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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**GEORGIA**

**DRAFT OPINION**

**ON THE PROVISIONS ON THE PROSECUTORIAL COUNCIL  
IN THE DRAFT ORGANIC LAW ON THE PROSECUTOR'S OFFICE  
AND  
ON THE PROVISIONS ON THE HIGH COUNCIL OF JUSTICE  
IN THE EXISTING ORGANIC LAW ON GENERAL COURTS**

On the basis of comments by

**Mr Richard BARRETT (Member, Ireland)**  
**Mr Nicolae EȘANU (Substitute member, Republic of Moldova)**  
**Mr András VARGA (Member, Hungary)**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

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Draft - restricted

## I. Introduction

1. In a letter dated 21 September 2018, Sir Roger Gale, Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, made a request for an opinion by the Venice Commission on the legal rules for the High Council of Justice and the Prosecutorial Council in Georgia. The provisions on the Prosecutorial Council are contained in the draft Organic Law on the Prosecutor's Office and the provisions on the High Council of Justice are contained in the existing Organic Law on General Courts with amendments (CDL-REF(2018)055 and CDL-REF(2018)056, respectively) and in the new Constitution of Georgia, which has not yet entered into force.
2. For the present draft opinion, the Venice Commission invited Mr Richard Barrett, Mr Nicolae Esanu and Mr András Varga to act as rapporteurs.
3. On 5-6 November 2018, a delegation of the Venice Commission, composed of Mr Richard Barrett and Mr Nicolae Esanu accompanied by Ms Tanja Gerwien from the Secretariat, visited Tbilisi and met with (in chronological order): the Public Defender of Georgia; the First Deputy Chairperson of the Supreme Court of Georgia; the Chief Prosecutor of Georgia; the First Deputy Chairperson of the Parliament of Georgia; the President of the Constitutional Court of Georgia; the Chairperson of the Committee on European Integration of the Parliament of Georgia; the Chairperson of the Parliament of Georgia; the First Deputy Chairperson of the Parliament of Georgia; the First Deputy Minister of Justice of Georgia; members of the diplomatic community; members of the High Council of Justice and members of the Prosecutorial Council as well as NGO representatives.
4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of unofficial translations of the draft Organic Law on the Prosecutor's Office and the existing Organic Law on General Courts with amendments as well as the new Constitution. Inaccuracies may occur in this opinion as a result of incorrect translations.
5. *This opinion was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

## II. Scope of the opinion

6. New legal conditions were created by Georgia's constitutional reform of 2017, on which both the reform of the prosecution system and that of the judiciary must be based. Georgia has also entered its fourth wave of judicial reforms this year, concerning mainly judicial discipline and evaluation.
7. Georgia's new Constitution will enter into force once the new President of Georgia has taken his or her oath<sup>1</sup> (in December of this year). The provisions on the Prosecutorial Council (*in the draft Organic Law on the Prosecutor's Office*) and the provisions on the High Council of Justice (*in the Organic Law on General Courts with recent amendments – not yet in force*), are the subject of this opinion. This opinion refers to other provisions in these texts when they relate to the context of the work and efficiency of these councils.
8. The draft Organic Law on the Prosecutor's Office was already presented for its second reading to Parliament in the week of 12 November 2018. However, the Venice Commission was informed that the recommendations made in this opinion will be taken into account in future amendments. The existing Organic Law on General Courts was adopted in 2015 and subsequently amended several times. Most of the relevant recent changes in the Organic Law on the General Courts will come into effect with the entering into force of the new Constitution.

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<sup>1</sup> At the time of the drafting of this opinion, the second round of elections – the run off – had not yet taken place.

New provisions on the High Council of Justice will be prepared by the end of this year. The Georgian authorities have stated that they will take the recommendations made in this opinion into account. This opinion will refer to provisions on the prosecution, which are in the stage of draft legislation, before turning to judges, which relate largely to legislation in force.

### III. General remarks

9. The Venice Commission has provided opinions for Georgia in the past on provisions on the High Council of Justice and Prosecutorial Council. As regards the Prosecutorial Council, the Venice Commission dealt with this body notably in its Joint Opinion on the draft amendments to the Law on the Prosecutor's Office<sup>2</sup> endorsed by the Venice Commission in October 2015. This draft Law established the Prosecutorial Council, which was welcomed by the Venice Commission as a step towards the depoliticisation of the Prosecutor's Office. However, the Venice Commission identified several issues that needed to be addressed, notably: the need for a more pluralistic composition of the "lay component" of the Prosecutorial Council involving *ex officio* members or a proportionate representation for the opposition; the need for an open nomination procedure for the positions of the "prosecutorial members" of the Prosecutorial Council and the need to define more clearly the status and powers of the Special Prosecutor.

10. As to the prosecution system, the Venice Commission noted that the recommendation on the requirement of a qualified majority in Parliament for the election of the Prosecutor General – made in its Opinion on the draft constitutional amendments adopted on 15 December 2017 at the second reading by the Parliament of Georgia (adopted by the Venice Commission in March 2018) – was not heeded.<sup>3</sup>

11. As regards the High Council of Justice (HCJ), the Venice Commission addressed the provisions on this body in its Joint Opinion on the draft Law on making changes to the Law on disciplinary liability and disciplinary proceedings of judges of general courts<sup>4</sup> (adopted by the Venice Commission in October 2014); in its Opinion on the draft revised Constitution (adopted by the Venice Commission in June 2017)<sup>5</sup> and in its Opinion on the draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017 (adopted by the Venice Commission in October 2017)<sup>6</sup> as well as in its Opinion on the draft constitutional amendments adopted on 15 December 2017 at the second reading by the Parliament of Georgia, mentioned above<sup>7</sup>.

12. In its 2014 Opinion, the Venice Commission considered that several issues needed to be addressed, notably: the need to curb the HCJ's power to apply disciplinary measures (e.g. sending reprimand letters to judges if kept, should be limited to a list of recommendations); the need to lower the two-third majority required for all decisions of the HCJ in disciplinary proceedings to a simple majority; the need for more precise provisions setting out the grounds to initiate disciplinary proceedings; the need for a general rule stating that HCJ sessions are public (this should not be an exception) and the need to enable the HCJ to decide, on a case-by-case basis, conditions to terminate disciplinary procedure when a criminal procedure is initiated on the basis of disciplinary measures.

13. In its October 2017 Opinion, the Venice Commission considered that the appointment of Supreme Court judges directly by the HCJ without the involvement of Parliament, or their appointment by the President upon proposal by the HCJ, would better guarantee the independence of the Supreme Court judges. It welcomed, however, that a qualified majority

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<sup>2</sup> [CDL-AD\(2015\)039](#).

<sup>3</sup> [CDL-AD\(2018\)005](#), paragraph 38.

<sup>4</sup> [CDL-AD\(2014\)032](#).

<sup>5</sup> [CDL-AD\(2017\)013](#).

<sup>6</sup> [CDL-AD\(2017\)023](#).

<sup>7</sup> [CDL-AD\(2018\)005](#).

requirement was introduced for the election of a number of members of the HCJ by Parliament, which followed the Commission's previous recommendation.

14. In its March 2018 Opinion, the Venice Commission recommended that longer mandates for the members of the HCJ be considered, so as not to coincide with the term of the legislature – which is particularly important for the members of the HCJ appointed by Parliament.

15. The present opinion will first deal with the provisions on the Prosecutorial Council in the draft Law on the Prosecutor's Office, followed by an assessment of the provisions on the HCJ in the Law on General Courts.

#### **IV. Assessment of the provisions on the Prosecutorial Council in the draft Law on the Prosecutor's Office**

##### **A. General comments**

16. The goal of the reform of the Prosecutor's Office was to depoliticise the Office. The prosecution system will be completely separate from the Ministry of Justice and from the Government, which has required the drafting of separate regulations on the appointment and dismissal of the Prosecutor General, on the formation and activities of the Prosecutorial Council and on parliamentary accountability of the prosecution service. The new Constitution sets out the term of office of the Prosecutor General, provides a general reference on the accountability of the Prosecutor's Office and the general rule for his or her appointment. It also provides the Prosecutorial Council with a constitutional status.<sup>8</sup>

17. The draft Organic Law on the Prosecutor's Office of Georgia (hereinafter, the "draft Law") is a rather complicated text, which includes regulations on the status of the prosecution service, the status of the Prosecutor General, of the "employees" of the prosecution service (types of employees, their rights, their duties), prosecutors' functions and the rules on the Prosecutorial Council (election, powers, proceedings). For the purpose of this opinion, the most important aspects will be presented as follows.

##### **1. Constitutional status of the Prosecutor's Office – the model used**

18. The current Organic Law "On the Prosecutor's Office"<sup>9</sup> has been in force for ten years and contains rules on a centralised, hierarchical body headed by a *Chief Prosecutor* under the supervision of the Ministry of Justice. The new Constitution of Georgia, not yet in force, provides for an *independent* prosecution service led by a Prosecutor General, elected by Parliament, on the proposal of the Prosecutorial Council (Article 65 of the new Constitution). The draft Law is a consequence of the new Constitution.<sup>10</sup>

19. The prosecution model of Georgia, a centralised, hierarchical prosecution led by a Prosecutor General elected by Parliament, is not unusual in Central and Eastern Europe. There is a general trend towards allowing more independence for the Prosecutor's Office. The rule of law requires independence of decision making, but not necessarily full institutional independence<sup>11</sup>. Where such institutional independence is sought, (as with the new Georgian model) one of the crucial elements is to provide that the head of the prosecution service be selected and appointed under a clearly established and transparent procedure. However,

<sup>8</sup> Human Rights Education and Monitoring Center (EMC), Reform of the Prosecution System, 2018, pp.12-13.

<sup>9</sup> October 21, 2008 (Legislative Herald of Georgia, 27, 27/10/2008).

<sup>10</sup> See the Explanatory note on the draft Law (CDL-REF(2018)055), "Elaboration of the draft Organic Law of Georgia as stipulated by amendments made to the Constitution of Georgia in connection with the establishment of the Prosecutor's Office of Georgia as an independent body, the need to define by the Organic Law the scope of authority, structure and rules of procedure of the Prosecutor's Office of Georgia".

<sup>11</sup> Rule of Law Checklist, (CDL-AD(2016)007), paragraph 91.

because the investigation and prosecution of crime is an essential part of state governance, it is not unreasonable for Parliament to retain ultimate control over the final appointment rather than allowing some other body, however distinguished, full control of the selection process.

20. According to Article 65(1) of the new Constitution of Georgia, *“The Prosecutor’s Office of Georgia shall be independent in its activities and shall act only in accordance with the law”*. Article 1(1) and Article 6(1) of the draft Law repeat this wording. At the same time, Article 65(3) of the new Constitution sets out that *“The Prosecutor’s Office shall be accountable to the Parliament”*, and Article 15(2)-(v4) adds that the Prosecutor General directly or his or her deputies or other persons designated *“submits a report on the activities of the Prosecutor’s Office to the Prosecutorial Council and the Parliament of Georgia”*. This is an indication that the prosecution service may not be completely independent. It might be independent from the executive, it is organised separately from the rest of the judiciary (even if the new Constitution regulates their status within the same chapter), but its accountability to Parliament means that the prosecution service is autonomous rather than fully independent – the Prosecutor General acts only in accordance with the law, s/he is not subject to any instruction coming from other state institutions.

21. However, this independence or autonomy only belongs to the Prosecutor General and, through his or her status, to the prosecution service as a whole.

## 2. Subordination of prosecutors – role of the Prosecutorial Council

22. The model chosen by Georgia – a centralised, hierarchical prosecution led by a Prosecutor General elected by Parliament – implies the subordination of all prosecutors and other employees of the prosecution service to the Prosecutor General.

23. However, this model, and the subordination of prosecutors, should not lead to the total subordination of prosecutors. Some level of internal independence, at least the opportunity to express professional positions, should be ensured.

24. A minimum set of guarantees should be included in the draft Law, such as the obligation of the superior prosecutor (including the Prosecutor General) to provide instructions in written form (at least on the request of the subordinated prosecutor); the right – and more importantly, the duty – of the subordinated prosecutor to draw attention to the illegality of an instruction received from his or her superior, as well as to the dangers of its implementation; the right of the subordinated prosecutor to express dissenting opinions regarding an instruction and to have this opinion attached to the files; the right of the subordinated prosecutor to ask for the reassignment of a case if s/he cannot follow the instructions due to professional or conscience and conviction. The Prosecutorial Council should be attributed with the role of ensuring these guarantees. In this respect, the Venice Commission has stated in the past that ***“Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.”***<sup>12</sup>

## 3. Disciplinary responsibility of employees

25. On the institutional level, the role of the General Inspectorate of the Prosecutor General’s Office (Article 77) and its relation to the Prosecutor General, to the Prosecutorial Council and to the other bodies of the Prosecutors’ Office need to be clarified.

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<sup>12</sup> Report on European standards as regards the independence of the judicial system – Part II – The Prosecution Service (CDL-AD(2010)040), paragraph 59.

26. The Venice Commission welcomes the latest amendments made to the draft Law following its second reading in Parliament, which deleted “breaching of the oath” as a ground for disciplinary responsibility. This affects Article 37(1)(k) on the procedure and grounds for discharge of an employee of the Prosecutor’s Office from the Prosecutor’s Office; Article 76 on the responsibility of an employee of the Prosecutor’s Office and Article 77(1) on disciplinary proceedings.

27. The latest amendments made to the draft Law also affect Article 45(6) on the incompatibility of interests and duties, which now provides that “6. *An employee of the Prosecutor’s Office, **except for a person employed by a labour agreement**, shall be prohibited from **participation in gathering, organising or taking part in a strike**” (changes in bold). Prosecutors have a duty of loyalty, which may be a good reason to restrict their freedom of expression and association, but the restrictions need to pursue a legitimate aim and constitute a proportionate response to a pressing need in order to be legitimate.<sup>13</sup> If this is a blanket ban for prosecutors to participate in gatherings, this might not be the best solution, because there is a trend in reducing the traditionally accepted limits to fundamental rights in this respect – especially for blanket bans. A blanket ban should be replaced with appropriate and specific limitations.*

## B. The Prosecutorial Council

28. There is no set international standard on the position of the prosecutorial service – a public prosecutor’s office may be independent or may be subordinate to the executive to some extent – just as there is no international standard on the functions and degrees of independence of a prosecutorial council if one is in place. If a state chooses a more independent model of public prosecution, such as Georgia now has, then an independent prosecutorial council is a good mechanism to help balance the power of the Prosecutor General.

29. The relevant changes in the draft Law, as well as in the new Constitution, relating to the Prosecutorial Council, may be summarised as follows:

- The enhanced role of the Prosecutorial Council, which is given the task of ensuring the independence, transparency and efficiency of the Prosecutor’s Office (Article 19(1) of the draft Law; Article 65(3) of the Constitution);
- The chairperson of the Prosecutorial Council shall be a person elected from the members of the Prosecutorial Council instead of the Minister of Justice (Article 19(5) of the draft Law)<sup>14</sup>;
- The Minister of Justice shall not be a member of the Prosecutorial Council and shall be replaced by a person who (under further amendments to the draft Law) will be nominated by the Minister of Justice, from persons with legal expertise, for election by Parliament. This was recommended by the Venice Commission in the 2015 Opinion<sup>15</sup>;
- The selection of the candidate for the Prosecutor General to be nominated to the Parliament of Georgia will be carried out by the Prosecutorial Council rather than by the Minister of Justice (Article 16(3)-(6) of the draft Law);
- The Rules of Procedure of the Prosecutorial Council shall be approved by the Prosecutorial Council itself instead of the Minister of Justice (Article 19(23));
- The draft Law does not seem to give the Prosecutorial Council a management role;

<sup>13</sup> ECtHR, 2 September 1998, Case of Ahmed and Others v. the United Kingdom, application no. 65/1997/849/1056, paragraphs 42-55; ECtHR, 26 September 1995, Case of Vogt v. Germany, application no. [17851/91](#), paragraphs 45-61. See also ECtHR, 1 April 2009, Case of Enerji Yapi-Yol Sen v Turkey, application no. 68959/01), paragraphs 25-34.

<sup>14</sup> [CDL-AD\(2015\)039](#), paragraph 40.

<sup>15</sup> *Ibid*, paragraph 39.



- Reports to the Prosecutorial Council by the Prosecutor General are due every 12 months in the draft Law in the version of CDL-REF(2018)055, but in the latest amendments that were received by the rapporteurs, has reverted back to every six months (Article 19(12)(d)), which is to be welcomed;
- The Prosecutorial Council's envisaged membership might not be best suited to achieve the constitutional requirement of ensuring the Prosecutor's Office's independence, transparency and efficiency (see further below).

30. The changes to the Prosecutorial Council in the draft Law are mainly aimed at reflecting the enhanced and rather unique constitutional role of that Council provided by Article 65(3) of the new Constitution, "*The Prosecutors' Council shall be established to ensure the independence, transparency and efficiency of the Prosecutor's Office.*"

31. This is an ambitious goal, which will be difficult to achieve with the powers granted to the Prosecutorial Council under Article 19(11) of the draft Law. The competence to select the candidate for the Prosecutor General's position alone cannot be considered to be a tool that will allow the Prosecutorial Council to ensure the independence of the Prosecutor's Office, when taking into consideration that the Prosecutorial Council has no say in the procedure of the removal from office of the Prosecutor General.

32. Article 19(14) of the draft Law also provides that the Prosecutorial Council meets once every six months (under the latest amendments) or by request of at least one-third of the full composition of the Prosecutorial Council; the request must be complied with immediately. The Council will, of course, be more active when selecting a candidate to fill a vacancy. The question might therefore be asked whether the Prosecutorial Council has the legal capacity to fully fulfil the identified constitutional role of ensuring independence, transparency and efficiency. In order to achieve that role, the Prosecutorial Council should be empowered to ensure the guarantees referred to in Section A.3 above.

33. In addition, a further question might be raised with respect to the Prosecutorial Council's membership and whether it is best suited to achieve the above-mentioned constitutional requirement. The Prosecutorial Council is composed of a majority of prosecutors elected by their peers. This achieves professional representation and expertise, but does not sufficiently enhance public credibility of independence. Such a composition was appropriate before the Council received the new constitutional role given to it by Article 65(3) of the new Constitution. The vertical nature of authority within the Prosecutor's Office and the professional subordination, as recognised by Article 5(d), undermines the independence of the prosecution service. This gap is not sufficiently filled by the other components of the Council's membership, each of which may be valuable, but the overall design is not sufficient to achieve independence. The Georgian authorities should consider an enhanced representation from civil society.

34. The key attribute of the Prosecutorial Council, which may be considered as contributing to the Prosecutorial Council's power to oversee the efficiency of the Prosecutor's Office, is the power to conduct disciplinary proceedings against the First Deputy and the Deputies of the Prosecutor General and to impose disciplinary sanctions on them as well as the power to hear reports and to submit recommendation. Article 65(3) of the new Constitution requires the establishment of a Prosecutorial Council that will be able to ensure the efficiency of the Prosecutor's Office. Additional controlling power should be attributed to the Prosecutorial Council, notably on the basis of the report of the Prosecutor General.

35. In view of the Prosecutorial Council's specific new role, it is also suggested that the *career management, ethics and incentives council* – which is one of the bodies established by virtue of Article 21(1) of the draft Law, headed by the Prosecutor General – be subordinated to the Prosecutorial Council.



36. As concerns the goal of ensuring the transparency of the Prosecutor's Office, the draft Law does not have a provision that expressly sets out or can be interpreted so as to allow the fulfilment of the task provided in the new Constitution. A reply to the report by the Prosecutor General to the Prosecutorial Council should become an integral part of the report of the Prosecutor General to Parliament.

37. When assessing the independence of the Prosecutor's Office, it is important to take into account the necessity of ensuring that not only the external independence of the Prosecutor's office is ensured in relation to the legislative or executive powers, but that also the internal independence of the prosecutors is ensured. Therefore, the Prosecutorial Council should become the body ensuring the guarantees referred to under Section A. 3 above. Individual prosecutors should have a right (and for alleged illegal instructions, a duty) to complain to an independent body, such as the Prosecutorial Council.<sup>16</sup>

38. Under the draft Law, the Prosecutor General has full discretion regarding the careers of prosecutors. In order to achieve a balance between the hierarchical control over and the independence of prosecutors, shared competences of the Prosecutor General and Prosecutorial Council should be provided regarding the careers of the prosecutors (e.g. proposals for promotion by the Prosecutorial Council).

39. Article 65(2) of the new Constitution provides that the *"Prosecutor's Office shall be led by the Prosecutor General, who is elected for a six-year term upon nomination of the Prosecutorial Council"*. But, Article 16(3) of the draft Law only provides that the Prosecutor General is elected by Parliament, without providing expressly that the election must be made upon nomination of the Prosecutorial Council. There is no such provision in any other Article of the draft Law. Even if there is an express provision in the new Constitution and some provisions in the draft Law that can also be interpreted in a way that Parliament may elect the Prosecutor General only upon nomination by the Prosecutorial Council – in order to avoid any misunderstanding, this should be provided expressly in Article 16(3).

40. Even if the choice to provide that the Prosecutorial Council shall nominate the candidate who has received the support of two-thirds of the full composition of the Prosecutorial Council, such an ambitious decision may lead to a deadlock and, therefore, consideration should be given to introducing an anti-deadlock mechanism. It may be necessary to gradually reduce the threshold for this vote following several unsuccessful voting rounds.

41. The rapporteurs were informed that in the latest amendments to this draft Law, Article 16(6) on the procedure and criteria for appointment to office of the Prosecutor General was amended as follows *"6. The Prosecutorial Council **with appropriate justification** shall present the selected candidate to the Parliament of Georgia. **If the nominated candidate fails to obtain the required number of votes of the members of the Parliament of Georgia, the Prosecutor's Council will select other candidates by the procedure prescribed by paragraph 4 of this Article**"* (changes in bold). These changes are welcome and for the Council to send an explanation with the recommendation of the candidate brings clarity to the process. Having the Council make another recommendation if the candidate does not get elected by Parliament goes some way to avoiding a deadlock and provides transparency on the manner in which the various bodies are expected to proceed.

42. The Venice Commission welcomes the other changes to the draft Law, which reflect earlier recommendations such as the removal of the role for an *ad hoc* prosecutor.

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<sup>16</sup> Report on European standards as regards the independence of the judicial system – Part II – The Prosecution Service (CDL-AD(2010)040), paragraphs 53-60.

## **V. Assessment of the provisions on the High Judicial Council in the existing Law on General Courts**

### **A. General comments**

43. It should be recalled that:

*"[...] The primary role of judicial councils is to be independent guarantors of judicial independence. However, this does not mean that such councils are bodies of judicial "self-government". In order to avoid corporatism and politicisation, there is a need to monitor the judiciary through non-judicial members of the judicial council. Only a balanced method of appointment of the SCM members can guarantee the independence of the judiciary. Corporatism should be counterbalanced by membership of other legal professions, the "users" of the judicial system, e.g. attorneys, prosecutors, notaries, academics, civil society."<sup>17</sup>*

And

*"There are no common standards on the membership of these ex officio members in the judicial council. It is clear that as an ex officio member, the President of the Supreme Court cannot be counted among the judges elected by their peers, as referred to in Recommendation Rec(2010)12. If the membership of the Prosecutor General were retained, it should be balanced by an ex officio membership of a representative of the Bar. In any case, this ex officio membership should be without the right to vote in matters concerning the career or discipline of judges."<sup>18</sup>*

And, most importantly:

*"Currently, the presence of the ex officio members allows for the Council to be a formal forum of exchange of views between the different stakeholders that enables regular consultations on the functioning of the judiciary. Their removal should not lead to a lack of dialogue between the SCM and these institutions. Other means of communication should remain open and should be fostered by the implementing legislation."<sup>19</sup>*

### **B. The High Judicial Council**

44. An overall assessment of the relevant provisions of the new Constitution and of the existing Organic Law of Georgia on General Court, with amendments (hereinafter "the Law") regulating the composition and activity of the HCJ permit to conclude that these are mostly in line with international standards and, if interpreted and implemented in good faith, can ensure the independence and efficiency of the judiciary.

45. However, in order to ensure public confidence in the HCJ, it is important that the provisions set out a clear and transparent procedure, including deadlines for the adoption of individual and normative acts, which will include the consultation of interested parties and will ensure the right of interested persons to be heard. Individual acts, especially acts concerning the career of judges, must be reasoned.

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<sup>17</sup> Opinion on the Law on Amending and supplementing the Constitution of the Republic of Moldova (Judiciary), (CDL-AD(2018)003), paragraph 56.

<sup>18</sup> Ibid, paragraph 59.

<sup>19</sup> Ibid, paragraph 60.

46. The relevant provisions of, and amendments to, the Law relating to the HCJ are:

- A majority of eight members shall be judges elected by their peers (new Article 47(2));
- The Chairperson of the HCJ will be elected by the HCJ from among the Judicial Members (new paragraph of Article 47(2<sup>1</sup>));
- The Head of the Supreme Court will be an *ex officio* member (new Article 47(2));
- One member is appointed by the President (new Article 47(2));
- The non-judicial members are no longer themselves Members of Parliament, but outsiders elected by Parliament from nominees of the legal community (new Article 47(5));
- A new Inspectorate (and an Independent Inspector) has been put in place as the initiator of complaints (Article 51<sup>1</sup>, Article 75<sup>6</sup>);
- The Secretary of the HCJ will be chosen by the Conference of Judges (new Article 51(1));
- There are changes to the criteria for disciplinary sanctions (new Article 72<sup>2</sup>, 72<sup>8</sup>, 72<sup>9</sup>, more generally: Chapter XIII);
- Decisions of the HCJ in disciplinary matters are appealed to the Disciplinary Board of Judges of Common Courts, which has five members, three of whom are elected by the Conference of Judges and the other two are not judges (new Article 75<sup>19</sup>(1)). There seems to be a mistake in the translation: decisions of the “Disciplinary Board” may be appealed to the “Disciplinary Board” (see Article 75<sup>40</sup>(5)). Perhaps it meant to read “may be appealed to the Disciplinary Chamber of the Supreme Court? However, this is covered by Article 75<sup>54</sup>(1), which states “A decision of the Disciplinary Board may be revised by appealing it to the Disciplinary Chamber of the Supreme Court of Georgia” – this should be clarified;
- Decisions of the Disciplinary Chamber are final and those decisions are then implemented by the HCJ without any further discretion (new Article 75<sup>62</sup>(4), new Article 75<sup>69</sup>);
- It is now clarified that the HCJ is accountable to the Conference of Judges (however this is seen rather as a reporting obligation). This is based on Article 64 of the new Constitution and (not entirely satisfactorily) reflected in Article 47(1<sup>1</sup>) of the Law.

47. These changes are broadly welcome and ensure that the structure and functions of the HCJ comply with the current standards and best practices for such bodies. The HCJ in Georgia is particularly powerful, as it has the lead role in appointment, discipline, design of judicial structural, promotion and training.

48. It is to be welcomed that under new Article 47(2) of the Law, the chairperson of the Supreme Court will no longer be the *ex officio* chairperson of the HCJ. The election of the chairperson by the members of the HCJ is in line with international standards.

49. Under Article 48 of the Law, the grounds for terminating the powers of a member of the HCJ provides in paragraph 1 (i) “[...] *improper fulfilment of duty*”. This wording is too vague as there are no objective criteria which clearly establish what is a proper or an improper fulfilment of duty. The independence of a body is impossible to guarantee without ensuring the stability of its members’ terms of office. It is therefore important to provide that the powers of the member of the HCJ can only be terminated where there are concrete rules that were infringed.

50. Under Article 50 of the Law, it seems that in all cases – including for cases on the career or disciplinary responsibility of judges – decisions are adopted by vote and the members have full discretion. In any case, all decisions of the HCJ should be reasoned.

51. The new Inspectorate and, notably, the position of an Independent Inspector, are interesting and it seems as if s/he is going to be one of the most powerful persons within the Georgian judiciary. As such, it is important that this position's independence be guaranteed, but also that it is accountable. The grounds for terminating the powers of the Independent Inspector also include, under Article 51<sup>1</sup>(6) (h) "[...] *improper fulfilment of duty*". As recommended above for the members of the HCJ, the wording here is too vague as there are no objective criteria which clearly establish what is a proper, or an improper, fulfilment of duty. This should be changed.

52. Another issue is accountability of the HCJ. Article 64(3) of the new Constitution provides that the rules for accountability must be established by the organic law. Article 47(1<sup>1</sup>) of the Law states that "*The High Council of Justice of Georgia is accountable before the Conference of Judges of Georgia*", which is not sufficient for this purpose. Accountability of the HCJ to the Conference of Judges appears problematic as reflecting excessive corporatism and self-governance of the judicial sector. The HCJ should be an independent body with a substantial participation of non-judicial members. If, as was indicated to the delegation of the Venice Commission, the accountability is a reporting obligation only, that should be more clearly set out in the Law.

53. It is to be welcomed that the decisions of the HCJ in disciplinary matters may be appealed to the Disciplinary Chamber of the Supreme Court (new Article 75<sup>55</sup>(1)). This is in line with the Venice Commission's position in previous opinions<sup>20</sup>, and importantly, with the case law of the European Court of Human Rights<sup>21</sup>.

## VI. Conclusion

54. The Venice Commission welcomes the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor's Office and the provisions on the High Council of Justice in the existing Organic Law on General Courts, with amendments, as well as the relevant provisions in the new Constitution of Georgia.

55. With respect, specifically, to the provisions on the Prosecutorial Council and the provisions on the High Council of Justice, the Venice Commission would like to make the following main recommendations:

### A. *The Prosecutorial Council*

- The current composition of the Prosecutorial Council, which consists of a majority of prosecutors elected by their peers, achieves professional representation and expertise, but does not enhance public credibility of its independence. Such a composition was appropriate before the Council received the new constitutional role given to it by Article 65(3) of the new Constitution. An enhanced representation from civil society could achieve this purpose;
- When assessing the independence of the Prosecutor's Office, it is important to ensure that not only the external independence of the Prosecutor's Office is ensured in relation to the legislative or executive powers, but also that of the internal independence of the prosecutors. The Prosecutorial Council, in this respect, should be attributed with the role of ensuring at least a minimum set of guarantees (which should be included in the draft Law), such as:

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<sup>20</sup> Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina ([CDL-AD\(2014\)008](#)), paragraph 110; Report on Judicial Appointments by the Venice Commission ([CDL-AD\(2007\)028](#)), paragraph 25.

<sup>21</sup> ECtHR, 6 November 2018, Case of Ramos Nunes De Carvalho E Sá v. Portugal, application nos. 55391/13, 57728/13 and 74041/13, paragraphs 132-133.

- the obligation of the superior prosecutor (including the Prosecutor General) to provide instructions in written form (at least on the request of the subordinated prosecutor);
  - the right – and more importantly, the duty – of the subordinated prosecutor to draw attention to the (alleged) illegality of an instruction received from his or her superior, as well as to the dangers of its implementation;
  - the right of the subordinated prosecutor to express dissenting opinions regarding an instruction and to have this opinion attached to the files;
  - the right of the subordinated prosecutor to ask for the reassignment of a case if s/he cannot follow the instructions due to professional or conscience and conviction.
- To achieve a balance between the hierarchical control over and the independence of prosecutors, shared competences of the Prosecutor General and Prosecutorial Council should be provided regarding the careers of prosecutors (e.g. proposal for promotion by the Prosecutorial Council).
  - In order to strengthen the Prosecutorial Council in view of its new specific role, it is suggested that the *career management, ethics and incentives council* – which is one of the bodies established by virtue of Article 21(1) of the draft Law, headed by the Prosecutor General – be subordinated to the Prosecutorial Council.
  - For the Prosecutorial Council to guarantee the transparency of the Prosecutor's Office, as required by the new Constitution, the draft Law needs to expressly indicate how this task is to be fulfilled. The replies of the Prosecutorial Council to the report by the Prosecutor General should become an integral part of the report of the Prosecutor General to Parliament.

#### B. *The High Council of Justice*

- Provisions on the HCJ need to set out clear and transparent procedures, including deadlines for the adoption of individual and normative acts, which will include the consultation of interested parties and will ensure the right of interested persons to be heard. Individual acts, especially acts concerning the career of judges, must be reasoned.
- Terminology for the grounds for terminating the powers of a member of the HCJ needs to be clear and precise – hence vague wording such as “[...] *improper fulfilment of duty*” (Article 48(1)(i)) should be avoided. Objective criteria should be established instead setting out what is deemed proper or improper fulfilment of duty.
- The HCJ must be an independent body and should not depend on the Conference of Judges. If this accountability is a reporting obligation only, that should be more clearly set out in the Law.

56. The Venice Commission remains at the disposal of the Georgian authorities and the Parliamentary Assembly for any further assistance in this matter.