



RULES FOR STAFFING THE CONSTITUTIONAL COURT IN GEORGIA AND EU MEMBER STATES

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**GEORGIAN
YOUNG
LAWYERS'
ASSOCIATION**

Georgian Young Lawyers' Association

**RULES FOR STAFFING THE
CONSTITUTIONAL COURT IN GEORGIA
AND EU MEMBER STATES**

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1. INTRODUCTION

All elements of the legal order must be in accordance with the Constitution. To achieve this, there is an institution of the Constitutional Court in continental Europe, especially in the so-called “new democracies”, which is considered an important achievement of the concept of democracy and the rule of law.¹ After World War II, the Constitutional Court was established first in Germany and Italy, then in Spain and Portugal, and finally in Central and Eastern Europe,² including Georgia.³

The existence of the Constitutional Court promotes the protection of public democracy, human rights and the rule of law.⁴ Its legitimacy and the quality of its functions largely depend on balanced and transparent staffing procedures.⁵ Otherwise, the credibility of the decisions is questioned.⁶

In 2020, two members were appointed to the Constitutional Court of Georgia by the quota of the Supreme Court.⁷ Despite the call,⁸ Judge Khvicha Kikilashvili was appointed to the position in a state of emergency, while the members of the plenum themselves had no information about the identity of the candidate.⁹ The process was assessed negatively¹⁰ and made clear the need for change. However, the Chairman of the Supreme Court did not take into account the experience gained, nor did he take into account GYLA’s leg-

¹ Garlicki L., “Constitutional courts versus supreme courts”, Oxford University Press and New York University School of Law, Volume 5, Number 1, 2007, pp. 44–68, available: <https://bit.ly/3dx8b1m>, updated: 03.06.2020.

² European Commission For Democracy Through Law (VENICE COMMISSION), Compilation of Venice Commission opinions, reports and studies on constitutional justice, p. 5, Website of Venice Commission, available: <https://bit.ly/2ZrTzML>, updated: 03.06.2020.

³ Paragraph 2 of Article 59 of the Constitution of Georgia.

⁴ Compilation of Venice Commission opinions, reports and studies on constitutional justice, p. 5.

⁵ Ibid.

⁶ Ibid.

⁷ Khvicha Kikilashvili was appointed to the position on April 3, 2020, and Vasil Roinishvili on May 29, 2020.

⁸ GYLA Calls on the Plenum of the Supreme Court to Suspend the Procedures for Appointing a Judge of the Constitutional Court until the State of Emergency Ends, March 30, 2020, Website of GYLA, available: <https://bit.ly/2YqRgHv>, updated: 12.06.2020.

⁹ Statement of Judge Ekaterine Gasitashvili of the Supreme Court on the discussion “Staffing of the Constitutional Court”, 1:37:40-1:40:50 mn, GYLA official Facebook page, available: <https://bit.ly/2ZHQWGE>, updated: 27.05.2020.

¹⁰ GYLA negatively assesses the process of appointing a member of the Constitutional Court by the Plenum of the Supreme Court, April 3, 2020, webpage of GYLA, available: <https://bit.ly/2xT9Kap>, updated: 27.05.2020.

islative proposal.¹¹ The same thing happened in May 2020.¹² Judges of the Constitutional Court have taken office as a result of opaque and unbalanced procedures. The interested parties did not have the opportunity to hold a proper discussion about them, and the members of the Supreme Court¹³ did not have the opportunity to make an informed decision.

Against this background, the aim of the research is to review the rules of staffing the Constitutional Court in Georgia and the EU member states, in which all three branches of state government participate in the formation of the Constitutional Court.

¹¹ The Young Lawyers' Association has submitted to the Parliament a legislative proposal regarding the appointment of a member of the Constitutional Court by the Plenum of the Supreme Court, the website of the Public Broadcaster, available: <https://bit.ly/2U1L2Y4>, updated: 05.06.2020.

¹² GYLA negatively evaluates the procedures for the appointment of a member of the Constitutional Court by the Plenum, May 29, 2020, GYLA website, available: <https://bit.ly/3cQr5Pv>, updated 12.06.2020.

¹³ Note: It is true that the members of the Supreme Court, unlike the appointment of Khvicha Kikilashvili, had information before the hearing, but there was no reasonable deadline in this case either.

2. RESEARCH METHODOLOGY

The doctrinal method of research is used in the work on this paper, which involves the analysis of legislation and other primary or secondary sources. The main part of the paper is based on a relatively legal method.

When selecting countries to compare with the Georgian model, the first criterion was EU membership. Second - territorial arrangement, like Georgia, all the states below are unitary. Third was the rule of staffing the Constitutional Court, the whole system discussed here belongs to a hybrid model¹⁴ similar to the Constitutional Court of Georgia.¹⁵ All three branches of state government participate in the staffing of the court. These countries are: Lithuania, Latvia, Italy, Bulgaria and Spain. On their example the document discusses the procedures for staffing the court: which body appoints a judge of the Constitutional Court in what terms and what criteria a person must meet.

Lithuania is a unitary state.¹⁶ The Constitutional Court is separated from the common court system.¹⁷ It consists of 9 judges elected for a term of 9 years.¹⁸ All three branches of government participate in the recruitment, however, which of the nominated candidates will become a judge is decided by the legislature.¹⁹ Like the President of the Republic and the Speaker of the Seim, the Speaker of the Supreme Court will nominate three members of the Constitutional Court.²⁰

Latvia is a unitary country.²¹ Constitutional justice is administered by the Constitutional Court as an institution independent of the common courts.²² It consists of 7 members elected²³ for a term of 10 years.²⁴ The final decision

¹⁴ Hybrid models include states where all three branches of government participate in the composition of the Constitutional Court; See: European Commission For Democracy Through Law (VENICE COMMISSION), *The Composition of Constitutional Courts*, p.5, Website of Venice Commission, available: <https://bit.ly/2Aw0KJl>, updated:03.04.2021.

¹⁵ Ibid.

¹⁶ European Committee of the Regions, Division of powers, Lithuania, Website of European Committee of the Regions available: <https://bit.ly/3eKg2ZD>, updated: 03.06.20.

¹⁷ Constitution of the Republic of Lithuania, article 102.

¹⁸ Ibid, article 103, cl. 1.

¹⁹ Ibid.

²⁰ Ibid.

²¹ European Committee of the Regions, Division of powers, Latvia, Website of European Committee of the Regions, available: <https://bit.ly/3dEfNpu>, updated: 03.06.2020.

²² Constitutional court of the Republic of Latvia, about the court, Website of the Constitutional Court, available, <https://bit.ly/3coFaDP>, updated: 03.06.2020.

²³ Constitutional Court Law of the Republic of Latvia, Section 7.

²⁴ Ibid, Section 3.

on the appointment of judges is made by the parliament,²⁵ Which, in turn, are nominated by groups of 10 members of parliament, the government (cabinet) and the plenum of the Supreme Court.²⁶

Spain is a unitary state.²⁷ Constitutional justice is the mandate of the Constitutional Court.²⁸ It consists of 12 members elected for a term of 9 years.²⁹ Judges are appointed by the monarch, whom in turn, the candidates are nominated by representatives of various branches of government.³⁰ Four members will be presented by the Senate and Congress (upper and lower house of the legislature), two will be represented by the cabinet.³¹ The participation of the judiciary in the process is ensured by the nomination of two members to the King by the General Judicial Council.³²

Italy is unitary state.³³ Along with the common courts, there is a constitutional court in the country.³⁴ The Court consists of 15 members elected for a term of 9 years,³⁵ one-third of whom are nominated by the President, Parliament and the Court.³⁶ Various institutions of common courts participate in filling the quota of the latter.

Bulgaria is a unitary country.³⁷ The body of constitutional control is the Constitutional Court, which is independent from the common courts.³⁸ It consists of 12 judges, one-third of whom are appointed by the President, Parliament and the Court for a term of 9 years.³⁹ Here, too, various institutions of common courts participate in filling the quota of courts.

²⁵ Ibid, Section 85.

²⁶ Ibid, Section 4.

²⁷ European Committee of the Regions, Division of powers, Spain, Website of European Committee of the Regions, available: <https://bit.ly/3sKX5NQ>, updated: 03.06.20.

²⁸ Constitution of Spain, Section 159.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ European Committee of the Regions, Division of powers, Italy, Website of European Committee of the Regions, available: <https://bit.ly/301H3U9>, updated: 27.03.2020.

³⁴ Constitution of the Italian Republic, article 134.

³⁵ Ibid.

³⁶ Ibid.

³⁷ European Committee of the Regions, Division of powers, Bulgaria, Website of European Committee of the Regions, available: <https://bit.ly/2ZYKawh>, updated: 27.03.2020.

³⁸ Constitution of the republic of Bulgaria, article 147.

³⁹ Constitutional court act, article 4.

3. STAFFING OF THE CONSTITUTIONAL COURT OF GEORGIA, REVIEW OF THE LEGISLATIVE FRAMEWORK⁴⁰

Censuses

A person can hold the position of a judge of the Constitutional Court from the age of 35.⁴¹ He must have a higher legal education, 10 years of professional experience and an outstanding professional qualification.⁴² It is inadmissible to appoint one person to a position for a second term.⁴³

Rule of Appointment

The Constitutional Court of Georgia consists of 9 judges elected for a term of 10 years.⁴⁴ All three branches of government are equally involved in the recruitment process.⁴⁵ Three members are appointed by the President, three by the Plenum of the Supreme Court, and three by the Parliament.⁴⁶

No procedure other than deadlines is prescribed by the Head of State for the appointment of a candidate,⁴⁷ therefore, his/her degree of discretion is high.

The following have the right to nominate a candidate for the highest representative body: the Speaker of the Parliament, a faction, a group of at least 7 members of the non-factional Parliament.⁴⁸ Finally, support for 3/5 of the full staff is required.⁴⁹

In the case of the Supreme Court, the decision is made by the Plenum.⁵⁰ The

⁴⁰ Constitution of Georgia, Paragraph 2 of Article 60.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Organic Law on the Constitutional Court, Paragraph 1 of Article 6.

⁴⁷ Organic Law on the Constitutional Court, in accordance with Paragraph 5 of Article 16, a new member of the Constitutional Court shall be appointed not earlier than 1 month and not later than 10 days before the expiration of the term of office of a member of the Constitutional Court.

⁴⁸ Rules of Procedure of the Parliament of Georgia, Subparagraph "c" of Paragraph 2 of Article 204.

⁴⁹ Ibid, Sub-paragraph "a" of paragraph 4.

⁵⁰ Organic Law on Common Courts, Subparagraph "c" of Paragraph 2 of Article 18.

candidate is nominated by the Chairman of the Supreme Court.⁵¹ The person who receives 2/3 of the votes of the present people,⁵² is considered elected as a result of voting.⁵³ Additional obligations are not set in advance of the nomination of a candidate, as in the case of the President.

⁵¹ Organic Law on the Constitutional Court of Georgia, Paragraph 2 of Article 7.

⁵² 2/3 of the judges should assist the plenary session

⁵³ Ibid.

4. STAFFING OF THE CONSTITUTIONAL COURT IN EU COUNTRIES

4.1. Lithuania

Censuses

Only Lithuanian citizens with an impeccable reputation, higher education in law and 10 years of work experience (scientific or practical) can hold the position of a judge of the Constitutional Court.⁵⁴

Rule of Appointment

Every three years, 1/3 of the members of the court are replaced by the Seimas.⁵⁵ The following persons have the right to nominate candidates for the legislature: the Speaker of the Seimas, the Chairman of the Supreme Court and the President of the Republic, depending on which judge nominated by the entity expires.⁵⁶

The term of office of a judge expires on the third Thursday in March of the respective year.⁵⁷ The responsible persons are obliged to nominate a candidate for a judge no later than three months before the expiration of the regular term of office of the replacement member.⁵⁸ In case of failure to make an appointment within the established time, the term of the judge shall be extended.⁵⁹ The names of the candidates must be announced through the press before the consideration in the Seimas,⁶⁰ also, two weeks before the voting, the information about the candidates should be published on the official website of the Seimas.⁶¹

After the nomination, the candidates will be considered by the factions of the Seimas and the relevant committees.⁶² It is the responsibility of the Legal Affairs Committee to discuss and submit an opinion to the Seimas.⁶³ Resolv-

⁵⁴ The Law Of The Constitutional Court of the republic of Lithuania, article 5.

⁵⁵ *Ibid*, article 4.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*, article 5.

⁶¹ Seimas of the republic of Lithuania statute, article 200.

⁶² *Ibid*, article 67.

⁶³ *Ibid*.

ing the issue requires a simple majority of those present (a session is authorized if it is attended by at least half of the 141 members).⁶⁴

4.2. Latvia

Censuses

A Latvian citizen over the age of 40 who has an impeccable reputation, higher legal education (master's degree or equivalent) can become a judge of the Constitutional Court.⁶⁵ The bidder is required to have at least 10 years of work experience in practical or scientific terms.⁶⁶ However, scientific activity means working only in higher education or professional institutions (except for first level vocational education institutions).⁶⁷

Rule of Appointment

Members of the Constitutional Court are appointed by the Seimas (Latvian legislature).⁶⁸ A majority of votes is enough to make a decision, but their number should not be less than 51.⁶⁹

The following subjects are nominated to the Seimas: at least 10 members of the Seimas⁷⁰, the Government (Cabinet) and the Plenum of the Supreme Court⁷¹.

The Supreme Court Plenum nominates both candidates from among the judges of the common courts.⁷² The sitting is authorized if it is attended by 2/3 of the full plenum⁷³, and the decision needs a majority of those present.⁷⁴ The agenda of the plenum must be notified to the judges 15 days in

⁶⁴ Ibid, article 113.

⁶⁵ Constitutional Court Law of the republic of Lithuania article 4, cl. 2.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ The Seimas (Parliament) consists of 100 members, see: The Constitution of the Republic of Latvia, article 5.

⁶⁹ The Constitution of the Republic of Latvia, article 85.

⁷⁰ Constitutional Court Law of the Republic of Latvia, article 4, cl. 1.

⁷¹ Ibid.

⁷² Law of the Republic of Latvia on Judicial Power, Section 49.

⁷³ Plenary Session Manual, article 5.

⁷⁴ Plenary Session Manual, article 31.

advance, and the draft decision - at least seven days in advance.⁷⁵ As a rule, the session is open, and voting is secret.⁷⁶

There are no written procedures for the nomination of two members of the court by the Cabinet of Government.⁷⁷ As for the candidates to be nominated by the Parliament (three candidates), after the nomination here, it will be decided by a majority of votes who will take the position.⁷⁸

After the authorized persons address the Parliament and provide information about the bidder to the Presidium of the Seimas,⁷⁹ the latter hands it over to the relevant Parliamentary Committee, which has 15 days in order to adopt the draft resolution.⁸⁰ The draft resolution will be voted on in the plenary session of the Seimas.⁸¹

4.3. Spain

Censuses

A judge of the Constitutional Court can only become a Spanish citizen⁸² who has more than 15 years of work experience in the legal field - in the position of a judge, prosecutor, university professor, public servant or lawyer.⁸³

Rule of Appointment

In Spain, all 12 judges are appointed by the king, although he does not make that decision alone. Several actors are involved in the process of staffing the Constitutional Court, and the rules for nominating a candidate for king are different.

4 candidates will be nominated by the Senate (Upper House of Parliament).⁸⁴ For its part, the Senate selects candidates from the Legislative Representa-

⁷⁵ Plenary Session Manual, article 12/13.

⁷⁶ Plenary Session Manual, article 27.

⁷⁷ European Commission For Democracy Through Law (VENICE COMMISSION), The composition of constitutional courts, 83. 52.

⁷⁸ Rules of procedure of the saeima, article 31.

⁷⁹ Note: The Presidium acts as the Bureau of the Parliament.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Organic law 2/1979 on the constitutional court, article 18.

⁸³ Ibid.

⁸⁴ Constitution of Spain, Section 159.

tion / Assembly of Autonomous Communities.⁸⁵ Each community nominates 2 candidates.⁸⁶ A special commission⁸⁷ selects from them as many candidates as there are vacancies to be submitted to the Seimas.⁸⁸ The commission may, if it deems necessary, call an additional candidate. The report will be presented by the commission at the Senate session. It has 10 minutes. Each political group also has 10 minutes to state their position on the candidate. After that begins the voting.⁸⁹ The person who receives 3/5 of the votes of the Seimas is considered elected.⁹⁰

The same number of candidates will be nominated by the Congress (lower house).⁹¹ Each faction can nominate 4 candidates for the position. They have 5-5 minutes to submit each.⁹² A majority of the attendees is sufficient to select a person, though not less than 1/3 of the full membership).⁹³

2 candidates will be nominated by the government to the king.⁹⁴ According to the procedure, the Council of Ministers assembles and decides on the nomination of the relevant person to the monarch.⁹⁵

The other 2 candidates will be presented to the King by the General Judicial Council.⁹⁶ 3/5 support is needed in order to make this decision.⁹⁷ The General Judicial Council is a constitutional, collegial and independent judiciary consisting of 21 members, judges / lawyers, and its main purpose is to protect the independence of the judiciary.⁹⁸

⁸⁵ Organic law 2/1979 on the constitutional court, article 16.

⁸⁶ Procedures for choosing other bodies, Website of Senate, available: <https://bit.ly/3duNZxe>, updated: 04.06.2020.

⁸⁷ The commission consists of the chairman of the Senate and the speakers of the parliamentary groups, however, in agreement with the chairman, it is possible that a member of the commission may be not a speaker, but any member of the parliamentary group, Standing orders of senate, article 185.

⁸⁸ Procedures for choosing other bodies.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Standing orders of the congress of deputies, article 204.

⁹⁴ Ibid.

⁹⁵ Gobierno de España, "Mariano Rajoy attends swearing in of Antonio Narváez as new Constitutional Court judge", Website of Spanish Government, available: <https://bit.ly/3eSfGQz>, updated: 04.06.2020.

⁹⁶ Ibid.

⁹⁷ Organic law 6/1985, Explanatory preamble, VI.

⁹⁸ General Council of the Judiciary, Website of the General Judicial Council, available: <https://bit.ly/3dxEe1e>, updated: 04.06.2020.

4.4. Italy

Censuses

A judge of the Constitutional Court is required to have 20 years of experience as a judge, university professor or lawyer.⁹⁹

Rule of Appointment

The composition of the 15-member court is based on the principle of balance of power between the branches of government. 5 members are appointed by the Parliament, which is bicameral and holds a joint sitting on this issue.¹⁰⁰ A person is elected by a 2/3 majority.¹⁰¹ Voting can be conducted three times.¹⁰² If it is impossible to collect 2/3 at a time, then 3/5 becomes enough for the fourth time.¹⁰³

5 judges are appointed by the President of the Republic.¹⁰⁴

The other 5 members are appointed by the judiciary, the highest bodies of the ordinary and administrative courts.¹⁰⁵ Of these quotas, 3 are appointed by the Supreme Court, one by the State Council,¹⁰⁶ and one by¹⁰⁷ the Audit Chamber¹⁰⁸.

⁹⁹ Constitution of the Italian Republic, article 135.

¹⁰⁰ The Italian Constitutional Court, Website of the Italian Constitutional Court, available: <https://bit.ly/308deBw>, updated: 04.06.2020.

¹⁰¹ Dengler, D. S. "The Italian Constitutional Court: Safeguard of the Constitution", Penn State International Law Review, 2001, Vol.19: No. 2, article 6., available: <https://bit.ly/2Boazcv>, updated: 04.06.2020.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Pegoraro L. "Between Europe and the Regions: The Difficult Governance of Italy", Institute of Law by David Batonishvili, 2016, p. 98.

¹⁰⁶ The State Council is an administrative-legal advisory body that oversees the implementation / administration of justice, Constitution of the Italian Republic, Title III - The Government, Section III Auxiliary Bodies, article 100.

¹⁰⁷ Note: The jurisdiction of the Audit Chamber includes preventive control over the activities of the executive / government, as well as control over the expenditure of the state budget, Constitution of the Italian Republic, article 100.

¹⁰⁸ Dengler, D. S. "The Italian Constitutional Court: Safeguard of the Constitution", Penn State International Law Review, 2001, Vol.19: No. 2, article 6., available: <https://bit.ly/2Boazcv>, updated: 04.06.2020.

4.5. Bulgaria

Censuses

Only a Bulgarian citizen can become a member of the Constitutional Court.¹⁰⁹ He/she must be highly professional and must have 15 years of experience working in the legal field.¹¹⁰

Rule of Appointment

The participation of all three branches of government in the staffing of a 12-member court is equal, they appoint judges independently.¹¹¹ One judge from each quota is changed every three years.¹¹²

Three months before the expiration of the term of office of an incumbent judge, the President of the Constitutional Court shall make a proposal to the persons authorized (President, Speaker of Parliament, Chairman of the Supreme Court), to appoint them to select or appoint the relevant judges.¹¹³

¹⁰⁹ Constitutional court act, article 4.

¹¹⁰ Constitution of the Republic of Bulgaria, article 147.

¹¹¹ Constitution of the Republic of Bulgaria, article 147.

¹¹² Composition, Website of the Constitutional Court of Bulgaria, available: <https://bit.ly/3cD4GW4>, updated: 04.06.2020.

¹¹³ *Ibid.*

5. SUMMARY

There are various mechanisms for balancing the branches of government in the composition of the Constitutional Court in the studied states. Finally it is difficult to formulate a common best practice. Every country tries to balance the branches of government with the staff of the Constitutional Court according to its own constitutional system. In Spain, for example, there are several steps to take before a final decision is made. Before the Senate chooses from among the candidates nominated by the Legislative Representation / Assembly of Autonomous Communities, it is natural to know about these candidates, which ensures the publicity of information and public awareness. In Lithuania, the decision is made by the parliament and the information about the candidates is published two weeks in advance. The Latvian example is one of the best in terms of nominating a candidate with a court quota, as members of the plenum usually know about the agenda and candidacy at least 7 days in advance.

The justice system in Georgia faces many challenges. Trust in common courts is very low.¹¹⁴ To remedy this, it is important that all procedures concerning the appointment of judges be as transparent as possible. Unfortunately, the current rules regarding the appointment of a judge of the Constitutional Court do not provide this.

The legislative reality of Georgia, in some cases, does not correspond to good practice, consequently changes are needed. After the nomination of a candidate by both the President and the President of the Supreme Court, a reasonable period of time is required before a candidate can be appointed to the position. This will enable both public debate on the candidate as well as civilian control over the appointment process.

¹¹⁴ Knowledge and Attitude of the Georgian Population towards the Judiciary: Results of the Population Survey, Human Rights Training and Monitoring Center (EMC), CRRC-Georgia, Institute for Development of Freedom of Information (IDFI), 2018, Website of EMC, available: <https://bit.ly/3heHffQ>, updated: 12.04.2020.