

Human Rights Council Universal Periodic Review

(Third Cycle, 37 session, 2020)

NGO coalition joint submission on
Critical Issues of Criminal Justice

NGO coalition:

Human Rights Education and Monitoring Center (EMC) and Georgian Young Lawyers' Association.

The coalition was formed to prepare joint statement for UPR Georgia 2020. Civil Society organizations of the coalition are well established NGOs, which intensively or exclusively work on the Judiciary and Law Enforcement issues in the country. The information provided in this report is prepared based on the participant organizations' studies, researches, legal cases, advocacy campaigns and lobbying on policy level. Joint report emphasizes on the country specific conditions related to the Right of Area 12.5.; 12.6.; 15-1.

ადამიანის უფლებების სწავლებისა და მონიტორინგის ცენტრი

EMC

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1. Investigative system reform

1.1 Separating investigative and prosecutorial powers, at the legislative and practical levels, is a persistent problem in the country. Under the legislation in practice, the prosecutor has, not only, the broad supervisory powers over the course of the investigation, in terms of their direct capacity to conduct the investigation, but also, in relation to the said investigation, the prosecutor retains the function of executing prosecutorial authority.¹

1.2 In this context, the investigator's professional independence is minimized, for they represent the prosecution and are obliged to follow each and every instruction given by the prosecutor. In doing so, the whole investigation is less focused on establishing an objective truth, and is primarily concentrated on successful completion of prosecutorial process in a specific case.

1.3 Last year, the state commenced work on the reform of the investigative system and developed the concept of reform, which is largely commended by the Venice Commission.² The concept of reform is also widely supported by civil society organizations.³ However, other active steps for legislative changes were not taken by the state. Moreover, it can be said that this process is suspended in the country.

Recommendation:

- **The Parliament of Georgia should, by the end of the Fall 2021 session, make legislative changes that shall increase the degree of independence of investigations in the country and ensure that investigative agencies are distanced from the Prosecutor's Office;**

2. Reform of administrative offenses legislation

2.1 Criminal and Administrative Offenses Codes of Georgia operate independently. The Code of Administrative Offenses imposes administrative penalties and defines sentencing procedures for the commission of minor misdemeanors. Consequently, positive changes in the criminal justice system have little to none effect on the administrative law enforcement, as persons subjected to administrative penalties cannot exercise right to fair trial and the imposition of unreasonable detention, administrative imprisonment or fines is not a common practice in these cases⁴.

2.2 The existing Code of Administrative Offenses has a long history and dates back to Soviet times (it was adopted in 194). The current edition of the Code of Administrative Offenses provides for heavy penalties for the commission of certain offenses, including administrative imprisonment, which by its nature requires the application of procedural safeguards normally afforded to criminal offenses. Nevertheless, the Code of Administrative Offenses imposes fewer procedural safeguards than a person charged with a criminal offense can have access to; It does not consider the presumption of innocence; The judge is not required to follow a standard beyond a reasonable doubt. Tight deadlines for case hearings and sanctioning procedures fail to ensure effective representation (the hearing may take up to 10-15 minutes). Accordingly, the existing form of the Code of Administrative Offenses in essence is contradictory to fundamental human rights and Georgia's international commitments.⁵

2.3 During the second Cycle of the UPR, Georgia was recommended to reduce the use of pre-trial detention.⁶ Practice shows that the number of detainees and imprisoned persons, under the Administrative legislation, has not been decreasing from year

¹ see: Analysis of Investigative System, 2018, "Human Rights Education and Monitoring Center (EMC)", available at: <https://bit.ly/2TQM3q1>

² see: Georgia - Opinion on the concept of the legislative amendments to the Criminal procedure code concerning the relationship between the prosecution and the investigators, adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019), available at : [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)006-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)006-e)

³ <https://bit.ly/38JzGsk>

⁴ E.g.: see. a. Human Rights Watch, *Administrative Error: Georgia's Flawed System of Administrative Justice* (January 2013, <https://www.hrw.org/sites/default/files/reports/georgia0112ForUpload.pdf> [Accessed: 16.03.2020].

b. Report 26 May Analysis of Human Rights Violations during and related to the Dispersal of the May 26 Assembly, GYLA, 2011 <https://goo.gl/nKDmpz> [Accessed: 16.03.2020].

c. Political Neutrality in the Police System, EMC, 2016 <https://emc.org.ge/2016/09/07/emc-130/> [16.03.2020].

d. Protests Considered to be an offence, GYLA, 2017 <https://goo.gl/ocENXL> [Accessed: 16.03.2020].

e., Beyond the Lost Eye“, GYLA Chapters 4 and 5, available at: <https://bit.ly/2OR8OZW> [Accessed: 16.03.2020].

⁵ How to End Georgia's Unconstitutional Use of its Administrative Offenses Regime Judicial Independence and Legal Empowerment Project (JILEP) October 15, 2013 http://ewmi-prolog.org/images/files/5244Eng_Admin_Regime_JILEP_Report_Oct_30_final.pdf; [Accessed: 16.03.2020].

⁶ Recommendation N118.11. Take steps to limit the application and length of pretrial detention (Denmark);

to year. In fact, out of 15 191 persons placed in temporary detention facilities in 2019, 5596 persons were deprived of their liberty under Administrative Offenses legislation.⁷

2.4 The Code of Administrative Offenses allows for administrative detention and administrative imprisonment. Administrative detention is a provisional measure, while administrative imprisonment is the most severe form of punishment for administrative misconduct. Both administrative detention and administrative imprisonment under the present Code of Administrative Offenses impede the protection of an individual's freedom and security and their right to a fair trial.

2.5 The Administrative Offences Code envisages 12 hours as the maximum period of detention, however if an individual is detained outside working hours, they may remain in a detention facility for up to 48 hours. Another significant shortcoming is that judges examining cases of an administrative violation are not required to check the lawfulness of the detention; besides, as a rule, the police do not indicate the specific grounds of the detention in the detention protocol, which makes it difficult to examine the lawfulness of the detention. In some cases, the maximum term of detention is applied without providing a proper substantiation. The police also use detention in cases where the law does not prescribe detention. Yet another significant procedural violation is that detainees are not informed of their right to appeal the detention or the timeframes.⁸

2.6 As for administrative imprisonment, the current maximum period for administrative imprisonment is 15 days. In 2019 administrative imprisonment was applied to 1802 individuals.⁹ At every stage of administrative imprisonment proceedings, the fundamental rights of individuals are violated and they are left without adequate legal safeguards. Administrative imprisonment is a sanction characteristic of criminal justice. Due to the said characteristic of the procedure, administrative offenses may not be subject to sanctions that require such intensive interference with an individual's freedom.¹⁰

Recommendations:

- The Parliament of Georgia, by the end of the Fall session of 2021, should implement a fundamental reform of the Code of Administrative Offenses, which shall replace the existing legislation with a new one, in line with the Constitution and international standards;
- The Parliament of Georgia, until the end of the Fall session of 2021, should abolish administrative imprisonment as a form of sanction for administrative offenses, in the framework of the reform of administrative offenses legislation;
- The Parliament of Georgia, until the end of the Fall session of 2021, should, in the framework of the reform of administrative offenses legislation, introduce a new category of offenses, "misdemeanors" in the Criminal Code, and administrative infractions of a criminal nature move to the misdemeanor section.
- The Parliament of Georgia, until the end of the Fall session of 2021, should, in the framework of the reform of administrative offenses legislation, extend the procedural rights guaranteed to the accused under the Criminal Procedure Code to the offenses of the criminal nature, envisaged in the Code of Administrative Offenses.

3. Measures of Restraint

3.1 Criminal Procedure Code of Georgia envisages the following types of measures of restraint: imprisonment, bail, an agreement not to leave and to behave properly, personal surety, supervision by the command of the behavior of a military service member.¹¹

3.2 During the second cycle of the UPR, one recommendation was made by the States to Georgia on reducing the use of pre-trial detention.¹² However, statistics released by the Supreme Court show that the rate of imprisonment has been increasing since 2016 and that approximately 50% of defendants have been subjected to pre-trial detention.¹³

⁷ Coalition for Independent and Transparent Judiciary, Letter to the Special Rapporteur on the rights to freedom of peaceful assembly and of association: https://info.police.ge/page?id=283&parent_id=233 [Accessed: 16.03.2020].

⁸ Coalition for Independent and Transparent Judiciary, Letter to the Special Rapporteur on the rights to freedom of peaceful assembly and of association: <https://bit.ly/2Qhjwcr> [Accessed 16.03.2020].

⁹ Official statistics published by the Ministry of Internal Affairs of Georgia, available at https://info.police.ge/page?id=283&parent_id=233 [Accessed: 16.03.2020].

¹⁰ See. Coalition report on administrative detention http://www.coalition.ge/index.php?article_id=123&clang=1 [Accessed: 16.03.2020].

¹¹ Criminal Procedure Code, article 199(1), available at <https://matsne.gov.ge/ka/document/download/90034/64/en/pdf>.

¹² Recommendation N118.11. Take steps to limit the application and length of pretrial detention (Denmark).

¹³ Specifically, year by year, the percentages are as follows: 2016 - 29%, 2017 - 34%, 2018 - 43%, and 2019 - 47%. Statistics of the Supreme Court on the use of a preventive measure. Available: <http://www.supremecourt.ge/files/upload-file/pdf/2019w-statistic-7.pdf>

3.3 In practice today, there are generally two types of preventive measures - detention and bail. In fact, other alternative measures are not implemented, for example, in 2019, besides bail and imprisonment, only 2% of the defendants were sentenced to other alternative measures. This is conditioned by two circumstances, one being that alternative measures provided for in the Procedure Code can only be applied in specific cases and, that the parties (lawyer, prosecutor) and judges do not consider these measures to be real alternatives to bail and detention.

3.4 According to GYLA Judicial Monitoring Report # 12, 12% of the decisions concerning detention and 30% of the cases where bail was set were unsubstantiated,¹⁴ according to Report No. 13, the rate of unjustified imprisonment was 15% and in case of bail, the rate was 28%.¹⁵

3.5 According to the amendments of July 8, 2015, the Georgian legislation established a new procedural mechanism for periodic and automatic review of imprisonment.¹⁶ With the amendment, the State has expressed a will, raised the standard, and undertook the responsibility to take full control of the necessity and timing of imprisonment.

3.6 During the second cycle of the UPR, one recommendation was made to Georgia concerning limiting the length of pre-trial detention.¹⁷ While legislation on detention review is in line with international standards, practice has shown that the rate of leaving persons in detention is very high. Judicial monitoring results show that the courts review the decision on detention with little deliberation, and in 96% of cases the person remains in custody, and in 75% of the cases, the courts do not substantiate the need to leave the detention in effect.¹⁸

Recommendations:

- The Parliament of Georgia should, by the end of the Fall session of 2021, amend the Criminal Procedure Code of Georgia and adopt effective alternative detention measures (aside bail and detention) that shall reduce the rate of imprisonment;
- The High Council of Justice of Georgia should, by the end of 2021, issue guidelines on preventive measures that shall guide judicial review and ensure that decision-making is conducted in line with international standards;
- The General Prosecutor's Office of Georgia should, by the end of 2021, develop guidelines on the preventive measures and, at the same time, introduce regular and mandatory trainings for prosecutors on submitting a substantiated request for the issuance of preventive measure;
- The High School of Justice should, by the end of 2021, provide regular and mandatory training for judges on preventive measures;
- During a court hearing concerning the revision of pre-trial detention, the judge should allow more time for deliberation and substantiate the need to change or revoke a preventive measure.

4. Repressive Drug Policy in Georgia

¹⁴ GYLA's Criminal Trials Monitoring Report N12, page 27, Period covered: March 2017 – February 2018. available at: <https://gyla.ge/files/news/2008/Court%20monitoring%20N-12%20ENG.PDF> .

¹⁵ GYLA's Criminal Trials Monitoring Report N13, page 32, Period covered: March 2018 – February 2019. available at: <https://gyla.ge/files/news/ფონდი/ტურნირი/angrishi%20sasamrtlo.pdf> .

¹⁶ Criminal Procedure Code, article 219, para 4(1), article 230¹

¹⁷ Recommendation N118.11. Take steps to limit the application and length of pretrial detention (Denmark);

¹⁸ GYLA attended 207 pre-trial hearings, where the detention issue was reviewed by the court. It is important to note that the court left unchanged the remand detention applied as a preventive measure in 182 (96%) out of 190 cases, and in 137 (75%) of these, the court did not substantiate or insufficiently substantiate why it was necessary to leave the imprisonment in effect.

GYLA's Criminal Court Monitoring Report №13, p.44-45. available at <https://bit.ly/2RiB5tw>

4.1 Georgia's drug policy remains a major challenge for the judiciary. In Georgia, drug use without a prescription is a punishable act¹⁹ and leads to imposition of unjust and disproportionate penalties, both under administrative and criminal law.²⁰ The existing drug policy allows for imposition of undue burden on citizens.²¹ Along with a strict criminal drug policy, the country's efforts in terms of prevention and treatment-rehabilitation are largely insufficient.²²

4.2 The relevant law,²³ on the one hand, specifies the list of substances under special control (narcotic substances), and, on the other hand, it establishes their minimal (basis for administrative offenses), small, large, and particularly large amounts for imposition of criminal liability.²⁴ The law does not provide for small amounts in relation to many common drugs (for example - amphetamine, methamphetamine, MDMA, etc.). In such a case,²⁵ possession of the smallest amount, including traces of the substance found in an empty syringe, qualifies for possession of a large amount of drugs and carries a prison sentence of five to eight years.²⁶

4.3 In the context of not determining the dosage of the narcotic/psychotropic substances or the unreasonable determination of the amounts, the sanctions imposed on drug offenders are disproportionately severe, which in some cases constitutes a basis for review by the Constitutional Court,²⁷ but is not subject to systematic changes by the Parliament. Sanctions imposed by the Criminal Code for possession of certain types of drugs purchased (also produced or cultivated) for personal use, without the purpose of distribution of drugs, are often more severe than in case of commission of such crimes as murder or rape.²⁸

4.4 In addition to conviction and sentencing, the drug abuser is automatically subjected to the restriction of additional civil rights.²⁹ According to the law, convicted individuals are automatically deprived of rights such as driving a vehicle, the right to work in public institutions, etc. The term of deprivation of rights depends on the type of drug crime and can last from 3 to 20 years,³⁰ which significantly impedes employment opportunities of these persons and limits their social reintegration prospects.³¹

4.5 In order to establish the fact of drug use, law enforcement agencies are authorized to transfer any person to a forensic drug examination. A person may be subjected to a forensic examination, in addition to other grounds, on the basis of operative information that the person is under an influence.³² Neither judicial nor prosecutorial control applies to the verification of the

¹⁹ Except for marijuana use, which was decriminalized by the Constitutional Court of Georgia, decision №1 / 3/1282 of July 30, 2018.

²⁰ Human Rights Education and Monitoring Center (EMC), "Drug Policy in Georgia - Suspended Reform and New Trends", 2019, p.7, available: <https://bit.ly/2TGqxW5>.

²¹ EMC, "Gaps in the Investigation and Prosecution of Drug Offenses (Analysis of 2017 high profile cases)", pp.1-11, available at: <https://bit.ly/2VYCx77>.

²² Public Defender's Report on the State of Human Rights and Freedoms in Georgia, 2018, p.261, available at: <https://bit.ly/2IE4Y2g>.

²³ Law of Georgia on Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance

²⁴ Annex N2 of the Law of Georgia on Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance on List of small, large, and particularly large amounts of narcotic drugs and psychotropic substances seized from illegal possession or circulation.

²⁵ Law of Georgia on Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance, articles 6, para. 4¹.

²⁶ Article 260 (3) of the Criminal Code of Georgia provides for imprisonment from 5 to 8 years for the purchase and possession of large quantities of narcotic drugs.

²⁷ Human Rights Education and Monitoring Center (EMC), "Drug Policy in Georgia - Suspended Reform and New Trends", 2019, p 23-27, available: <https://bit.ly/2TGqxW5>.

²⁸ Human Rights Watch, Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies, 2018, 83. 42-43, available at: <https://bit.ly/33eJtyr>.

²⁹ Article 3 of the Law of Georgia on Combating Drug-Related Crime.

³⁰ Article 3 of the Law of Georgia on Combating Drug-Related Crime.

³¹ EMC, "Drug Policy in Georgia - Suspended Reform and New Trends", 2019, p 33, available at: <https://bit.ly/2TGqxW5>; Human Rights Watch, Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies, 2018, 83. 53-55, available at: <https://bit.ly/33eJtyr>.

³² EMC, "Drug Policy in Georgia - Suspended Reform and New Trends", 2019, p 18, available at: <https://bit.ly/2TGqxW5>; Human Rights Watch, Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies, 2018, p. 29, available: <https://bit.ly/33eJtyr>; Decree N725 of September 30, 2015 of the Minister of Internal Affairs on "Instruction to submit a person for examination to establish the fact of narcotic drug or psychotropic substance consumption".

credibility / authenticity of the operative information.³³ The legislation gives the law enforcement representatives the authority to arbitrarily transfer any person to drug testing and, in case of their refusal, to detain them for 12 hours.³⁴

4.6 In Georgia, persons addicted to drugs are not adequately provided with treatment tailored to their medical, psychological and social needs.³⁵ Such an important element of drug addiction as psychosocial rehabilitation is nonexistent in the country.³⁶ The state does not have institutional mechanisms for provision of treatment as an alternative to punishment.

Recommendations:

- The Parliament of Georgia should, by the end of the Fall session of 2021, abolish criminal penalties for drug use;
- The Parliament of Georgia should, at the latest by the Spring Session of 2021, fairly determine the dosage of drugs;
- The Parliament of Georgia should, no later than the Fall session of 2021, determine the penalties prescribed by the Criminal Code of Georgia for drug offenses based on the principle of proportionality;
- The Parliament of Georgia should, by the end of the Fall 2021, revise the legislation restricting civil rights for convicted drug offenders and authorize the judges to impose such sanctions not automatically, but discretely, in accordance with the principle of individualization of punishment;
- Legislative procedure regulating compulsory drug testing should be in line with human rights standards;
- The Government of Georgia should, no later than 2021, establish a systematic prevention mechanism to plan and implement preventive measures;
- The Government of Georgia should, no later than 2021, set up commissions for referrals, based on which individual treatment, support or care services shall be individually tailored to the drug users, instead of punishing them.

³³ Article 21(2) of the Law of Georgia on Operative-Investigation Activities.

³⁴ Decree N725 of September 30, 2015 of the Minister of Internal Affairs on “Instruction to submit a person for examination to establish the fact of narcotic drug or psychotropic substance consumption”, article 4.

³⁵ Public Defender's Report on the State of Human Rights and Freedoms in Georgia, p. 261, available at: <https://bit.ly/2IE4Y2g>.

³⁶ Human Rights Watch, Harsh Punishment – The Human Toll of Georgia’s Abusive Drug Policies, 2018, p. 24, available at: <https://bit.ly/33eJtyr>