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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GEORGIA

OPINION

ON THE DRAFT ORGANIC LAW AMENDING THE ORGANIC LAW ON COMMON COURTS

Adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020)

on the basis of comments by

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Mr Richard BARRETT (Member, Ireland)
Mr Nicolae EȘANU (Substitute Member, Republic of Moldova)
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I. Introduction

1. By letter of 22 September 2020, the Parliament of Georgia requested an opinion of the Venice Commission on the draft Organic Law amending the Organic Law on Common Court (CDL-REF(2020)069).

2. Mr Yavuz Atar, Mr Richard Barrett, Mr Nicolae Esanu, Mr Jørgen Steen Sørensen and Mr Mats Melin (Expert, former member of CCJE) acted as rapporteurs for this opinion.

3. Owing to the sanitary situation due to the Covid-19 pandemic and to the very short period of time available to prepare this opinion, a visit to Georgia could not be organised. Therefore, on 30 September 2020, a series of virtual meetings was organised in lieu of the visit with (in chronological order): the High Council of Justice of Georgia, NGOs, the Parliamentary Opposition, the Parliamentary Majority and the Deputy Public Defender.

4. The Secretariat and the rapporteurs were informed on 30 September 2020 that the Parliament of Georgia had adopted, at its third and final reading, the draft Organic Law amending the Organic Law on Common Court.

5. This opinion was prepared in reliance on the English translation of the draft Organic Law amending the Organic Law on Common Court (hereinafter, "the draft Amendments"). The translation may not accurately reflect the original version on all points.

6. The present opinion was examined by the Commission members through a written procedure replacing the sub-commission meetings, and following an exchange of views with Mr Archil Talakvadze, Speaker of the Parliament of Georgia, was adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020).

II. Background

7. On 16 April 2019, following a request for an urgent opinion made by the then Speaker of Parliament on 11 March 2019, the Venice Commission issued an Urgent Opinion on the Selection and Appointment of the Judges of the Supreme Court of Georgia.[1] The Urgent Opinion was subsequently endorsed by the Venice Commission at its 119th Plenary Session, on 21-22 June 2019.

8. The Urgent Opinion welcomed the amendments made to the provisions on the selection and appointment of the judges of the Supreme Court of Georgia, but formulated the following key recommendations:[2]

a. *A higher age requirement and more emphasis on a candidate's experience as well as judgment, independence and diversity should be provided in the eligibility criteria;*
b. *The requirement for non-judge candidates to have passed the judicial qualification examination should be reconsidered because, […], only "specialist of distinguished qualification in the field of law" may be non-judge candidates for the Supreme Court. Persons with such qualifications should not be forced to sit an examination to prove that they are capable of dealing with points of law, which is the essence of the work of a Supreme Court;*
c. *Conducting secret ballots in the High Judicial Council should be abolished; information regarding the qualifications of candidates should be made public and the procedure should be based on the objective criteria on which each candidate is evaluated,*

[1] Venice Commission, CDL-PI(2019)002-e, Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia.
[2] Ibid., paragraphs 67 and 68.

producing a pool of candidates who satisfy these criteria. Within this pool, the candidates should be ranked according to the scores they have obtained during the evaluation procedure. This will allow a list of the best candidates to be presented to Parliament;

d. *Reasoned decisions regarding the selection and exclusion of candidates must be produced, with the possibility for a judicial appeal (see Article 35[4] of the Organic Law on Common Courts);*
e. *A member of the High Council of Justice, who is a candidate for judges of the Supreme Court, should be excluded from all procedures pertaining to the selection and nomination of these candidates.*

9. The Commission made the following additional recommendations:

f. *The procedure for the appointment of a Supreme Court judge should be initiated before the end of a judge's term of office, so as to ensure that the Supreme Court is not short of judges;*

g. *An anti-deadlock mechanism is needed for situations in which candidates have received the necessary number of votes to be nominated to the second ballot, but not 2/3rd of the required votes, if this requirement is kept.*

10. The draft Amendments were adopted at their first reading, on 16 September 2020, and at their second reading, on 18 September 2020.

11. On 18 September 2020, the rapporteurs of the Parliamentary Assembly of the Council of Europe issued a public statement, urging the Georgian authorities to request a Venice Commission opinion on the proposed amendments before they are adopted.[3]

12. In their request for an opinion on 22 September 2020, the Georgian authorities sought an assessment of whether the draft Amendments met the Commission's recommendations contained in the Urgent Opinion.

13. The Commission was willing to assist the Georgian authorities in reforming the system of appointment of Supreme Court judges in line with European standards and meeting the domestic calendar. However, owing to the extremely limited amount of time it disposed as a result of the belated opinion request, the Commission could not but limit the scope of its analysis of the draft Amendments to the examination of whether its previous recommendations had been met in the draft Amendments under consideration.

14. On 30 September 2020, the Secretariat and the rapporteurs were informed, regrettably, that the final adoption of these draft Amendments took place on that same day.

III. Analysis

15. In order for the best candidates to be presented to Parliament, the Venice Commission had recommended abolishing decisions by secret ballot, publishing information regarding the qualifications of the candidates, evaluating the candidates on the basis of objective criteria, producing a pool of suitable candidates, ranked according to the scores they had obtained during the evaluation procedure.

[3] https://pace.coe.int/en/news/8013/pace-monitors-urge-georgian-authorities-to-request-venice-commission-opinion-on-changes-to-the-process-for-appointing-supreme-court-judges-

16. The draft Amendments removes Article 34[1].7 of the Organic Law on Common Courts, which sets out the voting procedure by secret ballot, whereby the High Council of Justice (hereinafter, the "HCoJ") selects candidates for the position of a Supreme Court judge.

17. The new selection procedure comprises the following steps:

- *an interview of each candidate at a public hearing (new Article 34[1].10);*
- *an evaluation of each candidate by each HCoJ member according to the criteria set out in Article 35[1](for candidates with no judicial experience) and 36[4] (for those with judicial experience) of the organic law, accompanied by the written justification for each score and for each justification of integrity;*
- *the publication on the website of the HCoJ of the scores and evaluations of each candidate together with the relevant reasoning (without disclosing the identity of the relevant HCoJ member); (new Article 34[1].11);*
- *the vote on the interviews and evaluated candidates on the basis of the scores, evaluation and reasonings; additional numerical thresholds for competence and integrity are established for candidates to be admissible; written reasoning needs to be provided for each vote; the counting of the votes at a closed meeting of the HCoJ; the publication on the website of the HCoJ of the list of candidates admitted to the next stage together with the reasonings for the votes, without disclosing the identity of the relevant HCoJ member; (new Article 34[1].12);*
- *the final vote on the list of candidates (the vote of at least two-thirds of all the members of the HCoJ is necessary to be elected); provision of written reasoning for each vote by each member of the HCoJ; publication of the list and the reasoning on the website of the HCoJ; (new Article 34[1].13);*
- *the possibility for each HCoJ member to express a dissenting opinion in writing which is transmitted to Parliament and published on the website of the HCoJ;*
- *transmission to Parliament of all the information and documents published on the website of the HCoJ (new Article 34[1].14);*
- *in case of failure by Parliament to elect the new judges, a new selection from the list of registered candidates is made (only once) according to the procedure of paragraph 13; publication on the website of the HCoJ is foreseen under the same rules; (new Article 34[1].15);*
- *gathering of "credible" information on the registered candidates by the HCoJ (new Article 34[2].1).*

18. It should be pointed out here that Georgia's situation is an unusual one and requires a very high level of transparency, which is not a standard to be expected in all states. This is owed to the fact that, in the past, the HCoJ had difficulty establishing its credibility in the Georgian system. The Venice Commission would therefore like to commend the detailed work done to redesign the evaluation and voting process to remove the secret ballot and provide more transparency by conducting candidate's interviews in public hearings and by providing written reasoning for each vote, which is made public. This information and written reasonings must also be conveyed to Parliament for their vote. This gives a considerable degree of transparency to the procedure and allows, in principle, to point to deficient, insufficient or contradictory motivation for the ranking of the suitable candidates. The decisions of the HCoJ will therefore be exposed to some public scrutiny. In the Commission's opinion, these amendments go in the right direction and meet the first part of the Commission's recommendation that *"reasoned decisions regarding the selection and exclusion of candidates must be produced".*

19. It is true that one could question the very need for a vote by the HCoJ on the candidates, once the assessments have been made and scores and evaluations are available, when the evaluation in and of itself should be enough to establish a pool of candidates. This is, however, a choice of the Georgian legislator. Nevertheless, during its series of virtual meetings, the

Venice Commission delegation was informed that it was not mandatory for the members of the HCoJ to vote in compliance with the evaluation scores. Although the members would have to provide a special justification for their deviation, this is a matter of concern and appears to be inconsistent with a merit-based evaluation system.

20. The Commission notes that the identity of the HCoJ members in relation to each vote will not be disclosed and doing so would even expose them to (criminal) liability (the Secretariat was informed that this provision had been changed at the adoption of the draft Amendments on 30 September 2020 to mere "liability" without specifying whether it is criminal or other). Only in case a candidate complains about a decision of the HCoJ to the Qualifications Chamber of the Supreme Court shall the names of HCoJ members be revealed to the members of the Qualifications Chamber, the candidate and his or her representative and the representative of the HCoJ in those proceedings (not to the wider public).

21. The Commission considers that the disclosure of the identity of the members together with their votes would serve the purpose of enabling public scrutiny of the behaviour of the single members of the HCoJ, thus further enhancing the trust of the public in the HCoJ as a body. It would also serve as a deterrent from taking political or other irrelevant factors into consideration.

22. More importantly, the Commission notes that pursuant to new Article 34^3.1 a decision by the HCoJ may be challenged on the following grounds:

a. *A member of High Council of Justice was biased during the candidate selection process;*
b. *A member of High Council of Justice demonstrated a discriminatory approach during the candidate's selection process;*
c. *A member of High Council of Justice exceeded his/her rights under the Georgian law thereby causing a violation of the candidate's rights or jeopardizing judicial independence;*
d. *information on which the impugned decision rests is essentially false and the candidate has adduced relevant evidence to that effect;*
e. *the candidate selection process was held in breach of the established legal procedure to an extent as to be able to essentially affect the final outcome.*

23. While it appears possible for an unsuccessful candidate to build a case in order to complain on grounds d. and e., grounds a., b. and c. are very difficult to argue or demonstrate, if the candidate does not know how each judge voted and justified his or her vote. Non-disclosure of the identity of the members of the HCoJ in connection with their votes therefore seems to go against the purpose of Article 34^3. Consideration might also be given to adding another ground to counterbalance ground c) above – notably if the member of the HCoJ does not fulfil his or her duty.

24. One of the key recommendations of the Commission (see recommendation d. in paragraph 8) was to introduce the possibility of appealing to a court against the decisions of the HCoJ on the selection of candidates for election by Parliament (see Article 35^4 of the Organic Law on Common Courts). In order for this recommendation to be met, and to render possible for unsuccessful candidates to complain under grounds a., b. and c. of Article 34^3, the Venice Commission recommends to provide for the disclosure, together with the votes and the reasonings, of the identity of the members of the HCoJ who cast the relevant votes.

25. The Commission assumed that when a complaint to the Qualifications Chamber of the Supreme Court is made, the procedure in the HCoJ for the selection of candidates is stayed while the matter is pending before the Court. If that is not the case according to existing Georgian law,

consideration should be given to introducing a provision to that effect. Otherwise the vacant seats in the Court could be filled by Parliament by the time the matter is settled and thus there would be no effective remedy for the complainant.

26. Additionally problematic is the provision in Article 34[3] that "*If the Supreme Court Qualifications Chamber decides to cancel a High Council of Justice decision and remand the case to the Council for de novo review, the Council will, while heeding the decision of the Qualifications Chamber, review the matter of nominating the candidate to the Parliament for election to the Supreme Court anew and make a new decision to either present the candidate or to refuse nomination. A second decision of the High Council of Justice refusing to present a candidate to the Parliament for election in the Supreme Court may not be appealed any further.*"

27. This provision gives discretion to the HCoJ to reiterate a decision which was annulled by the Qualifications Chamber, without the possibility to appeal this second decision. The Commission notes that the same composition of the HCoJ will be empowered to decide to maintain its originally flawed decision, even if one of its members was biased against a candidate, or discriminated against a candidate, or violated a candidate's rights, or jeopardised judicial independence, or where the decision was based on false information. Therefore, the Commission recommends that, in order for its recommendation under d. in paragraph 19 above to be met, the second decision by the HCoJ should also be open to a second and final appeal to the Qualifications Chamber of the Supreme Court. Consideration could be given to modifying the composition of the HCoJ for the second decision – by excluding those members who have been found to be biased or for other reasons provided under new Article 34[3].1 a)-e) by the Qualifications Chamber of the Supreme Court.

28. With respect to the interview of candidates (new Article 34[1].10), although an organic law should not be overburdened (e.g. specifying the length of interviews, questions etc.), in order to ensure that all candidates are treated fairly and equally, the Commission recommends that reference be made to the need for equal treatment of candidates by following standardised interviews.

29. With respect to the final voting on the list of candidates, the Commission stresses that a high threshold has been introduced (two-thirds of all HCoJ members). This might lead to having to find a compromise by choosing candidates that have obtained low scores. This can have a negative effect on the judiciary's credibility in the long run. The Commission further reiterates its recommendation to envisage an anti-deadlock mechanism.

30. As concerns recommendations under a. in paragraph 8 above, it does not appear to have been taken into account as the eligibility criteria have not been modified, nor has an exemption from the need to sit a judicial examination been introduced for non-judge candidates in new Article 34[1].11.

31. Recommendations b, e and f in paragraphs 8 and 9 above were taken into account through a legislative amendment enacted on 1 May 2019.

32. Further recommendation g. is not addressed by the draft Amendments.

IV. Conclusion

33. As concerns the recommendation that "*Conducting secret ballots in the High Judicial Council should be abolished; information regarding the qualifications of candidates should be made public and the procedure should be based on the objective criteria on which each candidate is evaluated, producing a pool of candidates who satisfy these criteria. Within this pool, the*

candidates should be ranked according to the scores they have obtained during the evaluation procedure. This will allow a list of the best candidates to be presented to Parliament" and the recommendation that "R*easoned decisions regarding the selection and exclusion of candidates must be produced",* the draft Amendments go in the right direction by removing the vote by secret ballot and by providing that each vote must be accompanied by written reasoning which is made public.

34. In order to meet the Commission's other recommendation "*to provide for a judicial appeal*" against the decisions by the HCoJ not to select a candidate judge, it is further necessary:

- To provide for the disclosure, together with the vote and the reasoning, the identity of the member of the HCoJ who cast the vote;
- To allow a second and final appeal to the Qualifications Chamber of the Supreme Court against the second decision of the HCoJ.

35. The recommendation that "*The requirement for non-judge candidates to have passed the judicial qualification examination should be reconsidered because, […], only "specialist of distinguished qualification in the field of law" may be non-judge candidates for the Supreme Court. Persons with such qualifications should not be forced to sit an examination to prove that they are capable of dealing with points of law, which is the essence of the work of a Supreme Court";* the recommendation that *"A member of the High Council of Justice, who is a candidate for judges of the Supreme Court, should be excluded from all procedures pertaining to the selection and nomination of these candidates"* and the recommendation that *"The procedure for the appointment of a Supreme Court judge should be initiated before the end of a judge's term of office, so as to ensure that the Supreme Court is not short of judges"* were taken into account through a legislative amendment enacted on 1 May 2019.

36. The other recommendation made in the June 2019 Urgent Opinion appears not to be reflected in these draft Amendments and remains to be addressed.

37. The Venice Commission regrets that the draft Amendments were adopted at their third and final reading on 30 September 2020, however remains at the disposal of the Georgian authorities for further assistance on this matter.