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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON THE DRAFT AMENDMENTS TO THE  
ORGANIC LAW ON COURTS OF GENERAL JURISDICTION**

**OF GEORGIA**

**on the basis of comments by**

**Mr Nicolae ESANU (Member, Moldova)  
Mr James HAMILTON (Substitute Member, Ireland)  
Mr Jorgen Steen SORENSEN (Member, Denmark)**

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## **I. Introduction**

1. By a letter of 3 December 2012, the Permanent Representative of Georgia to the Council of Europe sought the Venice Commission's opinion on the amendments to the organic Law of Georgia on the Courts of General Jurisdiction (CDL-REF(2012)045) .
2. The following rapporteurs were invited by the Venice Commission to provide their comments on this draft Law: Mr Nicolae Esanu, Mr James Hamilton and Mr Jorgen Steen Sorensen.
3. On 6-7 February 2013, Mr Esanu and Mr Hamilton accompanied by Ms de Broutelles from the Secretariat, visited Tbilisi and had meetings with the Vice President of the Constitutional Court, the President of the Supreme Court, the Minister for Justice and the Deputy Minister for Justice, President and members of the Association of Judges, representatives of the Public Defender Office, members of Parliament and several NGO's.
4. The opinion takes into account information provided by the Government, NGOs and results of the visit to Tbilisi. The Venice Commission is grateful to the Georgian authorities and to other stakeholders for the excellent co-operation during this visit.
5. Finally, as for any other opinion given by the Venice Commission, there may be errors or misunderstandings due to translation difficulties.
6. *The present opinion was adopted by the Commission at its ... Plenary Session (Venice, ...).*

## **II. Media Coverage of Courts' proceedings**

7. Under the existing Law on the Common Courts of Georgia, photo, film, video recording and broadcasting of court hearings are inadmissible, except for cases where it is administered by the court or a person authorised by the court (cf. Article 12 of the current regulation).
8. During the visit, the delegation was told by several interlocutors that despite the provisions authorising the recording of court hearings, this hardly ever occurs, at least not in the manner in which it had been requested (for example, even where recording is authorised, it could happen that the microphones were turned off at key moments). For this reason, the Government was willing to amend the regulation of media coverage of court proceedings.
9. It was also mentioned during the visit that (part of) these amendments have already been adopted and were now included in the Code of Criminal Procedure.

### **A. The principle of audio and/or video recording of judicial proceedings**

10. There is no doubt that there are considerable advantages to having audio recordings of court hearings, notably for the purpose of settling any disputes about what transpired in court and also from the point of view of the transparency of proceedings. It can also help ensuring public scrutiny of the functioning of the justice system.
11. Video recording of court hearings may serve the same purpose, but at the same time the presence of cameras is more likely to create difficulties: the behaviour of the actors in the courtroom may change as a result of broadcasting; defendants and their lawyers may be more interested in appealing to the court of public opinion than to the court before which their case is listed; victims of crime and witnesses, not to mention the parties, may feel intimidated by the presence of cameras; the respect for private and family life of the public is much more difficult to ensure with a video recording than with an audio recording. In

addition, the conduct of criminal proceedings may reveal to be more difficult: for example, live recording of criminal proceedings will allow witnesses to be informed of other witnesses' statements, which will often give rise to conflict with prosecutorial as well as with defendant's interests.

12. Standards on the issue of media coverage of court proceedings are not very detailed within the Council of Europe.

13. Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003 at the 848<sup>th</sup> meeting of the Ministers' Deputies) set general principles and underlined in its preamble that "the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention".

14. The European Court of Human Rights had to deal with the issue of live broadcasting on a few occasions. In the decision on admissibility of P4 Radio Hele Norge ASA (Application no. 76682/01, Decision of 6 May 2003) the Court stated that the Contracting States must enjoy a wide margin of appreciation in regulating the freedom of the press to transmit court hearings live.

15. The case law on the right to private and family life and on a person's right to his or her image is more developed and has to be kept in mind<sup>1</sup>.

## **B. Legal framework for audio/video recordings in the amendments**

16. The amendments create an obligation on the courts to carry out audio/video recording of trials and a right for broadcasters and other individuals to take photos, carry out film-video-and audio recording and broadcasting of judicial proceedings and are an attempt to regulate this activity.

- The obligation or the right to carry out audio/video recordings

17. The amendments create an obligation for the courts and a right for public and private broadcasters, other representatives of mass media, the parties, "other people" and "any person" to carry out audio/video recording of trials.

18. Obligation for the court: the draft amendments first of all create an obligation on the court to carry out audio/video recordings (new Art 13.1 of the Law). However it is not clear whether this Article means that courts both have to audio and video record or whether the court has a choice between the two, and in this case, on which basis the choice is to be made.

19. Right for the public and private broadcasters: the public broadcaster is entitled to take photographs, carry out film, video, and audio recording and broadcasting of the judicial proceedings, unless the court has ordered full or partial closure of the session. If the public broadcaster does not use the right granted by this Law then another broadcaster may use it following a written application to the judge. If more than one other broadcaster applies for such a licence, the judge is required to select one of them by casting lots (new Art 13.2 and 3 of the Law)

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<sup>1</sup> see for example *Sciacca v. Italy*, Application no. 50774/99, 11 January 2005; *Khuzhin v. Russia* Application no 13470/02, 23 October 2008; *Gurgenidze v. Georgia*, Application no. 71678/01, 17 October 2006; *Von Hannover v. Germany*, Application no. 59320/00, 24 June 2004

20. Right for other representatives of mass media: in addition to this, with the consent of the court, other representatives of mass media are also entitled to take photographs and to carry out recording and broadcasting on the basis of a reasoned request, but subject to the judge's right to restrict this application by a reasoned decision (Art 13.4 of the amendments).

21. Right of the parties, "other people" and "any person": with the consent of the Court, the parties and "other people" (Art 13.4 of the amendments) as well as "any person in the courtroom" shall be entitled to carry out audio or video recording (Art 13.5 of the amendments).

22. Overall, every person in the courtroom may be authorised to audio or video record the hearing. This seems to be a very wide approach.

23. The interest of having any person authorised to record a hearing is questionable, especially given the light framework which has been foreseen for the exercise of this right (see below). Even though it might be difficult in practice to prevent the individual from recording the proceedings, it is questionable whether it is wise for the law to encourage it.

24. Moreover, the amendments provide that "other representatives of mass media, the parties and or other people" have to ask for the authorisation "on the basis of a reasoned request" and that the court may restrict this right by a "reasoned decision" but they are silent on which grounds the court may refuse or limit the authorisation: for example to what extent must the parties of the court proceedings in question have their say in this consent, or to what extent can they challenge this authorisation to broadcast the court session?

25. The Commission considers that these provisions require further specification.

- Conditions to the exercise of the right of broadcasting

26. The regulation of the conditions for the exercise of the right of video recording is very limited.

27. The amendments foresee that:

- the court can order full or partial closure of the session (Art 13.1);
- if the jury is participating in the court session, photographing or recording must be carried out without depiction of images of the jury, without disclosing their identity, appearance or other personal data (Art 13. 6);
- photography, recording and transmission are to be carried out from a seat or place allocated by the court in advance (Art 13.1) .5;
- the judge may apply "the measures defined by the Criminal and Civil Codes of Procedure" if these activities interfere with "the normal procedure of administration of justice".

28. The judge's powers are limited to ordering full or partial closure of the session. The judge does not have power to attach conditions to the exercise of these rights. For example, there may be cases where delay in broadcasting proceedings rather than an outright ban is appropriate. Such a situation can arise, for example, where questions of pre-trial publicity which is prejudicial to a fair trial are at issue. A similar issue may arise where it is desired to allow a witness to give evidence without other witnesses being aware of its content. This used to be given effect by excluding other witnesses from the courtroom while evidence was given, but this would obviously be ineffective if, in any event, the proceedings were to be broadcasted before the excluded witness gave evidence.

29. The protection of persons in court is limited to jurors. The photographer or broadcaster seems to be free to photograph or broadcast anything subject to that limitation. However, it

would be objectionable if the broadcaster or photographer were permitted, for example, to photograph the reaction of witnesses, victims or even ordinary members of the public who choose to attend the trial.

30. Moreover, the limitation of the photographer or broadcaster to staying in one place would not prevent creating such images. And the possible multiplicity of broadcasts might make very difficult the task of the court to protect the private and family life of everyone in the courtroom.

- The obligation to provide records

31. According to Article 13.1 of the Law, the Court is obliged to provide the audio/video recording “upon request” to the parties and to “other people”, unless the court has ordered full or partial closure of the session. It is not clear who the “other people” are to whom disclosure must be made. It is questionable whether this obligation is in conformity with the obligation to ensure the right to respect for private and family life. The obligation should extend only to persons who have an interest in obtaining the recordings. Where a person intends to use recordings for commercial purposes, the state should not have to pay for them.

32. Public Broadcaster: the public broadcaster is to ensure transfer of the records to other representatives of mass media upon their request (Article 13.2 of the amendments). In case the public broadcaster did not use his right to record the hearing, the duty to transfer the records to other representatives of mass media is incumbent to the broadcaster which was authorised to broadcast.

33. The amendments do not deal with the situation where the public broadcaster or the appointed substitute decides to record or broadcast only part of the proceedings. Public broadcasting which was done in a selective manner by a person not responsible to the court could create a misleading impression.

- Data retention

34. A very important issue on which the draft is silent is that of storage and possible disposal of broadcast material. Are recordings allowed to be kept for an indefinite period of time? Does anyone have the right to request them at any time? Does a broadcaster have the right to use them for any purpose, including processing?

35. These issues are not dealt with in the Law. Certain regulations related to audio/video recording might be contained in other texts to the one under examination in this opinion. In any case, the Venice Commission would like to underline that these issues should not be entirely left to self- regulation.

- Conclusion

36. As a conclusion the Venice Commission, would first like to recall *Principle 14 of the Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings*, which states that “Live reporting or recordings by the media in court rooms should not be possible unless and as far as expressly permitted by law or the competent judicial authorities. Such reporting should be authorised only where it does not bear a serious risk of undue influence on victims, witnesses, parties to criminal proceedings, juries or judges. “

37. Moreover, the Venice Commission is of the opinion that the draft amendments are too vague. It is doubtful that they meet the criteria of the “quality of the law” required by the case-

law of the European Court of Human Rights, according to which the law should be “accessible and enables the individual to foresee with reasonable degree of certainty the consequences of his actions and the circumstances in which, and the conditions on which, authorities may take certain steps”.

38. Therefore, there is a risk that interference with the right of private life would be in breach with Article 8 of the European Convention on Human Rights.

### **III. Composition of the High Judicial Council**

39. At present, the High Judicial Council (hereinafter “the Council”) consists of 15 members. The members are: the Chairman of the Supreme Court, eight other representatives of the judiciary, four members elected by the Parliament and two members appointed by the President.

40. According to Article 86.1 of the Constitution of Georgia the judicial component of the Council is meant to be elected by the self-government body of the judges, that is to say, by the Conference of Judges. However, the Organic Law as it stands at present provides that the persons elected must be nominated by the Chairman of the Supreme Court. In other words, he or she has the exclusive power of nomination. In addition to this, it is provided that the Conference of Judges has an administrative committee which can exercise functions in the period between sittings of the conference. Under Article 65b of the Organic Law, these functions include the power of electing judicial members of the High Council. In the light of Article 86.1 of the Constitution this seems of doubtful constitutionality, but as no one has challenged it, it has to be presumed to represent the law.

41. In important respects, the amendments represent progress when it comes to furthering the independence of the Council.

42. Thus,

- the President of Georgia will no longer appoint members of the Council;
- 8 judges will be elected by the Judicial Conference on a proposal from the judges themselves (new Article 47.4);
- Parliament will elect 6 members of the Council chosen among representatives of the civil society (new Article 47.5); these persons will not be politicians, as at present, but will be chosen from amongst the nominees of a number of institutions including the Bar Association, the law faculties of the universities and members of non-commercial, non-profit-making organisations working in the field of law;
- the amendments introduce the secret ballot for the elections of the members of the Council (new Article 64.2).

These significant changes are welcomed.

43. However, there remain certain controversial provisions.

#### Ban from election of chairmen of courts and chambers

44. Article 47.4 provides that “the chairman of a Court, the first deputy chairman, the deputy chairman, the chairman of boards and chambers and any persons who have held any of the listed positions during the previous year cannot be elected by the Judicial Conference of Georgia”.

45. During the visit, the delegation of the Venice Commission was informed that an overwhelming majority of the judicial component of the High Council—6 out of 8—are presidents of courts or of chambers of the Court (in addition, the delegation was informed that 5 of the 8 had been elected by the Administrative Committee rather than by the Conference of Judges).

46. It is easy to understand the desire to ensure that the High Council does not represent the senior judiciary only. However, if the Council is to represent the judiciary as a whole then in principle it seems wrong to exclude any member of the judiciary from the possibility of being elected.

47. The suggestion has also been made that to permit a person to be both a manager of a court and a member of the Council, which has important powers, concentrates too much power in the hands of the individual or individuals concerned.

48. A further argument is that to permit chairmen of courts to sit on the Council might create, in some cases, a conflict of interest.

49. The Venice Commission is of the opinion that it is for the electors to take these arguments into account when deciding whether a colleague deserves to be trusted with the power that a mandate in the Council provides. Moreover, the above arguments have, in a way, lost considerable weight, now that the election of members of the Council will be done by secret ballot.

50. The logic behind the establishment of judicial councils suggests that as few limitations as possible be laid on the right of the judges to elect who, among their colleagues, they might wish to represent them in the Council.

51. The Commission is cognisant of the concerns expressed by many interlocutors met during the visit. In order to meet these concerns, it could be envisaged that the Law limit the maximum number of chairmen who could sit on the Council.

52. The amendments could also provide, as an alternative or cumulative measure, that should a chairman of a court be elected in the Council, he or she would have to resign from his or her position as chairman.

#### Election of members by the Parliament

53. The new Article 47.5 provides that "The Parliament of Georgia by a majority of its members elects 6 members in the High Council of Justice".

54. The Venice Commission is of the opinion that elections from the parliamentary component should be by a two-thirds qualified majority, with a mechanism against possible deadlocks or by some proportional method which ensures that the opposition has an influence on the composition of the Council.

55. It is a matter for the Georgian authorities to decide which solution is appropriate, but the anti-deadlock mechanism should not act as a disincentive to reaching agreement on the basis of a qualified majority in the first instance<sup>2</sup>.

56. This recommendation concerns all the cases where the law provides for qualified majorities.

#### Majority required for the appointment of judges

57. Under new Article 50.3 and 50.4, decisions on disciplinary issues and on appointment of judges are only adopted if supported by at least 2/3 of the total number of members of the

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<sup>2</sup> Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro (CDL-AD(2012)024), para. 35).

Council. Given the new composition of the Council, this means that such decisions could only be adopted if supported by at least one of the non-judge members of the council.

58. This rule, in itself, is a positive one. However, this majority might not be easy to achieve and it is therefore recommended to analyse once again if this will not lead to deadlocks and to introduce an anti-deadlock mechanism.

#### Secretary of the High Council of Justice

59. Under the current Law, the Secretary of the High Council of Justice is elected by the Conference of judges of Georgia upon nomination by the President of the Supreme Court of Georgia for a three-year term of office.

60. The new Article 51 provides that the term of office of the Secretary of the High Council of Justice will be of 4 years, and he or she will be elected by the Judicial Conference of Georgia from among the judge members of the Council.

61. Whether the Secretary of the High Council of Justice should be elected by the Judicial Conference of Georgia or by the Council itself is something which could be reconsidered.

#### Administrative Committee of the Judicial Conference

62. The Administrative Committee of the Judicial Conference consists of 9 members elected by the Judicial Conference.

63. As mentioned above, under the current legislation, the Administrative Committee of the Judicial Conference has, in the period between the sittings of the Conference of Judges, a rather large competence which can be compared with the competence of the Judicial Conference itself. It includes the competence to elect and dismiss the Secretary of the High Council of Justice and other members of the Council. By amendments to Article 64, the competence of the Administrative Committee of the Judicial Conference to adopt decisions on the matters within the competence of the Conference of judges is excluded. This is to be welcomed.

64. The draft keeps the competence of the Administrative Committee "...to make decisions and elaborate acts on the administrative issues of the Common Courts, and submit the acts to the judicial conference..."(Article 64.2). On the one hand, it is not clear what is meant by "administrative issues of the Common Courts" and on the other hand the competence of the judicial conference to adopt "acts on the administrative issues of the Common Courts" is not provided in the Law in force or in the amendments.

65. In any case, it is doubtful whether this competence should be given to the Judicial Conference. The courts should be organised and should act on the basis of the laws adopted by Parliament and not acts adopted by a judicial conference or other similar bodies.

66. Moreover, it is not clear what the "decisions" mentioned in the same Article are. Should the text be interpreted in the sense that the Administrative Committee can make decisions on the administrative issues of the common courts, this competence should be removed for the same reasons as those expressed above.



Rules for election by the Judicial Conference of Georgia

67. The purpose of new Article 65.3 and 65.4<sup>3</sup> is to regulate situations where during the election of the Chairman and members of the Administrative Committee, the Secretary and other members of the High Council of Justice, the judge members of the Disciplinary Panel, the required number of votes (two-thirds of the members present) is received by more or less candidates than necessary.

68. Article 65.3 and 65.4 tries to bring solutions for avoiding deadlocks, by requesting that if two candidates received the same number of votes, the vote should be held again and the candidate elected will be the one who has the best score and, in any case, not less than  $\frac{1}{4}$  of the votes of the total number of members of the Judicial Conference. But it is questionable whether it is reasonable to establish such a high threshold for the first round, if for the second round the threshold is decreased from two-thirds to a quarter. This provision could discourage the attempts to find compromise solutions, which would allow reaching the high threshold.

**V. Transitional provisions – termination of functions of the current High Judicial Council of Georgia.**

69. Paragraph 2 of Article 3 of the amendments provides that upon enactment of the Law “authority of the members of the High Council of Justice, except the chairman of the Supreme Court, is terminated”.

70. During the visit, it was explained to the delegation of the Venice Commission by the proponents of this measure, that they wish to do so because they regard the existing composition of the High Council of Justice as so flawed that the only thing to do is to replace the whole Council.

71. However, had this appointment not been done in conformity with the Law or the Constitution, it should have been challenged before courts in due time.

72. The question is whether the mandate of the members of the sitting council can be interrupted and terminated before the term provided in the legislation under which they were appointed because a new legislation is to be implemented.

73. At first sight, a positive reply to this question would appear contrary to the principle of legal certainty.

74. The Organic Law provides for a four-year term of office. This term does not appear to have a constitutional basis. Both the law in force and the draft amendments establish an exhaustive list of the grounds for pre-term termination of the mandate of the members of the High Council of Justice. Neither of them includes norms which expressly provide or can be interpreted in the way that the mandate of the members of the High Council of Justice can be terminated when the procedure for appointment is changed.

75. The Venice Commission is of the opinion that when using its legislative power to design the future organisation and functioning of the judiciary, Parliament should respect the principle of the separation of powers and refrain from adopting measures which would

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<sup>3</sup> The Commission takes it that the reference to the High Council of Justice in Article 65.3 and 65.4 are translation mistakes. If not, the text should be reconsidered as it is obvious that the paragraphs are supposed to regulate the decision making process of the Judicial Conference and not of the High Council of Justice.

jeopardise the independence of the Judiciary and the continuity in membership of the High Judicial Council.

76. Removing all members of the Council prematurely would set a precedent whereby any incoming government or any new Parliament, which did not approve of either the composition or the membership of the Council could terminate its existence early and replace it with a new Council<sup>4</sup>.

77. As the Venice Commission already stated "Compliance with the rule of law cannot be restricted to the implementation of the explicit and formal provisions of the law and of the Constitution only. It also implies constitutional behaviour and practices, which facilitate the compliance with the formal rules by all the constitutional bodies and the mutual respect between them."<sup>5</sup>

78. Therefore, even though the composition of the current High Council of Justice may appear unsatisfactory, the Venice Commission recommends that it complete its mandate. If indeed members of the Council were appointed in an illegal manner, these appointments should be challenged in court proceedings.

#### **IV. Conclusion**

79. The amendments to the Organic Law of Georgia on the Courts of General Jurisdiction improve many provisions of the Organic Law and will bring this Law closer to European standards.

80. As concerns the coverage of court proceedings, several provisions should be further detailed. Judges should be given wider powers than those of ordering full or partial closure of the session. It might be wise to revisit the list of people authorised to record or take pictures in the courtroom. In addition, the obligation to provide records upon request to "other people" should be clarified in order to take into account the right to respect for private and family life. Finally, matters pertaining to storage should be regulated.

81. Concerning the High Council of Justice, as mentioned above, the main improvements are the following:

- the President of Georgia will no longer appoint members of the Council;
- 8 judges will be elected by the Judicial Conference on a proposal from the judges themselves (new Article 47.4);
- the Parliament will elect 6 members of the Council chosen among representatives of the civil society (new Article 47.5); these persons will not be politicians, as at present, but will be chosen from amongst the nominees of a number of institutions including the Bar Association, the law faculties of the universities and members of non-commercial, non-profit-making organisations working in the field of law;

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<sup>4</sup> See Opinion on the draft Law amending and supplementing the Law on Judicial Power of Bulgaria CDL-AD(2009)011, para. 14; Opinion on the Constitutional amendments reforming the Judicial System in Bulgaria (CDL-AD(2003)016), para. 25; Opinion on the draft Law on Amendments to the Judicial System Act of Bulgaria (CDL-AD(2002)015; Opinion on the Reform of the Judiciary in Bulgaria (CDL-INF(1999)005).

<sup>5</sup> Opinion On the Compatibility with constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other states institutions and the Government emergency ordinance on amendment to the Law no. 47/1992 regarding the organisation and functioning of the Constitutional Court and the Government emergency ordinance on amending and completing the Law no. 3/2000 regarding the organisation of a referendum of Romania, adopted by the Venice Commission at its 93<sup>rd</sup> Plenary session (Venice, 14-15 December 2012), par. 72.

- The amendments introduce the secret ballot for the elections of the members of the Council (new Article 64.2).

82. The Venice Commission recommends, however:

- that chairmen of Courts, first deputy chairmen, deputy chairmen, chairmen of boards and chambers and any persons who have held any of the listed positions during the year preceding the elections to the High Council of Justice should be authorised to be candidate; it could be envisaged that the Law limit the maximum number of chairmen who could sit on the Council; the amendments could also provide, as an alternative or cumulative measure, that should a chairman of a court be elected in the Council, he or she would have to resign from his or her position as chairman.
- that elections from the parliamentary component should be by qualified majority or by some proportionate method;
- that the provisions giving the power to the Administrative Committee “to make decisions and elaborate acts on the administrative issues of the Common Courts, and submit the acts to the Judicial Conference...” (Article 64. 2) should be reassessed;
- to consider changing the threshold for election by the Judicial Conference for provisions more conducive to negotiations;
- to delete Article 3.2 of the amendments, which provides that upon enactment of the Law “authority of the members of the High Council of Justice, except the chairman of the Supreme Court, is terminated” and consider adopting other transitional provisions.

83. The Venice Commission remains at the disposal of the Georgian authorities for further co-operation.