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დამოუკიდებელი
და გამჭვირვალე
მართლმსაჯულებისთვის
Coalition for
an Independent and
Transparent Judiciary

The Coalition's letter to the Venice Commission and OSCE/ODHIR on the draft law on selection of Supreme Court justices

TO: The European Commission for Democracy through Law / the Venice Commission

The OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR)

I. Introduction

On behalf of the Coalition for an Independent and Transparent Judiciary (hereinafter the Coalition), we would like to address you regarding legislative amendments to the *Organic Law of Georgia on Common Courts* (hereinafter the draft law), *Rules and Procedures of the Parliament of Georgia* and *Law of Georgia on Conflict of Interest and Corruption in Public Service,* which aim to regulate rules and procedures for the selection of Supreme Court justices.

The Coalition represents a unity of 39 non-governmental organizations in Georgia. The goal of the Coalition is to consolidate the advocacy of legal professional associations, NGOs, business associations, and media for an independent, transparent and

accountable justice system. The Coalition has been active and vocal about fundamental challenges faced by the Georgian Judiciary since 2011, placing us in a unique position to witness and evaluate the multiple reform stages undertaken by the Georgian governments.

The coalition would like to emphasize that the Georgian judiciary is in a severe crisis, caused by years of failed reform waves, strengthening doubts that the High Council of Justice (hereinafter the HCoJ) is ruled by a group of influential judges, making partial and unjustified judicial appointments. The crisis intensified in December 2018, when the HCoJ submitted a list of nominees for Supreme Court Justices to the Parliament without any selection procedure or transparency of the selection process. Following public outrage, street rallies and special petitions, the process was suspended and the ruling party undertook responsibility to draft necessary legislative amendments, as pursuant to the Constitution of Georgia.

Hence, the coalition would like to draw your attention to the severity of the situation. Our communication builds upon years of experience observing and analyzing HCoJ decision-making procedures and the multiple reform waves.[1] The aim of the communication is to present to the Venice Commission and OSCE/ODIHR the general context against which the present amendments should be assessed and evaluated, and provide a detailed assessment of specific threats posed by the draft law initiated by the Speaker of the Parliament.

II. Background Information/Context

Following the 2012 parliamentary elections, the new government came into power and announced that it would focus on liberating the judiciary from political influences and ensuring the independence of judges. In doing so, the Government of Georgia acknowledged the existence of fundamental challenges within the judiciary and the ultimate need for substantive reforms.

However, the process of implementation of these reforms made it clear that the government failed to show a strong political will for any meaningful and consistent changes. The measures taken within the so-called □□□□□ waves ᴀ of reform failed to create a strong and independent judiciary. Achievement of the independence of the judiciary is significantly hindered by the dominant judicial group-members who hold

important administrative positions within the system. The group members deliver arbitrary decisions and use their high positions to strengthen their influence over the system.

In the light of these failures, the Selection procedure of Supreme Court justices has been substantially changed within the scope of 2017 Constitutional reform. In particular, Supreme Court justices are no longer nominated by the President of Georgia, but rather by the HCoJ.

In May 2017, the Coalition submitted its opinion to the Venice Commission on the Constitutional provisions concerning the judiciary.[2]

The Coalition criticized several changes, including the rules of appointment of Supreme Court Justices. The Coalition believed that delegating exclusive power to nominate Supreme Court justices to the HCoJ could be detrimental to the development of the judicial system, since HCoJ (including the rules about HCoJ composition and operation) fell short of the standards of independence, transparency and effectiveness established by the Venice Commission and other international bodies.

The Coalition believed that in view of the local context in Georgia, the aim of the Venice Commission □□ recommendation---ensuring judicial independence---could not be achieved by transferring the nominating function to the HCoJ. On the contrary, it would further consolidate already broad and uncontrolled powers concentrated in the HCoJ and, in view of the Council □□ past performance, the proposed regulation could not guarantee the selection of candidates commensurate with the high status of Supreme Court Justice.

On 16 December 2018, amendments to the Constitution entered into force. However, at that moment, the legislation did not provide a transparent procedure for selecting and nominating candidates for Supreme Court Justice and Chairperson Positions.

On 24 December 2018, a week after the amendments to the Constitution entered into force, the HCoJ submitted to the Parliament a list of candidates that was drawn up by several judges behind closed doors. The nomination was made without any procedure. A majority of the nominated candidates had an unacceptable record of judgments.

All of the nominated candidates were acting judges, two of whom were judge

members of the HCoJ. The latter clearly demonstrates that HCoJ members abused their high office for personal interests. The criteria for selecting these judges was ambiguous, and it is not clear why other interested persons were precluded from equal participation in a fair, open and transparent competition.

As a result, ten candidates were nominated entirely by 11 members of the HCoJ. At the same time, the remaining members of the HCoJ were uninformed of the candidates to be voted on. The biographies of the candidates were not discussed, and those ten judges were arbitrarily distinguished from other acting judges. This demonstrates serious risks of corruption and nepotism.

Therefore, the nomination of candidates in December 2018 clearly indicated that the dominant group of judges aimed to exercise their influence on the highest instance of the judiciary by taking full control over the judicial system.

On 26 December 2018, following the protests of various public groups, the Speaker of the Parliament postponed the process until the spring session. Later, all of the nominated judges withdrew their candidacies.

In January 2019, the working group led by the Speaker of the Parliament began work on a draft law regarding rules for the selection of Supreme Court justices. However, it was evident that the process of preparing the draft was not aimed at substantive changes and was only focused on superficial improvement of the process.

Furthermore, the composition of the working group did not ensure fair representation of professional and interest groups. The majority of the Group consisted of the same members of the HCoJ and judges who were directly interested in hastened consideration and approval of the list. Various stakeholders protested against the undemocratic format and agenda of the meeting held by the Speaker.

Although the format of the working group was slightly changed amid protests, it became clear that the drafting process mainly served the interests of the influential group of judges and the ruling party was providing unconditional support to the group. As a result, the draft law only aims to strengthen influences of the dominant group within the judiciary and is explicitly tailored to the needs of this group.

III. Analysis

A. Eligibility Requirements for Supreme Court Justices

According to the draft law, a person can be considered as a candidate for the Supreme Court Justice if he/she is an acting judge, former judge, or a lawyer with distinguished qualifications, having professional work experience of not less than 5 years and having **passed/or planned to pass the judicial qualification examination**. Thus, the competition is limited to those candidates who have already undertaken the judicial qualification examination or plan to pass it **within one month** after applying for the vacancy.[3]

The judicial qualification examination consists of two parts: a) test format; and b) a written examination.[4] Moreover, it is an exam designed as a prerequisite for candidates for the lower court instances (first instance and appellate courts). It should be hereby emphasized that this mandatory requirement has never before been applied to Supreme Court Justices.

Pursuant to the Venice Commission standards, institutional rules have to be elaborated in a way to guarantee selection of highly qualified and personally reliable judges.[5] Moreover, in relation to the Supreme Court Justices, the Venice Commission is of the opinion that there is a special need to open up the system to analytically minded people equipped with complex and relevant interpretative techniques. Therefore, people with diverse law backgrounds outside the judicial system, such as law professors, legal scholars, former barristers and prosecutors should be a desirable and useful addition to the cassation instance court.[6] In addition, the examination is not and should not be deployed as the only tool for the assessment of candidates but their personal qualities, communication and other skills shall be taken into consideration.[7]Lastly, according to opinion No 1 (2001) of the CCEJ, □□□□□ *decision relating to a judge's appointment or career should be based on objective criteria...*"

Therefore, the Coalition believes that the judicial examination should not be considered as an eligibility criterion for candidates for Supreme Court Justice. The exam cannot be the sole ground of ascertaining qualifications of a candidate. Candidates can be assessed based on clean professional record and demonstrated competence, through impartial and transparent selection procedures.

Furthermore, in light of recent developments in the Georgian judiciary (namely, the flawed nomination of acting judges in December 2018, as discussed above), the requirements of the draft law in relation to judicial examination of candidates outside the judicial system aims to limit highly professional candidates with diverse law backgrounds from gaining access to the Supreme Court. This is an attempt to establish unreasonable barriers for candidates under the pretext of checking their competence and qualifications.

In sum, we strongly believe that judicial examination as an eligibility requirement should be removed. It is clear that the draft law provides an additional barrier, significantly hindering the appointment of people with no judicial experience to a position of the Supreme Court Justice.

B. Conflict of Interest

Pursuant to the draft law, a member of the HCoJ might be a candidate for the Supreme Court Justice and participate in the competition. The present legislative amendments only preclude the HCoJ member from voting in favor of himself/herself, while he/she is still eligible **to vote for other candidates (his/her rivals),** have access to all of the information regarding other candidates and participate in the assessment process, as well as conduct interviews.

Georgia, along with many European countries, has incorporated a neutral High Council of Justice into its legal system in order to protect and strengthen independence of the judiciary.[8] The role of a judicial council in the appointment procedure is of paramount importance. Therefore, it is crucial for HCoJ members to be neutral, independent and impartial. Underlining the importance of being a member of such council, The Venice Commission even had examined how much working time the members of such bodies should dedicate in order for councils to function properly and fulfill its tasks.[9]

The Coalition believes that if a member of the HCoJ decides to nominate himself/herself for the position of Supreme Court Justice, he/she shall not be able to participate in the decision making process in any form. In other words, the member of HCoJ as an evaluator vis-à-vis the same person as a candidate

constitutes a conflict of interest. The conflict is so evident that it poses serious threats to impartial conduct of the competition and gives rise to unequal and unfair treatment of other candidates.

However, the authors of the draft law attempted to justify the given regulation by referring to the Constitutional principle of separation of powers and limited competence of the Parliament to intervene in the functions of the HCoJ. The authors argue that it would be unconstitutional to restrict HCoJ members from evaluating and voting for other candidates.

The Coalition is of the opinion that the Constitutional framework and competences of two constitutional bodies, namely the Parliament and the HCoJ, do not preclude the former from establishing relevant procedures for the latter to select and nominate Supreme Court Justices, including the rules to eliminate potential conflict of interest.

In particular, according to article 25 para.1 of the Georgian Constitution, □□□□□□ *citizen of Georgia shall have the right to hold any public office if the individual meets the requirements established by legislation.* □Pursuant to the well-established case law of the Constitutional Court of Georgia, the right to acquire the position of Judge falls within the ambit of the mentioned right as for the purposes of the Constitution, the term □□□□□□□ office □ includes a position of the judge of all instances.[10] Furthermore, while establishing requirements for acquiring certain public office position, the Parliament is obliged to act in accordance with the equality clause, by giving equal opportunities to all candidates who wish to be nominated as a Supreme Court Justice.

Moreover, the Constitution also articulates a power of the HCoJ to select and nominate judges of all instances **based on their conscientiousness and competence.**[11] Therefore, contrary to the justification presented by the framers of the draft law, the whole architecture of the Georgian constitution (including the essence of the principle of separation of powers) clearly demonstrates that both the Parliament and the HCoJ have no discretion, but rather an obligation to ensure **equal opportunities for all candidates** who meet the requirements established by the Constitution and the law to hold the position of Supreme Court Justice.

The mentioned justification might have been acceptable if the decision on nomination of the Judge had been political (for example, nomination of Supreme Court Justices by

the President) or a vacant position should have only been occupied by the members of the same body (for example, the president of the Constitutional Court of Georgia shall be elected only among the nine judges of the Court). In the latter case, it is clear that there is no need to regulate conflict of interest as the circle of potential candidates is naturally limited and all members have an equal opportunity to vote for themselves and for others simultaneously.

On the contrary, the power and obligation of the HCoJ is not to select Supreme Court Justices among its members but to ensure selection of the best candidates based on merit and integrity. In turn, it has not been disputable by any stakeholder at any stage of elaboration of the draft law that the assessment of qualifications and integrity is better achieved through open and transparent competition.

Thus, if the Parliament has a general competence to determine procedures for appointing judges through the competition, it remains unclear why the rules of conflict of interest as an indispensable element of every competition cannot be set forth in the legislation in a complete manner.

In conclusion, the Coalition considers that the draft law shall ensure that if a member of the HCoJ presents a statement to participate in the competition, his/her position shall be suspended throughout the competition period.

C. Formation of the Longlist of Candidates

According to article 34^1(7) of the draft law, after the formal requirements have been met by the candidate, the HCoJ uses a secret ballot to decrease the number of participants, using a relative majority principle. It is important to note that at this stage, **the only information available to members of the HCoJ is the fact that the candidate meets the formal requirements for the vacant position.**

Although formation of the longlist of candidates might serve some legitimate aims, the Coalition considers that the given procedure is excessively vague and entirely based on the will and subjective interests of individual members of the HCoJ. Pursuant to opinion No 1 (2001) of the CCEJ, □□□□□ *decision relating to a judge □□ appointment or career should be based on objective criteria [☀□□A□*owever, a lot depends on what sort of *□bjective* A criteria are used, and how they relate to more*subjective* A

elements.

Moreover, the Venice Commission, in its opinion on *the Concept Paper on the Reform of the high Judicial Council of Kazakhstan,* stated: *the decision to nominate the candidate in the phase of competition is taken by the HJC by voting. This voting will necessarily reflect the sum of subjective perceptions (by the members of the HJC) of the moral and professional qualities of the candidate. There is nothing wrong in the appointment decision being based partly on such subjective perceptions.* ***It is important, however, that the law describes the relation between more [illegible] and more [illegible] elements in the overall assessment of the candidate."[12]***

However, unlike the situation referenced above, the draft law does not contain any single criterion or general implication for the members of HCoJ on how the decision on the formation of the longlist of candidates could be made, other than subjective opinions. Therefore, at this stage, all the procedures with regard to selection of candidates suffer from a main defect [illegible] and uncertainty. The latter would additionally demotivate otherwise professional candidates from even participating in a selection process.

D. Final Selection and Nomination of Candidates.

After the completion of voting on the short list of candidates, the final voting should be conducted and decision on selection and nomination of candidates be made by a 2/3 majority of the HCoJ. The Coalition shares the position of the Venice Commission reiterated in many opinions and reports that the composition of the High Judicial Councils should ensure a fair balance between judicial independence and self-administration on the one hand, and the necessary accountability of the judiciary on the other hand, to avoid cronyism and corporatism within the judiciary.[13]

Taking into consideration the Georgian context and recent developments in HCoJ in December 2018, as discussed above, the Coalition believes that the final decision on selection and nomination of candidates should be made with the support of a 2/3 majority of judge members and 2/3 majority of lay members, and the decisions must be duly substantiated. The latter position unanimously agreed between all interested local stakeholders, and is supported as the most fitted solution for the existing crisis

by the Council of Europe office, Delegation of the European Union, and the U.S. Embassy in Georgia.

E. Absence of Reasoned Decision

In addition, the draft law does not contain any obligation for the HCoJ to deliver a collective reasoned decision on selection and nomination of certain candidates for the position of Supreme Court Justice. However, the Coalition believes that this is a vital element to make the decision making process more transparent for public scrutiny.

Therefore, the Coalition shares a position of the Venice Commission expressed in its opinion *on the Draft Law on the Judicial Council of North Macedonia*. In particular, the draft law should contain a requirement of a collective reasoned decision on selection and nomination of candidates for Supreme Court Justice, reflecting the position of the majority of the HCoJ, accompanied by dissenting opinions of members who voted against, if they wish to give their reasons.[14]

F. Assessment of the Nominated Candidates by the Parliament.

Based on the recommendations of the Coalition, the Rules of Procedure of the Parliament[15] already envisage the creation of a working group in order to facilitate compliance of the candidates with the requirements of the legislation. However, the legislative initiative does not foresee the rules related to composition and duties of the working group.

In order to diminish the risk of biased conduct of the competition by the HCoJ, impartiality of the parliamentary working group is of the utmost importance. The Coalition believes that the working group should consist of highly reputable independent members, who will examine the completeness and accuracy of the information about the candidates, retrieve additional information from all possible reliable sources as needed, prepare a conclusion related to each nominated candidate and present it to the Legal Issues Committee.

IV. Conclusion

In light of the local context and recent developments in Georgia, the Coalition believes that the adoption of the draft law initiated by the Speaker of the Parliament and nomination of the candidates based on the proposed procedures will have a detrimental impact on the Georgian judiciary.

According to the amended constitution, which came into force in December 2018, the number of Supreme Court justices is increased to twenty-eight. The latter implies that initiated amendments to the Organic law of Georgia on Common Court will be used to select a substantial number of judges (eighteen in total) and appoint them until retirement age, thereby making the current process historic in its relevance and impact.

We hope that the Venice Commission and the OSCE/ODIHR will carefully examine the current situation and take into consideration the existing crisis in the judiciary in the process of preparing its opinion regarding the submitted draft laws.

About The Coalition for an Independent and Transparent Judiciary

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[1] More information about the work of the Coalition, can be found at: http://coalition.ge/index.php?article_id=1&clang=1

[2] Coalition Opinion on the Draft of the Constitution of Georgia, 18 May 2017, http://coalition.ge/files/coalition_opinion_on_const._provisions_regarding_judiciary_-_for_venice_commission.pdf

[3] Draft law, Art.34

[4] See Organic Law on Georgia on Common Courts, art. 53(3)

[5] CDL-AD(2010)004, para.8

[6] CDL-AD(2018)032, para.71

[7] CCEJ opinion no10 (2007), para. 56

[8] CDL-AD(2007)028, para.28

[9] CDL-AD(2017)019, para.93

[10] See judgement on the case of Citizen of Georgia *Omar Jorbenadze v. Parliament of Georgia*, 3/1/659, 15 February 2017

[11] See Articles 61 and 63 of the Constitution of Georgia

[12] CDL-AD(2018)032, para.63

[13] See CDL-AD(2007)028, para.27

[14] CDL-AD (2019)008, para.18

[15] Article 205(2)