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Opinion

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Directorate General Human Rights and Rule of Law

Justice and Legal Co-operation Department

and

Human Rights Policy and Co-operation Department

on the

Compatibility of the Draft Amendments of the General Part of the Criminal Code of Georgia with Relevant Council of Europe Legal Standards

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List of Abbreviations Used in the Text

CC	Criminal Code of Georgia
CCP	Code of Criminal Procedure of Georgia
CoE	Council of Europe
DCC	Draft Criminal Code of Georgia
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
JJA	Juvenile Justice Act of Georgia
UN	United Nations
ILO	International Labour Organisation
2015 Opinion	The CoE Opinion on Compatibility of the Draft Amendments of the General Part of the Criminal Code of Georgia, 25 March 2015

1. Introduction and Summary Comments

1. This Assessment examines a package of draft amendments to the current CC whose adoption is presently under consideration by the Republic of Georgia and which is based on the recommendations made in the CoE Opinion on Compatibility of the Draft Amendments of the General Part of the Criminal Code of Georgia as off 25 March 2015. The Assessment is based on the English translation of the Draft CC provided by the Georgian authorities.
2. The proposed package of legislative reforms directly affects app. 40 articles of the General Part of the Code.
3. The Assessment examines the overall compliance of the General Part of the DCC with the CoE standards and seeks to identify general provisions that do not comply and to recommend respective changes to ensure compliance. It also examines the level of conformity of the Draft CC with the recommendations made in the 2015 CoE Opinion, focusing on omissions and partial incorporations. Amendments are tested for clarity, foreseeability, and legal certainty, including consistency with established provisions and other legal acts where relevant, as part of their compliance with the general rule-of-law principle. Tests are run both for minimal and optimal compliance and focus on particular provisions where inevitable.
4. The current Draft does not significantly differentiate from the 2014 Draft. There has been no substantial retreat from legislative solutions which have been supported in the 2015 Opinion. Some of them have been improved in terms of clarity, legality and foreseeability.
5. However, critical 2015 recommendations which suggest different solutions have only been followed partially. Among them, issues with compliance with relevant international standards arise in respect with juveniles even in the context of the modern 2017 JJA. Other problematic areas relate to particular penalties and individualization rules. These issues need to be addressed. The current assessment reexamines them only if new arguments have to be added to the comments already presented in the 2015 Opinion. Otherwise, it refers to the respective paragraphs of the 2015 Opinion.
6. The Draft also introduces new amendments, some of which are regrettably problematic (e.g. expropriation, introduction of deprivation of the right to live with a minor, the amendments in the regime of the deprivation of rights to hold office, etc.). These have been examined more thoroughly.
7. Legal definitions belong to the foundations of the criminal-justice system. Though they might not directly contradict a human-right standard, they significantly impact the system's performance and outcomes thus potentially making *them* incompatible with basic requirements, e.g. foreseeability, equality, rule of law, etc. Therefore it must be generally recommended that suggestions made and concerns raised in Chapters 2 and 5, 2015 Opinion, be carefully considered and adopted.

2. System of Penalties

2.1. New penalties: House Arrest, Articles 40f and 47[11]; Deprivation of the right to live together with a minor, Article[1]

8. **House arrest** has been introduced as a new type of penalty under Article 47[1]. It is conceptualized as an alternative to imprisonment in line with the basic goal of the reform to

[1] The English version of Article 47[1] has been additionally provided.

liberalize penal policies. It is also fully compatible with the relevant international standards. It seems the new penalty is conceptualized to have more potentials to secure the goals of the punishment in comparison to restriction of freedom, which has been abolished.

9. The DCC introduces **deprivation of the right to live together with a minor** as a new penalty under Article[1] imposable only as a secondary penalty (Article 41 (2)). The reform cannot be supported. First, adults normally bear responsibilities and obligations to minors and their 'rights' toward them are largely restricted by the rights of the child. The penalty under Article[1] is formulated as a protective measure the imposition of which cannot be considered by a criminal court. It should be governed solely by the best interest of the child and not the goals of the punishment. It is very doubtful whether it is capable of achieving the goals of the punishment at all. It is problematic in terms of its potential conflict with family-law and child-protection-law institutes governing relations between adults and children and establishing the right of the children to live with adults. Such a conflict would rise, e.g. where the convicted person is deprived of the right to live with a minor who lives together with other children whose best interest requires living together with the minor and with the offender. The measure may be supported, **if regulated as a measure applicable on a person convicted for having committed a crime against a minor but subjected entirely to child protection.** It will normally be imposable by a family, civil or other type of court authorised to consider child and family issues.

10. Besides, if the main penalty is imprisonment, the convict cannot live with the minor during serving it. If both penalties are enforced simultaneously as stipulated by Article[1] (6), the secondary penalty would only make sense, if its term is longer than the term of imprisonment. Therefore, unless the meaning of the provision has been misinterpreted due to translation modification, it should be recommended that **the secondary sentence become enforceable from the moment of release or is automatically extended to cover the period of serving the primary custodial penalty**.

2.2. Community service, Article44

11. The rules on the penalty of community service have been improved partially.

12. *Length of Service*: the overall maximum length of service has been settled at 18 months in general cases of direct application and up to 3 years in cases of indirect imposition as a consequence of transformation of other penalties. These terms are not excessive and do not contradict the principle of minimum intervention as set out in the 1990 UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules). Subsequent amendments in the Procedure of Execution of Non-custodial Penalties and Probation of Georgia are recommended to ensure compliance with the CC and avoid confusion in the practice.

13. Abolishing the applicability of *community service as a secondary sentence* when it is not prescribed as a punishment by the relevant criminal provision is very welcome. It improves the predictability and proportionality of the penalty and strengthens compliance with the legality principle under Article 4, ECHR.

14. *The provision that community service is not to interfere with performing remunerable job, studies or supporting dependents:* The inclusion of obligations of the convicted person to third parties is welcome but it does not address the main concerns raised in par.38-40, 2015 Opinion. The principle of minimum intervention under Article2 (6) of the Tokyo Rules does not require States to adapt the execution of a non-custodial penalty to specific personal interests or civil obligations of the convicted person. If the law adapts such an approach, additional safeguards against social injustice and inequality before law are necessary. **A potential solution would be to have the list of circumstances under Article 44 (2[1]) to be considered by the court**

extended to include e.g. medical treatment and be reformulated as an unexhaustive list.

15. The penalty is still not fully compatible with the *prohibition of forced or compulsory labour* under Article 4 ECHR and Article 2 ILO 29 Convention (See par. 41-42, 2015 Opinion). However, introducing a formal requirement that the defendant consents to the penalty does not seem an appropriate solution within the Georgian criminal-law and labour-law system. The criminal justice system is based on classic Roman-law concepts which define penalties as compulsory by nature and applicable regardless of the offender's consent. The offender is legally subjected to the sovereign powers of the State to impose punishment. If his/her consent becomes a precondition for the imposition of a measure, this measure seizes to be a 'punishment' but transforms into another phenomenon. The issue of consent itself raises additional issues of guarantees, potential consequences in case of withdrawal, risks for labour freedoms within the labour relations, etc. Such a deep intervention in the legal system's foundations is not impossible. However, it is hardly reasonable or recommendable, as the problem with the compliance of the community service with forced labour prohibition may possibly be solved otherwise.
16. In any case, continuing incompliance constitutes intolerable legal situation. A possible solution is to **expressly require the court to establish malicious absconding and reformulate its powers under Article 44 (3) to include discretion**. Currently they are powers to 'replace' and not to 'impose'. 'Imposing' would mean that the court has to individualize the new penalty and not simply to recalculate it. Another solution would be to have the court which imposes community service to state in the judgment **what the potential penalty consequences would be in case of malicious absconding**. A third solution might be to **criminalise the intentional absconding** from community service as a separate offence punishable with heaver custodial penalties.
17. The issue related to the *criminal record of the convicted person*, as raised in par. 46, 2015 Opinion, needs to be addressed as well.

2.3. Deprivation of the right to hold office, etc., Article 43 (3)

18. The amendments proposed to Article 43 (3) do not solve the concerns raised in par. 60, 2015 Opinion. On the contrary, they establish new concerns.
19. First, there are no criteria for imposing the penalty as a primary punishment. The systematic interpretation suggests that these would be different from the criteria used in Article 43(3) which only relate to the imposition of the penalty as secondary. The absence of expressly stated criteria for imposing the penalty as a primary punishment makes the penalty partially undefined and its goals unclear from the perspective of the principle of legality. **Either a separate set of criteria should be introduced to guide courts when depriving of professional rights as a primary penalty, or the criteria under Article 43 (3) be extended to apply regardless of whether the penalty is imposed as primary or secondary.**
20. Second, introducing criteria for imposing the penalty *cannot compensate the fact that the penalty may not be envisaged as a punishment for the crime committed*. The criteria under Article 43(3) bind courts in the process of 'individualization the penalty'. However, the powers to decide which types of crime should be punishable by this type of penalty ('differentiation of penalties') are based on the separation-of-power principle and belong to the Legislator. These powers cannot be transferred by a provision regulating judicial individualization powers. **The issue which also raises strong concerns in relation to equality, clarity, foreseeability and legality of the penalty has been extensively discussed also in par. 34, 36, 55, and 60, 2015 Opinion, and should be addressed**. A possible solution might be to introduce special provisions authorizing the courts to impose the penalty upon discretion as a secondary punishment when certain charges are raised, or at least have Article 43 refer to constructive elements of the

crimes (e.g. gravity under Article 12, or amount of damages caused, or chapter to which the respective crime belongs, etc.) potentially punishable by deprivation of professional rights.

2.4. Imprisonment, Article 50

21. The redefinition of the penalty is in line with par. 63, 2015 Opinion. However, the review of the changes introduced in sanctions in the Special Part show that **recommendations in par. 62, 2015 Opinion, have not been considered**. In order to have the goals of the Draft achieved these recommendations should be followed, otherwise the effect of the law might be in contradiction to the aim of liberalization of penal policies.

2.5. Fines, Article 42

22. The replacement mechanism under Article 42 (9) has been improved to the extent that imprisonment has been abandoned as a potential substituent of unpaid fines. This is in line with the declared goal of liberalization of penal policies. The replacement rule expressly states they apply only to the unpaid part of the fine, which is also an improvement in terms of clarity and proportionality. However, the basic issues raised by par. 57, 2015 Opinion, have not been addressed – the complexity of the replacement mechanism and need for unification of the recalculation approach in Article 42 and Article 44 (each point at a different number of working hours of community service as equal to 1 daily reimbursement of a fine).

2.6. Illicit profits. Expropriation

23. The abolishment of expropriation by repealing Article 52 and erasing it from Article 40 goes far beyond the recommendation to have expropriation abandoned only as a type of punishment (par. 52, 2015 Opinion). Such a radical reconception cannot be supported. Expropriation is very reasonable as a preventive and restorative measure applicable regardless of the criminal liability of the perpetrator and aimed at his/her present property (as suggested in par. 52, 2015 Opinion). **It should be kept as an instrument of depriving a person of the tools and proceeds of a crime even if there are grounds for his/her exempting from criminal liability and regardless of the crime's gravity**.
24. Establishing fines as a punitive measure which may also be potentially applied to deprive the offender from proceeds of the crime is reasonable and valid but is a separate penal instrument. It cannot adequately replace expropriation. As a minimum, it requires the criminal liability of the offender to have been positively established and can target future income. It is therefore reasonable to **have both instruments at judicial disposal**. When expropriation is regulated as a restorative and preventive measure, it can be combined with fines and no issues of conflict or balance would occur.
25. Further, the abolishment does not seem to have been considered in respect with Article 41 which still allows for imposition of expropriation as a secondary sentence and Articles 107^3 and 107^7 which refer to it as a penalty whose applicability towards legal persons is maintained. However, the absence of Article 52 blocks the applicability of the measure because it makes it undefined as a penalty from the perspective of Article 7, ECHR.
26. **It must be recommended that the legislative concept whether expropriation is a penalty or a restorative and preventive measure be made clear and respectively followed. It is very strongly recommended that it be kept as a restorative measure.**

3. Individualisation of Penalties

3.1. Judicial discretion to impose more lenient penalties, Article 55

27. The restructuring of Article 55 improves the provision's clarity and better distinguishes the two grounds for application between subsections 1 and 2. The provision of Article 55 is not limited only to primary penalties, which must be positively evaluated. The 'confession' requirement and the 'reasonability' test have also been abandoned as mandatory conditions for the implementation of Article 55 (2), as recommended by par. 70 and next, 2015 Opinion.
28. However, these improvements are not enough to address all the issues discussed in par. 70-72, 2015 Opinion. The scope of Article 55 (2) is still too restrictive as other major limitations have been preserved – absence of prior convictions of the offender, limited gravity of the crime, limited judicial powers to reduce the penalty under Article 55 (3). These restrictions misbalance the two grounds for penalty reduction under subsection 1 and 2 increasing the relative significance of subsection 1. It allows for unlimited reduction of the penalty based only on concluded plea bargaining agreement and even in cases of recidivism, grave crimes and lack of mitigating circumstances. Such a solution establishes corruption risks and conditions for disproportionate penal policies. **Full incorporation of the recommendations in par. 70-72, 2015 Opinion, must strongly be encouraged**.

3.2 Conditional Sentence, Article 63 – 67

29. Although Article 63 must be regarded as fully compatible with relevant standards, it may be still be helpful to **have the 'confession' requirement under Article 63(2b) removed** as recommended in par. 78, 2015 Opinion.
30. The length of the trial period has been improved (in line with par. 79, 2015 Opinion). Recommendations in par. 82-83, 2015 Opinion, have also been considered in the draft of Article 67 (3). This is to be evaluated positively.

3.3 Accumulation of Crimes and Sentences, Article 59

31. Although the amendments in Article 59 are very positive (See par. 84-85, 2015 Opinion), it may still be wise to **introduce the excessive dangerousness of the perpetrator as a special ground for reaching the penalty maximum under Article 59 (2)** - the gravest penalty increased by half.

3.4 Release from criminal liability owing to reconciliation with a victim and reimbursement of damage: Article 69[1]

32. Article 69[1] has been amended to apply only to non-violent crimes. This brings it in line with the positive obligations arising under the ECHR in respect to crimes which might have caused serious physical or psychological harm to the victim (see par. 86, 2015 Opinion). However, the amendment **might prove too restrictive as some violent crimes also do not cause serious harm**. It may be wise to allow the offender to benefit from the provision as this would also be positive for the victim.
33. Recommendations under par. 87, 2015 Opinion, do not directly affect the compliance with the provision with relevant standards, but might still significantly improve it. Therefore, they should

be considered.

4. Juvenile Justice Issues

34. In order to validly examine the compliance of the criminal-justice regulations on juvenile liability with relevant international standards and 2015 Opinion (which extensively discusses the matter), the Assessment has taken into consideration the newly enforced Juvenile Justice Act (JJA). Article 2 (3), JJA seeks to resolve potential conflicts with the CC in favor of the JJA unless the CC provides for a more favorable solution in the particular case. Juvenile criminal liability has been subjected to principles of 'priority of most lenient measure' (Article 9) and 'detention as a last resort' (Article 8), individual approach (Article 14) and special proportionality test (Article. 7). All of these are fully compatible with the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules').

4.1. Community service for juveniles, Article 71, JJA

35. However, JJA has been influenced by a *concept of community service which contradicts basic international human-right standards*.

36. *First,* Article 3 (1) and (2) define the minimum age of criminal liability to be 14. Article 4 of the Georgian Labour Code defines the minimum age of labour capacity to be 16. Underage are only allowed to enter labour relations under specific job restrictions and circumstances, involving consent of third parties. Pursuant to relevant international standards *persons below the age of labour capacity cannot be sentenced to penalties involving labour* (see par. 44, 2015 Opinion). The international prohibition is absolute and applicable regardless of the definition of the labour as a 'restorative measure' (Article 44, JJA) or a 'penalty' (Article 66, JJA) as both are to be imposed regardless of the juvenile's consent. **The 16 years of age threshold should be introduced in relation to community service.**

37. Second, Article 71 (5) allows for the imposition of community service as an *additional* sentence *even if it is not provided for by the applicable provision of the CC*. This is problematic. The special provision of Article 71 (5) overrules the principle of priority of the more favourable regime under the general clause of Article 2 (3) and the 'most lenient measure' principle under Article 9. It also contradicts the principle of legality under Article 4, ECHR (See, par. 34, 2015 Opinion).

38. Third, the recommendation to have the *maximum term of community service for juveniles reduced proportionally to the reduction to adults* has not been addressed (par. 45, 2015 Opinion). Article 71 (1), JJA sets the maximum number of hours at 300 which is only 100 hours less than the maximum for adults. The minimum is established at 40 hours for both age-groups by the CC and the JJA. Thus the relative burden of the penalty for underaged offenders increases in comparison to adults in contradiction to Article 2, Convention on the Rights of the Child.

39. Further, JJA does not define a *maximum period in which the working hours should be executed by the convicted juvenile*. Although this issue has been duly addressed for adults, it remains open for juveniles, compromising the principle of legality under Article 7, ECHR and the Tokyo Rules (see, par. 33, 2015 Opinion). The maximum set out of adults by Article 44 (2), DCC, does not seem to be applicable to juveniles as its length corresponds to 8-hours working day for

adults. Working days for juveniles are shorter. It should be noted that the overall term of community service for juveniles cannot exceed the 18-month threshold for adults, otherwise equality and proportionality issues within the UN Convention on the Rights of the Child would definitely rise.

40. Next, JJA introduces restrictive criteria for individualization of the community service which only refer to performance of a remunerated work and the education, though the proportionality test should also apply. A clear reference to the Labour Code restrictions should also be inserted. Otherwise community service may become unenforceable – if the remunerated work of the juvenile does not leave opportunities to impose community service in the offender's free time. See also par. 14 above.

41. Last, it is unclear whether the law allows for transforming fines, community service and house arrest into one another in cases of absconding. If so, the law should provide for a special recalculation mechanism, as general rules for adults relate to longer working hours of community service.

4.2. Fines for Juveniles, Article 83

42. Applicability of fines against juvenile offenders should be abolished, as recommended in par. 59, 2015 Opinion. It is regrettable that the JJA has been developed in contradiction with this recommendation, despite of the restrictions set out in Article 68, JJA. They do not bring the regulation in line with the relevant international standards. Fining independent legal income of the juvenile offender may raise issues of equality before the law as such a person would be differently treated in comparison with a juvenile with no independent legal income even though both might have committed identical offenses. It is even unclear who would be treated less favorably – the juvenile who would be fined or the juvenile who cannot be fined but faces the risk of a graver penalty due to lack of independent income. These risks only demonstrate the unsuitability of fines for juveniles, even though the penalty as such may not be incompatible with minimum standards.

43. Reducing the fine rates by half for juveniles pursuant to Article 68 (2), JJA is welcome.

4.3 Conditional Sentencing of Juveniles

44. Pursuant to par. 81, 2015 Opinion, the regulations on conditional sentencing of juvenile have been withdrawn from the provisions applicable to adults. The new regulation is presented in Article 74, JJA.

5. Definitions

45. Currently, some of the recommendations offered have been followed (par. 12-14, 24, 25, and 90 related to General-part definitions and par. 92, 94 related to definitive elements of certain criminal offenses). The rest still need to be addressed.

46. The execution of unlawful order/instruction under Article 37 **should be reformulated as an exemption**, i.e. it needs to establish positive grounds which exclude criminal liability. As a defense the provision is linked with the presumption of innocence and does not require the

defendant to state evidence. It is the public prosecution that carries the burden to refute it. Therefore, it should be positively formulated.

47. In order to achieve full compliance with Article 33 of the Statute of the International Criminal Court Article 37 should **be expressly formulated to exclude cases where the order/instruction has assigned the commission of a war crime or a crime against humanity**. This is a direct requirement of international standard and cannot be subjected to the general 'obviousness' test under Article 37 (1) as drafted.

6. Summary of Recommendations

- The new penalty of deprivation of the right to live with a minor under Article[1] is potentially detrimental to rights of children and third parties. It has strong protective and preventive functions which make it unsuitable as a type of penalty. It is recommended that it be regulated as a measure applicable towards a person convicted for having committed a crime against a minor but subjected entirely to child-protection law and system [para 9].

- In order to ensure effectiveness of the deprivation of the right to live with a minor when imposed as a secondary penalty, the law should ensure that it becomes enforceable from the moment the primary custodial penalty has been served, or is automatically extended to cover the period of serving it [para 10].

- The list of circumstances under judicial consideration under Article 44 (2^1) needs to be either extended to include e.g. medical treatment and other humanitarian considerations, or be reformulated as an unexhaustive list [para 14]

- The penalty of community service is still not fully compatible with the international prohibition of forced and compulsory labour. Relevant 2015 recommendations and solutions suggested in par. 17 above should be further examined and addressed [paras 15-16]

- A separate set of criteria should be introduced to guide courts when imposing deprivation of professional rights as a primary penalty, or the criteria under Article 43 (3) should be extended to apply regardless of whether the penalty is imposed as primary or secondary. The penalty should not be imposable, if not expressly foreseen for the respective crime [paras 19-20]

- Recommendations made in par. 62, 2015 Opinion, in relation to internal dependencies between Article 50 and the sanctions in the Special Part provisions should be thoroughly examined and incorporated to ensure that the positive goals of the amended Article 50 be not compromised [para 21]

- Expropriation should be preserved as a preventive and restorative measure, separate from fines and applicable regardless of the criminal liability of the perpetrator and the crime's gravity. The legislative concept as to whether expropriation can also be used as a penalty against legal persons should be further examined [paras 23-26].

- The scope of Article 55 (2), though substantially improved, is still too restrictive. Full compliance with the recommendations in par. 70-72, 2015 Opinion, must strongly be encouraged [para 28].

- The 'confession' requirement under Article 63(2b) should be removed [para 29]

- Although the amendments in Article 59 are very positive, it may still be wise to introduce the excessive dangerousness of the perpetrator as a special ground for reaching the penalty maximum under Article 59 (2) [para 31]

- Community service for juveniles needs to be substantially amended to become compatible with basic human-right standards. Urgent amendments are necessary in respect for correction of minimum age threshold (16 years of age), abolishing applicability unless envisaged for the respective crime, introduction of maximum overall term, reduction of working-hour maximum to match maximums for adults, better coordination with Labour Code regimes for juveniles, etc. [paras 35-41]

- It may be that special recalculation mechanism transforming fines, community service and house arrest into one another in cases of absconding where the offender is a juvenile need to be established [para 41]

- The regime of fines for juveniles needs to be improved in line with 2015 recommendations [para 42]

- Recommendations made in 2015 Opinion, Chapters 2 and 5, in respect for definitions need to be fully incorporated [para 45]

- The execution of unlawful order or instruction under Article 37 should be redefined as an exemption and be expressly formulated to exclude cases where the order or instruction has assigned the commission of a war crime or a crime against humanity [paras 46-47].