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**BUREAU OF THE CONSULTATIVE COUNCIL
OF EUROPEAN JUDGES
(CCJE-BU)**

**Comment on the draft Law of Georgia
“Establishing the Temporary State Commission
on Studying the Miscarriages of Justice”**

Document prepared by the Bureau
of the Consultative Council of European Judges

INTRODUCTION:

The President of the Supreme Court of Georgia has forwarded the draft of a Law on Establishing the Temporary State Commission on Studying the Miscarriages of Justice to the Consultative Council of European Judges (CCJE) and requested an opinion of the CCJE.

The Bureau of CCJE has studied the draft, which was provided in an English translation. The following comment is based on this draft only. It was not possible to do an in-depth study of the respective procedural codes. The Bureau of CCJE is unable to consider any political or historical background.

CONTENT OF THE DRAFT LAW:

The objective of the law is to establish a commission, which would be entrusted with studying miscarriages of justice and supporting their elimination. "Interested persons" will be enabled to claim that a miscarriage took place in the period from 2005 to September 2012 in criminal procedures regarding "serious or especially serious crime" or cases with sentences where there had been detention or in civil or administrative procedures regarding a value of the subject of the dispute of more than 100.000 GEL. The commission will examine the relevant case and will have the power to initiate a review by the court, which may revise the judgment on account of newly revealed circumstances (Article 1 and 12),

The Commission is composed of 15 "recognized specialists of law" elected by the majority of members of the parliament (Article 4). Any interference in the activities of the Commission is a crime, and nobody has the right to request a report from a member of the Commission (Article 3).

Two basic problems can be identified:

1.) Legal Finality an Element of the Rule of Law:

An essential element of the rule of law is legal finality. People should be able to trust in the inviolability of final court decisions (*res judicata*).

- Recommendation 2012/10 of the Committee of Ministers of the Council of Europe on Judges: Independence, Efficiency and Responsibilities (2010), para 17:

17. With the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions.

- Opinion No 13 of the Consultative Council of European Judges on Enforcement of Judicial Decisions (2010), para 10:

10. Decisions of the Court show that, in some cases, legislative or executive powers have attempted to influence enforcement through refusal or suspension or denial of resort to the police. They also have interfered in pending litigation by enacting provisions, often declared as being of a retroactive or interpretative nature, aiming at changing the foreseeable outcome of one or more court cases or introducing new remedies for their review.

It is a common provision in procedural laws that after a decision of the court of final appeal the possibilities of reviewing this decision or of reopening the procedure, which led to this decision are limited to very exceptional circumstances. Procedural codes usually only permit such extraordinary steps if the procedure or the decision originated in a criminal act of one of the participants (party, witness, expert, judge) or where is fresh evidence or facts. In most systems the criminal offence has to be established before the procedure of review or renew can start. In most countries such a review can only be initiated by an authority within the judicial system e.g. the procurator general. In any case the decision if a case will be renewed or not is done by a court.

The proposed draft law is not apparently intended to be a general procedural law which would be universally applicable. In fact it derogates from general procedural law and applies only to certain types of cases within a certain timeframe.

The review and reopening of cases which had become legally final and binding should only be possible in exceptional circumstances. Procedural codes can contemplate such a procedure, if in a particular case there has been a serious miscarriage of justice. Only the parties of the case and not any "interested person" should have the right to ask for a review (Article 1 point 2 versus Article 13 point 1). The decision must be taken by a court.

The term "miscarriages" needs clear definition. Article 1 para 1 gives no definition. The draft should state that only "miscarriages" as defined in Article 16 can lead to an activity of the Commission. Even with this clarification the definition of "miscarriages" which are enumerated in Article 16 give too great range of discretionary powers.

The elements "neglected or did not duly evaluate the evidence", "evaluation of an impartial observer" and "reasonable doubt" in Article 16 para 2 subpara aa are open to a wide range of interpretation. These broad, even vague terms can easily be used by the political power to influence the judiciary.

The same goes in some respect to the para 2 subpara ab and b especially for the terms "gross violation and obvious violation" and para 3.

2.) Independence of the Judiciary

The Universal Declaration of Human Rights (Article 10) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6) guarantee for all the decisions by an independent and impartial court. This requires independence from all external influences especially from the other powers of the state. The division and balance of powers of the state constitute fundamental principles of every democratic state and of the rule of law.

As far as the independence of the judiciary as opposite the other powers of state is concerned, several international legal documents underline this necessary international standard e.g.

- United Nations Basic Principles on the Independence of the Judiciary (1985) principles 1, 2 and 4.

1. *The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*

2. *The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*

4. *There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary in accordance with the law.*

- Recommendation 2012/10 of the Committee of Ministers of the Council of Europe on Judges: Independence, Efficiency and Responsibilities (2010), paras 16 and 17:

16. *Decisions of judges should not be subject to any revision other than appellate or reopening proceedings as provided for by law.*

17. *With the exception of decisions on amnesty, pardon or similar measures, the executive and legislative powers should not take decisions which invalidate judicial decisions.*

- Opinion No. 13 of the Consultative Council of European Judges on Enforcement of Judicial Decisions (2010), paras 11, 12 and 13:

11. *Decisions of the Court show that, in some cases, legislative or executive powers have attempted to influence enforcement through refusal or suspension or denial of resort to the police. They also have interfered in pending litigation by enacting provisions, often declared as being of a retroactive or interpretative nature, aiming at changing the foreseeable outcome of one or more court cases or introducing new remedies for their review.*

12. *The enforcement of a decision must not be undermined by extraneous intervention whether from the executive or the legislator by imposing retroactive legislation.*

13. *The very notion of an "independent" tribunal set out in Article 6 of the ECHR implies that its power to give a binding decision may not be subject to approval or ratification, or the decision altered in its content, by a non-judicial authority, including the Head of State. All branches of states should therefore ensure that the legal provisions providing for the independence of courts, existing in their constitutions or at the highest level of their legislation, are construed in such a way that they call for*

prompt enforcement of judicial decisions with no interference of other powers of the State, with the sole exceptions of amnesty and pardon in criminal matters. The suspension of enforcement of a judicial decision may only take place by way of another judicial decision.

- and others.

The Commission, as contemplated in the draft, exercises such an external influence. Its composition is determined by a simple majority of the parliament. This puts the ruling majority in a position to influence judgments and creates the danger of an infringement of the independence of justice and of the principle of the division and balance of powers.

CONCLUSIONS:

- 1.) The introduction of this extraordinary review of court decisions violates the principle of *res judicata*, which is an essential element of legal certainty and finality and the trust in the judicial system.
- 2.) Any extraordinary procedure which results in the review and reopening of a final and binding judicial decision must be enshrined in a procedural law, which is universally applicable and is not confined to a particular type of case or a particular time-frame.
- 3.) A review should be limited to exceptional circumstances in a particular case in very well defined instances. Such miscarriages have to be defined in a precise way. As indicated above the present draft is not precise enough, which gives broad scope for interpretation and the exercise of a discretionary power.
- 4.) The establishment of a Commission to initiate a review and the reopening of court procedures is an external influence on the judiciary. At the least the decision to have a review must be taken only by a court.
- 5.) The Commission which is elected by a simple majority of the members of the Parliament opens up the possibility of direct political influence on the judiciary and infringes the independence of the judiciary and the principle of division and balance of powers.
- 6.) The argument that the proposed law should increase the trust in the judiciary is not accepted. The violation of the principle that final and binding judgements should be respected and the strong influence of the political system on the commission may cause just exactly the opposite. Thus trust in the judicial system may be weakened and not increased.