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PROCEDURAL RIGHTS IN ACCORDANCE WITH THE WESTERN VALUES

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Introduction

The important and organic part of the development of Western Civilization is deep understanding of the essence of a fair and impartial state. What does a fair impartial state mean, what are its fundamental principles built upon, what elements does it imply in itself? These issues have always been and continue to be of a serious reflection and analysis on the various stages of Western thought evolution. This problem is still deeply discussed by Plato and Aristotle. The organic unity of a fair state and a fair court are essential for the evolution of Western thinking and the architecture of today's modern democracies stands on this principle. That's why it is one of the most pressing and sensitive issues for present legal, political or philosophical understanding. It requires constant processing and clarification of new details. "In exercising their power, the people and the state are bound by universally recognized human rights and freedoms as directly applicable law. Law-making is the exclusive competence of the state. The legislator is obliged to establish mandatory rules of conduct, to safeguard human constitutional rights and to impose certain proportionate restrictions on the protection of other constitutional values" (Judgment of the Plenum of the Constitutional Court of Georgia (28. 12.2010)). In the judgment the Court suggested a very interesting position about interrelation of three elements:

Development of society, legislative amendments and political will. Legislative rules must reflect and respond to the public demands for the purposes of harmonization with the public needs. The great writer of the 19th century - Honore de Balzac, in the novel "Magic Skin," says: "Today the art of governance is giving power to public opinion". The legislator is obliged to bring the law in line with the modern challenges of a democratic society, as well as to provide the political will into law by the legislative mechanisms provided and to improve the legislation. Only by this way

it will be possible to reinforce the link between the law and the society. However, the important point here is that political will should not be associated with a radically different position of government from the public opinion. Political will, as reflected in legislative rules must derive from the public needs.

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In Georgian judicial system we have had some problems with regard to enforcement of decisions of the European Court of Human Rights. Judgments of the European Court, in fact, serve not only for the purposes to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules set forth in the European Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Thus, the goal of the European Convention system is to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States.[1] The right to execution of such decisions is an integral part of the "right to a court"[2] Otherwise, the provisions of Article 6 § 1 of the European convention would be deprived of all useful effect[3]. This is of even greater importance in the context of administrative proceedings. By lodging an application for judicial review with the State's highest administrative court, the litigant seeks not only annulment of the impugned decisions, but also and above all - the removal of its effects. The effective protection of the litigant and the restoration of legality, therefore, presuppose an obligation on the administrative authorities' to comply with the decisions.[4] Correspondingly, while some delay in the execution of a judgment may be justified in particular circumstances, the delay shall not be such as to impair the litigant's right to enforcement of the judgment. Execution and enforcement of decisions must be fully, and not partially, in accordance with the law standards. An unreasonably long delay in enforcement of a binding decision might breach the Convention. The reasonableness of such a delay is to be determined having regard in particular the complexity of the enforcement proceedings, the applicant's own behavior and that of the competent authorities, as well as the amount and the nature of the court award[5]. For example, In case of Hornsby v. Greece the Court held that by refraining for more than five years from taking the necessary measures to comply

1 European Court of Human Rights, Guide on Article 6. Right to a Fair Trial. 2013. www.echr.coe.int (case-law analysis-case-law guides).

2 (Hornsby v. Greece, § 40; Scordino v. Italy (no. 1) [GC], § 196). European Court of Human Rights, Guide on Article 6. Right to a Fair Trial. 2013.

3 (Burdov v. Russia, §§ 34 and 37). European Court of Human Rights, Guide on Article 6. Right to a Fair Trial. 2013. www.echr.coe.int (case-law analysis-case-law guides)

4 (Hornsby v. Greece, § 41; Kyrtatos v. Greece, §§ 31-32). European Court of Human Rights, Guide on Article 6. Right to a Fair Trial. 2013.

5 (Raylyan v. Russia,) European Court of Human Rights, Guide on Article 6. Right to a Fair Trial. 2013. www.echr.coe.int (case-law analysis-case-law guides).

with a final, enforceable judicial decision, the national authorities had deprived the provisions of Article[6] § 1 of the European Convention of all useful effect. In another case of the overall period of nine months taken by the authorities to enforce a judgment was found reasonable in view of the circumstances. According to the European Court of Human Rights Guide, the burden to ensure compliance with a decision against the State lies on with the State authorities. The Court's practice illustrates that even late payment to the applicant can't justify the failure of the national authorities. In case of Apostol v. Georgia The Court has also held that the authorities' stance of holding the applicant responsible for the initiation of execution proceedings in respect of an enforceable decision in his favor, coupled with the disregard for his financial situation, constituted an excessive burden and restricted his right of access to a court to the extent of impairing the very essence of that right6.

Article 31, paragraph 1 of the Constitution of Georgia states: "Everyone has the right to apply to the court for the protection of his rights. The right to a timely and fair hearing is guaranteed." On March 23, 2018, due to the Constitutional amendments, a second paragraph has been added to the mentioned Article. Thus, Article 31 of the Constitution of Georgia became closer to Article 6 of the European Convention. Convention for the Protection of Human Rights and Fundamental Freedoms further deepens the principle of a fair trial and obligations of states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". We see clearly differences and similarities between the paragraphs of the European Convention and the Constitution of Georgia. The fundamental differences include that the Georgian Constitution does not incorporate requirement of an independent and an impartial trial and is limited to a record about a fair trial. Second guarantee of fairness and impartiality of a trial, in my opinion, is the publicity of decision making process. However, the European Convention includes limitations on a ground of legitimate aim in which case the press and people might be excluded from the trial. According to the case law of the European Court, intervention in the right can be justified if it: is provided by law, serves a legitimate purpose, is essential in a democratic society and proportional to the legitimate interest.

The Constitution of The United States, Amendment VI (Rights of Accused in criminal Prosecutions) states, that: "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall been committed, which district shall have been

6 European Court of Human Rights, Guide on Article 6. Right to a Fair Trial. 2013. www.echr.coe.int (case-law analysis-case-law guides)

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense".[7] Amendment VI of the Constitution of the United States of America begins with the following sentence, when investigating all criminal cases, the accused enjoys the right to a speedy and public hearing in court. Before discussing this sentence, it is necessary to review protective mechanisms of the above-mentioned right. Prior to discussing the customary law of the principles and the further development, it is necessary to understand firmness of rules which arise from the customary law. A clear example can be the words of the great Roman philosopher, Seneca Chief: "Some unwritten laws are stronger than all written".[8] Incorporation of the protective mechanisms into the case law usually comes from the period of the Great Charter of Freedoms (Magna Carta, 1215 year)[9]. In 1642, Sir Edward Coke made an important decision with regard to the judges of England (United Kingdom). A key point of this finding was that English judges were required to ensure that detainees had a fair and speedy trial. Subsequently, the Habeas Corpus (Habeas Corpus Act - English Human Rights Bill), adopted in 1679, was required by the court to hold preliminary hearings before the detainee was granted bail. When Congress first prepared the Bill of Rights in America in 1689 without any discussion and disagreement, they unanimously agreed on the need for the right to a speedy hearing. In the 18th century, one of the most important procedural safeguards for the inviolability of personality in the United States law system, - the Habeas Corpus, namely the right to a speedy trial, often was linked to the right of a not excessive bail. However, with the development of the customary law, the view of the United States Supreme Court's about the issues has changed and the right to a speedy trial has been formulated separately. Subsequently, the United States Court has developed its approach towards the mentioned Article, noting that the right to a speedy trial of the case is not only preventive during pretrial detention, but also represents an opportunity for the defendant to avoid a threat in case of postponement. The Court of United States cites an example: the death of a witness.

The right to a speedy trial arises immediately upon arrest or prosecution, not from the moment the investigation begins. It is logical, though extremely difficult[10], for a court to invalidate a decision because the trial has been delayed. It is difficult to establish precise boundaries for timely or delayed court proceedings. This is a case where the words of two relative concepts must fall within a logically reasoned space, and without any ambiguity, the court could clearly determine whether the trial was timely or delayed. The Supreme Court of the United States of America (Supreme Court) has ruled that there are four cumulative elements required for courts to take

7 The Constitution of the United States, Article VI.

8 Афоризмы по иностранным источникам. Издательство "Прогресс". Москва 1972.

9 The Heritage Guide to the Constitution. Edwin Meese III Chairman of the Editorial Advisory Board. Regnery Publishing, Inc. 345 p.

10 The Heritage Guide to the Constitution. Edwin Meese III Chairman of the Editorial Advisory Board. Regnery Publishing, Inc. 346 p.

into account: 1) the defendant's position - substantiating and affirming constitutional right to a speedy trial; 2) duration of the court; 3) Reason that can be considered as an honorable reason for postponing the court; 4) deprivation of liberty prior to the trial caused damage to the accused (the same notion of pretrial detention). Additionally, significant is the damage suffered by the accused as a result of the court postponement.

The Supreme Court of the United States has taken a position on how courts should determine whether there is a violation of the right to a speedy hearing or not. It is clear that the court has a wide margin of appreciation in this matter if the defining elements for the measurement of violation are unclear. Therefore, the Court's view has is of a great importance in this particular case.

The difference between the Constitution of Georgia and the Constitution of United States is in wording and afterwards in the interpretation of the wording. On the one side there is a timely hearing – hearings within reasonable time, while, on the other side - speedy trial, reducing time and, thus, establishing higher standards of protection.

The next important part in the Amendment VI is the right of accused to a public hearing.[11] This right is deeply rooted in the Anglo-American system of law, traditions and values. Such connection is clearly expressed in Sir Edward Cook's view, in the 17th century in England, where he states that the court is almost defined by terms - open and public - "Trial's Almost Back Definition Open and Public". Judge Joseph Storey also noted in his work "Commentaries on the Constitution of the United States,"[12] that criminal trials should always be public. Statement of one of the greatest philosophers, Bacon, is kept in the world history: "Judges need to remember that their job is to interpret the law and not condone it."[13] And if we take a closer look at the United States justice system, we can clearly see that the Supreme Court has interpreted the right to a public hearing, just like every other law (article) in the American Bill of Rights, precisely to restrict and restrain federal and state government. The Court has also formulated a new view that the above-mentioned firmly established and fundamental right is not absolute and may be restricted in certain cases. The right of a defendant to a public hearing in a criminal case, as well as the interest of the press in attending a hearing, is also a essential during the open hearing of a case. However, the Supreme Court of the United States has noted that in some cases, given the specific nature of the case, the defendant may waive the right to a public hearing and request that the trial be closed at some point. The court may temporarily exclude the press and public from the trial if the main criteria of criminal cases – dignity, order and Décor (etiquette) are extremely neglected. For example, a court may close part of a hearing in a sexual assault case to protect

11 The Heritage Guide to the Constitution. Edwin Meese III Chairman of the Editorial Advisory Board. Regnery Publishing, Inc. 347 p.

12 The Heritage Guide to the Constitution. Edwin Meese III Chairman of the Editorial Advisory Board. Regnery Publishing, Inc. 347 p.

13 Афоризмы по иностранным источникам. Издательство "Прогресс". Москва 1972. Ст. 392.

minors (under age 18) or to protect confidential, sensitive information, such as identification of witnesses.

As The United States Judge Hugo L. Black pointed out: "Public trial serves as a safeguard against any attempt to employ our courts as instrument of persecution." [14] Abovementioned facts give us lots of reason why it should be better to give a larger meaning and legitimacy to the record: "public trial" in Constitution of Georgia.

It is also interesting to expand the part of the VI Amendment, which states that the accused should be informed of the nature and motives of the prosecution[15]. Article 31 of the Constitution of Georgia has no such record, but as we know from interpretations and explanations of this Constitution there are general safeguards for the fairness of the process, more specifically the area of fair trial includes four separate rights that should be guaranteed cumulatively:

A. The ability of a person to obtain information about the process and evidence that relates to it
B. Ability to express an opinion on evidence and procedural rules
C. The parties' confrontational speeches must be heard before the court
D. The parties must be served with a reasoned court decision.

The Amendment VI of the Constitution of The United States states, the accused shall enjoy the right to be informed of the nature and cause of the accusation". No other constitutional principle of right to trial under the rules of procedural law is as clearly established as notification of a defendant's specific allegation and certainly a chance for a person to hear at his / her own discretion the issues raised by the allegation. This constitutional right holds every defendant in all criminal cases in federal or state court. The right to seek a fair notice arose out of the customary law of earlier (Adrian) England. The above right of the defendant was perceived as part of the agreement reached at that time - well-accepted agreement. At the moment of adoption of the Constitution till today this principle is still a major issue (Ministerial Matter) in the routine of criminal proceedings. However, before the adoption of the Great Charter of Liberty - Magna Carta in 1164, King Henry II initiated a church reform that required church courts to identify and define accusation accurately before the defendant could be summoned. No person could be arrested by petition, advice or suggestion of a king or his council if there were no indictment or filing of "Bona Fide" and righteous persons from the same neighborhood where the act was committed, the process having to be based on customary law. However, after some time, the High Commission and the State Chamber resumed the practice of questioning citizens, without explaining the nature of the accusation. This misunderstanding of the English system of law in the 16th and 17th centuries led to the fact that in 1637 the Puritan Freeborn John Lilburne[16] was questioned on an unspecified,

14 The Heritage Guide to the Constitution. Edwin Meese III Chairman of the Editorial Advisory Board. Regnery Publishing, Inc. 347 p.
15 The Heritage Guide to the Constitution. Edwin Meese III Chairman of the Editorial Advisory Board. Regnery Publishing, Inc. 352 p.
16 Frederick Pollock & Frederic William Maitland, The History of English Law (2d ed. 1951).

obscure charge by a secret Supreme Court, which considered less serious crimes without jury “Star Chamber”. Accused said that he had no desire even to answer the questions, since, in his opinion, the Chamber wanted to imprison him by questioning. In his view, the reasons why he was detained could not prove his guilt and by this interrogation they would seek other issues and facts and he declared that if they did not inform and examine him about the reasons related to the allegation, he would not answer anymore. From the foregoing, it is not surprising that the tradition of the American law that emerged from the English customary law system reflected the rule regarding the accuracy of the charges. The function of this constitutional requirement is to provide the defendant with an adequate notice of the nature of the charge so that he or she can prepare a defense. On the other hand, informing the court of the nature of the charge enables the court to see more clearly whether there are sufficient legal grounds. A good example of this is the case of State v. 1876 Cruikshank, where the Supreme Court has held that, an indictment fails to meet constitutional standard, if it is insufficiently specific and due to its ambiguous content, obstructs the accused to question freely specific citizens whose rights and privileges are protected by the Constitution.

In my opinion, if Georgian legislators will give more board definition and include in Article 31 the right of accused to be informed of the nature and cause of the accusation as it is given in United States Constitution, would be more complete and comprehensive. Citizens’ protection coefficient will certainly increase on the basis of the existence of this part at the stage of prosecution, also the obligation to specify and define the nature of the accusation will in itself limit the maneuverability of the authorities to go beyond the legal framework.

Besides, the important part of the Constitution of the United States is the right of the accused to require the confrontation with witnesses who testify against him in all criminal cases - the Confrontation Clause. The wording of the abovementioned section guarantees adherence to the essential and crucial element - adversarial principle at a trial. By this part of the US Constitution citizens are protected from the abuse of power by the authorities to testify against their own interests. In my view, the existence of this right is a double measure of the testimony’s accuracy and is considered to be precisely the right of the accused to confront witnesses and cross-examine their testimony against him/her[17]. The Amendment VI of the Constitution of the United States illustrates circumstances when a defendant should attend a trial, see and hear the testimony of prosecution witnesses in open court, which may lead to cross-examination of the witnesses. However, the basic starting point still leaves vague questions about the restriction and the scope of the right to confront. It is a matter of discussion whether prosecution witnesses’ testimonies are required to be given face-to-face (face-to-face confrontation) or testimony by modern technology, for example: a video can be considered equivalent, as well as, when does it allow the prosecution to use testimony based on hearsay. On the one

17 The Heritage Guide to the Constitution. Edwin Meese III Chairman of the Editorial Advisory Board. Regnery Publishing, Inc. 354 p.

hand, it is obvious that the content of the "confrontation" - "Confrontation Clause" has always had a broader meaning. It includes not only the right of the accused to hear and see the witness, but also the legal right of the accused to cross-examine the witness in order to establish the credibility of the witness's testimony. This part of the Amendment VI gives the accused an opportunity to attend a tiral while the prosecution witnesses the question[18]. The above section guarantees an adequate opportunity (size) for effective cross-examination.[19] There are two difficulties with regard to application of these basic principles:

a) At the intersection of the Confrontation Clause and hearsay. Regarding this issue, in 2004 a court in the United States said that the use of hearsay as accusation by prosecution (testimony of witness based on what others have said) infringes the right of the Confrontation Clause until the defendant is allowed to cross-examine this applicant. As for the "non-testimonial-hearsay," it is still unsettled (for example: irritating expressions, business records and statements for the purpose of a medical diagnosis)

b) Moreover, important is the juvenile witness's right not to be questioned face to face. In this case, the right of accused to see the witness and hear what he or she is saying, also the right to cross-examine may be a subject of the restriction. However, in this particular situation, where the minor is under certain circumstances and is physically unable to testify in front of the accused, interrogation may also be considered as grounds for limiting the aforementioned rights.

Article 31 of the Constitution of Georgia has not included the right of confrontation. We have met the Confrontation Clause in the Criminal Code of Georgia - in particular, Article 115 (general rule of confrontation) establishes the rights of an opponent to cross examine the witness in accordance with Article 245 (Cross-examination):

"1. A cross-examination shall be conducted by a party which has not called a witness to be examined.

2. During cross-examination it is permissible to ask questions indicating the answer.

3. In order to ask questions and to answer questions the chairman of session shall determine to a party (witness) a reasonable time".

In my opinion, the abovementioned Article in the Criminal Code is not enough to legitimize such an important issue as the Confrontation Clause. Considering the fact that the Code complies with the Constitution of Georgia and universally recognized principles and standards of International Law, it would be better if the Confrontation Clause would fall within the scope of Article 31 of the Constitution of Georgia.

The last and most important issue under the Constitution of the United States is the Amendment VIII (Further Guarantees in Criminal Cases): "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

18 Kentucky v. Stincer, 482 U.S. 15 (1987).
19 Pointer v. Texas, 380 U.S. 400 (1965).

inflicted". The Amendment limits the abuse of the power of judges in the judicial system of the US. Interpretation of an excessive bail in the American and English law systems is based on case law. This indicates that in the absence of this section, the constitutionally guaranteed human rights had been violated and that the principle of justice had been completely disregarded. The impartiality of the court in the absence of the above mentioned preconditions and barriers to avoid corruption had also been at risk. The US Supreme Court has held that the amount of bail will be considered excessive on the basis of Amendment VIII if it is calculated more than is reasonably necessary to secure the prosecution's appearance. Amendment VIII of the Constitution of the United States is essentially preventative and appears as the best way to solve global problems in the judiciary. Therefore, if Georgian lawmakers will unify this issue in our fragile judicial system, where judicial practice is often associated with excessive bail and penalties, the degree of protection will be significantly increased.

In my opinion, refining our legislation by studying and understanding the Constitution of the United States will give us a more effective justice system. When we speak about the right to a fair trial there are obvious differences between the Constitution of Georgia and that of the United States. We find a much higher standard of protection for the rights of an accused in the US and European law. For example, the Constitution of the United States includes amendments about fast and the public hearing, Confrontation Clause, prohibition of excessive bail. Due to these crucial issues provided by the US Constitution amendments have specified scope of articles, reduced ambiguity and the case law of the Supreme Court has also been added for better interpretation of these rules. As mentioned in the introduction, the legislator has a constitutional obligation to bring society's demands and political will into law through legislative mechanisms, thereby improving legislative rules and bringing it in line with Western values as well as with the case law practice, existed in democratic countries. One of the legislative mechanisms[20] for fulfilling the function indicated by the legislator is amendments to a constitution, through which the political will of the legislator is transformed and becomes statutory. As a result, amendments and additions to constitution have a transitional, connecting function. Transforming the Georgian legislative space by implementing significant and major issues of the Constitution of the United States is one of the best ways to update legislative system in Georgia. I would also like to point out that the United States as a "beacon of democracy" is fundamental illustration of Western values and Constitution of our country carries precisely these values. Therefore, when one of the main goals of the country is to reach the effectiveness of the legislation, compliance with challenges of modern society and the democratic values, as well as establishment among states that hold democratic values, amendment of the legislation is a fairly legitimate way of achieving it.

20 Judgment of the Plenum of the Constitutional Court of Georgia. December 28, 2010. Case Title: Citizen of Georgia Vladimir Vakhania v. Parliament of Georgia.

Conclusion

The foreign policy of Georgia is clearly defined as an indisputable direction towards the Euro-Atlantic world in the matter of strategic partnership and full integration. Of course, this does not exclude close cooperation and deepening of friendly relations with other important geopolitical subjects, especially our neighboring countries, or even normalization of relations. With this regard, the government of Georgia has gone through several important stages, one of them is European Union Association Agreement. Obviously, this foreign policy course requires us to make the most important transformations in various spheres of the state and in the light of the standards and norms upon which the architecture of European and American democracies is built. One of them is the reform of the judiciary, in particular the establishment of a truly independent and impartial judiciary. It can be said that this is probably the main test that our country must pass in order for the EU and NATO membership to become fully real in the future.

Georgia has been given difficult legacy, because of situation in the justice system. During the period of President Eduard Shevardnadze, the judicial system was at first weak, fragile and politically pressured. Later it has become more independent and qualified, however has still been imbued with large-scale corruption. After the so called Rose Revolution, on the one hand, there was a specific transformation of the judiciary: better salaries, better buildings, but on the other hand, it came under unprecedented political pressure. The court has in fact turned into a blind performance of the will of the repressive regime created by the political elite. In most cases, judges directly following orders from the prosecutor's office, political elite, or the president himself. This has completely discredited the Georgian judicial system as in the eyes of the people, as well as by view of international society. At that time judicial system had been responsible for the hundreds of political prisoners, political and conscience prisoner as was my father Irakli Batiashvili. In the citizens' perception, the "judge" was a symbol of injustice, crime and discrimination.

As a result of the political changes following to elections in October 1, 2012, the process of freeing the court from the political pressure has began slowly but still has started. Doubtless, today the judge is much more independent. As Guide on Article 6[21] defines judicial independence, individual judges shall be free from undue influence outside the judiciary, and from within. Internal judicial independence requires that they shall be free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court. The absence of the sufficient safeguards securing the independence of judges within the judiciary and, in particular, vis-à-vis their judicial superiors, may lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court can be said to have been objectively justified (Case: Parlov-Tkalčić v. Croatia). Our standards of justice is in the process

21 European Court of Human Rights, Guide on Article 6. Right to a Fair Trial. 2013. www.echr.coe.int (case-law analysis-case-law guides)

of developing to become a truly fair democratic system, which will be our visit card to fully integrate in that world. We need a fundamental and systematic reform of the judiciary, not cosmetic, not superficial and not fragmented. The unified strategy, program and plan for this reform need to be developed. It should be attended by representatives of all branches of government, civil society and qualified specialists. This reform should be planned and carried out through the close cooperation with the specialists and consultants of those countries which have very high standards of fair trial. Implementation of this reform process should be continuous and systematic rather than periodic. As a result, we must get such a solid "building" of an independent, impartial court that will be established once and forever in Georgia and become a guarantor of a fair state.

NOTES:

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