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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT LAW

ON TEMPORARY STATE COMMISSION

ON MISCARRIAGES OF JUSTICE

OF GEORGIA

Preamble

Whereas 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;

Whereas huge majority of judicial judgments against such persons have become *res judicata* and under the current Law of Georgia there is no legal mechanism for appeal;

Whereas 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;

Keeping in mind, inter alia, the Venice Commission Opinion #710/2012, para. 59, adopted in its 94th Plenary Session;

Pursuing the objectives of providing for the review and correction of possible miscarriages of justice and of establishing the culture of rule of law and fairness;

And having been guided by the Constitution of Georgia and international human rights instruments;
Parliament of Georgia adopts this law as a temporary but absolutely necessary legislative measure.

Chapter 1. General Provisions

Article 1. Objectives of the Commission

1. A Temporary State Commission to review miscarriages of justice (hereinafter referred to as "the Commission") shall be constituted by this law.
2. Considering the complaints of persons defined in paragraph 1 of Article 17 of this law, the Commission shall examine the circumstances set forth in such complaints and conclude the existence or the absence of a miscarriage of justice.
3. Besides considering complaints, 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.

Article 2. Definition of the Miscarriage of Justice

For the purposes of this law the existence of a miscarriage of justice shall be considered established, if a diligent review of the circumstances of the case would lead an objective observer to conclude that:

- a. The conviction delivered after the examination of the case on the merits is manifestly ill-founded because an evidence which, in view of an objective observer, would give rise to a reasonable doubt that the accused person may have not committed the imputed crime had been either disregarded or not properly considered during the trial, or there is no sufficient irrefutable and legal evidence in the criminal case-file which would convince an objective observer beyond reasonable doubt that the accused person may have committed the imputed crime;

b. During the trial of the case there was a manifest and grave breach of the Criminal Procedural Law and/or the rights enshrined by the European Convention on Human Rights, which substantially influenced the outcome of the case;

c. While confirming the conviction as a result of a plea-bargain, the judge manifestly disregarded the court's obligations provided for in Articles 212 and 213 of the Criminal Procedure Code or Articles 6793 and 6794 of the Criminal Procedure Code of 1998.

Article 3. Legal Basis for the Commission's Activities

In its activities, the Commission shall be governed by the Constitution of Georgia, the Criminal Procedure Code of Georgia, other relevant legislation, the European Convention on Human Rights and other relevant international instruments, as well as the principles established by the European Court of Human Rights case law.

Article 4. Independence, Immunity, Principles

1. The Commission shall be independent and any influence on it or any interference with its activities to have any effect on its decisions shall be forbidden and punished by law.

2. Any form of communication with a member of the Commission not envisaged by this law with respect to any pending complaint is forbidden.

3. No one is entitled to hold a member of the Commission accountable for any specific case unless the member breached rules established by Law.

4. 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. This provision shall not apply in cases where a member of the Commission is caught in the act of committing a crime, which fact shall be notified immediately to Parliament. If after having received such a notification, Parliament does not give its consent, the arrested or detained member shall be immediately released. Parliament shall make its decision under the proceedings envisaged by its Rules.

5. A member of the Commission shall be entitled not to testify about the fact disclosed to him/her as to the member of Commission.

6. The Commission shall review the cases impartially and fairly. The Commission's reports shall be legal and duly reasoned.

Article 5. Publicity, Annual and Final Reports

1. Immediately after the commencement of its activities, the Commission shall create its own webpage, where information on the Commission activities, its decisions, reports, opinions and recommendations shall be published.

2. At the end of each year, also upon completion of its activities, the Commission shall adopt at its plenary session a report of activities. Such reports shall be made public, including on the Commission's webpage.

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

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

1. The Commission 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 Commission shall terminate its activities by a resolution of Parliament.
2. The Commission shall consist of 9 members.
3. Members and the Chairman of the Commission, candidates of which are nominated by parliamentary factions, shall be elected by Parliament for the period equal to the Commission's term of office with a majority of two-thirds of all members of Parliament within 4 weeks after the entry into force of this law. Parliament shall vote for each candidate separately. 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. Elections of the members and the chairman of the Commission shall be governed by the regulations laid down in the Rules of Parliament.
4. The member of the Commission shall be a Georgian national aged at least 30, shall have a high legal education, be of high moral character and be a specialist of criminal law with recognized competence. He/she shall also satisfy, with his/her reputation, the necessary standards to occupy the high functions of a Commission member.
5. The member of the Commission shall not be a member of a political party. Any person elected to sit in the Commission shall terminate immediately such a membership.
6. Functioning of the Commission shall be governed by the Rules adopted by the Plenary Commission.

Article 7. Incompatibility

The work of a member of the Commission shall be remunerated. The Commission member's office is incompatible with any other paid activity, except for scientific and academic work.

Article 8. Early Termination of the Term of Office

1. The term of office of a Commission member shall be terminated before expiration if:
 - a) the member loses Georgian citizenship;
 - b) the member has not fulfilled his/her duties for a month;
 - c) a conviction against the member has become final;
 - d) the member has been declared incapacitated, missing or dead by the court;
 - e) the member holds an office or engages himself/herself in an activity which is incompatible with the Commission member's office within the meaning of the present law;
 - f) the member files a letter of resignation with the Chairman of the Commission;
 - g) the member died.

2. The term of office of a Commission member shall be terminated by the resolution of Parliament to be adopted with the majority of all members.

3. A new member to replace the member whose term of office has been terminated before expiration because of one or more reasons enumerated in the paragraph 1 above, shall be elected by Parliament in accordance with the provisions of Article 6 of this law. The new member shall hold office for the remainder of his/her predecessor's term.

Article 9. Plenary Commission

1. The Plenary Commission shall consist of all the members of the Commission and shall be headed by the Chairman of the Commission.

2. The Plenary Commission shall adopt opinions and recommendations referred to in paragraph 3 of Article 1 of this law, approve the Rules of the Commission as well as the Commission's reports in cases envisaged in paragraph 5 of Article 20 of this law, and fulfill other duties defined by law.

3. Draft opinions and recommendations referred to in paragraph 3 of Article 1 of this law shall be submitted to the Plenary Commission by the chambers.

4. The 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.

Article 10. Chairman of the Commission

1. Activities and work of the Commission shall be led by the Chairman of the Commission, who sits as a member in one of the chambers.

2. The Chairman shall assign complaints to the chambers following their introduction date and speciality, supervise the Administration department and perform any other function as defined by the Rules of the Commission.

Article 11. Chambers

1. Three criminal chambers shall be formed within the Commission.

2. A chamber shall consist of three members who sit in it for a one-year period. The Plenary Commission shall determine the members to sit in different chambers by lot.

3. The Plenary Commission shall elect the chairmen of chambers, candidates of which shall be nominated by the Chairman of the Commission or by a group of three members of the Commission.

4. The chamber shall make decisions by the majority of its members.

Article 12. The Administration department

1. From the organizational and technical point of view, the Commission shall be assisted by an Administration department, the staff roster of which shall be approved by Parliament based on a proposal of the Chairman of the Commission within an eight-week period after this law enters into force.

2. The Administration department shall be managed by its head. The structure and rules of proceedings of the Administration department shall be laid down in the Rules of the Commission.

Article 13. Conflict of Interests

1. A member of the chamber shall not take part in examination of a complaint at any stage of proceedings, if he/she had considered it in the past as a judge, prosecutor, investigator, witness, expert, lawyer, or representative, or if there is any other circumstance that may cast doubt upon his/her objectivity and impartiality.

2. If there is any circumstance set forth in paragraph 1 of this Article, the member of the chamber shall step down or the plaintiff may apply for this member to withdraw. The request for withdrawal shall be examined and a decision shall be made by the Chairman of the Commission within 3 days of its reception.

3. If the request referred to in paragraph 2 above is granted, the Chairman of the Commission shall assign another member of the Commission to sit in the chamber to replace the member withdrawn for the period of consideration of the given case.

4. If the request aims at the withdrawal of the Chairman of the Commission, it shall be examined and the decision shall be made by the Plenary Commission under the rules set forth in the two preceding paragraphs.

Article 14. Budget of the Commission

The budget for the first year of the Commission work shall be submitted by the Chairman of the Commission and adopted by Parliament within an eight-week period after this law enters into force. The subsequent yearly budgets shall be adopted under the same rule, three months prior to expiration of the previous budget year.

Chapter III. Examination of Complaints

Article 15. Rules for Submission of Complaints

1. A complaint shall be filed in writing and shall not exceed 10 printed pages. It shall contain the following:

- a) the name and surname of the author of the complaint, his/her procedural status, personal ID number, official address and actual residence, contact telephone number;
- b) the name of the court which has delivered the disputed judgment and the date of its delivery; if several court decisions exist, the same information shall be presented for each of them in a chronological order;
- c) the circumstances testifying that complaint meets the requirements of Article 17 of this law;
- d) the arguments and evidence in support of the plaintiff's allegations.

2. The complaint shall be accompanied by copies of each court decision given in the case and other necessary materials, if any.

Article 16. Stages for Examination of Complaints

Examination of a complaint shall go through 3 different stages:

- a. Examination of admissibility;
- b. Examination on the merits and preparation of a draft report;
- c. Consideration and adoption of the report.

Article 17. Admissibility Criteria

A complaint shall be found admissible if it meets all of the following criteria:

1. Complaint shall be submitted in writing by a person who considers being a victim of a miscarriage of justice in a criminal case conducted against him/her (hereinafter referred to as "the plaintiff"). If the plaintiff is dead, his/her close relative—spouse, divorced spouse, unmarried partner with whom the plaintiff has lived in a common household for the last two years before the death, child, adopted child, parent, adopter, sister or brother - may lodge the complaint. The complaint may also be filed by the plaintiff's or his/her close relative's lawyer, in which case a power of attorney certified by a notary shall be presented.
2. If a complaint has already been found inadmissible or examined on the merits, the plaintiff shall not be entitled to file a new complaint based on the same facts and legal arguments, or if it is essentially the same as the previous complaint.
3. A person may apply to the Commission in case of conviction for a grave or most grave crime. A person convicted of a less grave crime has the right to apply to the Commission only if he/she was sentenced to imprisonment and has fully or partially served this sentence in jail.
4. The Commission shall deal with the complaint related to a criminal case on which the first instance court judgment or decision was delivered within the period from January 1, 2004 to November 1, 2012.
5. A complaint shall be filed only if the matter had previously been subject of examination by all judicial instances according to the rules defined by law. 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.
6. The criminal case which was examined on the merits by all judicial instances shall not give rise to a complaint unless the plaintiff requested before higher courts that the first instance findings about his/her guilt be replaced by an acquittal.
7. The Commission shall not consider a complaint which is being at the same time subject of examination by a court, including under reopening proceedings with regard to newly discovered circumstances.
8. 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.

Article 18. Admissibility of Complaints

1. If the complaint meets all the requirements set forth in Article 17 of this law, it shall be found admissible and the Administration department shall register it in the list of cases. In case of the contrary the complaint shall be found inadmissible and the plaintiff shall be notified thereof in writing no later than three months after the introduction of the case.

2. The decision on inadmissibility shall be final.
3. Where the case does not satisfy the requirements of Article 15 of this law and this makes it impossible to verify the compatibility of the complaint with the conditions set forth in Article 17 above, the head of the Administration department shall inform the Plaintiff thereof within one month after the introduction of the complaint and grant him/her a reasonable time limit in which necessary information and/or arguments shall be presented. In the absence of a reply, or in case the plaintiff fails to present the materials requested within the fixed time limit, the complaint shall be declared inadmissible and the plaintiff shall be notified thereof in writing.
4. 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 (hereinafter referred to as "the Rapporteur").
5. If, after the complaint had been declared admissible, it comes to the chamber's knowledge that there were grounds for finding it inadmissible, the chamber shall terminate the examination of the case notwithstanding the stage of the proceedings and shall strike it out of the list of cases.

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

1. The Rapporteur shall examine the admissible complaints in a chronological order, following their dates of introduction.
2. 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.
3. In order to examine the complaint, the Rapporteur shall retrieve the case materials from the relevant court. The court shall submit the case materials within not later than 2 weeks after the Rapporteur's request.
4. The Rapporteur shall be entitled to retrieve any necessary information from public and private institutions or from any other person who shall provide this information within not later than 10 working days after the Rapporteur's request.
5. 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.
6. If the Rapporteur concludes that the evidence already examined by the court requires reexamination he/she shall include this opinion in the draft report. The Rapporteur may also conclude that the court decision about inadmissibility of an evidence having crucial importance to the outcome of the case, or the court's refusal to examine such evidence are not based on solid ground.
7. After having examined the case with due diligence, the Rapporteur shall determine whether any circumstance set forth in Article 2 of this law exists and shall submit to the chamber a motivated report about existence or absence of a miscarriage of justice in the case.

Article 20. Examination of the draft report

1. The relevant chamber of the Commission shall examine and shall approve or reject the draft report presented by the Rapporteur.
2. The draft report shall be examined by the chamber sitting in camera. If necessary, the chamber may invite to its session the plaintiff, his/her lawyer or any other person who may detain important information about the case. The chamber may also invite as amicus curiae a specialist with recognized competence in law notwithstanding his/her nationality or a non-governmental organization in order to hear their expert opinions regarding the complaint under consideration. Upon the chamber's request or on his/her own initiative, the Public Defender of Georgia may also provide his oral observations about the case. The expert involved in the case as amicus curiae and the Public Defender of Georgia may also submit their observations in writing.
3. As a result of the examination of the case, the chamber shall adopt one of the following reports pursuant to the provisions of Article 2 of this law:
 - a) report on existence of a miscarriage of justice;
 - b) report on absence of a miscarriage of justice.
4. The report of the chamber shall be duly motivated. The report of the chamber shall take form of the report of the Commission.
5. In case the chamber rejects the draft report presented by the Rapporteur, the chairman of the chamber shall prepare a new report with the opposite findings or charge a member of the chamber with drafting such a report which shall be ultimately approved by the Plenary Commission. In this case, the provisions of paragraph 2 of this Article shall apply.
6. A member of the chamber or of the Commission may enclose to the report his/her dissenting opinion.
7. The report of the Commission shall be a public document.

Article 21. Notification of the Report to the Plaintiff

1. The report of the Commission shall be sent to the plaintiff.
2. 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.