Opinion of the Coalition for Independent and Transparent Judiciary on the Fourth Wave of Judicial Reform Legislative Package

To Parliament of Georgia

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The Parliament of Georgia is conducting the first hearing on the legislative package of amendments to the Law on Common Courts, and the Civil and Administrative Procedural Codes, which together make up the “Fourth Wave” of judicial reforms.

According to the initiators of the package, the legislative amendments aim at resolving the problems of protracted case hearings and judicial overload. It came to the Coalition □□ attention that later on, and within the Fourth Wave, amendments are

planned regarding judicial discipline, the mandate of the High Council of Justice (HCOJ) and the High School of Justice. We would like to stress that the Coalition supports the continuation of systemic reforms in the judiciary and hopes that the Fourth Wave amendments address the challenges stemming from the informal and damaging management of the judicial system, and aim at strengthening individual judges and increasing accountability.

At the same time, the Coalition negatively assesses the process of working on the Fourth Wave, which was conducted in isolation, without involving professional groups or civil society organizations. Given the previous experiences with judicial reform efforts, the reasons for excluding organizations with many years of experience in monitoring courts and the High Council of Justice, as well as working on reforms and judicial strategy, are unclear to us. The Coalition hopes that the work on other legislative amendments of the Fourth Wave will be made more open and participatory.

Below we present the Coalition □□ opinion on the initiated amendments. The Coalition commends certain changes proposed by the amendments that will alleviate the problem of protracted justice. Among these are the issues of: admissibility of evidence at the preparatory hearing; use of security measures during the appeal; sending copies of case materials to Appeals Courts; usage of electronic signatures and electronic submission of documents; and widening the scope of the cases that can be heard by a single judge.

Still, the proposed drafts contain changes that may negatively affect the realization of the right to fair trial or could be detrimental to independence of the judiciary and public trust in the judiciary.

Widening the scope of work for the court personnel (Magistrate civil servant)

The Coalition does not consider it prudent to give the magisters the authority to administer justice and to introduce this as a mechanism for ensuring speedy justice.

According to the current Civil Procedural Code, a magistrate □□ work is confined to hearing undisputed cases. The proposed amendments widen the magistrate □□ scope to hearing certain disputed cases as well. The Coalition does not consider it

appropriate to delegate the administration of justice to court personnel (magistrate civil servant) and does not support the introduction of this as a mechanism for fast justice. Additionally, the Coalition stresses that the draft amendments do not regulate the appointment of the personnel, their term and other matters of great importance. Widening the personnel □□ authority is unjustifiable in the legal-constitutional and practical sense.

According to the draft provision □□ explanatory note, the proposed change aims to avoid protraction of case hearings, diminish the case backlog, and aid speedy justice. However, it remains unclear why the widening of the court personnel □□ authority is necessary and how would it aid the objective of timely delivery of justice. Giving the authority to administer justice to court personnel without any guarantees of independence, rather than to a judge, is unwarranted. Rather than increasing the number of judges, the amendments call for the increase of court personnel numbers and new regulation of this position, which requires new regulation of several interconnected issues. The explanatory note does not clarify what is the reason for the preference of this approach over increasing the number of judges. Such substantiation is particularly crucial given that the draft amendments introduce a completely novel mechanism, the need for which must be adequately justified prior to adoption.

In general, for the objective of speedy justice, whether a judge or court personnel administers justice is irrelevant. Hence, it remains unclear what additional benefits expanding the authority of court personnel would entail.

The Coalition considers that endowing court personnel with the function of administering justice is not justified, since the introduction of this mechanism for hearing disputes would not be effective in reaching the objective of speedy justice. Additionally, this would be associated with greater difficulty, compared to at least a marginal increase of the number of judges. The court personnel do not enjoy all of the guarantees of independence that the legislation affords to the judges.

According to the draft amendments, the decisions of the court personnel would be appealed in the same court of first instance, and then in the Court of Appeals. This adds an extra step to the existing process of hearing disputes, which could further protract reaching the final decision. Pointing to the low rate of appeals as a counter-argument does not substantiate the appropriateness for introducing the new

mechanism.

According to transitional provisions of the draft amendments to the Organic Law on Common Courts, with the entry into force of this legislation the current court personnel would be considered acting magistrate civil servants until the appointment of permanent staff under the rules set by the new legislation. This provision contradicts the Constitution of Georgia, which states that justice is administered by a judge who is appointed to the position by the HCOJ under the procedures set by the law.

The Coalition proposes that the government use the mechanism of judicial transfers as an interim measure, rather than increasing the authority of the court personnel. It is well known that the problem of judicial overload is most significant at Tbilisi City Court. Hence it would be more reasonable for the High Council of Justice to use the transfer mechanism for such situations. This would also allow postponing legislative changes until the time when in-depth analysis and long-term vision for solving the problems is available.

Introduction of further specialization of judges in the Appeals Courts

The Coalition considers that introduction of the general mechanism of specialization at Appeals Courts is unwarranted and that it contains tools that may threaten judicial independence.

According to Article 1 of the amendments to the Organic Law on Common Courts, the HCOJ may decide to introduce further specialization of judges at the Appeals Courts.

The narrow specialization of judges has always been a problem for the judicial system. In practice, the HCOJ narrows judicial specialization to such a degree that it threatens the independence of individual judges and often may make the new case distribution system pointless. The creation of specializations is the HCOJ □□ prerogative, however the court Chairs unilaterally decide on the appointment of judges to the specializations, further escalating the risks.

Of the recent high profile cases, the hearing of Rustavi 2 case at Tbilisi City Court, serious criticism was directed to the fact that there was only one judge at the court specializing in copyright issues. This was the reason why the Rustavi 2 case was not

allocated alphabetically, using random selection as prescribed by law, but was rather assigned directly to Judge Tamaz Urtmelidze. Accordingly, while narrow judicial specialization is already problematic at the first instance level, introduction of a similar mechanism at the appellate level, particularly with only general provisions, is inexcusable. Importantly, for most cases the Appeals Court would be the highest instance to reach. In this situation, with amendments such as this the legislation would give the HCOJ and the Court Chairs a tool that threatens judicial independence.

The draft □□ explanatory notes indicate that □□□□□□□□□□□□ similar cases by a judge is related to the timely execution of justice. Additionally, this ensures raising the qualifications of a judge in the particular field of law, which in turn will have significant effect on the quality of justice. A This is not adequately substantiated. According to the draft □□ explanatory notes, the disputes that constitute the bulk of the case-load are not of a complicated legal nature. Mostly, these are small loan contracts with banks and financial institutions, which are simple disputes. Hence it is unclear why there is a need for narrow specialization, when hearing such simple disputes is not connected to raising the qualification of judges or providing speedier justice. Any judge sitting at the Civil Law chamber of the Appeals Court can hear such cases rapidly and with high quality. Additionally, the drafts do not contain any substantive amendments to the Civil or Administrative law that would have possibly justified narrower specialization for judges.

The Consultative Council of European Judges Opinion #15 (2012) on the specialization of judges does not indicate alleviating heavy case burden as among the objectives of specialization. The opinion stresses that along with its benefits, specialization has disadvantages and can be a threat to judicial independence, among others. Article 8 of the Opinion notes that specialization is seldom a pre-determined choice and is most often a result of adaptation to needs stemming from changes in the legislation. Hence, the narrow specialization of judges is not a general rule, and important and legitimate grounds are needed for its use.

Article 24 of the above Opinion stresses that all judges of common and specialized courts must be experts in the art of judging. They must have sufficient knowledge to be able to analyze and assess facts and the law, and must be able to reach a verdict on cases in different spheres of law. For this they must have thorough knowledge of legal institutions and principles. According to Article 26 of the Opinion, □□□□□□□ should be capable of deciding cases in all fields. Their general knowledge of the law and its

underlying principles, common sense and knowledge of the realities of life give them an ability to apply the law in all fields, including specialist areas, with expert assistance if necessary."

The Coalition believes that if the Parliament plans changes regarding specialization, these changes must first of all reduce the Court Chairs' competence on this issue.

Public Hearing of Court Cases

The Coalition considers that parties consent for hearing a case without oral hearing must be maintained.

The proposed draft adds points 1^2 - 1^4 to Article 34 of the Administrative Procedural Code, which sets the list of instances when the Appeals Court may consider the appeals claim without an oral hearing. In the circumstances under Article 34.1^4, the Court may only consider the case without an oral hearing with the parties' consent.

During the first hearing of the draft at the January 5, 2018 session of the Legal Affairs Committee of the Parliament, one MP suggested to remove the requirement of parties' consent and have the oral hearing at the sole discretion of the Court.

The Coalition considers it important to retain the parties consent on deciding a case without an oral hearing. Here it is important to note that this amendment pertains to the general rule and extends to all claims under the administrative law. Importantly, in such cases the state is always a party. Hence, it is essential that the oral hearing of such cases is not disproportionately limited. The explanatory note of the draft mentions cases of several jurisdictions that conduct cases without oral hearings. Removal of the parties consent and making this a matter of the court discretion would counter the arguments outlined in the explanatory note.

Interim Chairs and Deputy Chairs of Appellate Courts

The Coalition believes that the rule for appointing interim Court Chairs and Deputies proposed in the draft is too general. It does not establish any restrictions for appointing an Interim Chair and his/her Deputy, thereby exacerbating the problems existing in practice. The absence of criteria and rules for selecting Court Chairs is also problematic. The draft does not

address this issue.

The draft amendment to the Organic Law on Common Courts specifies the functions of the High Council of Justice. The draft establishes the Council □□ authority to appoint an Interim Chair prior to the appointment of an Appellate Court Chair.

The current legislation does not define criteria and rules for appointing Chairs and Deputy Chairs of courts/chambers/collegiums. In practice, the Council □□ work related to the appointments of Chairs and Deputy Chairs is problematic. Decisions are not substantiated and limited in time. In this situation a minor technical change of the legislation is not sufficient. The legislation should clarify a number of important issues related to the appointment of Court Chairs, Deputy Chairs, Chairs of Chambers and Collegiums. These issues include appointment criteria and rules, appointment of interim Chairs/Deputies for a specific period of time, and substantiation of appointment decisions. The problems with the appointment of Interim Chairs/Deputies are similar to the issues with appointment of Court/Chamber/Collegium Chairs. The High Council of Justice established a practice in which Interim Chairs can perform the functions of Chairs for years. The need for Interim Chairs is not justified or bound in time. This creates a ground for manipulating the process for appointment of Chairs and Deputies.

For many years, Court Chairs were used by the High Council of Justice as leverage for exerting control over the judiciary. This institution has been heavily criticized by civil society organizations. Court Chairs make up the influential group of judges exercising a clan-type management of the court system. The High Council of Justice has been appointing Chairs subjectively, without assessing their managerial skills or substantiating appointment decisions. This practice contradicts the established international standards.

Without introducing criteria and rules for appointing Chairs and Deputy Chairs, a mere technical specification of the issue is a sign of the legislator □□ attempt to consider the needs of the court system without grasping the real significance of the problem. This approach strengthens a clan-type administration of the court system.