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(VENICE COMMISSION)

DIRECTORATE FOR JUSTICE AND HUMAN DIGNITY
OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW

JOINT OPINION

OF THE VENICE COMMISSION

AND THE DIRECTORATE FOR JUSTICE AND HUMAN DIGNITY OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DG I) OF THE COUNCIL OF EUROPE

ON THE DRAFT LAW ON THE TEMPORARY STATE COMMISSION ON MISCARRIAGES OF JUSTICE

OF GEORGIA

Adopted by the Venice Commission
at its 95th Plenary Session
(Venice, 14-15 June 2013)

on the basis of comments by

Mr Nicolae ESANU (Member, Moldova)
Mr James HAMILTON (Substitute member, Ireland)
Mr Angel SANCHEZ NAVARRO (Substitute member, Spain)
Ms Janne KRISTIANSEN (Expert, DG I)

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I. Introduction

1. By a letter of 14 May 2013, the Minister of Justice of Georgia requested the Venice Commission and the Director General of Human Rights and Rule of Law of the Council of Europe to provide an opinion on the draft Law on Temporary State Commission on Miscarriage of Justice (CDL-REF(2013)024).

2. Mr Nicolae Esanu, Mr James Hamilton and Mr Angel Sanchez Navarro acted as rapporteurs. Ms Janne Kristiansen, former Head of the Norwegian Criminal Cases Review Commission, provided an expert opinion at the request of the Directorate for Justice and Human Dignity (of the Directorate General of Human Rights and Rule of Law (hereinafter DJHD).

3. The Venice Commission also received comments from the Supreme Court of Georgia (CDL-REF (2013)026).

4. The present opinion was discussed at the Sub-Commission on the Judiciary on 13 June 2013 and, following an exchange of views with the Deputy Minister of Justice of Georgia, Mr Alexandre Baramidze, was subsequently adopted by the Venice Commission at its 95th plenary session (Venice, 14-15 June 2013).

II. Preliminary remarks

5. On 21 December 2012 the Parliament of Georgia adopted an Amnesty Law which contained a provision relating to political prisoners and which led to the release of about 200 so-called political prisoners.

6. The general context for the adoption of the Amnesty Law was explained to a delegation during the meetings in Tbilisi in the framework of the preparation of the opinion on the provisions in the Amnesty Law of Georgia[1] as follows: after the parliamentary election of 1 October 2012 a significant number of persons claimed that they had been imprisoned for political reasons; these people were detained in difficult conditions and there was an urgent need for reducing the number of prison inmates.

7. In its Opinion on the Amnesty Law, the Venice Commission concluded that *"[a]n amnesty by Parliament must comply with certain fundamental principles of the rule of law, namely legality (including transparency), the prohibition of arbitrariness, non-discrimination and equality before the law. The Venice Commission is of the opinion that Article 22 of the Amnesty Law failed to comply with these principles. Nevertheless, it is undisputable that it would be contrary to the principles of legal certainty and non-retroactivity of criminal law if the persons who have been released were to be returned to prison."*[2]

8. The Opinion also noted that *"[d]uring its visit to Georgia, the delegation of the Venice Commission was informed that there are, at present, a substantial number of persons still in prison in Georgia who claim to have been imprisoned for political reasons. Some mechanism which would involve courts has to be found to determine their cases. Criteria to be applied in this mechanism would need to be made public, including any criteria used in the past."*[3]

[1] CDL-AD(2013)009, Opinion on the Provisions relating to Political Prisoners in the Amnesty Law of Georgia Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).
[2] CDL-AD(2013)009, para. 58.
[3] CDL-AD(2013)009, para. 59.

9. The preamble of the draft Law on the Temporary State Commission on Miscarriages of Justice (hereinafter "the draft Law") explicitly refers to the Venice Commission's Opinion on the Amnesty Law and is intended to provide such a mechanism.

10. The preamble of the draft Law states that *"after the parliamentary election of October 1, 2012 thousands of Georgian citizens, foreigners or stateless persons have filed complaints to the executive authorities and Parliament of Georgia stating that in 2004-2012 they were unlawfully and/or unjustly convicted of criminal offences"* and further states that *"it is the intention of the Government of Georgia to restore law and justice with respect to all those persons who were convicted unlawfully and/or unjustly, for which reason it is necessary to design some additional and temporary legislative mechanisms".*

11. The very idea of a process of massive examination of possible cases of miscarriage of justice by a non-judicial body raises issues as regards the separation of powers and the independence of the judiciary as enshrined in the Georgian Constitution. It may only be conceived in very exceptional circumstances. If the Parliament of Georgia were of the opinion that indeed such circumstances occur nowadays in Georgia, it is evident that the mere re-examination of cases without a profound reform of the judiciary would be insufficient. Any such measure would have to be accompanied by a wider reform of the judiciary in order to strengthen its independence and impartiality. It is particularly important that the rule of law should not be weakened by the adoption of a measure that might be perceived by some as politically motivated as this, and the relevant provisions of the proposal that highlight its political nature, will only bring discredit to the judiciary and the justice system.

12. The Rule of Law is one of the main goals of the Georgian Constitution, according to its Preamble. According to the European democratic tradition, in Georgia the Constitution is "the supreme law of the State" (Article 6 of the Constitution of Georgia), and "State authority shall be exercised on the basis of the principle of separation of powers" (Article 5.4). What is more, *"the legislation of Georgia shall correspond to universally recognised principles and rules of international law."* This openness to international rules is such that "an international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia… shall take precedence over domestic normative acts" (article 6.2, after the reform adopted by the Constitutional Law of Georgia of 30 March 2001).

13. This principle means that in Georgia the *"Parliament (…) shall be the supreme representative body of the country, which shall exercise legislative power, determine the principle directions of domestic and foreign policy, exercise control over the activity of the Government within the framework determined by the Constitution and discharge other powers"* (Article 48). Together with Parliament, the other two classical powers are in charge of their also classical functions. In particular, the Judiciary power "shall be independent and exercised exclusively by courts", which "shall adopt a judgment in the name of Georgia" (82.3 and 4 GC). Of course, independence of the judiciary implies, above all, that judicial "activity… shall be subject only to the Constitution and law. Any pressure upon the judge or interference in his/her activity with the view of influencing his/her decision shall be prohibited and punishable by law". And, moreover and among other things, that "only a court shall be authorised to repeal, change or suspend a court judgment in accordance with a procedure determined by law" (article 84, par. 1 and 5).

14. The approach taken by the Georgian authorities to involve a non-judicial body in this process follows their assessment that the entire judiciary and the prosecution service have participated in this alleged massive miscarriage of justice. However, even if the Georgian authorities are ready to go in this direction despite the constitutional (and principle) hurdles, there is a red line which must not be overstepped, lest Georgia failed to live up to its

standards of the Rule of Law: **any decision on the determination of the criminal charges against plaintiffs having suffered a miscarriage of justice must be adopted by a court.**

15. Article 82.2 of the Constitution of Georgia sets out that "[a]cts of courts shall be obligatory for all state bodies and persons throughout the whole territory of the country." If a non-judicial body were to review judicial decisions, the rights of all possible victims of the criminal conduct punished by the courts would remain unprotected. In addition, if new circumstances have arisen, including awareness of past miscarriages of justice, only courts can be able to review them in final instance. This is why it is essential that when deciding whether or not a case should be referred to a Court of Appeal, the TSCMJ should not touch upon what should have been or should be the outcome of the case at issue. Moreover, the outcome of the new procedure – despite the fact that the procedural flaws of the original one will have been fixed – might be the same as the original procedure. In other words, the court reviewing a case of alleged miscarriage of justice will not necessarily reach the conclusion that the plaintiff was innocent and should be released.

16. It is important to note that the Venice Commission and the DJHD do not take a position on whether in fact there were miscarriages of justice in Georgia nor on whether such miscarriages of justice were of a systemic nature and require the creation of this Temporary State Commission. They only intend to provide their contribution with a view to ensuring that the mechanism proposed be as in conformity as possible with the principles of separation of powers and independence of the judiciary enshrined in the Constitution of Georgia. However, the Venice Commission and DJHD wish to stress that it seems difficult to reconcile the rule of law imperatives which must apply to any process of re-examination of criminal cases with the specific features of today's Georgia, in particular the extremely polarised political context and the limited size of the judiciary. In this context, the Venice Commission and DJHD underline the very different contexts in which the other criminal cases review commissions on of which exist in Europe, operate.

17. This opinion is based on an English translation of the draft Law. The translation may not accurately reflect the original version on all points and, certain comments may result from problems in the translation.

III. Examples of Commissions in Europe

18. Criminal cases review commissions have been in existence since 1997 (England, Wales and Northern Ireland), 1999 (Scotland) and 2003 (Norway). These have been created after the discovery of grave miscarriages of justice. The three commissions have different legislative frameworks and rules.

A. The Criminal Cases Review Commission for England, Wales and Northern Ireland [4]

19. The Criminal Cases Review Commission (CCRC) is an independent public body that was set up in March 1997 by the Criminal Appeal Act 1995. Its purpose is to review possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refer appropriate cases to the appeal courts.

20. There are eleven Commissioners, appointed in accordance with the Office for the Commissioner for Public Appointments' Code of Practice. They are completely independent and impartial and do not represent the prosecution or the defence. They work with the Senior Management Team to ensure the Commission runs efficiently.

[4] http://www.justice.gov.uk/about/criminal-cases-review-commission

21. Anyone who believes they have been wrongly convicted of a criminal offence can ask the CCRC to review their case, as long as they were convicted in a criminal court in England, Wales or Northern Ireland. There is no way the courts can increase the applicant's sentence because he or she has applied to the Commission.

22. The CCRC application form asks for some information about the applicant's case. The CCRC will need to find significant new evidence or new legal argument in order to refer the case to an appeal court. Usually this means something that was not covered at the trial or the appeal. For example it may be new evidence not known about at the time, or something that has changed since the trial, like the appearance of a new witness or a new development in science. New legal argument is usually some significant new point of law that has not been made before, such as a complaint that the judge's summing-up was faulty, or that the prosecution applied the law incorrectly.

B. The Norwegian Criminal Cases Commission[5]

23. The Norwegian Criminal Cases Review Commission was established by a revision of the Criminal Procedure Act Chapter 27. The amendment came into force on 1 January 2004.

24. The Norwegian Criminal Cases Review Commission is an independent body which has responsibility for deciding whether convicted persons who seek review of their conviction/sentence should have their cases retried in court. If the Commission decides that there should be a review, the case will be referred for retrial before a court other than that which imposed the conviction/sentence. It must be a criminal case which has been decided by a legally enforceable judgment.

25. The Commission shall assess whether the requirements for a review are present. The most important grounds for a criminal case to be reopened are:
- New evidence or new circumstances that may lead to acquittal or a considerably lighter sentence;
- In a case against Norway, an international court or the UN Commission on Human Rights has concluded that the decision or the proceedings of the convicted person's case is in contravention of international law and there are grounds to suppose that a new examination of the criminal case will lead to a different conclusion;
- If someone who has had crucial dealings with the case (prosecuting counsel, judge, expert, defence counsel, witness) has committed a criminal offence that may have affected the conviction/sentence to the disadvantage of the convicted person.

26. The permanent members of the Norwegian Criminal Cases Review Commission decide whether a petition for review is to be accepted. The Commission is appointed by the King in Council and has five permanent members and three deputy members. The appointed members together have solid and broad experience from the courts, the prosecuting authority, the defence counsel profession as well as from the community at large. The Chairperson, Vice Chairperson and one of the members must be lawyers.

27. The Commission's mandate is to decide whether there are grounds to believe that the conviction/sentence in the case under review is wrong. The Commission is not another appeals body and it is not to determine guilt or pass sentence. Nor is it a scrutiny commission tasked to investigate the practices of the courts. It decides only on petitions for

[5] http://www.gjenopptakelse.no/index.php?id=31

reopening of cases put forward by those who believe they have been subjected to an erroneous judgment.

28. The Commission may decide to refer the case for retrial to a court other than that which imposed the conviction/ sentence. The new court will be of equal standing to that which imposed the conviction/sentence.

IV. Analysis of the Law article by article

Chapter 1. General provisions

Article 1. Objectives of the Commission

29. Article 1.1 provides that the task of the Temporary State Commission on Miscarriages of Justice (hereinafter "TSCMJ") is to *"review miscarriages of justice".* At the outset, it should be noted that the name of the Commission could be more neutral / less likely to generate controversy. The name of the Commission could for example be "the Temporary Commission on Criminal Cases".

30. The term "review" gives the impression that the TSCMJ will have the task to decide cases of alleged miscarriage of justice in final instance. Article 21.2 of the draft Law indicates that this is not the case and the competent appellate court will be enabled to reopen such cases. The term "review" in Article 1 of the draft Law should be replaced with a more neutral term like "examine" or similar. The TSCMJ should not establish that a miscarriage of justice has taken place but only adopt a report, which states that the TSCMJ has a 'reasonable suspicion' about the existence of a miscarriage of justice. The existence of a miscarriage of justice shall only be established by the appellate court, which reopens the proceedings on the basis of the report of the TSCMJ.

31. In the same vein, the aim of the work of the Commission should be clearly stated. The fact that on the basis of a decision of the TSCMJ the plaintiff is entitled to ask for the reopening of the case with an appeal should be set out right in the beginning of the law. It might be emphasised that such a procedure is the only means by which a case might be re-opened.

32. According to Article 1.3, *"the Commission shall adopt and submit to Parliament of Georgia and public authorities of justice system its opinions on possible systemic causes of miscarriages of justice, as well as recommendations for elimination and prevention of such miscarriages in the future"* and aaccording to Article 5, *"At the end of each year, also upon completion of its activities, the Commission shall adopt at its plenary session a report of activities. (…)"*

33. The Venice Commission and the DJHD are of the opinion that the Commission should concentrate on individual cases and not on systemic causes of miscarriage of justice. On the basis of the decisions of the TSCMJ, it is for the Ministry of Justice to establish the causes and possible need for reform.

34. Finally, a regular reporting might interfere with the efficiency of the Commission and might have an impact on its independence. Therefore, an activity report (i.e. on individual cases and with statistics) should only be submitted to the authorities on final completion of the Commission's task.

Article 2. Definition of Miscarriage of Justice

35. Article 2 of the draft Law defines a miscarriage of justice. The article states that a miscarriage of justice shall be considered established if a diligent review of the circumstances would lead an objective observer to such a conclusion if (a) certain fundamental conditions on evidence were not fulfilled, (b) if there was a manifest and grave breach of the criminal Procedural Law and/or of the rights enshrined by the European Convention on Human Rights, which has substantially influenced the outcome of the case, or (c) if the conviction was a result of a plea-bargain and the judge manifestly disregarded certain articles of the Criminal Procedure Code.

36. Even if Article 2 refers to the term "objective observer", it is difficult to conclude that this alone provides sufficiently objective criteria. A reference to the standards of Article 6 ECHR could provide such criteria.

Article 4. Independence, Immunity, Principles

37. Article 4 underlines the importance of the Commission's independence. These principles are well founded and absolutely necessary for the credibility of the Commission. Even if the TSCMJ is not a judicial organ, it is essential that the TSCMJ be totally independent and that in no circumstances can it receive instructions from the authorities.

38. Paragraph 4, which states that *"The arrest or detention of a member of the Commission, his/her personal search, or the search of his/her residence, car, or working place may only be allowed with Parliament's consent"* seems to go too far: the immunity of the members of the Commission should only be limited to acts linked with the capacity as Commission member. Even judges should benefit only from functional immunity[6]. Any immunity of the members of the TSCMJ need not go further than that.

Article 5. Publicity, Annual and Final Reports

39. Article 5 concerns publicity, annual and final reports (as concerns those see under Article 1 above). There should also be a provision on non-disclosure (or "non-openness") of certain decisions or information where this is of importance to and in the interests of the plaintiff. It may be in the interests of the plaintiff to be able to rely on the non-disclosure of sensitive information. A person should not be discouraged from bringing forward a petition for fear of having sensitive and personal information disclosed.

Chapter 2 - Composition, Term of Office, Organizational Support of the Commission's Activities

Article 6. Composition, Term of Office, Requirements to be a Member

40. Article 6.1 provides that the TSCMJ shall be established for a three-year term. Upon a reasoned request of the Chairman of the Commission, Parliament may extend the term for no more than a year. The TSCMJ shall terminate its activities by a resolution of Parliament.

41. As set out above, the Venice Commission and the DJHD agree that in the specific circumstances in Georgia it may be necessary and important to limit in time the process of assessment of miscarriages of justice, hence the term of the TSCMJ.[7] The exceptional

[6] CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010), para. 61.

[7] In the context of lustration, the Venice Commission stated that "It should be welcomed that all lustration measures are temporary only, and it also seems reasonable to provide for a fixed end of all the lustration

procedure for the re-opening of cases in Georgia creates serious problems for legal certainty and it is important to set a clear time-frame for the stability of the justice system in the country. In this respect, a decision to prolong the process would necessarily have a strong political meaning and should not be possible.

42. The term for which the State Commission shall be established is difficult to assess *in abstracto*. Setting a term for the Commission provides a clear incentive for the Commission to finalise its work in the shortest possible time but at the same time it is necessary to ensure that the Commission will have sufficient time to deal with all cases with the same care. Moreover, before starting its work and in order to be fully operational, the Commission will have at the beginning of its existence to set up internal structures and procedures.

43. In the light of the high number of cases already signaled, three years might be too short a period. While it is not for the Venice Commission and the DJHD to assess whether three years is the appropriate length for the TSCMJ's term of office, they underlines that this term should be set on the basis of a realistic estimate of the possible workload of the TSCMJ.

44. Article 6.1 states: *"The Commission shall terminate its activities by a resolution of Parliament".* Parliament should also be able to terminate the mandate of the State Commission earlier, if there are no more cases.

45. According to Article 6.2, the TSCMJ shall consist of 9 members, one of which is the Chairman.

46. Article 6.3 provides that candidates should be *"nominated by parliamentary factions".* Given the criteria for being a candidate (in particular to *"have a high legal education"* and *"be a specialist of criminal law with recognized competence"*) a public call for applications in media would permit including any specialist fulfilling these criteria and reduce possible political influence. Every possible step to depoliticise the State Commission should be taken. The Venice Commission and the DJHD are mindful that the highly polarized context of today's Georgia may make this task difficult but are convinced that the success of the Commission depends very much of the depoliticisation of the whole process.

47. According to Article 6.3, *"Members and the Chairman of the Commission shall be elected by Parliament with a majority of two-thirds of all members of Parliament (…)"*. This provision is welcomed as it should lead to the election of members who are recognized as independent experts. However, the next sentence which reads *"If all vacancies are not filled in the first round of voting, Parliament shall proceed with a second round and elect candidates with an absolute majority of all members*" is problematic. It gives the majority the option to wait for the second round in order to elect the persons supported only by them. In such a setting, the parliamentary majority has little incentive to come to an agreement with the minority in order to obtain a two-thirds majority in the first round. On the other hand, the minority should not be able to block the whole process by not accepting any candidates. A better anti-deadlock mechanism should be found in order to encourage the majority and minority to agree on neutral and independent experts as members of the TSCMJ.

48. According to Article 6.5, a member *"shall not be a member of a political party. Any person elected to sit in the Commission shall terminate immediately such a membership".* In view of the need to have members who are also seen to be independent in the eyes of the public, the Venice Commission and the DJHD are of the opinion that members of political

process." (Amicus Curiae Brief on the Law on determining a criterion for limiting the exercise of public office, access to documents and publishing, the co-operation with the bodies of the state security ("Lustration Law") of "the former Yugoslav Republic of Macedonia", CDL-AD(2012)028, para. 33).

parties should not sit on this TSCMJ, even if they are ready to resign from their party membership.

Article 8. Early termination of the term of office

49. Article 8 states the reasons for early termination of the term of office for the commission members. Paragraph 1.b - if *"the member has not fulfilled his/her duties for a month"* - is difficult to understand. If a member has a valid ground for not fulfilling his/her duties on a temporary basis (illness or other valid reasons), the result should not be that s/he has to terminate his/her membership of the Commission unless the unavailability is prolonged over a certain longer time - to be determined - or becomes permanent.

50. The drafters could also consider the possibility of appointing substitute members. This would provide continuity should a member be prevented from fulfilling his/her functions.

Article 9. Plenary Commission

51. Article 9 provides the working methods of the plenary of the TSCMJ. Paragraph states that *"[t]he Plenary Commission may deliberate if two thirds of its members are present. Decisions shall be passed by the majority of the present members only if this vote includes the majority of the members of the Plenary Commission. "*This provision is somewhat unclear. The plenary has the possibility to deliberate only if two thirds of the members are present. In other words this is a quorum. It seems that no decision can be taken by less that the majority of the plenary (i.e. 5 votes). It would be preferable to state these figures expressly in the Law itself in order to avoid any misunderstanding.

Article 10. Chairman of the Commission

52. According to Article 10.2, *"[t]he Chairman shall assign complaints to the chambers following their introduction date and speciality".* It is unclear what "speciality" means in this context and under which criteria the Chairman will assign a case to one chamber rather than to another since all of them are "criminal chambers" (Article 11.1), the members of which are drawn by lots (Article 11.1). Therefore the term "speciality" should be deleted.

53. The Law should provide that the distribution of the cases will be made randomly in order to reduce the discretionary powers of the Chairman of the Commission.

Article 11. Chambers

54. Three (criminal) chambers shall be formed within the Commission. Each chamber shall consist of three members who sit on it for a one-year period. The Plenary Commission shall determine the members to sit in different chambers by lot. The fact that members are chosen on a random basis is welcomed. It is to be noted that if chambers have a life of one year, their work-load would have to be concluded within that year, otherwise the composition at random of the chambers for the next year will not be possible. This one-year limitation rule might lead to practical difficulties and it appears therefore better to remove it.

In order to develop a common understanding of the criteria to be applied, it would be useful to provide for regular meetings of the three chambers.

Article 13. Conflict of Interests

55. Article 13 describes conflicts of interest and the measures to be taken should this occur. The provisions are welcomed. However it is questionable whether it is for the Chairman of the Commission alone to examine the request for withdrawal of a member and make a decision

(Article 13.2). Requests for withdrawal should be examined by the plenary - with the exception of the member concerned. Such a collegial decision would strengthen confidence in the objectivity and impartiality of the TSCMJ. Should the requests for withdrawal be retained, the procedure established by Article 11.2, which provides that the members of the chambers are assigned by lot, could also be used in order to replace the member withdrawn rather than giving this power to the Chairman of the Commission.

56. In order to ensure the proper functioning of the TSCMJ should the plaintiff or her/his lawyer object to the participation of any member of the Commission on the grounds of disqualification, the objection should be supported by a reasoned statement right at the application stage. This would allow an efficient allocation of the case to members who are not concerned.

Chapter 3 - Examination of complaints

Article 15. Rules for Submission of Complaints

57. Article 15 sets out the rules for the submission of complaints. It would be practical to draw up a form for the plaintiff to use when he/she made an application to the Commission. This form might also contain information on the Commission and on the law. Moreover the limitation of the written complaint to a certain number of pages should not be applied too strictly; exceptions should be possible.

58. If the plaintiff does not have a lawyer, the administrative department should provide advice on formal aspects of the application. In justified cases, *legal aid* should be available to plaintiffs.

Article 17. Admissibility criteria

59. Article 17 sets out the admissibility criteria for the cases to be heard by the Commission. Paragraph 3 states that a person convicted of a “less grave crime” has the right to appeal to the Commission only if he/she was sentenced to imprisonment and has fully or partially served this sentence in jail. However, an application should also lie where a person has not served any part of a sentence but is legally liable to do so.

60. Article 17.4 provides that only criminal cases in which the first instance decision was delivered between 1 January 2004 and 1 November 2012 can be brought before the TSCMJ. It is unclear why this limitation should refer to first instance decisions. Every legal system deals with miscarriages of justice by way of appeal and it is for the parties to raise grounds for appeal with the higher instance. Only the last instance, which was able to provide a full review of facts and law should be taken into consideration for any allegation of miscarriage of justice by the TSCMJ. Article 17.5 indeed insists on the exhaustion of remedies.

61. As concerns paragraph 5 of this article, the reason for the criteria for admissibility that the person has used in full all judicial instances for appeal seems reasonable. However, the limitations and burden of proof put upon the applicant in the last part of this paragraph are too strict. “If the criminal case was terminated by a first instance court decision without examination on the merits, the complaint shall be found admissible whether or not the plaintiff appealed this decision, provided he/she furnishes sufficient evidence that the plea-bargain agreement had been struck under the delusion, with coercion, violence or threat”. Given that most of these convictions are supposed to be of political character, one would assume such were the reasons for not giving an appeal at the time of the conviction.

62. Another problem relates to the limitation of the temporal scope as such. The preamble to the draft Law refers to the fact that thousands of complaints have been filed stating that between 2004 and 2012 persons were unlawfully or unjustly convicted. As concerns the upper limit of this period there seems to be some incoherence. Article 1.3 seems to presume that the work of the TSCMJ would result in the identification of "systemic causes" and recommendations to prevent such miscarriages in the future. If this is the case, it seems unreasonable to limit the competence of the TSCMJ to cases decided before 1 November 2012 because problems in the judiciary are likely to continue until the systemic causes are addressed.

63. As concerns the lower limit of this time-frame, neither Article 17 nor the preamble of the draft Law provide a justification as to why the miscarriages of justice started on 1 January 2004. These time limits should be either justified, in order not to appear arbitrary, or should be reviewed.

64. The provision in Article 17.5 that the plaintiff has to have exhausted all judicial instances for appeal seems reasonable.

65. The same paragraph makes an exception for cases of plea-bargaining, however: *"If the criminal case was terminated by a first instance court decision without examination on the merits, the complaint shall be found admissible whether or not the plaintiff appealed this decision, provided he/she furnishes sufficient evidence that the plea-bargain agreement had been struck under the delusion, with coercion, violence or threat".* In these cases, the first instance is also the final instance.

66. Plea bargaining indeed raises a number of issues as concerns the judicial scrutiny of the cases. The German Federal Constitutional Court recently held that *"… plea bargains bear the risk that the constitutional requirements are not fully adhered to. However, under the Constitution the legislature is not a priori precluded from permitting plea bargains in order to simplify proceedings. In order to meet the constitutional demands, the legislature deemed it necessary to establish explicit legal requirements for plea bargains, which, while significant in practice, have always remained controversial"* and *"Transparency and documentation of plea bargains are key aspects of the regulatory approach. This is meant to ensure an effective control by the public, the prosecution, and the court of appeals. Notably, the actions in connection with the plea bargain have to be comprehensively incorporated into the – usually public – trial. This fact also confirms that even after a plea bargain, the judges' conviction has to derive from the hearing as a whole. A violation of the duty to provide transparency and documentation will generally render a plea bargain that has nonetheless been concluded illegal. If a court adheres to such an illegal agreement, it will frequently not be possible to exclude the possibility that the judgment was based on this violation of the law."*[8] The inclusion of plea bargaining in the scope of the TSCMJ seems reasonable.

67. Article 17.8 provides that a "*complaint shall be submitted to the Commission within three-month period after the Plenary Commission sits in its first official session. Such a session shall be held immediately after the establishment of the chambers, recruitment of the staff of the Administration department and adoption of the Rules of the Commission, but no later than three months after this law enters into force."*

68. The TSCMJ has to give the plaintiff the opportunity for filing a proper complaint and, as consequence, a longer period for filing complaints would be appropriate. Moreover, the date of the session which triggers the three months period for filing the complaints should be published in the media and in prisons.

[8] Federal Constitutional Court - press release in English language on Judgment 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11, of 19 March 2013: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-017en.

Article 18. Admissibility of Complaints

69. Article 18.4 states that *"The complaint, after having been declared admissible, shall be transferred to the Chairman of the Commission who shall assign it to the chairman of a chamber. The latter shall nominate a member of the chamber in charge of examination of the case on the merits".* The chairman of a chamber should not have discretion in assigning the case to a rapporteur. Case attribution should be done randomly.

Article 19. Examination on the Merits and Preparation of a Draft Report

70. Within a chamber, a Rapporteur shall examine the admissibility complaints in a chronological order, following their dates of introduction (Article 19.1), except when the *"chairman of the chamber may give priority to a complaint, in which case he/she shall take into account first of all the plaintiff's being in detention and the length of the prison term, the plaintiff's age, the plaintiff's state of health, or any other circumstance indicating that a delay in examination may result in causing irreparable damage".* Dealing with the complaints in chronological order only may lead to inefficient case management.

71. Paragraph 4 enables the rapporteur to request *"necessary information from any public and private institutions or from any other person and that these persons shall provide this information within not later than 10 working days after the Rapporteur's request".* This gives strong powers to the TSCMJ and it rapporteurs and it is doubtful whether the TSCMJ should have such powers. The basis of the examination of the question whether there was a miscarriage of justice should be the case-file.

72. Paragraph 5 goes even further and states that in *"case the necessity of preparing a duly motivated report requires additional investigation of an important circumstance of the case, the Rapporteur may send the case materials to the prosecution authorities with a request of conducting necessary investigative actions. In such a case the Rapporteur shall fix in the request a reasonable time limit within which the prosecution authorities shall submit results of additional investigation".* This touches again the question as to whether the TSCMJ should re-open the cases and investigate. The TSCMJ is not a court and the final decision is not made by the TSCMJ but by a court of appeal, which re-opens the case. Consequently, the TSCMJ should not have the same powers as a court. In this respect, the possibility given to the Commission to ask the prosecution authorities to conduct investigative actions goes too far.

Article 20. Examination of the draft report

73. Article 20.2 provides that the regular examination of the cases shall be done *in camera*. This will provide for an efficient procedure. However, the chamber may also invite "*the plaintiff, his/her lawyer or any other person who may detain important information about the case"* to a hearing. Thus the plaintiff will be allowed to participate in a hearing only if invited by the chamber. However, the Public Defender of Georgia (ombudsman) can provide oral observations about the case on his/her own initiative. The Public Defender thus has the right to request a hearing. There seems to be no requirement that the Public Defender acts upon request by the plaintiff or a victim. The role of the Public Defender in the TSCMJ should be reconsidered.

74. On the other hand, there is no provision for an intervention of the possible victim of the crime for which the plaintiff has been convicted. To the extent that only the case-file is examined in the light of Article 6 ECHR, in analogy to a procedure before the European Court of Human Rights, the absence of the involvement of the victim can be justified only if

the victims' rights are safeguarded in the ensuing re-opening of the proceedings before the court of appeal.

75. Paragraph 3 provides that as a result of the examination of the case the chamber shall adopt a report on the existence or absence of a miscarriage of justice, as the case may be. This report must be limited to an assessment of the fairness of the procedure and must not amount to declaring the original court decision illegal. Otherwise, it would not be in accordance with the international standards and with Article 82.2 of the Georgian Constitution which provides that "Acts of courts shall be obligatory for all state bodies…".

76. Article 20 does not clarify whether the report of the Commission can be challenged in court. Given that the report serves as the basis for the reopening of the case before the court of appeal, the Law should state that the report as such is final.

Article 21. Notification of the Report to the Plaintiff

77. Article 21 provides that the report of the Commission shall be sent to the plaintiff. And that *"If the report of the Commission is about existence of a miscarriage of justice, the plaintiff shall be entitled to apply, within two months after the receipt of this report, to the chamber for miscarriages of justice of the competent appellate court which shall review, pursuant to subparagraph (t) of Article 310 of the Criminal Procedure Code, the disputed judgment under the provisions of the same code governing the proceedings"*

78. The current Code of Criminal Procedure does not contain any reference to a "chamber for miscarriages of justice" nor to a subparagraph (t) in Article 310. This means that amendments to the Code are envisaged; these amendments have been submitted neither to the Venice Commission nor to the DJHD.

79. For obvious reasons, the court that reviews the conviction should not be the same as the court that made the impugned decision. How this important principle may be applied in Georgia given the limited size of its judiciary remains to be seen. It is also essential that no special "chamber for miscarriage of justice" be specially created in order to reexamine the cases sent back to the judiciary by the State Commission. The creation of special chambers seems to be contrary to paragraph Article 83.4 of the Constitution of Georgia which provides that the "Creation of either extraordinary or special courts shall be prohibited".

V. Conclusion

80. In its opinion on the provisions relating to the political prisoners in the Amnesty Law of Georgia the Venice Commission concluded that the Amnesty Law failed to comply with "fundamental principles of the rule of law, namely legality (including transparency), the prohibition of arbitrariness, non-discrimination and equality before the law" It further stated that should the Georgian authorities pursue the process which has been started, "Some mechanism which would involve courts has to be found to determine their cases. Criteria to be applied in this mechanism would need to be made public, including any criteria used in the past." The draft Law on the Temporary State Commission on Miscarriages of Justice is intended to provide such a mechanism.

81. The very idea of a process of massive examination of possible cases of miscarriage of justice by a non-judicial body raises issues as regards the separation of powers and the independence of the judiciary enshrined in the Georgian Constitution as well as in international standards. The approach taken by the Georgian authorities to involve a non-judicial body in this process follows their assessment that the entire judiciary and the prosecution service have participated in this alleged massive miscarriage of justice. However, even if the Georgian authorities are ready to go in this direction despite the constitutional hurdles and problems of

principle, there is a red line which must not be overstepped, lest Georgia fail to live up to standards of the Rule of Law: any decision on the determination of criminal charges must be adopted by a court.

82. The Venice Commission and the DJHD do not take a position on whether in fact there were miscarriages of justice in Georgia nor on whether such miscarriages of justice were of a systemic nature and require the creation of this Temporary State Commission. They only intend to provide their contribution with a view to ensuring that the mechanism proposed be as in conformity as possible with the principles of separation of powers and independence of the judiciary enshrined in the Constitution of Georgia. However, the Venice Commission and DJHD wish to stress that it seems difficult to reconcile the rule of law imperatives which must apply to any process of re-examination of criminal cases with the specific features of today's Georgia, in particular the extremely polarised political context and the limited size of the judiciary. In this context, the Venice Commission and DJHD underline the very different contexts in which the other criminal cases review commissions which exist in Europe, operate.

83. On this basis, the Venice Commission and the DJHD recommend that:

1. The final decision in cases which are reopened has to remain with the judiciary only. Therefore, the term "review" in Article 1 should be replaced with a more neutral term like "examine" or similar;
2. The fact that on the basis of a decision of the TSCMJ the plaintiff is entitled to ask for the reopening of the case with an appeal should be set out right in the beginning of the law (Article 1);
3. The TSCMJ should concentrate on individual cases and not report on systemic causes of miscarriage of Justice;
4. An activity report should be submitted to the authorities only upon final completion of the Commission's task;
5. The members of the TSCMJ should have only functional immunity (Article 4);
6. Rules on non-disclosure should be added in Article 4;
7. The TSCMJ should have a single non-renewable term (Article 6) but Parliament should be able to terminate the mandate of the TSCMJ earlier if there are no more cases to be dealt with;
8. Members of the TSCMJ should not be nominated by parliamentary factions and should not be members of political parties (Article 6) and a public call for candidates should be made ;
9. The Commission should be able to give advice or guidance to the applicant; In justified cases, legal aid should be available to plaintiffs ;
10. The temporal competence of the TSCMJ should be either justified or reviewed (Article 17§4);
11. The time limit for submitting complaints should be prolonged and the starting date for these submissions should be published in the media and in prisons (Article 17);
12. The cases should be attributed randomly, both to the chambers and the rapporteurs in the chambers (Article 18);
13. The TSCMJ should not be able to ask the prosecution service for assistance (Article 19);
14. The TSCMJ should only adopt a report, which states that the TSCMJ has a 'reasonable suspicion' about the existence of a miscarriage of justice and the existence of a miscarriage of justice shall only be established by the appellate court, which is empowered to reopen the proceedings on the basis of the report of the TSCMJ (Article 20);
15. The establishment of a special "chamber for miscarriages of justice" would be contrary to the constitutional prohibition of extraordinary courts.

84. The Venice Commission and the DJHD remain at the disposal of the Georgian authorities for assistance in this and other areas.