invoked

[182] Gillan and Quinton v. the United Kingdom, no. 4158/05, §§. 76-77, ECHR 2010

[183] Genevieve Lennon, Stop and Search Powers in UK Terrorism Investigations: A Limited Judicial Oversight?, The International Journal of Human Rights, Vol. 20, No. 5, 2016, p. 635

only for prevention of a terrorist act – certainly much more serious crime than any administrative offence.

The outstanding nature of the legal framework in Georgia is also illustrated through practice and statistic. The Ministerial Orders presented are visibly standardized, likely pre-signed with only a change of date at regular intervals, without any specificity about risks, extending to the whole country for several days.[184] The identical contents of the Minister's ordinances and public statements referring to statistics of crime in general also illustrate the measure is used for general prevention and fight against the perpetual crimes, and most importantly without any prior grounds. Public information published after completion of the special control measure does not contain any indication that the identified offenses or seized criminal objects are in any form related to the information that the police had prior to the special control measure, moreover, as a rule, the Ministry does not specify which offenses, concerned in the prior information, were prevented through this operation and most of the offences are identified incidentally.

3.4. Conclusion

Comparative analysis shows that reversal of the presumption of liberty, in the UK, contrary to Georgia, is permissible only to prevent an immediate threat of terrorism. Moreover, none of the checks even as it stood before Gillan, are included in the Georgian legislations (e.g. existence of Code of Ethics, some territorial and temporal restrictions, the Independent Reviewer of Terrorism Legislation, JCHR). Thus, the low standard for starting the police special control operation and non-existence of safeguards in Georgia clearly indicates that proper balance between public and

[184] Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, Council of Europe, p. 12, Updated on 31 December 2018, available at: https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf

private interest is not struck, which brings Georgian in conflict with its Convention obligations. Before Gillan, there were trends in the UK pointing to transformations of the powers as general crime prevention policy, namely there were continued re-authorizations which illustrated attenuated connection to terrorism threats. However, this dynamic was constrained by the decision of the European Court. It can not be denied, that since then, UK legislation has displayed some noticeable improvements, Namely, the standard for authorization has now higher threshold and more circumscribed territorial and duration limitations. These changes have in practice meant fewer authorizations, and fewer limitations of rights.[185]

This illustrates the need for an external check on the legislation. Unlike UK, where the potential of non-exceptional use of counterterrorist state measures was constrained, the Georgian legislation, targeting among others petty administrative offences, mandates achievement of the objective of crime prevention through "declaring" a regime resembling state of emergency, when interference becomes the norm, rather than an exception.

[185] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, 743-745

Conclusion: Potential Safeguards

To conclude, it is obvious that in its nature prevention of crime serves democracy, however democracy is also threatened by arbitrary power. Constitutional democracies are precisely for defending an individual against accumulated state power. Such reversal of presumption of liberty, when the state sees an individual as an a priori threat, the territory is the green light for restrictions, and fishing for evidence is permitted, bluntly puts fight against crime ahead of an individual, precisely harms democracy. There is basis to fear that the power can be used to suppress peaceful protest as a tool for political repression. Therefore, if this reversal is to survive in the face of new challenges of state, such as terrorism, there have to be additional, counterbalancing safeguards.

Conversely, adequate domestic safeguards may broaden a state's means to fight terrorism in the name of security. Indeed, even if short-term effectiveness is argued, long-term damage to community trust in police, and consequently to the effectiveness of counterterrorist policing renders these measures counterproductive.[186]

First, domestic law must be clear and precisely defined to contain clear instructions against arbitrariness. In this regard, for stability and simplicity it is preferable that all limitations about this counterterrorism measure are incorporated in one law, rather than in separate laws and by-laws.[187]

[186] Without Suspicion: Stop and Search under the Terrorism Act 2000, Human Rights Watch, 2010, p. 2, available at: https://www.hrw.org/sites/default/files/reports/uk0710webwcover.pdf

[187] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, 743-745

Next, as the Gillan court made clear, beyond clarity in the law, it has to ensure that the scope of the discretion and the manner of its exercise is restricted. Oversight and accountability is better guaranteed through a network of scrutinizing institutions.[188]

Some standard of suspicion coupled with judicial review of lawfulness in individual instances of stop and searches will guarantee that an officer's suspicion was based on certain objective grounds.[189] Some scholars suggest that it would be enough if the normative act instructs officers to focus on suspicious behavior,[190] however to minimize extent of arbitrariness, the best version is maintaining reasonable suspicion standard, requiring some objective evidence.[191] Proper recording of the measure is important for further limiting arbitrariness and for subsequent information analysis.[192]

Judicial authorization of these powers, before they are exercised, could subject initiation of these measures to independent scrutiny of the necessity. It is true the approach would be an irregular measure; however, the very irregularity of such powers calls for novel mechanisms.

[188] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 760

[189] Cormac Mac Amhlaigh, Revisiting the Rule of Law under the European Convention of Human Rights: Gillan and Quinton v The United Kingdom University of Edinburgh School of Law, Working Paper Series, No. 2010/24, 2010, p. 5, available at: http://ssrn.com/abstract=1649995

[190] John Ip, The Reform of Counterterrorism Stop and Search after Gillan v United Kingdom, Human Rights Law Review, 13:4, 2013, p. 755

[191] Katerina Hadjimatheou, The Relative Moral Risks of Untargeted and Targeted Surveillance, Ethical Theory and Moral Practice 17, no. 2, pp.198-199, see also: Thomas Crofts and Nicolette Panther, Changes to Police Stop and Search Laws in Western Australia: What Decent People Have to Fear, The Western Australian Jurist, Vol. 1, 2010, p. 61

[192] Rebekah Delsol and Michael Shiner, Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales, Critical Criminology, vol. 14, no. 3, Dec. 2006, pp. 255-256

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