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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

GEORGIA

DRAFT OPINION

**ON THE DECEMBER 2021 AMENDMENTS
TO THE ORGANIC LAW ON COMMON COURTS**

on the basis of comments by

Mr Yavuz ATAR (Member, Turkey)

Mr Eirik HOLMØYVIK (Member, Norway)

Mr Jørgen Steen SØRENSEN (Member, Denmark)

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I. Introduction

1. By letter of 2 February 2022, Mr Piero Fassino, Chairperson of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, requested an opinion from the Venice Commission on the December 2021 amendments to the Organic Law on Common Courts ([CDL-REF\(20-22\)012](#)).
2. Mr Yavuz Atar, Mr Eirik Holmøyvik and Mr Jørgen Steen Sørensen acted as rapporteurs for this opinion.
3. A visit to Tbilisi with the rapporteurs was not possible and was replaced with online meetings organised on 18-19 May 2022 with the relevant stakeholders. These included representatives of the Parliamentary Opposition, the Parliamentary Majority, the Constitutional Court, the Deputy Public Defender, the High Council of Justice, the Supreme Court, the Georgian Association of Judges, NGOs, civil society and the international community.
4. This opinion was prepared in reliance on the English translation of the above-mentioned provisions. The translation may not accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.
5. *This opinion was drafted on the basis of comments by the rapporteurs and the online meetings. Following an exchange of views with ..., the opinion was adopted by the Venice Commission at its ... Plenary Session (...).*

II. General remarks

6. The Venice Commission has adopted several opinions on the Georgian Organic Law on Common Courts over the past four years. These are, in reverse date order: (1) the Urgent Opinion on the amendments to the Organic Law on Common Courts,¹ endorsed by the Venice Commission in July 2021; (2) the Opinion on the draft Organic Law amending the Organic Law on Common Courts,² adopted by the Venice Commission in October 2020; and (3) the Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia,³ endorsed by the Venice Commission in June 2019.
7. This opinion is on yet further amendments to the Organic Law on Common Courts ([CDL-REF\(2022\)012](#)), which were adopted in December 2021 (hereinafter, the “2021 Amendments”). Despite their recent adoption, the Venice Commission has been requested to analyse these 2021 Amendments, which predominantly focus on the appointment of judges, the secondment (transfer) of judges, the membership of the High Council of Justice and the disciplinary liability of judges.

III. Background and legislative context

8. Before addressing the substance of the 2021 Amendments, the Venice Commission will first comment on the central role of the High Council of Justice (hereinafter, the “HCoJ”) in the common courts system of Georgia and then on the law-making process as it affects the 2021 Amendments.

¹ Venice Commission, [CDL-AD\(2021\)020](#), Georgia - Urgent Opinion on the amendments to the organic law on common courts.

² Venice Commission, [CDL-AD\(2020\)021](#), Georgia - Opinion on the draft Organic Law amending the Organic Law on Common Courts.

³ Venice Commission, [CDL-AD\(2019\)009](#), Georgia – Urgent Opinion on the selection and appointment of Supreme Court judges.

9. The HCoJ is a key institution in Georgia's judicial system and is defined under Article 64 of the Constitution of Georgia as being a body of the common courts system established to ensure the independence and efficiency of the common courts, to appoint and dismiss judges and to perform other tasks. The Constitution also provides that the HCoJ is composed of 15 members (14+ 1 *ex officio*): the President of the Supreme Court (*ex officio*) and then more than half of the members are elected from among the judges by the self-governing body of judges of the common courts, one member is appointed by the President of Georgia and the other members are elected by a majority of at least three-fifths of the total number of Members of Parliament.

10. At the moment (June 2022), the HCoJ has ten members: nine judge-members and one non-judge member, the latter was appointed by the President of Georgia.⁴ There are therefore no non-judge members elected by Parliament that are currently part of the HCoJ. Parliament should have elected five non-judge members in the summer of 2021 but has not yet done so.⁵

11. The HCoJ's composition has been marred by criticism. The latest criticism to date was in November 2021, when the HCoJ was alleged to have rushed the appointments of two judge-members in the HCoJ and was criticised for having done so in neither a competitive nor transparent manner by many and notably, by the international community.⁶

12. On 27 December 2021, six MPs of the majority party (Georgian Dream) introduced the 2021 Amendments, which were then adopted by Parliament on 30 December 2021, using the *accelerated procedure for adopting a law* under Article 117 of the Rules of Procedure of Parliament⁷. This means that the 2021 Amendments were adopted at the very end of the parliamentary term, just before the New-Year holidays in an entire legislative process that lasted

⁴ წევრები - საქართველოს იუსტიციის უმაღლესი საბჭო (Google translation: Members – High Council of Justice (hcoj.gov.ge)).

⁵ See Rules of Procedure of Parliament of Georgia, Article 208 on the procedure for electing members of the High Council of Justice of Georgia and members of the Disciplinary Committee of Judges of Common Courts of Georgia (<https://matsne.gov.ge/en/document/view/4401423?publication=27>).

⁶ <https://civil.ge/archives/452561>: Judiciary Developments: U.S. Slams 'Closed System'; <https://civil.ge/archives/452507>: EU Condemns 'Fifth Setback' in Georgian Judiciary. Earlier: <https://agenda.ge/en/news/2021/1411>: Four elected to High Council of Justice amid protests.

⁷ <https://parliament.ge/en/legislation/reglament>:

Article 117

ACCELERATED PROCEDURE FOR ADOPTING A LAW

1. Parliament may consider and adopt a draft law through the accelerated procedure. The draft law shall be considered through the accelerated procedure if it involves only the introduction of amendments to the law.

2. The consideration and adoption of a draft law through the accelerated procedure implies its consideration and adoption by all three hearings during one week of the parliamentary plenary sessions. The draft law may be considered and adopted in 1 day of the plenary session by more than one hearing but by not more than two hearings of the draft law only by the decision of the parliamentary bureau. Moreover, the draft law may be considered and adopted by second and third hearings on the same day.

3. A decision on the consideration of the draft law through the accelerated procedure shall be made by the parliamentary bureau, on the basis of a written substantiated request of the initiator of the draft law. The decision may be made by the parliamentary bureau both during the making of a decision on the commencement of the procedure for considering the draft law, and before the consideration of the draft law by first hearing.

4. In the case of making a decision by the parliamentary bureau through the accelerated procedure for considering a draft law, subjects provided for by the Rules of Procedure shall transfer to the Leading Committee their comments on the draft law within the time frame determined by the parliamentary bureau. (01.07.2020 №6700)

5. A draft law may not be considered through the accelerated procedure at a parliamentary plenary session from the day of making a decision on the consideration of the draft law through the accelerated procedure to the next day inclusive.

6. The draft law on which the decision to consider it through the accelerated procedure has been made, shall be attached by appropriate opinions provided for by the Rules of Procedure during its consideration by the parliamentary session. At the parliamentary plenary session, the draft law shall be considered and voted through the accelerated procedure in accordance with the procedure provided for by the Rules of Procedure for considering and voting a draft law.

7. When adopting a draft law through the accelerated procedure, the voting may be held on the same day, after the end of the consideration of the draft law by appropriate hearing. In addition, Parliament shall put the draft law to vote by third hearing only if its final edited version is submitted.

only four days. For the opposition, as well as for stakeholders and civil society, the 2021 Amendments came as a complete surprise. The authorities have not put forward convincing reasons to the Venice Commission delegation during their meetings that would justify a fast-track legislative process for the 2021 Amendments. In addition, upon signing the 2021 Amendments into law, the President of Georgia stated that “ (...) *I would like to warn the Legislature of the risks that the new law contains and remind them that the independence and impartiality of judges is a cornerstone of the development of our democracy, as well as I want to reassure all that I will be attentive to the law enforcement process.*”⁸

13. All interlocutors the Venice Commission delegation met with, save for the government party and the HCoJ, noted that this law-making process was excessively fast, lacked transparency as to its motives and aims and was conducted without inclusive and effective consultations.

14. The 2021 Amendments were accompanied by a six-page explanatory note, which mostly repeats the contents of the amendments and addresses formalities. The explanatory note contains no meaningful justification for the amendments, their timing, or the necessity of adoption through an accelerated procedure. Nor does the explanatory note contain any impact assessment of the possible effects of the amendments, such as on the efficiency of disciplinary procedures and sanctions or the impact on the independence of judges. The Venice Commission has consistently recommended that explanatory memorandums to draft legislation be provided, as law-making is not only an act of political will, but also a rational exercise.⁹ No meaningful debate is possible if the reasons for a reform are not put forward. This applies *a fortiori* when a draft law is presented and adopted in a sudden and rushed manner by an accelerated procedure, which limits public and parliamentary scrutiny.

15. While the formal accelerated legislative procedure appears to have been respected, the suddenness and rapidity of the amendment process means that there was no meaningful consultation either from the opposition or the stakeholders or civil society. Moreover, the 2021 Amendments were presented and adopted together with another important legislative reform, which reorganised the State Inspector’s Office. The introduction and adoption of amendments to the laws on two key state institutions in a very short period of time close to the holidays at the end of a parliamentary session, made it impossible for the opposition and civil society to consider the effect of the amendments and to provide any meaningful contribution to the legislative process.

16. Democratic law-making is not a formal concept. The Venice Commission has consistently maintained that “*Democracy governed by the rule of law is not only about the formal adherence to procedures allowing the majority to govern, but also about deliberation and a meaningful exchange of views between the majority and the opposition.*”¹⁰ For this reason, the Venice

⁸ [სალომე ზურაბიშვილმა „საერთო სასამართლოების შესახებ“ ორგანულ კანონში ცვლილებებს ხელი მოაწერა | საინფორმაციო სააგენტო "ინტერპრესნიუსი" \(interpressnews.ge\)](https://www.interpressnews.ge/) (Google translation: Salome Zurabishvili Signs Amendments to Organic Law on Common Courts | News Agency "Interpressnews").

Google translation of the relevant part is as follows:

“Instead, I would like to warn the Legislature of the risks that the new law contains and remind them that the independence and impartiality of judges is a cornerstone of the development of our democracy, as well as I want to reassure all that I will be attentive to the law enforcement process,” the President said.

⁹ [CDL-AD\(2020\)035](#), Bulgaria – Urgent Interim Opinion on the draft new Constitution, paragraphs 17-19; [CDL-AD\(2008\)042](#), Opinion on the Draft Law on protection against discrimination of “the former Yugoslav Republic of Macedonia, paragraphs 29 and 32.

¹⁰ [CDL-AD\(2020\)036](#), Albania – Joint Opinion of the Venice Commission and the OSCE/ODIHR on the amendments to the Constitution of 30 July 2020 and to the Electoral Code of 5 October 2020, paragraph 34. See also [CDL-AD\(2020\)035](#), – Bulgaria – Urgent Interim Opinion on the draft new Constitution, paragraph 15; [CDL-AD\(2020\)017](#), Poland – Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DG1) of the Council of Europe on amendments to the Law on Common Courts, the Law on the Supreme Court, and some other laws, paragraph 18; [CDL-AD\(2019\)015](#), Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, paragraph 67; [CDL-](#)

Commission is always critical of rushed adoptions of acts of Parliament, regulating important aspects of the legal order, without normal consultations with the opposition, experts or civil society.¹¹

17. Firstly, proper deliberation, justification and impact assessment is particularly important for legislative reforms of the judiciary, which is an independent branch of government.¹² Amendments concerning disciplinary grounds and procedures as well as the irremovability of judges are very sensitive matters which merit thorough and inclusive considerations, as they relate directly to the independence of judges. Sudden and rapid amendments to key components of the independence of judges through accelerated legislative procedures may undermine the public trust in the judiciary as being independent from the executive and legislative branches of government.

18. Secondly, rushed law-making by means of accelerated procedures in Parliament without proper consultations with the opposition, stakeholders, experts or civil society, is bound to negatively affect the quality of the legislation. Indeed, several of the amended legal texts lack sufficient precision and clarity.

19. Thirdly, sudden and rapid amendments to law affects legal certainty, which is an essential component of the rule of law.¹³ In this case, the 2021 Amendments may significantly affect the tenure and irremovability of judges as well as their freedom of speech.

20. In the Venice Commission's view, the way the 2021 Amendments were prepared and adopted raises serious concern as to the motives of these amendments and consequences to the independence of judges in Georgia.

IV. Assessment

A. Reallocation of judges

21. In new Article 35 (Procedure for holding the position of a judge), paragraph 13¹ seems to address the situation in paragraph 15 of the same Article¹⁴ of the Organic Law on Common Courts, when not all vacancies in a competition are filled by judicial candidates. The amendment allows the HCoJ to appoint unsuccessful consenting judicial candidates to other vacancies.

22. At first glance, this rule appears to be reasonable, as it allows the HCoJ to draw from the entire pool of qualified judicial candidates when filling judicial vacancies rather than starting a new competition. However, the amendment is not clear as to the qualification requirements for such second-round appointments as compared to the first round of appointments. It should be clarified that a judicial candidate appointed in the second round must fulfil all the requirements of the specific vacancy, e.g., specialisation requirements.

23. Moreover, it is unclear whether the HCoJ in the second round is allowed to appoint judicial candidates that have received a lower score in the evaluation than judicial candidates that were rejected in the first round. If that is the case, then the rule would allow the HCoJ to circumvent

[AD\(2019\)004](#), Hungary – Opinion on the Law on Administrative Courts and on the Law on the entry into force of the Law on Administrative Courts and certain transitional rules, paragraphs 30-31.

¹¹ See Venice Commission, [CDL-AD\(2019\)014](#), Romania – Opinion on Emergency Ordinances GEO No. 7 and GEO No. 12 Amending the Laws of Justice, paragraphs 9-21.

¹² Venice Commission, [CDL-AD\(2019\)027](#), Ukraine – Opinion on Amendments to the Legal Framework Governing the Supreme Court and Judicial Governance Bodies, paragraph 10.

¹³ Venice Commission, [CDL-AD\(2016\)007](#), Rule of Law Checklist, II.B.

¹⁴ “15. If not all vacancies of a judge were occupied on the basis of competition, the High Council of Justice of Georgia shall, within a period of three months after the competition results are announced, announce another competition under the procedure established by this Article.”

the qualification principle set out in paragraphs 9-11 of Article 35 of the Organic Law on Common Courts.¹⁵ In order to prevent abuse, the Venice Commission recommends that new Article 35 paragraph 13¹ be rewritten so as not to allow for any interpretation to circumvent the initial ranking and thus the appointment of judges according to merit.

B. Secondment or transfer of judges

24. Article 37¹ of the Organic Law on Common Courts regulates the procedure for sending a judge on secondment to another court on the same level or from a Court of Appeal to a city or district court. The HCoJ may second judges with or without their consent. For the *consensual approach*, the amendment to Article 37¹ simplifies the procedure, but makes no substantial changes. For the *non-consensual approach*, the amendment broadens the HCoJ's powers *vis-à-vis* the judges.

25. According to the current procedure, if a judge does not consent to be transferred, the HCoJ may if "*necessary in the interests of justice*" by a reasoned decision second a judge to a court of the same instance, "primarily" to a court "nearby". In case of secondment from a Court of Appeal to a city/district court, consent is always required. The judge to be seconded is chosen by drawing lots. A judge may provide grounds for not being seconded, and if accepted by the HCoJ, a new judge is selected by drawing lots.

26. The 2021 Amendments allow the HCoJ to select a judge to be seconded without drawing lots and without a geographical limitation. This means that the HCoJ may now freely pick judges to be seconded against their will to serve in a court anywhere in Georgia. Moreover, the HCoJ may now second a judge from the Court of Appeal to a city/district court as well as the other way around.

27. The time limit for secondment without consent has also been extended. According to the amended Article 37¹, the HCoJ may second judges without their consent for up to two years, unlike the former version of this Article, where the duration is limited to one year. Moreover, the HCoJ may extend the secondment without the judge's consent for another two years, and thus for a total of four years.

28. The irremovability of judges is recognised in the case law of the ECtHR¹⁶ and in a number of international reference documents as an important safeguard for the independence of

¹⁵ "9. Candidates for judge shall be evaluated according to the criteria determined in Article 35¹ of this Law, based on interviews conducted with them, and information acquired under Article 35² of this Law. Current and former judges, who have at least 3 years' experience of judicial activity, shall be evaluated on the basis of Article 36¹ (1) and (2) and Articles 36² and 36³ of this Law, the examination of cases provided for in Article 36⁴ of this Law, the points-based assessment system and the forms filled out by members of the High Council of Justice of Georgia independently following the interview. The evaluation system determined for a judge assigned to the post for a 3-year term shall not apply to a current or former judge of the Constitutional Court or the Supreme Court of Georgia. These judges shall be assigned to the post for an unlimited term by decision of the High Council of Justice of Georgia, based on the criteria and under the procedure determined for the assignment of a judge.

10. Within a period of five working days after the interview is finished, each member of the High Council of Justice of Georgia shall complete the evaluation sheet of each candidate for judge, in which results of the evaluation of a candidate for judge according to the criteria determined in Article 35¹ of this Law will be entered. The form of the evaluation sheet of a candidate for judge shall be approved by the High Council of Justice of Georgia.

11. The information entered in the evaluation sheets of candidates for judge shall be summarised by a respective organisational unit of the High Council of Justice of Georgia within a period of three days, then subsequently it shall submit the evaluation results to the High Council of Justice of Georgia. Within a period of two days after the evaluation results are submitted, the High Council of Justice of Georgia shall put to vote the assigning of a candidate for judge to a vacancy of a judge."

¹⁶ See ECtHR, Guðmundur Andri Ástráðsson v. Iceland [GC], no. 26374/18, 1 December 2020, paragraphs 239-240.

judges.¹⁷ While the principle of irremovability is not absolute, as a general rule, the transfer of judges without their consent is only permissible in exceptional cases, such as general reforms of the judicial system and as a result of disciplinary sanctions. In its 2010 Report on the independence of the judiciary, the Venice Commission stated that “*Transfers against the will of the judge may be permissible only in exceptional cases.*”¹⁸

29. Although Georgia is not a member of the EU, it is interesting to note that the irremovability of judges in relation to their independence is also emphasised in the Judgments of the Court of Justice of the EU, see notably the Joined Cases C-748/19 to C-754/19 of 16 November 2021: “(...) compliance with the requirement of independence means that the rules governing the secondment of judges must provide the necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions” and “In order to avoid arbitrariness and the risk of manipulation, the decision relating to the secondment of a judge and the decision terminating that secondment, in particular where a secondment to a higher court is involved, must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons.”¹⁹

30. The importance attached to the irremovability of judges in relation to their independence, which is also guaranteed by Article 63 of the Constitution of Georgia, suggests that a careful approach should be taken for the secondment of judges. International standards suggest that the secondment of judges against their will should only be possible in exceptional cases and justified by a legitimate objective.

31. Considering international standards on the irremovability of judges, the amendments to Article 37¹ raise three issues.

32. The first issue is the justification for broadening the HCoJ’s powers so that it can select judges to second against their will and to a different court level. The old version of the Law required the HCoJ to select the judges by drawing lots and to transfer judges to nearby courts, which, on the face of it, would limit the potential of abuse. It is hard to see how the change to a non-random selection procedure with no geographical limitation can be justified.

33. During the meetings with the delegation from the Venice Commission, the government party argued that the 2021 Amendments were necessary to ensure the timely adjudication of cases in courts in the remote areas of Georgia. However, no statistics or factual evidence for this claim were put forward in the explanatory note or in the meetings. Some statistics were sent to the Venice Commission delegation after the meetings, but the Venice Commission would like to underline that it is in no position to be able to assess the accuracy of these statistics. In any case, the statistics do not justify some of the measures introduced by the 2021 Amendments.

34. As for the necessity of selecting specific judges for secondment against their will, the government party argued that the drawing of lots led to a too lengthy process. The Venice

¹⁷ See [Recommendation CM/Rec\(2010\)12](#) of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraphs 49-52; [CDL-AD\(2016\)033](#), Rule of Law Checklist, para. 80; [CCJE Opinion No. 1 \(2001\)](#), paragraph 57.

¹⁸ See [CDL-AD\(2010\)004](#), Report on the Independence of the Judicial System Part 1: The Independence of Justice, paragraph 43.

¹⁹ CJEU, Joint Cases C-748/19 to C-754/19, 16 November 2021, paragraphs 73 and 79: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=04F66190436E572528AE43A63CE936FE?text=&docid=249321&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1316599>. The two cases concerned Poland, where secondment requires the consent of the judge (paragraph 76), yet the CJEU held that even the possibility for the Minister of Justice to terminate the secondment at any time without being required to provide reasons “are not provided with the guarantees and the independence which all judges should normally enjoy in a State governed by the rule of law” (paragraph 87).

Commission does not find this argument credible, as the Law contains no lengthy procedures for the drawing of lots, and a rapid procedure could easily be established in the law.

35. The second issue is the lack of precision in the criterion for secondment without consent. According to both the current and the amended Article 37¹, the HCoJ may second judges to other courts in case of “*necessity, in the interests of justice*”. While “*necessity*” imposes a certain threshold, “*in the interests of justice*” is quite vague and broad. It is not clear what “*other objective circumstances*” can be envisaged as “*necessity, in the interests of justice*”. The two issues mentioned in the text, the absence of a judge or a high increase in the case load, seems to suggest that the operative criterion for secondment of judges is that a court is not able to render decisions within a reasonable time, as required by Georgian law and more generally by the ECHR. However, even this is not clear from the wording of the Article.

36. Article 63 (5) of the Constitution of Georgia allows that a “*judge of the common courts may be ... moved to another position only in cases defined by the organic law. The irremovability of a judge shall be guaranteed by the organic law.*” While the Constitution does allow for judges to be transferred in certain cases, for an exception to the main principle of irremovability to be meaningful, the 2021 Amendments should define and narrowly delimit the cases in which the transfer of judges is permissible.

37. The third issue is the time frame for secondment. The delegation of the Venice Commission received no information as to why the timeframe for secondment without consent is increased from one year to two years, with an extension possible for another two years, which means that a total of four years is now possible.

38. Given that a secondment is meant to be an exceptional measure, as suggested by the examples mentioned in Article 37¹, secondment without the consent of the judge for up to four years is clearly disproportionate.

39. In the case of vacancies or a high increase in the caseload of a court, other measures such as permanent appointments, incentives and support for judges taking posts in less attractive courts and adjusting the boundaries between court districts to give them a more balanced caseload, should be considered before allowing a long-term transfer of judges against their will.

40. In sum, the amendments to Article 37¹ significantly increase the powers of the HCoJ over judges and represent a serious interference with a judge’s safety of tenure. The main safeguards against abuse in the old Law have been abolished. According to interlocutors, the drafters maintained during the committee hearings in Parliament that the HCoJ would have to justify its decision to transfer judges, but that safeguard was not included in the final 2021 Amendments. The HCoJ is now authorised to select specific judges for transfer to any first instance or appellate court in Georgia for up to four years on any grounds that the HCoJ deems to be “*necessary in the interests of justice*”. In the view of the Venice Commission, this broad and unrestrained power to transfer judges against their will is excessive and not justified.

41. While the amendments to Article 37¹ are problematic in themselves, they are particularly worrying in the specific context they were made in. Most interlocutors the Venice Commission delegation met claimed that the true aim of the 2021 Amendments was to allow the HCoJ to control and silence judges opposing government policies and reforms as well as the HCoJ itself. The interlocutors pointed out that the transfer or threat of transfer without consent has historically been applied to silence judges in Georgia.²⁰ While the Venice Commission is not in a position to

²⁰ Examples of inconsistencies and irregularities in the transfer of judges by the HCoJ are mentioned by the Georgian Young Lawyer’s Association in the publication *Justice in Georgia*, 2010, p. 15-21. It is also referred to in the constitutional complaints by the five judges and the Public Defender’s Office, courtesy of a summary of the five judges’ legal brief from Ms Ketevan Meskhishvili, who is one of them: *E. Areshidze, K. Meskhishvili, M. Maisuradze, T. Khazhomia, M. Tsiklauri vs. Parliament of Georgia, Constitutional Claim (N1693)*, registered on 11.04.2022 as well as

verify these claims, around 20 sitting judges have distanced themselves in November 2021, from a statement made by the Administrative Committee of the Conference of Judges of Georgia, which accused the international community of meddling in Georgia's affairs when they criticised the appointment of two-judge members to the HCoJ (see above) – calling it a setback in the Georgian judiciary and that the process was neither competitive nor transparent.²¹

42. Indeed, for the first time in the history of Georgia, on 11 April 2022, five sitting judges initiated a constitutional complaint, directed against the very amendments to the Organic Law on the Common Courts discussed in this opinion.²²

43. In sum, in order to prevent abuse, the Venice Commission recommends that for the secondment of judges against their will, the 2021 Amendments should provide:

- clear and narrow criteria;
- a justification with a legitimate objective;
- shorter time periods and
- allow it only in exceptional cases.

A random or objective procedure with a geographical limitation should be reintroduced.

C. Recusal of district court and court of appeal judges from trial

44. The amendment to Article 45 provides a new procedure for the recusal of judges of a district/city court or a court of appeal.

45. The new procedure introduces additional safeguards since judges can no longer be recused and have their salary suspended upon prosecution or by a decision of the Disciplinary Panel of the Georgian General Court of Judges. According to the new procedure, the decision to recuse is made by the Disciplinary Board of Judges of the Common Courts of Georgia upon application of the HCoJ backed by the majority of the HCoJ, on the basis of a reasoned motion of the Independent Inspector.

46. This new procedure seems to prevent an automatic recusal in case of prosecution. Moreover, this new procedure introduces a threshold to limit the discretion of the Disciplinary Board. Recusal is only possible in case of *“reasonable belief, that remaining on this position he/she will prevent disciplinary proceedings and/or recovery of damages caused by disciplinary misconduct, and/or will continue violation of labour discipline.”* The decision to recuse a judge may be appealed within three working days to the Disciplinary Chamber of the Supreme Court.

47. The amendments also lift the prohibition in Article 75¹⁶ of withdrawing a judge from a case and exercising other official powers after the initiation of disciplinary proceedings or the initiation of disciplinary liability.

48. On the face of it, the amendment to Article 45 appears to provide certain safeguards for the irremovability of judges in case of prosecution and disciplinary proceedings. Involving multiple independent bodies in the decision should provide an additional safeguard. However, it is unclear

from the Deputy Public Defender.

²¹ <https://civil.ge/archives/452989>: Judges Accuse EU, U.S. Embassies of Meddling in Georgia's Internal Affairs; <https://agenda.ge/en/news/2021/3439>: Judiciary denounces concerns on recent appointment of 2 judge members to High Council of Justice, calls decision “not hasty”; also <https://www.state.gov/recent-judicial-appointments-in-georgia/>: Recent judicial appointments in Georgia; <https://ge.usembassy.gov/u-s-embassy-statement-on-the-appointment-of-judges/>; <https://georgiatoday.ge/carl-hartzell-appointments-of-2-members-of-high-council-of-justice-were-hasty-non-transparent-non-competitive/>

²² The Venice Commission obtained a summary of the five judges' legal brief from Ms Ketevan Meskhishvili, who is one of them: *E. Areshidze, K. Meskhishvili, M. Maisuradze, T. Khazhomia, M. Tsiklauri vs. Parliament of Georgia, Constitutional Claim (N1693), registered on 11.04.2022.*

what is meant by “*continue violation of labour discipline*”. Given the severity of recusal, this criterion seems too vague and broad.

49. International standards do not explicitly address the situation of recusal in the context of a disciplinary investigation of a judge. However, any disciplinary proceedings and decisions against a judge must respect the basic requirement of independence, fair trial, and proportionality.²³

50. As for a fair trial, the amended Article 45 allows the judge to appeal a decision to the Disciplinary Chamber of the Supreme Court. The time limits for filing an appeal (two days) as well as a reviewing the appeal (five days) are too short. It is questionable whether these time limits leave the judge with sufficient time to present his or her case before the Disciplinary Chamber. Moreover, it falls within the Disciplinary Chamber’s discretion to allow an oral hearing.

51. The consequence of recusal is serious: the judge’s salary is suspended even before any disciplinary offence is proven and a decision as to disciplinary liability is made. It is of fundamental importance that any interference with the tenure and irremovability of judges respect the principle of proportionality.²⁴

52. The Venice Commission has, in previous opinions, accepted the reduction in salary as a disciplinary sanction as well as the termination of privileges provided to a judge in case the powers of a judge are withdrawn by a disciplinary body after finding a disciplinary violation.²⁵ However, the proportionality of such measures is different at the investigative stage, when no violation has been determined yet by a competent body.

53. It is true that amended Article 45 (7) requires the reimbursement of a suspended salary and of other benefits in case of acquittal, but the suspension of a salary is nonetheless a heavy burden. Even with the reduction of time limits in investigating and deciding disciplinary offences, the suspension of a salary according to unclear terms before any disciplinary offence is proven and decided appears disproportionate and should be removed.

D. Members of the HCoJ term of office and appointment of new members

54. In Article 47 (High Council of Justice of Georgia) paragraph 12, the amendment lifts the restriction on serving on the HCoJ for more than one term in a row. The term of office is four years. Such a term of office is consistent with the practice in most Council of Europe countries.

55. There is no hard international standard on the reappointment of members of judicial councils such as the HCoJ, as long as their appointment and terms of office provide sufficient guarantees for their independence.²⁶ However, the Consultative Council of European Judges (CCJE) has in

²³ See [Recommendation CM/Rec\(2010\)12](#) of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 69: “*Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.*”

²⁴ See Venice Commission, [CDL-AD\(2014\)039](#), Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, paragraphs 67, 68, 71 72 and 75. See also [CDL-AD\(2015\)042](#), Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of “The Former Yugoslav Republic of Macedonia”, paragraph 57.

²⁵ See Venice Commission, [CDL-AD\(2014\)006](#), Joint opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law of the Council of Europe, and of the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) on the draft law on disciplinary liability of judges of the Republic of Moldova, paragraphs 41-42; [CDL-AD\(2011\)012](#), Joint Opinion on the constitutional law on the judicial system and status of judges of Kazakhstan by the Venice Commission and OSCE/ODIHR, paragraph 54.

²⁶ While the institutional context was different, the requirement for sufficient guarantees for the independence of the body exercising disciplinary powers over judges was emphasised by the ECtHR in *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021.

its recent Opinion No. 24 drawn “*attention to the possible impact of re-election on the independence of the members of a Council for the Judiciary. In principle, re-elections of full-time members should be avoided in favour of longer fixed terms to ensure independence.*”²⁷ The Venice Commission too has expressed the view that a fixed term without the possibility for immediate re-election may enhance the appearance of independence.²⁸ These recommendations suggest that lifting the restriction in Article 47 paragraph 12 on immediate re-election should be justified. The explanatory report does not provide any particular justification for the amendment other than re-election would allow competent and capable members to continue their service in the HCoJ.

56. The Venice Commission and the CCJE usually recommend that a gradation, or staggered approach, in the turnover of members of judicial councils be introduced so that the elected members do not end their terms simultaneously.²⁹ Article 47 does not provide for such a staggered approach in the composition of the HCoJ, which might be considered.

E. Disciplinary liability of judges

57. In the *Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of Georgia* (hereinafter, the “2014 Joint Opinion”), the Venice Commission recommended that the two-thirds majority requirement for the decisions of the HCoJ in disciplinary proceedings be replaced with a simple majority requirement.³⁰ A simple majority would allow for a more efficient disciplinary system, as a qualified majority requirement creates the risk that too many complaints will not be followed up at different stages of a disciplinary procedure due to corporatist attitudes within the HCoJ.

58. In conformity with this recommendation, the amendments lower the majority requirement from a two-thirds majority to an absolute majority for the HCoJ’s decisions on “*disciplinary matters*” (paragraph 3 of Article 50), initiating disciplinary prosecution against a judge (paragraph 1 of Article 75⁸), imposing disciplinary liability on a judge (paragraph 1 of Article 75¹³), decisions to appeal a Disciplinary Board decision (paragraph 3 of Article 75⁵⁴).

59. Lowering the majority requirement to simple majority allows, in principle, decisions to be made by the judge-members of the HCoJ alone. For this to happen, all judge-members would have to act in concert. During the meetings in Georgia, the delegation from the Venice Commission learned that the judge-members of the HCoJ do indeed act in concert in most cases and that there were internal divisions between the judge-members and other members of the HCoJ. Many of the interlocutors the Venice Commission delegation met with, claimed that the judge-members of the HCoJ acted to protect the corporative interests of an influential group within the judiciary.³¹

²⁷ See [CCJE Opinion No. 24 \(2021\)](#): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, paragraph 36.

²⁸ Venice Commission, [CDL-INF\(1998\)009](#), Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, paragraph 20.

²⁹ Venice Commission, [CDL-INF\(1998\)009](#), Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania, paragraph 21; [CDL-AD\(2018\)011](#), Opinion on the draft amendments to the constitutional provisions on the judiciary of Serbia, paragraph 65. See also CCJE Opinion No. 10, paragraph 35.

³⁰ Venice Commission, [CDL-AD\(2014\)032](#), paragraphs 24, 66, 72.

³¹ See paragraphs 51-52, <https://assembly.coe.int/LifeRay/MON/Pdf/DocsAndDecs/2021/AS-MON-2021-10-EN.pdf>; P. 47 [https://www.europarl.europa.eu/thinktank/sv/document/EPRS_STU\(2022\)699489](https://www.europarl.europa.eu/thinktank/sv/document/EPRS_STU(2022)699489); Page 6, 9 and 18: [Report on the First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia | OSCE](#); [Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia | OSCE](#); [Third Report on the Nomination and Appointment of Supreme Court Judges in Georgia | OSCE](#); [Final report on the Nomination and Appointment of Supreme Court Judges in Georgia | OSCE](#); <https://bti-project.org/en/reports/country-report/GEO>. In the press: <https://oc-media.org/georgias-clan-of-judges-hits-out-at-foreign-interference/>; <https://agenda.ge/en/news/2021/3271>;

60. The Venice Commission is not in a position to verify these claims, but persistent and widespread claims of corporatism and self-interest in the HCoJ may damage the public trust in the judiciary and should be taken seriously.

61. In this respect, the Venice Commission would like to emphasise that a council for the judiciary such as the HCoJ should ultimately exercise its powers to protect judicial independence and the efficiency and quality of justice in a way that reinforces public confidence in the justice system.³² Public confidence in the justice system would suffer if a council for the judiciary is perceived to act out of self-interest, self-protection and cronyism.³³ The organisation of a council should not allow for judicial corporatism to serve the self-interests of one group of judges to the detriment of other groups of judges.³⁴

F. New grounds for disciplinary misconduct

62. The 2021 Amendments add new grounds for disciplinary misconduct in Article 75¹. As “*Conduct that violates the principle of independence*”, the grounds “*Expression of opinion by a judge in violation of the principle of political neutrality*” has been added. The current Article 75¹ already lists in paragraph 8 b.e “*membership in a political association, engagement in political activities, public support for a political entity running in an election, or public expression of a political opinion by a judge*” as grounds for disciplinary misconduct. In relation to legislative technique and the coherence within Article 75¹, it is not clear what other acts of a judge will violate his/her “*political neutrality*”. While paragraph 8 b.e. lists specific activities, the wording “*political neutrality*” is less specific, and therefore allows for a broader interpretation and application. The explanatory note does not provide any specific justification for the new disciplinary ground and how it should be interpreted. Several interlocutors the Venice Commission delegation met with, claimed that the aim of the new wording “*political neutrality*” was to silence certain judges who had criticised the government in the past and who then brought a complaint on the 2021 Amendments before the Constitutional Court.

63. A judge’s right and duty to independence and impartiality suggests that his or her freedom of expression and the right to political association may be legitimately restricted and that violations may constitute grounds for disciplinary misconduct.

64. However, judges should not be barred completely from engaging in societal activities outside their official functions.³⁵ In regulating judges’ impartiality, a balance must be struck between the fundamental right to freedom of expression and the legitimate interest of the state to ensure an impartial and non-political judiciary.

65. The ECtHR has recognised that it is legitimate for the state to impose on judges a duty of discretion, the freedom of speech of judges is nonetheless protected by Article 10 of the ECHR.³⁶

³² See [CCJE Opinion No. 10 \(2007\)](#).

³³ There is a growing body of legal scholarship showing that the European model for councils for the judiciary is prone to judicial corporatism, see e.g. the overview in David Kosář, “Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe”, *German Law Journal* 2019 pp. 1567-1612.

³⁴ See here the more nuanced approach taken by the CCJE in Opinion No. 24 (2021), Evolution of the Councils for the Judiciary, paragraph 29.

³⁵ See Venice Commission, [CDL-AD\(2015\)018](#), Report on the freedom of expression of judges, paragraphs 29-44; [Recommendation CM/Rec\(2010\)12](#) of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 21. See also [CDL-AD\(2013\)035](#), Opinion on the draft Code on Judicial Ethics of the Republic of Tajikistan, paragraphs 65-66; [CDL-AD\(2014\)018](#), Joint opinion of the Venice Commission and OSCE/ODIHR on the draft amendments to the legal framework on the disciplinary responsibility of judges in the Kyrgyz Republic, paragraph 34; [CDL-AD\(2017\)019](#), Opinion on the Draft Judicial Code of Armenia, paragraph 54; [CDL-AD\(2016\)013](#), Opinion on the Draft Code of Judicial Ethic of the Republic of Kazakhstan, paragraphs 62, 65.

³⁶ See ECtHR, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, paragraphs 162-167.

Yet judges' duty of discretion is relative to the context, forum and topic. Due to the requirement of impartiality, a particular discretion is required for judges in the exercise of their adjudicatory function.

66. On the other hand, issues concerning the separation of powers, the functioning of the judicial system, and legislative matters fall within the public interest and judges enjoy, as other citizens, a high degree of protection under Article 10 of the ECHR. The fact that a separation of powers issue or an issue concerning the judicial system has political implications, should not prevent judges from participating in the public debate.³⁷

67. As for the amendment to Article 75¹, a general duty for political neutrality for which a violation would be a disciplinary offence, is not in itself questionable. However, for a violation of a general duty of neutrality to be grounds for a disciplinary sanction, would require a narrow interpretation in accordance with the case law of the ECtHR on the freedom of expression of judges. Moreover, it is possible that the existence of broadly worded disciplinary offences for making statements that may have an impact on the political debate can have a chilling effect on judges' freedom of expression.

68. The amendment to Article 75¹ should therefore be reconsidered. If the wording "*political neutrality*" is to be maintained, the 2021 Amendments should qualify the grounds for disciplinary sanctions to only manifest violations of the duty of neutrality or by excluding certain types of issues, such as reforms of the court system and legislative issues.

69. As regards "*Conduct that violates the principle of competence and diligence*", the amendment to Article 75¹ subparagraph f.a. raises the threshold for misconduct due to a judge's failure to meet time limits set out in procedural legislation. While the former version of the law considered any violation of time limits as misconduct unless delay was due to circumstances outside the judge's control, the amendment requires a "*substantial violation*" for misconduct, also with exceptions for violations "*due to objective circumstances directly related to the administration of justice (number of cases, complexity of the case, etc.)*". This amendment is to be welcomed.

G. Disciplinary penalties

70. The amendment to Article 75³ sets out the application of disciplinary penalties. A rebuke, reprimand, severe reprimand, and dismissal of a judge from office may only be applied as a primary disciplinary penalty, while temporary reductions in salary and dismissal from chairperson positions, may be applied as both a primary as well as an additional disciplinary penalty.

71. The amendment to Article 75⁴⁷ allows the Disciplinary Board to apply more than one primary penalty in "*exceptional cases*" when the "*primary disciplinary penalty fails to ensure the achievement of the purpose of disciplinary liability*".

72. These amendments, when read together, mean that temporary reductions in salary and dismissal of chairpersons are penalties that may only be applied in exceptional cases. Such a restriction on the application of penalties appears to introduce a proportionality requirement into the law and should be welcomed.

H. Time limits

73. There are several amendments that appear to have the aim of shortening the time limit for the examination of disciplinary complaints (see also paragraph 49 above). These include:

³⁷ See e.g. Wille v. Lichtenstein [GC], no. 28396/95, 28 October 1999, paragraph 67.

- The amendment to Article 75⁵, which lowers the time limit from 10 to five days for correcting errors after they have been identified by the Independent Inspector in a complaint.
- The amendment to Article 75⁷, which lowers the examination period for the Independent Inspector from two months to one month after receiving a complaint, application or other information on the disciplinary misconduct of a judge.
- The amendment to Article 75¹⁰, which lowers the time limit for the completion of disciplinary examinations from two months to one month after the decision to take explanations from a judge.
- The amendment to Article 75²⁵, which lowers the time limit for the Disciplinary Board to consider a disciplinary case from two to one month.
- The amendment to Article 75⁵⁶, which lowers the time limit for the Disciplinary Chamber to verify that a complaint is admissible from 10 to five days. The time limit for correcting errors in the complaint is also reduced from 10 to five days.
- The amendment to Article 75⁵⁸, which lowers the time limit for the Disciplinary Chamber to consider a case from one month and extendable once for another month, to 15 days respectively.

74. During the meetings, the Venice Commission delegation was told by the authorities that the practical aspects of shortening the time limits was to increase procedural efficiency. However, other interlocutors were concerned that these time limits could be too short to carry out an effective investigation and adjudication of disciplinary offences while respecting procedural safeguards for the judge. This is difficult to determine at this point in time, but might be revisited if keeping these time limits becomes problematic.

I. Other issues

75. According to the amendment to Article 75⁷², paragraph 1 of this Article will be removed, which states: *"1. After an appropriate recommendation for dismissing a judge is received, a judge of the Supreme Court shall be dismissed by the Parliament of Georgia, and all other judges shall be dismissed by the High Council of Justice of Georgia."* This means that according to Article 75⁷² paragraph 2, the HCoJ will now be able to dismiss all judges, including Supreme Court Judges, further increasing the power of the HCoJ.

76. As regards Article 75⁴⁶, it may be a translation issue, but it is unclear what threshold of evidence *"inter-compatible and irrefutable evidence collectively"* refers to. This should be clarified.

77. None of the 2021 Amendments seem to have heeded the Venice Commission's recommendation made in the 2014 Joint Opinion to clarify when disciplinary proceedings should be considered as initiated in order to allow the judge to benefit from his or her right to counsel in the early stages.³⁸ No such amendments have been made after 2014 and before the 2021 Amendments either, see Article 75⁴ (3) and 75⁷. The Venice Commission would like to repeat this recommendation.

V. Conclusion

78. The Venice Commission notes that, while the formal accelerated legislative procedure appears to have been respected, it regrets that the adoption of the December 2021 amendments

³⁸ Venice Commission, [CDL-AD\(2014\)032](#), Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Making Changes to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of Georgia, paragraphs 49-50. See also [CDL-AD\(2015\)042](#), Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "The Former Yugoslav Republic of Macedonia," paragraphs 93 and 98.

to the Organic Law on Common Courts of Georgia was done with excessive haste, lacked transparency as to its motives and aims and was conducted without inclusive and effective consultations.

79. Democratic law-making is not a formal concept and the Venice Commission is always critical of a rushed adoption of acts of Parliament, regulating important aspects of the legal order, without normal consultations with the opposition, experts or civil society.

80. The Venice Commission would like to underline that the combined effect of a rushed adoption of the 2021 Amendments and their introduction of an increase in the powers of the HCoJ to second/transfer judges without their consent, and the new and vague grounds for disciplinary misconduct and the suspension of a judge's salary in the case of a disciplinary investigation – may in the specific context of Georgia create a chilling effect on judges' freedom of expression and internal judicial independence.

81. The Venice Commission therefore makes the following recommendations as regards the 2021 Amendments:

1. *Reallocation of judges*: It should be clarified that a judicial candidate appointed in the second round must fulfil all the requirements of the specific vacancy, e.g., specialisation requirements.
2. *Secondment or transfer of judges*: the secondment of judges against their will should only be possible in exceptional cases and justified by a legitimate objective. Clear and narrow criteria as well as shorter time periods for secondment should be provided. A random or objective procedure with a geographical limitation should be reintroduced
3. *Recusal of district court and court of appeal judges from trial*:
 - Given the severity of recusal, the criterion "*reasonable belief, that remaining on this position he/she will prevent disciplinary proceedings and/or recovery of damages caused by disciplinary misconduct, and/or will continue violation of labour discipline.*" appears too vague and broad.
 - The time limits for filing an appeal (two days) and reviewing the appeal (five days) are too short to allow the judge sufficient time to present his or her case before the Disciplinary Chamber.
 - The salary of a judge should not be suspended before any disciplinary offence is proven and a decision as to disciplinary liability is made.
4. *Disciplinary liability of judges*: In conformity with the Venice Commission's recommendation in its 2014 Opinion, the 2021 Amendments lower the majority requirement from two-thirds majority to absolute majority for the HCoJ's decisions on "*disciplinary matters*". However, the Venice Commission would like to stress that persistent and widespread claims of corporatism and self-interest in the HCoJ damages the public trust in the judiciary and should be taken seriously.
5. *New grounds for disciplinary misconduct*: If the wording "*political neutrality*" is to be maintained, the law should qualify the grounds for disciplinary sanctions to only manifest violations of the duty of neutrality or by excluding certain types of issues, such as reforms of the court system and legislative issues.

82. The Venice Commission would also like to reiterate the recommendation made in its 2014 Opinion, notably to clarify when disciplinary proceedings should be considered as initiated so as to allow the judge to benefit from his or her right to counsel in the early stages.

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

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