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(VENICE COMMISSION)

GEORGIA

URGENT OPINION

**ON THE SELECTION AND APPOINTMENT
OF SUPREME COURT JUDGES**

**Issued pursuant to Article 14 a
of the Venice Commission's Rules of Procedure**

on the basis of comments by

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I. Introduction

1. A request was made on 11 March 2019 by Mr Irakli Kobakhidze, Chairperson of the Parliament of Georgia, for an urgent opinion by the Venice Commission on the selection and appointment of judges to the Supreme Court of Georgia.

2. This request for an urgent opinion was made as a result of the incomplete composition of the Supreme Court of Georgia, which currently has 11 judges (and will have only eight judges by the beginning of July 2019) and should be composed of 28 judges according to Article 61.2 of the new Constitution. At the 118th Plenary Session, on 15-16 March 2019, the Venice Commission authorised the rapporteurs to issue this urgent opinion.

3. The procedure for the appointment of Supreme Court judges has proved to be difficult, following the presentation of a list of ten candidates to Parliament by the High Council of Justice in December 2018. This list was eventually withdrawn, due to the controversies and criticism it raised in the population, civil society and a number of members of the High Council of Justice, following the speed at which it was drawn up and presented to Parliament. The criticisms claimed that the selection procedure lacked clear and objective criteria as well as transparency. In this respect, NGOs have alleged that the appointment process is controlled by a political network of influential judges, who do not enjoy the best reputation due to past decisions and partial appointments. This resulted in the call for the drafting of legislative amendments to provide for clear and objective criteria and a transparent procedure for the selection and appointment of judges to the Supreme Court of Georgia.

4. In this context, the Venice Commission received three texts which contain the provisions on the selection and appointment of Supreme Court judges: (1) the draft Organic Law on the amendments to the Organic Law on Common Courts; (2) the draft Law on amendments to the Rules of Procedure of the Parliament; and (3) the draft Law on Conflict of Interest and Corruption in Public Institutions (CDL-REF(2019)007) as well as the relevant provisions of the new Constitution of Georgia¹. The draft Organic Law on the amendments to the Organic Law

¹ *Article 61. Supreme Court of Georgia*

1. The Supreme Court of Georgia shall be the Court of Cassation.

2. The Supreme Court shall consist of at least 28 judges. Upon nomination by the High Council of Justice, the judges of the Supreme Court shall be elected for life, until they reach the age established by the organic law, by a majority of the total number of the Members of Parliament.

3. Upon nomination by the High Council of Justice, Parliament shall elect a Chairperson of the Supreme Court from among the members of the Supreme Court for a term of 10 years by a majority of the total number of the Members of Parliament shall elect a Chairperson of the Supreme Court from among the members of the Supreme Court for a term of 10 years by a majority of the total number of the Members of Parliament. A person who has already held the position of chairperson of the Supreme Court shall not be re-elected.

Article 63.6 Judge

6. A judge of the common courts shall be a citizen of Georgia who has attained the age of 30, has a relevant higher legal education and at least 5 years of specialised professional experience. Additional qualification requirements for judges of the common courts shall be defined by the organic law. Judges of the common courts shall be appointed for life until they reach the age established by the organic law. Judges of the common courts shall be selected based on their conscientiousness and competence. The decision to appoint a judge shall be made by a majority of at least two thirds of the total number of the members of the High Council of Justice. The procedures for appointing and dismissing judges shall be determined by the organic law.

Article 64. High Council of Justice

1. The High Council of Justice of Georgia – a body of the common courts system – shall be established to ensure the independence and efficiency of the common courts, to appoint and dismiss judges and to perform other tasks.

2. The High Council of Justice shall consist of 14 members appointed for a term of 4 years, and the Chairperson of the Supreme Court. More than half of the members of the High Council of Justice shall be members elected from among the judges by the self-governing body of judges of the common courts. In addition to the members elected by

on Common Courts was already endorsed by the Georgian Parliament on 20 March 2019 and is scheduled for a second reading before Parliament on 19 April 2019.

5. For the present urgent opinion, the Venice Commission invited Mr Yavuz Atar, Mr Richard Barrett, Mr Nicolae Esanu, Mr Jørgen Steen Sørensen and Mr Mats Melin to act as rapporteurs.

6. On 1-2 April 2019, a delegation of the Venice Commission, composed of Mr Yavuz Atar, Mr Nicolae Esanu, Mr Jørgen Steen Sørensen and Mr Mats Melin accompanied by Ms Tanja Gerwien from the Secretariat, visited Tbilisi and met with (in chronological order): the Chairman of Parliament; representatives of the Parliamentary Majority; representatives of the “National Movement” faction; representatives of the “Alliance of Patriots and Social-Democrats” faction; representatives of non-affiliated/independent Members of Parliament; representatives of the “European Georgia” faction; the Public Defender; representatives of the Georgian Bar Association; members of the diplomatic community; NGO representatives; the Chairman of the Legal Issues Committee of Parliament; the members of the High Council of Justice; the Minister of Justice; the Acting Chairperson of the Supreme Court and the Chairperson of the Civil Case Chamber of the Supreme Court.

7. The present urgent opinion was prepared on the basis of contributions by the rapporteurs and on the basis of translations provided by the Georgian authorities of the draft Organic Law on the amendments to the Organic Law on Common Courts, the draft Law on amendments to the Rules of Procedure of the Parliament and the draft Law on Conflict of Interest and Corruption in Public Institutions. Inaccuracies may occur in this opinion as a result of incorrect translations.

8. This urgent opinion was issued pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions, (CDL-AD(2018)019) and will be presented to the Venice Commission for endorsement at its 119th Plenary Session in Venice on 21-22 June 2019.

II. Background and context

9. Georgia’s constitutional reform of 2017 culminated with the entering into force of Georgia’s new Constitution, on 16 December 2018, when the new President of Georgia was sworn in, creating new legal conditions that also affect the procedure for the selection and appointment of the Supreme Court judges.

10. In this respect, before the constitutional reform, the Supreme Court was composed of “*no less than 16 judges*”² and now, under Article 61.2 of the new Constitution, “*[T]he Supreme Court shall consist of at least 28 judges*”. This Court currently has 11 judges, but technically only 10, as one of the judges’ terms has already ended and this judge is staying on to complete cases. The term of office of two other judges will expire at the end of June 2019, which means that the Supreme Court will be left with only eight judges on 1st July 2019. The fact that this Court should have 28 judges at the very least, according to the new provision in the

the self-governing body of judges of the common courts, and the Chairperson of the Supreme Court, the High Council of Justice shall have one member appointed by the President of Georgia and members elected by a majority of at least three fifths of the total number of the Members of Parliament. The Chairperson of the High Council of Justice shall be elected for 4 years, but not more than the term defined by his/her term of office as a member of the High Council of Justice. The Chairperson of the High Council of Justice shall be elected by the High Council of Justice from among its judge members in accordance with the procedures established by the organic law. The Secretary of the High Council of Justice shall be elected for 4 years by the self-governing body of judges of the common courts from among the members of the High Council of Justice that have been elected by the self-governing body of judges of the common courts.

3. The High Council of Justice shall be accountable to the self-governing body of judges of the common courts. The procedure for accountability shall be determined by the organic law.

² Regulated by the Law on Common Courts of Georgia.

Constitution, explains the urgency of the selection of candidates for the – soon-to-be – 20 vacancies at the Supreme Court of Georgia.

11. Before the constitutional reform, Supreme Court judges were elected by a majority of all the Members of Parliament upon the proposal of the President of Georgia and their term of office was *“for a period of not less than 10 years”*. Under Article 61.2 of the new Constitution – although the Venice Commission had recommended that the Supreme Court judges be appointed directly by the High Council of Justice (hereinafter, the “HCoJ”) without the involvement of Parliament, or be appointed by the President upon proposal by the HCoJ, in order to better guarantee their independence³ – Supreme Court judges are now nominated by the HCoJ and elected for life (until retirement) by a majority of all the Members of Parliament.

12. The Supreme Court of Georgia, which is the final instance court in the country, will effectively have an entirely new composition with the appointment of 18 to 20 new judges, who will be appointed for life (until retirement). Since the new Constitution leaves the final decision of the appointment of judges of the Supreme Court to Parliament, this implies that the present parliamentary majority will be entrusted with the appointment of a practically new Supreme Court, the composition of which will possibly remain the same for the next 20 to 30 years.

13. This is an important and very unusual, if not extraordinary, situation. In most countries, the appointment of judges – especially to a supreme court – is staggered over years, if not decades. This renders the nomination and appointment procedure for these judges in Georgia all the more important and should be considered with great care.

14. According to the information received by the delegation of the Venice Commission during its meetings in Tbilisi, the HCoJ enjoys a fairly low trust by a large segment of society at the moment. The Venice Commission is in no position to evaluate whether this lack of trust is warranted or not. Nevertheless, the fact that the HCoJ – in its current situation – will be selecting nearly all the candidates for judges of the Supreme Court, producing a list which will then be submitted to a political majority in Parliament (in between elections), which in turn will appoint nearly all the Supreme Court judges, should be a matter of concern. This may be detrimental to the high level of public trust that an institution such as the Supreme Court must enjoy in a country. It may even be argued that the long-term risks are far greater in a society that is characterised by political polarisation, which the delegation was told during its visit in Tbilisi is the situation in Georgia today.

III. Assessment

A. General recommendation

15. In the light of the observations made in paragraphs 12-14 above, consideration might be given to having the fixed term of office of the current Supreme Court judges transformed to lifetime appointments. The rationale behind this suggestion is to ensure that at least 11 experienced judges continue to serve in the Supreme Court and thus (a) the extent to which an entirely new Supreme Court is created by Parliament is mitigated to some extent and (b) a number of more experienced judges, and not only total newcomers, will be adjudicating cases and contributing to the stability and consistency of the Supreme Court’s work.

16. In addition, notwithstanding Article 61.2 of the new Constitution, Parliament should only appoint the number of Supreme Court judges which is absolutely necessary to render the work of the Supreme Court manageable. How many new judges will be needed to achieve this

³ Opinion on the draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017 (CDL-AD(2017)023), paragraph 45; Opinion on the draft constitutional amendments adopted on 15 December 2017 at the second reading by the Parliament of Georgia (CDL-AD(2018)005), paragraph 15.

should be decided after consultations with the Supreme Court. The number should not exceed half of the 18 to 20 positions that will be vacant. Further appointments may then be made by Parliament elected at the next general elections. Such a staggered approach in the appointment of all the Supreme Court judges may both alleviate the present burden on the Supreme Court and ensure that it enjoys the public trust and respect it deserves in the long run.

B. Draft Organic Law on the amendments to the Organic Law on Common Courts

General remarks

17. According to Article 1.2 (referring to amended Article 34¹.1) of the draft Organic Law on the amendments to the Organic Law on Common Courts (hereinafter, the “draft Organic Law”), the HCoJ initiates the procedure for the selection of candidates for judges of the Supreme Court to be nominated to Parliament within one month from the date of the vacancy announcement.

18. In general, and in order to avoid situations in the future that could lead to a shortage of judges in the Supreme Court, consideration should be given to publishing the vacancy announcement(s) before the end of the term of office of any outgoing judges, so as to render the vacancy period as short as possible.

Eligibility Criteria

19. The eligibility criteria set out in Article 1.B), Paragraph 7 (referring to amended Article 34.7) of the draft Organic Law, allows any citizen of Georgia of 30 years of age or upward, who has an advanced level of legal education, has command of the state language and has the relevant professional working experience for the high status of justice, to be elected by Parliament as a judge of the Supreme Court. The amended Paragraph 8 will clarify that relevant professional working experience is, five years as a judge (including former judges), a non-judge, who wishes to be a candidate, must be a specialist of distinguished qualification in the field of law with five years professional working experience and who has also passed the judicial qualification examination.

20. It is important that non-judge candidates, who can display experience of legal work (identified here as five years of experience), should be eligible. They are, however, expected to satisfy two extra criteria.

21. The first is to be “*a specialist of distinguished qualification in the field of law*”. This is an unusual formula, which should be further examined. If the reference to ‘a specialist’ indicates that lawyers with a more general legal background would not be eligible that appears unduly restrictive and would unnecessarily hamper the possibility to promote the highly desirable diversity within the Supreme Court. Further, if the reference to “*distinguished qualification*” suggests that a higher academic qualification is required of non-judge candidates again, that would seem unduly restrictive and difficult to justify. If, however, “*specialist of distinguished qualification in the field of law*” is a synonym for ‘lawyer with a distinguished reputation’ it does not appear problematic.

22. The second hurdle for non-judge candidates is that they have passed the judicial qualification examination. This should be reconsidered because, as indicated above, only a “*specialist of distinguished qualification in the field of law*” may be a candidate for judges of the Supreme Court. A person with such qualifications should not be forced to sit an examination to prove that he or she is capable of dealing with points of law, which is the essence of the work of a Supreme Court.

23. It appears from criticisms of the draft Organic Law that it is too lenient with respect to the age requirement⁴ and experience, as it may be questioned whether a person will have acquired the necessary experience to be a Supreme Court judge at the age of 30 and after no more than five years of service as a judge, advocate or academic. These relatively low formal thresholds are all the more questionable as they also apply to the position of Chief Justice.

24. Yet, further in the draft Organic Law, under Article 1.2 (referring to Article 34¹ in paragraphs 7, 12, 13 and 16), reference is made to the situation of a tie vote between candidates, in which case preference is given to the candidate with a longer professional working experience. Although this is to be welcomed, more emphasis on experience should be provided in the criteria in general as well as a higher age requirement.

25. It is to be welcomed that, by reference in Article 34¹.14 to Article 35¹.1, 3-14, the eligibility criteria for candidates seem to not be of an exclusively formal character. It is of great importance that practices and statutory provisions in relation to the recruitment and appointment of judges are based on merit, which in turn is based on qualifications, integrity, ability, efficiency and experience, including personal qualities. The judges appointed to the Supreme Court must have the required legal knowledge, skills, competence and seniority to take up this important function. It is therefore crucial that the method of appointment not be based upon political or personal considerations. Eligibility criteria should be wide enough to allow for a diversity of candidates and nominees.

26. In this respect – Recommendation No.R(94)12, later taken up by Recommendation CM/Rec(2010)12 *on judges: independence, efficiency and responsibilities*, as well as by the Consultative Council of European Judges (CCJE) in its Opinion No.1 – decisions concerning the selection and career of judges should be based on objective criteria that are pre-established by law or by the competent authorities and that such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity⁵. Furthermore, “*there must be total transparency in the conditions for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate’s merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency*”⁶.

27. With respect to merit, the Venice Commission’s *Report on the Independence of the Judicial System Part I: The independence of judges*⁷ indicates that “*Merit is not solely a matter of legal knowledge, analytical skills or academic excellence. It should also include matters of character, judgment, accessibility, communication skills, efficiency to produce judgments, etc.*” Also, “*It is essential that a judge have a sense of justice and a sense of fairness. However, in practice, it can be difficult to assess these criteria. Transparent procedures and a coherent practice are required when they are applied. (...)*”⁸ While these are standards applicable to the appointment and promotion of judges in general, when it comes to Supreme Court judges, personal qualities such as ability, integrity and impartiality are of even greater importance.

⁴ The Venice Commission, in its Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine (CDL-AD(2013)014, paragraph 26) for Ukraine, found that the requirement for newly appointed judges to be 30 years of age, as against the current 25, and to have a five-year rather than a three-year experience, to be reasonable. Therefore, even for newly appointed judges, the requirements of 30 years plus five years of work experience are sought and are considered to be reasonable by the Venice Commission - these conditions cannot be considered enough to be appointed as a judge to the Supreme Court.

⁵ Recommendation CM/Rec(2010)12, paragraph 44.

⁶ See CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, paragraph 50.

⁷ CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges.

⁸ CDL-AD(2010)004, paragraph 25.

28. Ensuring a high standard of independence and integrity among Supreme Court judges is important in all situations. It might be argued that it is of special importance where the final decision of appointment is taken by a political body, such as Parliament.

29. As regards the selection process and with respect, in particular, to the role of a Council for the Judiciary in this process, the CCJE underlined the following:

“it is essential that, in conformity with the practice in certain States, the appointment and selection criteria be made accessible to the general public by every Council for the Judiciary. The Council for the Judiciary shall also ensure, in fulfilling its role in relation to the court administration and training in particular, that procedures for judicial appointment and promotion based on merit are opened to a pool of candidates as diverse and reflective of society as a whole as possible”⁹.

“In addition, where more senior posts are concerned, particularly of a head of jurisdiction, general profiles containing the specificities of the posts concerned and the qualities required from candidates should be officially disseminated by the Council for the Judiciary in order to provide transparency and accountability over the choice made by the appointing authority”¹⁰.

30. In summary, as regards the eligibility of non-judge candidates, it is important that the formula “a specialist of distinguished qualification in the field of law” is not unduly restrictive and, ideally, refer to a lawyer with a distinguished reputation. Also, the requirement for non-judges to have passed the judicial qualification examination should be reconsidered.

31. As regards the age and experience requirements – for both, the formal thresholds are low and more emphasis on experience should be provided in the criteria in general as well as a higher age requirement.

Secret ballots in the HCoJ

32. The draft Organic Law contains an elaborate selection process with more than two stages, with the publication of lists of names of those advancing to the next stage. The process also includes a hearing of candidates at the second stage. The proposed rules on background checks of candidates seem to provide the HCoJ with material to evaluate the candidates (see below).

33. However, the principal difficulty in this draft Organic Law is the proposal that during the process, the HCoJ will conduct a secret ballot to shortlist applicants and will later conduct a second secret ballot for the final list of nominees. Although the Venice Commission understands the reasoning behind using secret ballots as a means by the HCoJ members to decide anonymously and forestalling any attempts of influence, this is difficult, as the nature of a secret ballot process is to be non-reasoned. It also allows those voting to be influenced by extraneous considerations – not based on objective criteria on the basis of which each candidate should be evaluated – as they do not have to disclose their view even within the HCoJ. It also makes it impossible for the rationale behind the voting process to be articulated. The new Constitution at Articles 61 and 63 provides that the HCoJ selects and nominates judges based on their conscientiousness and competence.

34. In addition, there seems to be no provision requiring the HCoJ to publish the selection criteria to be applied in the process nor to provide reasoning (which is the result of secret ballots).

⁹ See CCJE Opinion No. 10 (2007) on the Council for the Judiciary at the service of society, paragraph 50.

¹⁰ Ibid, paragraph 51.

35. Even if the fundamental criteria of the existing Law are applied, it may be relevant for the HCoJ to separately inform prospective candidates and the general public about these criteria. As the CCJE emphasised, this is essential *“to provide transparency and accountability over the choice made by”*¹¹ – in this case – the authority proposing the candidates to Parliament.

36. In order to have transparency and accountability, it naturally follows that the decision of the HCoJ to nominate certain candidates before other contenders needs to be reasoned with regard to those same criteria that have been published beforehand. It would therefore be recommended that reasoning be provided in the shortlisting of candidates and, as a result, conducting secret ballots should be reconsidered and preferably abolished.¹²

37. The wording of Article 1.2 of the draft Organic Law (referring to amended Article 34^{1.15}) providing a dissenting HCoJ member with the possibility to address Parliament in writing, and that such dissenting opinion shall be conveyed to each Member of Parliament, also seems to imply that the reasons for the HCoJ decision should be stated. At the same time, there is no provision obliging the HCoJ to provide reasons to the candidates themselves, in particular not to those who are not finally nominated to Parliament. This must effectively mean that, regardless of the meticulous processes provided for and the meticulous criteria to be applied, there is no possibility for the individual candidate to be aware of (and challenge, for that matter) the reasons behind the decisions made by the HCoJ.

38. However, as stated in the draft Organic Law, since the data of candidates collected by the HCoJ *“are confidential and may not be disclosed in any form”* (Article 1.2 of the draft Organic Law referring to amended Article 34^{2.4}), this may make it difficult for the HCoJ to provide reasons for nominations. This provision should be revised to state that the information may be disclosed only to the extent absolutely necessary for the HCoJ to provide reasons for its decisions.

39. The Venice Commission recommends that the HCoJ be obliged to give substantial reasons for its decisions based not only on the result of background checks, but also on answers given by candidates during the hearings that can be reviewed by a court. This implies that the procedure not be based on secret ballots, but rather on the confirmation of the objective criteria on which each candidate is evaluated, producing a pool of candidates which 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.

40. If the HCoJ provides reasoned opinions, this will enable losing candidates to file an appeal against this decision. Such appeals would be in line with the general approach of the Georgian legislation, as appeals already exist for other decisions made by the HCoJ (see Article 35⁴ of the Organic Law on Common Courts). This possibility for an appeal would ensure that the HCoJ does not take arbitrary decisions, but bases its decisions on the merits of each candidate. This would also increase confidence in the appointment process, which is sorely lacking at the moment (see Paragraph 3, above).

Background checks

41. Background checks are regulated by Article 1.2 of the draft Organic Law (referring to amended Article 34²), which is to a large extent a copy of the current provision in Article 35² of the Organic Law on Common Courts. This provision contains a number of safeguards for the

¹¹ Ibid.

¹² See GRECO's Evaluation Report on Georgia (fourth evaluation round), adopted at its 74th Plenary Meeting, 28 November – 2 December 2016, notably paragraphs 92-94.

candidate, including a right to appeal/challenge results of the background check (Article 1.2 of the draft Organic Law (referring to amended Article 34^{2.9})).

42. Under Article 1.2 of the draft Organic Law (referring to amended Article 34^{2.5}), it appears to be more or less entirely up to the discretion of the HCoJ whom to contact in order to acquire information, and in this respect, different choices could apparently be made regarding different candidates, as decided by the “*relevant structural unit*” stipulated in the provision. This seems to carry the risk of arbitrariness. On the other hand, as candidates will have different backgrounds, it will probably be difficult to design a uniform concept of sources, but the template for the range of information to be sought should be published. A compromise solution may be that in Article 1.2 of the draft Organic Law (referring to amended Article 34^{2.9}), the candidate should be given the right to demand that the HCoJ collect further information from specified sources (unless clearly unfounded).

43. Moreover, although the process for background checks is described in detail in the draft Organic Law, due consideration should be given to the exercise of this process, as it also concerns the personal rights of candidates.

44. In a Joint Opinion by the Venice Commission on Georgia, the following considerations were expressed concerning a unit investigating the financial situation of candidates: “*Furthermore, the possibility of the ‘structural unit’ of the High Council of Justice to collect information on the financial status of the candidates (draft Art. 35¹) is also problematic for the same reasons and might jeopardize the right of every citizen to hold any public office protected by the Article 29 of the Georgian Constitution. Second, although the consent of the candidate is necessary for that the ‘structural unit’ of the High Council of Justice has access to his/her personal details, in practice, it seems not to be possible for a candidate to refuse this consent.*”¹³

45. It may not be sufficient, in the interest of producing an objective evaluation, to have only one member evaluating the information on candidates. Consideration might be given to introducing a board of, for instance, three members to consider this information. In addition, in the contacts established with respect to candidates under Article 1.2 of the draft Organic Law (referring to amended Article 34^{2.5}), consideration should be given to the fact that the information received by some of the persons listed in the draft amendment may be based on personal observations and hence, subjective. This information must therefore be treated with caution. In this context, this information is brought to the attention of the members and taken into consideration by them in the voting process. Undoubtedly, objective criteria such as professional competence and merit, impartiality and experience should be taken into account when appointing a candidate. It is important to evaluate the data obtained on the candidates in accordance with the law. Care should be taken to ensure that the background checks are not arbitrary and subjective.

Risk of deadlock

46. There are also possible risks of a deadlock in the process. Following the public hearing and the second secret ballot, the candidates who received the highest number of votes (“*the best results*”) shall be considered nominated by the HCoJ to Parliament if these candidates each receive at least 2/3rd of the votes of all HCoJ members¹⁴.

¹³ CDL-AD(2014)031, Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, paragraphs 51, 52 and 56.

¹⁴ See Article 1.2 of the draft Organic Law (referring to amended Article 34^{1.13}).

47. In principle, this may be a useful provision as it guarantees that candidates cannot be nominated with a very small majority within the HCoJ. Also, in cases where each relevant candidate has in fact, in the second ballot, had at least 2/3rd of the votes, this should not be a practical problem.

48. On the other hand, there will inevitably be cases in which there will be candidates who have received the necessary number of votes to be nominated to the second ballot, but not 2/3rd of the votes. In principle, this may be the case for all candidates in question. For example, if there is only one position to be filled, the HCoJ may be fairly equally divided as to the merits of two candidates. In such a situation, deadlocks are very likely to occur and will be difficult to overcome. It is not clear how such candidates would obtain a 2/3rd majority of all HCoJ members.

49. The current procedure prescribed in the provision does not appear to solve the problem and this should be addressed, if this voting procedure is kept in the draft Organic Law.

Conflict of interest

50. Another important aspect in this nomination process is that it needs to be construed in such a way as to avoid any conflict of interest and ensure that even the impression of such a conflict is avoided.

51. While it is a welcome improvement that members of the HCoJ, who are candidates for judges of the Supreme Court, will not have the right to vote during the selection process, it should be noted that, with regard to selecting candidates for a position in lower courts, the Organic Law on Common Courts states that a member of the HCoJ may not participate in the procedure if s/he himself/herself is going to participate in the competition (Article 35.3 1-3). In order to avoid any perception of a conflict of interest, it seems important to apply the same standard to the procedure for the nomination of Supreme Court judges. A member of the HCoJ, who is a candidate, should be excluded from all procedures pertaining to the selection and nomination of candidates for judges of the Supreme Court. In addition, other situations are relevant and should be included, notably where a spouse or close relative etc. is a candidate.

52. It is also important that the final decision of the HCoJ on which candidates to nominate for Parliament's consideration, be based exclusively on how each candidate has scored on the different evaluation criteria applied, not on the result of a secret ballot among the HCoJ members. This seems necessary in order to convince both the candidates and the general public that the decision is based on the candidates' merits rather than on HCoJ members' personal preferences.

Chief justice of the Supreme Court

53. According to the draft Organic Law, the term of office of the Chief Justice of the Supreme Court is of 10 years. In the current situation in Georgia, which is at a point of transition to a larger and newly constituted Supreme Court, the appointment of a Chief Justice for as long as 10 years might be too long. Therefore, to facilitate a staggered appointment, as suggested in Paragraph 16 above, a shorter term of office for the Chief Justice might be considered.

C. Draft Law on amendments to the Rules of Procedure of the Parliament

54. Under Article 61.2 of the new Constitution, Supreme Court judges are elected by Parliament.¹⁵ According to Article 1.a of the draft Law on amendments to the Rules of

¹⁵ Opinion on the draft revised Constitution of Georgia (CDL-AD(2017)023), paragraph 45; Report on judicial appointments (CDL-AD(2007)028), paragraphs 9-12.

Procedure of the Parliament (hereinafter, the “draft Amendments”), the Legal Issues Committee of Parliament is the body designated to assess the compliance with the selection and appointment of candidates for judges of the Supreme Court.

55. In view of this, it appears crucial that the procedures in the Legal Issues Committee be designed in such a way as to examine, to the highest possible extent, the conformity of the candidates’ qualifications with the requirements of the Constitution and the Organic Law on Common Courts. In this respect, it is to be welcomed that this is indeed stipulated as the task of the Committee (and the prescribed working group)¹⁶. It is also to be welcomed that a public hearing will be conducted.

56. According to current Article 205.4 of the existing Rules of Procedure of the Parliament (which appears to remain unchanged), the Legal Issues Committee shall adopt a conclusion by a majority of votes. Such conclusion “*shall include a recommendation of the committee regarding the candidacies ...*” and this is then “*submitted to the Bureau of the Parliament to be put on the agenda of the Parliament’s plenary sitting and is published on the Parliament’s website*”. This seems to require that the Committee state its own opinion on the merits of each candidate.

57. To balance the disadvantages of a final vote in Parliament, procedures should ensure that the merits and qualifications of each candidate are made available to Parliament and to the general public to the highest extent possible in order to motivate Parliament to vote on the basis of professional merits rather than political preferences etc.

58. Again, this reflects the basic problems of a system of parliament-elected judges.

D. Draft Law on Conflict of Interest and Corruption in Public Institutions

59. Article 1 of the draft Law on Conflict of Interest and Corruption in Public Institutions, stipulates that a “*Candidate nominated in accordance with Article 34^{1.13} of the Law of Georgia on Common Courts for the position of Judge of Supreme Court of Georgia, shall submit the asset declaration of public official within 7 days after publishing relevant information on the website of the High Council of Justice of Georgia.*”

60. It might be appropriate to impose on candidates the obligation to report not only their own assets, but also the assets of their spouses and children.

61. In general, if the provisions of this draft Law on Conflict of Interest and Corruption in Public Institutions apply to the HCoJ, then there seems to be no need to introduce specific provisions on conflict of interest issues in the draft Amendments to the Organic Law on Common Courts (see above) – a cross reference to this Law might be sufficient. See, for instance, Article 11.1 of this Law, which prescribes that a public servant “*whose duty within a collegial body is to make decisions, with respect to which he/she has property or other interest, shall inform the other members of the body or his/her immediate supervisor of this fact and shall refuse to participate in the decision making*”. This seems to be a general principle that also applies to the members of the HCoJ. If this is the case, it would be important to ensure that the provisions of this draft Law and the draft Amendments to the Organic Law on Common Courts do not contradict one another.

¹⁶ See Article 1 b) and d) of these draft Amendments.

IV. Conclusion

62. The Supreme Court of Georgia is the court of highest review and of final instance in the country. Under current law and the proposed amendments, this Court will effectively have an entirely new composition with the appointment of 18 to 20 new judges who, upon selection by the High Council of Justice, will be appointed for life (until retirement) by the present parliamentary majority.

63. In the context of the selection and appointment of Supreme Court judges, the delegation of the Venice Commission was informed during its meetings in Tbilisi that the High Council of Justice currently enjoys a fairly low trust by a large segment of society. Although the Venice Commission is in no position to evaluate whether or not this lack of trust is warranted, having a High Council of Justice which does not enjoy full public trust and a political majority, in between elections, appointing nearly all the Supreme Court judges to lifetime positions, may be detrimental to the high level of public trust that an institution such as the Supreme Court must enjoy in any country.

64. Under these circumstances, consideration should be given to having the fixed term of office of the current Supreme Court judges transformed to lifetime appointments and Parliament should only presently appoint the number of Supreme Court judges that is absolutely necessary to render the work of the Supreme Court manageable.

65. How many new judges will be needed to achieve this should be decided after consultations with the Supreme Court. Further appointments may then be made by Parliament elected at the next general elections. Such an arrangement may both alleviate the present burden on the Supreme Court and ensure that it enjoys the public trust and respect it deserves in the long run.

66. With respect to (1) the draft Organic Law on the amendments to the Organic Law on Common Courts; (2) the draft Law on amendments to the Rules of Procedure of the Parliament and (3) the draft Law on Conflict of Interest and Corruption in Public Institutions – the Venice Commission welcomes the amendments made to the provisions on the selection and appointment of the judges of the Supreme Court of Georgia in the amendments made to these laws.

67. However, a number of improvements should be made to the draft Laws:

The key recommendations are:

- 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;
- The requirement for non-judge candidates to have passed the judicial qualification examination should be reconsidered because, as indicated above, 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;
- 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;

- Reasoned decisions regarding the selection and exclusion of candidates must be produced, with the possibility for a judicial appeal (see Article 35⁴ of the Organic Law on Common Courts);
- 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.

Other recommendations include:

- 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;
- 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.

68. The Venice Commission remains at the disposal of the Georgian authorities for any further assistance in this matter.