



THE IMPACT OF THE PANDEMIC ON THE CRIMINAL JUSTICE SYSTEM

SPECIAL REPORT



**GEORGIAN
YOUNG
LAWYERS'
ASSOCIATION**

Georgian Young Lawyers' Association

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INTRODUCTION

The spread of Covid-19 has significantly changed the way criminal justice is administered. The court soon adapted to the restrictions imposed due to the pandemic, and mainly switched to remote consideration of cases, which minimized the risks of the spread of the pandemic. The court and the parties had the opportunity to hold court hearings in compliance with the terms of detention and imprisonment established by the criminal procedure legislation. However, at the initial stage, ensuring the principle of publicity was seriously threatened, as within two months after the start of the outbreak, the attendance of interested persons/court observers at public hearings became dramatically limited.

Later, GYLA monitors managed to resume monitoring remote and in-courtroom hearings in the Tbilisi, Kutaisi, Batumi, and Rustavi City Courts. At the same time, remote court trials conducted due to the pandemic enabled GYLA observers to attend remote hearings in the Zugdidi District Court.

As a result of monitoring the court hearings, the GYLA identified problems in the conduct of remote trials, for the solution of which the organization has prepared relevant recommendations for various agencies.

Nevertheless, even after two years since the onset of the Covid-19 pandemic, serious challenges relating to legal norms and technical issues in remote case proceedings are still observed. One of the most major concerns is the protection of confidentiality of communication between the lawyer and the client. In addition, the Court has not yet provided premises specially equipped with appropriate technical means for interviewing witnesses in remote trials, where the interrogated persons would feel free from psychological pressure.

A large-scale shift to remote consideration of cases was supposed to have significantly saved the time of the parties and the court, but due to the fact that the accused/convicted persons from correctional institutions were not connected to the court trials at the appointed time, the hearings, as a rule, would begin with a significant delay. The inefficiency of penitentiary institutions at the initial stage was manifested in the fact that lawyers had to wait in long queues to meet with their clients, which significantly affected their ability to have effective communication with their clients before court hearings. The way in which the premises were arranged inside the correctional facilities where lawyers could meet with their clients created a risk that the communication between the lawyer and the client would be accessible to third parties.

We hope that the presented paper will help to improve the quality of criminal proceedings, eliminate the shortcomings that emerged during the pandemic, and improve the legal status of the accused.

METHODOLOGY

The report aims to assess the situation two years after the start of the pandemic – in particular, to what extent the criminal justice policy was in line with the fight against the pandemic and whether the actions taken by the relevant authorities were effective in practice.

To this end, the GYLA has analyzed the **amendments introduced to the criminal law** under the influence of the pandemic, as well as the issues identified as a result of the observation of criminal trials.

The organization requested from the **courts of general jurisdiction** the judgments handed down in relation to certain offences – namely, the verdicts concerning violations of isolation and/or quarantine rules,¹ as well as violations of the state of emergency or martial law.²

In particular, the GYLA retrieved the following information from the six courts - Tbilisi, Batumi, Rustavi, Kutaisi City Courts, and Zugdidi and Telavi District Courts:

- The number of cases considered by each court relating to the crimes under Articles 248¹ and 359¹ of the Criminal Code of Georgia (separate data), as well as in combination with these articles, in the period from 2 May 2020 to 16 March 2022.
- Of these, the number of plea agreements concluded and the number of cases finalized through merits consideration.
- The number of acquittals, guilty or partially guilty verdicts.

For the purposes of the research, information received from the relevant bodies - **the Ministry of Internal Affairs of Georgia** and the **General Prosecutor's Office** with respect to the initiation of investigation and criminal prosecution under specific articles (Articles 248¹ and 359¹ of the Criminal Code of Georgia) has been also analyzed.

The paper offers an assessment of the criminal justice policy implemented by the State during the pandemic, including **the amnesty acts**.

In addition, as part of the study, in-depth interviews and surveys were conducted with human rights defenders/lawyers³ who spoke about the challenges that the pandemic posed to them in terms of protecting human rights.

KEY FINDINGS

- Technical issues that were identified in the early stages of the Covid-19 pandemic are still emerging in criminal court hearings.
- Two acts of amnesty were issued in connection with the pandemic. In one case, persons who committed the crime under Articles 248¹ (violation of isolation and/or quarantine rules) or 359¹ (violation of the state of emergency or martial law) of the Criminal Code of Georgia were released from criminal responsibility and punishment. In the other case, in order to compensate for the restriction of the right to short visitations for prisoners, the period of stay in the penitentiary institution was calculated within the term of serving a sentence as follows: 4 days of detention was counted as having served 5 days of the sentence.

¹ Article 248¹ of the Criminal Code of Georgia.

² Article 359¹ of the Criminal Code of Georgia.

³ Ten lawyers have been interviewed. Of these, in-depth interviews were conducted with 8 lawyers, and 2 of them were surveyed (they provided the GYLA with their opinions about the matters of interest for the study in a written form).

- In connection with a new crime introduced during the pandemic - violation of the state of emergency or martial law (Article 359¹ of the Civil Code) – no criminal prosecution was launched in the period from 3 May 2020 to 16 March 2022.
- As in the early days of the pandemic, the interrogation of witnesses still takes place in the administrative building of the police, which has a negative impact on the ability to deliver information in an environment free from psychological or other types of pressure.
- An analysis of the verdicts has revealed that parties generally conclude a plea agreement for the violation of the isolation and/or quarantine rules (Article 248¹ of the CC) - 51 (88%) cases. In merely 7 (12%) cases, the court considered the case on the merits.
- Out of 56 judgments provided by the court, in all cases, the court hearings ended with a guilty verdict, albeit with milder sentences.
- The analysis of judgments concerning the violation of the isolation and/or quarantine rules (Article 248¹ of the CC) has revealed that most frequently the court considered term imprisonment as a suspended sentence - (46%), and also often (22%) imposed community service. The type of punishment – a fine was used by the court in 16% of the cases, generally in the amount of 2000-3000 GEL.
- There is no statutory regulation for the code of conduct during remote court hearings. Except for single cases, judges did not inform the attendees even of the minimum rules of behaviour during the hearing.
- When remotely interviewing witnesses using technical means, there is still a high risk that other witnesses can hear the information the questioned person is providing.
- Examination of audio-video evidence in remote court trials remains a major challenge. In such cases, defendants in penitentiary facilities find it difficult to perceive the information reflected in the recordings.
- Both during court proceedings and in places of deprivation of liberty, the conversation between the lawyer and the client is not always confidential.
- Neither the courts nor local self-governments provide the premises equipped with special technical means for the remote interrogation of witnesses.
- No other penitentiary facilities apart from №8 provide for the portal to book a lawyer's visit, which deprives human rights defenders of the opportunity to effectively manage their time.
- According to lawyers, very short time is allocated for scheduled visits - only half an hour, which is often not enough to communicate with clients.
- Judges arbitrarily decide to admit or not interested persons to court hearings held remotely or partially remotely.
- During online court hearings, there is a risk that personal data, commercial secrets, as well as the confidential information of the accused and other persons participating in the proceedings, which is discussed at closed hearings, might be disclosed.

PUBLIC INFORMATION RECEIVED

The Zugdidi District Court⁴ provided the GYLA with 10 judgments delivered on the crimes under Articles 248¹ and 359¹ of the CC in the period from 2 May 2020 to 16 March 2022.

During the same period, **the Batumi City Court**⁵ considered 3 cases under Article 248¹ of the Criminal Code of Georgia (of which, in 2 cases, a plea agreement was concluded, and one case was considered at the merits hearing) and not a single case relating the crime provided for in Article 359¹ of the Criminal Code of Georgia.

Significantly, in the period from 2 May 2020 to 16 March 2022, **the Telavi District Court**⁶ did not consider any case on the commission of a crime under Articles 248¹ and 359¹ of the Criminal Code of Georgia.

In the given period, **the Rustavi City Court**⁷ reviewed 4 cases under Article 248¹ of the Criminal Code of Georgia. All four of them ended in a plea agreement. With regard to the crime under Article 359¹ of the CC, the Court did not hear any such cases during the period.

The Kutaisi City Court⁸ considered 40 cases under Article 248¹ of the CC and in conjunction with this article. According to the plea agreements, 40 guilty verdicts were handed down. No one was convicted in connection with Article 359¹ of the CC or in conjunction with it.

Based on the information provided by **the Tbilisi City Court**⁹, during the reporting period, no judgments were delivered in connection with the crime under Article 359¹ of the Criminal Code of Georgia. As regards Article 248¹ of the CC, the Court considered 1 criminal case against one person.

The number of cases heard by major courts shows that the courts approached the above crimes differently¹⁰ in the regions. For example, the Telavi District Court assumed a more relaxed attitude towards the criminal justice policy than the jurisdiction of the Kutaisi City Court, where 40 criminal cases were considered during the reporting period.

According to the information provided by the **Ministry of Internal Affairs**,¹¹ during the indicated period, the MIA units registered **23525** facts of violation of Article 42¹⁰ of the Administrative Offences Code of Georgia (violation of the isolation and/or quarantine rules). Of these, the perpetrators were mostly natural persons. Only 87 (0.4%) offences were committed by legal entities.¹²

⁴ The reply of the Zugdidi District Court, 29.03.2022, application №135.

⁵ The reply of the Batumi City Court, 30.03.2022, application №139 -გ/3.

⁶ The reply of the Telavi District Court, 28.03.2022, application № 8-133.

⁷ The reply of the Rustavi City Court, 28.03.2022, №399/გ.

⁸ The reply provided by the Kutaisi City Court, 28.03.2022, application № 2348-1.

⁹ The reply of the Tbilisi City Court.

¹⁰ Crimes envisaged by Articles 248¹ and 359¹ of the CC.

¹¹ The reply provided by the Ministry of Internal Affairs of Georgia, 20.04.2022, MIA 7 22 01053991.

¹² Note: 1. Please note that the statistical data also include the violations identified prior to 23 June 2021, on which the Law of Georgia "On Release from administrative fines and penalties" adopted on 7 September 2021 also applies. 2. The Information-Analytical Department of the Ministry of Internal Affairs of Georgia operates with the manual and automated centralized data collection methodology, which is characterized by the different periodicity of registration, as well as different levels of completeness and accuracy. Therefore, according to separate categories

Table №1

Statistics of the Ministry of Internal Affairs in relation to Article 42¹⁰ of the Code of Administrative Offences (violation of the isolation and/or quarantine rules) (02.05.2020-28.02.2022)	
Natural persons	23438
Legal persons	87

The Ministry of Interior did not provide the GYLA with statistical data on the number of persons fined under administrative charges for the violation of Article 177¹⁵ (violation of the state of emergency or martial law) of the Administrative Offences Code of Georgia. The agency sent the organization a few-month data only.¹³

Of the above two new crimes, investigations were more frequently initiated under Article 248¹ of the Criminal Code. In the reporting period,¹⁴ the investigation was launched on **1699** facts under this article, and on 137 cases under Article 359¹ of the Criminal Code.

Table №2

Period: from 2 May 2020 to 28 February 2022	Investigation initiation rate
Violation of the isolation and/or quarantine rules (Article 248 ¹ of the CC)	1699
Violation of the state of emergency or martial law (Article 359 ¹ of the CC)	137

According to the information provided by the **General Prosecutor's Office of Georgia**,¹⁵ criminal prosecution for the violation of the introduced new regulations - Articles 248¹ and 359¹ of the CC - is not often initiated. In addition, no criminal prosecution for the violation of the state of emergency or martial law (Article 359¹ of the CC) was launched at all during the reporting period. It can be said that this article has hardly been applied in practice over the past two years.

of information arrays, further processing of data is done multiple times - in the form of primary, interim and summary reports. At the same time, as of today, the structural revision and architectural renewal-reorganization processes are underway for the Ministry's Information and Analytical Department's database of administrative offences, before the final completion of which, there is a certain probability of further data changes, within the marginal average statistical error.

¹³ The website of the Ministry of Internal Affairs of Georgia, the offences identified as a result of the violation of the state of emergency, available at: <https://info.police.ge/uploads/5eda9f0d152f4.pdf> , updated: 13.08.2022

¹⁴ It covers the period from 3 May 2020 to 16 March 2022, only public information provided by the Ministry of Internal Affairs - from 2 May 2020 to February 2022.

¹⁵ The reply provided by the General Prosecutor's Office of Georgia, 29.03.2022, №13/18107.

Table №3

Period: from 3 May 2020 to 16 March 2022	Criminal prosecution rate
Violation of the isolation and/or quarantine rules (Article 248 ¹ of the CC)	125
Violation of the state of emergency or martial law (Article 359 ¹ of the CC)	Not recorded

Quite noteworthy is the percentage of investigations into violations of isolation and quarantine rules, which significantly exceeds the number of criminal prosecutions. Despite the initiation of investigations in multiple cases, no one was held accountable.

THE ANALYSIS OF VERDICTS

GYLA studied **58 judgments** handed down by the courts¹⁶ in relation to crimes under Article 248¹ of the Criminal Code of Georgia (violation of isolation and/or quarantine rules). The organization has not received any verdicts regarding Article 359¹ of the CC (violation of the state of emergency or martial law). According to the courts, they did not consider cases of violation of the article at all, which is logical in the light of the lack of information about the initiation of criminal prosecution under this article.

As the examination of the court verdicts showed, in all cases relating to the above crime,¹⁷ **guilty verdicts** were passed. The defendants, as a rule, pleaded guilty to the charges, and the cases were finalized with a plea agreement. In particular, in 51 (88%) cases, a plea agreement was concluded and only 7 (12%) of them ended with consideration of the case on the merits. Even during the substantive hearing of the case, the majority of the accused admitted their guilt, which ultimately served as the ground for imposing a lenient sentence. In particular, in all cases, the court applied term imprisonment as a punishment, which was then considered as suspended.

Generally speaking, the verdicts show a trend that the approach of the Prosecutor's Office and the court in relation to the violation of the isolation and/or quarantine rule was not harsh.

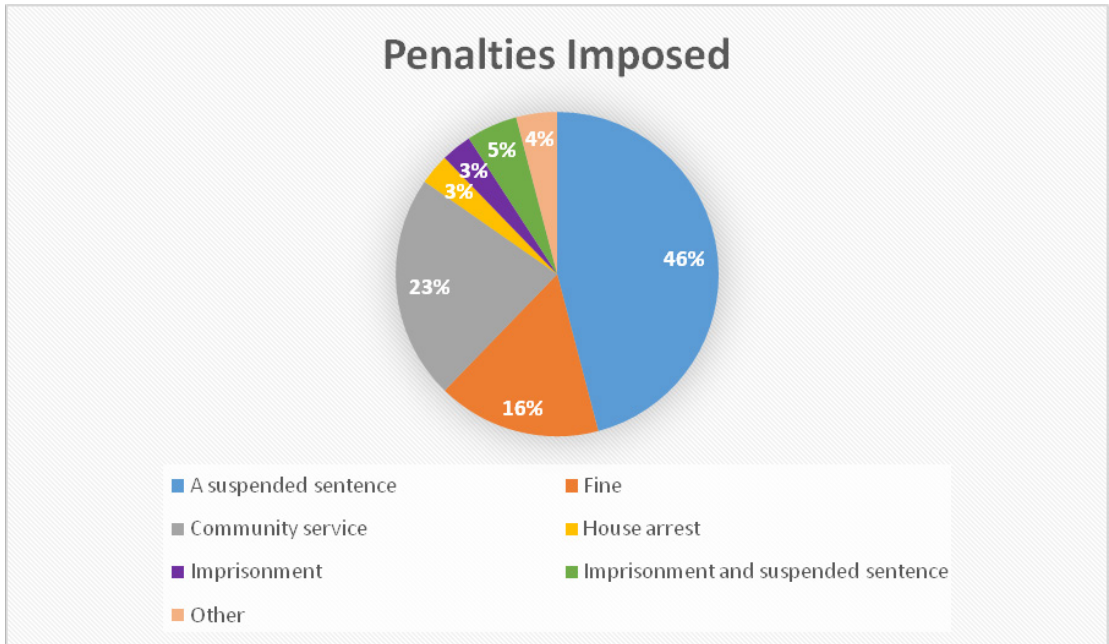
With respect to punishments, the court most frequently imposed a suspended sentence - 26 cases (46%) and community service - 13 cases (22%).

See below the trend in the use of punishments expressed in percentages.

¹⁶ Kutaisi City Court - 40 judgments; Batumi City Court - 3 judgments; Rustavi City Court - 4 judgments; Zugdidi District Court - 10 judgments; Tbilisi City Court - 1 judgment. No cases under these articles were heard by the Telavi District Court during the period.

¹⁷ A case of violation of the isolation and/or quarantine rule.

Chart №1



It should be noted that in connection with the above crimes, **house arrest** was ordered by the court in merely 2 cases. Both cases took place in the Zugdidi District Court. The defendants were sentenced to house arrest for a period of 1 year, within which they were obliged to stay at their places of residence from 19:00 to 09:00 a.m. daily.

Another type of punishment - a fine - was usually imposed by the court in the amount of 2000-3000 GEL.

Actual punishment¹⁸ or actual punishment with a suspended sentence was applied only when there was a combination of crimes. In all other cases, the defendants received a less severe sentence than imprisonment.

A similar trend in sentencing was noted by the GYLA in its Criminal Court Trial Monitoring Report №15.¹⁹

The previous report also showed that the court frequently imposed term imprisonment, which was then considered a suspended sentence.

It is quite curious that plea agreements for other types of crimes usually impose more lenient sentences on defendants than the trial on the merits, while during the substantive hearing of persons charged with the crime under Article 248¹ of the CC, the judges usually imposed punishment similar to that specified in the plea agreement and/or in some cases even lighter ones.

¹⁸ Imprisonment as a type of punishment, which the accused is serving in a penitentiary institution.

¹⁹ GYLA's Report №15 on Criminal Court Trial Monitoring, p. 43-45, available at: <https://bit.ly/3oQPc9n> , updated: 13.08.2022.

IMPORTANT REGULATIONS INTRODUCED TO CRIMINAL JUSTICE DURING THE PANDEMIC

Considering the large-scale spread of the Coronavirus (COVID-19), the growing number of challenges facing the country, and in order to properly respond to the pandemic, on 21 March 2020, a state of emergency was declared in the entire territory of Georgia,²⁰ the duration of which was initially announced to be one month. According to Article 7 of the Decree №1 of the President of Georgia passed on 21 March 2020, it became possible to hold court trials as stipulated by the criminal procedure law remotely using electronic means of communication.²¹

The state of emergency declared throughout Georgia on 21 April 2020 was extended until 22 May 2020.²²

On 23 May 2020, an amendment was introduced to the Criminal Procedure Code, providing for the possibility of conducting criminal court proceedings remotely until 15 July of the same year.²³ The purpose of a range of subsequent legislative changes²⁴ was to extend the validity period of the above regulation. **Eventually, the temporary rule for conducting litigations remotely was further extended until 1 January 2023.**²⁵

Another legislative change in the criminal law necessitated by Covid-19 was the addition of two new offences to the Criminal Code. In particular, Article 248¹ - Violation of the isolation and/or quarantine rules and Article 359¹ - Violation of the state of emergency or martial law were added to the Criminal Code.²⁶

Later, with the view to lessening the negative impact of the pandemic, the legislator passed two humane acts - the Amnesty Law.

THE AMNESTY ACTS ISSUED IN CONNECTION WITH THE PANDEMIC

The state, based on the principles of humanism and taking into consideration separate socio-political aspects, periodically makes decisions (including by amending the legislation) aiming at improving the legal status of convicts and providing additional legal instruments for their release from punishment.

Up until today, **two amnesty acts** related to the pandemic have been adopted. It is noteworthy that the legislators first tightened their approach, introduced criminal liability to control citizens during the pandemic, and then issued two humane acts of amnesty with the view to addressing these changes.

²⁰ Decree №1 of the President of Georgia issued on 21 March 2020 "On declaring a state of emergency in the entire territory of Georgia."

²¹ Decree №1 of the President of Georgia.

²² Decree №2 of the President of Georgia.

²³ Law of Georgia "On the Amendments to the Criminal Procedure Code of Georgia, 22.05.2020.

²⁴ Law of Georgia "On the Amendments to the Criminal Procedure Code of Georgia, 29.12.2020.

²⁵ Law of Georgia "On the Amendments to the Criminal Procedure Code of Georgia, 22.12.2021.

²⁶ Law of Georgia "On the Amendments to the Criminal Code of Georgia, 23.04.2020.

Amnesty Act of 7 September 2021²⁷

On 23 June 2021, the Government of Georgia submitted to the Parliament a **bill on amnesty**,²⁸ according to which a person who committed a crime under Articles 248¹ (violation of isolation and/or quarantine rule) or 359¹ (violation of the state of emergency or martial law) of the Criminal Code of Georgia would be released from criminal responsibility and punishment. The amnesty would also apply to the outstanding part of a respective fine. As for the circle of persons, according to the draft law, the amnesty covered those who committed the crime before 23 June 2021. According to the information provided in the explanatory card, the investigation of the crime under Article 359¹ of the Criminal Code of Georgia was launched in 227 cases, while on the crime under Article 248¹ of the Criminal Code of Georgia, in 1486 cases.

In addition, pursuant to the law, a person who has committed a crime and is released from criminal responsibility and punishment shall be considered not to have been convicted. It is important that the amnesty also applied to the outstanding part of the fines imposed on legal entities.

It is noteworthy that along with the announcement of the amnesty, certain administrative fines were also “pardoned” based on the law of Georgia “On Exemption from Administrative Fines and Penalties”.²⁹ Accordingly, the persons who were held responsible for the violation of Article 8 of the Decree №1 of the President of Georgia dated 21 March 2020 “On measures to be implemented in connection with the declaration of a state of emergency throughout the territory of Georgia” and the “Measures to be implemented in order to prevent the spread of the novel Coronavirus in Georgia” adopted per the Resolution №181 of the Government of Georgia of 23 March 2020 “On the approval of measures to be implemented in order to prevent the spread of the novel Coronavirus in Georgia”, as well as for the violation of Articles 42¹⁰, 42¹¹ and 177¹⁵ of the Code of Administrative Offences of Georgia were freed from the obligation to pay administrative fines. In addition, the law specifies that the exemption from the administrative fine applies to the unpaid part of the administrative fine.

It is worth noting that from the onset of the pandemic to 23 June 2021, the court monitoring conducted by the GYLA also identified³⁰ the cases of defendants being charged with the violation of isolation and/or quarantine rules (Article 248¹ of the Criminal Code of Georgia), however, after the issuance of the first amnesty act dictated by the pandemic, the organization has not detected such cases anymore. As of today, for the period of the first half of 2022, since the incidence of Covid-19 cases has decreased, the criminal persecution mechanisms are actually no longer used.

²⁷ Law of Georgia “On Amnesty,” 07.09.2022, available at: <https://bit.ly/3A9XmyW> ,

²⁸ Draft Law of Georgia “On Amnesty,” 23.06.2021, available at: <https://parliament.ge/legislation/22385> , updated: 13.08.2022.

²⁹ An explanatory card attached to the draft law of Georgia “On the release from administrative fines and penalties”, available at: <https://bit.ly/3QERDYN>, Updated: 13.08.2022.

³⁰ GYLA’s report №15 on Criminal Court Trial Monitoring, p. 43-45, Available at: <https://bit.ly/3oQPc9n> , Updated: 13.08.2022.

Amnesty Act of 12 April 2022

By issuing the **second Amnesty Act**,³¹ the legislator assessed the deterioration of the situation in terms of human rights during the pandemic. In particular, due to the fact that prisoners in the penitentiary institutions had been limited in the right to communicate and meet with other individuals, it was decided to calculate a sentence in favour of prisoners/convicts.

The adoption of the amnesty law on 12 April 2022 was dictated by the desire to compensate for the negative impact of the pandemic, which prompted the state to introduce certain preferential conditions. In particular, according to the law, in order to compensate for the restrictions imposed on the persons in custody during the fight against the pandemic caused by the spread of the new Coronavirus (COVID-19) in the world, as a one-time, temporary and special measure, the sentences of persons convicted of the crimes provided for by the Criminal Code of Georgia were reduced, and their stay in the penitentiary institution was calculated into the term of serving the sentence in a different manner.³²

All persons who were imprisoned in the period from 5 March 2020 to 25 May 2020, as well as from 28 November 2020 to 1 January 2021, with the status of the accused or convicted and who, due to any unforeseen reasons, were restricted in their right to a short visitation provided for in the Prison Code, one day in prison was counted as serving the sentence based on the following calculation: 4 days of imprisonment - 5 days of serving the sentence.

Furthermore, according to the same law, persons who committed the crime under the Criminal Code of Georgia before 1 January 2004 were released from criminal liability and punishment (except for those sentenced to life imprisonment).³³ The amnesty act covered both major and additional punishments, as well as probationary and suspended sentences.

It should be noted that only persons sentenced to term imprisonment were released from punishment. As for those sentenced to life imprisonment, they were deemed to have satisfied the requirement for serving a part of the sentence stipulated by Article 72¹(1) of the CC or Article 73(7) of the same Code, and relevant authorities became entitled to consider their release on parole, as well as the issue of replacing the already selected punishment with a lighter one.

³¹ Law of Georgia "On Amnesty", 12.04.2022, available at: <https://bit.ly/3caalZs>

³² An explanatory card attached to the draft law of Georgia "On Amnesty", Available: <https://bit.ly/3QCKsA0> , updated: 13.08.2022.

³³ The amnesty did not cover crimes provided under Articles 108, 109, 137-141, 142-144³, 164, 179, 183, 223-224, 236-239, 253-255², 280, 353, 378-379 404-413 and chapters XXXVII and XXXVIII of the Criminal Code of Georgia and the crime provided in the Criminal Law Code of Georgia committed by a person determined by Resolution №339 approved by the Government of Georgia on 26 June 2018 "on the approval of the Otkhozoria-Tatunashvili list" - of the persons accused and convicted of murder, kidnapping, torture, serious injury to health, and inhumane treatment of Georgian citizens in the occupied territories, as well as of persons accused and convicted for covering up these crimes, preparation or attempt of the aforementioned crimes."

CHALLENGES POSED BY THE PANDEMIC IN CRIMINAL CASE PROCEEDINGS

The COVID-19 pandemic has presented the court with a number of serious challenges. Among these were several issues that prevented the effective implementation of criminal justice.

The observation of criminal court trials at the initial stage of the pandemic revealed a problem relating to the limitation of the principle of publicity at court hearings. The GYLA observers were not able to attend criminal proceedings for almost two months. In addition, technical shortcomings during remote court trials significantly hindered the timely conduct of court cases, and sometimes led to their delay, including in cases where defendants were not sentenced to imprisonment as a preventive measure. Examining evidence at remote court hearings, especially interviewing witnesses, was also problematic. The right to defence was impossible to be fully enjoyed - the confidentiality of the communication between the lawyer and the accused was constantly under threat. This was due to the peculiarities of remote trials, as well as problems emerging during meetings of the lawyer and his/her client in penitentiary facilities.

RIGHT TO A PUBLIC HEARING AND ACCESS TO COURT TRIALS

The Georgian Young Lawyers' Association has been talking about the problem of publicity of information about first appearance court hearings of the accused for several years. If earlier GYLA monitors themselves tried to find the courtrooms where the first appearance hearings were held, this time the restrictions imposed due to the pandemic deprived them of even this possibility. As a rule, courts do not publicly and proactively publish information about first appearance court sessions. Therefore, it was often not possible to attend trials remotely.

In addition, in the initial phase of the pandemic, the remote conduct of court hearings by courts of general jurisdiction limited the possibility for GYLA monitors, as well as other interested parties, to be present at criminal case proceedings. The organization was unable to follow the trials for two months. It was the Tbilisi City Court that first allowed the GYLA observers to attend remote court hearings, and after 1 June 2020, the observers managed to monitor criminal proceedings in a hybrid mode in the Tbilisi, Kutaisi, Batumi, Rustavi City Courts and Telavi and Zugdidi District Courts.³⁴ Based on the document prepared on the existing challenges,³⁵ the organization presented recommendations for the relevant agencies, yet, even after two years, many of the recommendations still remain unfulfilled.

Meanwhile, the infrastructure of the courts became better equipped, protective barriers were installed, seats in the courtrooms were marked to maintain the required distance, and the High Council of Justice developed specific recommendations regarding attendees, yet due to the lack of clear instructions, certain judges would still arbitrarily decide whether to allow or not citizens to public court hearings. There were instances where the parties attended case hearings in the courtroom, while GYLA monitors and other individuals were prevented from

³⁴ GYLA's Special Report - Courts During the Pandemic, 2020, p. 12-14, available at: <https://bit.ly/3cAIPnS>, updated: 13.08.2022

³⁵ GYLA's Special Report - Courts During the Pandemic, 2020, available at: <https://bit.ly/2PGNppn>, updated: 13.08.2022.

doing so, in the name of the restrictions imposed due to Covid-19. Alternatively, when observers requested access to court hearings remotely, they would receive the answer that the court could not launch a specific programme just for the observers.

It should be noted that from the onset of the pandemic to the present day, the common courts have demonstrated different approaches, which could be attributed to the spread of the pandemic in the country. The courts are trying to cope with the current pandemic situation using their own mechanisms. With a decrease in the number of infected persons, the courts tried to conduct trials in the courtrooms, and when the Coronavirus intensified, they would mostly limit themselves to remote court hearings.³⁶

SHORTCOMINGS IDENTIFIED DURING REMOTE COURT HEARINGS, CHALLENGES WITH EXAMINING EVIDENCE, AND RISKS ASSOCIATED WITH THE INTERROGATION OF WITNESSES

It is significant that the courts managed to switch to remote court hearings soon after the start of the pandemic. However, the problems that emerged at the initial stage, such as technical shortcomings at the beginning and during court trials, the lack of premises for interviewing witnesses inside the court building, the absence of a uniform approach of the common courts to the presence of outsider persons at court trials, the interrogation of witnesses from the administrative building of police stations, have remained a challenge.

At remote court trials, reviewing video materials is still not carried out in a manner that the information reflected in the recordings can be easily perceptible to the parties, especially to those in penitentiary facilities.

Even after two years since the onset of the pandemic, the code of conduct for remote court trials has not been prepared at the normative level. Moreover, no appropriate recommendations have been developed on the protection of information indicated as the reason for the closure during the remote conduct of trials closed on relevant grounds.

Similar to the GYLA's findings, lawyers also note the difficulty and complexity of examining evidence at remote court hearings. In addition, the cases of interrogation of witnesses from the administrative building of the police stations are still reported. The majority of lawyers believe that based on the principle of immediacy, interviewing a witness in the courtroom is the most effective form.

A lawyer: "I am against the remote manner of interviewing witnesses. In my practice, I had a case where the witness was joining the court hearing from the police station while a police officer was standing over him/her, literally dictating what he/she had to say."

The lawyers unanimously mention the technical problems identified during remote court trials. In penitentiary institutions, the lack of equipment and personnel necessary to ensure the smooth participation of the accused/convicted persons in remote court hearings resulted in the delayed start of trials. In addition, it was not uncommon that defendants could not hear

³⁶ GYLA's Report №15 on Criminal Court Trial Monitoring, p. 23, available at: <https://bit.ly/3OLDpoh>, updated: 13.08.2022.

during the court hearings what the court and the parties were talking about or the employees of the penitentiary facilities could eavesdrop on their conversations.

A lawyer: “Soon after the start of the pandemic, I had a case where the trial scheduled for 10:00 in the morning began at 19:00, nine hours late. The penitentiary institutions failed to properly ensure the involvement of prisoners in remote trials. They probably have few rooms technically equipped for online court hearings, which is why the trials were usually postponed. It would be good if the penitentiary institutions provided more technical staff to eliminate these problems.”

THE RIGHT TO DEFENCE, THE CONFIDENTIALITY OF COMMUNICATION BETWEEN THE LAWYER AND THE ACCUSED

One of the serious problems identified as a result of the monitoring of court trials conducted by the GYLA is the problem of protecting the confidentiality of communication between the lawyer and the accused.³⁷ This mainly concerned the cases identified during remote court trials, however, according to lawyers, they also experienced the lack of confidentiality when communicating with prisoners under their protection³⁸ even in penitentiary facilities.

During the interviews, the lawyers unanimously noted that the pandemic has greatly affected their communication with clients. According to them, the confidentiality of their conversation was ensured neither during the court hearings nor in the penitentiary institutions. In particular, communication with the accused/convicted in penitentiary facilities had to be done from the commonly shared premises by telephone, which meant that the details of their conversation were available to other prisoners and convicts present there, as well as to the employees of the penitentiary institution. This greatly increased the risk that the accused/convicted persons would refrain from providing information to their lawyers **about alleged ill-treatment**.

The lawyers also remark that the visitation rooms, redesigned to meet the requirements of the pandemic, deepened the previously existing feeling of being watched and tapped by the administration. The physical meetings with prisoners switched to the so-called “telephone mode”. In a commonly-shared premise, there is a separating barrier, on one side of which prisoners sit, and on the other - lawyers, who have to talk using the specially installed telephones.

GYLA believes that even if a person trusts his/her lawyer, the surrounding environment may provoke his disbelief and the feeling that someone is eavesdropping on his conversation - be it the prison administration or other inmates.

See the lawyers’ comments on the issue below.

A lawyer: “The biggest problem is that even we, the lawyers, sitting in the open space, are separated by a thin barrier and get disturbed by each other’s talk. This creates huge discomfort for us and prisoners as well, which is why they usually feel reluctant to talk about the details of the case. Every prisoner had the feeling that the phone was being tapped while they

³⁷ GYLA’s Report №15 on Criminal Court Trial Monitoring, p. 33-36.

³⁸ It implies the accused/convicted persons placed in a penitentiary facility.

were talking to the lawyer behind the separating glass. There was no room for sincerity and openness. We often had to speak in whispers. Two years have passed actually since the pandemic began but this remains a problem.”

Another lawyer: “In the visiting room, prisoners/convicts and lawyers separated by a sound-proof glass barrier have to communicate using specially provided telephones. Prisoners believe that the noise that accompanies any telephone conversation is an indication that the conversation is being tapped. Another disadvantage of the shared premise is that sometimes when the hall is crowded it is so noisy that we can’t hear anything.”

This is a serious problem in cases where the interests of defendants represented by different lawyers do not coincide. One of the interviewed **lawyers** spoke about this problem: “In my practice, there was a criminal case which had several defendants. When I entered the penitentiary institution, I found the other defendant with whom my client had a very big positional conflict sitting next to me, just two seats away. It was very easy for him to hear our conversation. In such conditions, our presence there was meaningless.”

It is also noteworthy that at the initial stage of the pandemic, lawyers had to wait in long queues to meet with defendants, which created a serious problem, given the busy schedules of lawyers. They were forced to shorten the length of visits, which often resulted in a lack of effective communication with the client, especially in the cases the hearing of which was limited by procedural timeframes. To handle the problem, the penitentiary institution №8 introduced an innovative electronic portal for booking a visit with a lawyer.³⁹ According to the lawyers, as a result, the procedure for scheduling a visit to the facility has been greatly simplified, they no longer have to wait and can manage their time more efficiently.

On the other hand, several lawyers have observed certain shortcomings with the pilot system of the reservation system. This mainly concerns the shortness of the time allocated for the visit - half an hour. Lawyers believe that the time should be increased - at least up to one hour.

One of the lawyers believes that “the platform cannot completely replace the rule for the entry into a prison, which mandatorily requires that a visit must be reserved 24 hours in advance. However, sometimes lawyers cannot do that. Besides, the lawyer must not be limited in the right of unlimited consultation with his client, as half an hour is not enough.”

The lawyers generally welcome the implemented innovation and think that other penitentiary facilities must also introduce the platform, but still believe that the portal is an alternative way of scheduling a visit with a prisoner.

Another obstacle to the meetings of lawyers and prisoners was the lack of clear instructions in penitentiary institutions on the necessary equipment for the prevention of Covid-19 and the measures to be taken to protect the health of prisoners. All prisons offered different rules. The facilities did not have a unified system or plan to ensure that lawyers could have unhindered access to the institutions.

³⁹ The electronic booking portal for visiting penitentiary facility №8 for lawyers is operational, available at: <https://bit.ly/3OScjuC> , Updated: 13.08.2022.

One of the lawyers: “In the initial phase of the pandemic, from March 2020, the problem was the lack of information when entering prison. Often, upon arrival at the facility, we would encounter new regulations. It was mandatory to wear a special gown, which the institution did not provide. Rules sometimes were changed, requiring us to wear a gas mask or other protective equipment, about which we had not been informed in advance so that we could get better prepared.”

The state must take effective steps in this respect to protect to the maximum extent possible the confidentiality of communication between the accused/convicted and their lawyers in the courthouse or penitentiary institutions.

COMMUNICATION OF PRISONERS WITH THE OUTSIDE WORLD DURING THE PANDEMIC

The pandemic caused by the Coronavirus has seriously affected the ability of prisoners to communicate with the outside world. Initially, the penitentiary institutions considered that the complete isolation of defendants/convicts would be the most effective way to fight against the pandemic. According to the special report on the National Preventive Mechanism, the accused/convicted persons were given the right to additional free telephone calls as compensation.⁴⁰ This was appreciated by prisoners, yet those defendants, who, according to a decision of the prosecutor, were restricted to communicate by telephone due to the interests of the investigation, were unable to make phone calls even during the pandemic. Moreover, the persons against whom the administration of the correctional facility imposed limitations on telephone conversation as a form of disciplinary punishment found themselves in a similar situation. As a result, some inmates were deprived of the only available means of communication with the outside world.

The above-mentioned report made it clear that a telephone conversation cannot replace the right to visitations. 40% of the defendants/prisoners reported deterioration in the situation with respect to short visits, while 70% noted problems related to long-term visitations.⁴¹ The pandemic has revealed the shortcomings of the infrastructure required for video visits and the unequal treatment of prisoners in various penitentiary institutions in this regard. It is noteworthy that at the initial stage of the pandemic when the movement of citizens was limited to a certain extent, family members of prisoners had to show up at the pre-trial detention facilities in order to exercise their right to a video visit, which created additional difficulties for them.

In the report on the National Preventive Mechanism, as well as in the interview with the GYLA, the lawyers have mentioned the problems of confidentiality of communication with prisoners. In the aforementioned study, prisoners noted that for a certain period of time their right to communicate with their lawyers was restricted.⁴²

⁴⁰ Public Defender of Georgia, the National Preventive Mechanism - Report on Impact of the COVID-19 on the Health and Other Legal Rights of Prisoners and Staff of Penitentiary System, 2022, p. 30-32, available at: <https://bit.ly/3cUMo8o> .

⁴¹ Ibid. p. 30.

⁴² Ibid. p. 34.

CONCLUSION

The issues discussed in this special report once again confirm that holding court trials through technology means remains a serious challenge for both the judiciary and the penitentiary system. Technical shortcomings significantly delay the commencement of hearings and affect the ability of the court as well as the participants in case proceedings to efficiently manage their time. The non-uniform perception of the recommendations offered by the High Council of Justice and the arbitrariness of individual judges restricting the attendance of citizens to public court trials seriously affects the principle of publicity.

The threat to the confidentiality of communication between the lawyer and the client has a negative impact on the rights of the accused to effectively enjoy their right. The interrogation of witnesses from the police administrative buildings still calls into question whether the witnesses can freely express their opinions. The absence of a code of conduct for the parties and those present at remote case proceedings creates a risk to ensuring the confidentiality of the information disclosed at hearings closed on appropriate grounds. Currently, just like during the initial stage, the examination of material and video evidence during remote court hearings, communication between the interpreter and the accused/convicts, and other issues, which in general affect the rights of the accused and the quality of the implementation of criminal justice, remains a challenge.

We believe that the implementation of the recommendations that the GYLA has prepared based on the issues identified during the observation of remote criminal court trials and interviews with the lawyers will have a positive effect on the conduct of remote court proceedings. Based on the foregoing, we hope that the relevant authorities will take effective steps to address the problematic issues presented in the study at least now, two years after the start of the Covid-19 pandemic.

RECOMMENDATIONS

- Courts should ensure that information about all stages of a case proceeding is publicly and proactively published.
- In order to reduce the psychological pressure on witnesses and eliminate technical obstacles, special premises equipped with appropriate devices for interviewing witnesses should be provided in the courthouse or local municipalities.
- The courts and parties must ensure that remote court hearings are conducted in the best interests of the accused.
- Penitentiary facilities must be equipped with the necessary amount of technical equipment. In addition, a sufficient number of employees should be added and re-trained to ensure the smooth participation of the accused in case hearings.
- The penitentiary institutions must ensure the protection of the accused/convicted against any negative influence on the free expression of their will during their remote participation in the court trial, as well as the confidentiality of the information disclosed by them during the hearing.

- Defendants who find it difficult to express their opinion at the trial without direct communication with their lawyers should be given the opportunity, albeit given the risks of the pandemic, to participate in the court trial from the penitentiary facility together with their lawyer.
- An appropriate normative act should be developed to provide specific rules for photo, audio, and video recording for the parties and those present at remote court hearings.
- In closed court trials conducted remotely, information containing personal data or commercial secrets and/or the disclosure of which may pose a threat to the safety of persons must be protected to the maximum extent possible.
- The parties should respect the code of conduct as much as possible and refrain from disclosing photographs taken by the participants during trials to the general public.
- The High Council of Justice and/or, for greater flexibility, local authorities should provide well-equipped rooms for remote participation in the general courts or local government premises.
- During the pandemic, when communication with the outside world is limited by any other means, prisoners should be granted additional free phone calls and video sessions in a confidential environment.
- Penitentiary facilities should ensure confidentiality of communication of the accused with their lawyers, as well as the doctor and psychologist.
- The Ministry of Justice of Georgia should introduce appropriate changes to the current video visitations rules, so that family members of the accused/convicted no longer have to wait in long queues or overcome additional obstacles.
- As in penitentiary facility №8, all other institutions must implement the mechanism for booking an appointment with lawyers, and the duration of the visit must be of reasonable length, as required for effective communication.
- Employees of penitentiary facilities should be provided with relevant training to improve their skills in managing the pandemic effectively and dealing with stress in prisons.