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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS  
BY THE SUPREME COURT  
OF GEORGIA**

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

**Judiciary's Comments**  
**27.05.2013**

**Introduction**

The Government of Georgia plans to introduce the draft law on Establishing the Temporary State Commission on Studying the Miscarriages of Justice. The Commission will be established for the period of 3 years and will review “the cases for which the trial court has passed a judgment during the period from January 1, 2004 until November 1, 2012”.

The Georgian Government's intention to introduce the draft law raises many question marks. There are number of controversial aspects to the draft law that deserve scrupulous examination by all parties concerned in order to avoid potential hazards that could undermine rule of law principles embedded in the Georgian legal system.

Below you will find comments of the judiciary on the draft law.

**Is there a need to establish such a Commission?**

The Commission, as anticipated, expects to review the cases that have already been adjudicated by the courts. It is highly controversial that there should be an extra-judicial body established for this purpose as it will essentially duplicate functions of the judiciary itself. Moreover, respective Georgian legislation is in line with the European standards of fair trial and allows review of court decisions based on the newly/freshly discovered evidence.

According to the Chapter XXVII of the Criminal Procedure Code of Georgia, parties to the case have the right to apply to the court with the request to review the case based on fresh evidence regardless of time that passed after the ruling was delivered. The Article 310 of the Chapter XXVII provides the grounds, which can serve as a basis for the party to file a relevant application to the court to review the case.

Having said this, in order to avoid a negative influence on the judiciary, it is essential that only Judiciary remains authorized to reconsider the cases. The independence of Judiciary is a foundation stone of rule of law in any country as it contributes to building up a culture of legal certainty.

Reconsideration of court decisions can only be allowed in compliance with terms set out by the law. Due to this reason, existing legislation allows review and reconsideration of court decision only in cases when it is explicitly permitted by the law. This is duly established by the Article 84.5 of the Constitution of Georgia which states that: “the decision of the court may only be abolished, changed or suspended by the court in accordance with law”.

In addition, special interest has to be attached to the opinion of the European Court of Human Rights with regard to similar commissions and chambers in UK, Norway and Russia.<sup>1</sup>

Namely, European Court of Human Rights in case *Ryabykh v. Russia*<sup>2</sup> made the following definition:

“...One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question.

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<sup>1</sup> The legislation of UK and Norway allows the possibility of reconsideration of the miscarriage of justice through the special Commissions only in criminal cases, but in Russia it covers criminal, civil as well as administrative cases.

<sup>2</sup> *Ryabykh v. Russia*, no. 52854/99, § 51-52.

Legal certainty presupposes respect for the principle of res judicata that is the principle of the finality of judgments. This principle underlines that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.”

### **Independence and Impartiality of the Commission**

According to the draft law, the members of the Commission will be elected by the rule (members will be elected by 2/3 of votes and if the Parliament fails to fill the vacant seats then simple majority rule will apply) favoring parliamentary majority.

This procedure endangers the independence and impartiality of the Commission and creates prerequisites for exerting external political influence on it. This in turn goes against the principle of balance of powers.

Moreover, unless there are proper legal safeguards provided, the Commission in its current status can become an instrument of retribution against judges. This will weaken the judiciary and leave it at the mercy of political decisions.

### **Terms**

It is also alarming that the commission will have mandate to review the cases adjudicated in the period of January 1, 2004 - November 1, 2012. **This very fact leads to the conclusion that the move is guided solely by political motives.** Therefore, if established, the Commission should extend its authority to review the court decisions adjudicated prior to January, 2004.

Furthermore, it is questionable that the Commission will be able to reach its statutory goals/objectives provided that it will only be operational for 3 years with a possible 1 year extension. Taking into consideration the aforementioned, it is highly doubtful that the Commission will be an effective body.

### **Definition of the “Miscarriages of Justice” (Article 2)**

The Draft Law enables the Commission to hear the case if the guilty verdict is “clearly unsubstantiated”. By doing so, the Commission provides a legal assessment of a Court decision, which falls under the exclusive competence of the judiciary itself.

Hence, a final decision of the Commission may only serve as a confirmation of the newly established/revealed circumstances and shall in no way present a binding assessment of a previously adopted Court decision.

In addition, the term “miscarriages” needs clear definition. The elements “neglected or did not duly evaluate the evidence”, “evaluation of an impartial observer” and “reasonable doubt” are open to a wide range of interpretation that can be used by the political power to influence the judiciary.

### **Special Chamber**

According to the Article 21 of the Draft Law, a plaintiff may file a lawsuit based on the decision of the Commission to the Chamber on Miscarriages of Justice which will be specifically created within the Appellate Court of Georgia. It is important to note that the Draft Law does not provide any rule or guidance on how the mentioned Chamber will be formed.

In addition, it must be noted that the Article 83(4) of the Constitution of Georgia prohibits the creation of special courts. Due to its temporary, special and politicized nature, the Judiciary reckons that the creation of the special Chamber is in contradiction with the Constitution of Georgia.

### **Plea Agreements**

In addition, we consider it unreasonable to extend the authority of the Commission to review cases involving plea agreements since pertinent Georgian Criminal Procedure legislation (see annex 1) provides sufficient guarantees to ensure that the plea agreements are concluded with full consideration of defendant's rights.

### **Annex 1**

#### **Criminal Procedure Code of Georgia**

##### **Article 210 Concluding a Plea Agreement**

1. Plea agreement shall be concluded with a prior written consent from a supervisory prosecutor.

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4. It is prohibited to enter into a plea agreement without participation of a defense counsel and the defendant's prior consent to it.

5. It is prohibited to enter into such plea agreement which limits the defendant's constitutionally guaranteed right to request prosecution of relevant people in cases of torture and inhuman or degrading treatment.

##### **Article 212 Review of a Prosecutor's Motion to Render a Judgment without Substantial Consideration of a Case**

1. A plea agreement must be concluded in writing and shall be approved by the court. A plea agreement must be reflected in the court judgment.

2. The court shall make sure that the agreement is reached without violence, coercion, deception or upon other illegal promise, is voluntary and the defendant was given an opportunity to receive qualified legal assistance.

3. Before approving a plea agreement the court must make sure that:

- a) The defendant fully acknowledges the nature of the crime he is charged with;
- b) The defendant fully acknowledges possible sentence for the crime to which he/she pleads guilty.
- c) The defendant is aware of all requirements of the law, in connection to the plea agreement, and the guilty plea.
- d) The defendant acknowledges that if the court does not approve the plea agreement, it is prohibited to use information provided by the defendant under the plea agreement against him in the future.
- e) Defendant acknowledges that he/she has the following constitutional rights:
  - i. to a defense counsel;
  - ii. right to reject a plea agreement;
  - iii. right to have his case examined in a substantial hearing by the court;
- f) The plea agreement is not a result of coercion, intimidation or other promise to a defendant, which exceeds the scope of a plea agreement.
- g) The defendant agrees with the factual grounds of the guilty plea.
- h) All terms agreed upon by the defendant and the prosecutor are reflected in writing in the plea agreement.
- i) The Defendant and defense counsel are fully familiar with the case materials.

4. Before approving plea agreement the court must get confirmation from the defendant himself/herself, that torture, inhuman or degrading treatment was not exercised on the defendant from the police or other law enforcement agency representatives. The judge shall in addition inform the defendant that should the defendant decide to file a complaint about being subjected to torture, inhuman or degrading treatment, this will not hold up the plea agreement which was concluded in compliance with the law.

5. The judge shall decide on the plea agreement based on the law and is not required to approve the agreement reached by the prosecutor and the defendant