To: The Venice Commission
From: Coalition for Independent and Transparent Judiciary of Georgia
Re: Questionnaire relating to opinion 845/2016 on amendments to the Organic Law on the Constitutional Court and on the Law on Constitutional Legal Proceedings
Date: May 25, 2016

(1) What is the purpose of the amendments?

According to the explanatory report of the draft law,[1] the purpose of the amendments is to remedy gaps and ambiguities in the legislation (Organic Law on the Constitutional Court of Georgia [hereafter "the Organic Law"] and the Law on Constitutional Legal Proceedings [hereafter "the Law"]). The following is found to be problematic in the current legislation according to the Report:

a. Provisions on electing President of the Constitutional Court, Vice Presidents and the Secretary of the Court are not clear, and no regulation explicitly indicates the respective minimum votes necessary for the election;
b. Automatic prolongation of the term of the judges[2] of the Constitutional Court (when pending cases[3] are left unfinished after expiring of the term) is not regulated in the legislation properly; and
c. Entry into force of the decisions of the Constitutional Court is not regulated in the legislation.

However, the Coalition for Independent and Transparent Judiciary of Georgia (hereafter "the Coalition") considers these reasons deceptive. As mentioned in the Coalition's initial statement,[4] the draft law is directed not only against the current members of the Constitutional Court and/or specific judges, but is intended to paralyze the work of the Constitutional Court (hereafter "the Court") and diminish its important role. These changes will jeopardize the fundamental values of a modern democratic state, such as the rule of law, recognition and protection of human rights, separation of powers and providing adequate, effective and impartial constitutional justice.

The current ruling majority and executive branch (especially the Minister of Justice) was critical towards the current judges of the Court. Even the Venice Commission issued a special declaration with clear expression of the concerns about public calls by the executive to terminate the mandate of the President of the Constitutional Court, which risks undermining the authority of the Court.[5]

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[1] Available online on the following web-pages: < http://info.parliament.ge/file/1/BillReviewContent/115535? >
< http://info.parliament.ge/file/1/BillReviewContent/115538? >.[Accessed May 21, 2016] [Georgian version].
[2] The terms – 'Judge of the Court' and the 'Member of the Court' are used with the same meaning interchangeably in this document.
[3] (1) Admissible cases and (2) those cases where admissibility is not decided yet.
[4] Published on May 14, 2016. Available online: < http://www.coalition.org.ge/en/article276/Statement_on_amendments_on_Constitutional_Court_adopted_by_the_Parliament > [Accessed May 21, 2016].
[5] Declaration by the Venice Commission on undue interference in the work of Constitutional Courts in its member States, March 16, 2016. Available online: < http://www.venice.coe.int/webforms/events/?id=2193 > [Accessed May 21, 2016].

Additionally, none of the reasons and official intentions indicated in the explanatory report of the draft law is substantiated. First, it should be noted that President of the Court, Vice President and the Secretary has been chosen through elections several times since 1996. The existing legislation contains detailed provisions on their election (except for the Secretary), and no problem has ever been identified in the election process (not even by the individual members of the Court). Second, the inherent prolongation of the term of the members of the Court in order to continue and finish ongoing cases had been working properly in the Court, and it is a common approach used in many jurisdictions including in the Courts of Ordinary Jurisdiction of Georgia[6] (the main reason behind this rule is to protect the rights of the parties to proceedings). And third, even though there is no clear provision in the legislation, the Constitutional Court of Georgia has already clearly indicated in its case law that the decision enters into force when it is publicly announced in the courtroom. This practice is well established, and for many years it was explicitly indicated in the decisions of the Court (resolution part). No practical problems were identified in that regard.

Taking into consideration the overall context, where the current ruling majority was heavily criticizing and intimidating the Court, and the non-urgent need to reform several key regulations relating to the Court, it is obvious that the reform was intended to hinder/paralyze the Court. This conclusion is also demonstrated by the speedy procedures in the Parliament (please see the answer to Question 3); if the ruling majority was intending to reform the Court, it should not have proceeded so quickly and should have allowed the draft law to be prepared/elaborated in close partnership/cooperation with civil society organizations and the Court (including former members) itself.

(2) Are there specific problems that led to the adoption of the amendments? If so, please explain

The Organic Law and the Law were adopted in 1996, and since then no substantial and systemic reforms have been implemented in the legislation regarding the Court, although some individual amendments and supplements were passed by the Parliament. Additionally, no civil society organization ever made a report indicating the necessity of the reform of the Constitutional Court (unlike Courts of General Jurisdiction).

The Court itself was in the process of identifying some problematic procedural issues and was collecting them to propose further amendment/improvements to the Parliament. One of the main purposes of the EU-funded project "Support to the Constitutional Court of Georgia" was to assist the Court in identifying problems (technical and substantial) and improving its overall functioning.[7] To this end, the Court held several working meetings with the participation of civil society organizations and academia during the past few years. Even though the Court had already systematized and finalized some technical amendments (with close cooperation and assistance of civil society organizations, including members of the Coalition), it was not consulted before the initiation of the legislation in the Parliament.

There is only one recent instance in which there was an issue with the signing of the judgment by a judge of the Court (please see answer on Question 5). In September 2015, a recently appointed judge refused to sign a decision due to illness and a lack of time to

[6] Art 36, Sec 5 and 6 of the Organic Law on the Common Courts of Georgia. Available online: < https://matsne.gov.ge/en/document/view/90676 > [Accesses May 21, 2016].
[7] Information available online: < http://humandynamics.org/en/project/georgia-constitutional-court > [Accesses May 21, 2016].

become familiar with it. Although the other eight members of the Court visited the newly appointed judge in the hospital, they said that every member of the Court had enough time to read the decision and sign it. Even though there were no clear procedures, the eight judges signed the decision and published it. The Minister of Justice and other representatives of the majority declared that the Court violated its procedures.[8] This is the only time that the absence of a clear regulation concerning a judge not signing a judgment has been a problem, and cannot justify Parliament's hasty adoption of new procedures without consultation.

(3) Were the amendments adopted in a speedy procedure? If so why?

The draft was initiated on March 10, 2016.[9] It passed the first reading on April 27, 2016. The first version of the draft contained many systematic problems, and the Coalition issued its concerns on this version of the draft law.[10]

The draft law was then modified, but the updated version of the draft law was not disseminated publicly. The Coalition only managed to receive a copy of the updated draft law on May 11, at the Human Rights and Civil Integration Committee hearing in the Parliament. The Committee made several amendments to the draft laws after intensive discussions in this Committee hearing.

On May 12 (a public holiday in Georgia, when Parliament would not normally meet) and May 13, the draft laws were discussed in Parliament at the plenary session. On May 13 at 8:28 p.m. the draft laws were adopted on a second reading with 83 votes. That same day, late at night, a meeting of the Bureau of the Parliament was held and the third reading of the law was scheduled for the next morning of March 14, 2016 (a Saturday, when Parliament also does not normally meet). The meeting of the Committee of Human Rights and Civil Integration was held also on May 13, late at night, and the majority of the members supported the draft law for the third reading. The draft law was then referred for the plenary hearing. On the morning of Saturday, May 14, the drafts were adopted by Parliament on the third reading.

Even though there were approximately two months between the initiation of the draft laws and their adoption on the third reading, the procedure was not transparent. The first draft of the laws was amended behind closed doors and civil society was not able to participate in that process. Then, civil society did not have access to the substantially revised second draft of the laws until May 11, the day before that draft was discussed in Parliament, when civil society representatives received a hard copy at the Committee of Human Rights and Civil Integration hearing. The second draft was revised once more at the Committee hearing, at which point the draft laws were committed for the plenary session. The third draft was not disseminated publicly, and was only made available online on May 13, after the laws were adopted by the Parliament. Not only was the process of adopting the laws exceedingly rushed, but also the plenary hearings for the second and third readings took place on a public holiday and during a weekend, which made it more difficult to mobilize public and professional attention to provide input and comments.

[8] Information available online: < http://rustavi2.com/en/news/26856 > [Accesses May 21, 2016].
[9] Official document available online (in Georgian): < http://info.parliament.ge/file/1/BillReviewContent/114237? > [Accessed May 21, 2016].
[10] Available online: < http://www.coalition.org.ge/en/article270/განცხადება-საკონსტიტუციო-სასამართლოს-შესახებ-კანონებში-დაგეგმილ-ცვლილებებზე > [Accessed May 21, 2016].

(4) How will the terms of office of the members of the Constitutional Court change?

According to the Constitution, the term of judges of the Constitutional Court is 10 years. The current law allows for the extension of the ten-year term of office until the rendering of the final judgment on cases that had already been considered. Notably, the extension of a judge's term of office under similar circumstances is allowed by Protocol No. 14 of the European Convention for Human Rights.[11] When the new amendments enter into force, the provision allowing for the extension of the term of office will be abolished.

Under the new amendments, a member of the Constitutional Court shall not be assigned to take part in the review of new cases if less than three months are left in her/his term. During those three months, the amendments only allow consideration of the admissibility of new cases, as well as suspension of application of impugned norms. In addition, during the last three months of their term judges of the Constitutional Court will be authorized to consider the merits of new cases that should be resolved within a special limited timeframe, as prescribed by the applicable legislation. The legitimate purpose of the restrictions placed on last three months period of justice's 10-year term is unclear.

It should be mentioned that the term of four Court judges will expire on September 30, 2016. In the months until then, it seems impossible to render final judgments on all cases that have been under consideration by the current judges. Thus, especially in this very specific situation, the amendments will harm the interests of certain applicants because it will require the reconsideration of cases that have already been considered. This may also be detrimental for the interests of justice, and may overload the Court because new judges will have to deal with previously considered cases in addition to new ones.

(5) How will the requirement of signature of acts of the Court change?

With respect to signature of acts of the Court, it should be noted that there was already such an obligation in the Georgian constitutional justice system before the adoption of the proposed amendments. In particular, the Law provided that a judge involved in the court proceedings had the obligation to sign final acts delivered by the Court. Thus, it was one of the prerequisites for judgments and decisions to come into force.[12]

There was the only case when the judge failed to show up to sign the judgment of the Court, citing health problems.[13] However, in response to that, the Court clearly stated that the participation of a judge in resolving a case should be perceived as his/her ultimate constitutional obligation and not an option. Consequently, the violation of that obligation by a judge without a good reason shall not impede the Court from delivering its final decision or somehow question the capacity of the Court to do so.[14]

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[11] The members of the court are elected for the term of nine years, but the term is subject to an extension in order to allow them to deal with cases that they already have under consideration.

[12] Art 22 and Art 29 of the Law. Available online: < http://constcourt.ge/en/court/legislation/law.page > [Accessed May 21, 2016].

[13] Information available online: < http://www.transparency.ge/en/post/general-announcement/ngos-respond-constitutional-court-ruling > [Accessed May 21, 2016].

[14] The statement of the Court in Georgian, available online: < http://constcourt.ge/ge/news/gancxadeba-saqartvelos-sakonstitucio-sasamartlos-2015-wlis-15-seqtembris-32646-gadawyvetilebastan-saqme-saqartvelos-moqalaqe-giorgi-ugulava-saqartvelos-parlamentis-winaagmdeg-dakavshirebit.page > [Accessed May 21, 2016].

Under the amendments, decisions/judgments/rulings of the Court shall be signed by all judges involved in the Court proceedings, unless a judge intentionally violated the obligation or it cannot be fulfilled for a good reason. Therefore, acts of the Court will come into force if there are sufficient signatures of the judges to deliver relevant decision/judgment/ruling (a quorum), instead of requiring the signatures of all judges involved in court proceedings. This amendment should be assessed positively since it supports the overall smooth operation/functioning of the Court.

(6) What are the increased competences of the plenum? Why has there been a shift from the boards to the plenary session?

With regard to increased competences of the plenum, the law has widened the scope of the issues reviewed by the full bench of the Court. Such competencies include:

a. A dispute regarding the constitutionality of regulatory standards for referendum and elections, and the constitutionality of elections (or referendums) held or to be held based on these standards;[15]
b. A decision on the suspension of disputed acts or its relevant part;[16]
c. A dispute concerning the constitutionality of an organic law in relation to human rights prescribed by Constitution of Georgia.

Considering the diversity of issues and legal purposes that these amendments entail, it would be beneficial to analyze each of them separately.

First, a dispute relating to the constitutionality of elections or a referendum is a special and very important competence of the Court, which shall be examined within 30 days (and 12 days in case of Presidential elections) after the lodging a constitutional complaint.[17] Thus, considering the increased quorum of the plenum required delivering judgments (please see the answer to Question 7) the proposed amendments threaten the effective rendering of decisions by the Court.

Furthermore, in light of upcoming parliamentary elections in October and possible referendum to ban same-sex marriage[18], the proposed amendments could be seen as an attempt to weaken the Court's ability to deliver judgments that might be undesirable for the government.

Moreover, pursuant to the legislation currently in effect*, if the Constitutional Court believes that the operation of a normative act may* ***entail irreparable consequences to one of the parties****, it shall be able, by decision of the executive session, to suspend the operation of a disputed act or its relevant part until a final decision.*[19] A ruling based on this competence requires the Court to act simultaneously, in a short period of time. For instance, in its ruling on the Case of *LLC Broadcasting Company "Rustavi 2" and LLC Broadcasting Company "Sakartvelo" v. Parliament of Georgia*[20]*,* the Court had to decide upon the issues of immediate execution of Court judgments where the applicant was in urgent need to stop

[15] Art 19 Sec D of the Organic Law, Available online: < https://matsne.gov.ge/ka/document/view/32944?impose=translateEn > [Accessed May 23, 2016].
[16] Ibid. Art 25 Sec 5.
[17] Ibid. Art 22 Sec 2.
[18] Information available online: < http://rustavi2.com/en/news/43784> [Accessed May 23, 2016].
[19] Art 25 Sec 5 of the Organic Law.
[20] Available online: < http://constcourt.ge/ge/legal-acts/recording-notices/shps-samauwyeblo-kompania-rustavi-2-da-shps-telekompania-saqartvelo-saqartvelos-parlamentis-winaagmdeg.page [Accessed May 23, 2016].

proceedings in Courts of Ordinary Jurisdiction. Otherwise, the applicant would have lost all its property. This is a clear example how shifting the given competence from the board to the plenum (considering the increased quorum) could severely damage the legal interests of the applicant and/or cause irreparable consequences to one of the parties of the proceedings. Additional time will also be needed for the technical transferring of the case and the respective bureaucracy, and an additional five judges will have to get familiar with the case files.

Finally, disputes concerning the constitutionality of an organic law in relation to human rights may include disputes on statutes related to elections, citizenship, Courts of Ordinary Jurisdiction, the expropriation of property, and other important issues. If an organic law infringes human rights, the case must be decided by the plenum of the Court, while if more important human rights are affected by ordinary legislation, the board of the Court will be capable of deciding the case.

At the Human Rights and Civil Integration Committee hearing on May 11, it was indicated that adoption of an organic law needs more legitimacy (minimum 76 votes out of 150 MPs). Therefore, while deciding the constitutionality of an organic law, final decision should be made by the full bench of the Court.

Nevertheless, it is inconsistent with European standards as the number of judges deciding the case **must not** depend on the votes of deputies supporting particular piece of legislation. For example, organic laws and ordinary laws could be adopted by the same amount of votes as well as an ordinary law might be passed by full majority (150 votes). Therefore, it remains unclear why organic laws are distinguished from ordinary laws for purposes of the given amendments.

(7) What are the effects of raising the quorum for the plenary session?

The law provides that the plenum is authorized to render judgments if seven out of nine judges are present. Judgments are made if they are supported by six of the nine judges. Establishing such a high quorum comes at odds with international standards, including the Venice Commission assessments, and it is highly probable to paralyze the work of the Court.[21]

The Court consists of nine members; the Parliament of Georgia elects three of them by majority vote, three of them are elected by the Plenum of the Supreme Court, and the President of Georgia appoints three. Plenum of the Supreme Court of Georgia and the Parliament of Georgia elect their respective candidates. There might be a scenario, when these entities are unable to elect respective candidates due to the absence of the necessary votes and consensus. There could be an even worse scenario, when there is deliberate intent to block action by the Constitutional Court. If the requirement of a “super quorum” is retained, one branch of the government will be in a position to block any action by the Court by not electing its respective judges. Since there is no clear provision for prolonging the term of the previous judges before electing new ones, this peril is real and may endanger democracy and the rule of law in Georgia.

[21] Available online: < http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e > [Accessed May 22, 2016]

(8) What are the effects of the new procedure relating to the challenge of provisions that have the same content as provisions previously found unconstitutional?

The current legislation defines authority of the Court to declare a normative act unconstitutional by a ruling on admissibility without consideration of the merits where the disputed norms have the same content as provisions previously found unconstitutional, except where the Board of the Court considers that its position is different from the practice of the constitutional court and applies to the Plenum of the Court. Under the adopted amendments, one member of the Board is also entitled to apply to the Plenum for consideration of the case. Unless the Plenum rejects the motion by six votes, the case will be adjudicated by the Plenum. This will result in a situation where a dissenting judge can prolong a proceeding and transfer the case to the plenum from the boards. Since the plenum of the Court will hear most of the cases (according to the amendments passed by the Parliament),[22] the process will be slow and will result in the mass deadlock of cases. It should be noted that according to official statistics constitutional complaints have increased dramatically between 2014 and 2016 (by more than 100%).[23]

The effects of the new procedures will not automatically lead to unconstitutional results and consequences; nevertheless, they may lead to the deadlocking of the Court, when all cases must be considered by all nine judges. The common European trend (including the European Court of Human Rights) is to delegate cases from the full bench to small collegiums in order to achieve more speedy procedures. In light of this, it is not clear why Parliament has added impediments to the effective functioning of the Constitutional Court and shifts cases from the Boards to Plenum.

Additionally it should be noted that the authors of the amendments consider the Plenum of the Court more legitimate than Boards. However, the Boards of the Court are formed in a manner, which ensures their maximum legitimacy.[24]

(9) What will be the effect of the new procedure making on the suspension of provisions, which have an irremediable effect on parties?

Under the legislation currently in effect, a decision on suspending the operation of the disputed provision is made directly by the Board that reviews the case (consisting of four judges), with a majority of members taking part in the case review. Pursuant to the adopted amendments, if a Board of the Court considers that the disputed provision may result in an irreparable outcome for the claimant, the case is to be transferred to the Plenum of the Court for review (consisting of nine judges) and, prior to reaching the final decision, two-thirds of the full bench can suspend operation of the disputed provision or a part thereof.

The concept and purpose of suspending the disputed provision are to be considered first. It is designed to avert an irreparable harm to the claimant before the Court reaches a final decision on the case. Where the Court suspends the disputed provision, timely review of the case is important in order to avoid infliction of irreparable damage to the claimant.

[22] If impugned provision is Organic Law, the case will be dealt automatically by the Plenum.

[23] Information available online in Georgian: < http://www.constcourt.ge/en/legal-acts/statistics > [Accessed May 22, 2016].

[24] The members of the Constitutional Court designated by the President of Georgia, by the Parliament of Georgia and the Supreme Court of Georgia shall be represented on the Boards as equally as possible. Art 11, Sec 4, 2nd Sentence of the Organic Law.

The obligation to transfer the case from the Board to the Plenum means that the review of the case will be done by at least seven judges, which may result in delays and impede the effective protection of the claimant's rights.

Pursuant to the legislation currently in effect, the Board of the Constitutional Court acts as the Constitutional Court and is authorized to declare the disputed normative act unconstitutional. In such conditions it is not clear which legitimate interest the Board restriction serves (to suspend effectiveness of the disputable provision prior to making the final decision). This raises concern that the amendment is the result of the government's negative response to decisions made by the Constitutional Court in the "Rustavi 2" case, in which the first Board of the Constitutional Court suspended operation of the disputed provisions of a law so as not to inflict irreparable damages to the claimant's rights. The concern that this amendment is the result of the government's displeasure with the Court's decision in the "Rustavi 2" case is supported by the fact that the Minister of Justice publicly expressed doubt as to the impartiality and objectivity of the case reviewing board, and by the fact that the Parliament filed a motion to challenge two Constitutional Court judges who were reviewing the complaint of "Rustavi 2".[25]

(10) What are the changes as to the publication of the acts of the Court?

Under the current legislation, decisions of the Court come into effect after they are announced in the courtroom. According to the adopted amendments, decisions of the Constitutional Court will come into effect after the publishing of the full text on the Court's website.

The Coalition believes the law should provide alternative procedures for entry into force of the Court's decisions, in case the website is experiencing technical difficulties. In this scenario, the Court's decision might not enter into force due to technical impediments.

(11) What will be the effect of the need to decide some cases with a 2/3 majority?

This topic is similar to the issue of the quorum (Question 7). Before discussing it, the Georgian context should be taken into account.

The Court consists of nine members; the Parliament elects three of them by majority vote, three of them are elected by the Plenum of the Supreme Court, and the President appoints three judges. Three different branches of the government are equally participating in the process of electing judges. If the respective bodies do not appoint new members, the competence of the previous members is not prolonged automatically. Therefore, if one branch of the government does not elect/appoint its judges, the court will be blocked and barred from effective functioning, unable to render any decision/judgment. Thus, the requirement for a two-thirds majority vote increases the likelihood that one branch of the government will be able to block the effective functioning of the Court. For example, the Parliament might not elect its judges (three members), and with this the Court will be prevented from making decisions.

[25] The Parliament, as the respondent in the Constitutional Court, claimed that a judge of the First Panel, Konstantine Vardzelashvili, and a member of the same panel, Maia Kopaleishvili, "act in a biased and unobjective manner and they are likely to display a biased attitude in delivering the final judgment" in relation to the complaint of Rustavi 2.

Secondly, a two-thirds majority of decision-making is quite unusual for the judicial bodies in European Countries. It can be applicable to special procedures (where clear political issues are at stake – like impeachment), but not to every decision of the Court. However, under the recently adopted rules, a two-thirds majority vote will be the general rule for decision-making, not the exception. If there is a split vote, five judges in the minority and four judges in the majority, a decision will be impossible. This system is against the logic of judicial review. Even if a majority of the judges of the Court thinks the law is unconstitutional, it will not be repealed since the Parliament (the author of the legislation) set the rule that a decision must be adopted by a two-thirds vote. The Parliament should not be allowed to adopt such regulations when the case concerns Constitutional Court, since no checks and balance is ensured in this process and it is also against the principle of rule of law.