Coalition
for and Independent and
Transparent Judiciary

European Commission for Democracy through Law

The Venice Commission

On behalf of the Coalition for an Independent and Transparent Judiciary, we would like to address you about a new draft of the Constitution of Georgia prepared by the Constitutional Commission in Georgia. The draft offers a number of new regulations, including amendments to the chapter on the judiciary.

The draft introduces many positive initiatives in the Chapter on the judiciary, including:

- recognition of the principle of irremovability of judges and prohibition of judicial dismissals based on reorganization or liquidation of a court;
- specification that the function of the High Council of Justice (HCoJ) is to ensure independence and effectiveness of courts;
- transfer of the Supreme Court Chair's exclusive power of lifting judicial immunity to the collegial body – the High Council of Justice;
- specification of integrity and professionalism as criteria for selection of judges.

Despite the foregoing positive initiatives, regrettably, other changes introduced by the draft are highly detrimental to the prospects for development of the judicial independence. In addition, during the final stage of deliberations about the draft, representatives of the ruling party refused to support many initiatives that were endorsed by the civil society. As of today:

- The draft envisages a three-year probationary period for judges that are appointed for the first time, although the Venice Commission has recommended[1] on a number of occasions that the probationary period be abolished as it undermines independence of judges.
- During the final session of the Constitutional Commission a provision that requires open voting and reasoned decisions for appointment of judges by the HCoJ was removed from the draft.

The fact that the process of judicial appointments was regulated as recently as in February 2017 and the regulations are deficient proves the need to enshrine the principles of judicial selection/appointment in the Constitution.

In addition, considering the important flaws in the practice of judicial selections/appointments[2], it is vitally important that the system of selection of candidates based on integrity and professionalism be guaranteed by the Constitution, as envisaged by applicable international standards.[3] We deeply regret that the authorities have taken back this positive initiative approved by the working group on the judiciary. This calls the government's readiness to implement a meaningful judiciary reform into question.

Coalition Members:

Article 42 of the Constitution
Multinational Georgia
Georgia Small and Medium Enterprise Association
Civil Integration Foundation
Georgian Lawyers for Independent Profession
Liberal
Center for Protection of Constitutional Rights
International Society for Fair Elections and Democracy
The Union "21 Century"
Georgian Young Lawyer's Association
Human Right Center
Transparency International
Union of Meskhetian Democrats
Liberty Institute
Civil Development Agency
United Nations Association of Georgia
The European Law Students' Association
Civil Society Institute
Open Society Georgia Foundation
Institute of Democracy
American Chamber of Commerce
Europe Foundation
Institute of Development of Freedom of Information
Human Rights Priority
Tbilisi Media Club
Human Rights Education and Monitoring Centre
Foundation for the Support of Legal Education
Institute of Civil Engagement
Association of law firms of Georgia
Association of Young Economists of Georgia
European Choice of Georgia
Liberal Academy Georgia
Partnership for Human Rights
Georgian Human Rights Network
Georgian Democratic Initiative
Sapari Union

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[1] See also CDL-AD(2014)031

[2] The High Council of Justice monitoring reports 2014, 2015 and 2016 by the Georgian Young Lawyers' Association and the Transparency International – Georgia (for 2013, 2014 and 2015 reporting periods), available at: https://gyla.ge/files/news/gamocemebi2012-2013/HIGH%20COUNCIL%20OF%20JUSTICE%20MONITORING%20REPORT%20.pdf;https://gyla.ge/files/news/Monitoring%20Report%20of%20the%20High%20Council%20of%20Justice%20Three-Year%20Summary.pdf ; https://gyla.ge/files/news/High%20Council%20of%20Justice%20Monitoring%20Report%203.pdf ; https://gyla.ge/files/news/2010%20%E1%83%AC%E1%83%9A%E1%83%98%E1%83%A1%20%E1%83%92%E1%83%90%E1%83%9B%E1%83%9D%E1%83%AA%E1%83%94%E1%83%9B%E1%83%94%E1%83%91%E1%83%98/eng.pdf
Statement of the Public Defender of Georgia about the process of judicial appointments/selections, available at: http://www.ombudsman.ge/ge/news/saqartvelos-saxalxo-damcveli-exmaureba-mosamartleta-sherchevadanishvnis-process.page

[3] CCJE Opinion No.1(2001), para. 25.; CoE Recommendation No. R(94)12, para. 2c; Venice Commission, JUDICIAL APPOINTMENTS CDL-AD(2007)028, para. 47.

- Contrary to the CCJE[4] and the Venice Commission recommendations,[5] the draft introduces the rule for appointment of the HCoJ members by Parliament by a simple majority. Up until 2017, the organic law envisaged appointment of one member of the HCoJ by a qualified majority but the position remained vacant for 4 years. Full exclusion of parliamentary political forces from composition of the HCoJ and creation Constitutional guarantees to that end, is wrong and a step backward.
- According to the draft, the Supreme Court judges will be elected by Parliament on the HCoJ's nomination, while at present they are elected by Parliament on the President's nomination. **Delegating the HCoJ with the exclusive power to nominate the Supreme Court judges could be detrimental to the development of the judicial system considering that the HCoJ (including the rules about the HCoJ composition and operation) fall short of the standards of independence, transparency and effectiveness established by the Venice Commission and other international bodies.** Instead of ensuring de-politicization of the process of judicial appointments, delegating the HCoJ with the said function will further consolidate already broad and uncontrolled powers concentrated in the HCoJ.

The Coalition would like to present to the Venice Commission its opinion about the situation in the judicial system in light of which the foregoing negative initiatives are even more alarming:[6]

1. **The High Council of Justice is one of the most problematic institutions in the judicial system today, one that has been widely criticized both nationally[7]and internationally.[8]**

The HCoJ composition regulations are problematic. According to applicable legislation and in practice Parliament appoints non-judge members of the HCoJ by a simple majority, which contradicts the principle of ensuring plurality of opinions and relevant international recommendations. Procedures for selection of judge and non-judge members of the Council are not established and members are not selected on basis of their views and qualifications, which is also in conflict with international recommendations.[9] As a result, public usually knows nothing about the competence, experience and views of HCoJ members elected by the Parliament, which gives an impression of a politically motivated appointments. Similarly, the Conference of Judges voted for 2 judge members of the Council whose views and relevant qualifications are not known. Moreover, at the conference itself where the said two members were elected, candidates didn't present their views about current situation in the judicial system and their plans if elected as members of the Council. Their qualifications, past professional experience, etc. weren't discussed during the Conference.

The HCoJ activities are poorly regulated by law. The Council is not required to provide a reason for any of its important decisions and therefore, effective mechanisms for appeal of those decisions do not exist. This provides the Council with a broad possibility for making subjective decisions.

The checks and balances are not available for the Council's decisions. The HCoJ has been delegated with immensely broad powers, including: organizing and evaluating judicial qualification exams, announcing admission to the High School of Justice (HSoJ), holding a competition, making student admission decisions, judicial selections/appointments, transfers, promotions and specializations, appointment of court chairs, institution of disciplinary proceedings, etc. In light of the above problems, the broad powers that the Council has been delegated will essentially allow it to exercise full and uncontrolled authority over the judicial system.

The practice suggests that the Council uses its powers against the interests of justice, instead of protecting them.[10] Monitoring of the HCoJ has uncovered practical flaws in important areas of the Council's activities:

[4] CCJE Opinion N10, (2007), par.32

[5] CDL-AD(2013)007-e, par.52

[6] For detailed information about problems in the HCoJ performance, please refer to Annex 1.

[7] High Council of Justice Monitoring Report #4, Georgian Young Lawyers' Association, Transparency International Georgia, 2016, https://goo.gl/luZJ2f

[8] Detailed information is available in Annexes 2 and 5.

[9] CCJE Opinion No. 10(2007), para. 21, 22.

[10] The High Council of Justice monitoring reports 2014, 2015 and 2016 by the Georgian Young Lawyers' Association and the Transparency International – Georgia (for 2013, 2014 and 2015 reporting periods), available at:
https://gyla.ge/files/news/gamocemebi2012-2013/HIGH%20COUNCIL%20OF%20JUSTICE%20MONITORING%20REPORT%20.pdf ; https://gyla.ge/files/news/Monitoring%20Report%20of%20the%20High%20Council%20of%20Justice%20Three-Year%20Summary.pdf; https://gyla.ge/files/news/High%20Council%20of%20Justice%20Monitoring%20Report%203.pdf; https://gyla.ge/files/

the process of judicial selections/appointments is not objective or reasoned. As a result, judges are appointed on the basis of inappropriate decisions made behind the scenes; judicial promotions are not based on merit or reasons; the Council fails to act in abidance by the principle of irremovability of judges and never provides reasons for judicial transfers; evaluation of judges on a probationary period lack objectivity and justification; legislation that would regulate long-term evaluation of judges or legal provisions that the Council uses not to conduct a long-term evaluation of judges at all are lacking; the Council abuses its exclusive powers to conduct qualification exam and admit students to the HSoJ to exercise inappropriate control on admission of candidates to judicial competition, etc.

Flaws in the process of judicial selections/appointments in first instance courts and in appellate courts are as follows: secret ballots for appointment of judges were preceded by negotiations behind closed doors; during interviews judicial candidates were treated unequally – some were asked to answer questions related to professional and other issues, while others weren't asked the same type of questions to evaluate them against the criteria.[11] Under these circumstances, one cannot expect that the Council will select candidates in good faith, based on merit and professionalism.

2. The government's will to conduct a meaningful reform of the judiciary is called into question

Adoption of legislative amendments for the so-called Third Wave of the judicial reform was delayed for almost two years. During the parliamentary discussions, numerous changes were made in the draft laws, often without public discussions, and the last changes were made ahead of the third parliamentary hearing, when only editing of a legal draft is allowed.[12] Eventually, the contents of the draft laws for the Third Wave of the judicial reform greatly deteriorated and the authorities rejected a number of progressive changes at the last minute.[13] Within the Constitutional Commission, the government also changed its mind about introducing a provision requiring an open ballot and reasoned decisions for judicial appointments, leading us to believe that **the government is not planning to make any substantial changes in the judicial system in the near future.**

The new government that came into power following the 2012 parliamentary elections announced that it would focus on liberating the judiciary from political influences and ensuring independence of judges. However, the process of implementation of these reforms makes it clear that **the government failed to**

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[11] The HCoJ monitoring reports by the Georgian Young Lawyers' Association and Transparency International – Georgia: the 2015 reporting period, para. 5.2.3. – 5.2.7., available at: https://gyla.ge/files/news/2010%20%E1%83%AC%E1%83%9A%E1%83%98%E1%83%A1%20%E1%83%92%E1%83%90%E1%83%9B%E1%83%9D%E1%83%AA%E1%83%94%E1%83%9B%E1%83%94%E1%83%91%E1%83%98/eng.pdf ; the 2014 reporting period, para. 5.1., available at: https://gyla.ge/files/news/High%20Council%20of%20Justice%20Monitoring%20Report%203.pdf

The Coalition for an Independent and Transparent Judiciary demands that the process of judicial appointments be conducted in an objective and transparent manner, 12.04.2015 https://gyla.ge/en/post/koalicia-moitkhovs-obieqturad-da-gamtchvirvaled-tsarimartos-mosamartleta-danishvnis-procesi

The Coalition evaluates the judicial selection competition, Coalition for Independent and Transparent Judiciary, 2016, https://goo.gl/NhuyrF

[12] Statement of the Coalition for an Independent and Transparent judiciary Calls on Parliament to Consider President's Objections in Relation to the «Third Wave» Judicial Reform Bill, January 31, 2017 http://coalition.ge/index.php?article_id=144&clang=1

[13] The third wave of legislative changes related to the Georgian court system was meant to be a reform of the judiciary, however, the legislation was adopted by the Parliament with several serious flaws and drawbacks for the judicial independence:

- After the Venice Commission's positive assessment to introduce the system of election of court presidents by their peers, the ruling government changed the draft law and left the current rule of appointment of court presidents by the HCoJ unchanged. For years the court presidents have been seen as superior judges through whom the HCoJ controls the whole court system and individual judges.
- At the last stage of parliamentary hearings, without holding public discussion whatsoever, the relevant restriction was removed from the law and court presidents have been granted a right to be elected in the HCoJ.
- The system of selection and appointment of judges, points based selection and criteria for the selection of candidates was introduced, however, with serious flaws: points based selection system applies only to the selection by competence but not by integrity; criteria for the selection does not comply with the international standard of objective criteria, appointment of judges with secret vote remains which excludes the possibility to substantiate the decisions of appointment of judges.
- The position of an independent inspector was introduced to initiate and investigate disciplinary violations of judges, however, the inspector is not independent from the HCoJ and in substance cannot change the flawed system of judicial discipline.

show a strong political will for any meaningful and consistent changes in the judicial system. It gradually made concessions to groups that dominate the corps of judges, including during the pre-election period. Any disagreements between judicial and non-judicial members of the HCoJ gradually disappeared and eventually, their views started to coincide on virtually every issue.[14] Such relations between the dominant judicial group and the authorities encouraged the practice of cronyism and suppression of different opinion; as a result, the judicial system encounters important challenges in terms of independence. Basis for independence of a judge are fragile on the account of expiration of judgeship term for many of the judges, which is abused by the HCoJ in the flawed process of judicial selections/appointments.

Conclusion

Here we must note that the government's arguments for transferring the power to nominate the Supreme Court judges to the HCoJ mostly relied on previous recommendations of the Venice Commission. Georgian civil society fully supports the positions of the Venice Commission in its 2005[15] and 2010[16] reports about gaps in the existing rule under which judgeship candidates are nominated by the President for Parliament's approval. The Coalition understands the general recommendations of the Venice Commission about engaging the HCoJ in the process but we also believe that in view of the local context in Georgia, the aim of the Venice Commission's recommendation – ensuring judicial independence – cannot be achieved today by transferring the nominating function to the HCoJ. On the contrary, it will further consolidate already broad and uncontrolled powers concentrated in the HCoJ and, in view of the Council's past performance experience, the proposed regulation cannot guarantee selection of judges based on professional criteria.

In addition, a Constitutional expert Sir Jeffrey Jowell, who was asked to advice the Constitutional Commission stated the following in his report: *"Despite the Venice Commission's recommendation, and in the light of recent history since that report was published, I am not convinced that the removal of the involvement of the President at this point is a beneficial step in itself. His or her involvement adds another check in a system based on the separation of powers and these issues should be considered in a holistic manner. If change is needed, I believe that a powerful role of Parliament in the selection of a Supreme Court (rather than a Constitutional Court, for reasons set out above), presents the appearance of political bias on the part of the judiciary. I respectfully suggest that steps are taken to make the appointment of the Supreme Court appear less controlled by the political branch of government."*[17]

In light of the above, we believe it is important to:

- change the rule of election of the Council members by a simple majority by Parliament in a way that ensures participation not only of the ruling but also of the opposition political forces in composition of the HCoJ;
- completely abolish probationary period for judges; instead, the government should make steps for improving regulations for judicial selections/appointments;
- the obligation of the Council to make judicial appointment decisions based on an open ballot and reasoned decisions should be reflected in the Constitution;
- the rule that authorizes the HCoJ to nominate Supreme Court judges for Parliament's approval should be amended. Within the Constitutional Commission, civil society has proposed several alternatives to ensure against high risks of the Council's engagement, including: 1. Co-participation of the HCoJ and the President in nomination of candidates for Parliament's approval; 2. Postponing transfer of the nominating power to the HCoJ until comprehensive judiciary reforms are implemented

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[14] Monitoring reports by the Georgian Young Lawyers' Association and Transparency International – Georgia: 2014 reporting period, para.3.1. https://gyla.ge/files/news/High%20Council%20of%20Justice%20Monitoring%20Report%203.pdf ; 2015 reporting period, para. 3.1. https://gyla.ge/files/news/2010%20%E1%83%AC%E1%83%9A%E1%83%98%E1%83%A1%20%E1%83%92%E1%83%90%E1%83%9B%E1%83%9D%E1%83%AA%E1%83%94%E1%83%9B%E1%83%94%E1%83%91%E1%83%98/eng.pdf

[15] CDL-AD(2005)005, par.5

[16] FINAL OPINION ON THE DRAFT CONSTITUTIONAL LAW ON AMENDMENTS AND CHANGES TO THE CONSTITUTION OF GEORGIA, Venice Commission, CDL-AD(2010)028, para. 87.

[17] See Annex #4, Review of Amendments to the Constitution of Georgia in Respect to Human Rights and Judiciary Matters, Prepared by: Sir Jeffrey Jowell, practising barrister at Blackstone Chambers, London; Professor Emeritus of Public Law, University College London; Founder-Director of the Bingham Centre for the Rule of Law (2010-15); UK Member on the Venice Commission (2000-2010).

in consideration of all international recommendations and for transforming the Council into the guarantor of judicial independence; 3. There is another model that the Coalition worked on in the past. According to this model candidates would still be nominated by the President but through a special selection commission that would ensure a quality background check and recommend candidates to the President.

The government did not support any of these alternatives, including to postpone the entry into force of the provision which transfers the nominating power to the Council, stating that it will finish the judiciary reform before the new Constitution is passed and becomes effective. In view of the scale of the reform that needs to be implemented in the judicial system[18], and in consideration of the lack of adequate political will, rather contrary, resistance to the judiciary reforms, the government's promise to implement comprehensive reforms in a short period of time does not sound convincing.

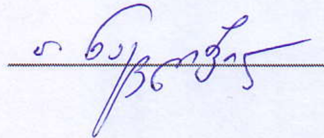
We hope that the Venice Commission will carefully examine the existing situation and take it into consideration in the process of preparing its opinion about the constitutional amendments.

Annexes:

1. **Main drawbacks related to the HCoJ's activities;**
2. **Reports of national and international organizations/institutions about the HCoJ's activities;**
3. **List of the judiciary reforms that need to be implemented;**
4. **Opinion of Sir Jeffrey Jowell;**
5. **Media coverage of the HCoJ's activities.**

Chairwoman

Ana Natsvlishvili



[18] For details refer to Annex 3

ANNEX 1

MAIN DRAWBACKS RELATED TO THE HCOJ'S ACTIVITIES

Annex 1

Main drawbacks related to the HCoJ's activities

- **Law does not regulate the HCoJ's activities. Instead, the Council's activities are largely self-regulated, which grants it an unlimited discretion and poses a risk of abuse of the broad power.**

The High Council of Justice activities are not subject to the General Administrative Code of Georgia or the Law on Normative Acts of Georgia. In addition, the law does not provide for the limits, rules and procedures for challenging the Council's decisions in court, meaning that legality and substantiation of the Council's decisions are essentially left outside control. The High Council of Justice activity regulations are provided exclusively in the Council Statute, which fails to define procedures for makingthe Council's individual or normative decisions and other important matters. The most important principles of the Council's activities, including principles of legality, fairness, transparency, objectivity, foreseeability, proportionality, conflict of interest prevention, etc. are not established and guaranteed by law.

In the CCJE's view, *mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice.*[19]

- **Contrary to the principle of foreseeability of the law, legislation that regulates the judicial system is often ambiguous**

Norms that regulate issues related to career of judges and legal regulations about specialization of judges, distribution of cases and other issues are inadequate and ambiguous, and therefore they fail to create sufficient guarantees for independence of a judge. It is not clear and established which decisions of the Council in particular are subject to the General Administrative Code of Georgia; the law does not provide any criteria for judicial promotions; procedures for evaluating judges on a probationary period are ambiguous and the Council has not established a detailed rule for evaluation; grounds and rules for transfer of a judge (the principle of irremovability of judges) are not established by law; grounds for disciplinary liability of a judge are ambiguous (violation of the Code of Ethics, inadequate fulfillment of responsibilities of a judge, etc. serve as grounds for a disciplinary liability); the institute of an independent inspector has been introduced but law does not supply any guarantees for the inspector's independence; law does not prescribe any grounds and rules for changing specialization of a judge and it does not require any substantiation; the list of exceptions related to distribution of cases is not established and in an event of distribution of cases as an exception, the court chair is not required to provide a reason for such distribution; the law delegates the Council with the power to appoint court chairs but it does not prescribe procedures for such appointments, etc. Ambiguity of the legal norms provides the Council with broad and unlimited discretion, which is abused in practice.

Based on international standards, *independence of the judiciary must be enshrined in the Constitution or the law.*[20]

Based on applicable international standards, *"there must be **total transparency in the conditions** for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency.Therefore, it is essential that, in conformity with the practice in certain States, **the appointment and selection criteria be made accessible to the general public by every Council for the Judiciary**..." "A case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of **objective, pre-established criteria and following a transparent procedure** by an authority within the judiciary."*[21]

[19] CCJE Opinion N10, (2007), para.19

[20] UN Basic Principles on the Independence of the Judiciary, para. 1.

[21] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para.9

In order to ensure transparency in the selection process, ***the procedure and criteria for judicial selection must be clearly defined by law.*** *The vacancy note, as well as the terms and conditions, should be publicly announced and widely disseminated...*[22]

"The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way", "...If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office".[23]

- **Powers are concentrated in one judicial body**

A number of powers that must be distributed among different bodies are instead concentrated in the theHCoJ, including: holding a judicial qualification exam (this should be included in the HSoJ functions), announcing admission to the HSoJ (this should also be included in the HSoJ functions), determining number of new students to be admitted by the HSoJ (the School itself should determine this), holding a competition for admission to the HSoJ and admitting new students (this should also be included in the HSoJ functions), the HSoJ does not participate in discussions about promotion of judges. Such concentration of powers allows the Council to influence the process of judicial selections by deciding not to hold a qualification exam and not to announce admission to the HSoJ.

Based on applicable international standards, *"judicial Councils are bodies entrusted with specific tasks of judicial administration and independent competences in order to guarantee judicial independence. In order to avoid excessive concentration of power in one judicial body and perceptions of corporatism* ***it is recommended to distinguish among and separate different competences****, such as selection, promotion and training of judges, discipline, professional evaluation and budget. A* ***good option is to establish different independent bodies competent for specific aspects*** *of judicial administration without subjecting them to the control of a single institution or authority. The composition of these bodies should each reflect their particular task. Their work should be regulated by statutory law rather than executive decree."*

"Unless there is another independent body entrusted with this task, ***a separate expert commission should be established to conduct written and oral examinations in the process of judicial selection*** *(see also para 8). In this case the competence of the Judicial Council should be restricted to verifying that the correct procedures have been followed and to either appoint the candidates selected by the commission or recommend them to the appointing authority."*[24]

- **The law does not require the HCoJ to provide reasoned decisions**

The legislation does not establish the obligation to provide reasoned decisions. The problem is clearly illustrated by decisions made by the HCoJ about appointment of judges, court, chamber and board chairs, admission of new students to the HSoJ, judicial promotions and transfers. After taking a close look at the HCoJ meeting minutes and decisions it has been found that decisions made by the Council about the said important decisions are rather general and lack explanation on their grounds.

Based on applicable legal standards, *"Some decisions of the Council for the Judiciary in relation to the management and administration of the justice system****, as well as the decisions in relation to the appointment, mobility, promotion, discipline and dismissal of judges (if it has any of these powers) should contain an explanation of their grounds,*** *have binding force, subject to the possibility of a judicial review. Indeed, the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision." "All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers* ***must be reasoned****"... "Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions."*[25]

"Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society

[22] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para.21

[23] Venice Commission, Report on the Independence of the Judicial System Part I: The Independence of Judges, para.37

[24] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, paras 2-3

[25] CCJE Opinion N10, (2007), paras 39, 92, 93

by developing pre-established procedures and ***reasoned decisions****."*[26]

- **Lack of transparency of the HCoJ meetings**

The Council does not publish meeting agendas and documents to be discussed during the meeting. Videotaping of the Council meetings by media representatives is prohibited.

Based on applicable international standards, "*The Judicial Council shall meet regularly so that it can fulfill its tasks.* ***Public access to the deliberations of the Judicial Council and publication of its decisions shall be guaranteed in law and in practice****."*[27] *"Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary,* ***transparency in the actions undertaken by this Council must be guaranteed****. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self protection and cronyism within the judiciary."*[28]

- **Judicial selections/appointments are not based on merit, are done for the sake of formality only and seem to lack objectivity**

Judicial selections fall short of the standard of objective criteria and lack reasons. Judicial appointment decisions will never be substantiated unless secret ballot is abolished. Foreign experts working with the judicial reform strategy committee have provided similar recommendations. The standard of objective criteria and reasoned decisions for judicial selections is a requirement established by a number of international standards. Many international organizations suggest that weneed to improve the process of selection of judges.

Access to candidate interviews is an expression of the Council's goodwill, although interviews are essentially the only open stage of judicial selections/appointments process. Openness of candidate interviews helps identify drawbacks in the process of selection/appointment of judges to address them in the future. In light of this, we especially regret that within the task force for reforming the Constitution, the Constitutional Commission rejected the idea of enshrining open ballot for election of judges in the Constitution.

Based on applicable legal standards, "all decisions concerning the professional career of judges should be **based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency**..."[29]

"...There must be ***total transparency in the conditions for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency****."*[30]

- **Court chairs are perceived as superior judges in the judicial system; there are legitimate suspicions that the HCoJ uses court chairs to exert inappropriate influence on the judiciary in general.**

The HCoJ monitoring has revealed that candidates for court/board/chamber chairmanship are identified through a process that lacks transparency; there are no pre-determined criteria that a chairmanship candidate must fulfill, and the Council fails to evaluate credentials of a candidate against a certain criteria to determine his/her suitability for the office.

An attempt was made within the Third Wave of judicial reform to introduce rules for election of chairs but it didn't succeed due to the lack of the authorities' will to transition to the elective system. Under these circumstances, the process of appointment of court chairs by the HCoJ should be subjected to a legal framework and any room for arbitrariness should be eliminated.

Based on applicable international standards, *"The role of court chairpersons should be strictly limited in the*

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[26] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para.28

[27] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para.10

[28] CCJE Opinion N10, (2007), para.91

[29] Recommendation No. R (94) 12 of the Committee of Ministers on the independence, efficiency and role of judges, Principle I, 2(C)

[30] Opinion no.10(2007) of the Consultative Council of European Judges (CCJE), para.50

*following sense: **they may only assume judicial functions which are equivalent to those exercised by other members of the court**. Court chairpersons must not interfere with the adjudication by other judges and shall not be involved in judicial selection. Neither shall they have a say on remuneration (see para 13 for bonuses and privileges). They may have representative and administrative functions, including the control over non-judicial staff. Administrative functions require training in management capacities. **Court chairpersons must not misuse their competence to** distribute court facilities to exercise influence on the judges."*[31]

*"**The selection of court chairpersons should be transparent**. Vacancies for the post of court chairpersons shall be published. All judges with the necessary seniority/experience may apply. The body competent to select may interview the candidates. A good option is to have the judges of the particular court elect the court chairperson. In case of executive appointment, an advisory body - such as a Judicial Council or Qualification Commission (see para 4) - taking also into consideration views from the local bench, should be entitled to make a recommendation which the executive may only reject by reasoned decision. In this case the advisory body may recommend a different candidate. Additionally, in order to protect against excessive executive influence, the advisory body should be able to override the executive veto by qualified majority vote.*[32]

- **Drawbacks in the system of judicial disciplinary proceeding suggest that the HCoJ misuses the mechanism in disregard of internal independence of individual judges**

The list of grounds for instituting disciplinary proceedings against a judge needs to be revised as current list falls short of the standard of foreseeability of law. In addition, violation of rules of the Ethics Code in general without specifying a concrete rule should not serve as the basis for a disciplinary liability.

Based on applicable international standards, *"Disciplinary proceedings against judges shall deal with alleged **instances of professional misconduct that are gross and inexcusable and that also bring the judiciary into disrepute**. Disciplinary responsibility of judges shall not extend to the content of their rulings or verdicts, including differences in legal interpretation among courts; or to examples of judicial mistakes; or to criticism of the courts."*

*"...it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, **on the basis of clearly defined disciplinary faults**. ..."*[33]

*"There shall be a special independent body (court, commission or council) to adjudicate cases of judicial discipline (see para 9). The bodies that adjudicate cases of judicial discipline may not also initiate them or have as members persons who can initiate them. These bodies shall provide the accused judge with procedural safeguards, including the right to present a defence and also the right to appeal to a competent court. Transparency shall be the rule for disciplinary hearings of judges. **Such hearings shall be open,** unless the judge who is accused requests that they be closed. In this case a court shall decide whether the request is justified. **The decisions regarding judicial discipline shall provide reasons. Final decisions on disciplinary measures shall be published**."*[34]

- **Lack of diversity of opinion in the HCoJ**

Non-judge members of the HCoJ are elected by Parliament by a simple majority, ruling out participation of non-ruling political forces. Studies have shown that positions of judge and non-judge members of the Council coincide and a different opinion is voiced only by a representative appointed by the President of Georgia. Within the changes introduced by the Third Wave of judicial reform, election of one member of the HCoJ by a qualified majority was abolished. In addition, plans are underway to introduce indirect election of the president in Georgia, meaning that the individual that enjoys support of the parliamentary majority, i.e. the ruling political team becomes the president. Consequently, changes introduced within the Third Wave and indirect elections of the president are further detrimental to pluralism in the HCoJ.

Based on applicable international standards, *"the composition of the Council for the Judiciary should reflect*

[31] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para.11

[32] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para.16

[33] CCJE Opinion N10, (2007), para.63

[34] Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, paras 25-26

as far as possible the diversity in the society".[35]

"If in any state any non judge members are elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support, and should be persons affording, in the overall composition of the Council for the Judiciary, a diverse representation of society."[36]

[35] CCJE Opinion N10, (2007), para.24

[36] CCJE Opinion N10, (2007), para.32

ANNEX 2

REPORTS OF NATIONAL AND INTERNATIONAL ORGANIZATIONS / INSTITUTIONS ON THE ACTIVITIES OF THE HIGH COUNCIL OF JUSTICE OF GEORGIA

Annex 2

Reports of National and International Organizations / Institutions on the Activities of the High Council of Justice of Georgia

Introduction

Authoritative and influential international and local organizations / institutions in their reports negatively evaluate the separate directions of the work of the High Council of Justice. The reports focuson the issues and challenges that prevent the effective functioning of the HCOJ. In some cases, the identified gaps are accompanied with relevant recommendations for solution of the problems.

1. **Fourth Evaluation Round - GRECO (Corruption prevention in respect of members of parliament, judges and prosecutors, January 17, 2017)**
    - The GRECO evaluation team points out that the decisions made by the HCOJ frequently remain vague and the ongoing reforms are not sufficient to eradicate the existing gaps;
    - The process of election of judges behind the closed doors, carrying outthe votesin secret and no public access to the substantiated decisionshas been negatively evaluated.
    - The report has criticized the fact that despite the incompatibility/conflict of interests, the members of the Council still participated in the selection process of judges. Consequently, the objectivity of the decisions undersuch conditions cannot be guaranteed;
    - Experts have identified significant gaps in the procedure of promotion of the judiciary. Similar to the selection process, it includes anontransparent procedure, and there is a lack of clear and objective criteria;
    - The grounds for disciplinary liability of judges have been widely criticized due to their vagueness. A clear example of the inefficiency is the cases submitted to the HCOJ, in particular, none at all from 300 cases admitted by the Council in 2013-2015 were transferred to the Disciplinary Panel. According to the experts, making decisions by the Council during disciplinary proceedings by the majority of two-third is quite a high standard and the higher margin than a simple majority should not be required for the Council's decisions.

2. **Trial Monitoring Report Georgia - OSCE (Office for Democratic Institutions and Human Rights, 2014)**

The report focuses on the activities of the Council of Justice in respect of selection and appointment of judges

- The report gives a negative evaluation of the existing procedure for selection and appointment of judges, which compromises the judicial independence. At the same time, according to the recommendation, the HCOJ should adopt the key criteria and uniform procedures concerning the selection and appointment of judges regardless of whether theprobationary period is retained. Those procedures should includea requirement that relevant reasoning in writing shall be preparedfor all decisions;
- The report criticizes the lack of transparency of the procedure for the transfer of judges by the Council of Justice. In particular, the decisions of the High Council of Justice are not substantiated unless the reference to the relevant provisions of the law is included. Consequently, the HCOJ enjoys the unrestricted authority regarding the transfer of judges. Accordingly, the relevant recommendation has been prepared: The HCOJ should interpret the General Administrative Code of Georgia as requiring them to provide substantiate reasoning for any decisions concerning the transfer of judges;
- The HCOJ should develop additional regulations to complement provisions on monitoring and evaluation of judges contained in the Organic Law on General Courts taking into consideration international recommendations.

The report also focuses on other activities of the High Council of Justice

- The HCOJ should ensure full transparency of their sessions and decisions by scheduling sessions sufficiently in advance, and informing the public of the agenda of the respective sessions.

3. **ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT ANTI-CORRUPTION NETWORK FOR EASTERN EUROPE AND CENTRAL ASIA** (Anti-Corruption Reforms in Georgia, Fourth Round of Monitoring of the Istanbul Anti-Corruption Action Plan, 15 September, 2016)

- The report focuses on the shortcomings of the High Council of Justice regarding its transparency and integrity. Moreover, the procedure for selection, appointment, promotion, transfer and discharge of judges is negatively evaluated. The procedure for appointment of court presidents and distribution of cases between judges is also an issue;
- The report severely criticizes the regulation which envisages establishing a probationary period for judges with experience in the judiciary system. In particular, those judges who were appointed for 10 year-term before the constitutional amendments in 2013 will have to complete a three-year probationary period as well. Such situation can be seen as constituting a great danger to the judiciary independence and can become an effective political tool to dismiss judges appointed during the "previous" judiciary system. Furthermore, the three year probation period produces inequality between judges who have been providing judicial practice for already 10 years as they and new-comers to the profession will be subjected to the same appointment regulations.

4. **Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe** (20-25 January 2014)

In his report the Commissioner focuses on the need to improve the activities of the High Council of Justice in respect of transparency of sessions, substantiation of decisions and appointment of judges. Moreover, the Commissioner recommends that the provision for the appointment of judges for the three-year probation period should be revised in order to maintain the independence of the judiciary.

5. Reports by the Public Defender of Georgia:

2016 - On the State of Protection of Human Rights and Freedoms in Georgia[37]

- The report prepared by the Public Defender negatively evaluates the fact that under the amendments elaborated within the Third Wave of the Judicial Reform, the authority for the appointment of chairpersons is still in the hands of the HCOJ;
- The report negatively evaluates the high representation of chairpersons of the Panel, the Chamber and courts in the High Council of Justice, which constitutes a real threat of the power concentration;
- The Public Defender negatively evaluates the fact that the law does notprovide regulations and procedures for promotion of judges and the HCOJ has to elaborate these issues;
- The Ombudsman negatively evaluates the legal regulations and practice of disciplinary liability of judges and calls on the HCOJ to revise the practice of disciplinary proceedings against judges;

2015 - On the State of Protection of Human Rights and Freedoms in Georgia[38]

- Particularly alarming was non-transparent and formalized process of promotion and appointment of judges in the High Council of Justice which was not based on fair and objective assessment of professional activities of the candidates;
- The appeals of the Public Defender to those judges, who demonstrated gross violation of the procedural regulations during the examination of cases, remained with no adequate response.

[37] Report of the Public Defender of Georgia 2016 available only in Georgian http://www.ombudsman.ge/uploads/other/4/4409.pdf

[38] Annual Report of the Public Defender of Georgia 2015 http://www.ombudsman.ge/uploads/other/3/3892.pdf

2014 - On the State of Protection of Human Rights and Freedoms in Georgia[39]

- The Public Defender has repeatedly appealed to the High Council of Justice to initiate disciplinary prosecution against the judges who grossly violated the procedural norms during the examination of cases. Unfortunately, the HCOJ limited itself to general and formal response saying that no legal offenses committed by judges had been confirmed.

[39] The Report of the Public defender of Georgia 2014 http://www.ombudsman.ge/uploads/other/2/2797.pdf

ANNEX 3

LIST OF JUDICIAL REFORMS TO BE IMPLEMENTED

Annex 3

List of judicial reforms to be implemented

- The legislature should establish the basic rules regulating the activities of the High Council of Justice;
- The legislature should regulate thoseimportant powers which are related to the activities of the Council and limit the unrestricted authorityof the Council in respect of career matters of judges;
- The legislature regulating the judicial system (the Law of Georgia on Common Courts, the law regulating the distribution of cases, the Law of Georgia on Disciplinary Liability of the Judges etc.) shall be improved to meet the standards of foreseeability of the law and contain the necessary safeguards for judicial / judiciary independence;
- The legislature that regulates the judicial system should be improved to balance the powers concentrated in the hands of the High Council of Justice between the Council and the High School of Justice in accordance with international standards;
- The legislature should establishthe obligation for the Council to providereasoned decisions;
- The legislature should provide that the information about the Council sessions be published within the timeframeas prescribed by the law and the Council of Justice shall ensure the publication in advance of the date of sessions and draft documents to be discussed;
- The legislature should amend non-transparent regulation for selection and appointment of judges,the ambiguousassessment criteria of honesty, interviews with candidates for judges at closed sessions, secret ballots and non-substantiated decisions;
- The legislature should determine the objective criteria for selection / appointment of judges, the obligation to substantiatethe decisions on appointment of judgesandthe rule of appointment of a judge by secret ballot should be cancelled;
- The legislature should establish the criteria for chairpersons of the courts / Chamber / Panel, the rule and procedure for appointmentthrough acompetition, the Council'sobligation to substantiate the decision on appointment of chairpersons;
- The Organic Law should determine that qualification exams of judges shallbe conducted by the High School of Justice and not by the High Council of Justice. The Organic Law should provide for the basic principles of conducting the qualification examination of judges, rulesfor staffing the qualification examination committee which willensure the conduct of the qualification exams and assessment of examination papers by impartial assessors through the objective procedure.
- The process of admissionof students to the High School of Justice should be transparent. Specifically, the legislature should establish objective criteria for admission of students to the High School of Justice, should determine sources and grounds for assessment of students throughthe established criteria, the obligation to provide reasoned assessments and the rules of appealing decisions.
- The rule for appointment of judges for a probationary period should be abolished. Lifetime appointment of judgesshould be enacted only after the rules for admission to the High School of Justice and the process of selection / appointment of judges areamended;
- The legislature shouldprovide thatthe grounds of disciplinary liability for judges be foreseeable. Transparency of disciplinary proceedings should be improved so that to avoid using this mechanism against the independence of individual judges;
- The legislature should determine the rule for selection of non-judge members of the High Council of Justice by a qualified majority of the Parliament members.

ANNEX 4

REPORT BY SIR JEFFREY JOWELL

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Promoting Rule of Law in Georgia (PROLoG)

REVIEW OF AMENDMENTS TO THE CONSTITUTION OF GEORGIA IN RESPECT TO HUMAN RIGHTS AND JUDICIARY MATTERS

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MARCH 2017

This document is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of the expert and do not necessarily reflect the views of USAID or the United States Government or East-West Management, Inc. (EWMI).

This Report is based upon a study of proposed amendments (see Annex 1) by the State Constitutional Commission of Georgia to parts of Chapter 1, Chapter 2 and Chapter 5 (now proposed to be Chapter 6) of the Constitution of Georgia (human rights and judiciary).

It is based upon a preliminary study of the constitutional history and context of Georgia, followed by a visit to Tbilisi under the auspices of the USAID-funded Promoting Rule of Law in Georgia Activity (*PROLoG*) from March 13- 18 where I attended two sessions of the State Constitutional Commission and met with the Chair and Deputy Chair. I also met with the Chief Justice and members of the High Council of Justice, the Public Defender, and a number of other experts from NGO's and members of the opposition party.

In general I am impressed with the amendments, which bring the Constitution much more in line with modern standards of European democracy while at the same time asserting an independent and sometimes refreshingly creative approach to constitutional drafting.

I have assessed each Article on the basis of the following criteria:

1. Does the content of the Article meet common European standards in respect of human rights and the rule of law?
2. Do the rights and duties in a relevant Article permit of a limitation? Are the terms of any such limitation appropriate?
3. Is the right or duty clearly expressed so as to be accessible to the public?
4. Is the right enforceable? And will any enforcement through the courts respect the division of functions between courts and other branches of government? (This applies particularly, but not solely, to so-called "socio-economic rights")
5. Are the provisions internally consistent and consistent with the country's values and principles as expressed in the constitution?
6. Are there any additional rights, institutions, or standards which might enhance the constitution's compatibility with human rights and rule of law norms its enforceability or its accessibility?

CHAPTER 1: GENERAL PROVISIONS

I understand that this Chapter of the Constitution is not intended to establish directly enforceable rights, but rather the principles, aspirations or expressions of basic values underlying the Constitution.

These are divided into three principal values, defining Georgia's essence as:

(a) A "***Democratic state***" (**Article 3)**;

(b) a "***Rule of law***" state (**Article 4)**; and
(c) a **"*Social state*"** (**Article 5**).

Essential features of each of those values are then set out under the respective subsections of each of those Articles.

Under **Article 3 ("Democratic State)**":

- **Subsection (3)** initially provided that "*people shall exercise their power through a referendum, other forms of direct democracy, and their representatives*".
  This gives the impression that Georgia is more a popular than a representative democracy. I note that that formulation was, sensibly, changed in a subsequent draft to:

"*people shall exercise their power through it representatives as well as through referendums or other form of direct democracy*".

Under **Article 4 (Rule of Law State):**

- **Subsection (2)** states that "*the State recognises and protects universally recognised human rights* etc."

  I suggest that the word "*promotes*" be added to that subsection after "recognises and".

- The second part of **Subsection 2** provides that "*the Constitution does not deny those universally recognised human rights and freedoms that are not mentioned here but naturally flow from constitutional principles*".

  This formulation incorporates in this Chapter Article 39 of the present Constitution. Keeping the Article in the revised Constitution is sensible as it permits courts and public officials to keep abreast with modern human rights developments. Its move from the directly enforceable rights section (Chapter 2) to this Chapter may not weaken its impact as otherwise it would serve no purpose. However, if is thought that there is any doubt that it is not directly enforceable it should be returned to Chapter 2.

  In view of what will be said below re the right to human dignity, the formulation in Article 10 of the Estonian Constitution may offer an alternative model:

  "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the

principles of human dignity and of a state based on social justice, democracy, and the rule of law".

- **Subsection 6** provides that Georgian legislation must comply with universally recognised principles and rules of international law and that a treaty or international agreement takes precedence domestically over other normative acts "unless it conflicts with the Constitution". This provision fits with Subsection 2, above, and is welcome to the extent that I understand that Georgia has ratified the leading international human rights treaties, which apply directly and therefore supersede domestic legislation and official acts.

  However, it is noted that these treaties will not necessarily apply directly where they are inconsistent with the Constitution and therefore cannot be assumed in this Review to apply automatically. I therefore assess each Article by reference to its own text and not as may be supplemented by any international treaty obligation to which Georgia is a party.

Article 7 (Social State – probably more accurately: 'Welfare State'):

This Article sets out a number of goals in the area of social and economic development. These include, under **subsection 4**, a requirement that

> "*the State support citizen healthcare and social protection, the provision of citizens with the subsistence minimum, and suitable dwelling. The State helps the citizen with becoming employed. A law determines rules and conditions of subsistence minimum".*

Subsection 5 requires the State more generally to support "*development of education, science, culture and sports*".

Subsection 6 requires the State to "*ensure*[s] *environmental protection, rational use of natural resources and . . .sustainable ecological development"*

Subsection 7 requires the State to "*support the creation of special conditions for honouring the rights and interests of disabled people", and*

Subsection 8 requires the State to "*facilitate[s] equal participation of men and women in public and political life*".

I understand that the inclusion of these goals in Chapter 1 of the Constitution, rather in Chapter 2 where they now sit (Articles 30-38 – which only seems not to include "*the provision of a minimum subsistence, and suitable dwelling"*) is to indicate that they are not open to direct legal enforcement. I have not seen the provision in the draft that makes that limitation explicit. However, on the

assumption that the limitation will be made clear in a subsequent version of the draft, the question must be asked as to whether moving those rights into Chapter 1 would diminish their impact.

The rationale given during the discussions within the Commission, was that the rights that are being moved into Chapter 1 are "abstract rights", and therefore not amenable to direct enforcement. At that time the draft had shifted to Chapter 1 other goals set out presently in Chapter 2, such as some Trade Union Rights - such as to found and join trade unions; and also the right to healthcare and more specific environmental rights. These have, I believe correctly, now been restored to Chapter 2 under Article 24 (freedom of work) and Article 26 (right to healthcare -which also includes environmental rights).

I note, however, that other goals in Chapter 2, such as those which relate to *free entrepreneurship, competition law, and consumer protection,* might also appear to be more in the nature of "abstract rights", but these have not been considered for replacement in Chapter 1. Perhaps this reflects a political choice (see discussion below re Article 26).

Some have pointed out what is a well-known argument against "socio-economic rights", namely, that if they are directly enforceable in the courts this will draws judges into pronouncing on matters of social policy, and the allocation of scarce resources, which is the exclusive role of parliament. This is why constitutions, such as the Indian and Irish, call "socio-economic" goals (such as to social security, health or housing): "*directive principles of state policy*" which cannot be enforced directly as constitutional rights.

In answer to those who object to the socio-economic rights being downgraded, the Constitutional Commission replies that they could nevertheless be indirectly enforced and also enforced by evoking the principle of "human dignity", which is set out as an enforceable right under Chapter 2 (the new Article 8) of the Constitution. A person, therefore, who is deprived of housing may therefore argue that her lack of housing infringes her (enforceable) right to human dignity (as has sometimes been done under the German Constitution). On the other hand, to leave enforcement of these goals to the courts as they may interpret the principle of human dignity is to invite uncertainty. Judges may or may not take this opportunity. Or may on occasion stretch the concept of human dignity in order to interfere unduly in the allocation of scarce financial resources.

Other constitutions seek to obviate the problems of judicial interference in the allocation of scarce resources in different ways. For example, the Polish Constitution specifies some socio-economic goals as "rights". These include social security and health (Articles 67 and 68 of the Polish Constitution).

However, it is provided that the extent of the right shall be determined by statute (as is proposed in subsection 4 above in respect of the minimum level of subsistence, but not in respect of the standard of housing). A similar provision is found in Chapter 28 of the Estonian Constitution.

The South African constitution of 1996 adopts a different approach. Like the Polish and Estonian constitution, it considers as rights, rather than directive principles, to housing, clean water, health, social security and environmental protection. However, it qualified such rights by making it clear in most cases that "everyone has the right to have **access** to such rights", and the duty of the state to provide them is not absolute, but qualified as follows:

> "The State must take **reasonable and other measures, within its available resources, to achieve the progressive realisation** [of the relevant right]"[1].

In practice, therefore, in South Africa (and a number of countries which have since 1996 adopted its model[2]) when there is a dispute in the courts about the extent of the State's obligation to deliver such rights, the courts require largely that the State put their mind to their delivery; defer to their judgement of "available resources" and only intervene where there is no "reasonable" plan to achieve the "progressive realisation" of those rights (the term "progressive realisation" adopted from the International Convention on Social and Economic Rights").

I must note with some apprehension that the socio-economic goals in **subsection 4** are only open to **citizens**, unlike their equivalent in Chapter 2, which are, with few exceptions, open to **everyone**. Compare section 28 of the Estonian Constitution which provides socio-economic **rights** to everyone, although a law may limit the right to non-citizens.

In conclusion, I believe that some of the goals shifted to Chapter 1 (such as to sport, science and cultural matters) are better placed there. However, the Commission may want to reconsider whether matters at least such as basic subsistence, or suitable housing are such clear aspirations in a "social state" that they should be regarded as enforceable rights alongside with others in Chapter 2. If this is done, as has been indicated, this does not mean that the judges will therefore be able freely to allocate resources to the relevant right, as it is possible to employ one or other of the drafting techniques mentioned above

[1] For a similar formulation in respect of environmental rights see the discussion on Article 26, below.

[2] These countries include Malawi, Zimbabwe, Kenya, The Maldive Islands, Fiji, East Timor and the Cayman Islands.

so as to limit such judicial action (and see further my comments on Article 26, below).

CHAPTER 2 – FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

This chapter includes most but not all of those 'civil and political rights' set out in the International Covenant on Civil and Political Rights (ICCPR) and in the European Convention on Human Rights (ECHR), although sometimes in different form. It also includes some rights specifically, and properly, tailored to the culture, institutions and history of Georgia. It also retains and expands upon rights set out in relatively new constitutions, such as rights to information, personal data protection and adds a right to the internet.

Article 8 (dignity, life and inviolability of person)

- **Subsection 1** provides that human dignity is "*inviolable and is protected by the State.*" Other constitutions phrase dignity as a right: e.g.:

  "everyone has inherent dignity and has the right to have that dignity protected and respected". (South African Constitution Section 10)

- By placing human dignity together in the same Article as the prohibition on torture etc., it seems that it is included primarily to justify such a prohibition. If it were to be seen as a stand-alone right, then dignity may more easily be able to be interpreted from time to time to cover some of the 'directive principles' or 'socio-economic goals' presently proposed for Chapter 1 (as discussed above).
- The remaining subsections of this Article meet the European standards set out in Article 3 of the ECHR although they are not as emphatically expressed. For example, whereas **Subsection 2** now provides that "*Human life is protected*", under Article 3 of the ECHR a separate Article provides that *"Everyone's right to life shall be protected by law. . ."*.
- In addition, the particular limitations of this right under Article 2(2) of the ECHR might be considered. (See below my comments on limitation of rights in respect of Article 31 below)
- This Article might also include some provisions of Article 4 of the ECHR dealing with rights not otherwise mentioned, such as the prohibition on

slavery, servitude and forced labour (which otherwise could be re-inserted into Article 24 (freedom to work).

Article 9 (right to equality)

The proposal provides that:

> *"Everyone is equal before the law."* It then prohibits "*discrimination on the grounds of race, colour of skin, origin, ethnic belonging, language, sex, religion, political other opinions, social affiliation, property or other social status, place of residence, or other grounds.*"

This formulation goes further than Article 14 of the ECHR to the extent that it prohibits discrimination generally, as a 'stand-alone right', and not only in respect of "the rights and enjoyments set out in the ECHR". It accords more therefore with Protocol 12, Article 1 of the ECHR, which prohibits discrimination of "the rights and enjoyments set out in the law".

It is welcomed that the proposed Article also seems to apply to discrimination by both private individuals or entities and also by public authorities, rather than confining the right to discrimination by public authorities alone (as does Article 1 of Protocol 12 of the ECHR).

The Article is silent, however, on grounds of discrimination which have been developed in recent years either through international instruments (such as disability discrimination -although disability protection is recognised in the proposals under Chapter 1 described above), or through the case law of the European Court of Human Rights (ECtHR). These grounds include discrimination on the ground of *age, sexual orientation, marital status and pregnancy*. The provision in this proposal to forbid discrimination on the ground of "origin" is not as broad as the ECHR formulation of "*national or social origin*". However, it may be open to the courts to read such grounds into Article 9 on the basis of "*other grounds*". Nevertheless, it would enhance clarity, as well as endorse developing European norms of equality, if some or all of these grounds could be incorporated in this Article.

Two final suggestions for possible expansion this Article:

First, the formulation in the United States Constitution of a right to "*equal protection of the law"* has been adopted in some modern constitutions, and sometimes reads as follows:

> *"Everyone is equal before the law and has the right to the equal protection [and benefit] of the law"*

Secondly, some constitutions have qualified "*discrimination*" with the word "*unfair discrimination*". This may permit special assistance to disadvantaged groups (the practice of 'positive discrimination' or 'affirmative action'). See e.g. the German Constitution Article 3 which specifically authorises, in respect of equal rights for men and women, the State to "*take steps to eliminate disadvantages that now exist".*

Article 10 (right to free development of one's own personality)

This provision, which recognises that "*everyone has the right to free development of their own personality",* could perhaps be coupled with the provision found in Article 16 of the ICCPR and which speaks to problems such as of lack of identity for children and others:

> *"Everyone shall have the right to recognition everywhere as a person before the law".*

Article 11 (Human Liberty)

The proposal under **subsection 1** is: *"Human liberty is protected".* This advances the existing formulation; "*Human liberty shall be inviolable"* by placing a positive obligation on the state to 'protect' liberty.

Compare Article 9(1) of the ICCPR and Article 5 of the ECHR, which both start with the words "*Everyone shall have the right to liberty and security of the person*", which sets out clearly that liberty is a human right (and then goes on set out the limitations on that right, and then the various duties of the state).

The ICCPR goes on to provide that: *"No one shall be subjected to arbitrary arrest or detention"*. This phrase shows that the norm is concerned with *all* of arbitrary or unlawful arrest and detention, not merely that effected by the State. It therefore imposes a *positive* duty to take effective measures to protect against such detention by any other party (such as kidnapping) and through investigations into any suspected case that may arise.[3]

"I recommend that a *prohibition on arbitrary arrest or detention* be added to this Article, perhaps along the lines of the model of " Article 20 of the Lithuanian Constitution which provides that:

[3] UN Human Rights Committee, General Comment 35, *"Article 9 (Liberty and security of person)"*, 16 December 2014, (CCPR/C/GC/35) at §9.

"No one may be arbitrarily apprehended or detained . . . "

I should flag up that the pre-trial detention period of 9 months under ***subsection 6*** of the draft is much higher than the two or three week period permitted in common law systems, although civil law systems, such as France, permit longer periods.

Article 12 (freedom of movement)

This provision meets the standards set out in Article 2 of Protocol 4 of the ECHR.

Article 13 (inviolability of private life space, communications, abode and place of activity)

This section notably differs from Article 8 of the ECHR. **Subsection 1** provides that:

> *'Every individual's private life space (?) abode and place of activity are protected. No one has the right to enter or the right to search an abode or other possessions against the will of the human being"*

It then proceeds to regulate searches, and sets out its own limitation on the prohibition of searches.

By contrast, the parallel provision in Article 8 of the ECHR, provides more directly and simply:

> *'Everyone has the right to respect for his private* ***and family*** *life, his home and his correspondence.'* (emphasis added).

The limitations under Article 8 of the ECHR are similar to those in subsection 2.

I strongly believe that the clear right to '*private and family life*' has attained a special status in the jurisprudence of the ECtHR and that of many European countries. It is in particular (but by no means solely) employed in respect of the right of children or spouses to join their families who have been separated by war etc. It does not necessarily allow unrestricted immigration (which may be regulated under the Article's limitation provision).

See for example Article 47 of the Polish Constitution ("*Everyone shall have the right to legal protection of his private and family life")*, and Article 26 of the Estonian Constitution ("*Everyone has the right to the inviolability of private and family life*"). I strongly suggest, therefore, that the formulation under Article 8 of the ECHR, above, or one or other of the provisions from the Polish or

Estonian Constitutions, be substituted for the first sentence of Article 13 as presently drafted.

<u>Article 14 (freedom of belief and conscience)</u>

This provision removes *thought and religion* from the right to belief and conscience, all presently in Article 19 of the present Constitution. Freedom of thought is proposed to be moved into Article 15.

It therefore distinguishes itself from the formulations in Article 18 of the ICCPR and Article 9 of the ECHR in that respect, and also in the fact that:

(a) it does not include the right "*to manifest [a person's] religion or belief, in worship, teaching, practice and observance",* and

(b) in its single ground of limitation (where the expression of the belief etc. "infringes the rights of others"). The limitations in Article 9 of the ECHR are more extensive (and see further my remarks on limitations of rights below). I recommend that religion be restored to this Article, or provided as a separate right elsewhere. The right should include the right to manifest belief as in (a) above.

<u>Article 15 (freedom of thought and information)</u>

The provision for free expression differs markedly from Article 10 of the ECHR and Article 19 of the ICCPR. The proposal reads:

> *(1)"Everyone shall be free to receive and disseminate information, to express and disseminate their opinion orally, in writing or otherwise".*
>
> *(2) "Mass media shall be free. Censorship shall be inadmissible".*

- The ECHR and most modern constitutions employ the simpler and more direct and accessible formulation:

  "<u>Everyone has the right to free expression</u>"

  which then proceeds to include freedom of the press and all media; to impart information or ideas and freedom of artistic or intellectual creativity.

  I note that "*freedom of intellectual work*" is "guaranteed" separately in Article 18 below, and wonder whether it should not be joined to this Article, to which it is inherently connected.

  As discussed above, *freedom of thought* has been removed from the present Article 19. However, it is not specifically mentioned here except

in the title. Specific reference to *expression*, rather than thought, in the title would make the purpose of the article clearer.

- The provisions in this section in respect of the right to *internet access*, the "*mass media*" and the creation of a *public broadcaster* are useful developments. Provision might be made for the subsequent independent regulation of the public broadcaster.
- Despite these differences from equivalent provisions in other constitutions and the ECHR, the Article does overall I believe meet European standards, although the Commission may want to include here the rights that are protected in some modern constitutions, such as *academic freedom* (so as to avert the history of so many countries where the road to totalitarianism began with attacks on academic institutions), *freedom of artistic creativity* and *freedom of scientific research* (See Section 16 of the South African Constitution or, as in the German Constitution, Article 5(3): "*Arts and Sciences, research and teaching shall be free*")
- The limitations clause for this Article is similar to that of Article 10 of the ECHR, but does not include the limitation on the grounds of "*protecting health or morals*".
- The Commission will know that some constitutions which do not follow the U.S. position on unrestricted free speech (unless there is a "clear and present danger" of violence etc.) permit the regulation of speech which may *incite imminent violence.* Others forbid *"hate speech"(*See e.g. Article 12 of the Estonian Constitution which prohibits both the *incitement of violence or discrimination on grounds of national, racial, religious or political or other opinion*, and also prohibits the *incitement of hatred, violence or discrimination between social groups*).

Article 16 (right to public information)

This Article provides a modern right to public information, prescribed by law, except where the information contains "*state, professional or commercial secrets".* It also protects certain private information kept in public records, with certain exceptions.

- On the right to public information, I do believe that the exception for "*secrets*" should be more carefully defined as the needs of secrecy could go further than the Article intends. For instance, the exception could be phrased in a following manner "*matters necessary to the confidentiality of the state or matters of professional privilege or commercial secrets*".

- On the protection of private data, I wonder whether there should be a *separate Article* for private data-protection (I have seen the extensive Law on Personal Data Protection), which might also refer to the need to regulate *investigatory powers* generally (through electronic surveillance, etc.), consistent with Article 13 (private life) above.
- The role of the *Data Protection Inspector* could also be placed in that section.6

Article 17 (right to property)

The present provision provides a strong statement that "the right to own and inherit" property will be safeguarded in Georgia. And that deprivation of property will attract fair compensation.

It should be noted here that this provision is stronger than Article 1 of Protocol 1 of the ECHR, which protects only *"the peaceful enjoyment of property"*. It also permits expropriation not only in the public interest, but *"subject to the rules provided for by law."*

Some constitutions' property clauses also protect *intellectual property*. I note that the right to intellectual property has been removed from the existing Article 23 of the Constitution and has also not been included in the new Article 18 (freedom of intellectual work). The reason for this is probably that the definition of property self-evidently includes intellectual property. However, in an era where some countries pay little regard to intellectual property, it would be reassuring to spell out Georgia's commitment to intellectual property rights by specifically mentioning that fact in this section.

Subsection 4 provides that land in Georgia may only be owned by Georgian citizens, *"except for special events envisaged by law"*.

Such a provision of course has a political as well as legal dimension. It is well known that foreign investment is often deterred by countries which do not permit land ownership to non-nationals.

On the strictly legal side, three issues must be identified:

- First, any law forbidding existing non-citizen property-owners or their heirs from selling to anyone other than a citizen would fall foul of Article 1 of Protocol 1 of the ECHR as such an action would reduce the scope of demand for the land, and hence its price. It would at most be an interference with the enjoyment of the property, and also possibly be seen as a discrimination under Article 14 ECHR. At the least, fair compensation would be required.

- Secondly, preventing future ownership of land by non-nationals may conflict with the equality clause in the constitution (discrimination on the ground of *origin* – although see the discussion on Article 9 –the right to equality -above), and the constitution would have to make clear which provision prevailed.
- In addition, it must be recognised that although Article 1 Protocol 1 of the ECHR engages only the right to property's "*peaceful enjoyment",* this phrase has been interpreted over the years to include, in certain circumstances, the right to acquire property as well as to use it. The test will be whether any deprivation of that right is fulfils a lawful purpose, and is proportionate.
- In general, common European standards do permit some unequal treatment in respect of foreigners. See e.g. Article 16 of the ECHR which permits the restriction of the *political activity of aliens*. And a number of States world-wide restrict ownership of aliens of at least some property.
- However, to fulfil the test of proportionality it may be that a blanket ban on non-citizens owning property, albeit allowing exceptions to be established by law, will not fulfil the proportionality test. For that reason, a more restrictive ban may be more within the spirit of European standards.
- Perhaps the Commission might consider that, instead of a blanket ban on foreign land ownership, *the Estonian Constitution* could prove a model more in keeping with a proportionate approach: Article 32 of that Constitution provides that

  "Everyone has the right to freely possess, use and dispose of his or her property." However, "Classes of property [may, where provided by law] and in the public interest, be acquired in Estonia only by Estonian citizens, some categories of legal persons, local governments, or the Estonian State. . .".

Article 18 (freedom of intellectual work)

See comment above on Article15.

I am not sure why **subsection 4** (*"The State protects cultural heritage through law")* fits into this Article. Perhaps it should be included in one of the Articles which seek environmental protection, either in general terms in Chapter 1, or under Article 26 below.

Article 19 (freedom of gathering)

Subsection 1 provides that "*everyone except members of the armed forces shall have the right to gather publicly and without arms without prior permission'.*

Subsection 2 then permits, but does not prescribe, a law to regulate prior warning if the gathering is held ("*in a place where people or transport move around*").

Subsection 3 provides the government only to end a gathering or rally if it becomes unlawful.

- Should the right be, as in ECHR Article 11, to *peaceful* public gatherings? And then to permit the ending of a gathering if it threatens not only the law but also a wider range of issues, such as set out in the limitation clause of ECHR Article 11 such as national security, public safety, the protection of health, and the rights of others?
- Note also the wider possible exemption provided by ECHR Article 11:

  '*This article does not prevent imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police, or of the administration of the state.*'

Article 20 (freedom of association)

This provision provides a "*right to establish and join public and commercial associations*".

The right to establish trade unions and political parties are dealt with elsewhere (Articles 21 and 24 respectively).

In the light of (a) the lack of clarity as to what is a "*public association*", and (b) the reality of attacks in other countries nowadays of legitimate activities of *non-governmental organisations* (known also as *civil society organisations*) thought should be given to a guarantee of their right to be established and to carry on lawful activities.

Article 21 (freedom of parties)

These provisions meet European standards.

Article 22 (electoral rights)

This article sets out the right of political participation, and excludes from the franchise prisoners convicted of a *"serious or very serious"* crime, as well as anyone whom a court has committed to an inpatient mental institution.

Recent judgments of the ECtHR in respect of blanket bans in the UK and Italy have held that a blanket ban on voting of all prisoners violates Article 3 of Protocol 1 of the ECHR (the right to political participation). This is because even prisoners are considered to enjoy rights (e.g. rights of unimpeded

correspondence, etc., or not to be tortured). However, the ECtHR has upheld subsequent legislation in Italy which allows some prisoners, although not all, to exercise the franchise.

In respect of mentally disabled persons, a judgment from Hungary before the ECtHR similarly held that a blanket ban on their voting violated the ECHR.

In the light of that jurisprudence of the ECtHR, the ban on serious prisoners voting would seem to meet European standards.

The blanket ban on all inpatients in mental institutions does in my view violate common European standards.

Article 23 (the right to hold public office)

These proposals seem compatible with European standards.

I note that an earlier proposal to define the *role of the civil service* is not included in this draft. If it is reinserted, I commend Section 195 of the South African Constitution which sets out the "*basic values and principles governing public administration",* including *impartiality and lack of bias*, *professional ethics*, transparency, and *efficiency*.

Article 24 (freedom of work)

This Article sets out the common labour rights, and balances them with rights of free entrepreneurship etc. (as discussed in relation to **Article 4, subsection 8**, above).

I note that although **subsection 5** seeks to protect consumer rights, there is no mention here of the need to protect *health and safety standards in the workplace*.

I have mentioned (in the discussion on Article 8, above) the lack of *prohibition on forced labour and servitude*, which might well fit in this section, in addition perhaps to a *protection against child labour* (if there is not to be a separate Article dealing with the rights of the child).

Article 25 (right to education)

These proposals all seem to meet all the necessary standards.

Article 26 (right to healthcare)

This Article includes *an enforceable right to enjoy State healthcare services* (**subsection 1);** requires *the supervision by the State of healthcare institutions,* and *regulation of pharmaceuticals* (**subsection 2)** and *environmental rights* **(subsection 3).**

In respect of subsection 1 and 3, I note that these rights do not seem to be sufficiently sensitive to resource limitations. (See the discussion above in respect of **Chapter 1, Article 4 subsection 8).**

In that regard, I commend the following provision recently adopted in the Constitution of the Cayman Islands in relation to environmental rights:

18.—(1) Government shall, in all its decisions, have due regard to the need to foster and protect an environment that is not harmful to the health or well-being of present and future generations, while promoting justifiable economic and social development. (2) To this end government should adopt reasonable legislative and other measures to protect the heritage and wildlife and the land and sea biodiversity of the Cayman Islands that— (a) limit pollution and ecological degradation; (b) promote conservation and biodiversity; and (c) secure ecologically sustainable development and use of natural resources.

Article 27 (right to marriage)

Subsection 1 of this Article declares that marriage as "*a union between a man and a woman for the purpose of creating a family is based on equal rights and free will of spouses*".

This definition seems at present to fall within the terms of Article12 of the ECHR, which provides that "*Men and women of marriageable age have the right to marry and found a family, according to the national law governing the exercise of that right*".

The Commission will be well aware of cultural differences regarding same-sex marriage, or civil partnerships. And they will also be very aware of the growing trend in Europe and elsewhere to regard same-sex marriage as a constitutional right.

In a very recent case before the ECtHR, *Vallianatos v. Greece*, it was held that the Court does not require the possibility of a "marriage" for homosexuals, but if an alternative form of partnership is open for heterosexual couples, it is necessary to grant something equivalent to same-sex couples (and possibly *vice versa*).

Article 28 (procedural rights)

Subsection 1 of this Article states that:

> *"Everyone has the right to apply to a court for the protection of his/her rights and freedoms. The right to fair trial is ensured."*

It is not clear whether this provision seeks to provide a general clause providing for the enforcement of the bill of rights through courts. Or whether it is simply setting out the requirements of a fair trial. I therefore suggest that:

(a) the first sentence of subsection 1 be deleted here, and that a separate clause for enforcement be drafted (see suggestion below), and

(b) that it be made clear this Article deals specifically with the requirement of a *fair trial* and that it be called "*the right to a fair trial*". Indeed the section now effectively contains the principal elements of a fair trial, some of them sensibly moved from the former Chapter 5 (on the judiciary), and also other related principles, such as against retrospective laws or double jeopardy.

I would, therefore, strongly suggest that the opening words of Article 6 of the ECHR be substituted for the second sentence in subsection 1 as follows:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or other independent and impartial tribunal".*

This famous formulation sets out the foundation of the rule of law, namely, that everyone have access to justice. It also immediately introduces three elements of the fair trial, and indeed of the rule of law more generally, which are not contained in the present Article, namely, a public hearing, before a court or its equivalent that is both independent (of other branches of government) and impartial (in respect to the merits of the case).

Article 29 (Georgian citizenship)

and

Article 30 (rights of foreigners and stateless persons)

Both these Articles seem to meet with the standards of European democracy.

Article 31 (general principles applying to fundamental rights)

This Article deals with three issues.

First, in **subsection 1,** that "*fundamental rights and freedoms provided by the constitution shall apply, mutatis mutandis to legal entities".*

It is not clear whether this Article intends

(a) that all the rights in Chapter 2 attach to business and other corporations or non-governmental organisations (does a business corporation have the right of free expression? Or to vote in an election?), or
(b) whether those entities are required also to be bound by the various rights

(are they bound not to discriminate on the grounds set out in Article 9?).

Some human rights provisions have, in respect to some constitutions, attained "horizontal" effect (that is, they have been applied to private as well as public entities). However, this is a difficult area of human rights law and perhaps needs some further consideration in the light of international experience.

Secondly, **subsections 2 and 3** provide a *general limitation* clause. **Subsection 2** forbids the exercise of rights and freedoms from breaching "*the human rights of others",* and **subsection 3** provides that any limitation must not "*undermine the very essence of that right".* I have two comments on those subsections:

- It seems to me that there is merit in a separate Article on **limitation of rights.** This is because it is of the utmost importance that it be clear as to which of the rights (1) not be open to limitation (e.g. such as the right not to be tortured), (2) be open to limitation only for some purposes (sometimes set out in the Article that provides the right), or (3) is open to the general limitation clause.
- I wonder whether the formulation of the German Constitution that a limitation must not "undermine the very essence of a right" has not proved itself too imprecise. The common European test is now that a limitation must fulfil the qualities of **proportionality.** However, that concept in the abstract is also imprecise. Some constitutions with general limitation clauses therefore spell out with greater clarity the essential qualities of proportionality, namely, that any limitation of rights must be:
  - *(i)* *Prescribed by law*
  - *(ii)* *Be necessary in a democratic society, taking account*
  - *(iii)* *The nature of the right*
  - (iv) *The purpose of the limitation,* and
  - (v) *Less restrictive means to achieve that purpose*.

Thirdly, **Subsection 4** of this Article provides for restrictions (on certain rights only) during a *state of emergency or state of war*.

I have seen the provisions of the Constitution which regulate a state of emergency (Articles 46(1) and (2) and Article 72 (h). I have not been asked to review those provisions but would note that some constitutions provide that even in a state of emergency those rights that may be derogated from may only be limited if the derogation is "*strictly required by the exigencies of the situation".*

Article 32 (public defender)

I believe that establishing the Public Defender as a constitutional office has great advantages. I have seen the Public Defender Law which provides as

extensive powers as are found in any equivalent institution elsewhere, with one exception.

In discussions with the Public Defender I came to understand that his powers are limited in respect of obtaining information from private persons and also in respect of enforcing his decisions in cases of discrimination. It seems to me important that that deficiency be corrected – if not in the Constitution then by an amendment to the Law.

FURTHER SUGGESTIONS ON CHAPTERS 1 AND 2:

1. **A General Enforcement Article**

   It seems important to provide a separate Article in Chapter 2 that makes it clear that courts (perhaps to be specified) *have jurisdiction to hear and determine applications for a denial, violation, infringement of, or threat to a right under this section, and to provide an appropriate remedy (which may be specified).*

   The provision might also say who may approach the court (including possibly a person acting as a member of an interest group or a civil society association. See further my comments on Article 56(5) on Chapter 6, below).

2. **A Right to Administrative Justice**

   I respectfully commend to the attention of the Constitutional Committee the merits of a new right to "administrative justice".

   I have seen the General Administrative Code of Georgia, which establishes sophisticated standards of public administration which would be appropriate to be endorsed on the constitutional level.

   This right is gaining increasing acceptance in modern constitutions and has been accepted in the European Union's Charter of Fundamental Rights, Article 41, as a "*right to good administration"*. The South African Constitution, Article 33, provides for a "*right to just administrative action"*. The Polish Constitution, Article 184, provides that administrative courts shall exercise, to the extent specified by statute, "*control over the performance of public administration"*

   Such a right is designed:

   (a) to constitutionalise and provide as a right decisions which are *lawful, procedurally fair, reasonable (or not arbitrary*) and *efficient*. Some

constitutions require decisions to provide *reasons* and /or *to be decided within a reasonable time*, and

(b) to ensure the implementation of those standards by permitting individuals to challenge decisions made by any public official which contravene those standards.

The right has proved effective in signalling that a constitution is for both ordinary people about whom decisions are made by officials at every level. It also serves as an incentive to higher standards of public administration and a culture of accountability and justification.

3. Rights of the Child

A number of modern constitutions are providing for the protection of children, in line with the UN Convention on the Rights of the Child.

The protections include such as: *to a name from birth; to basic care; to be protected from maltreatment, neglect or abuse; to be protected from exploitative labour practices; not to be detained for long periods; to be protected from trafficking and use in armed conflict.*

4. Procedure for a Certification of Compatibility

Finally, I respectfully commend a practice from the UK, where when a bill is submitted to Parliament, it has to be accompanied by a statement from the promoters of the bill that it is *compatible with the standards of human rights* (as set out in the ECHR, but in Georgia the standards would be those set out in the Constitution in general, or in Chapter 2 in particular).

The benefit of such a provision is that it focuses the attention of the legislature and the executive, during the law-making process, on the implementation of rights. It therefore helps make clear that the achievement of human rights is not only for the courts, but is part of a dialogue between all branches of government.

CHAPTER 6: JUDICIARY AND PROSECUTION

Article 55 (Judiciary)

Subsection 1 provides that:

"The judicial branch of government is independent and is exercised by the Constitutional Court and courts of general jurisdiction."

Subsection 2 establishes the Constitutional Court, and **subsection 3** establishes Courts of General Jurisdiction, jury trial and, forbids the establishment of specialized courts, including military courts, outside of courts of general jurisdiction. This last provision is to be welcomed.

These provisions are now perfectly clear and may not need any further elaboration. However, the Commission may wish to have regard to the following models which make it even clearer as to (a) the source, or authority of judicial power, and (b) the commitment to judicial independence.

- On the source of authority of judicial power:
  The South African Constitution, 1966 s.165:

  (1) *The judicial authority of [the State] is vested in the courts*

  The Kenyan Constitution, 2010, s 159:

  (1) *Judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.*

- On the commitment to judicial independence: Judicial independence is endorsed under **Article 59(4)** below. However, it may be that the commitment to judicial independence is better placed not under the Article relating to judges (Article 59) but in relation to the judiciary as a branch of government (under Article 55), stressing the separation of functions more generally as in the two models below:

  The South African Constitution, s. 165:

  a. *The courts are independent and only subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
  b. *No person or organ of the state may interfere with the functioning of the courts.*
  c. *Organs of the state, through legislative and other measures, must assist and protect the courts and ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*

d. *An order or decision issued by a court binds all persons to and organs of the state to which it applies.*

The Kenyan Constitution, s.160 (a):

"In the exercise of judicial authority, the Judiciary . . .shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority"

Article 56 (the Constitutional Court)

This Article establishes the Constitutional Court which "*exercises judicial power by means of constitutional legal proceedings*" (**subsection 1**). It then proceeds to regulate its number and appointment procedures (**subsection 2**) and its Chairperson (**subsection 3**). **Subsection 4** provides both for the qualifications of judges and requires an organic law to determine its rules and other issues relating to its proceedings and operations. **Subsection 5** then sets out who may bring proceedings before it. **Subsection 6** requires its limited jurisdiction over elections in the year before an election; and **subsection 7** provides that its decisions are final and conclusive.

Subsection 1 does not define "*constitutional legal proceedings*". It would be clearer if the second part of **subsection 4** (requiring an organic law to establish this) were to be included in this subsection, as in the present Article 83(1). It would be clearer still if the extent of its jurisdiction were laid down in this Article.

Subsection 2

- Does not specify whether the court should always sit *en banc* with all 9 members in attendance. This should be made clear.
- In relation to the appointment of the Constitutional Court, it should be noted that the strong trend world-wide is for even constitutional courts to be appointed increasingly free of political involvement, most often by an independently appointed Judicial Appointments Commission. *See the Venice Commission Report **On the Independence of the Judicial System (CDL-AD (2010) 004, Chapter 3***, and *The Report of the Bingham Centre for the Rule of Law and the Commonwealth Secretariat*, ***The Appointment, Tenure and Removal of Judges*** (2014).

  If it is considered that an independent Commission is not appropriate for appointment to a constitutional court, because a degree of political involvement is beneficial (as in the models of appointments to the U.S. Supreme Court or the German *Bundesverfassungsgericht),* the Commission may nevertheless want to consider some technique to increase the element of objectivity in the appointments process – perhaps

by requiring that candidates should receive the support of, say, *two-thirds of members of parliament*. (See further the discussion in relation to the Supreme Court, High Judicial Council and Prosecutor below).

Subsection 5 sets out in detail who has standing before the court.

Subsection 5(a) permits challenges to *normative acts in respect of fundamental human rights enshrined in Chapter 2 of the Constitution by:* a *natural person* (which I assume includes persons or groups with an interest in the matter, but this is not clear), a *legal entity* (which I assume includes associations or civil society organisations with an interest in the matter, but this too is not clear), and the *Public Defender.*

The widening of standing to sue in this subsection is welcome. However, the jurisdiction of the Court remains narrow, insofar as it applies only to normative acts in respect of chapter 2. Most constitutional courts play a central role in assuring the accountability of all public officials (including the executive), to the standards of human rights. This applies not only when the public official is acting under a normative law which offends the constitution, but also when the official acts within a law that is constitutional in itself but where the exercise of discretionary power is either outside the scope of the law, or is within the law but is otherwise exercised in a way which breaches a human right (such as the right to a fair hearing). The constitutional court then becomes a guardian of human rights in all circumstances.

I recommend therefore that serious consideration should be given to giving the Constitutional Court jurisdiction over the acts of all public officials in respect of rights enshrined in Chapter 2 of the Constitution.

Article 57 (the Supreme Court)

Subsection 1 of this Article sets out the Supreme Court as a court of cassation.

Subsection 2 provides for its composition of 16 judges (again, not setting out whether the court should sit *en banc)*. II understand that the current law on Courts sets a minimum of 16 Supreme Court judges and confers upon the Plenum of the Supreme Court power to decide how many more judges should sit on the Supreme Court. I assume that the request for more judges must be negotiated with the executive, as it is a matter of resource allocation (see my remarks on budgetary matters discussed under Article 59 below). In general, it would seem that the *number of Supreme Court judges should be set in the constitution, subject to agreement for additional judges where justice requires*.

The subsection goes on to set out the process by which the judges are appointed (discussed further immediately below) and the fact that their *tenure is limited only by their age of retirement* (which is a welcome development in the interest of judicial independence, See the recommendation to that effect in Venice Commission Report on Georgia CDL-AD (2010)028). It then provides for the election of a Chairperson.

Subsection 3 provides for an organic law to provide for its adjudication other than a cassation instance.

In respect of the **appointment process**:

My remarks in respect of the trend towards less political involvement in the appointment of judges to the Constitutional Court apply even more forcibly to the appointment of a Supreme Court, which decides matters that are less "political" than those resolved in the Constitutional Court.

I note that the Venice Commission (CDL-AD (2010) 028 above, at paras.86 and 87) recommended that the existing system of appointment by the President should be abolished in favour of transferring the appointments to the Supreme Judicial Council, and this has been adopted in the present draft, which provides that Parliament shall elect all the judges on a simple majority of its members, at the recommendation of the High Council of Justice.

It is not clear in subsection 2 whether the High Council of Justice, nominates the precise number of vacancies for the Supreme Court, or gives Parliament a choice of candidate. Nor is it clear what happens if Parliament rejects the nomination/s. *I recommend that this process be clarified either in the Constitution or through a reference in the Constitution that the issue be set out in a Law.*

Despite the Venice Commission's recommendation, and in the light of recent history since that report was published, I am not convinced that the removal of the involvement of the President at this point is a beneficial step in itself. His or her involvement adds another check in a system based on the separation of powers and these issues should be considered in a holistic manner.

If change is needed, I believe that a powerful role of Parliament in the selection of a Supreme Court (rather than a Constitutional Court, for reasons set out above), presents the appearance of political bias on the part of the judiciary. I respectfully suggest that steps are taken to make the appointment of the Supreme Court appear less controlled by the political branch of government.

One way would be to require, as is suggested above in relation to the Constitutional Court, that a majority of two-thirds of members of parliament be required for the appointments. Another would be to establish a new independent *Judicial Appointments Commission*, on the model of many other countries (see the *Report of the Bingham Centre and the Commonwealth Secretariat*, cited above).

I can relate that in the United Kingdom, as a result of Council of Europe pressure, it was decided, in 2005, to abandon the system of appointment of judges at every level by the Executive (by the "Lord Chancellor" – effectively the Minister of Justice). This was not because the appointments were in fact politically biased, but because they presented the appearance of bias. As a result, the system was changed and a new Judicial Appointments Commission now regulates the appointment of all judges and lower tribunals in the UK[4].

In the case of higher courts, the Commission presents its nominations to the Minister of Justice, who may reject a nomination, with reasons, but normally accepts all nominations by the Commission. (The equivalent in Georgia would be for the Commission to present the nominations to the President).

I stress that I am not suggesting any one model for Georgia (least of all that of the UK), but am putting forward for the consideration of the Commission a model of more independent appointment procedure which is in accordance with the strong recommendations of the Venice Commission (see their *Report on the Independence of the Judicial System: Part1: The Independence of Judges* CDL-AD (2010) 004).

Article 58 (legal proceedings)

This Article asserts (**subsections 1 and 2)** the binding nature of legal proceedings and then goes on (**subsections 3-5) to require** some of the elements of the right to a fair hearing, which I suggest would fit more comfortably in **Article 28 above.**

Article 59 (judges)

Subsection 1 sets out the qualification for judges. It requires their "*integrity and competence*". I recommend adding "*independence*" to those qualities.

[4] The Commission consists of 15 members. The Chair is always not a lawyer, and of the other 14, 5 are judges (selected by the Judicial Council), 5 are non-lawyers, and 4 are lawyers (selected by the Bar Council), one is an academic lawyer (selected by the university representative body)

Subsection 2 requires appointment for life, or retirement age, which repeats the provision in Article retains the provision in relation to the Supreme Court (see the discussion re **Article 57(2)** above).

Probationary period

The subsection then goes on to retain the requirement that judges who are appointed for the first time must serve *a probationary term of three years*.
This provision provides no reasons why this provision should only serve for those judges who serve for the first time.

It also offends against the advice of the Venice Commission (see above, CDL-AD (2010)004 (*Independence of Judges*) and CDL-AD (2010) 028 (*Report on Georgia*), and CDL-AD (2014) 031, para. 32) that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way.

On the other hand, it must be recognised, as the Venice Commission Report into Serbia put it (CDL-AD(2005)023, para.13), that there is the *"practical need to first ascertain whether a judge is really able to carry out his or her functions effectively [especially] where people with limited experience are appointed as judges"*.

There is not conclusive case-law by the ECtHR on this subject, but in Scotland it was held that Article 6 (1) of the ECHR (the notion of a fair trial before an independent judge) was violated in a criminal trial held before a temporary "sheriff" (judge of the High Court of Justice) who was serving a trial period subject to the discretion of the executive not to appoint him.[5] This case led to the abolition of temporary judges in the UK and the substitute of "recorders" who were appointed on a part-time basis, and not as judges until their competence had been assessed.

Other ways to obviate the danger to judicial independence would be to provide a mentoring service for candidates for judgeships, as in Poland and Austria, or to permit judicial review of the removal process (see the German case before the European Commission on Human Rights in Application No. 28899/95, *Stieringer v. Germany 25 Nov. 1996).*

In any event the removal process for a probationary judge should always be the same as for a permanent judge (and therefore provide safeguards preventing their removal on the ground of independence).

[5] *Starr v Ruxton* [2000] HRLR 191 and see also *Millar v Dickson* [2001] HRLR 1401.

Subsection 3 deals with offices not open to judges, and **subsection 4** with judicial independence (discussed under **Article 55 (1)** above).

Resources and remuneration

There is no mention of the budget of the judiciary under this subsection or anywhere else in this Chapter. However, the maintenance of the independence of the judiciary depends on the provision of sufficient resources, both in terms of remuneration of judges and the provision of adequate court services. The Venice Commission's Report on the Independence of Judges (CDL-AD (2010) 004) makes clear (at paras. 52 ff.) that appropriate resources are required to allow the judiciary to live up to the standards laid down in Article 6(1) of the ECHR, and in national constitutions, and to "*to perform their duties with the integrity and efficiency which are essential to the fostering of public confidence in justice and the rule of law*".

I recommend that an appropriate provision be inserted into this Article, requiring <u>*the State provide adequate resources to the judicial system, after due consultation with the judiciary.*</u> This should guard against the judiciary being financed by discretionary decisions and create a degree of stability of resources on the basis of objective and transparent criteria.

Subsections 5 provides for the "untouchability" of a judge (by which I assume immunity?) in relation to criminal offences with the exceptions provided.

Subsection 8 then deals with the grounds for dismissal from office.

As the Venice Commission argues (CDL-ADL 2010 004 – *The Independence of Judges*, para. 60 ff.) judges should have a limited functional immunity and not a general immunity that protects them entirely from criminal prosecution. The balance struck here seems about right and seems also not to allow judges to be exposed to any personal liability for the exercise of their duties in good faith. I understand, however, that disciplinary offences may rightly, be brought against judges for gross incompetence, neglect of duty, or misbehaviour. Consideration might be given as to whether the waiving of a judge's immunity for criminal liability might be in the hands of the Chairperson of the Supreme Court and two others (perhaps one nominated by the body of self-government of judges and the other by the High Judicial Council).

Article 60 (the High Council of Justice)

Subsection 2 sets out the composition of the High Council of Justice in general terms. It requires more than half its members to be elected by the body of self-government of judges and refers to presidential appointment and appointment

by Parliament. It does not specify the precise balance in each case. Article 47 of the Law on Common Courts sets out a total of 15 members of the High Council of Judges, 8 to be elected by the judges' self-government body, 1 by the President and 5 by Parliament.

It seems important that the composition of this body, which is key to safeguarding judicial independence, be specified in the Constitution.

I would however, repeat the argument above in relation to the appointments to the Constitutional Court and Supreme Court, namely, that since a principal function of the High Council is to secure judicial independence, its composition should be as little 'political' as possible. I would therefore advise reducing the role of the Parliament in the election of the High Council, or at least ensuring that there wide cross-party support is required for the appointments (such as a two-thirds or higher majority of members of parliament).

Article 61 (the Prosecution Office)

The Venice Commission's *Report on the Prosecution Service* (CDL-AD (2010) 040, states that although the appointment of the prosecutor should gain the confidence of the legal profession and the public, it is reasonable for the government to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning the state.

The proposals in this Article appear to fulfil these criteria, with the appointment being recommended by the Prosecutorial Council and then elected by Parliament for a period of 6 years. The Prosecutorial Council (which ensures the independence, and also the effective functioning and transparency of the Prosecution Office) is elected by a combination of the prosecutors' self - governance body (more than 50 per cent) and by Parliament.

These procedures seem to conform to modern European standards.

Sir Jeffrey Jowell QC **25 March 2017**

Blackstone Chamber

Temple

LONDON EC4 9BWI

Annex 1

Proposed Amendments

CONSTITUTION OF GEORGIA

We, the citizens of Georgia, firmly desiring to establish a democratic public order, economic freedom, a social and a rule-of-law social state; to secure universally recognized human rights and freedoms; to enhance state independence and peaceful relations with other peoples; Relying on centuries-old traditions of statehood of the Georgian Nation and the historical and legal heritage of the 1921 Constitution of Georgia,

Hereby proclaim this Constitution before the God and the Country.

Chapter One. General Provisions.

Article 1 (State sovereignty)

1. Georgia is an independent, single and indivisible state as proven by the Referendum of 31 March 1991 held throughout the territory of the country, including the Autonomous Soviet Socialist Republic of Abkhazia and the Former Autonomous Region of South Ossetia, and by the Act of Restoration of the Georgian State Independence of 9 April 1991.
2. Georgia's state territory has been determined as it existed at the date of 21 December 1991. Georgia's territorial integrity and inviolability of its state borders are upheld by the Constitution and the laws of Georgia, and are recognized by the world community of nations and international organizations. It is prohibited to alienate Georgia's state territory. State borders can only be altered by a bilateral agreement entered into with a neighboring state.

Article 2 (State symbols)

1. The name of the State of Georgia is "Georgia".
2. Georgia's capital is Tbilisi.
3. Georgia's state language is Georgian, while in the Autonomous Republic of Abkhazia it is also Abkhazian. The State language is protected by an organic law.
4. Georgia's state symbols are determined in an organic law, which can be amended through a procedure required for amending the Constitution.

Article 3 (Democracy)

1. Georgia is a democratic State.
2. The people is the source of State power. The people exercises its power through its representatives as well as through referendums and other forms of direct democracy.
3. No one can arrogate power to itself. It is prohibited to decrease or increase, by Constitution or by law, the current tenure of a body elected through universal election.
4. Parties participate in forming the political wishes of the people. Parties' activities must be based on the principles of freedom, equality, publicity and in-party democracy.
5. The citizens of Georgia regulate issues having local importance through local self-government, without prejudice to the state sovereignty and in accordance with the legislation of Georgia.

Article 4 (Rule-of-law state)

1. Georgia is a rule-of-law State.
2. The State recognizes and protects universally recognized human rights and freedoms as everlasting and supreme human values. In exercising power, the people and the state shall be bound by these rights and freedoms as by directly applicable law. The Constitution does not deny those universally recognized human rights and freedoms that are not mentioned here but naturally flow from constitutional principles.
3. State power is exercised on the basis of the principle of division of power.
4. State power is exercised within the limits established by the Constitution and the law.
5. The Constitution of Georgia is the supreme law of the State. All other legal acts shall comply with the Constitution. Rules of enacting and publishing legislative and other normative acts and the hierarchy of such acts are determined in an organic law.
6. The Georgian legislation complies with the universally recognized principles and rules of international law. A treaty or international agreement of Georgia, unless it conflicts with the Constitution, shall take precedence over domestic normative acts.

Article 5 (Social State)

1. Georgia is a social state.
2. It is the objective of the State to ensure social justice, social equality and social solidarity.
3. The State supports equal socio-economic development of the country's entire territory. The law prescribes privileges for the development of high mountain regions.
4. The State supports citizen healthcare and social protection, and provision of citizens with the subsistence minimum and suitable dwelling. The State helps the citizen with becoming employed. A law determines rules and conditions of subsistence minimum.
5. The State supports development of education, science, culture and sports.
6. With due account to the interests of current and future generations, the State ensures environment protection, rational use of natural resources and the country's sustainable ecological development.
7. The State supports creation of special conditions for honoring the rights and interests of disabled people.
8. The State facilitates equal participation of women and men in public and political life.

Article 6 (Territorial arrangement of the State)

1. The following are the exclusive competences of Georgia's highest State bodies:
   a) legislation on Georgian citizenship, human rights and freedoms, emigration and immigration, entrance in and departure from the country, and temporary or permanent presence of foreign citizens and stateless persons in Georgia;
   b) the status, regime and defense of State frontiers; the status and defense of territorial waters,

airspace, continental shelf and the Exclusive Economic Zone;
c) state defense, armed forces, military industry and trade in arms; state security;
d) matters of war and truce; determination of the legal regimes of, and declaring, state of emergency and state of war;
e) foreign policy and international relations;
f) foreign trade, customs and tariff regimes;
g) state finances and state loans; currency production; legislation on banks, credits, insurance and taxes;
h) standards and models; geodesy and cartography; determination of exact time; state statistics;
i) a single energy system and regime; communications; merchant fleet; ensigns; harbors, airports and aerodromes of all-state importance; control of airspace, transit and air transport, registration of air transport; meteorological service; environment observation system;
j) railways and motor roads having state importance;
k) fishing in ocean and high seas;
l) *cordon sanitaire* at the border;
m) legislation on pharmaceuticals;
n) legislation on accreditation of educational institutions and academic degrees;
o) legislation on intellectual property;
p) enactment of trade laws, criminal law, civil law, administrative law, labor law, corrections law and procedural legislation;
q) criminal police and investigation;
r) enactment of laws on land, subsoil and natural resources.

2. Georgia's constitutional laws, which are part and parcel of the Constitution, shall determine the competences of, and the rules of discharging their competences by, the Abkhazian Autonomous Republic and the Acharan Autonomous Republic.
3. Georgia's territorial arrangement will be reviewed by means of a constitutional law and based on the principle of division of competences after Georgia's jurisdiction is fully restored on the entire territory of the country.

Article 7 (Relations between the State and the Georgian Orthodox Church)

Along with recognizing the freedom of belief and confession, the State recognizes a special role the Georgian Apostolic Autocephalous Church played in Georgia's history and its independence from the State. Relations between the Georgian State and the Georgian Apostolic Autocephalous Orthodox Church are governed by a Constitutional Agreement, which must fully conform to the universally recognized principles and rules of international law.

Chapter Two. Fundamental Human Rights and Freedoms

Article 8 (rights to human dignity, life and inviolability of person)

1. Human dignity is inviolable and is protected by the State.
2. Human life is protected. Death penalty is prohibited.
3. Inviolability of human person is protected.
4. Torture and inhuman treatment as well as degrading, cruel or inhuman punishment of human beings are prohibited. Physical or mental coercion of detained individuals is prohibited.

Article 9 (right to equality)

1. Everyone is equal before the law. It is prohibited to discriminate on the grounds of race, skin color, origin, ethnic belonging, language, sex, religion, political or other views, social affiliation, property or social status, place of residence or other grounds.
2. In accordance with the universally recognized principles and rules of international law and the Georgian legislation, the citizens of Georgia are entitled, without any difference based on their ethnic, religious or linguistic belonging and without any discrimination, to develop their culture

and to use their mother tongue in private and in public.

Article 10 (right to free development of own personality)

Everyone has the right to free development of their own personality.

Article 11 (Human liberty)

1. Human liberty is protected.
2. Human liberty may not be restricted without a court decision.
3. A human being may be arrested by a person authorized by the law to do so in the events prescribed by the law. A detainee or a person whose liberty has been otherwise restricted shall be brought before a court of competent jurisdiction not later than 48 hours. If the court does not order detention or other form of liberty restriction within the next 24 hours, the person shall be released forthwith. The person has the right to challenge the court decision in a higher judicial instance.
4. A person shall be made aware of his/her rights and grounds for restriction of his/her liberty immediately after his/her liberty is restricted. He/she may request an attorney's assistance immediately after his/her liberty is restricted, which request must be satisfied.
5. A defendant may not be detained for more than 9 months.
6. Violation of the provisions of this article is punishable by law. A person who has been arrested or detained unlawfully has the right to compensation.

Article 12 (freedom of movement)

1. Everyone lawfully present within the territory of Georgia shall have the right to move freely inside the entire territory of the country, freely choose a place for residence and freely leave Georgia.
2. These rights may be restricted only in accordance with the law and for the purpose of ensuring state security or public safety, protection of health, prevention of crime or delivering justice as being necessary in a democratic society.
3. A citizen of Georgia may freely enter Georgia.

Article 13 (inviolability of private life space, communications, abode and place of activity)

1. Everyone's private life space, communications, abode and place of activity are protected. No one has the right to enter or the right to search an abode or other possessions against the will of the human being.
2. These rights may be restricted for the purposes of ensuring state security, territorial integrity or public safety, prevention of crime or protection of others' rights in a democratic society, on the basis of a court decision or without it where there is an urgent necessity. Any restriction of these rights must be notified to the court within 12 hours, which must then confirm legality of the restriction within 24 hours after being notified.

Article 14 (freedom of belief and conscience)

1. Everyone has the freedom of belief and conscience.
2. It is prohibited to persecute a person for their belief or conscience as well as to force a person to express their views about the former.
3. It is prohibited to restrict the freedoms of belief and conscience unless their expression breaches the rights of others.

Article 15 (freedoms of thought and information)

1. Everyone shall be free to receive and disseminate information, to express and disseminate their views orally, in writing, or otherwise.
2. Mass media shall be free. Censorship is inadmissible.
3. Everyone has the right to access the Internet and to freely use the Internet.
4. Neither the State nor individual persons shall have the right to monopolize mass media or the means of dissemination of information.
5. Exercise of the rights listed in paragraphs 1 to 3 of this article may be restricted by law, to the extent and insofar as this is necessary in a democratic society, in order to ensure state security, territorial integrity or public safety, to prevent crime, to safeguard rights and dignity of others, to prevent the disclosure of information acknowledged as confidential or to ensure independence and impartiality of justice.
6. The law establishes a public broadcaster to provide the public with a variety of programs that are free from political and commercial influence and are relevant to the interests of the society. The public broadcaster is independent in its activities and is not subordinated to any State institution.

Article 16 (right to access public information)

1. Every citizen of Georgia shall have the right to access information and official documents kept at state institutions, according to a procedure prescribed by law, unless they contain state, professional, or commercial secrets.
2. Information contained in official records pertaining to health, finances, or other private matters of an individual shall not be made available to anyone without the consent of that individual, except in the events prescribed by law where this is necessary in order to ensure state or public safety or the protection of health or the rights and freedoms of others.

Article 17 (right to property)

1. The right to own and inherit property shall be recognized and protected. It is prohibited to abrogate the universal rights to property and to acquisition, alienation and inheritance of property.
2. These rights may be restricted in public interests, and in the events and according to the rules prescribed by law.
3. For pressing social needs, property may be confiscated in the events expressly prescribed by the law, based on a court decision or in an urgent necessity envisaged by an organic law, provided that advance, full and fair compensation is made. Such compensation shall be exempt from all taxes and fees.
4. Land as a resource having special importance may be owned only by a citizen of Georgia or a legal entity founded by citizens of Georgia except for special events envisaged by law. An organic law determines the rules of acquiring, alienating and inheriting land.
5. Property obliges someone to do something

Article 18 (freedom of intellectual work)

1. Freedom of intellectual work is guaranteed.
2. Interference in creative work and censorship in the field of creative activity are prohibited.
3. It is prohibited to arrest or ban dissemination of a product of creative work if its dissemination does not breach the rights of others.
4. The State protects cultural heritage through law.

Article 19 (freedom of gathering)

1. Everyone except members of armed forces shall have the right to gather publicly and without arms without any prior permission thereto.
2. The law may prescribe a requirement of giving the government a prior warning if a gathering or a rally is intended to be held in a place where people and transport move around.
3. The government may end a gathering or a rally only if it becomes unlawful.

Article 20 (freedom of association)

1. Everyone has the right to establish and join public and commercial associations.
2. A public or a commercial association may be liquidated only on the basis of a court decision, in the events and according to the procedure prescribed by law.

Article 21 (freedom of parties)

1. Citizens of Georgia have the right to found political parties and participate in their activities according to an organic law.
2. A person who enlists in the armed forces or is appointed a judge or a prosecutor shall cease his/her membership in any political party.
3. It is prohibited to found and operate a political party the aim of which is to overthrow or forcibly change the constitutional order of Georgia, infringe on the independence of the country, violate its territorial integrity or which propagates war or violence or kindles national, provincial, religious or social strife.
4. Activities of a political party may be subject to ban only by decision of the Constitutional Court in the events and according to the procedure prescribed by an organic law.

Article 22 (electoral right)

1. Every citizen of Georgia who has attained the age of 18 shall have the right to participate in referenda and elections of state bodies, bodies of autonomous republics and self-government bodies. Free expression by voters of their will is guaranteed.
2. A citizen has no right to participate in elections and referendums if he/she is in the penitentiary for a serious or very serious crime on the basis of a convicting judgment of a court or if he/she has been committed to an inpatient mental institution on the basis of a court decision.

Article 23 (the right to hold public office)

1. Every citizen of Georgia shall have the right to hold any public office if they meet the requirements established by law. Terms and conditions of civil service are determined by law.
2. A citizen of Georgia who is also a citizen of a foreign country may not hold the office of President, Prime Minister or Chairperson of the Parliament.

Article 24 (freedom of work)

1. Everyone has the right to work and the right to freely choose a job.
2. An organic law provides for labor rights and institutional guarantees for the protection of labor rights.
3. Everyone has the right to found and join trade unions.
4. The right to strike is recognized. Rules of exercising this right are determined by law.
5. The State is obliged to promote the development of free entrepreneurship and competition. Monopoly is prohibited except in the events allowed by law. Consumer rights are protected by law.

Article 25 (right to education)

1. Everyone has the right to receive education and the right to choose the form of education.
2. Pre-school education is provided for according to rules established by law. The State funds general education to the full according to the rules established by law. Citizens have the right to receive state-funded vocational and higher education according to the rules established by law.

Article 26 (right to healthcare)

1. Everyone has the right to enjoy State healthcare services as an affordable and effective means of medical assistance.
2. The State supervises all healthcare institutions, and production of and trade in pharmaceuticals.
3. Everyone has the right to live in an environment that is safe for health and the right to use a public space. Environment protection, rational use of natural resources and sustainable ecological development are ensured by law. Everyone has the right to timely receive complete information about the conditions of the environment.

Article 27 (right to marriage)

1. Marriage as a union between a man and a woman for the purpose of creating a family is based on equal rights and free will of spouses.
2. The State supports family welfare. Rights of mothers and children are protected by law.

Article 28 (procedural rights)

1. Everyone has the right to apply to a court for the protection of his/her rights and freedoms. The right to a fair trial is ensured.
2. Everyone shall be tried only by the court that has jurisdiction over his/her case.
3. The right to defense is guaranteed.
4. An accused person has the right to ask for calling his/her witnesses and having them examined under the same conditions as the prosecution witnesses.
5. Everyone is deemed innocent until their guilt is proven according to the rules established by law and by a final convicting judgment of a court.
6. No one has to prove their innocence. It is the prosecution's obligation to prove charges.
7. A decision to find a person accused must be based on a probable cause, while a convicting judgment on irrefutable evidence. Any suspicion that is not proven according to the rules established by law must be decided in favor of the accused.
8. No one may be convicted twice for the same offense.
9. No one can be held liable for the conduct that was not considered an offense at the time it was committed. No law can have a retroactive effect unless it mitigates or quashes liability.
10. Evidence obtain in breach of law has no legal force.
11. No one has to testify against self or the relatives specified by law.
12. It is guaranteed to everyone who has unlawfully sustained damages by acts of bodies and officials of the State, autonomous republics or self-government bodies that they can be compensated in full through a judicial procedure from the funds of the State, autonomous republic or local self-government respectively.

Article 29 (Georgian citizenship)

1. Georgia protects its citizens no matter where they are.
2. Georgian citizenship can be acquired by birth or by naturalization. An organic law determines rules of acquiring and losing Georgian citizenship.
3. A citizen of Georgia may not be a citizen of another State simultaneously. An organic law determines terms and conditions of granting Georgian citizenship to foreign citizens in special cases.
4. No one may be deprived of his/her citizenship.
5. It is prohibited to expel a Georgian citizen from Georgia.
6. It is prohibited to surrender a Georgian citizen to a foreign State except in the events envisaged by international treaties. A decision to surrender a citizen may be challenged in the court.
7. The State supports compatriots living abroad with maintaining and developing their contacts with the homeland.

Article 30 (rights of foreigners and stateless persons)

1. Foreign citizens and stateless persons living in Georgia have the same rights and obligations as Georgian citizens save exceptions envisaged by the Constitution and the law.
2. Georgia grants foreign citizens and stateless persons asylum as required by universally recognized rules of international law and in accordance with the procedure prescribed by law.
3. It is prohibited to surrender to another State a person who has taken shelter in Georgia and who is being persecuted for his/her political beliefs or for an action that is not considered a crime under the legislation of Georgia.
4. The State may impose limitations on political activities of foreign citizens and stateless persons.

Article 31 (general principles in applying the fundamental rights)

1. The fundamental rights and freedoms provided for by the Constitution shall apply *mutatis mutandis* to legal entities.
2. Exercise of human rights and freedoms must not breach the rights and freedoms of others.
3. Any limitation imposed on a right must not undermine the very essence of that right.
4. In a state of emergency or a state of war, the President has the right to issue a decree imposing restrictions, in the entire country or in a part of the territory, on the rights and freedoms referred to in Articles 11, 12, 13, 15, 16, 17, 19 and 24 of the Constitution. The President must immediately lodge such a decree with the Parliament for approval. If the Parliament does not approve the decree, the latter becomes invalidated as soon as the relevant voting process is over.

Article 32 (the Public Defender)

1. The Public Defender oversees protection of human rights and freedoms in the territory of Georgia. A Public Defender is elected for a term of 5 years by a majority of the total number of members of the Parliament. The same person may not be re-elected Public Defender.
2. Creating obstacles that hinder the activity of the Public Defender is punishable by law.
3. A Public Defender can be arrested or detained or his/her home, car, workplace or his/her person may be searched only with the consent of the Parliament. An exception is if he/she is caught red-handed, which the Parliament must be made aware of immediately. If the Parliament does not issue its consent, the Public Defender must be released immediately.
4. An organic law determines the competences of a Public Defender.

Chapter Six. Judiciary and Prosecution

Article 55 (Judiciary)

1. The judicial branch of government is independent and is exercised by the Constitutional Court and courts of general jurisdiction.
2. The Constitutional Court is a judicial body of constitutional control. Its competences and rules of establishment and operation are determined by the Constitution and an organic law.
3. Justice is delivered by courts of general jurisdiction. Specialized courts may be established only within the system of courts of general jurisdiction. Military courts may be established only in a state of war and only within the system of courts of general jurisdiction. It is prohibited to establish special courts. In courts of general jurisdiction, jury will try cases in the events and according to rules prescribed by law. An organic law determines the system, competences and rules of operation of courts of general jurisdiction.

Article 56 (the Constitutional Court)

1. The Constitutional Court exercises judicial power by means of constitutional legal proceedings.

2. The Constitutional Court consists of 9 judges. Three judges are appointed by the President of Georgia, three judges are elected by the Parliament with a majority of all of its members, and three judges are appointed by the High Council of Justice. The tenure of a judge of the Constitutional Court is 10 years. A person who has previously held the office of a judge of a Constitutional Court may not serve as a judge of the Constitutional Court anymore.
3. The Constitutional Court elects its chairperson from its composition for a period of five years. The same person may not be re-elected Chairperson.
4. A person may become a judge of the Constitutional Court if he/she is a citizen of Georgia with a higher legal education and is at least thirty. An organic law determines rules of recruiting, appointing and electing the judges of the Constitutional Court, also rules of termination of their tenure, and other issues related to constitutional proceedings and operation of the Court.
5. According to the rules envisaged by an organic law, the Constitutional Court will:
   a) based on a lawsuit by a natural person, a legal entity or the Public Defender, adjudicate on the constitutionality of normative acts in respect of fundamental human rights and freedoms enshrined in Chapter Two of the Constitution;
   b) based on a lawsuit by the President, at least one-fifth of MPs, the Government or a court, adjudicate on the constitutionality of a Constitutional Agreement, laws or normative acts of President, Government, and Abkhazian and Acharan authorities;
   c) based on a lawsuit by the President, at least one-fifth of MPs, the Government, a court, the High Council of Justice or the Public Defender, adjudicate on competence-related disputes between the state bodies;
   d) based on a lawsuit by the President, at least one-fifth of MPs or the Government, or based on a submission by at least one-fifth of MPs, adjudicate on the constitutionality of international treaties and agreements;
   e) based on a lawsuit by the President, at least one-fifth of MPs, the Government or the representative bodies of Abkhazian and Acharan autonomous republics, adjudicate on the constitutionality of founding and operation of citizens' political associations;
   f) based on a lawsuit by the President, at least one-fifth of MPs or the Public Defender, adjudication on disputes on the constitutionality of regulations governing referenda and elections, as well as disputes on the constitutionality of the election or referendum to be held on the basis of such regulations;
   g) based on a lawsuit by the President, at least one-fifth of MPs or the representative body of the Acharan autonomous republic, adjudicate on disputes on violation of the Constitutional Law on the Status of the Autonomous Republic of Ajara;
   h) based on a lawsuit by a representative body of a self-governing unit or 5% of members of all of the representative bodies of self-governance units, adjudicate on disputes on the compatibility of normative acts with Chapter Nine of the Constitution;
   i) based on a lawsuit by the High Council of Justice, adjudicate on the compatibility of normative acts with Articles 55, 57, 59 and 60 of the Constitution;
   j) based on a lawsuit by the Prosecutor-General, adjudicate on the compatibility of normative acts with Article 61 of the Constitution;
   k) based on a lawsuit by the National Bank, adjudicate on the compatibility of normative acts with Article 64 of the Constitution;
   l) based on a submission by the Auditor-General, adjudicate on the compatibility of normative acts with Article 65 of the Constitution;
   m) exercise other powers envisaged by the Constitution and the organic law.
6. It is prohibited for the Constitutional Court to declare election-related provisions unconstitutional during a year preceding the relevant election. It is allowed to declare election-related provisions unconstitutional during a year preceding the relevant election only if the provisions in question have been enacted during the year preceding the relevant election.
7. A judgement of the Constitutional Court is final. A normative act or the part of a normative act declared unconstitutional loses its legal force immediately after the respective judgment of the Constitutional Court is published, unless the judgment itself prescribes some other date for the normative act or its part to lose the legal force.

Article 57 (the Supreme Court)

1. The Supreme Court of Georgia is a court of cassation.
2. The Supreme Court is composed of at least 16 judges. At the recommendation of the High Council of Justice, the Parliament elects, with a majority of a total number of its members, judges of the Supreme Court, for life, until they reach the age limit prescribed by an organic law. The Parliament elects a Chairperson of the Supreme Court among members of the Supreme Court for a term of 10 years at the recommendation of the High Council of Justice.
3. An organic law may provide for the Supreme Court to adjudicate cases as a judicial instance other than cassation instance.

Article 58 (legal proceedings)

1. Courts deliver their decisions on behalf of Georgia. Acts of courts are legally binding. Failure to implement a court decision or hindering implementation of a court decision is punishable under law.
2. A court decision may be set aside, reversed or suspended only by a court according to rules prescribed by law.
3. Cases in courts are examined at an open hearing. A case may be examined *in camera* only in the events prescribed by law. A court decision must be announced publicly.
4. The State language shall be the language of legal proceedings. A person who does not know the State language will be provided with an interpreter.
5. Legal proceedings are based on equality of parties and adversarial process.

Article 59 (judges)

1. A person may become a judge if he/she is a citizen of Georgia aged at least 30 who has relevant higher legal education and has been working in the legal profession for at least 5 years. Judges are selected on the basis of their integrity and competence.
2. Judges are appointed for life until they reach an age determined by an organic law. If they are appointed for the first time, until their lifetime appointment, judges must serve in the judicial capacity a probationary term of 3 years. Selection, appointment and dismissal rules for judges are determined by the Constitution and an organic law.
3. The judicial office shall be incompatible with any other office and paid activities save pedagogical and scientific work. A judge may not be a member of a political party and may not participate in political activities.
4. A judge is independent in his/her activity and abides only by the Constitution and the law. Influencing a judge in any way or interfering with the activity of a judge is prohibited and is punishable by law. A judge may be removed from adjudicating a case, dismissed from office or transferred to another position only in the events prescribed by an organic law. No one shall have the right to call a judge to account for individual cases. Any act that imposes restrictions on judicial independence is void.
5. Judges are untouchable. It is prohibited to bring a judge to criminal liability, arrest him/her or search his/her home, car, workplace or his/her person without the consent of the Chairperson of the Supreme Court of Georgia. An exception is if he/she is caught red-handed, which the High Council of Justice or, in the cases of a judge of the Constitutional Court, the Constitutional Court must be made aware of immediately. If the High Council of Justice or the Constitutional Court, whichever appropriate, does not issue their consent, the judge with restricted liberty must be released forthwith.

6. The State ensures safety to a judge and his/her family.
7. Judges are appointed by the High Council of Justice with two-thirds of its full composition.
8. A judge may be dismissed from office on the following grounds:
    a) Own request;
    b) Commission of disciplinary misconduct;
    c) Being declared by a court to have limited legal capacity or as an aid receiver, unless the court decision speaks otherwise;
    d) Termination of the Georgian citizenship;
    e) Entry into force of a final convicting judgment against the judge;
    f) Attainment of the age of 65;
    g) Commission of a corruption offense;
    h) Death;
    i) Being elected or appointed to an office in some other institution;
    j) Liquidation of the court, downsizing the position held by the judge;
    k) Being appointed or elected to another court.

Article 60 (the High Council of Justice)

1. The High Council of Justice of Georgia shall be established with the aims of ensuring independence and effectiveness of courts of general jurisdiction, appointment of judges and performance of other tasks.
2. More than a half of the members of the High Council of Justice shall be members elected by a body of self-government of judges from courts of general jurisdiction. Those members of the High Council of Justice that are neither elected by a body of self-government of judges from courts of general jurisdiction nor appointed by the President of Georgia shall be elected by the Parliament. The Chairperson of the Supreme Court chairs the High Council of Justice.
3. An office term of a member of the High Council of Justice shall terminate for the reasons indicated in Article 59(8)(a)-(j) of the Constitution.
4. The High Council of Justice is accountable to a body of judicial self-governance.
5. An organic law determines the competences and the rules of establishing the High Council of Justice.

Article 61 (the Prosecution Office)

1. The prosecution office is independent in its activity and abides only by the law.
2. The prosecution office is headed by a Prosecutor-General elected by the Parliament at the recommendation of the Prosecutorial Council for 6 years.
3. A Prosecutorial Council is established in order to ensure independence, transparency and effective functioning of the Prosecution Office. The Prosecutorial Council consists of 15 members elected by the Parliament and a prosecutors' self-governance body according to rules prescribed by an organic law. More than a half of the members of the Prosecutorial Council are elected by a prosecutors' self-governance body. The Prosecutorial Council elects its Chairperson for a term of 2 years.
4. In its activity, the Prosecution Office shall be guided by a criminal policy document approved by

the Parliament with a majority of a total number of its members.

5. An organic law determines the competences, organization and rules of operation of the Prosecution Office.

ANNEX 5

MEDIA COVERAGE/PUBLIC OUTCRY ON THE ACTIVITIES OF THE HIGH COUNCIL OF JUSTICE

Annex 5

Media coverage/public outcry on the activities of the High Council of Justice

Introduction

A number of TV reportsand television programs have been devoted to the gapswithin the High Council of Justice. Representatives of the civil sector, political parties and the society criticize the decisions made by the HCOJ regarding the selection, appointment and transfer of judges, appointment of politically motivated and unfair judicial candidates in the courts, alsothe unsubstantiated and faulty decisions adopted by the Council.

1. Selection and appointment of judges by the High Council of Justice

1.1 In thenews reportnon-governmental organizations evaluate the appointment of judges. They talk about the dangers. The GYLA does not rule out that some of the elected judges will still be biased and make unsubstantiated decisions, taking into consideration the decisions already made by them.

According to GYLA, the Council failed toretrieve information adequately on judicial candidates which canprejudice the independence of the judicial system because it is notclear whether these judgeswill be able to exercise judicial authority without prejudicing their independence. Prior to the approval of the candidates, the HCOJ should have thoroughly studied their activities. The civil sector also emphasizes the illegitimacy of the selection process.

Transparency International – Georgia,the NGO believes that the High Council of Justice did not substantiatethe selection criteria for already elected judges and the process further deepened the questions and suspicions in the society. (15-07-2016) - http://rustavi2.ge/ka/news/51862

1.2 In parallel with the selection process of judges through which 65 judges from the candidates shall beselected, the rallyof the Georgian Bar Association is underway at the High Council of Justice.

Theparticipants of the rally demand not to appointthe judges for a new term whose past activities are questionable.

According to Zaza Khatiashvili,the Chairman of the Georgian Bar Association, “the appointment of these people means that the court will neverable to get out of the bog in which it has been swamped in so long. Today we will witness if Judge Tamaz Urtmelidze had beenassociated with the Georgian Dreamwhen conducting terrible things during the court hearings. Today we will witness if these odious figures receive the support from Eva Gotsiridze, VakhtangTordia and Kakha Sopromadze, the three elected members of the Georgian Dream. If theysupport them today, it will be obvious that the Georgian Dream is standing behindthe illegality, “Zaza Khatiashvili said.

Tamar Alania and MerabGabinashvili, the two present members of the Councilas well as Tamaz Urtmelidze, the Judge reviewing the case of Rustavi 2,are among 125 candidates, (14-07-2016) - http://rustavi2.ge/ka/news/51773;https://www.youtube.com/watch?v=tEuejfn-EiE

1.3 The TV episode shows that the High Council of Justice did not wait for the enactment of the amendment to the Law of Georgia on Common Courts. By the decision of the Council, the competition of the judiciary will be completed by June.

As a result, the newly elected judges who already have several years of experience in the courts will still be subject to a three-year probationary period before the appointment. And it happens when the relevant provision was recognized as unconstitutional by the Constitutional Court and the Parliament was assigned to change it till July 1.

The Council did not support VakhtangMchedlishvili’sinitiative, a member of the HCOJ, to adjourn the process ofthe appointment of judges until the Parliament made the lawconsistent with the Constitution and amendthe

unconstitutional provision. The Council members did not agree with hisopinion and assumed that it was a boycott against the Council.

The decision of the Council was critically evaluated by the non-government sector. (2017-03-31) - **http://1tv.ge/ge/news/view/155396.html**

1.4 According to NGOs, the selection process of judges is carried out with violations.

The Chairman of the Georgian Young Lawyers' Association declares that the interview questions do notoften checkwhether candidatesareaware of the legal normsor not and candidates are often placed in unequal position as they are not askedthe same questions. Ana Natsvlishvili states that "the interviews often leave the impression that they do not actually serve the purpose to examine compliance of the candidates with the criteria.Some candidates are not asked legal questions at all," Natsvlishvilisays.

International Transparency –Georgia also expresses distrust to the selection process of judges andstates that the Council members often criticize non-governmental organizations and the media and argue with candidates on thesemattersin the course of interviews. "There have beencases when a candidate was asked about the issuesby which it is unclear whatcould be examined and also candidates were asked about the unlimited activities of the media and non-governmental organizations,which naturally means the declaration of the Council member's position. There was the case when the Council member and the candidate argued about the matter, "- says Giorgi Gvilava,Project Manager at Transparency International Georgia."

The NGOshave also observed some violations during the interviews conducted by the High Council of Justice forselection of the judicial candidates.

The NGOs, the observers of the selection process of judges,highlight another problem - low qualification of candidates. Along with the low qualification, the interviews revealed that the main motivation of some candidates was high salary and not the execution of justice.

Representatives of the Third Sector consider that the regulations to the candidates who wish to be judges should be tightened. The observation of the processhas revealedthe cases when former judges demonstrateddiscriminatoryattitude tothe LGBT community. Moreover, one of the candidates did not even know the meaning of the above and said that LGBT was an organization.

The members of the Council of Justice refused to answer the current complaints regarding the selection process of judges.

The process of selection of judges was also critically evaluatedby the President's Administration.

The Minister of Justice believes that the complaints regarding the selection and appointment of judges are thoroughly reasoned.

According to Tea Tsulukiani, in response to these shortcomings the Government drafted the Third Wave of the Judicial Reform.

The Coalition for Independent and Transparent Judiciary considers the process of interviewing candidates for 65 vacant positions of judges in the High Council of Justiceas faulty and hastened.

According to the civil sector, the process has once again demonstrated systemic problems within the selection and appointment of judges.

"The uneven approach was exercised to contestants, some of them were givendifficult questions while others received much easier ones," said Mikheil Benidze, the Executive Director of the International Society for Fair Elections and Democracy.

"In addition, the Coalition has negatively assessed the fact that the High Council of Justice did not wait for the decisions of the two most important constitutional bodies - the Parliament of Georgia and the Constitutional Court" (05-07-2016)- http://rustavi2.ge/ka/news/51055;http://rustavi2.ge/ka/news/51047;http://rustavi2.ge/ka/news/50979

2. Appointment of Levan Murusidze

Representatives of the Civil Sector, Georgian Bar Association and political parties protest against the decision of the HCOJ to appoint Levan Murusidze as a judge for a new term as Levan Murusidze is a judge executor who fulfills the orders of the specific management team, they declare.

Zaza Khatiashvili, the Head of the Georgian Bar Association, filed a complaint in the Prosecutor's Office. He is suing 10 judge and non-judge members of the Council of Justice who voted forthe appointment of Levan Murusidze as a judiciary. Khatiashvili is convinced that the members of the Council of Justice exceeded their powers. According to Zaza Khatiashvili:"We, the Georgian Bar Association,demandthe initiation ofa criminal prosecution againstEva Gotsiridze, Kakha Sopromadze, VakhtangTordia,non-judgemembers of the Council of Justice and against all the judges who voted for the appointment of Levan Murusidze on December 25. The complaint contains 100% facts.According to the statements made by Eva Gotsiridze and VakhtangTordia and KakhaberSopromadze, they knew that the above person was not worthy forthe position howeverhe wasstill appointed sincethe members of the HCOJwould not support other deserving candidates. This is a direct admittance of the crime. The Prosecutor's Office should simply summon those persons and initiate criminal prosecution against them."

Almost the whole spectrum of the political parties protests against the appointment of Levan Murusidze in the Chamber of Administrative Cases of the Courtof Appeals. The decision of the HCOJ is criticized by members of the opposition as well as the ruling party and Murusidzeis perceived as a political figure.

Non-parliamentary opposition is going to hold consultations with both non-governmental organizations and the parliamentary opposition and the ruling party. It is likely that they will adopt a joint statement initially. They do not exclude legislative amendments as well.

MamukaKatsitadze, the Chairman of New Rights Party, said: "We will elaborateboth legal and political forms, the means to press the parliament and the government onthe decision of the Council of Justice and will requirethe amendment of the legislative norms so as not to leave this decision unattended."

The New Rights are responding to the possiblelifetime appointment of Levan Murusidze as a judge. According to Manana Nachkebia, a member of the Leaders' Councilof the Party, the appointment of Levan Murisidzein the Court of Appeals will pose a serious threat to the Georgian judiciary system, and have a negative impact on Georgia's Europeanintegration.

"Appointment of Levan Murusidze in the Court of Appeals will seriously stab the Georgian judiciary system and finally burry the Georgian judicial system. We are going through the process of European integration, we are under surveillance of a thousand eyes and magnifying glasses, andtherefore such facts shall not be ignored, "said Manana Nachkebia.

The parliamentary majority also criticizes the appointment of Murusidzeto the Chamber of Administrative Cases of the Court of Appeals.

The Chairperson of European Integration Commissioncalled the judges' decision "disgraceful". However, one member of the majority states that despite the discontent, the government cannot interfere in the judicial activities.

Levan Berdzenishvili, "I do not like Murusidze and his election is a shameful fact in the history of Georgia. The requirement that the governmentshould interfere in the judicial authorityis wrong, naive and non-democratic. The election of Murusidze of a wrong and infamous person was carried out with the complete ignorance of the rules of democracy. I feel ashamed of all those judges but we cannot even tell them anything. To me, all those members who elected Murusidze, aredespicable people, but it does not mean that we should interfere in their decision. "

The lifetime appointment of Levan Murusidzein the Court of Appeals has been criticized byNGOs. According to Ana Natsvlishvili, the GYLA Chairman, Levan Murusidze is ajudge executor as he himself admitted the relianceon wrong laws and legitimacy of his decisions because the law did not allow for any other decisions. This means that he believes the judge'srole is only to enforce the law and he will proceed to enforce the law regardlessof the controversiallegalprovisions.

According to Levan Murusidze, all his decisions are legal as the law did not allow him to make any other

decisions.(15-12-2015) - https://www.youtube.com/watch?v=OXPpAGvwhsU; http://rustavi2.ge/ka/news/37296; http://rustavi2.ge/ka/news/35327; http://rustavi2.ge/ka/news/35331;http://rustavi2.ge/ka/news/34271

3. **Information leakage on the tests of the recentQualification Exams for Judges held by the High Council of Justice for selection of judges**

3.1 According to the Chairman of the Tbilisi City Court,the violation identified during the qualification exams for judgesis the persistent systematic problem. According to MamukaAkhvlediani, the exam papers with the answers had been known to some contestants in advance.

MamukaAkhvlediani is planning tovoice the names, and imposes the responsibility for the above on the Council of Justice.

The Chairman of Tbilisi City Court presentedthe evidence to the third sector. Representatives of the NGO think that the violation contains the signs of criminal offense.

The Secretary of the High Council of Justice does not deny that he has been informed about the violation. According to Levan Murusidze, the internal inquiry is underway in the Council. Murusidzerefrains from giving outthe specific names, however, points outthe likelihood of corruption deals within the system.

The doubtswere raised by the results of one of the contestantswho earned 100 points. IrineKherkheulidze is Nino Gvenetadze's close associate.

It is likely that the problemidentified today will be reviewed at the tomorrow's session of the High Council of Justice, which will be attended by Nino Gvenetadzewho is expected to return from thebusiness trip. (02-02-2016) - http://rustavi2.ge/ka/news/38070

3.2 The NGO sector welcomes the initiation of the investigation by the Prosecutor's Office onthe so-called the judges' exam tests based on the report of the HCOJ, though some of them doubt the efficiency of the investigation. The third sector declares that after the Council detected an alleged offense, first it conducted an internal inquiry and then handed over the case to the investigative agency, which is why NGOs think that important evidence may have been destroyed by that time.

"The investigation has begun today but the Council members made a statement yesterday that they were not to be blamed. I did not really expect that any member of the Council would say it wastheir fault and that theydisclosed the tests or committed a crime. It is important to investigate not only who disclosed thetests but alsoif any evidence had been destroyed within that period, "said Dimitri Khachidze, a lawyer of Article 42 of the Constitution.

Executive Director of Transparency International Georgia has also responded to the fact of launching the investigation by the Prosecutor's Office. Eka Gigauri says that it is important to establish the identity of those persons involved in the alleged offense.

"It is important to establish the identity of the persons who were involved in this alleged offense and in the long run it will contribute to the processes in the judicial system to be transparent," Eka Gigauri said.

We would like to remind that the Prosecutor's Office initiated the investigation based on the report submitted by the High Council of Justice.

But the former chairman of the Tbilisi City Court challenges the internal investigation of the tests scandal.

MamukaAkhvlediani, as a regular judge, has held consultations with non-governmental organizations on all the above issues.

Nino Lomjaria, the consultant of the International Society for Fair Elections and Democracy, states that the tests leakage contains the signs of crime and this falls into the competence of the investigation.

"The investigation should have started from the moment when information about the alleged offense was disseminated. We do not understand what the Councilwas doing for several months if they already

hadthe information about the fact. This creates a feeling that the members of the Council weretrading and negotiatingwhether to hide or disclose the information, “said SophoVerdzeuli, a lawyer for the Human Rights Education and Monitoring Center.(25-02-1016) - **http://rustavi2.ge/ka/news/40189**; http://rustavi2.ge/ka/news/39945

3.3 The High Council of Justice has completed the inquiry into the scandal of the judges’ tests. The only result of the inquiry which the members of the Council announced todayis related to the issue of their alleged fault. Levan Murusidze says that the members of the HCOJ have not been involvedinthe tests leakage. Presently the Council will not make any other details.

The Council of Justice will forward the results of the internal inquiry to the Prosecutor’s Office in the nearest future. The Council members declare that they are ready to give the testimonyto theinvestigative agency after the investigation is launched. Besides them, supposedly, other employees of the HCOJ will also have to cooperate with the investigative agency.

It is known that along with the information and materials kept confidential by the members of the Council, the test papers of judicial candidates andvideo records removed from the examination hall surveillance cameras will be handed over to theinvestigation. (19-02-2016) - http://rustavi2.ge/ka/news/39656; http://rustavi2.ge/ka/news/39639

3.4 The Prosecutor’s Office has launched the investigation based on the report of the HCOJ. The statement released by the prosecutor’s office provesthis.

“Subject to the materials forwardedby the High Council of Justice to the Investigation Department of the Chief Prosecutor’s Office of Georgia, an investigation was launched on the fact of power abuse by individual public officials under the Criminal Code of Georgia, Article 332 Part 1due to the presence of criminal elements.

The report sent by the HCOJ to the Prosecutor’s Office refers to the alleged violation by public officials of the confidentiality of the tests and cases of the judges’ qualification exams conducted on November 21-28, 2015, - declares the statement released by the Prosecutor’s Office.

Based on the application of the High Council of Justice, the Prosecutor’s Office has initiated the investigation today. The case was commencedon the abuse of official authority. No further explanation was made by the Prosecutor’s Office about the details of the investigation or the persons to be interrogated. It is not clear if questions will be asked to the former chairperson of the City Court whopublicized the scandalous information about the breach of confidentiality of the judges’ tests. MamukaAkhvledianideclares that he is ready to do so, however, he is not convincedabout the efficiency of the investigation. The Secretary of the HCOJ plans to discuss the details only in the investigative department.

The HCOJrequested the Prosecutor’s Office to initiate an investigation only after a two-month internal inquiry. The NGOs say that this fact may influence the effectiveness of the investigation.

The government authorities are also expecting the results of the investigation. The parliamentary opposition claims that the Prosecutor’s Office will never reveal real culprits.

(25-02-2016) - http://rustavi2.ge/ka/news/40145; http://rustavi2.ge/ka/news/40205

3.5 Levan Murusidze, the Secretary of the High Council of Justice of Georgia, has been interrogated by the Prosecutor’s Office on the so called Judges’ Tests. Murusidzeverifies the fact of interrogation but does not speak about additional details in the interests of the investigation.

May we remind that the case concerns the alleged violation by public officials of the confidentiality of the tests and cases of the judges’ qualification examinations conducted on November 21-28, 2015,(25-04-2016) - http://rustavi2.ge/ka/news/45204