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Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

GEORGIA

URGENT OPINION

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

**Issued pursuant to Article 14a
of the Venice Commission's Rules of Procedure on 28 April 2021**

**Endorsed by the Venice Commission
at its 127th Plenary Session
(Venice and online, 2-3 July 2021)**

on the basis of comments by

**Mr Yavuz ATAR (Member, Turkey)
Mr Richard BARRETT (Member, Ireland)
Mr Nicolae EȘANU (Substitute Member, Republic of Moldova)
Mr Jørgen Steen SØRENSEN (Member, Denmark)**

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I. Introduction

1. By letter of 8 April 2021, the Speaker of the Parliament of Georgia, Mr Archil Talakvadze, requested an urgent opinion of the Venice Commission on the Organic Law of Georgia on Amendments to the Organic Law of Georgia on Common Courts ([CDL-REF\(2021\)033](#), hereinafter, the “Amendments”).
2. The Bureau of the Venice Commission authorised the request for this urgent opinion on the ground that it is important for previous Venice Commission recommendations to be taken into account in the procedure for filling several vacancies at the Supreme Court of Georgia, which is under way.
3. Mr Yavuz Atar, Mr Richard Barrett, Mr Nicolae Eșanu and Mr Jørgen Steen Sørensen acted as rapporteurs for this urgent opinion.
4. Owing to the sanitary situation due to the COVID-19 pandemic and to the very short period of time available to prepare this urgent opinion, neither a visit to Georgia nor online meetings could be organised.
5. This urgent opinion was prepared in reliance on the English translation of the Amendments. The translation may not accurately reflect the original version on all points.
6. This urgent opinion was drafted on the basis of comments by the rapporteurs. It was issued on 28 April 2021 pursuant to the Venice Commission’s Protocol on the preparation of urgent opinions, (CDL-AD(2018)019) and was endorsed by the Venice Commission at its 127th Plenary Session (Venice and online on 2-3 July 2021).

II. Background

7. The Georgian Organic Law on Common Courts has been the subject of two recent Venice Commission opinions, in reverse date order: (1) the Opinion on the draft Organic Law amending the Organic Law on Common Courts, adopted by the Venice Commission in October 2020¹ (hereinafter, the “2020 Opinion”) and (2) the Urgent Opinion on the selection and appointment of Supreme Court judges of Georgia (April 2019),² endorsed in by the Venice Commission in June 2019.³
8. This urgent opinion is on yet further Amendments to the Organic Law on Common Courts ([CDL-REF\(2021\)033](#)), which have recently been adopted. Despite their recent adoption, the Venice Commission has been requested to analyse these Amendments in the light of the recommendations made in its previous opinions. This will therefore be the focus of this urgent opinion.
9. These Amendments focus on the important task of appointing judges to the Supreme Court of Georgia.

¹ Venice Commission, [CDL-AD\(2020\)021](#), Georgia – Opinion on the draft Organic Law amending the Organic Law on Common Courts, adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020).

² Venice Commission, [CDL-PI\(2019\)002](#), Georgia – Urgent Opinion on the selection and appointment of Supreme Court judges (once endorsed, it became CDL-AD(2019)009).

³ Venice Commission, [CDL-AD\(2019\)009](#), Georgia – Urgent Opinion on the selection and appointment of Supreme Court judges, endorsed by the Venice Commission at its 119th Plenary (Venice, 21-22 June 2019).

III. Analysis

A. Shortlisting and voting stage

10. The Georgian authorities have heeded several recommendations made in the Venice Commission's previous opinions. For instance, in Article 1 of the Amendments, referring to Article 34¹ of the Law on Common Courts regarding the shortlisting of candidates, paragraph 10 sets out that *"A public hearing of candidates shall be held in accordance with the principle of equal treatment towards all candidates"*. This is in line with the Venice Commission's recommendation made in paragraph 28 of its 2020 Opinion, setting out that *"in order to ensure that all candidates are treated fairly and equally, the Commission recommends that reference be made to the need for equal treatment of candidates (...)"*.

11. Also in Article 1 of the Amendments, but referring to paragraph 12 of Article 34¹ of the Law on Common Courts, an important improvement has been noted with respect to explicitly stating that only candidates having achieved the best results are shortlisted: *"[T]he next stage is passed by so many candidates, having the best results according to the sum of points accumulated while evaluation in accordance with the competency criterion, as vacancies are announced."* This is to be welcomed.

12. The previous wording used regarding the non-disclosure of the member of the High Council of Justice (hereinafter, the "HCoJ")'s identity with respect to the evaluation decisions and justifications has been removed and the failure to submit the reasoning or to complete them upon request from the HCoJ disqualifies the HCoJ member from the entire procedure. This follows the Venice Commission's recommendation in paragraph 24 of its 2020 Opinion, which states that *"the Venice Commission recommends to provide for the disclosure, together with the votes and the reasonings, of the identity of the members of the HCoJ who cast the relevant votes."* This is to be welcomed.

13. The central point of the selection procedure is dealt with in Article 1 of the Amendments, referring to Article 34¹ paragraph 11, notably the evaluation of the candidates for judges of the Supreme Court. This phase is then followed by the procedure in paragraphs 12 and 13 above; the Venice Commission finds that it is difficult to base an efficient merit-based appointment on a voting procedure. However, while voting is imperfect, the level of transparency now proposed together with an appeal process (see below), should be of some help.

14. The following phase consists in a formal decision of the approval of a full list of candidates selected on the basis of objective criteria in phase 1. The Venice Commission would like to point out that the ambitious goal of obtaining a 2/3 majority of the full membership of the HCoJ in this step of the procedure could well lead to deadlocks.

B. Appeal mechanism

15. As regards the appeal mechanism, the Venice Commission would like to welcome that the subsequent decisions by the HCoJ are open to an appeal to the Qualifications Chamber of the Supreme Court, as recommended in paragraph 27 of its 2020 Opinion. However, this paragraph also recommends *"(...) that consideration could be given to modifying the composition of the HCoJ (...) – by excluding those members who have been found to be biased or for other reasons provided under new Article 34.1 a)-e) by the Qualifications Chamber of the Supreme Court."* The Venice Commission would like to repeat this recommendation.

16. Another aspect that should be taken into consideration is that it is crucial for the appointment procedure to be stayed until a decision is rendered by the Qualification Chamber of the Supreme Court. This is important – as the HCoJ must follow the decision of the Qualification Chamber of the Supreme Court in their new decision – which is necessary for a meaningful right to appeal.

This is the difference between the nomination of judges to the Supreme Court (HCoJ) and checking the legality of the procedure for their nomination (court of law).

17. In summary, the Venice Commission recommends modifying the composition of the HCoJ for subsequent decisions and staying the appointment procedure until a decision has been rendered by the Qualification Chamber of the Supreme Court. These recommendations are made to ensure a meaningful right to appeal and to avoid what would otherwise amount to an exercise in futility.

C. Other matters

18. Article 2 of the Amendments seems to indicate that the Georgian authorities wish to retain the ongoing competition, which will then be conducted/continued under the new rules. This means that the initial interviews will already have taken place under the old rules and the new rules will apply to later interviews. This needs to be handled with great care, as it raises a major concern of equality of treatment of candidates. For this reason, the procedure may need to be restarted.

IV. Conclusions

19. The Venice Commission welcomes the Organic Law of Georgia on Amendments to the Organic Law of Georgia on Common Courts, which has taken into account several recommendations made in the Venice Commission's previous opinions on the Law on Common Courts.

20. Nevertheless, there are a number of outstanding recommendations that should be reconsidered. In this respect, the Venice Commission makes the following key recommendations:

1. To consider modifying the composition of the HCoJ for the subsequent decisions;
2. To stay the appointment procedure until a decision is rendered by the Qualification Chamber of the Supreme Court;
3. In order to ensure that there is an equality of treatment of candidates, the selection procedure may need to be restarted.

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