OPINION OF
DEMOCRACY INDEX – GEORGIA AND
THE GROUP OF INDEPENDENT LAWYERS
ON
THE LEGISLATIVE PACKAGE ON AMENDMENTS TO THE ORGANIC LAW OF GEORGIA ON COMMON COURTS
07-3/265/10[1]

CONTEXT

When evaluating a legislative package, it is important to find to what extent and degree it implements the recommendation of the European Commission. The explanatory note attached to the draft law[2] states that the purpose of initiating the changes is "to amend the Organic Law on General Courts in order to fulfill one of the priority tasks stipulated in the opinion provided by the European Commission on June 17, 2022, in order to grant the EU membership candidate status to Georgia." The mentioned priority, with respect to the judicial system, implies as follows: adopting and implementing a strategy and action plan for transparent and effective judicial reform; ensuring the full independence, accountability, and impartiality of the judicial system; eliminating shortcomings identified in the process of appointing judges; conducting a substantial reform of the High Council of Justice and appointing members of the High Council.[3]

In response to the above goals, according to the explanatory note, the essence of the draft law is a) to determine the rules for issuing fully or partially depersonalized text of judicial acts adopted as a result of open court hearings as public information in accordance with the decision of the Constitutional Court 1/4/693857 of June 7, 2019, on the case "N(N)LE "Media Development Foundation" and N(N)LE "Institute for Development of Freedom of Information" v. the Parliament of Georgia"; b) to prevent the participation of any biased member in the procedure dedicated to the election of judges of the Supreme Court; c) to apply some of the rules established for the appointment of a judge of the Supreme Court to the vacant position of a judge of city/district and appellate courts; d) to allow a candidate member of the Council of Justice to submit an opinion to the Conference of Judges; e) to refine, improve, and specify certain norms.

[1] Draft Law on the Amendments to the Organic Law on Common Courts of Georgia and related bills, accessible only in Georgian language https://info.parliament.ge/#law-drafting/25094

[2] Ibid.

[3] Several draft laws do not have independent content and they have been developed based on amendments to the Organic Law "On General Courts". A large part of the text of this draft law does not change anything in terms of content and has a more technical nature (improvement in terms of structural and legislative techniques, etc.). Therefore, below we will focus on the main innovations proposed by the bills included in the package.

The bill does not comply with the requirement for comprehensive judicial reform set as a priority by the European Commission, nor does it take into account the recommendations of the Venice Commission and the OSCE-ODIHR on increasing the transparency, integrity, and accountability of the Council's activities. The draft law is merely focused on certain fragmentary legislative amendments.

CHAPTER I
EVALUATION OF THE BILL REGARDING THE ISSUANCE OF COURT DECISIONS IN THE FORM OF PUBLIC INFORMATION

The draft law adds Chapter I[1] "promulgation of the text of a judicial act as public information" to the law. The new chapter includes Articles 13[3]-13[5], which regulate the issuance of the text of a judicial act as public information upon the request of an interested person. According to the explanatory card, the purpose of the change is to bring the legislation in line with the decision of the Constitutional Court.[4] The Constitutional Court considered the matter when the courts of general jurisdiction limited the publication and otherwise disclosure of court decisions on the grounds of protecting personal data. The Constitutional Court, in its decision designated for the Parliament a deadline, May 1, 2020, to make relevant changes to the legislation, but the Parliament delayed the enforcement of the decision of the Constitutional Court and has not yet implemented it. On their part, the general courts failed to adhere to the rule of establishing a balance between the rights specified in the decision of the Constitutional Court and did not establish the proper practice of disclosing or proactively publishing court judgments. As a result, access to court decisions in Georgia has been significantly limited since 2019.[5]

In general, it can be assessed that:

- The draft law does not ensure the implementation of the decision of the Constitutional Court requiring the introduction of a flexible mechanism to facilitate the public's timely access to judicial acts.[6]
- The draft law introduces the procedure for disclosing court decisions which in practice will cause undue delays in access to court decisions.

[4] Decision N1/4/693,857 of the Constitutional Court of Georgia of June 7, 2019 on the case "N(N)LE "Media Development Foundation" and N(N)LE "Institute for Development of Freedom of Information" v. Parliament of Georgia".
A brief summary of the Constitutional Court's decision in English is available at the following link: https://www.constcourt.ge/en/judicial-acts?legal=1268&fbclid=IwAR1wQlLB_QSyIjnRCt5yJI6836FvCyTkQUavyClBziE10inYCqx1zC1rrr4

[5] For example, based on a request of the Group of Independent Lawyers, the court refused to disclose the decision on the indictment of the third president of Georgia, Mikheil Saakashvili, on the grounds of protecting his personal data. The refusal was appealed to the general courts, where the request was also not satisfied.

[6] Paragraph 67 of the decision of the Constitutional Court.

- The model proposed by the draft law for the disclosure of court decisions may further overload the already busy courts. This creates the expectation that the courts will not be able to meet the already long deadlines for disclosure proposed by the draft law and even further delay the disclosure of court decisions.
- The draft law does not fully reflect the principles of balance between the rights of publicity and personal data protection, enshrined in the decision of the Constitutional Court,[7] which is necessary to avoid non-homogeneous judicial practices and selective approaches.

The largest part of the draft law concerns the enforcement of the above-mentioned decision of the Constitutional Court, though contains a number of significant gaps:

1. **The bill does not include amendments to the rule of proactive promulgation of court judgments.**

The draft law does not change the rule for proactive publication of the text of judicial acts, which is regulated by current Article 13, Paragraph 3^1 of the Organic Law of Georgia "On Common Courts": "A court decision made as a result of the substantive consideration of the case at an open court hearing shall be fully published on the court's website... the issue whether to disclose personal data of any person named in the court decision shall be resolved in accordance with the law." Leaving unchanged the norm regulating the proactive promulgation of court decisions (Article 13, Paragraph 3^1 of the Organic Law on General Courts) leads to the ambiguity of the existing rule of proactive promulgation of court decisions, and it becomes completely unclear how the practice of proactive publication of court judgments will develop after the adoption of the changes, how court decisions will be published in classified or unclassified form, and what rule will be applied to proactive promulgations.

Despite Article 13, Paragraph 3^1 of the current law being still in force, since May 2020, courts have practically ceased to publish court decisions in both classified and unclassified form (except for decisions of the Supreme Court, which are published in a classified form on the website of the court). Since the above article has not been amended, it remains unknown how the issue of proactive publication of court decisions will be implemented in practice, and whether the rule of data depersonalization will apply to it.

2. **Making a court decision accessible only after it enters into legal force contradicts the reasoning of the Constitutional Court.**

According to the draft law (Article 13^3, Paragraph 2), a court decision may be issued only when the final judgment made by the court on this particular case enters into legal force. This means that the decision of the first instance court can become available only after the case has been considered by the

[7] For example, the standard of balance specified in paragraphs 55 and 69 of the decision of the Constitutional Court can be transferred to the draft law.

appellate and cassation courts, and the decision of the Supreme Court enters into legal force, or the deadline for appealing the decision has expired.

Example 1. Under the proposed regulation, the interim court decision of February 2021 ordering the imprisonment of Nika Melia, the leader of the largest opposition political party, would have become available only after the finalization of the investigation into this case, as well as the merits consideration of the case in all three court instances, and the entry into force of the final decision.

Example 2. According to the proposed regulation, the court ruling on conducting a search-and-seizure investigation in the building of TV Pirveli, known for its criticism against the government, would have become available only after the completion of the substantive consideration of the case in the courts of all three instances and the entry into force of the final decision. The decision on the issuance of the search-seizure ruling was made by the judge in March 2021. The case, for the purpose of which a search and seizure was conducted in the TV company, has not yet been investigated.

This manner of access to court decisions, proposed by the draft law, contradicts the reasoning of the Constitutional Court, where the Court lists down the interests to access court decisions as follows: to exercise public control over the acts adopted by the court in a democratic society; legitimacy of court decisions and public confidence. The Constitutional Court does not link the access to court decision to its entry into legal force.

Prior to the moment when the final decision becomes legally binding, a superior (and in some cases, urgent) interest may arise in obtaining this court decision. In such cases, interested persons will be forced to wait for the final decision of the court to enter into force, when the need to do so may not actually exist. The delayed receipt of public information in certain cases may deprive this information of its meaning and relevance. Ultimately, this may hinder the exercise of the right of access to public information and public control of the judicial system.

3. The bill indiscriminately denies access to court decisions made in closed hearings.

The rule stipulated in the draft law (Article 13^3, Paragraph 3) shall apply if the court has not made a decision to partially or completely close a court hearing. This may also apply to those cases when an interested, informed and conscious decision-making person expresses no interest in protecting the information about him or her from disclosure. Although the Constitutional Court discussed only the availability of decisions made in open court trials, the standard established by the Constitutional Court also implies in itself the availability of court decisions made in closed hearings for the purpose of protecting personal data. In particular, according to the Constitutional Court, unless a person declares

an interest in protecting his or her personal data, then there is no necessity to preserve the confidentiality of personal data reflected in the judicial acts.[8]

In addition, based on the principle of legal certainty, the norm needs to be specified, because, in case of closing a part of the court hearing, the interested party should have access to the part of the judicial act that does not contain the confidential data discussed at the closed trial.

4. **The bill allows the issuance of interim court decisions only after the final judicial act on the case has been delivered.**

The draft law (Article 13^3, Paragraph 5 of the draft law) provides for an inappropriately lengthy procedure for the disclosure of interim court decisions that do not contain personal data and/or information related to a person's health, finances, family life, or other personal details. In addition, according to the draft law (Article 13^5, Paragraph 2), the issue of depersonalizing all judicial acts adopted in a specific case shall be decided simultaneously with the adoption of the final judicial act on the case. Timely access to interim court decisions may and has repeatedly become in practice a matter of legitimate interest, for example, when monitoring the judicial system by non-governmental organizations (the court ruling on conducting a search-seizure in the office of TV Pirveli; the issue of ordering a preventive measure against Ilichova and Melashvili, etc.).

5. **According to the bill, none of the court decisions made before 2023, whether classified or not, can be disclosed until May 1, 2025.**

The draft law provides for an inappropriately protracted procedure (Article 13^4, Paragraphs 2 and 3) for disclosure of court decisions made before May 1, 2023. In particular, a period of one year (until May 1, 2024) has been established for persons wishing to protect their personal data from disclosure to apply to the court with such a request. Within one year after the expiration of the specified period (until May 1, 2025), the court shall consider the application of the interested person and decide on the full or partial classification of personal data in each particular case. Those court decisions in respect of which the interested parties have not demanded the protection of personal data are subject to disclosure without classification after May 1, 2025.

It should be noted that in the period from 2017 to 2020 only, Georgian courts delivered 369,630 final decisions.[9]

[8] Decision N1/4/693,857 of the Constitutional Court of Georgia of June 7, 2019 on the case "N(N)LE "Media Development Foundation" and N(N)LE "Institute for Development of Freedom of Information" v. Parliament of Georgia", II-31.

[9] Statistical data on the performance of georgian coourts is accessible on the web-site of the Supreme Court of Georgia only in georgian language.

Before the above-mentioned procedures are carried out, the draft law (Article 13^4, Paragraph 8) declares the promulgation of court decisions made before May 1, 2023, as inadmissible.

Based on the content of the draft bill, judgments handed down before May 1, 2023, will not be made accessible in either form until May 1, 2025. It should be noted that due to the lack of rules for publishing or otherwise disclosing the court decisions with the protection of personal data, access to court decisions in Georgia has been dramatically limited since 2019. In addition, this rule will also restrict access to those judicial acts in respect of which no one has demanded the protection of the information contained therein from disclosure and there is no necessity to do so.

6. The bill provides for unreasonably lengthy procedure for disclosure of decisions made after May 1, 2023.

As for the disclosure of court decisions made after May 1, 2023, according to the draft law, the judge reviewing a case shall make a decision on this matter along with making final decision on the same case. Before final decision on the case is delivered, the judge shall find out about the true will of the person whose personal data is subject to disclosure.

An inappropriately lengthy procedure is envisaged by the provision of the draft law for the verification of a person's true will (Article 13^5, Paragraph 4). For example, all persons appearing at a court trial must declare their will in a written application within the time period determined by the court (which cannot be shorter than the deadline for the completion of the case hearing), rather than verifying the will of such persons by fixing their will in a protocol of the case in the course of the case hearing. There are other procedures as well that can unreasonably delay the verification of a person's true will.

Another inappropriately prolonged procedure is provided for in the draft law (Article 13^5, Paragraph 5) according to which a court decision to disclose all (interim or final) judicial acts adopted on a specific case shall become effective only after 1 year from the issuance of this decision (if the person refuses to publicize his or her personal information reflected in the judicial act). It is illogical to restrict the right of access to information for such a long period of time if the person does not appeal this decision of the court, because during this period an urgent and supreme interest may arise in receiving such information. It is also not clear why the judgment should not enter into force if it was appealed and the higher instance court uphold the same decision, i.e. confirmed that the disclosure of particular judgement has a priority over the protection of personal data.

The bill envisages an inappropriately lengthy procedure for issuing those court decisions in respect of which there are no grounds to protect personal data. In particular, even when a person gives his or her consent to disclose his or her personal data, the draft law still obliges the judge to consider the matter and make a relevant decision at the end of the case proceedings (Article 13^5, Paragraph 3). This means that even if a person has consented to the disclosure of his/her personal data, an interim decision may

not become available until the legal proceedings are over and the final decision made on the case enters into legal force.

According to the draft law (Article 13^5, Paragraph 6), a court decision regarding the disclosure of a judicial act as public information may be appealed at any time after its entry into force, yet no more than once during two calendar years. Introducing the possibility to re-appeal a judgment multiple times without the requirement to present new circumstances is problematic for the following several reasons:

- It contradicts the principle of legal security, namely the stability and sustainability of judicial acts.
- The draft law does not indicate any circumstances on the basis of which it may be permissible to review a court decision that has already entered into legal force. Even the establishment of the periodical filing a complaint cannot change the situation, which is very vague. It creates the impression that it is possible to file a new complaint after two years on the same grounds including if the first complaint was denied.
- It is unclear whether the limitation is aimed at a complainant or a court judgment, i.e. whether the same complainant can appeal the judgment once in two years or the same judgment can be appealed once in two years.

Chapter II
EVALUATION OF OTHER ARTICLES OF THE DRAFT LAW

7. Excluding a member of the Council of Justice from the process of selecting candidates for the position of judges of the Supreme Court

This novelty (Article 34^3, paragraph 13^1 of the draft law) can be assessed positively in the sense that a member of the High Council of Justice who showed bias, a discriminatory attitude, and/or exceeded the powers granted to him/her by law can be removed from the process of selecting candidates. However, the draft law leaves open the question of what will happen if as a result of the exclusion of a member(members) of the High Council of Justice from the selection process, the quorum necessary for making the relevant decision no longer exists in the Council. Also, the criterion of "creating a threat to the independence of the judiciary" remains vague and provides ample opportunities for a selective approach.

8. Changing the procedure for appointing judges of the district (city) or appellate courts

The draft law (Articles 35 and 35^1) provides that the High Council of Justice shall appoint a person to the vacant position of a judge of a district (city) or appellate court in the manner as it is established for selecting a candidate to be nominated to the Parliament for election to the position of a judge of the Supreme Court.

It is hard to imagine that this step will bring transformative changes in terms of improving the qualifications and integrity of the judiciary of the first instance and appellate courts, since the current practice of selection/appointment of judges of the Supreme Court has already been harshly criticized many times, including in the OSCE/ODIHR monitoring reports.[10] The criteria for the selection of judges established by the current legislation do not meet the European standard of "objective criteria" and needs further improvements.[11] In addition, it is important who and in what manner makes the decision on the appointment of a judge. The current model allows for the appointment of a judge to the position without the involvement of members of the High Council of Justice elected by the Parliament. All decisions are made with the vote of 9 judge and 1 non-judge members ecxluding majority of non-judge members from the decision-making process. It is necessary to develop a model that would exclude the appointment of judges on the basis of an internal corporate decision. In this respect, the draft law does not envisage the implementation of the specific recommendations of the OSCE/ODIHR.[12]

The draft law (Articles 34 paragraphs 3 and 4) lists those candidates for whom the requirements to pass qualification examination and/or graduate High School of Justcie is waived. These candidates are: candidates nominated to the Supreme Court; candidates who have 18 month of prior experience of working as a judge; and those who graduated from the High School of Justice. At the same time the draft law introduces short time frames for the announcment of the competition to fill the judicial vacancies. Considering the closed system for entering the georgian judiciary more lawyers should be freed from requirements to either pass qualification exam or graduate the High School of Justice. Every competition held during past several years demonstrated the severe shortage of candidates and lack of

[10] OSCE/ODIHR Fourth Report On The Nomination And Appointment Of The Supreme Court Judges, August 2021, „The HCJ failed to ensure a broad and inclusive recruitment process, which led to a limited applicant pool. In an encouraging move, the HCJ took measures to ensure open public access to the 43 candidate hearings, which were recorded and made available for viewing online. Unfortunately, in the absence of clear and consistent guidelines set by the HCJ for the hearings, they varied widely in length, structure, and tone, calling into question the equality of conditions for the candidates." Page 4. https://www.osce.org/files/f/documents/4/b/496261.pdf

[11] Group of Independent Lawyers, Selection of Judges in Transitional Democracies, paragraphs 3.2.1. and 3.2.2. https://democracyindex.ge/uploads_script/studies/tmp/phpqcHPDF.pdf

[12] Effective involvement of civil society in the process of selection of judges; aligning the process of appointing judges with the OSCE recommendations; reforming the High Council of Justice in order to increase public trust, and other recommendations.
https://www.osce.org/files/f/documents/4/b/496261.pdf?fbclid=IwAR3PTHwylqYQXRRlAbnsJr9Ctdvfb2h9H5LjLCz2ePBf5ntJCOBAs6i6tJY

new lawyers entering the judiciary from outside the court system.[13] E.g. for 76 vacancies announced by the HCJ in ongoing competition only 21 candidates passed the eligibility requirements.[14]

9. Granting candidate members of the Council the right to address the Conference of Judges

Prior to casting votes, a candidate participating in the procedure for electing a judicial member of the High Council of Justice shall have the right to speak to the Conference of Judges and present his or her visions and opinions on issues related to the exercise of his or her powers if he or she is elected as a member of the Council (Article 65 paragraph 3 of the draft law). Giving candidates this opportunity is a positive but extremely insignificant step to be seen as a part of a substantive reform of the High Council of Justice. If desired, candidates could have addressed the Conference before, and we have seen such precedent in practice. The problem is that the norm does not provide for a proper procedure for its implementation.

The procedure for electing judicial members of the Council should ensure the wide involvement of a diverse body of judiciary (women judges, regional court judges, etc)[15] in its activities, comprehensive rotation of the composition of the Council, and minimization of the influence of those judges who are exercising administrative and non-judicial functions. On the contrary, Article 65, Paragraph 3 of the draft law again retains the possibility of electing a chairperson/deputy through a separate and less competitive procedure. Although the law does not provide for quota system for court presidents, the draft law establishes separate voting procedure designated for court/chamber presidents/deputy presidents which significantly increases the chances for the holders of abovementioned positions to be elected to the HCJ.

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[13] Commission Opinion on Georgia's Apprication For Membership of the European Union, 17.06.2022. page 8.: „The 2020 budget for the judicial system was EUR 32.4 million (0.23 % of GDP). The number of judges (329) and the number of prosecutors (414) is low compared to the European averages of 21 judges/12 prosecutors per 100,000 inhabitants (9 judges and 12 prosecutors per 100,000 inhabitants for Georgia 4). Judges are trained at the High School of Justice, which is assessed as adequate. Prosecutors are trained by the General Prosecutor's Office. The Supreme Court publishes annual statistical data for each year of cases at the common courts of Georgia. The High Council of Justice publishes activity reports covering several years. An integrated case management system is in place, but needs to introduce a statistical element. In terms of efficiency, the disposition time in civil and commercial litigious cases increased to 433 days in 2020, compared to 274 days in 2018. The clearance rate decreased to 87 % (91 % in 2018). The disposition time remains a major concern. The backlog for pending court cases amounts to 4 322 and 746 cases for the first and second instances, respectively." https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-06/Georgia%20opinion%20and%20Annex.pdf

[14] HCJ Decree N1/141, 20.12.2022 accessible in Georgian language http://hcoj.gov.ge/Uploads/2023/1/141-2022.pdf?fbclid=IwAR1rKwrNwMf6TFCrbuIrHybMOdyge7ons8HnRhxPQXpkEeyMg65lT7FmOeI
HCJ Decree N1/130, 25.11.2022 accessible in Georgian Language http://hcoj.gov.ge/Uploads/2022/11/130-2022.pdf?fbclid=IwAR1kG_T7oJ1BbsT-PotaZ53fwijijkYYyUqf1snnm-7FTQ10O0QiATV9eCo

[15] CCJE Opinion N10, 2007 on diverse and territorial representation of the judges in the councils https://rm.coe.int/168074779b

10. Hearing of candidate members of the High Council of Justice at the public session of the Legal Issues Committee of the Parliament

This is not a novelty and the existing practice is reflected in the Rules of Procedure of the Parliament. Although the establishment of the practice at the normative level is a positive step, it cannot be seen as an important step taken in terms of reforming the High Council of Justice.