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EMC

Human Rights Education and Monitoring Center

GEORGIAN YOUNG LAWYERS' ASSOCIATION

NGO coalition joint submission on Institutional Challenges in Judiciary and Law Enforcement System; Critical Issues of Criminal Justice.

NGO coalition:

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

The coalition was formed to prepare a joint statement for UPR Georgia 2020. Civil Society Organizations (CSOs) of the coalition are well established non-governmental organizations (NGOs), which, above all, work intensively and concentrate on the Judiciary and Law Enforcement issues in the country. The information provided in this report is based on the studies, researches, litigation experience, advocacy campaigns and lobbying on a policy-making level of participant organizations. The joint report emphasizes the country-specific circumstances related to the Right of Area 12.5, 12.6, 15-1.

A. Institutional Challenges in Judiciary and Law Enforcement System

1. Judicial System

1.1. In 2016, within the Universal Periodic Review, Georgia was recommended to strengthen its efforts to establish the rule of law by promoting judicial independence and transparency through the depoliticization of the judiciary.[1] However, the system is still affected by interests of political parties and the clan. An influential group of judges (the "clan") has the advantage to influence the judiciary in making important decisions[2] and they use their authority to pursue their own interests within the judicial system;[3] the group is in alliance with the government and uses the gaps in the legislation to act arbitrarily, against the interests of the judiciary. This leads to a feeling of injustice among citizens. Trust in the judiciary is critically low in the country.[4]

1.2. The High Council of Justice (hereinafter referred to as the "Council") is the body that ensures the independence and effectiveness of the common courts, as well as has the responsibility to carry out various objectives.[5]The composition rule of the Council[6] is problematic as it fails to balance equal representation of the interests of various groups within the judiciary system.

1.3. One and the same individuals usually hold administrative positions, substituting each other, within the courts triggering establishment of privileged groups among the judges.[7] It further leads

[1] 2RP: Responses to Recommendations & Voluntary Pledges, Georgia, Second Review, Session 23, Review in the Working Group: 10 November 2015, Adoption in the Plenary: 16 March 2016, Recommendations 118.22. (US) and 118.19. (Poland), supported by Georgia, available at: http://bit.ly/3dhE3aL, updated: 21.03.2020.

[2] Abashidze A., Arganashvili A., Beraia G., Verdzeuli S., Kukava K., Shermadini O., Tsimakuridze E., *The Judicial System Past Reforms And Future Perspectives*, Coalition for an Independent and Transparent Judiciary, Tbilisi 2017, p. 12, the webpage of the Coalition, available at: http://bit.ly/3b468A4, updated: 21.03.2020.

[3] In relation to the clan-based governance, please see: Coalition for an Independent and Transparent Judiciary, *„The Coalition is Starting "Make Courts Trustworthy" Campaign"*, the webpage of the Coalition, available at: http://bit.ly/33sRNKY, updated: 21.03.2020; Also, Abashidze A., Arganashvili A., Beraia G., Verdzeuli S., Kukava K., Shermadini O., Tsimakuridze E., *the cited work,* p. 12.

[4] Human Rights Education and Monitoring Center (EMC), CRRC-Georgia, Institute for Development of Freedom of Information (IDFI), *Knowledge and Attitudes of the Population of Georgia towards Judiciary: Results of the Public Opinion Survey*, 2018, the EMC webpage, available at: http://bit.ly/2UhKwK2, updated: 21.03.2020.

[5] Article 64, paragraph 1 of the Constitution of Georgia.

[6] The High Council of Justice of Georgia consists of 15 members. Eight members of the High Council of Justice of Georgia, each representing at least one court, shall be elected by the self-governing body of judges of the courts of general jurisdiction of Georgia. Five members shall be elected by Parliament of Georgia and one by the President of Georgia. The Chairperson of the Supreme Court is a member of the High Council of Justice of Georgia.

[7] Coalition for an Independent and Transparent Judiciary; "The Coalition's Legislative Proposal to Reform the High School of Justice and the Institute of Court Chairs", the webpage of the Coalition, available at: http://bit.ly/3ddYnK3, updated: 21.03.2020.

to the concentration of immense power in their hands.[8] According to the legislation, the Council shall appoint the Chairperson and the Deputy Chairperson of the Court of Appeals and the Chairperson of a District (City). This power granted to the Council is another instrument to control the judiciary and can be used against the independence of individual judges.[9] In 2014, the European Commission for Democracy through Law (the Venice Commission) welcomed the initial version of the draft law suggesting that the judges shall elect the chairpersons. This would have provided them with further guarantees to improve the standards of self-governance within the system. Unfortunately, this particular clause has been left out of the final draft law introduced to the Parliament.[10] It is worth mentioning that the position of Deputy Chairperson carries practically no functions.[11]

1.4. The Venice Commission positively evaluated the inclusion of the electronic case distribution system,[12] and noted that it is crucial to include a provision in the law governing the operation of the electronic system and as well as case distribution rule in case of the system being temporarily unavailable.[13] There are several notable shortcomings in this regard,[14] namely:

- The power of the chairperson of a court to determine narrow specialization of the judges. In such cases, chairpersons retain the authority to distribute cases selectively to a limited circle of judges;[15]
- The distribution system does not envisage objective criteria for determining the number of cases;[16] the program does not take into account the complexity and importance of a case, which is necessary for a fair and equal distribution of cases.

1.5. The broad powers of the Council with respect to the admission rules of justice students[17] to the High School of Justice (HSoJ) have been criticized several times.[18] Current legal framework

[8] Nozadze N., Shermadini O., *Monitoring Report of The High Council of Justice #7*, Georgian Young Lawyers' Association and Transparency International, Tbilisi 2019, p. 47, GYLA webpage, available at: http://bit.ly/3daZiLd, updated: 21.03.2020.

[9] Coalition for an Independent and Transparent Judiciary,"The Coalition's Opinion on the Proposed Amendments to the Organic Law on Common Courts, Coalition for an Independent and Transparent Judiciary", the webpage of the Coalition, available at: http://bit.ly/2UhH0iB, updated: 21.03.2020.

[10] European Commission For Democracy Through Law (VENICE COMMISSION), On the Draft Law on Amendments to the Organic law on General Courts, Opinion #773/2014, Strasbourg,14 October 2014, p. 16, par. 10, the website of the Venice Commission, available at: http://bit.ly/3a3Ng4m, updated: 21.03.2020.

[11] Kukava K., Talakhadze M., Nozadze N., *The Supreme Court of Georgia, Analysis of Institutional and Legal Framework,* Institute for Development of Freedom of Information" (IDFI) and "Georgian Young Lawyers' Association" (GYLA), GYLA webpage, available at: https://bit.ly/2Ssralk, updated: 21.03.2020.

[12] Id.

[13] Coalition for an Independent and Transparent Judiciary, „Opinion of the Coalition for Independent and Transparent Judiciary on the Fourth Wave of Judicial Reform Legislative Package", the webpage of the Coalition, available at: http://bit.ly/3a67LNC, updated: 21.03.2020.

[14] For the detailed information regarding the challenges concerning the electronic case distribution system, please see: Mkhatvari M., Talakhadze M., Kukava K., *Assessment of the Judicial Reform Electronic System of Case Distribution System for Disciplinary Liability of Judges*, Human Rights Education and Monitoring Center (EMC) and Institute for Development of Freedom of Information (IDFI), Tbilisi 2019, pp. 9-10, the EMC webpage, available at: http://bit.ly/3dbZj1r, updated: 21.03.2020.

[15] Id. p. 9.

[16] Id.

cannot ensure the proper institutional and functional independence of the school from the Council;[19] it is possible to block any undesired candidates, the Council would not like to see becoming judge in the future, from the beginning if the body acts against the principle of integrity. Additionally, the admission criteria to the school are not defined.

1.6. The Council plays a significant role in the **composition process** of Independent Board[20] of the School,[21] namely, the Council:

- Appoints two of seven members of the Independent Board from its composition;[22]
- Plays an important role in appointing members within the quota of accredited universities;[23]
- Elects the **chairperson of the Independent Board of the school** within the quota of the Conference of Judges.[24]

1.7. In 2019, selection process of Supreme Court justices resulted in a public indignation; the implemented legislative amendments failed to identify the best candidates for the position of Supreme Court justices jeopardizing the right to a fair trial. The CSOs,[25] international organizations[26] and the Public Defender of Georgia[27] criticized the process. The competence and the integrity of the selected justices were put under doubt as well. This was due to several factors, including:

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[17] The purpose of the school is to provide professional training for a person who shall be then appointed as a judge in the system of common courts of Georgia.

[18] Coalition for an Independent and Transparent Judiciary, "Considerations of the Coalition on the "Third Wave" of the Judicial Reform", The Coalition webpage; available at: http://bit.ly/3b48nU0, updated: 21.03.2020.

[19] Mkhatvari M., Talakhadze M., Kukava K., *Implementation of the Judicial Strategy and the Action Plan (Shadow Report),* Human Rights Education and Monitoring Center (EMC) and Institute for Development of Freedom of Information (IDFI), p. 25, the EMC webpage, available at: http://bit.ly/2x3N3zr, 2018, updated: 18.03.2020.

[20] The direction of the school activities is determined, coordinated and supervised by the Independent Board of the School.

[21] The Conference of Judges of Georgia shall elect three members of the Independent Board, who are judges from each of the three instances of the common courts system, for a term of four years. The High Council of Justice of Georgia shall elect two members of the Independent Board (one judge member and one non-judge member) from its composition for the term of office of a member of the High Council of Justice of Georgia. The other two members of the Independent Board, who hold the academic position of a professor, associate professor or assistant professor in a higher education institution accredited by law and who do not work in a public institution, shall be elected for four years by the High Council of Justice, upon the recommendation of at least three members of the body.

[22] Article 66^3, paragraph 4 of the Organic Law on Common Courts.

[23] Id.

[24] Article 66^3, paragraph 5 of the Organic Law on Common Courts.

[25] Coalition for an Independent and Transparent Judiciary, „Assessment of the Hearings of Supreme Court Judicial Candidates at the Parliament Legal Committee, Coalition for an Independent and Transparent Judiciary", the Coalition webpage, available at: http://bit.ly/2Qu56po, updated: 21.03.2020.

[26] Office for Democratic Institutions and Human Rights, ODIHR Report, Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia, June – December 2019, the OSCE website, available at: http://bit.ly/33tmwYx, updated: 21.03.2020; Also, Europian Commission, "Joint staff working document Implementation Report on Georgia", par.2.3 Justice, freedom and security, the Europian Commission website, available at: http://bit.ly/2UeDzJC, updated: 21.03.2020.

[27] In more details: Monitoring Report on the Selection of Supreme Court Judicial Candidates, the Public Defender's website, available at: https://bit.ly/2Y6UHmz, updated: 21.03.2020.

- Participation of Council members in the selection process **despite the conflict of interest during the competition;**[28]
- Uniform voting scheme practiced by the judge-members of the Council in the selection process;[29]
- The procedure of committee hearings in the Parliament are not clearly regulated;
- The decision on the nomination and selection of justices was not consensus-based and presumably was the result of a deal between the Clan and the authorities.[30]

1.8. In certain cases, if a candidate has no judicial experience, the Council may appoint them as a judge of the first and second instance court for a three-year probation period,[31] which poses a risk to their independence,[32] as the judge whose appointment depends on decisions delivered during the probationary period is more vulnerable to pressure.

1.9. The Independent Inspector shall be obliged to carry out an objective, impartial, thorough investigation and preliminary examination of any alleged disciplinary misconduct committed by judges.[33] The Independent Inspector shall submit the report to the Council and the latter shall make a final decision on the imposition of disciplinary liability.[34] Unfortunately, the legislative framework does not provide adequate guarantees of independence necessary for the work of the Inspector.[35] At the same time, the selection principles do not set out the basic rules of the competition (impartiality, publicity, the prohibition of discrimination, avoidance of conflicts of interest, etc.),[36] which allows the Council for a wide scope for arbitrariness. The fact that a high quorum is not required for the election of the Inspector and merely the support of a simple majority is sufficient remains a problem.[37] After adoption of the independent inspector institute both inspectors (acting and former) were chosen via closed selection process, which raised questions regarding the Council's illegitimate interests in the competition outcomes and undermined public trust in the selected candidates.[38]

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[28] Coalition for Independent and Transparent Judiciary „The Coalition is assessing the ongoing process of selection of Supreme Court judicial candidates", the Coalition website, available at: http://bit.ly/3dhHNZR, updated: 18.03.2020.

[29] The statement of the Public Defender, 28.06.2019, the Public Defender's website, available at: http://bit.ly/2k3CTsy, see also: Coalition for Independent and Transparent Judiciary, "The Coalition is assessing the ongoing process of selection of Supreme Court judicial candidates", the coalition website, available at: https://bit.ly/3dcEmD5, updated: 21.03.2020

[30] In more details: Monitoring Report on the Selection of Supreme Court Judicial Candidates, the Public Defender's website, available at: https://bit.ly/2W8ypzC, updated: 21.03.2020.

[31] Article 36, paragraph 4^1 of the Organic Law on Common Courts.

[32] Europian Commission for Democracy Through Law (VENICE COMMISSION), the cited report, par. 17.

[33] Article 51^1, paragraph 1 of the Organic Law on Common Courts.

[34] Article 75^{13}, paragraph 1 of the Organic Law on Common Courts.

[35] Id.

[36] Nozadze N., Shermadini O., *the cited work.* pp.: 40-51.

[37] Article 51^1, paragraph 1 of the Organic Law on Common Courts.

[38] Coalition for an Independent and Transparent Judiciary, "The Coalition Criticizes the Independent Inspector's Selection Process", 2020, the webpage of the Coalition, available at: https://bit.ly/2Mb90Rf, updated: 21.03.2020; Coalition for an Independent and Transparent Judiciary, "The Coalition Criticizes the Independent Inspector Selection Competition for the Lack of Transparency", 2017, the webpage of the Coalition, available at: https://bit.ly/2zCql31, updated: 21.03.2020.

As for the disciplinary liability proceedings, although the rules on pre-examination and investigation of a disciplinary case were strictly defined by organic law in 2017, however, deadlines were still violated, and disciplinary proceedings were delayed. Furthermore, existing legislative framework does not set the obligation to remove identification data when publishing opinions by independent inspector. Opinions are not available even if they are requested as public information, which is an important shortcoming in terms of transparency. In turn, the High Council of Justice continues to hold meetings on disciplinary cases with insufficient frequency, which further contributes to delays in disciplinary proceedings.[39]

Recommendations:

- Until the end of 2021, the legislation shall envisage the gender quotas for the election of the judge and non-judge members of the Council (every other member of the Council should be of a different gender[40] - except for *ex-officio* members). Quotas shall be imposed on regional and court instance representation of judge members as well. The rule of holding the position of Chairperson of the Court as well as being a member of the Council at the same time shall be abolished;
- Until the end of 2021, the legislation shall be amended so that judges of respective courts can elect chairpersons. The position of Deputy Chairperson should be abolished;
- By the end of 2021, the law allowing one and the same person to serve as Chairperson of the court for two consecutive terms shall be abolished;
- By the end of 2021, the electronic case distribution system shall be refined so that court chairpersons or other individuals are unable to influence the process. The amendments should also ensure that the significance and complexity of a particular case are taken into account when distributing cases;[41]
- The legal framework shall be amended by the end of 2021 so that the Council is deprived of the right to appoint members and chairperson of the Independent Board of the school. Furthermore, the competition procedures for the selection of justice students shall be provided in details on the the legislative level;
- By the end of the Spring Session 2021, Parliament shall introduce amendments to the law requiring consensus, i.e. representatives of both majority and minority shall support the selection of justices to the Supreme Court;
- The Parliament of Georgia shall abolish the probation period of appointment of judges until the end of 2021;
- By the end of 2021, the Parliament shall develop transparent procedures for the selection of an Independent Inspector, including the selection principles such as impartiality, publicity, the

[39] In more details: Institute for Development of Freedom of Information(IDFI), Human Rights Education and Monitoring Center (EMC), Assessment of the Judicial Reform – System of Disciplinary Liability of Judges, November, 2019, EMC webpage, available at: https://bit.ly/2VMkWxz; updated: 21.03.2020.

[40] For the detailed recommendations, please see: Council of Europe Office in Georgia News," Why women judges are underrepresented in the management of the common courts in Georgia – the Council of Europe has published a study", Council of Europe's website, available: https://bit.ly/2zKGrqZ, updated 01.05.20.

[41] For the detailed recommendations, please see: Mkhatvari M., Talakhadze M., Kukava K., the cited work, p. 40 et al.

prohibition of discrimination, avoidance of conflict of interests. Two-thirds of the members of the Council shall be required to select the Inspector.

2. The system of the Prosecutor's Office

2.1. The depoliticization and independence of the Prosecutor's Office in the country's judicial system remain the major challenges. In 2016, through the Universal Periodic Review, Georgia was issued a recommendation to continue its efforts to establish an independent and effective Prosecutor's Office.[42]

2.2. With the 2016-2018 constitutional reforms, the status of the Prosecutor's Office was redefined. As a result of the amendments, the Prosecutor's Office is no longer a part of the Cabinet of Ministers and it has acquired the status of an independent body. The Prosecutorial Council, a collective body, was established within the framework of the Office to ensure the independence, transparency and efficiency of the system.[43]

2.3. Within the mandate set by the law, the Prosecutorial Council is unable to fulfill its constitutional obligation and ensure the independence, transparency and effectiveness of the Prosecutor's Office.

2.4. The Prosecutorial Council consists of 15 members and the majority of its members (8 members) are prosecutors.[44] The non-prosecutor members include MPs (creating the risks of politicizing the Council, especially that it is based on a system of party quotas, which the Venice Commission has considered as one of the most undesirable models[45]), a member appointed by the Ministry of Justice (creating the risk of the interference by the government with the activities of the Prosecutor's Office), as well as third parties elected through parliamentary quota. The election rule of the third parties is not based on a political consensus. The presence of judges and lawyers within the Council also poses a risk of conflict of interests.

2.5. The legislation does not properly regulate the rules for the election of prosecutor members of the Council. They are selected by the Conference of Prosecutors from among candidates nominated only by 30-member initiative groups,[46] an initiative group may nominate no more than

[42] The recommendation 118.23 issued by Belgium and supported by Georgia. Take measures to support and strengthen prosecutions for human rights violations by the judiciary, with reference to the recommendations made by the Council of Europe Commissioner for Human Rights, including with respect to the strengthening of the independence and effectiveness of the Prosecutor's Office (Belgium); available at: https://bit.ly/2xXjLD5 updated: 20.03.2020.
[43] Article 65, Paragraph 3 of the Constitution of Georgia.
[44] Article 19 of the Organic Law of Georgia on the Prosecutor's Office.
[45] European Commission For Democracy Through Law (VENICE COMMISSION), Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), Par: 42-43, the website of the Venice Commission, available at: https://bit.ly/35lxFLJ, updated: 21.03.2020.
[46] Article 8^1 (2) of the Organic Law of Georgia on the Prosecutor's Office.

two candidates for membership of the council. Therefore, only the initiative groups and not individual prosecutors are allowed to nominate the potential candidates of prosecutorial council. This model reduces the impact of individual prosecutors in the staffing process. The process is also flawed in terms of gender and geographical quotas.

2.6. One of the problematic issues is the procedure for electing the Prosecutor General provided by the law. Under the existing regulations, the legislation does not define the qualification requirements for candidates for the position of the Prosecutor General clearly and comprehensively. Additionally, the legislation does not restrict the possibility of the re-election of the same person on the position of the Prosecutor General, which is one of the important recommendations of major international recommendations and best practices.[47]

Recommendations:

- By the end of 2021, the Parliament shall amend the procedure for composing the Prosecutors' Council as follows: exclude political entities, governmental members, representatives of judiciary and lawyers from its composition. Instead, the Parliament shall determine the procedure for electing non-prosecuting members of the Council in a way that requires the support of both a majority and a minority; each prosecutor shall be entitled to nominate a candidate at the Conference of Prosecutors when electing members of the Council. Besides, this process shall include fair gender and geographical quotas. The number of members of the same sex in the Prosecutors' Council must not exceed eight;
- The State should resume the talks regarding the mandate of the Prosecutorial Council and determine its powers so that it can actually fulfill its constitutional obligations - guarantee the independence, transparency and efficiency of activities of the body;
- By the end of the Spring Session 2021, the Parliament shall introduce amendments to the law requiring the support of both a majority and a minority to elect the Prosecutor General;
- The possibility of re-appointing the same person as the Prosecutor General should be restricted.

3. The State Security Service

3.1. Pursuant to the law, the State Security Service (SSS) has a wide scope of competence and it includes "counterintelligence and anti-terrorism activities, as well as the fight against corruption, terrorism and the investigation of other offences against the state and human rights and freedoms (including any breach of equal rights, racial discrimination)."[48] In addition to the investigative actions, the State Security Service is equipped with the power to carry out preventive measures to

[47] Gvasalia T., Imnadze G., *Prosecution System Reform*, Human Rights Education and Monitoring Center (EMC), 2018, the EMC website, available at: https://bit.ly/3dBitgT, updated: 20.03.2020.

[48] Menabde V. (the Principal Investigator and Scientific Editor) et al; "Twenty Years without Parliamentary Oversight", Supervision by the High Representative Body on Security Sector Activities in Georgia, Second Revised Edition, Tbilisi, 2019, p. 152. Available at: https://bit.ly/3cJRKPm, updated: 20.03.2020.

identify, prevent and investigate crimes.[49] The power granted to the State Security Service and the range of its scope of action greatly increases the risks of violation of human rights, control over specific groups in various regions in the country and abuse of power.

3.2. The appointment, as well as dismissal of the head of the State Security Service, is a quasi-trust/distrust mechanism that allows one political group to make unilateral and arbitrary decisions.[50] A candidate nominated by the Prime Minister for the position of the SSS head needs the support of the government,[51] and then the Parliament votes for and approves the candidate with an absolute majority.[52] For the removal of the head of the SSS, it is sufficient for the matter to be initiated by one- third of the MPs[53] or the government supported by the absolute majority of the Parliament.[54] The procedure is not oriented on consensus seeking and lacks sufficient legal guarantees.[55]

3.3. As for the accountability of the Service, there is no mixed committee in the parliament composed of both parliamentary entities and independent experts, which impedes the effective parliamentary supervision over the SSS.

Recommendations:

- By the end of 2021, Parliament shall limit the functions of the State Security Service. It is necessary that its mandate is limited to analytical activities only.
- The law shall be amended by the end of 2021 requiring the support of both a majority and a minority to elect and dismiss Head of the State Security Service and the right to initiate a candidacy for the position shall be granted to any faction.
- No later than the spring session 2021, the Parliament shall set up a mixed committee consisting of both parliamentary subjects and independent experts to oversee the activities of the SSS.

4. The State Inspector Service

4.1. The impartial investigation of crimes committed by law enforcement officials for years has been a major problem in the state, which has led to the necessity to develop an independent investigative mechanism. The state undertook an international commitment to establish the

[49] Article 11 (a) of the Law of Georgia on State Security Service.
[50] Menabde V. (the Principal Investigator and Scientific Editor) et al, the cited work, pp. 159 and 166.
[51] Article 7 (1) of the Law of Georgia on State Security Service.
[52] Article 7 (7) of the Law of Georgia on State Security Service.
[53] Article 183 (1) of the Law of Georgia on State Security Service.
[54] Article 183 (2) of the Law of Georgia on State Security Service.
[55] The group of authors "Reform of the Security Service in Georgia, Results and Challenges," Human Rights Education and Monitoring Center - (EMC), Tbilisi 2018, p. 19. the EMC Website, Available at: https://bit.ly/2AKY6PJ, Updated: 21.03.2020

mechanism in a timely manner.[56] Pursuant to the special law passed in 2018, the State Inspector Service was established in the country, yet it was only in November 2019 when the Service started functioning due to the postponement of the enactment of the law several times.

4.2. Ensuring the independence of the State Inspector Service is largely dependent on the procedure for the election of the Inspector. The Inspector shall be appointed by Parliament (by an absolute majority),[57] though the Prime Minister plays a crucial role in this process, as he/she presents a candidate to the legislative body. This gives the ruling party an opportunity to select a loyal candidate for the Inspector's position.

4.3. Another problem is the scope of the Service that is very limited. The Inspector is not entitled to investigate cases related to the Minister of Interior Affairs, the Prosecutor General, or the Head of the SSS. The investigative powers of the Inspector are also limited to specific types of crimes that do not ensure effective, credible and unbiased investigations into all types of offences committed by law enforcement officers. Besides, the Inspector may not conduct such important investigative activities as searches, arrests, covert investigations independently and shall only depend on the prosecutor overseeing a specific case.

Recommendations:

- By the end of 2021, the State Inspector Service shall be strengthened both institutionally and functionally, including by extending the scope of the Service authority to ensure the full independence of the agency;
- By the end of 2021, the law shall be amended in terms of the election of the Inspector. The state shall develop a rule for the appointment of the Inspector that would exclude the possibility of the involvement of executive bodies in the process and require the support of both a majority and a minority of the parliament to elect the Inspector.

[56] The National Action Plan 2015 on the implementation of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, available at: https://bit.ly/3bhniur, updated: 20.03.2020.
[57] Article 6(6) of the Law of Georgia on the State Inspector Service.

B. Critical Issues of Criminal Justice

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.[58]

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.[59] The concept of reform is also widely supported by civil society organizations.[60] 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.

[58] Imnadze G., Gvasalia T., Verdzeuli S., kvachantiradze d., Abesadze D., *Analysis of Investigative System*, Human Rights Education and Monitoring Center (EMC), 2018, the EMC webpage, available at: https://bit.ly/3imvyxF, updated: 30.06.2020.

[59] European Commission For Democracy Through Law (VENICE COMMISSION), 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), the website of the Venice Commission, available at: https://bit.ly/2VvGvTD, updated: 30.06.2020.

[60] Human Rights Education and Monitoring Center (EMC), *Opinions to the Venice Commission about Investigation System Reform in Georgia,* February, 2019, the EMC webpage, available at: https://bit.ly/38JzGSk , updated: 16.03.2020.

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 cases[61].

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.[62]

2.3 During the second Cycle of the UPR, Georgia was recommended to reduce the use of pre-trial detention.[63] Practice shows that the number of detainees and imprisoned persons, under the Administrative legislation, has not been decreasing from year to year. In fact, out of 15 191 persons

[61] A.Human Rights Watch*, Administrative Error: Georgia's Flawed System of Administrative Justice*,January 2013, the Human Rights Watch webpage, available at:https://bit.ly/2YKppn3, updated: 16.03.2020. B. Georgian Young Lawyers' Association, Report 26 May *Analysis of Human Rights Violations during and related to the Dispersal of the May 26 Assembly*, 2011, the GYLA webpage, available at: https://goo.gl/nKDmpz, updated: 16.03.2020. C. Mkhatvari M., Kukava k., Nasrashvili A, Imnadze G., Kachkachishvili I., Lolashvili G., *Political Neutrality in the Police System*, Human Rights Education and Monitoring Center (EMC), 2016, the EMC webpage, available at: https://bit.ly/2BOef7R, updated:16.03.2020. D. Kurdovanidze N., *Protests Considered to be an offence*, Georgian Young Lawyers' Association, 2017, the GYLA webpage, available at: https://goo.gl/ocENXL, updated: 16.03.2020. E. Gotsitidze G., Mamrikishvili E., Oniani T., Simonishvili N., Jakhua M., Jomarjidze N., *Beyond the Lost Eye*, Georgian Young Lawyers' Association, Chapters 4 and 5, 2019, the GYLA webpage, available at: https://bit.ly/2OR8OZW, updated: 16.03.2020.

[62] How to End Georgia's Unconstitutional Use of its Administrative Offenses Regime Judicial Independence and Legal Empowerment Project (JILEP) October 15, 2013, ewmi/PRoLOG website, avilable at: https://bit.ly/2VIZf27, updated: 16.03.2020.

[63] UPR, Recommendation N118.11. Take steps to limit the application and length of pretrial detention (Denmark);

placed in temporary detention facilities in 2019, 5596 persons were deprived of their liberty under Administrative Offenses legislation.[64]

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. [65]

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.[66] 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. [67]

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;

[64] Official statistics published by the Ministry of Internal Affairs of Georgia, the Ministry of Internal Affairs website, available at: https://bit.ly/2C5kl3G, updated: 16.03.2020.

[65] Coalition for Independent and Transparent Judiciary,"Letter to the Special Rapporteur on the rights to freedom of peaceful assembly and of association", The Coalition webpage, available at,: https://bit.ly/2ZFvyzX, Updated 16.03.2020.

[66] Official statistics published by the Ministry of Internal Affairs of Georgia, the Ministry of Internal Affairs website, available at: https://bit.ly/2C5kl3G, updated",uptadetd: 16.03.2020.

[67] Coalition for Independent and Transparent Judiciary, "Comments and Recommendations on Administrative Detention and Imprisonment", The Coalition webpage, available at: https://bit.ly/31H1YNt, updated: 16.03.2020.

- 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.[68]

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.[69] 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.[70]

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,[71] according to Report No. 13, the rate of unjustified imprisonment was 15% and in case of bail, the rate was 28%.[72]

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[68] Criminal Procedure Code, article 199(1), available at: https://bit.ly/31B1ybn, updated: 30.06.2020.

[69] UPR, Recommendation N118.11. Take steps to limit the application and length of pretrial detention (Denmark).

[70] 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. The supreme court website, Available: https://bit.ly/2Z2L4XH, updated: 30.06.2020.

[71] Kartvelishvili M., *Monitoring criminal trials in Tbilisi, Kutaisi, Batumi, Gori and Telavi courts - monitoring Report №12*, Georgian Young Lawyers' Association, გვ.: 27, Period covered: March 2017 – February,2018, the GYLA webpage, available at: https://bit.ly/3ieMANP, updated: 30.06.2020.

[72] Kartvelishvili M., *Criminal Trials Monitoring Report N13 (In Tbilisi, Kutaisi, Batumi, Gori and Telavi Courts),* Georgian Young Lawyers' Association, გვ.: 32, Period covered: March 2018 – February, 2019, the GYLA webpage, available at: https://bit.ly/2Z1jn0h, updated: 30.06.2020.

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.[73] 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.[74] 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.[75]

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.

[73] Criminal Procedure Code, article 219, para 4(1), article 230^{1}.

[74] UPR, Recommendation N118.11. Take steps to limit the application and length of pretrial detention (Denmark).

[75] 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 ap- plied as a preventive measure in 182 (96%) out of 190 cases, and in 137 (75%) of these, the court did not substantiate or insufficiently substantiated why it was necessary to leave the imprisonment in effect.
Kartvelishvili M., *Criminal Trials Monitoring Report N13 (In Tbilisi, Kutaisi, Batumi, Gori and Telavi Courts*), Georgian Young Lawyers' Association, pg., 44-45, Period covered: March 2018 – February, 2019, the GYLA webpage, available at: https://bit.ly/2Z1jn0h, updated: 30.06.2020.

4. Repressive Drug Policy in Georgia

4.1 Georgia's drug policy remains a major challenge for the judiciary. In Georgia, drug use without a prescription is a punishable act[76] and leads to imposition of unjust and disproportionate penalties, both under administrative and criminal law.[77] The existing drug policy allows for imposition of undue burden on citizens.[78] Along with a strict criminal drug policy, the country's efforts in terms of prevention and treatment-rehabilitation are largely insufficient.[79]

4.2 The relevant law,[80] 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.[81] The law does not provide for small amounts in relation to many common drugs (for example - amphetamine, methamphetamine, MDMA, etc.). In such a case,[82] 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.[83]

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,[84] 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

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

[77] Nasrashvili A., D*rug Policy in Georgia - Suspended Reform and New Trends*, Human Rights Education and Monitoring Center (EMC), pg.:7, 2019, the EMC webpage available: https://bit.ly/2TGqxW5, updated: 30.06.2020.

[78] *Gaps in the Investigation and Prosecution of Drug Offenses (Analysis of 2017 high profile case*s), Human Rights Education and Monitoring Center (EMC), pg.1-11., 2017, the EMC webpage, available: https://bit.ly/2VYCx77, updated: 30.06.2020.

[79] Public Defender's Report on the State of Human Rights and Freedoms in Georgia, 2018, pg.:261, the Public Defender's website, available at: https://bit.ly/3iqaFSd, updated 30.06.2020.

[80] Law of Georgia on Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance.

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

[82] Law of Georgia on Narcotic Drugs, Psychotropic Substances and Precursors, and Narcological Assistance, articles 6, para. 4^1.

[83] 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.

[84] Nasrashvili A., *Drug Policy in Georgia - Suspended Reform and New Trends*, Human Rights Education and Monitoring Center (EMC), pg.23-27., 2019, the EMC webpage available: https://bit.ly/2TGqxW5, updated: 30.06.2020.

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.[85]

4.4 In addition to conviction and sentencing, the drug abuser is automatically subjected to the restriction of additional civil rights.[86] 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,[87] which significantly impedes employment opportunities of these persons and limits their social reintegration prospects.[88]

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.[89] Neither judicial nor prosecutorial control applies to the verification of the credibility / authenticity of the operative information.[90] 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.[91]

4.6 In Georgia, persons addicted to drugs are not adequately provided with treatment tailored to their medical, psychological and social needs.[92] Such an important element of drug addiction as psychosocial rehabilitation is nonexistent in the country.[93] 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;

[85] Human Rights Watch, *Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies*, 2018, pg. 42-43, the Human Rights Watch webpage,available at: https://bit.ly/33eJtyr, updated: 30.06.2020.
[86] Article 3 of the Law of Georgia on Combating Drug-Related Crime.
[87] Article 3 of the Law of Georgia on Combating Drug-Related Crime.
[88] Nasrashvili A.,*Drug Policy in Georgia - Suspended Reform and New Trends*, Human Rights Education and Monitoring Center (EMC), pg.: 33, 2019, the EMC webpage available: https://bit.ly/2TGqxW5, updated: 30.06.2020.; Human Rights Watch, *Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies*, 2018, pg.: 53-55, the Human Rights Watch webpage, available at: https://bit.ly/33eJtyr, updated: 30.06.2020.
[89] Nasrashvili A.,*Drug Policy in Georgia - Suspended Reform and New Trends*, Human Rights Education and Monitoring Center (EMC), pg.33., 2019, the EMC webpage available: https://bit.ly/2TGqxW5, updated: 30.06.2020.; Human Rights Watch, *Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies,* 2018, pg.: 29, the Human Rights Watch webpage, available at: https://bit.ly/33eJtyr, updated: 30.06.2020.; 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".
[90] Article 21(2) of the Law of Georgia on Operative-Investigation Activities.
[91] 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.
[92] Public Defender's Report on the State of Human Rights and Freedoms in Georgia, 2018, pg.: 261, the Public Defender's website, available at: https://bit.ly/3iqaFSd, updated 30.06.2020.
[93] Human Rights Watch, *Harsh Punishment – The Human Toll of Georgia's Abusive Drug Policies*, pg.: 24, 2018, the Human Rights Watch webpage, available at: https://bit.ly/33eJtyr, updated: 30.06.2020.

- 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.