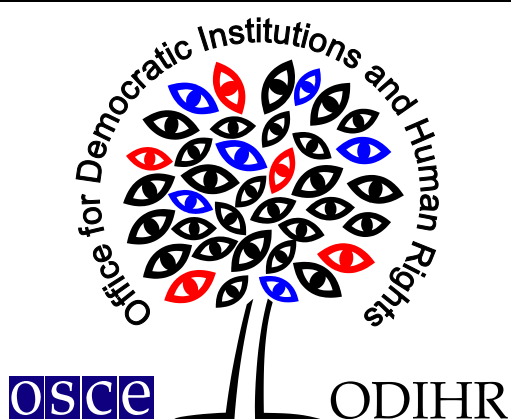


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OPINION

ON DRAFT AMENDMENTS RELATING TO THE APPOINTMENT OF SUPREME COURT JUDGES OF GEORGIA

**based on an unofficial English translation of the draft amendments provided by the
Public Defender of Georgia**

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*This Opinion will also be available in Georgian.
However, the English version remains the only official version of the document.*

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I. INTRODUCTION

1. *On 27 March 2019, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) received a request from the Public Defender of Georgia to review draft amendments relating to the appointment of Supreme Court of Judges of Georgia (hereinafter “Draft Amendments”).¹*
2. *On 2 April 2019, the Public Defender of Georgia informed ODIHR that a second parliamentary reading for the adoption of the Draft Amendments is planned on 19 April 2019 and therefore requested the legal analysis to be prepared before that date.*
3. *On 4 April 2019, the ODIHR responded to this request. Taking into consideration the time constraint, and in keeping with its methodology, ODIHR offered to prepare a legal review evaluating the compliance of the Draft Amendments with OSCE human dimension commitments and international human rights and rule of law standards.*
4. *This Opinion was prepared in response to the above-mentioned request.*

II. SCOPE OF REVIEW

5. The scope of this Opinion covers only the Draft Amendments submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the judiciary in Georgia.
6. The Opinion raises key issues and provides indications of areas of concern. The ensuing recommendations are based on international and regional standards, norms and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field.
7. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women² (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality³ and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the analysis seeks to take into account the potentially different impact of the Draft Amendments on women and men, as judges or as lay persons.
8. The Opinion is based on an unofficial English translation of the Draft Amendments provided by the Public Defender of Georgia, which is attached to this document as an Annex. Errors from translation may result. The Opinion will also be available in Georgian. However, the English version remains the only official version of the document.
9. In view of the above, ODIHR would like to make mention that this review does not prevent ODIHR from formulating additional written or oral recommendations or

¹ These include Draft Amendments to the Organic Law on Common Courts of Georgia and to Article 205 of the Rules of Procedure of the Parliament of Georgia.

² *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Georgia acceded to this Convention on 26 October 1994 and to the Optional Protocol to the CEDAW on 1 August 2002.

³ See par 32 of the *OSCE Action Plan for the Promotion of Gender Equality* adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

comments on respective legal acts or related legislation pertaining to the legal and institutional framework regulating the judiciary in Georgia in the future.

III. EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

10. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law. It is essential to engendering public trust and credibility in the justice system in general. How persons are selected for appointment to the bench is important to maintain the confidence of the public in the administration of justice. The Draft Amendments, which aim at filling a gap by introducing more detailed provisions on the selection criteria, conditions and procedure before the High Council of the Judiciary (HCJ) for the selection of candidates to Supreme Court judgeship, are welcome.
11. At the same time, the Draft Amendments could benefit from certain revisions and additions, to enhance the openness and transparency of the appointment process and ensure greater compliance with international and regional standards. Bearing in mind that on the basis of the Draft Amendments, almost 3/4th of the vacant positions in the Supreme Court may be filled in the coming months, it is of the utmost importance to ensure that the judges are elected following clearly defined and uncontroversial procedure, which would guarantee appointment of the most qualified and experienced candidates. In this context, the expeditious procedures for judicial appointments envisaged by the Draft Amendments create reasons for concern.
12. Particularly, the drafters should ensure that clearly defined selection criteria are provided at every stage of the appointment process, so that ultimately, the best candidates are appointed. The modalities for the HCJ to select candidates by secret ballot undermines the merits-based selection system and should be replaced by a procedure whereby the HCJ would adopt a summary of majority justification for the ranking of candidates and their nomination in light of the clearly defined selection criteria. Moreover, the Draft Amendments should specifically regulate the issue of conflict of interest in the context of nomination of candidates to Supreme Court judgeship by the HCJ. Finally, unsuccessful candidates should have the possibility to challenge the HCJ decision before a judicial body.
13. Though beyond the scope of this legal review, ODIHR would also like to reiterate that the election of Supreme Court judges and Chief Justice by the Parliament and thus its influence on the final composition of the highest Court, carries with it a risk of politicisation of the process and could undermine the independence and impartiality of the Supreme Court (and its appointed judges). To mitigate this risk, the Parliament's role in the appointment process should be strictly circumscribed to a supervisory role with respect to compliance of the overall process with the applicable legislation and clearly defined by law, while providing for robust procedures and guarantees to ensure that appointment decisions are exclusively taken based on objective criteria.
14. Additionally, ODIHR hereby emphasizes that when initiating reforms of the judicial system, the judiciary and civil society should be consulted and should ideally play an active part in the process, as specified in the key OSCE commitments (1990 Copenhagen Document, par 5.8 and 1991 Moscow Document, par 18.1). Any legislative proposals on judicial reform should be subject to inclusive, extensive and effective consultations at all stages of the law-making process, from the early stages of

policy-making through the parliamentary stage of the discussions, up until the law is adopted.

15. In light of international human rights and rule of law standards and good practices, ODIHR makes the following recommendations to further enhance the Draft Amendments:
 - A. to increase the number of years of professional experience to be eligible to Supreme Court judgeship and replace the requirement for non-judicial candidates to take the judicial qualification examination by other testing modalities applicable for all (judicial and non-judicial) candidates; [pars 32 and 36]
 - B. to supplement draft Article 34¹ to:
 1. specify the selection criteria applicable at each stage of the appointment process; [par 40]
 2. provide for additional qualities and expertise to be selected as Supreme Court judge, including extensive expertise in human rights; [par 43]
 3. state that selection should be carried out without discrimination, while introducing mechanisms to ensure that the composition of the Supreme Court is more balanced in terms of gender and diversity; [pars 44-45 and 49]
 4. replace the system of selection of the candidates by the HCJ by secret ballot by a proper merits-based assessment, including of the hearing, and provide that the HCJ should prepare a summary of majority justification for the ranking of candidates and their nomination in light of the selection criteria; [pars 57 and 61]
 - C. to specifically provide that in case a HCJ member participates in the competition for Supreme Court judgeship, then s/he should not participate in the selection/nomination procedures for such post as a member of the HCJ or alternatively, require the said HCJ member to resign before applying for Supreme Court judgeship; [par 63]
 - D. to provide for the possibility for unsuccessful candidates to challenge the HCJ decision before a judicial body; [par 78]
 - E. to specify that the information collected about the candidates is destroyed after three years of time; [par 76] and
 - F. to better define the procedure and criteria for the nomination of the candidate Chief Justice by the HCJ [par 89] and for the election of the Supreme Court judges and Chief Justice by the Parliament, while ensuring that Parliament's role is limited to scrutinizing the procedural aspects of the selection/nomination undertaken by the HCJ. [pars 30, 85 and 87]

Additional Recommendations, highlighted in bold, are included in the text of the Opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. The Legal Framework Relating to the Appointment of Supreme Court Judges of Georgia

16. Article 61 of the Constitution of Georgia provides that the “Supreme Court shall consist of at least 28 judges” elected for life, nominated by the HCJ and elected by a majority of the total number of the Members of Parliament. Upon nomination by the HCJ, the Parliament also elects the Chairperson of the Supreme Court from among the members of the Supreme Court for a term of 10 years by a majority of the total number of the Members of Parliament (Article 61 (3) of the Constitution). Before the entry into force of the constitutional amendments adopted on 23 March 2018, the (not less than 16) Supreme Court judges were appointed for a ten-year term. Currently, the Supreme Court has eleven judges, though the term of office of one of them has already ended, while three others will terminate their mandate this year. This means that almost 3/4th of the composition of the Supreme Court may be appointed anew in the coming months.
17. Article 34 (4) of the Organic Law on Common Courts of Georgia currently specifies that the candidates to the position of Supreme Court judge must have “professional experience, [which] must suit the high status of a member of the Supreme Court of Georgia” and are not required to pass the judicial qualification examination. Article 36 states the modalities of the election of Supreme Court judges and Chief Justice by the Parliament.
18. Other provisions of the Organic Law detail the rules for the appointment of judges of common courts (Article 35), the criteria and conditions for their selection (Article 35¹), the rules on conflict of interests for HCJ members (Article 35³), the evaluation of judicial activity (Articles 36¹ to 36⁴), among others. However, there are no detailed provisions on the selection criteria, conditions and procedure before the HCJ for the nomination of candidates to Supreme Court judgeship, and their subsequent election by the Parliament. The changes introduced by the Draft Amendments aim at filling this gap, which is welcome. At the same time, while the Organic Law can define the key principles and rules governing the appointment process, not all the details need to be provided therein and a reference to secondary legislation or to rules of procedure of the HCJ if they exist, which will further elaborate the procedure and modalities, could be included.

2. International Standards and OSCE Commitments on the Independence of the Judiciary and Appointment of Judges to the Highest Court

19. The independence of the judiciary is a fundamental principle and an essential element of any democratic state based on the rule of law.⁴ The principle of the independence of

⁴ See UN Human Rights Council, [Resolution on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers](#), A/HRC/29/L.11, 30 June 2015, which stresses “the importance of ensuring accountability, transparency and integrity in the judiciary as an essential element of judicial independence and a concept inherent to the rule of law, when it is implemented in line with the Basic Principles on the Independence of the Judiciary and other relevant human rights norms, principles and standards”. As stated in the [OSCE Copenhagen Document 1990](#), “the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and

the judiciary is also crucial to upholding other international human rights standards.⁵ More specifically, the independence of the judiciary is a prerequisite to the broader guarantee of every person's right to a fair trial i.e., to a fair and public hearing by a competent, independent and impartial tribunal established by law and by an accountable judiciary. This independence means that both the judiciary as an institution, but also individual judges must be able to exercise their professional responsibilities without being influenced by the executive or legislative branches or other external sources. The independence of the judiciary is also essential to engendering public trust and credibility in the justice system in general, so that everyone is seen as equal before the law and treated equally, and that no one is above the law. Public confidence in the courts as independent from the political arms of government is vital in a society that respects the rule of law. How persons are selected for appointment to the bench is important to maintain the confidence of the public in the administration of justice.

20. At the international level, it has long been recognized that litigants in both criminal and civil matters have the right to a fair hearing before an “independent and impartial tribunal”, articulated in Article 10 of the *Universal Declaration of Human Rights*, which reflects customary international law, and subsequently incorporated into Article 14 of the *International Covenant on Civil and Political Rights*⁶ (hereinafter “the ICCPR”). The institutional relationships and mechanisms required for establishing and maintaining an independent judiciary are the subject of the *UN Basic Principles on the Independence of the Judiciary* (1985),⁷ and have been further elaborated in the *Bangalore Principles of Judicial Conduct* (2002).⁸ International understanding of the practical requirements of judicial independence continues to be shaped by the work of international bodies, including the UN Human Rights Committee and the UN Special Rapporteur on the Independence of Judges and Lawyers. In its *General Comment No. 32 on Article 14 of the ICCPR*, the UN Human Rights Committee specifically provided that States should ensure “the actual independence of the judiciary from political interference by the executive branch and legislature” and “take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws, and establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them”.⁹
21. As a member of the Council of Europe, Georgia is also bound by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*¹⁰

full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression” (par 2).

⁵ See e.g., [OSCE Ministerial Council Decision No. 12/05 on Upholding Human Rights and the Rule of Law in Criminal Justice Systems](#), 6 December 2005.

⁶ UN International Covenant on Civil and Political Rights (hereinafter “ICCPR”), adopted by the UN General Assembly by the Resolution 2200A (XXI) of 16 December 1966. Georgia acceded to the ICCPR on 3 May 1994.

⁷ [UN Basic Principles on the Independence of the Judiciary](#), endorsed by UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁸ [Bangalore Principles of Judicial Conduct](#), adopted by the Judicial Group on Strengthening Judicial Integrity, which is an independent, autonomous, not-for-profit and voluntary entity composed of heads of the judiciary or senior judges from various countries, as revised at the Round Table Meeting of Chief Justices in the Hague (25-26 November 2002), and endorsed by the UN Economic and Social Council in its Resolution 2006/23 of 27 July 2006. See also [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#) (2010), prepared by the Judicial Group on Strengthening Judicial Integrity.

⁹ UN Human Rights Committee, [General Comment No. 32 on Article 14 of the ICCPR: Right to Equality before Courts and Tribunals and to Fair Trial](#), 23 August 2007, par 19.

¹⁰ The Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”), signed on 4 November 1950, entered into force on 3 September 1953. Georgia ratified the ECHR on 20 May 1999.

(hereinafter “the ECHR”), particularly its Article 6, which provides that everyone is entitled to a fair and public hearing “by an independent and impartial tribunal established by law”. To determine whether a body can be considered “independent” according to Article 6 par 1 of the ECHR, the European Court of Human Rights (hereinafter “ECtHR”) considers various elements, *inter alia*, the manner of appointment of its members and their term of office, the existence of guarantees against outside pressure and whether the body presents an appearance of independence.¹¹

22. The Council of Europe’s Committee of Ministers also formulated important and fundamental judicial independence principles in its *Recommendation CM/Rec(2010)12 on Judges: Independence, Efficiency and Responsibilities*,¹² which among others expressly states that “[t]he authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers” (par 46). The Opinion will also make reference to the opinions of the Consultative Council of European Judges (CCJE),¹³ an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges, and to the opinions and reports of the European Commission for Democracy through Law (Venice Commission).¹⁴
23. OSCE participating States have also committed to ensure “the independence of judges and the impartial operation of the public judicial service” as one of the elements of justice, “which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings” (1990 Copenhagen Document).¹⁵ In the 1991 Moscow Document,¹⁶ participating States further committed to “respect the international standards that relate to the independence of judges [...] and the impartial operation of the public judicial service” (par 19.1) and to “ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice” (par 19.2). Moreover, in its *Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (2008), the OSCE Ministerial Council also called upon OSCE participating States “to honour their obligations under international law and to observe their OSCE commitments regarding the rule of law at both international and national levels, including in all aspects of their legislation, administration and judiciary”, as a key element of strengthening the rule of law in the

¹¹ See European Court of Human Rights (ECtHR), *Campbell and Fell v. the United Kingdom* (Application nos. 7819/77, 7878/77, judgment of 28 June 1984), par 78. See also *Olujić v. Croatia* (Application no. 22330/05, judgment of 5 May 2009), par 38; *Oleksandr Volkov v. Ukraine* (Application no. 21722/11, judgment of 25 May 2013), par 103; *Morice v. France* [GC] (Application no. 29369/10, judgment of 23 April 2015), par 78; on the relation of the judiciary with other branches of power: *Baka v. Hungary* [GC] (Application no. 20261/12, judgment of 23 June 2016), par 165; *Ramos Nunes de Carvalho E Sá v. Portugal* [GC] (Application nos. 55391/13, 57728/13 and 74041/13, judgment of 6 November 2018), par 144; *Guðmundur Andri Ástráðsson v. Iceland* (Application no. 26374/18, judgment of 12 March 2019), pars 100-103.

¹² Council of Europe, *Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies.

¹³ Available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp>, particularly CCJE, *Opinion No. 1 (2001) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges*; *Opinion No. 10 (2007) on the Council for the Judiciary at the Service of Society*; *Opinion No. 17 (2014) on the Evaluation of Judges’ Work, the Quality of Justice and Respect for Judicial Independence*; *Opinion No. 18 (2015) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy*; and *Opinion No. 19 (2016) on the Role of Court Presidents*.

¹⁴ In particular European Commission for Democracy through Law (Venice Commission), *Report on Judicial Appointments* (2007), CDL-AD(2007)028-e; *Report on the Independence of the Judicial System – Part I: The Independence of Judges* (2010), CDL-AD(2010)004; and *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016.

¹⁵ OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (Copenhagen, 5 June-29 July 1990), pars 5 and 5.12.

¹⁶ OSCE, *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE* (Moscow, 10 September-4 October 1991).

- OSCE area.¹⁷ Further and more detailed guidance is also provided by the *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) (Kyiv Recommendations).¹⁸
24. Other useful reference documents elaborated in various international and regional fora contain more practical guidance to help ensure the independence of the judiciary, including, among others:
- the reports of the UN Special Rapporteur on the Independence of Judges and Lawyers;¹⁹
 - the *Universal Charter of the Judge* (1999, as last updated in 2017);²⁰
 - the *European Charter on the Statute for Judges* (1998);²¹
 - the Magna Carta of Judges (2010);²²
 - the reports and other documents of the European Network of Councils for the Judiciary (ENCJ);²³ and
 - the opinions of the OSCE/ODIHR and the Venice Commission dealing with issues pertaining to judicial councils and the independence of the judiciary.²⁴
25. Based on the above, all decisions concerning the appointment and the professional career of judges, which should include the appointment to the highest posts within the judiciary, should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures.²⁵ Judicial appointments should be made in a way that maintains the independence of the judiciary, public confidence in judges and the court system, while seeking to reflect the composition of the population as a whole.²⁶

3. General Comments

26. The independence of the judiciary is both an issue of the independence of the judiciary and of individual judges, which is perceived as a matter crucial for the fairness of trials, and a constitutional matter of institutional checks and balances.²⁷ In that context, it is of utmost importance that the influence of partisan politics be prevented when appointing

¹⁷ OSCE, *Ministerial Council Decision No. 7/08 on Further Strengthening the Rule of Law in the OSCE Area* (Helsinki, 4-5 December 2008).

¹⁸ The *OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* (2010) were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence.

¹⁹ Available at <<http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>>.

²⁰ *Universal Charter of the Judge* (1999, as last updated in 2017), adopted by the International Association of Judges.

²¹ *European Charter on the Statute for Judges* (Strasbourg, 8-10 July 1998), adopted by the European Association of Judges, published by the Council of Europe [DAJ/DOC (98)23].

²² CCJE, *Magna Carta of Judges*, 17 November 2010.

²³ Available at <<https://www.encj.eu/>>.

²⁴ Available at <<http://www.legislationline.org/search/runSearch/1/type/2/topic/9>> and at <<https://www.venice.coe.int/webforms/documents/?topic=27&year=all>>.

²⁵ *Op. cit.* footnote 18, pars 21-23 (2010 Kyiv Recommendations); *op. cit.* footnote 14, pars 23-32 (2010 Venice Commission Report on the Independence of the Judicial System); and *op. cit.* footnote 20, Articles 4-1, 5-1 and 5-2 (Universal Charter of the Judge).

²⁶ *ibid.* par 24 (2010 Kyiv Recommendations).

²⁷ See e.g., *op. cit.* footnote 11, par 122 (*Guðmundur Andri Ástráðsson v. Iceland*, ECtHR judgment of 12 March 2019), par 122, which states that “[t]he Court places emphasis on the importance in a democratic society governed by the rule of law of securing the compliance with the applicable rules of national law in the light of the principle of the separation of powers”; and *op. cit.* footnote 13 (CCJE Opinion No. 18 (2015)).

judges to the highest court.²⁸ The procedure for appointment of Supreme Court judges envisaged in the Constitution and in the Organic Law provides for their appointment by vote of Parliament. While this procedure may be seen to give additional democratic legitimacy and avoid the risk of corporatism, at the same time, it carries with it a risk of politicisation of the appointment process and of public perception of dependence of the elected judges on the legislature.²⁹

27. OSCE commitments and soft law elaborated at the international and regional level recommend that judicial appointments, including at the highest court level, be undertaken by a body that is independent, where judges represent a substantial part or a majority of its members, representative of the judiciary at all levels³⁰ and being responsible towards the public.³¹ Such judicial councils or other independent bodies should, however, not be composed completely or over-prominently by members of the judiciary, so as to prevent self-interest, self-protection, cronyism and the perceptions of corporatism.³²
28. When the appointment of judges to the highest level is the subject of a vote by Parliament, as this is often the case in OSCE participating States, the risk that political considerations prevail over the objective merits of a candidate cannot be excluded.³³ In its October 2017 Opinion on the draft revised Constitution of Georgia, the Venice Commission specifically noted that “[t]he appointment of Supreme Court judges directly by the HCJ without the involvement of Parliament [would] better guarantee the independence of the Supreme Court judges”.³⁴ In any case, judicial councils or other independent bodies should have the decisive role when appointing judges, and not the political bodies, which, if they are involved at all, should be able to object only on procedural grounds.³⁵
29. Furthermore, the appointment process involves some questioning by Parliamentarians (see Sub-Section 5.1 *infra*), which may create the image of judges being dependent on the views of the Parliament in a manner not necessarily compatible with the principle of separation of powers. Although a public hearing at the Parliament is a tool for enhanced transparency, and also provides for public scrutiny that election by the Parliament is made based on merits rather than political considerations, such hearing may increase even more the politicisation of the process while having rather limited added value in the determination of candidates’ professional qualifications. Finally, in the Georgian

²⁸ *ibid.* See also e.g., [Beijing Statement of Principles of the Independence of the Judiciary](#) (1995), signed by 32 Chief Justices throughout the Asia Pacific region, Principle 12, which states that “[t]he mode of appointment of judges [...] must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed”.

²⁹ See *op. cit.* footnote 13, par 15 (2015 CCJE Opinion No. 18); pars 33 and 45 (2001 CCJE Opinion No. 1); and pars 48-51 (2007 CCJE Opinion No. 10). See also *op. cit.* footnote 14, pars 12 and 29 (2007 Venice Commission’s Report on Judicial Appointments).

³⁰ See e.g., *op. cit.* footnote 18, par 7 (2010 Kyiv Recommendations); *op. cit.* footnote 12, par 27 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 21, par 1.3 (1998 European Charter on the Statute for Judges); and *op. cit.* footnote 13, pars 27-30 (2007 CCJE Opinion No. 10).

³¹ *ibid.* par 48 (2010 CoE Recommendation CM/Rec(2010)12); pars 4 and 21 (2010 Kyiv Recommendations); par 16 (2007 CCJE Opinion No. 10); *op. cit.* footnote 20, Article 2-3 (Universal Charter of the Judge); *op. cit.* footnote 10, Preamble (2002 Bangalore Principles of Judicial Conduct), which states that the Bangalore Principles “presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards which are themselves independent and impartial”.

³² *ibid.* par 2 (2010 ODIHR Kyiv Recommendations on Judicial Independence); and par 16 (2007 CCJE Opinion No. 10). See also e.g., Venice Commission, [Opinion on the Seven Amendments to the Constitution of “the former Yugoslav Republic of Macedonia” concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones](#), CDL-AD(2014)026-e, pars 68-76.

³³ See e.g., *op. cit.* footnote 14, pars 12 and 47 (2007 Venice Commission’s Report on Judicial Appointments).

³⁴ Venice Commission, [Opinion on the Draft Revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017](#), CDL-AD(2017)023-e, par 45.

³⁵ *Op. cit.* footnote 18, par 23 (2010 Kyiv Recommendations); *op. cit.* footnote 12, par 47 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 14, pars 25 and 32 (2007 Venice Commission’s Report on Judicial Appointments); and *op. cit.* footnote 13, par 49 (2007 CCJE Opinion No. 10).

context, the role of the Parliament does not seem merely ceremonial by simply mark the formal completion of the decision-making process undertaken by the HCJ.³⁶

30. In light of the above, ODIHR considers that the Parliament's influence on the final composition of the highest Court, particularly in the current context where almost 3/4th of Supreme Court judges may be appointed anew in the coming months, could undermine the independence and impartiality of, and public trust in, the Supreme Court (and its appointed judges).³⁷ **To mitigate this risk, the Parliament's role in the appointment process should be strictly circumscribed to the extent possible and clearly defined by law, emphasizing the Parliament's supervisory role in respect of compliance of the overall process with the applicable rules of national law** (see also Sub-Section 5 *infra*). **The drafters should also provide for robust transparent procedures and guarantees to ensure that nomination and appointment decisions are exclusively taken on the basis of objective criteria.** The importance of providing such safeguards is even more paramount when a critical mass of Supreme Court judges may be appointed in a single process and potentially during a rather short time.

4. The Nomination of Candidates to the Positions of Supreme Court Judges by the HCJ

4.1. Eligibility Criteria for Supreme Court Judges

31. Draft Article 34 (7) of the Organic Law lists the eligibility requirements for becoming a Supreme Court judge. These refer to Georgian nationality, a lower age limit (30 years old), the degrees required (Master or equivalent), working experience and knowledge of the state language. Draft Article 34 (8) further defines what is needed in terms of professional experience i.e., having worked as a judge for not less than five years (and in case of former judges, that no more than ten years have elapsed since the termination of judge status), or being a "specialist with distinguished qualification in the field of law" with more than five years of professional experience and having passed a judicial qualification examination.
32. The requirement for five years' experience, combined with the 30-years old minimum age limit, clearly falls short of introducing adequate minimum eligibility requirements ensuring the selection of the most qualified and experienced candidates, especially if this formally allows young professionals from outside the judiciary with such limited working experience to qualify as "specialist with distinguished qualification". Moreover, the use of 30-years old minimum age eligibility requirement is not necessarily the best proxy to identify the most qualified professionals for the highest judicial position of the country. Rather, the professional experience alone is. In that respect, the requirement of five years of professional experience appears relatively low to guarantee the selection of the most qualified and experienced candidates. Consequently, **the drafters should consider increasing substantially the number of years of required professional experience, which would by itself result in a higher age of the candidates.**

³⁶ See, on the contrary, the role of the French President of the Republic, which was considered as being merely formal by the ECtHR in *Thiam v. France* (Application no. 80018/12, judgment of 18 October 2018), paras 81-82.

³⁷ See e.g., Venice Commission, *Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein*, CDL-AD(2002)032, paras 29-30.

33. Article 34 (8), as before, provides for the possibility for candidates from outside the judicial system to apply for the position of Supreme Court judge. The opening of the profession for candidates, such as lawyers and other legal practitioners or renowned law professors, including at the Supreme Court level, is generally recommended at the international level. This tends to diversify access to the judicial profession and enhance the interpretative competence of the highest court by bringing diverse perspectives from law practitioners and civil society and a variety of experiences to the Supreme Court's work, which should ultimately contribute to greater judicial quality.³⁸ At the same time, the opening of the profession may carry the risk of even further politicization of the appointment process, hence the need to ensure even more that the selected candidates are well-experienced and that the appointment process is exclusively based on qualities and merits (see par 29 *supra* and Sub-Section 4.2 *infra*).
34. Article 34 (4) of the Organic Law currently provides that the proposed nominees to Supreme Court judicial positions do not need to pass a judicial qualification examination. Such provision would be deleted if the Draft Amendments are adopted. This means that candidates who are not judges or former judges would need to pass the examination, which is generally required to enter the judicial profession, to be eligible. They will need to take it between the 21st and 25th day following the date of announcement of a vacancy for the position of Supreme Court judge (draft Article 34¹(4) of the Organic Law).
35. Such examination is generally appropriate for the appointment of judges in countries where judges enter the judiciary right after their law studies, but not necessarily when selecting experienced legal professionals to hold the highest judicial position in a country.³⁹ Moreover, the nature of such judicial qualification examination is not clear. If such examination is the same as the one envisaged for candidates for entry-level judicial positions, it is questionable whether this is an adequate modality to evaluate "specialist of distinguished qualification in the field of law" and thus test the eligibility of external candidates to Supreme Court judgeship, particularly if in practice, this might lead to their exclusion. Moreover, allowing only 25 days for non-judicial candidates to take this examination put them on unequal footing compared to judicial candidates. In addition, such stringent timeline compared to candidates for judgeship at lower courts who have several months to prepare and take their judicial qualification examinations, may ultimately deter qualified candidates from applying.
36. **While some forms of testing are acceptable, it should be specifically designed and adequate to evaluate candidates for the highest judicial positions and should be applicable to all candidates, while giving reasonable time for the candidates to prepare. The drafters should consider replacing the requirement for non-judicial candidates to take the judicial qualification examination by other testing modalities that are applicable for all candidates, judicial and non-judicial alike, while providing minimum requirements that would ensure applications from well-experienced and qualified legal professionals. The Draft Amendments should be amended accordingly.**

³⁸ See *op. cit.* footnote 18, par 17 (2010 Kyiv Recommendations); Venice Commission, [Opinion on the Concept Paper on the Reform of the High Judicial Council of Kazakhstan](#), CDL-AD(2018)032-e, par 71; and [Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia](#), CDL-AD(2002)026, par 49. See also the [Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges](#) (February 2016), which are the outcome of an international research project led by Professor Hugh Corder of the University of Cape Town, carried out in collaboration with the Bingham Centre for the Rule of Law, a constituent part of the British Institute of International and Comparative Law, Principle 2.

³⁹ See e.g., similar conclusions reached by the Venice Commission in [Opinion on the Draft Law on the Council for the Selection of Judges of Kyrgyzstan](#), CDL-AD(2011)017, par 15.

4.2. Selection Criteria and Procedure

37. In principle, the selection process for candidates to judgeship should be based on pre-determined objective criteria set out in law, and open and transparent procedures.⁴⁰ Any decisions relating to appointment or promotion of judges should be reasoned with explanation of their grounds, with the possibility for the unsuccessful candidate to challenge the respective decision,⁴¹ which should be subject to judicial review, at least on procedural grounds.⁴²
38. Civil society representatives and the Public Defender of Georgia have raised some concerns regarding the lack of transparency and impartiality of HCJ decisions, which also negatively impacts the legitimacy of the judicial appointments the Council has carried out.
39. Draft Articles 34¹ of the Organic Law envisions five major stages before the HCJ following the publication of the vacancy notice:
- 1) a preliminary screening of received applications to check their compliance with eligibility requirements (see Articles 34¹ (5));
 - 2) a first selection by closed ballot of a number of candidates going to the next stage representing 2,5 or 3 times the number of vacancies (see Articles 34¹ (7));
 - 3) a public hearing of the said candidates before the HCJ (see Articles 34¹ (8) and (10)); followed by
 - 4) a secret vote to reduce the number of candidates down to the number of vacancies (see Articles 34¹ (12)); and
 - 5) a final secret vote regarding each of the candidate during an HCJ's open session whereby those receiving at least 2/3 of the votes will be submitted to Parliament (see Articles 34¹ (13)).

4.2.1. Selection Criteria

40. The selection criteria for candidates to the position of Supreme Court judges are not explicitly stated in draft Article 34¹. However, draft Article 34¹(11) on the evaluation of candidates during the third stage of the selection/nomination process, at the conclusion of the public hearings, makes a cross-reference to the grading system provided in Article 35¹ par 16 of the Organic Law.⁴³ This provision addresses the evaluation of candidates without prior judicial experience (i.e., the scoring system used to evaluate the competence of candidates for general judgeship). For candidates with judicial

⁴⁰ *Op. cit.* footnote 18, pars 21-23 (2010 Kyiv Recommendations); and *op. cit.* footnote 14, pars 23-32 (2010 Venice Commission Report on the Independence of the Judicial System). See also the [Istanbul Declaration on Transparency in the Judicial Process](#) (2013), which was adopted by Chiefs Justices and Senior Justices of the Asian Region on 22 November 2013, Section 13.

⁴¹ See *op. cit.* footnote 12, par 48 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 18, par 23 (2010 Kyiv Recommendations); and *op. cit.* footnote 13, pars 50-51 and 91-93 (2007 CCJE Opinion No. 10), and pars 17-31 (2001 CCJE Opinion No. 1).

⁴² *ibid.* par 48 (2010 CoE Recommendation CM/Rec(2010)12); and par 39 (2007 CCJE Opinion No. 10). See also e.g., Venice Commission, [Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD\(2012\)001 on Hungary](#), CDL-AD(2012)020, 15 October 2012, par 56.

⁴³ Article 35¹ par 16 of the Organic Law states that “the maximum points to be earned for each characteristic [of the competence criterion] shall be: a) knowledge of legal norms – 25 points; b) ability of legal substantiation and competence – 25 points; c) writing and verbal communication skills – 20 points; d) professional qualities – 15 points; e) academic achievements and professional training – 10 points; f) professional activity – 5 points”.

experience, draft Article 341(11) refers to Article 36⁴⁴ par 8 of the Organic Law⁴⁴ (i.e., the scoring system used to evaluate the judges in activity) to assess the candidates. At the final stage, for the nomination of candidates to be submitted to the Parliament, draft Article 34¹ (14) refers to the criteria provided by Article 35¹ (3) and (14) to select candidates to judgeship, i.e., good faith criterion⁴⁵ and so-called characteristics of professional activity,⁴⁶ respectively. There is no mention under draft Articles 34¹ and 34² of other criteria to be used to select the candidates for Supreme Court judgeship at the other stages of the process. **Clear selection criteria should be provided to guide the HCJ at each stage of the selection/nomination process. The Draft Amendments should be supplemented as appropriate, while specifying that the person to be nominated shall be the most qualified and competent among the applicants who meet pre-set minimum eligibility requirements.**

41. Generally, selection of judges should be based on objective and clearly defined criteria pre-established by law,⁴⁷ to assess their ability, integrity and experience,⁴⁸ while ensuring that the composition of the judiciary reflects the composition of the population as a whole⁴⁹ and is balanced in terms of gender.⁵⁰ The objective is to ensure that the respective selection decisions are based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law in conformity with human rights norms.⁵¹
42. The grading system and selection criteria provided for the third stage of the selection process are relatively clear and detailed, and it is specified what weight is to be given to the different elements for the evaluation of judges, at least for the evaluation of the competence criteria, which is welcome.⁵² At the same time, the said assessment criteria may not necessarily be very practical at the level of the HCJ. The Draft Amendments do not specify how the written and oral communication skills will be tested. Also, as the work of the judges is regularly evaluated, it is unclear why the results of such evaluations are not considered.

⁴⁴ Article 36⁴ par 8 of the Organic Law states that “*the maximum number of points to be gained for each of these characteristics [of the competence criteria of practicing judges] is different and they shall be determined in the following manner: a) knowledge of legal norms – 20 points; b) ability to provide legal arguments, and competence – 20 points; c) writing skills – 20 points; d) oral communication skills – 15 points; e) professional qualities, including conduct in a courtroom – 15 points; f) academic achievements and professional training – 5 points; g) professional activity – 5 points*”.

⁴⁵ Article 35¹ (3) provides that “*the characteristics of a good faith criterion shall be as follows: a) personal good faith, and professional conscience; b) independence, impartiality and fairness; c) personal and professional behaviour; d) personal and professional reputation*”.

⁴⁶ Article 35¹ (14) states: “*[w]hen evaluating a candidate for judge by the characteristic of professional activity, consideration shall be given to his/her ability to take initiative, suggesting ideas and making proposals, his/her scientific and other publications, merits to the legal profession and community, etc.*”

⁴⁷ See e.g., *op. cit.* footnote 9, par 19 (2007 UN HRC General Comment No. 32); *op. cit.* footnote 12, par 44 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 18, par 21 (2010 Kyiv Recommendations); *op. cit.* footnote 20, Articles 4-1 and 5-1 (Universal Charter of the Judge); *op. cit.* footnote 21, pars 2.1 and 2.2 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 14, par 27 (2010 Venice Commission’s Report on the Independence of the Judicial System); *op. cit.* footnote 13, pars 5-51 (2007 CCJE Opinion No. 10).

⁴⁸ *Op. cit.* footnote 7, par 13 (1985 UN Basic Principles on the Independence of the Judiciary); and *op. cit.* footnote 13, pars 17 and 29 (2001 CCJE Opinion No. 1).

⁴⁹ *Op. cit.* footnote 18, par 24 (2010 Kyiv Recommendations); and *op. cit.* footnote 13, par 50 (2007 CCJE Opinion No. 10).

⁵⁰ See par 190 under Strategic Objective G.1: “Take measures to ensure women’s equal access to and full participation in power structures and decision-making” of the [Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995 \(A/CONF.177/20 and Add.1\)](#); and [OSCE Ministerial Council Decision 7/09 on Women’s Participation in Political and Public Life](#), 2 December 2009, par 1. See also *op. cit.* footnote 19, par 81 (2011 Annual Report of the UN Special Rapporteur on the Independence of Judges and Lawyers).

⁵¹ *Op. cit.* footnote 12, par 44 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 14, pars 4 and 10 (2007 Venice Commission’s Report on Judicial Appointments); and *op. cit.* footnote 7, Principle 10 (1985 UN Basic Principles on the Independence of the Judiciary), which states that “[p]ersons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law”.

⁵² See e.g., Venice Commission, [Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia](#), CDL-AD(2009)023, par 22.

43. Further, it is somewhat uncommon that the candidates to the highest national judicial office are not required to present other qualities beyond those that are required for candidates to lower judicial positions. One would expect that additional personal skills and qualities would be considered as done in some other countries, for instance sensitivity to the needs of different communities and groups,⁵³ **extensive expertise in human rights**, since the Supreme Court has also a key role to play in that respect⁵⁴ (this is mentioned in general for the evaluation of judges' activity under Article 36³(8)), creativity and flexibility,⁵⁵ ability to consider difficult and sensitive issues,⁵⁶ commitment to the judiciary as an institution, and other qualities required from candidates for high judicial office, such as persuasiveness, reputable conduct and integrity, among others.⁵⁷ **The drafters should consider supplementing the Draft Amendments in that respect.** While such qualities may sometimes be more difficult to evaluate in practice,⁵⁸ these could eventually be assessed based on situational and experience-based questioning,⁵⁹ with the weighting of the various criteria determined in advance to limit the risk of subjectivity⁶⁰ (see also Sub-Section 4.2.4 *infra*).
44. It is noted that Article 35 (7) of the Organic Law specifically states that selection of district and appellate court judges “shall be carried out in full compliance with the principles of objectivity and equality”, without discrimination on the basis of “race, sex, religion, political and other views, their status in society, national, ethnic and social affiliation and other circumstances”. At the same time, **the specific rules regarding the selection of Supreme Court judges under draft Article 34¹ do not mention such a principle and should be supplemented in that respect.**
45. It is also noted that Article 35 (7) does not list all the prohibited grounds recognised in international human rights law⁶¹ and in applicable domestic law.⁶² **The anti-discrimination provision should in any case be supplemented in that respect, especially by adding reference to non-discrimination on the basis of skin colour, place of birth or residence, property or social status, belief, marital status, sexual orientation, gender identity, disability** (see also Sub-Section 4.4 *infra* on the right to challenge HCJ decisions).
46. The Organic Law and the Draft Amendments do not introduce provisions to achieve more gender balance in the judiciary, and especially at the highest level of the Supreme Court. An independent, impartial and gender-sensitive judiciary has a crucial role in

⁵³ See e.g., the criteria for appointment to the UK Supreme Court, available at <<https://www.supremecourt.uk/docs/information-pack-for-justices-role-2019.pdf>>.

⁵⁴ See e.g., Venice Commission, *Opinion on the Reform of Judicial Protection of Human Rights in the Federation of Bosnia and Herzegovina*, CDL(1999)078, pars 30 and 32.

⁵⁵ *Op. cit.* footnote 53, criteria for appointment to the UK Supreme Court.

⁵⁶ *ibid.*

⁵⁷ See ENCJ, *Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges* (May 2012), Indicator no. I.4.

⁵⁸ See e.g., *op. cit.* footnote 52, pars 30-31 (2009 Venice Commission's *Opinion on the Draft Criteria and Standards for the Election of Judges and Court Presidents of Serbia*).

⁵⁹ See e.g., the US National Centre for State Courts, *Handbook for Judicial Nominating Commissioners* (2nd Edition), Chapter 7, pp. 146-147.

⁶⁰ See *op. cit.* footnote 18, par 21 (2010 Kyiv Recommendations). See also e.g., *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers* (2018), par 3.7.

⁶¹ See e.g., *op. cit.* footnote 38, Principle 3 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges); and *op. cit.* footnote 7, Principle 10 (1985 UN Basic Principles on the Independence of the Judiciary).

⁶² Article 11 of the Constitution of Georgia states that “[a]ny discrimination on the grounds of race, colour, sex, origin, ethnicity, language, religion, political or other views, social affiliation, property or titular status, place of residence, or on any other grounds shall be prohibited”. Article 1 of the *Law of Georgia on the Elimination of All Forms of Discrimination* (2014) lists the following as prohibited grounds for discrimination: “race, skin colour, language, sex, age, citizenship, origin, place of birth or residence, property or social status, religion or belief, national, ethnic or social origin, profession, marital status, health, disability, sexual orientation, gender identity and expression, political or other opinions, or other characteristics”. See also OSCE/ODIHR, *Opinion on the Draft Law on the Elimination of All Forms of Discrimination of Georgia* (18 October 2013).

advancing women's and men's human rights, achieving gender equality and ensuring that gender considerations are mainstreamed into the administration of justice.⁶³

Therefore, states should make an effort to evaluate the structure and composition of the judiciary to ensure adequate representation of women and provide necessary conditions for the advancement of gender equality within the judiciary.⁶⁴ At the same time, any attempt to achieve diversity in the selection and appointment of judges should not be made at the expense of the basic criterion of merit.⁶⁵

47. The current composition for the eleven Supreme Court judges currently serving on the bench is relatively gender balanced.⁶⁶ Nevertheless, to ensure that gender balance is achieved and maintained with the future appointments, and to be in line with OSCE human dimension commitments,⁶⁷ international standards and good practices,⁶⁸ the drafters could consider introducing a mechanism to ensure that the relative representation of women and men within the Supreme Court is taken into consideration when selecting/nominating the candidates to be presented to the Parliament, while not compromising on the experience and professional quality of candidate. In that respect, the *OSCE Athens Ministerial Council Decision on Women's Participation in Political and Public Life* specifically calls on participating States to "consider providing for specific measures to achieve the goal of gender balance in all legislative, judicial and executive bodies".⁶⁹ For instance, this may require setting up appropriate mechanisms to ensure that gender requirements are introduced in both the nomination process to identify candidates, as well as in the respective rules and procedures governing their appointment.⁷⁰
48. The composition of the Supreme Court should also aim at reflecting the composition of the population as a whole,⁷¹ especially in terms of representation of minorities⁷² and of persons with disabilities. As regards the latter, Article 27 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD),⁷³ which has been

⁶³ See Article 1 of CEDAW; and UN General Assembly, *Report of the Special Rapporteur on the Independence of Judges and Lawyers on Gender and the Administration of Justice*, A/HRC/17/30, 29 April 2011, par 45.

⁶⁴ *ibid.* par 47.

⁶⁵ See *op. cit.* footnote 57, Indicator no. I.8 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also e.g., the [vacancy notice for the position of UK Supreme Court judge](#), page 4, which states that "[s]ubject to the overriding principle of selection on merit, the selection commission will wish to ensure as far as possible that there is an appropriate balance of expertise, professional experience and background within the Court".

⁶⁶ Out of the 11 Supreme Court judges currently seating on the bench, there are four women and seven men; see <<http://www.supremecourt.ge/eng/judges/judges/>>.

⁶⁷ OSCE participating States have committed to provide "for specific measures to achieve the goal of gender balance [...] in all judicial and executive bodies" (Athens, 2009) and to ensure "that judges are properly qualified, trained and selected on a non-discriminatory basis" (Moscow, 1991); see OSCE Ministerial Council, Decision No. 7/09, "*Women's Participation in Political and Public Life*", Athens, 2 December 2009, par 1; and *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, Moscow, 10 September to 4 October 1991, par 19.2 (iv).

⁶⁸ UN CEDAW Committee, *General Recommendation No. 23 (1997) on Political and Public Life*, par 5; *Beijing Platform for Action, Chapter I of the Report of the Fourth World Conference on Women*, Beijing, 4-15 September 1995 (A/CONF.177/20 and Add.1), pars 182 and 190, particularly Strategic Objective G.1. "Take measures to ensure women's equal access to and full participation in power structures and decision-making"; CoE, *Appendix to Recommendation Rec (2003)3 of the Committee of Ministers on the Balanced Participation of Women and Men in Political and Public Decision-making*, adopted on 12 March 2003, which refers to the goal of achieving a minimum representation of 40% of women and men in political and public life, through legislative, administrative and supportive measures. See also *op. cit.* footnote 18, par 24 (2010 Kyiv Recommendations), which states that "[g]enerally, it would be desirable that the composition of the judiciary reflects the composition of the population as a whole".

⁶⁹ *Op. cit.* footnote 67, par 1 (OSCE Ministerial Council, Decision No. 7/09).

⁷⁰ See e.g., OSCE/ODIHR-Venice Commission, *Joint Opinion on the Draft Amendments to the Legal Framework on the Disciplinary Responsibility of Judges in the Kyrgyz Republic*, 16 June 2014, Sub-Section 5.1.

⁷¹ *Op. cit.* footnote 18, par 24 (2010 Kyiv Recommendations).

⁷² See e.g., OSCE High Commissioner on National Minorities, *The Graz Recommendations on Access to Justice and National Minorities*, November 2017, Recommendation 5.

⁷³ UN General Assembly, *Convention on the Rights of Persons with Disabilities*, A/RES/61/106, 24 January 2007. Georgia ratified the Convention on 13 March 2014. See particularly Article 13 of the Convention, which imposes a positive duty on States to provide the necessary accommodations in order to facilitate effective role of persons with disabilities as direct and indirect participants in legal proceedings.

ratified by Georgia, prescribes their right to work, on an equal basis with others. This includes the right to gain a living by “work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities”. Persons with disabilities also have the right to participate on an equal basis in the justice system, not only as users of the system, but also as judges, prosecutors, jurors and lawyers. “Participation on an equal basis” in justice sector professions implies not only that selection and employment criteria must be non-discriminatory, but also that states are obliged to take positive measures to create an enabling environment for the realization of full and equal participation of persons with disabilities,⁷⁴ meaning that adequate conditions should be provided to facilitate the work of qualified candidates. This could be specified in the vacancy notice.

49. In light of the above, **the drafters could consider introducing a mechanism to ensure that the relative representation of women and men within the Supreme Court, as well as of under-represented persons or groups, especially minorities and persons with disabilities, is taken into consideration when ranking candidates though not at the expense of the basic criterion of merit.** For instance, in case of a tie between two judicial candidates applying for a Supreme Court judge position, instead of the criteria of longer-serving judge mentioned in draft Article 34¹ (7), (12), (13) and (16), the drafters could specify that **the individual belonging to the under-represented gender or persons within the Supreme Court should be chosen.** If such an option is introduced, the Draft Amendments should also **include provisions pertaining to the consequences of the violation of this gender and diversity balance requirement**⁷⁵ (see also Sub-Section 4.5 *infra* regarding accountability and reporting in that respect). **The drafters could also state in the Draft Amendments that the HCJ should adopt relevant policies in that respect, while equally ensuring the quality of the selected candidates.**

4.2.2. *Transparency of the Selection/Nomination Procedure*

50. According to the Kyiv Recommendations, the selection procedure must be clearly defined by law.⁷⁶ In that respect, draft Article 34¹ of the Organic Law elaborates in detail all the steps of the selection procedure, from the publication of the vacancy notice up to the submission of the list of candidates to the Parliament for election. Draft Article 34² of the Organic Law further states the rules governing background checks of candidates. At the same time, a number of aspects could be improved in order to enhance the transparency of the selection process.
51. First, draft Article 34¹ (1) provides that the HCJ announces “the initiation of the selection proceedings through the official publishing entity of Georgia”. While being publicly announced, this publication modality does not ensure that the vacancy will be widely disseminated. This is not in line with recommendations elaborated at the international level,⁷⁷ which require that the vacancy be readily accessible to candidates

⁷⁴ See recommended standards for judicial selection and training set forth in Part II of 2010 Kyiv Recommendations, *op. cit.* footnote 18.

⁷⁵ For instance, the Draft Amendments could provide that the selection of the candidates of the over-represented gender shall be annulled. See e.g., Article 75 of the [French Law on Equality between Men and Women](#) (2014). See also par 39 of the 2013 [Report of the UN Working Group on the issue of discrimination against women in law and in practice](#) (A/HRC/23/50), adopted on 19 April 2013.

⁷⁶ *Op. cit.* footnote 18, par 21 (2010 Kyiv Recommendations).

⁷⁷ *ibid.* par 21 (2010 Kyiv Recommendations). See also *op. cit.* footnote 38, Principle 9 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

and the public at large,⁷⁸ which may not be the case if publication is limited to the official publishing entity of Georgia. Wide dissemination is also important in order for the appointment process to be opened to a pool of candidates as diverse and reflective of society as a whole as possible and to reach out to underrepresented persons or groups.⁷⁹ The drafters should consider **specifying that the vacancy should also be published on the HCJ website, a certain number of national newspapers and other relevant professional websites or media, while ensuring that such publications are accessible and disability-friendly.**⁸⁰

52. Second, the provision does not elaborate on the content of the published announcement. In order to ensure the transparency of the process, **the vacancy notice should reiterate the selection criteria for Supreme Court judgeship and specify the process of selection.**⁸¹ **Draft Article 34¹ (1) should be supplemented accordingly.**

4.2.3. *Publicity of the Process*

53. The list of candidates selected at the conclusion of each stage of the selection/nomination process, except for the third stage (after completion of the public hearing of the candidates), is published on the HCJ's website. Publicity of the selection process is also envisioned in draft Article 34¹ (8) where it is provided that the hearings of candidates are public and in draft Article 34¹ (13) where the stage of voting for the candidates to be presented for election by the Parliament is made during an open session of the HCJ.
54. In principle, the publicity of selection/appointment processes can help maintain public confidence in the judiciary. In that respect, the publication of the vacancies and of the list of candidates for those posts permits public scrutiny of the appointment process,⁸² which is welcome. As mentioned in par 51 *supra*, the public should be able to understand the criteria, general principles and procedure of the appointment process, which therefore need to be made available to the public.⁸³
55. When determining to which extent the different phases of the judicial selection/appointment process should be public, the drafters should balance the need to protect the independence of the judiciary and the necessity to ensure public trust in the process. In the context of a particular society, holding interviews of candidates in public may promote legitimacy and credibility of the appointment process, especially when there are allegations of lack of transparency and/or risk of corporatism within the HCJ.⁸⁴ In the Georgian context, given the tensed discussions surrounding the procedure of selecting Supreme Court judges, the public nature of the interviews appears to be an

⁷⁸ See e.g., *op. cit.* footnote 40 (2013 [Istanbul Declaration on Transparency in the Judicial Process](#)); *op. cit.* footnote 8, par 12.3 (2010 [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#)); and *ibid.* Principle 9 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

⁷⁹ See e.g., OSCE High Commissioner on National Minorities, [The Graz Recommendations on Access to Justice and National Minorities](#), November 2017, page 25; and *ibid.* Section 13 (2013 [Istanbul Declaration on Transparency in the Judicial Process](#)).

⁸⁰ This includes, for example, easy-to-read formats, the option to switch on voiceover, sub-titles including sounds and provision of transcripts for audio and video content for persons with visual impairments.

⁸¹ See *op. cit.* footnote 8, par 12.3 (2010 [Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct](#)); and *op. cit.* footnote 38, Principle 9 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

⁸² *Op. cit.* footnote 40, Section 13 (2013 [Istanbul Declaration on Transparency in the Judicial Process](#)).

⁸³ *Op. cit.* footnote 18, par 21 (2010 [Kyiv Recommendations](#)); and *op. cit.* footnote 38, Principle 9 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges). As a comparison, regarding the evaluation of judges, *op. cit.* footnote 13, par 48 (CCJE Opinion No. 17).

⁸⁴ See e.g., *op. cit.* footnote 38, Principle 12 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges). See also *op. cit.* footnote 78, Section 4 (2013 [Istanbul Declaration on Transparency in the Judicial Process](#)).

appropriate solution, all the more since this concerns the highest jurisdiction of the country. At the same time, the questioning during the public hearing should be conducted in a manner that ensures respect for judicial independence (see Sub-Section 4.2.4 *infra*).

56. When it comes to the detailed evaluation assessments and results of individual candidates by the HCJ should be treated confidentially and not be published. Indeed, publishing such personal information could discredit the judge in the eyes of the public or fellow judges⁸⁵ and render him/her vulnerable to outside influence, verbal or other attacks⁸⁶ or acts of disobedience.⁸⁷ Accordingly, it would not be appropriate to have the HCJ discuss the evaluation of the individual candidates during an open session. **HCJ deliberations on the evaluation of candidates should take place in private.**
57. **At the same time, the Draft Amendments should specify for the HCJ to prepare a sufficient summary of majority justification providing reasons for the ranking of candidates and nomination in light of the pre-determined criteria.**⁸⁸ **Such document should be made available to the candidates upon request after the completion of the nomination process** (see also Sub-Section 4.4 *infra* regarding the right to challenge the HCJ decision). This will allow the unsuccessful candidates to be able to understand the *rationale* behind the HCJ's decision (see par 37 *supra*) and also contribute to guarantee the effectiveness of the challenge process to which any unsuccessful applicant is entitled if he or she believes that s/he was unfairly treated in the appointments' process⁸⁹ (see Sub-Section 4.4 *infra*). In the context of judicial proceedings challenging a decision of the HCJ, an exception to the confidentiality rule could be envisaged allowing the court to access information about the individual evaluation and scores of other candidates, while imposing an obligation on the parties to the proceedings to keep such information confidential.
58. Candidate interviews are a valuable part of any selection process. Apart from the possibility for HCJ members to ask general questions, it is not clear from draft Article 34¹ (8) and (10) what will be the purpose, scope and format of the public hearing, or whether this will merely consist of a presentation made by the candidates. Moreover, Draft Article 34¹ (8) does not specify which weight it will have in the overall process. According to the Kyiv Recommendations, **both the topic of an interview and its weight in the process of selection should be pre-determined,**⁹⁰ which is not the case here. **The Draft Amendments should be supplemented accordingly or alternatively, should specify that a more detailed procedure and specific conditions will be developed in secondary legislation.**
59. It is noted that draft Article 34¹ (15) provides that information about the grades concerning the competence criterion each candidate was assigned in accordance with paragraph 11 (i.e., just after the public hearing), will be communicated to each member of the Parliament. Since it is not clear from paragraph 11 how the grading will be made

⁸⁵ *ibid.* par 48 (CCJE Opinion No. 17). See e.g., Venice Commission, [Opinion on the Draft Law about obtaining information on activities of the Courts of Azerbaijan](#) (11-12 December 2009), CDL-AD(2009)055-e, par 38.

⁸⁶ *ibid.* pars 48 and 49 (14) (CCJE Opinion No. 17).

⁸⁷ See e.g., Council of Europe, [Opinion on the Rules of Procedure of the Public Council of Integrity of Ukraine](#), April 2017, Support to the implementation of the judicial reform in Ukraine Project, par 3.6.

⁸⁸ *ibid.* Principle 13 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

⁸⁹ *Op. cit.* footnote 57, Indicator no. II.9 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges).

⁹⁰ *Op. cit.* footnote 18, par 21 (2010 Kyiv Recommendations).

by HCJ members and compiled, it is unclear which format this communication will take. **This should be clarified in the Draft Amendments.**

4.2.4. Fairness/Equity of the Process and Potential Conflict of Interest

60. At three stages of the process, the selection is carried out by secret vote, at the second stage of shortlisting (draft Article 34¹ (7)), right after the public hearing (draft Article 34¹ (12)) and at the final stage for the submission of candidates to the Parliament. The secret vote will have, in fact, the paradoxical effect of undermining the merit-based selection system based on selection criteria and the grading system to assess the competence and good faith of a candidate (see Sub-Section 4.2.1 *supra*), whereas the assessment of the merits of candidates is actually fundamental in the overall process of judicial appointments.⁹¹
61. This also means that the HCJ will not provide a reasoned motivation for ranking a candidate over another one to go to the next stage of the selection process, and consequently there will be no possibility for a candidate to know why s/he was unsuccessful (see Sub-Section 4.4 *infra*).⁹² This is not in line with recommendations elaborated at the international and regional level whereby to ensure transparency towards judges and society, councils of the judiciary should adopt *reasoned* decisions that demonstrate that the decisions were not arbitrarily adopted.⁹³ Judicial appointments on the basis of vague or arbitrary criteria, or arbitrarily decided, may ultimately result in the violation of Article 6 of the ECHR, which provides for the basic guarantee for independent and impartial tribunal.⁹⁴ In light of the above, **the modalities for selection of the candidates by secret vote should be reconsidered altogether.**
62. In principle, the HCJ must ensure that interviews are conducted in a manner that is respectful and fair to candidates.⁹⁵ Standardised questioning is probably one of the prerequisites for treating judicial candidates fairly and equally during the public hearing or interview.⁹⁶ In order to avoid the risk of bias or discrimination and ensure that all the candidates are treated in an equitable manner, **the drafters should develop a more structured approach to the interview process and consider requiring standardised format for interviews to reduce the scope of subjectivity in the questioning of candidates and ranking.** This should include the development of a ranking and scoring methodology for assessing candidates based on the various selection criteria.⁹⁷ As mentioned in par 58 *supra*, the purpose, scope and format of the interview should be

⁹¹ See e.g., *op. cit.* footnote 11, par 116 (*Guðmundur Andri Ástráðsson v. Iceland*, ECtHR judgment of 12 March 2019).

⁹² *Op. cit.* footnote 57, Indicator no. I.10 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also *op. cit.* footnote 38, Principle 17 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

⁹³ See e.g., *op. cit.* footnote 12, pars 28 and 48 (2010 CoE Recommendation CM/Rec(2010)12); *ibid.* Principle 13 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges); and *ibid.*, Indicator no. I.10 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also See Venice Commission, *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*, CDL-AD(2018)029-e, par 45, where the Venice Commission noted that it is important to have individual acts adopted by the HCJ, especially those concerning the career of judges, duly reasoned.

⁹⁴ See e.g., *op. cit.* footnote 11, par 115 (*Guðmundur Andri Ástráðsson v. Iceland*, ECtHR judgment of 12 March 2019).

⁹⁵ *Op. cit.* footnote 14, par 25 (2010 Venice Commission Report on the Independence of the Judicial System), which states that “[t]ransparent procedures and a coherent practice are required”; and *op. cit.* footnote 13, par 11 (CCJE Opinion No. 17). See also e.g., *ibid.* Principle 12 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

⁹⁶ Council of Europe, *Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights – Explanatory Memorandum*, CM(2012)40-add, 29 March 2012, par 57.

⁹⁷ See e.g., *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers* (2018), par 3.7.

specified, while ensuring that the questioning is respectful of the candidates⁹⁸ in order not to undermine their credibility or humiliate them.

63. The Draft Amendments envision the situation where a member of the HCJ is also a candidate to Supreme Court judgeship, in which case s/he does not vote during the second and fourth stages (draft Article 34¹ (7) and (12)), nor when his/her candidacy is at stake during the final stage (draft Article 34¹ (13)). However, such a member has still the right to ask questions to other candidates during the public hearing (draft Article 34¹ (10) and can still vote in favour or against the other candidates during the final stage (draft Article 34¹ (13)). Hence, s/he can still have a decisive influence on the selection/nomination process, and can also participate in the HCJ deliberations about the candidates. This is not in line with recommendations elaborated at the regional level, whereby judicial councils should ensure that no conflicts of interest arises in the council in carrying out its various tasks.⁹⁹ **The drafters should therefore supplement the Draft Amendments by providing that the HCJ member participating in the competition for Supreme Court judgeship should not be able to participate in the said nomination process as member of the HCJ at all. Alternatively, to avoid conflicts of interest, the drafters could introduce provisions that require the said HCJ member to resign from her/his position as HCJ member before applying for judicial office.**¹⁰⁰
64. Moreover, there are other conflicts of interest situations, which should also be addressed by the Draft Amendments. It is possible that some judge members may currently be working with the applicant and thus vote on him/her. If this is the case, **such HCJ members should similarly be excluded from participating in the nomination procedure.**

4.2.5. Voting Threshold for Final Nomination of the Candidates to be Submitted to the Parliament for Election

65. If the system of secret vote is retained, the voting threshold contemplated in the Draft Amendments should be revisited. Draft Article 34¹ (13) provides that each of the candidates who receives at least 2/3rd of the votes of all Council members during a secret vote of the HCJ open session is selected to have his/her candidacy submitted to the Parliament. In the Georgian context, this 2/3rd voting threshold has been criticised as giving too much powers to the judicial members of the HCJ, who account for nine members out of a total of fifteen members comprising eight judge members, the Chairperson of the Supreme Court and six non-judicial members, of which five are appointed by the Parliament and one by the President of the Republic.¹⁰¹
66. The composition of the HCJ is in line with international guidelines, which specify that no less than half of the members of judicial councils should be judges chosen by the judiciary itself.¹⁰² At the same time, regional bodies, including ODIHR, the Venice

⁹⁸ *ibid.* par 3.6.

⁹⁹ *Op. cit.* footnote 13, recommendation D(a) (CCJE Opinion No. 10).

¹⁰⁰ See e.g., *op. cit.* footnote 38, Principle 7 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

¹⁰¹ Article 47 of the Organic Law.

¹⁰² See e.g., *op. cit.* footnote 18, par 7 (2010 Kyiv Recommendations); *op. cit.* footnote 12, par 27 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 21, par 1.3 (1998 European Charter on the Statute for Judges); *op. cit.* footnote 13, pars 17-18 and 25 (2007 CCJE Opinion No. 10); *op. cit.* footnote 14, par 25 (2007 Venice Commission's Report on Judicial Appointments) and par 50 (2010 Venice Commission's Report on the Independence of the Judicial System); and *op. cit.* footnote 23, par 2.1 (ENCJ Report on Councils for the Judiciary 2010-2011).

Commission and the CCJE, generally recommend a greater inclusion of lay members in such bodies to prevent self-interest, self-protection, cronyism and also to avoid the risk of corporatism and add a certain level of external, more neutral control.¹⁰³ If the stakeholders consider that the existing voting rules confer a too important influence of judge members over the selection/nomination process, the drafters should consider alternative modalities to ensure that public confidence in the process is not altered.

67. In any case, as a general approach, members of the selection and appointment authority should attempt to reach consensus, and use vote mostly to resolve deadlocks and as a final resort.¹⁰⁴
68. According to the *ENCJ Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016),¹⁰⁵ in order to ensure the effective participation of non-judicial members, it is recommended that adequate quorum for the composition of the judicial council and voting procedures (majorities for adoption of decisions) be adopted to give effect to this aspiration. Accordingly, **the drafters could consider introducing a quorum guaranteeing that at least half of the non-judicial members will need to be present for the vote to be valid (i.e., 12 members at a minimum or 11 if one excludes the Chairperson of the Supreme Court) and discuss the majorities for adoption of decisions. In any case, to avoid the risk of frequent deadlocks, if none or not enough candidates can be selected when applying the quorum and voting threshold, the drafters should also provide for a proper anti-deadlock mechanism.** As noted by the Venice Commission, there is no single model of anti-deadlock mechanism and it is for each country to devise its own formula.¹⁰⁶ A variety of mechanisms could be contemplated¹⁰⁷ and it is for the relevant stakeholders to avoid the paralysis of the work of the HCJ and seek consensus, while ensuring that ultimately, the best candidates are selected.

4.2.6. Time-lines for the Selection/Nomination of the Candidates by the HCJ

69. The time-lines for the selection/nomination of the candidates by the HCJ appear rather short, which runs the risk of speedy evaluation and poor assessment of the candidates. The period of application of four weeks is very brief. Then, the HCJ has only five days to review all the applications to check the candidates' eligibility (Article 34¹(5)); following which the shortlisting should take place within 5 working days after the expiry of the appeal deadline (Article 34¹(7)). Then between 10 to 20 days after the publication of the shortlisted candidates, the public hearing shall commence (Article 34¹(8)).

¹⁰³ *ibid.* par 7 (2010 Kyiv Recommendations); pars 27 and 30 (2007 Venice Commission's Report on Judicial Appointments) and par 50 (2010 Venice Commission's Report on the Independence of the Judicial System); par 27 (2010 CoE Recommendation CM/Rec(2010)12); pars 16-18 and 25 (2007 CCJE Opinion No. 10). See also *op. cit.* footnote 78, Section 13 (2013 Istanbul Declaration on Transparency in the Judicial Process); and OSCE/ODIHR, *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, par 38.

¹⁰⁴ See e.g., *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers* (2018), par 3.7.

¹⁰⁵ ENCJ, *Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016), pars. II. 4.

¹⁰⁶ Venice Commission, *Compilation relating to Qualified Majorities and Anti-deadlock Mechanisms* (27 June 2018), page 13.

¹⁰⁷ There are various options, which could be considered by the drafters. One option would be to provide for different, decreasing majorities in subsequent rounds of voting, but this would have the drawback that the majority may not seek a consensus in the first round knowing that in subsequent rounds their candidate will prevail. An alternative solution could be an *ad hoc* Evaluation Committee composed of experts, retired judges etc appointed by the HCJ and who are not part of the HCJ, and whose report and ranking with details of the score are then submitted to the HCJ. Another option could be the setting up of an *ad hoc* body composed of two judicial and two non-judicial members selected by their peers, with eventually the participation of one additional external third person, chosen by them, to reach a consensus on the ranking of the proposed candidates in accordance with the above-mentioned selection criteria; then the list of the candidates could be proposed back to the other HCJ members for a rejection vote with a qualified majority.

70. At the international and regional levels, it is generally recommended that adequate time be provided for the assessment of candidates.¹⁰⁸ The relatively short time periods for what may potentially be a large number of candidate evaluations is not conducive to an objective and qualitative assessment of the competences and qualities of candidates. The urgency in filling existing vacancies may not justify inherently deficient procedures, which may risk having long-term negative impact, as the Supreme Court judges are appointed for life. **The drafters should therefore reconsider the contemplated timeline.**

4.3. Background Checks of Candidates

71. Draft Article 34² of the Organic Law provides that a “structural unit” of the HCJ will collect “reliable information in accordance with the procedure established in this law for the purpose of an objective and comprehensive evaluation of candidates who are shortlisted [pursuant to Draft Article 34¹(7)]”. Draft Article 34¹(3) provides that the submitted application shall include consent of a person for the HCJ to check/collect information (including personal data) according to the rule established by Article 35² of this law. Hence, it is not clear whether “the procedure established in this law” refers to the procedure provided in Article 35² of the Organic Law on acquiring information about candidates for judges or to the procedure stated in Draft Article 34². **This should be clarified.** In any case, Draft Article 34² of the Organic Law seems to closely mirror Article 35² of the Organic Law.
72. According to the Kyiv Recommendations, background checks should be handled with utmost care and strictly on the basis of the rule of law.¹⁰⁹ The selecting authority can request a standard check for a criminal record and any other disqualifying grounds from the police but no other background checks should be performed by any security services.¹¹⁰
73. With regards to draft Article 34², it is worth referring to the recommendations made by the Venice Commission concerning the search for information on candidates for judgeship and which have not been addressed in the adopted Organic Law. Given the quite extensive investigative powers of the “structural unit” to search for a wide array of information on candidates, including highly confidential information, **special requirements for the members of such a unit must be laid down in the legislation. Moreover, the conditions for their selection/appointment by the HCJ and their responsibilities must be made clear.**¹¹¹ **The Draft Amendments should also specify which working methods it will use.**¹¹²
74. Candidates to Supreme Court judgeship should give their consent for the HCJ to check/collect information, including personal data (Draft Article 34¹(3)). This seems to mean that in order to be eligible, the candidate has to give her/his consent to such data collection. In practice, it seems not to be possible for a candidate to refuse this consent

¹⁰⁸ See e.g., *op. cit.* footnote 38, Principles 9-11 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

¹⁰⁹ *Op. cit.* footnote 18, par 22 (2010 Kyiv Recommendations).

¹¹⁰ *ibid.* par 22 (2010 Kyiv Recommendations).

¹¹¹ Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, *Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia*, CDL-AD(2014)031, par 55.

¹¹² *ibid.* par 55.

if s/he wants to be considered as a candidate. This was considered problematic by the Venice Commission in its Opinion on the (draft) Organic Law.¹¹³

75. Pursuant to draft Article 34² (9), within two days from the dates the results of the background check become available, the candidate has the right to apply to the HCJ in order to submit additional information and/or challenge the results “under a relevant rule”. It is not clear which “relevant rule” this provision is referring to and **this should be clarified**. Again, the time limit (two days) for challenging the background check results appears to be very short and might render such a challenge impossible in practice. Moreover, the deadline runs from the time the results become available, which is not the same as the time when one is notified of the availability of the results. **The latter should be preferred and reflected in the Draft Amendments**. Further, according to the Kyiv Recommendations, the candidate should be able to appeal the results from this check in court.¹¹⁴ While this is not explicitly provided for in the Draft Amendments, it is alleged that **Article 36⁶ of the Organic Law regarding the possibility to challenge the decisions of the HCJ before the Chamber of Qualification of the Supreme Court, would be applicable in that case. For the sake of certainty however, this should be clarified**. Further, the decision to refuse a candidate based on background checks needs to be reasoned.¹¹⁵ **The drafters should consider supplementing the Draft Amendments accordingly**.
76. Finally, according to Article 34²(10), the information on candidates shall be retained in a sealed form in a secured place allocated by the HCJ for at least three years. Instead, the legislation should clearly provide for a maximum period for data retention.¹¹⁶ In that respect, it is worth noting that Georgia has ratified the *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*,¹¹⁷ though not yet its latest Protocol.¹¹⁸ According to this Convention, personal data should be preserved in a form which permits identification of the data subjects *for no longer* than is required for the purpose for which those data are stored.¹¹⁹ The data must therefore be erased or anonymized when those purposes have been served.¹²⁰ It is not clear why information storing by the HCJ is needed once the appointment procedure has been terminated. In any case, **the drafters should consider stating that the said information is destroyed after three years of time, unless they specify that this information will be retained in case the candidates re-apply at a later stage**.
77. It is also not clear from the Draft Amendments which information will be sent to the Parliament. Article 34¹(15) provides that each member of Parliament will be given information about the grades each candidate received regarding the evaluation of the competence criteria (draft Article 34¹(11)), as well as any written dissenting opinion of an HCJ member on a candidate. This presumably means that such evaluation results will become public information, which makes the above recommendation on

¹¹³ *ibid.* par 56.

¹¹⁴ See *op. cit.* footnote 13, par 41 (CCJE Opinion No. 17); and *op. cit.* footnote 18, par 22 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

¹¹⁵ *ibid.* par 22 (2010 ODIHR Kyiv Recommendations on Judicial Independence).

¹¹⁶ *Op. cit.* footnote 111, par 59 (2014 Joint Venice Commission-DGI Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia).

¹¹⁷ See the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, Strasbourg, 28 January 1981, ratified by Georgia on 1 April 2006.

¹¹⁸ *Protocol CETS 223 amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, Strasbourg, 10 October 2018.

¹¹⁹ Article 5 (e) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

¹²⁰ EU Fundamental Rights Agency, *Handbook on European Data Protection Law* (2018 edition), p. 129.

confidentiality (see pars 56-57 *supra*) irrelevant unless it applies to the parliament submissions. The Parliament will also receive the candidates' certificates confirming that they submitted an Asset Declaration Form and a Drug Examination Certificate (draft Article 34¹(19)). It is unclear whether they will also receive a summary report of the HCJ on the process, the biographies of the candidates and maybe their application form, though no other personal data, particularly those collected during the background checks should be communicated. **It is recommended to clarify the Draft Amendments in that respect.**

4.4. Right to Challenge the HCJ Decision

78. An unsuccessful candidate should have the right to challenge the decision before an independent body, or at a minimum the procedure under which the decision was made.¹²¹ While Article 35⁴ of the Organic Law provides for such possibility when a candidate is refused a judicial appointment by the HCJ, it is not clear whether this provision is applicable with respect to selection/nomination of candidates for Supreme Court judgeship. The Draft Amendments **should be clarified in that respect. Also, a candidate who has a reason to believe that s/he was discriminated during the selection/nomination process should also be able to challenge decision of the HJC on this ground.**

4.5. Transparency and Accountability Mechanism

79. A judicial council should be accountable for its activities and decisions.¹²² Article 64(3) of the Constitution provides that the rules for accountability of the HCJ must be established by the organic law. Article 47(1¹) of the Organic Law states that “[t]he High Council of Justice of Georgia is accountable before the Conference of Judges of Georgia”. As noted by the Venice Commission in its Opinion on the Organic Law, accountability of the HCJ to the Conference of Judges appears problematic as reflecting excessive corporatism and self-governance of the judicial sector.¹²³ In order to ensure that the HCJ is accountable specifically with regards to the procedure for the selection/nomination of Supreme Court judges, **the drafters could consider providing that at the end of the process, the HCJ should prepare a report regarding the appointment that should be made available to the public, while maintaining the principle of confidentiality of individual candidates.**¹²⁴ Such report should **include data regarding the number of applications, information on short-listed candidates, and candidates at each stage of the selection/nomination process, all of them disaggregated by gender and other information on under-represented groups, as appropriate, as well as recommendations by HCJ for future selection procedures.**

¹²¹ *Op. cit.* footnote 12, par 48 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 20, Articles 5-2 par 3 (Universal Charter of the Judge); *op. cit.* footnote 57, Indicator no. I.10 (2012 ENCJ Dublin Declaration setting Minimum Standards for the Selection and Appointment of Judges). See also *op. cit.* footnote 38, Principle 17 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges) which states that “[d]ecisions of the commission should also be reviewable by the courts on established grounds of legality and constitutionality”; and Venice Commission, [Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD\(2012\)001 on Hungary](#), CDL-AD(2012)020, 15 October 2012, par 56.

¹²² *Op. cit.* footnote 22, par 13 (2010 CCJE Magna Carta of Judges).

¹²³ *Op. cit.* footnote 93, par 52 (2018 Venice Commission's [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](#)).

¹²⁴ See e.g., *op. cit.* footnote 38, par 16 (2016 Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges).

This is in addition to the fact that the HCJ is also accountable for its decision on individual applications, through the provision of feedback and reasons on request from the unsuccessful candidates.

80. In addition, the drafters could also specify, for instance, that the decisions of the HCJ may be subject to examination by the Public Defender of Georgia with power to make findings and non-binding recommendations in the case of maladministration.
81. Other modalities for ensuring greater public oversight over the process could also be envisioned. Non-judicial members of the HCJ could be involved in the work of a subcommittee who would be in charge of screening the applications/shortlisting.¹²⁵ **Subject to a duty to treat all information confidentially, the drafters could provide for the attendance of civil society representatives as monitors or observers during certain of the sessions of the judicial council, or their involvement in consultative bodies that could be created under the auspices of the judicial council to assist during the selection/nomination process.**¹²⁶

5. The Election of the Candidates by the Parliament

82. There is a variety of mechanisms for judicial appointments across the OSCE region. However, it is generally emphasized that undue political influence over the appointment process should be avoided,¹²⁷ and that candidates are selected based on candidates' merits and never on political considerations.¹²⁸ In principle, judicial councils should be leading in the selection, appointment and promotion of judges, which should be carried out in absolute independence from the legislature.¹²⁹ As mentioned in Sub-Section 3 *supra*, the election of the candidates for Supreme Court judgeship by the Parliament causes problems in that respect and should be strictly regulated.
83. The involvement of the Parliament and the modalities envisioned in the draft amendments to the Rules of Parliament of Georgia means that *de facto*, the Parliament/its Committee will undertake a second evaluation of the candidates. When the final decision relating to a judge's appointment or career is not adopted by an independent judicial council, it is recommended that the decision is subject to guarantees to ensure that it is not taken other than on the basis of objective criteria.¹³⁰
84. Moreover, where legislation provides that the legislative power shall take decisions concerning the selection and career of judges, CoE Recommendation CM/Rec(2010)12 states that "an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions

¹²⁵ ENCJ, *Minimum Standards regarding Non-judicial Members in the Judicial Governance* (2016), pars. II.4.

¹²⁶ See e.g., *op. cit.* footnote 18, par 10 (2010 ODIHR Kyiv Recommendations on Judicial Independence), which states that "[p]ublic access to the deliberations of the Judicial Council and publication of its decisions shall be guaranteed in law and in practice"; UNODC, *Criminal Justice Assessment Toolkit – The Independence, Impartiality and Integrity of the Judiciary* (2006), page 11, . See also OSCE/ODIHR, *Annotated Agenda and Consolidated Summary of the 2016 Human Dimension Seminar on Promoting Effective and Integral Justice Systems: How to Ensure the Independence and Quality of the Judiciary*, 21-23 November 2016.

¹²⁷ See e.g., *op. cit.* footnote 12, par 46 (2010 CoE Recommendation CM/Rec(2010)12); *op. cit.* footnote 18, par 8 (2010 Kyiv Recommendations); *op. cit.* footnote 21, par 1.3 (1998 European Charter on the Statute for Judges); and *op. cit.* footnote 13, par 48 (CCJE Opinion No. 10). See also *op. cit.* footnote 14, pars 25 and 32 (2007 Venice Commission's Report on Judicial Appointments).

¹²⁸ See *ibid.* par 51 (CCJE Opinion No. 10); par 44 (2010 CoE Recommendation CM/Rec(2010)12); and par 8 (2010 Kyiv Recommendations).

¹²⁹ *ibid.* recommendation D(b) (CCJE Opinion No. 10).

¹³⁰ *Op. cit.* footnote 13, par 37 (CCJE Opinion No. 1); and par 15 (CCJE Opinion No. 18).

which the relevant appointing authority follows in practice” [emphasis added].¹³¹ While it is difficult to envision providing in legislation that the Parliament will be bound by the selection made by the HCJ, the process could be adapted in order to limit the discretion of the Parliament or political considerations to prevail in that respect.

5.1. Election of Supreme Court Judges by the Parliament

85. The Draft Amendments to the Rules of Procedure of the Parliament of Georgia provide that the Legal Issues Committee determines “the compliance of the presented official with the requirements defined by the Constitution of Georgia and/or another Law” (Draft Article 204 par 2). The Constitution does not state any specific requirement regarding Supreme Court judges. It is not clear whether the assessment would then refer to the above-mentioned eligibility requirements only, or whether this will also involve an assessment based on the above-mentioned selection criteria, i.e., on competence and good faith (see Sub-Section 4.2.1 *supra*). According to the Organic Law and the Draft Amendments, there appears to be no limitation on the power of the Parliament to accept or refuse a candidate, and it is not required to have any reason for rejecting a candidate, much less a good one. To avoid politicisation of the process, the Parliament/Committee should probably not be tasked with re-assessing the competence and good faith of all the candidates, but rather the compliance with applicable procedures, as this would otherwise confer on politicians a decisive influence in the appointment process. In any case, **the drafters should clarify what is meant by “compliance of the candidates with the requirements of Constitution of Georgia and/or other Law”, specifying that this focuses on the procedural aspects only and does not amount to an evaluation of the merits of the candidates.**
86. According to draft Article 205 par 2 of the Rules of Procedure, the Committee will create a working group to assist it in its task. Again, it is not **clear what will be the composition, powers and exact role of this working group, particularly whether it will collect additional information** or rely only on the documents submitted by the HCJ. **This should be clarified.**
87. According to draft Article 205 par 3¹ of the Rules of Procedure, the candidates are subject to a public hearing before the Legal Issues Committee, where Committee members may ask questions to the candidates. As mentioned in Sub-Section 4.2.3 *supra*, depending on the context, some forms of publicity of the judicial appointment process may be beneficial to enhance public trust in the process and in the judiciary in general. At the same time, given the politicised climate of parliamentary debates, including at the committee level, possibility of questioning candidates to Supreme Court judgeship may potentially endanger their independence and pose a real risk of politicisation (see pars 26 and 29 *supra*). In that respect, and to try to limit the role of the Parliament in the election process and reduce the risk of tense political debates, **the drafters could consider providing that the Legal Issues Committee’s (and Parliament’s) role should be limited to scrutinizing the procedural aspects of the selection/nomination undertaken by the HCJ.** These provisions would aim at reducing the role of the Parliament in the election process of Supreme Court judges, and as such at enhancing the independence of the judges (see also Sub-Section 3 *supra*).

¹³¹ *Op. cit.* footnote 12, par 47 (2010 CoE Recommendation CM/Rec(2010)12).

5.2. Election of the Chief Justice by the Parliament

88. It is noted that the Chief Justice is also elected by the Parliament by the majority of its full composition (Article 61(3) of the Constitution of Georgia) upon nomination by the HCJ. This provision is reiterated in draft Article 36 par 1 of the Organic Law. Generally, the manner in which presidents of courts are selected, appointed or elected should follow the same procedure as that for the selection and appointment of other judges. Especially in the cases of Presidents of Supreme Courts, the relevant processes should formally rule out any possibility of political influence.¹³² To avoid such risks, it is generally recommended to adopt a model whereby the election/selection of the Presidents of the Supreme Courts is done by the judges of the Supreme Court concerned.¹³³ Election of the Chairperson of the Supreme Court by the Supreme Court judges could be a better option in that respect, though this would ultimately require an amendment to the Constitution.
89. The Organic Law and the Draft Amendments do not specify what will be the selection criteria, nor the procedure for the HCJ to nominate one of the Supreme Court judges as a candidate to be elected as the Chief Justice by the Parliament. Election/selection procedures for presidents of courts should conform to certain criteria and provide for safeguards in order to maintain the fundamental principles of independence of the judiciary and the impartiality of judges.¹³⁴ **To limit the discretion of the HCJ in that respect, the Draft Amendments should better define the procedure and criteria for nomination of the candidate for Chief Justice.**
90. As it stands, the present formulation does not offer any clarity and does not satisfy the foreseeability requirement of the rule of law.

6. Additional Concerns Related to the Process of Preparing and Adopting the Draft Amendments

91. OSCE participating States have committed to ensure that legislation will be “adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability” (1990 Copenhagen Document, par 5.8).¹³⁵ Moreover, key commitments specify that “[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (1991 Moscow Document, par 18.1).¹³⁶
92. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.¹³⁷ According to recommendations issued by

¹³² *Op. cit.* footnote 109, pars 37-40 and 53 (CCJE Opinion No. 19).

¹³³ *ibid.* par 53 (2016 CCJE Opinion No. 19 on the Role of Court Presidents). See also *op. cit.* footnote 18, par 16 (2010 Kyiv Recommendations); and OSCE/ODIHR, [Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland](#) (30 August 2017), par 107.

¹³⁴ *Op. cit.* footnote 13, pars 37-40 and 53 (CCJE Opinion No. 19).

¹³⁵ Available at <<http://www.osce.org/fr/odihr/elections/14304>>.

¹³⁶ Available at <<http://www.osce.org/fr/odihr/elections/14310>>.

¹³⁷ See e.g., [Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes](#) (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information.¹³⁸ To guarantee effective participation, consultation mechanisms should allow for input at an early stage *and throughout the process*,¹³⁹ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.¹⁴⁰ Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted.

93. With regard to the judiciary's involvement in legal reform affecting its work, the CCJE has expressly stressed "the importance of judges participating in debates concerning national judicial policy" and the fact that "the judiciary should be consulted and play an active part in the preparation of any legislation concerning their status and the functioning of the judicial system".¹⁴¹ The 1998 European Charter on the Statute for Judges also specifically recommends that judges be consulted on any proposed change to their statute or any change proposed as to the basis for their remuneration, or as to their social welfare, including their retirement pension, to ensure that judges are not left out of the decision-making process in these fields.¹⁴² More specifically, regarding the legislative process when adopting laws relating to the highest Court, the Venice Commission has considered that "[i]t is [...] highly recommended that the legislator takes into consideration the opinion of the Supreme Court in the legislative process [...]".¹⁴³
94. If the Draft Amendments were not subjected to any legitimate, open and meaningful consultation process prior to this date, with the members of the Supreme Court itself, bodies of the judiciary, association of judges or similar bodies, and individual judges, as well as with the public or civil society organizations, this would appear to be at odds with the foregoing principles.
95. Moreover, given the potential impact of the Draft Act on the independence of the judiciary and the rule of law, it is essential that such legislation be preceded by an in-depth regulatory impact assessment, completed with a proper problem analysis using evidence-based techniques to identify the best efficient and effective regulatory option.¹⁴⁴ The Organic Law on Common Courts has undergone several rounds of

¹³⁸ See e.g., OSCE/ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), pars 40-41.

¹³⁹ See OSCE/ODIHR, *Assessment of the Legislative Process in Georgia* (30 January 2015), in [English](#) and in [Georgian](#), pars 33-34. See also e.g., OSCE/ODIHR, *Guidelines on the Protection of Human Rights Defenders* (2014), Section II, Sub-Section G on the Right to Participate in Public Affairs.

¹⁴⁰ *ibid.*

¹⁴¹ *Op. cit.* footnote 13, par 31 (CCJE Opinion No. 18).

¹⁴² *Op. cit.* footnote 21, par 1.8 (1998 European Charter on the Statute for Judges). See also *op. cit.* footnote 22, par 9 (2010 CCJE Magna Carta of Judges), which states that "[t]he judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)"; and ENCJ, *2011 Vilnius Declaration on Challenges and Opportunities for the Judiciary in the Current Economic Climate*, Recommendation 5, which states that "[j]udiciaries and judges should be involved in the necessary reforms".

¹⁴³ *Op. cit.* footnote 111, par 19 (2014 Joint Venice Commission-DGI Joint Opinion on the draft Law on Amendments to the Organic Law on General Courts of Georgia).

¹⁴⁴ *Op. cit.* footnote 139, pars 74-76 (2015 ODIHR Report on the Assessment of the Legislative Process in Georgia).

amendments in a relatively short timeframe.¹⁴⁵ This raises doubts as to whether these legal changes were preceded by proper policy-making and regulatory impact assessment. The volume of legislation amended in the field of the judiciary, its piecemeal structure, level of detail and frequent amendments, could lead to confusion, and to a situation where individuals, including even legal professionals, may have difficulties understanding and implementing the relevant legislation. The manner in which these laws were amended may have negative repercussions, not only with respect to the democratic legitimacy of the legislation, but also with respect to public confidence in public institutions in general. In future, it may be helpful to adopt a more comprehensive approach, involving a proper policy discussion and impact assessment at the outset, so that all necessary amendments to legislation regarding the judiciary may take place as part of one reform process.

96. The examination of the bill under review by the Parliament of Georgia started on 11 March 2019 and the draft amendments were adopted during the first reading by the Parliament that occurred nine days after, on 20 March 2019. The second reading is planned on 15 April 2019.
97. Given the short timeline for the adoption of the draft amendments, it is highly unlikely that the deputies would have had sufficient time to review and evaluate the draft legislation, and to take professional account of the opinions of the staff and the relevant committee, or consider the views of judicial stakeholders, civil society organizations and other experts. In principle, adequate time limits should be set prior to the actual drafting exercise, as well as for the proper verification of draft laws and legislative policy for compatibility with international standards at all stages of the law-making process.¹⁴⁶
98. In light of the above, the process by which the Draft Amendments were developed and adopted does not seem to conform to the aforesaid principles of democratic law-making. Any legitimate reform process relating to the judiciary **should be transparent, inclusive, extensive and involve effective consultations, including with representatives of the Supreme Court, other members of the judiciary, relevant authorities, such as the Public Defender of Georgia, civil society organisations and should involve a full impact assessment including of compatibility with relevant international standards, according to the principles stated above. Adequate time should also be allowed for all stages of the ensuing law-making process.** It would be advisable for relevant stakeholders to follow such processes in future legal reform efforts. ODIHR remains at the disposal of the authorities for any further assistance that they may require in any legal reform initiatives pertaining to the judiciary.

[END OF TEXT]

¹⁴⁵ Seven Organic Laws amending the 2009 Organic Law on Common Courts of Georgia were adopted in 2018 and four in 2017. See <<https://matsne.gov.ge/ka/document/view/90676?publication=33>>.

¹⁴⁶ *Op. cit.* footnote 139, pages 6 and 7 (2015 ODIHR Report on the Assessment of the Legislative Process in Georgia).

ANNEX

Draft

Organic Law of Georgia

On the Amendments to the “Organic Law on Common Courts of Georgia”

Article 1. The following changes shall be made to the Organic Law of Georgia on Common Courts (Legislative herald #41, 08.12.2009; Article 300)

1. A) Paragraph 4, sub-paragraph “a” of Article 34 shall be removed

B) paragraphs 7 and 8 with the following wording shall be added after paragraph 6:

“7. A citizen of Georgia who reached 30 year, with the highest legal education, equivalent to the Master’s Degree or academic degree equal to that/diploma of the highest education, professional experience of working that is in compliance with the high status of a justice determined in paragraph 8 of this Article and has knowledge of the state language shall be nominated by the High Council of Justice of Georgia to the Parliament of Georgia to be elected as a Chief Justice or the justice at the Supreme Court .

8. A person can be considered to be with high professional working experience compatible with the high status of the Supreme Court justice if:

a) acting judge who has not less than 5 years of working experience as a judge

b) former judge, who has a professional working experience not less than 5 years and no more than 10 years passed since the termination of status of a judge;

c) specialist of distinguished qualification in the field of law, who has professional working experience not less than 5 years and has passed judicial qualification examination.

a) Articles 34¹ and 34² shall be added to the law:

“Article 34¹. The rule of selection of a candidate to be nominated to the Parliament to be appointed to the position of a justice of the Supreme Court

1. The High Council of Justice of Georgia in accordance with the procedure established by this law initiates the proceedings to select the judicial candidate during 1 month period from the date vacancy of a judge is available at the Supreme Court. The HCJ announces the initiation of the selection proceedings through the official publishing entity of Georgia.

2. The persons determined under paragraphs 7 and 8 of Article 34 are entitled to participate in the selection.
3. The HCJ determines the form of application and list of documents to be attached for a person to participate in the selection proceedings. The submitted application shall include consent of a person for the HCJ to check/collect information (including personal data) according to the rule established by Article 35² of this law.
4. The application to the vacancy announcement can be submitted within 4 weeks from the date of announcement. The judicial qualification examination shall be conducted no earlier than 21 and no later than 25th day from the date of announcement of vacancy for a person determined under paragraph 8, sub-paragraph “c” of Article 34 who has not passed the judicial qualification examination or the results of the examination are no more valid.
5. The HCJ within 5 days from the date of expiration of vacancy announcement shall review the applications and attached documents. The list of applicants, their bios and the decision of the HCJ with regard to compliance of applicants with the requirements of law shall be published on the web page of the HCJ.
6. The decision of the HCJ determined under paragraph 5 of this Article can be appealed by the persons who has participated in the selection proceedings within 2 working days to the Qualification Chamber of the Supreme Court of Georgia in case the HCJ considers the age, education and professional working experience not to be in compliance with the requirements of law. The Qualification chamber shall review the application and make a decision within 2 working days.
7. After the expiration of terms of review and appeal determined under paragraph 6 of this Article the HCJ within 5 working days shall conduct closed ballot regarding the transfer of person participating in the selection proceedings to another stage. Each members of the HCJ at the session of the HCJ shall circle the names of candidates that do not exceed the number of vacancy announcements. The ballots shall be placed in the sealed box. The ballot box shall be open in presence of the HCJ members as soon the ballot proceedings are finished. The ballot counting is done by the members of the HCJ. If a HCJ member selects more candidates than existing vacancies, the ballot will be considered void. At the end of the voting process, HCJ secretary will sign a protocol. If the selection process is announced for 1 or 2 Supreme Court Justice positions, the number of candidates to be moved to the next stage shall exceed the existing vacancies by 3 times. If the selection process is announced for no less than 3 vacancies, the number of candidates moved to the next stage will exceed the number of vacancies by 2.5 times. (The number of candidates that will be moved to the next stage will be rounded up to the full number). If there is a tie vote, a preference will be given to the candidate who has longer years of professional experience. A list of persons who moved to the next stage of selection process will be published on a homepage of the High Council of Justice. If a number of participants in the selection process is lower, or is equal to the quota of persons to be moved to the next stage, these participants will move to the next stage without a voting process. In case the member of the HCJ participates in the selection process to the position of the Supreme Court justices than he/she can't apply their right to vote at this stage.

8. No earlier than 10 days, and no later than 20 days from the day of publishing on the HCJ homepage a list of persons referred to in paragraph 7, who moved to the next stage, a hearing of the candidates will commence. The hearing will be public.
9. No later than 5 days before the commencement of hearings, each member of the Council will be provided with information on the candidate obtained in accordance with the procedure established by this law.
10. Candidates will be heard individually during the hearing. The Council members have a right to ask questions of candidates.
11. After the completion of the hearing of a candidate the members of the HCJ at the earliest session of the HCJ shall evaluate the candidate without prior judicial experience with the grades determined under Article 35¹ paragraph 16 and a candidate with judicial experience in accordance with the Article 36⁴ paragraph 8.
12. After completing the hearings, at the earliest HCJ session, the Council will conduct a secret vote, in accordance with rule 7 of this article, in order to reduce a number of participants down to the number of vacancies announced for candidates to be presented to Parliament for election to the Supreme Court Justice positions. Number of candidates that matches the number of open vacancies, with the best results, will move to the next stage. If there is a tie vote, a preference will be given to the candidate who has longer years of professional experience. In case the member of the HCJ participates in the selection process to the position of the Supreme Court justices than his/her right to vote is restricted. Names of persons who moved to next stage will be published on the HCJ homepage.
13. After publishing the names of candidates in accordance with rule 12 of this article, the vote will be held on the submission to Parliament of the candidate for the Supreme Court position. The candidate voted on by the HCJ for submission to Parliament for the Supreme Court position will be considered elected, if the candidate, receives at least 2/3 of votes of all Council members, during a secret vote of the Council's open session. If the HCJ is unable to submit to Parliament, the number of candidates that matches the number of vacancies, the Council will conduct a secret vote, in accordance with paragraph 7 of this article, with the goal of reducing a list of candidates who moved to the next stage in accordance with a selection process outlined in paragraph 7, down to the number of vacancies of candidates for submission to Parliament for the Supreme Court positions. Number of candidates that matches the number of open vacancies, with the best results, will move to the next stage. If there is a tie vote, a preference will be given to the candidate who has longer years of professional experience. From these candidates, those who receive at least 2/3 votes, during a secret vote by HCJ members will be submitted to Parliament. A council member, who is a candidate, shall not vote for himself/herself. Decision of the HCJ on the candidates to be submitted to Parliament for election to Supreme Court is published on the HCJ homepage.
14. HCJ members will apply criteria provided for by this law article 35¹ paragraph 3 and 14, during the selection of candidates for submission to Parliament for election to Supreme Court Positions.

15. If the HCJ member has a different opinion on the candidate presented to Parliament for election to the Supreme Court, he/she may address the Parliament in writing. Such dissenting opinion will be provided to all members of Parliament. In addition, each member of the Parliament will be given information about the grades each candidate was assigned in accordance with paragraph 11 of this Article.
16. If Parliament does not elect the candidate to the Supreme Court, in order to fill the vacancy, within two weeks, the HCJ will conduct a secret vote, in accordance with paragraph 7 of this article, on the remaining names of candidates that were published in accordance with rule 12 of this article, with the goal of reducing a list of candidates down to the number of remaining vacancies of candidates for submission to Parliament for the Supreme Court positions. Number of candidates that matches the number of open vacancies, with the best results, will move to the next stage. If there is a tie vote, a preference will be given to the candidate who has longer years of professional experience. From these candidates, those who receive at least 2/3 votes, during a secret vote by HCJ members, will be submitted to Parliament. Decision of the HCJ on the candidates to be submitted to Parliament for election to Supreme Court is published on the HCJ homepage. This paragraph provides for a one-time procedure.
17. If a vacancy for the position of a Supreme Court justice is not filled under the rule established in this article, the selection procedure is restarted in 1 month.
18. A candidate for the position of a Supreme Court justice who does not receive the required number of votes at the Parliament, can be nominated only twice during the Parliament's single term.
19. A candidate nominated in accordance with Paragraph 13 of this Article has to submit a certificate confirming submission of an Asset Declaration Form and a Drug Examination Certificate according to the Georgian legislation to High Council of Justice in 7 business days from the date when the relevant information is posted on the High Council of Justice website. These certificates are submitted to the Parliament of Georgia upon receipt.
20. The High Council of Justice approves a standard recommendation form and a special questionnaire to be used for collecting information on candidates for the position of a Supreme Court justice.

Article 34². Background Checks of Candidates to be nominated to the Parliament for the Position of a Supreme Court Justice

1. A respective structural unit of the High Council of Justices established in Paragraph 5 of Article 36⁴, begins collection of reliable information in accordance with the procedure established in this law for the purposes of an objective and comprehensive evaluation of candidates who are shortlisted according to the procedure established in Paragraph 7, Article 34¹ of this law upon publication of the short list on the High Council of Justice website.

2. While conducting background checks of candidates to be nominated to the Parliament of Georgia for the position of a Supreme Court Justice, the relevant structural unit of the High Council of Justice thoroughly examines their professional reputation and activities, verifies accuracy of the submitted information, as well as the information on their past criminal/disciplinary prosecution and/or administration proceedings against candidates.
3. The information about candidates to be nominated to the Parliament of Georgia for the position of a Supreme Court Justice collected under this Article is used by members of the High Council of Justice solely for evaluating candidates. A member of the High Council of Justice is authorized to consider information on candidates while making voting decision in relation to candidates to be nominated to the Parliament of Georgia for the position of a Supreme Court justice.
4. The data of a candidate to be nominated to the Parliament of Georgia for the position of a Supreme Court justice that have been collected as a result of a background check, are confidential and shall not be disclosed in any form.
5. Under this Article while conducting a background check of a candidate to be nominated to the Parliament of Georgia for the position of a Supreme Court justice, a relevant structural unit of the High Council of Justice is authorized to contact candidate recommenders, his/her former employers and colleagues, the administration and academic staff of an appropriate education institutions, as well as the agencies that may retain the information about any previous convictions of the candidate, his/her administrative and disciplinary disputes and violations. To obtain this information, an authorized structural unit of the High Council of Justice of Georgia shall submit a candidate's written permission for collecting/verifying his/her personal data to an appropriate person.
6. To acquire information about candidates to be nominated to the Parliament of Georgia for the position of a Supreme Court justice, an authorized structural unit of the High Council of Justice of Georgia shall use a standard recommendation form and a special questionnaire. An authorized structural unit of the High Council of Justice of Georgia may, as an exception, contact an information provider with follow-up questions, and/or communicate with an information provider orally. The information obtained orally must be formalized in writing and signed by an information provider.
7. Any action and/or communication performed to acquire information about a candidate to be nominated to the Parliament of Georgia for the position of a Supreme Court justice shall be reflected in a general summary protocol.
8. Information about a candidate to be nominated to the Parliament of Georgia for the position of a Supreme Court justice acquired in violation of the procedure established by this Article shall not be considered when making a respective decision.
9. After results of a background check of candidates to be nominated to the Parliament of Georgia for the position of a Supreme Court justice are submitted to the members of the High Council of Justice, the High Council of Justice of Georgia shall inform candidates about completion of a background check and ensure individual candidates' access to information available at the High Council of Justice. After results of a background check become available,

the candidate shall have the right to apply within 2 days' term in writing to the High Council of Justice, in order to submit additional information and/or challenge results of background check under a relevant rule. A candidate shall also be entitled to access this information any time after voting is completed. Sources of information are confidential. The candidate shall familiarize himself/herself with this information in a place designated by the High Council of Justice of Georgia for this purpose.

10. The information about a candidate to be nominated to the Parliament of Georgia for the position of a Supreme Court justice shall be retained in a sealed form in a secured place allocated by the High Council of Justice of Georgia for at least three years.

3. Article 36:

a) Paragraph 1 to be formulated as follows:

„1. The Parliament of Georgia shall elect the Chief Justice by the majority of its full composition from the Supreme Court justices upon nomination by the High Council of Justice. A Chief Justice is elected for 10 years, but not for more than his/her term of office in the capacity of a Supreme Court justice. The same person cannot be elected as the Chief Justice twice.”

b) Paragraph 3 to be deleted.

Article 2.

1. After this law is entered into force the candidacies nominated to the Parliament of Georgia for the position of a Supreme Court justice are considered withdrawn.

2. The procedure of nomination of candidates to the Parliament of Georgia for the position a Supreme Court justice shall start no later than one month after this law is entered into force.

Article 3. This Law shall enter into force upon publication.

President of Georgia

Salome Zurabishvili

Rules of Procedure of the Parliament of Georgia

On Amendment in the Rules of Procedure of the Parliament of Georgia

Article 1. Amendment in Article 205 of the Rules of Procedure of the Parliament of Georgia (Legislative Herald of Georgia (www.matsne.gov.ge), 14.12.2018, Registration Code: 010190030.06.001.016054) shall be made:

a) 1st Paragraph shall be formulated as follows:

„1. The Bureau of Parliament shall define the Committee/Committees determining the issue of selection, consent on appointment of the officials defined under Article 204 of the Rules of Procedure of the Parliament of Georgia. The Committee determining the issue of the selection of officials defined by Article 2."e" of the Rules of Procedure of the Parliament of Georgia shall be Legal Issues Committee.“

b) 2nd Paragraph shall be formulated as follows:

„2. The Committee stipulated under this Article shall determine the compliance of the presented official with the requirements defined by the Constitution of Georgia and/or another Law. For this purpose, the candidate is obliged to provide the Committee with the necessary information. In its turn, the Committee is entitled to seek/verify the information necessary for the candidacy of the relevant official, including information on his/her biography, work experience and professional knowledge. For the purpose of assisting the identification of compliance of the candidates of the Chairman and Judges of the Supreme Court of Georgia with the requirements of Constitution of Georgia and/or other Law the Legal Issues Committee creates a working group defined under Article 46 of the Rules of Procedure.“

c) Paragraphs 2¹ and 2² with the following content shall be added after Paragraph 2:

„2¹. The Legal Issues Committee creates a working group defined under Article 46 of the Rules of Procedure within three days after submission of the nomination of candidates for Judges of the Supreme Court of Georgia by the Bureau of Parliament.

2². The Legal Issues Committee ensures to send the nomination with the attached materials to all the members of the Committee in no later than 1 week from the submission of the nomination of candidates for Judges of the Supreme Court of Georgia by the Bureau of Parliament.“

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d) Paragraphs 3¹ and 3² of the following content shall be added after Paragraph 3:

„3¹. For the purpose of determining the compliance of the candidates of the Judges of the Supreme Court with the requirements of Georgian legislation the Legal Issues Committee shall listen to each candidate at the public hearing in no sooner than 1 week from sending the documents defined under Paragraph 22 of this Article to all the members of the Committee. After listening to each of the candidates the candidate shall answer the questions of the Committee members.

3². The procedure of hearing the candidates of the Judges of the Supreme Court of Georgia at public hearing of the Legal Issues Committee shall be defined by the Chairman of the Committee in coordination with the Committee.“.

e) 6th Paragraph shall be formulated as follows

„6. Before the vote, the Chairman of the Plenary Session shall inform the Parliament about the list of candidates and their written consent. After completion of the discussion at the plenary session, each candidate of the member of CEC, judge of the Constitutional Court of Georgia, judge of the Supreme Court of Georgia, Public defender and State Inspector shall be voted separately“.

Chairman of the Parliament of Georgia

Irakli Kobakhidze