



Coalition

for an Independent and
Transparent Judiciary

10 YEARS OF JUDICIAL REFORMS: CHALLENGES AND PERSPECTIVES





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10 Years of Judicial Reforms: Challenges and Perspectives

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Introduction

Despite the numerous reforms implemented throughout the past decade, the Georgian justice system still faces fundamental obstacles and is undergoing a severe crisis of legitimacy and trust.

The 2012 change in government presented an excellent opportunity for substantial improvements. Locally and internationally, the initial stages of the reform were regarded favorably. On the ten-year anniversary of the reform commencement, however, the implemented legislative changes can be viewed as superficial attempts at institutional modernization of the judiciary, which failed to address the primary challenges of the Georgian context, namely the concentration of power and informal influences within the judicial system. Moreover, during the reform implementation process, the political system failed to adhere to the principal objectives of transforming the court into a democratic one. Instead, over time, it made concessions with the influential groups in the judicial corps regarding fundamental issues. Due to this process, the judicial system's corporatism and progressive dissent suppression made it challenging for the court as whole and individual judges to maintain their internal independence.

One of the most severe manifestations of the problems in the judicial system was the selection process of the Supreme Court of Georgia in 2018-2021, which took place against the background of intense public protests and critical international assessments. This process severely eroded public faith in the judicial system and the confidence of local civil and international organizations and international partners. Instead of accepting objective criticism and taking concrete measures, in December 2021, the Parliament of Georgia took another severe step and adopted a package of legislative changes in an accelerated manner, without public involvement and without consulting the judges, which, in parallel with reducing the guarantees of the independence of individual judges, further increased the power of the High Council of Justice. Accordingly, the internal corporatism and informal influences in the system were strengthened. The amendments mentioned above received particularly sharp criticism from the Venice Commission. As a result, several judges filed an appeal with Georgia's Constitutional Court, requesting that the amendments be declared unconstitutional.

International criticism of the judiciary also intensified along with the deterioration of the situation. In particular, Georgia received suggestions from the United States (in whose recommendations the influential group of judges is directly addressed) and from other countries regarding eradicating informal influences in the judicial system as part of the Universal Periodic Review (UPR)¹. In its 2020 opinion, the Venice Commission

¹ Universal Periodic Review – Georgia, 26 January, 2021, Available at: <https://bit.ly/3YQPYTU>; Accessed on: 12.04.2023).

noted that the issues the Georgian judiciary faces are exceptional and demand a very high level of transparency (which may not even be expected from courts in other countries).² Furthermore, in evaluating the legislative changes enacted in December 2021, the Commission emphasized that persistent and pervasive claims of corporatism and the domination of entrenched interests within the High Council of Justice may weaken public confidence in the judiciary. Thus, this issue should be treated seriously.³ The problem of informal influences in the court is also mentioned in the 2021 report⁴ of the United States State Department and the monitoring report on the implementation of the Association Agreement of the European Union.⁵

Hence, even though it has been ten years since the reforms began, the judiciary has become a closed, monolithic institution where dissent and genuine, objective debates are increasingly suppressed. The representatives of the judicial authorities are unwilling to discuss the concerns openly. And the High Council of Justice, due to the accumulation of excessive influence in its hands, has become the primary institution undermining the court's independence and is undergoing a severe crisis of accountability and transparency. Thus, a comprehensive appraisal of existing problems in the justice system and the pursuit of potential solutions remain on the agenda.

This document aims to identify and examine the main challenges in the legislation and practice governing the judicial system, which have been emphasized in the evaluations of local and international organizations working on judicial system issues throughout the years. Accordingly, the assessment does not consider the complete list of concerns in the direction of justice. Instead, it concentrates on key issues to the administration of the judicial system, the career and independence guarantees of individual judges, and the transparency and accountability of the judiciary. These issues lead to the consolidation of power within the justice system and the expansion of informal influences.

2 EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), OPINION ON THE DRAFT ORGANIC LAW AMENDING THE ORGANIC LAW ON COMMON COURTS Adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), Par. 18. Available at: <https://bit.ly/3xmLDMs> ; Accessed on: 12.04.2023).

3 EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), OPINION ON THE DECEMBER 2021 AMENDMENTS TO THE ORGANIC LAW ON COMMON COURTS, Adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), Par. 60. Available at: <https://bit.ly/3xiKCF0> ; Accessed on: 12.04.2023).

4 2021 Country Reports on Human Rights Practices: Georgia, 2021, Available at: <https://bit.ly/3XuVES8> ; Accessed on: 12.04.2023).

5 Association agreement between the EU and Georgia, European implementation assessment, issued by EPRS | European Parliamentary Research Service, 2022, p. 39. Available at: <https://bit.ly/3RYRoZZ>; Accessed on: 12.04.2023).

Main Challenges:

Corporatism and informal influences - the actions of administrative and self-government entities of the judicial system have more political weight and are utilized to illustrate the court's internal cohesion. The current institutional framework inside the court is less conducive to disagreements and substantial discussions. Only the same members of the influential group are typically elected/appointed to significant administrative positions, whereas other judges in the system have no opportunity to participate in judicial management.

Excessive power concentration within the High Council of Justice - the Council makes judgments on all crucial court issues in a manner that essentially eliminates the active participation of non-judge members and, consequently, effective public accountability. The Council is mainly responsible for staffing the judiciary, for instance. However, its disproportionate impact on the High School of Justice and the factors that determine the careers of judges impedes the system's ability to recruit new personnel. The unchecked power of the Council also prevents the decentralization of administrative authority within the court and the judges' real autonomy.

Insufficient guarantees of the independence of individual judges- Insufficient guarantees of the independence of individual judges and their adoption practices, which have worsened in recent years, pose a significant challenge. The new rules for judges' secondments established by legislative amendments of December 2021, the possibility of removing a judge from the ongoing cases in the event of the commencement of the disciplinary liability process, and the new, ambiguous regulation of disciplinary liability increase the risks of infringing on the independence of individual judges and endangering their freedom of speech. In addition, unduly implementation of the electronic system of case distribution and the unequal workloads of the judges generates additional incentives for improper use of the system and pressure on individual judges. In practice, judges are not actively involved in the court's self-governance. A clear example is the Conference of Judges. At the Conferences held in recent years, where the most significant decisions for the judicial system were taken, not only were there no dissenting viewpoints from the judges, but there were also no queries regarding the candidates or their perspectives.

The Lack of Transparency and Accountability in the System – The challenge to access court decisions is a clear manifestation of the closure and opacity of the current judicial system. The decision of the Constitutional Court of Georgia of June 7, 2019, by which the court, considering the standards of personal data privacy, established the standard of access to judicial acts, still needs to be enforced. This practice significantly violates the principles of transparency and public accountability of the judiciary, hinders public or interested parties' research of judicial course, complicates evidence-based substantive criticism, and ultimately reduces trust in the judicial system.

1. Arrangement/Organization of Common Courts

Georgia belongs to the group of post-Soviet governments where a judicial authority based on the self-governance of judges exists and where, for many years, the main objective of judicial reforms was to distance the court as much as possible from political governance. However, the outcomes of the reform made it clear that the challenges posed by internal factors within the court are just as significant as the external pressures that enhance corporatism and cronyism.

Within the current legal framework, the informal influences present in the common courts reflect on the activities of the primary structural units of court administration. To identify the problems of the justice system, the institutional shortcomings of the common court system should be tackled. The legal framework and practice of such important court bodies as the Conference of Judges, the High Council of Justice, the High School of Justice, and individuals with administrative powers of the courts – chairpersons, and deputies – are fundamental to the system's challenges.

1.1. Conference of Judges

The Conference of Judges is a self-governing body comprised of judges from the Supreme, Appeal, and District (City) Courts.⁶ According to the law, the Conference strengthens public confidence in the courts, enhancing judges' authority.⁷ Thus, the mandate and powers of the Conference should underline the significance of the judiciary autonomy and its independence from political control.

- Observations of recent years reveal that the Conference has become more politically charged and is primarily used to demonstrate the internal unity of the court.

Significant changes to the Conference of Judge's legislation came in the scope of the first wave of judicial reform. Much of it was about strengthening the self-governance of the courts and making the process more democratic.⁸ For example, the right to nominate candidates for elective offices was granted to any attending conference judge rather than just the Chief of the Supreme Court;⁹ also, voting on some issues became anonymous,

6 Organic Law of Georgia on “Common Courts”, Article 63, paragraph 1.

7 Ibid, paragraph 2.

8 S. Verdzeuli, Justice System Reform in Georgia (2013-2021), Georgian Young Lawyers' Association, Tbilisi, 2021, p. 25, Available at: <https://cutt.ly/1MIWQ3d> ; Accessed on: 12.04.2023).

9 Organic Law of Georgia on “Common Courts”, Article 65 paragraph 2.

increasing the guarantees for judges to make decisions in a free environment.¹⁰ However, despite the positive changes, some problematic issues remained in legislation and practice:

- If the candidates nominated at the Conference do not receive the support of two-thirds of those present, they are voted on again.¹¹ In this case, the quorum varies, and at least a quarter of the votes of the full composition of the conference is sufficient.¹² This record goes against the consensus-oriented approach and fails to bolster the principle of promoting high-consensus decisions.¹³
- As practice shows, the main problem in the work of the Conference of Judges is not the agreement of the different views of the individual judges but the lack of differences between them and their formal, automatic unity.

Nomination and Election of a Member of the High Council of Justice by the Conference

Per international standards, the selection of members of the High Council of Justice (judges or non-judges) should be based on their competence, experience, independence, and level of awareness of the judiciary principles.¹⁴ However, in recent years, observation of the judges' conference has revealed several problems:

- Any judge has the right to nominate a candidate for a seat on the Council, but in practice, only members of the influential group of judges have this right. Judges avoid competing against the people they nominate.¹⁵ The following observation supports this claim, in recent years, the number of nominated candidates always matched the available seats.¹⁶

10 Ibid, Article 66, paragraph 2

11 Ibid, Article 65 paragraph 5.

12 Ibid.

13 S. Verdzeuli, Justice System Reform in Georgia (2013-2021), Georgian Young Lawyers' Association, Tbilisi, 2021, p. 25

14 CCJE Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, 5 November 2021, Strasbourg, <https://cutt.ly/ENhmHT>; Accessed on: 12.04.2023).

15 N.Tsereteli, "Factors contributing to nepotism and cronyism in the judicial system", Georgia Court Watch, Available at: <https://cutt.ly/LMIJh59> ; Accessed on: 12.04.2023).

16 N. Nozadze, Monitoring Report of the High Council of Justice No. 10, Georgian Young Lawyers' Association of Georgia, Tbilisi, 2022, p. 10, available at: <https://cutt.ly/vMmyCME> ; Accessed on: 12.04.2023).

- Judges and the public generally do not know who the candidates are in advance. Once nominated, the candidates do not share their views and opinions on the challenges and achievements of the system with the conference on their own accord.¹⁷ Attending judges do not question them further; however, most support the nominated candidate in a non-competitive environment.

The formal nature of decisions made by the Conference of Judges is well illustrated by recent practice and the number of votes received by the nominated candidates.

The conference on 26 May 2021, where four judges were elected, was attended by 291 judges. The vote results were distributed: Badri Shonia – 281, Temur Gogokhia – 278, Gocha Abuseridze – 274, Levan Mikaberidze – 283.¹⁸ Of the 279 judges registered¹⁹ at the conference on 23 October 2022, 268 voted for Levan Murusidze, while 267 voted for Dimitry Gvritishvili. In both cases, there were exact candidates at the conference as vacancies on the board. Also, in none of the cases did the candidates present their views or opinions, nor did the judges at the Conference ask questions about their plans.

- In recent years, it has become a trend for a member of the Council to resign from his or her post on their own accord.²⁰ The general public is largely unaware of the reasons for their resignation, and even the judges present at the Conference do not ask any further questions.

At the conference on 23 October 2022, the Council member judges – Gocha Abuseridze and Giorgi Goginashvili, resigned from their positions on their initiative. Abuseridze was then elected as a member of the Disciplinary Chamber of the Supreme Court, which is incompatible with membership in the Council of Justice.²¹ However, it is unclear what led to the premature resignation of Giorgi Goginashvili. He served as a judge-member of the Council for about a year, and his term was due in 2025. In their position, the conference almost unanimously supported the choice of Levan Murusidze and Dimitri Gvritishvili.

From all those mentioned above, it is clear that the Conference of Judges has failed to establish itself as a mechanism that fosters trust in the system, strengthens the

17 Ibid.

18 Ibid.

19 “XXXI Conference of Judges”, official website of the High Council of Justice of Georgia, October 23, 2022, available at: <https://cutt.ly/EMmgEe7> ; Accessed on: 12.04.2023).

20 At the conference of October 31, 2021, as well as the conference of October 23, 2022, a portion of the Council's judicial members resigned early, citing personal reasons.

21 The Organic Law of Georgia “On Common Courts” Article 47 Paragraph 4.

individual judge, and promotes the pluralism of opinions in the system. Moreover, despite legal guarantees, this crucial body of judicial self-government eventually became a conduit for consolidating informal influence within the judicial system. Good examples of this are the non-competitive environment at the conference and the practice of electing the members of the collegiate body without healthy discussion and disagreement.²²

1.2. The High Council of Justice

The idea of creating judicial councils is mainly to distance the judiciary from the political branches of government and thus increase its independence. The model of collegial governance of the judiciary, where judges play a leading role in the decision-making process, has enjoyed significant support from international actors for a long time, especially in the post-Soviet states.²³ Recently, however, problems in the justice system in various countries have called into question the legitimacy of this model.²⁴ Criticism has been mainly directed at the issue of the independence of individual judges from internal influences and, in the context of the increasing power of the judiciary, the lack of accountability.²⁵

As in most post-Soviet countries, the main body for the administration of the judiciary in Georgia is the High Council of Justice, which has a constitutionally defined statute and decides on all important issues in the system (selection-nomination of judges, transfer without competition, promotion, discipline). So, given the formal powers concentrated in the Council, that's where we find the bulk of the problems in the justice system and the internal influences.

Significant and positive changes to the composition of the Council were introduced in the first wave of judicial reform: the possibility of nominating candidates for judge-members of the Council to any member of the Conference of Judges, while the power to

22 Coalition Responds to the XXXI Conference of Judges, 25 October 2022, available at: <https://cutt.ly/nMmzfc0> ; Accessed on: 12.04.2023).

23 S. Verdzeuli, "Reform of the Justice System in Georgia (2013-2021)", Georgian Young Lawyers' Association, Tbilisi, 2021. p. 10.

24 CCJE Opinion No. 24 (2021): Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, Consultative Council of European Judges, 5 November 2021, para. 9, Available at: <https://cutt.ly/qMSxAQQ> ; Accessed on: 12.04.2023).

25 S. Verdzeuli, "Reform of the Justice System in Georgia (2013-2021)", Georgian Young Lawyers' Association, Tbilisi, 2021. p. 10.

elect was given exclusively to the Conference of Judges;²⁶ the legislation prohibited the election of the Chairman of the Court, the First Magistrate/Deputy,²⁷ as a member of the Council; the limitation of the number of chairs of the Panel and Chamber was imposed, and their number was set at 3.²⁸

In the later stages of the reform, the growth of informal influences within the judicial system and the tendency for judges in administrative positions to return to power became noticeable. One example of this is the change in the third wave of judicial reforms, which removed the restriction on the choice of court²⁹ chairpersons as members of the Council while retaining the power to appoint them.

As a result, several waves of judicial reform failed to ensure broad judiciary representation in the High Council of Justice and establish a healthy working process. Moreover, the legislative amendments of December 30, 2021, which lifted the ban on the same person being elected to the Council twice in a row, aimed to strengthen this body and its informal influence.³⁰ It is also worth noting the prevailing practice over the years that the same judges have held the same managerial positions in the court. Given all the above, there has been growing criticism from local civil society and international organizations of the legislation and practice conferring powers on the Council in recent years.³¹

The Venice Commission, in its conclusion of 2020, emphasized that the context of Georgia is unique because, due to its history, the High Council of Justice failed to gain public trust and recognition.³² The Venice Commission was particularly critical in assessing the December 2021 legislative amendments. The conclusion highlighted years of criticism from the public and the civil sector about corporatism and the flawed

26 The Organic Law of Georgia “On Common Courts” on Amendments to the Organic Law of Georgia, 20/05/2013, 580-II.

27 Ibid.

28 Ibid.

29 Organic Law of Georgia “On Common Courts” Article 47 Paragraph 4.

30 Coalition Responds to Expedited Review of Organic Law “On Common Courts” Amendments, December 28, 2021, available at: <https://cutt.ly/HMCSxyj> ; Accessed on: 12.04.2023).

31 N. Nozadze, “Distribution of clan members to managerial positions in the narrow circle-court”, Georgian Young Lawyers’ Association, Tbilisi, 2021, available at: <https://cutt.ly/2ByqsRt> ; Accessed on: 12.04.2023).

32 European Commission for Democracy Through Law (Venice Commission), Opinion on the draft organic law amending The Organic Law on Common Courts, Strasbourg, 8 October 2020, Opinion No. 1001/2020, the official website of Council of Europe, para. 18, Available at: <https://bit.ly/34HKVKH> ; Accessed on: 12.04.2023).

practices of cronyism in the Council. The Commission reaffirmed the importance of considering the context when assessing judicial reforms.³³

As informal influence in the judiciary, especially in the Supreme Court, has increased, the emphasis has shifted from external independence to internal influence in U.S. State Department reports over time. For example, while the U.S. State Department concluded in 2012 that external influences on the judiciary were a significant problem,³⁴ the 2020 report focuses more on internal challenges.³⁵ The 2019 report also discusses the informal influence in the court, especially in the Council, the tendency of these influential people to suppress critical opinion, and the delay in initiatives to strengthen the court.³⁶

The Decision-Making Process and Lack of Involvement of Non-Judicial Members

The decision-making procedure plays an important role in the functioning of the Council. As mentioned, in this model of collegial governance of the judiciary, judges play a central role in the decision-making process, as there are nine judges out of 15 members. Thus, the Board consists of 6 non-judge members, whose presence here should, as a rule, ensure the Court's transparency, accountability, and public involvement in its activities. But the reality is different.

- The existing rule of decision-making by the Council on key issues (appointment/promotion of judges, imposition of disciplinary responsibility, etc.) by a 2/3 majority minimizes the influence of non-judge members on this process. Nevertheless, the existence and functioning of informal influence in the judicial system, especially in the High Council of Justice, are significantly dependent on this arrangement since the judge members (in the case of a union) need only one non-judge member to pass a decision.

The legislative arrangement of the Council's decision-making and the practice of its activities testify to the vital importance of appointing honest, competent, and politically

33 Opinion on the December 2021 amendments to the Organic Law on Common Courts, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), CDL-AD (2022)010-e Georgia, paras. 61, 81. Available at: <https://bit.ly/3tSfb3a> Accessed on: 12.04.2023).

34 2012 Country Reports on Human Rights Practices: Georgia, U.S. Department of State (available at: <https://bit.ly/3XlIN60>; Accessed on: 12.04.2023).

35 2020 Country Reports on Human Rights Practices: Georgia, U.S. Department of State, Available at: <https://bit.ly/3YNNKEO> ; Accessed on: 12.04.2023).

36 Georgia 2019 Human Rights Report, U.S. State Department, 2019, p. 13, Available at: <https://bit.ly/39wo8FK> ; Accessed on: 12.04.2023).

neutral individuals to the post of non-judge members, in whom there is high public confidence and broad political consensus. The participation of such persons in the work of the Council will contribute significantly to the existence of different and critical thinking, increase the quality of public information and create more opportunities for their genuine involvement in the vital decision-making process.³⁷

For example, in 2013, when the parliament elected four non-judge members to the Council, the practice of voicing dissident views emerged from these individuals. Although the non-judge members were not the decision-making force, they helped to ignite discussions at the council meetings on important issues in the system. Interestingly, the opinions of non-judges tended to conflict with those of the judges.³⁸ However, in the following years, this dynamic gradually changed, and the positions of individual non-judge members of the Council increasingly coincided with those of the judges.³⁹

Additionally, a significant achievement of the 2017 constitutional amendments was the election of non-judge members based on a contest, by anonymous voting, with the support of at least three-fifths of the full composition of the Parliament.⁴⁰ Such a decision-making system requires political consensus and limits the possibility of one-party decisions. However, the practice of parliamentary election of non-judge members of the High Council of Justice shows that political consensus on this issue is often difficult to achieve. The position of five non-judge members to be elected by Parliament has been vacant since June 2021, which the ruling party attributes to the difficulty of striking an agreement with the opposition.

Involvement of Individuals in Administrative Positions in Council Activities

In the initial round of judicial reforms enacted in 2012, the law prohibited the election of the High Council of Justice members who held administrative positions. However, today, the legislation no longer imposes such a stringent restriction. According to the current law, no more than half of the members of the Council can be the Chairman of the Court, its Deputy, or the Chairman of the Judicial Chamber/Panel.⁴¹

37 Coalition for Independent and Transparent Judiciary, A New Perspective on Judicial Reform, June 21, 2021, available at: <https://cutt.ly/oUoGLNr> ; Accessed on: 12.04.2023).

38 A. Natsvlishvili, st. Mezvrishvili, High Council of Justice Monitoring Report N3, Georgian Young Lawyers' Association, Transparency International Georgia, Tbilisi, 2015, p.10. Available at: <https://tinyurl.com/ycujrybp>

39 E. Tsimakuridze, St. Mezvrishvili, Monitoring Report of the High Council of Justice N4 Report, 2016, p.15, available at: <https://tinyurl.com/5texvyrv> ; Accessed on: 12.04.2023).

40 Organic Law of Georgia "On Common Courts" Article 47 Paragraph 5.

41 Ibid.

- In practice, the restriction of electing persons holding administrative positions in the court as members of the Council is interpreted differently, and the so-called "Chairman's Quota" is always filled.

For example, after the election of Dmitry Gvritishvili at the Conference on October 23, 2022, 2 out of 4 judges (half of the Council members elected by the Conference) are the chairman of the Tbilisi City Court's collegium, and 2 – Chairman of the Chamber of the Court of Appeal.⁴²

The Lack of Regional and Gender Representation

One of the positive changes of the fourth wave of judicial reform is the legislative amendment, according to which at least one of the judicial members of the Council must represent the court of each instance.⁴³ However, the procedure for staffing the High Council of Justice does not consider the so-called "Regional quotas."

Currently, out of 8 judge members of the Council, two are from the Supreme Court, three from the first instance, and three from the Court of Appeals.

- Apart from Tbilisi, no other regional courts are represented in the Council, even though regional courts make up most of the judicial system.
- The makeup of the High Council of Justice does not ensure gender representation.

The majority of judges in the judiciary are women, although:

- Since 2013, the Conference has elected 22 male and 5 female members to the Council;
- Only two of the nine judge-members of the Council are women.⁴⁴

Furthermore, interestingly, in 2017, seven judges were nominated when there were four vacant seats on the board. Out of the seven, only one was female. In the end, the Conference elected four male members. However, we can positively evaluate the election of two female judge members to the Council in 2020. In 2021, however, the situation deteriorated once again as the Conference of Judges replaced both female judge members with male ones (female judges submitted letters of resignation).⁴⁵

42 Paata Silagadze, Dimitri Gvritishvili, Badri Shonia, Temur Gogokhia.

43 Organic Law of Georgia "On Common Courts" article 49, paragraph 2.

44 One of the two is the Chairman of the Supreme Court, Nino Kadagidze, who is ex officio member of the Council.

45 N. Nozadze, Monitoring Report of the High Council of Justice No. 10, Georgian Young Lawyers' Association, Tbilisi, 2022.

1.3. The High School of Justice

Another critical component of the justice system is the High School of Justice, which is mainly responsible for providing the inflow of new professionals and the quality of justice.⁴⁶ Therefore, the School's institutional independence and effective functioning are vital to the court's staffing.⁴⁷

With the changes made in the 4th wave of judicial reform, the role of the Chairman of the Supreme Court in electing the members of the school's independent board was limited, and this power was transferred to the High Council of Justice and the Conference of Judges. On the surface, these revisions were supposed to make the professional training of judges and the recruitment of new personnel more democratic. In light of the existing practice of decision-making by the Council and Conference of Judges, serious concerns exist regarding the School's independence and efficacy.

Institutional Independence of the High School of Justice and the Dominant Role of the High Council of Justice

- Despite the reforms, the High Council of Justice still holds a dominant position in the functioning of the High School of Justice, which is another notable example of the concentration of power in the hands of the Council. The Council's overly formal influence over the Independent Board, the school's primary governing body, is particularly noteworthy.

In particular, according to the legislation, the Independent Board coordinates the school's activities and approves the statutes and the budget.⁴⁸ The Board decides to admit or expel a person as a student from the School. However, the excessive power of the High Council of Justice is clearly seen in the composition of the Independent Board. In particular, out of the seven members of the Board:

- 2 members (1 Judge and 1 non-judge member) are appointed by the High Council of Justice from its members.⁴⁹

46 Organic Law of Georgia "On Common Courts" Article 34 Paragraph 1.

47 S. Verdzeuli, "Reform of the Justice System in Georgia (2013-2021)", Georgian Young Lawyers' Association, Tbilisi, 2021, p. 21.

48 The Organic Law of Georgia "On Common Courts" Article 633 Paragraph 1.

49 Ibid, paragraph 4 of Article 633. This change was included in the organic law within the framework of the fourth wave. Before the changes, the chairman of the independent board of the school was elected by the conference of judges.

- Two additional members are appointed by the High Council of Justice by academic quota.⁵⁰
- The remaining three members of the Independent Board are elected by the Conference of Judges.⁵¹
- The Chairman of the Independent Board is elected by the High Council of Justice by a simple majority of the votes cast from among the three members chosen by the Conference.⁵²

As a result, the school's Independent Board is largely composed of members elected by the High Council of Justice, and its chairman is appointed by the Council.

Along with the legislative arrangements, staffing the Independent Board is also interesting. For example, in 2021, the Conference of Judges elected Dimitri Gvritishvili as a member of the Board, later appointed by the High Council of Justice as the same board's chairman. A year later, in November 2022, Gvritishvili left the position of chairman, as this time, the Conference of Judges elected him as a member of the High Council of Justice. For two more members, Sergo Metofishvili and Khatia Ardazishvili, the terms of the office expired in September 2022. On October 23, 2022, the Conference of Judges elected Giorgi Mikautadze, Irakli Shengelia, and Vasil Mshvenieradze to the 3 vacant positions. They were members of the High Council of Justice in previous years.

Thus, the legislation and practice of establishing the Independent Board of the High School of Justice is just another illustration of the High Council of Justice's uneven and excessive concentration of power.

Lastly, the rule governing the decision-making process of the Independent Board is also problematic. In particular, a meeting of the Board is authorised if a majority of its whole composition is present. Accordingly, the Board shall act by a majority of the votes of the members present at its meeting, and in the event of an equal distribution of the votes, the vote of the Chairman shall be decisive.⁵³

- The rule of decision-making in the Independent Board indicates that the transfer of the selection of School students from the High Council of Justice to the School is only formal, and the High Council of Justice again controls the selection process of students in the School.

50 Ibid.

51 Ibid, paragraph 4 of Article 63³.

52 Ibid., paragraph 5. Also, paragraph 2 of Article 50.

53 Ibid., paragraph 4 of Article 66⁵.

The Ineffectiveness of the High School of Justice

As noted, the High School of Justice holds the competition for the students,⁵⁴ although the High Council of Justice decides to hold the competition.⁵⁵ Nevertheless, before the announcement of the competition, the Council will submit to the School the total number of students who will be admitted for approval based on the number of vacancies identified within the system.⁵⁶

Observations on the practice show that the activities of the High School of Justice are less effective in the process of recruiting new staff, which is due, on the one hand, to the lack of institutional independence from the High Council of Justice and, on the other hand, to the scarcity of resources and lack of openness.

- Today, there are up to 100 vacant places available for judges in the common court system, but there was no students' acceptance process initiated neither in 2021 or 2022;
- For years, the School could not provide training for more than 20 students at a time. According to the Council, the school's limited resources are the reason for such a low number;
- The High Council of Justice has jurisdiction to announce a competition. Therefore, it can artificially hinder the entry of new personnel into the system because, for a candidate with no judicial experience, school is the only way to enter the system.
- A lack of interest in job openings is another issue. One of the most recent competitions demonstrates this, as just 13 of 42 positions were filled.⁵⁷ Twenty-one applications were filed for the 76 judicial openings announced on November 25, 2022.

A couple of factors could be the reason for the lack of interest:

- The amount of scholarships allocated for schooling is not attractive to qualified staff;
- The school is not open to interested outsiders. The practice has shown that the training is mainly attended by internal court staff (assistants, secretaries);
- Successful school completion is not a guarantee of appointment as a judge, as the High Council of Justice decides on the subsequent stages.

54 Ibid., Article 66¹⁴.

55 Ibid., Article 66¹² Paragraph 2.

56 Ibid., Article 66¹⁵.

57 N. Nozadze, Monitoring Report of the High Council of Justice No. 10, Georgian Young Lawyers' Association, Tbilisi, 2022, p. 16.

1.4. Chairmen of the Court Chambers and Panels

For many years the subject of civil organizations' protests has been legislative rule and practice regarding the appointment and activities of court chairpersons. Given the concentration of power in the hands of the High Council of Justice and the pervasive informal influence prevalent in the judicial system, the chairpersons of individual courts are viewed as agents of informal influence.

Firstly, it should be noted that judges with administrative functions have significant privileges when conducting their judicial duties. For instance, despite a severe problem with case overcrowding, the law stipulates a low workload percentage. Moreover, the chairpersons of the panel/chamber of courts, who simultaneously hold the High Council of Justice member position, are excluded from judicial activities.⁵⁸

The fact that the same individuals hold the office of chairman in many courts indicates its prestige and attractiveness, as well as the influential group's keen interest in it. Moreover, they alternate in these positions, thus denying other judges the opportunity to participate in the management of the court⁵⁹. Thus, the institution of the chairman continues to be one of the most difficult challenges of the judicial system.

Problems Associated with the Appointment of Chairpersons

Despite continuous criticism, the system for appointing chairpersons has changed little throughout the years. The initial draft of the third wave of judicial reform called for the election of chairpersons by judges. In the end, however, this part was omitted from the bill.⁶⁰ Nowadays, the High Council of Justice appoints the chairpersons of the court's panels/chambers for a five-year term, beginning with forming the respective chamber and panel.⁶¹ When there is a vacancy for the position of chairman, the application is posted on the court's internal network, but no clear selection criteria are established. In addition, the Council decides on this matter through a vote of the majority of its full

58 Regarding the workload of judges, see "2.4. – Distribution of cases and workload of judges".

59 N. Nozadze, "Narrow circle – distribution of clan members to managerial positions in the court", Georgian Young Lawyers' Association, Tbilisi, 2021.

60 N. Nozadze, Monitoring Report of the High Council of Justice No. 8, Georgian Young Lawyers' Association, Tbilisi, 2020, p. 44, the website of the Georgian Young Lawyers' Association, available at: <https://bit.ly/3qTcutK>; Accessed on: 12.04.2023).

61 Organic Law of Georgia "On Common Courts" Article 23 Paragraph 6.

composition.⁶² According to the fourth wave of judicial reform's legislative revisions, the High Council of Justice should present a reasoned position when assigning a judge to the chairperson/deputy of the court and consults with the relevant court's composition before selecting the chairperson of the court.⁶³

As evidenced through observation of current practice,

- The process of selecting chairpersons is generally undertaken in an environment devoid of competition;
- Typically, the Council does not even interview if there is just one applicant nominated (this practice has not changed in recent years);
- The practice of holding consultations with judges is also inconsistent (sometimes it takes place in an open session, and sometimes it takes place in a closed session), which, given the need to justify the Council's decision to appoint the chairman, cannot achieve the goal of enhancing public confidence in the system.

For instance, on August 11, 2020, the council reviewed Vasil Mshvenieradze's candidacy for the position of Kutaisi Court of Appeal chairman.⁶⁴ Consultations were held in a closed format, while during the appointment of the chairpersons of the district courts of Akhaltsikhe, Khelvachauri, and Gurjaani, consultations with the judges of the respective courts were held in an open session.⁶⁵

During the pandemic, consultations with the relevant court's judges were conducted remotely, online.⁶⁶ The board chairman inquired about the judges' support for the nominee and urged them to record dissenting opinions, if any.⁶⁷ The responses were homogeneous. Judges put primary emphasis on the candidate's vast judicial experience.⁶⁸ Thus, it is apparent that the consultation procedure with judges cannot ensure the impartial appointment of chairpersons. One example is the reappointment of Mikheil Chinchaladze as the head of the Tbilisi Court of Appeal for the second time in succession.⁶⁹ The attendance of 53 judges from the Tbilisi Court of Appeals for consultation was more

62 Ibid., Article 50.

63 Ibid.

64 N. Nozadze, Monitoring Report of the High Council of Justice No. 9, Georgian Young Lawyers' Association of Georgia, Tbilisi, 2021, p. 23, available at: <https://cutt.ly/QA5FwMf>; Accessed on: 12.04.2023).

65 Ibid.

66 Ibid.

67 Ibid.

68 Ibid.

69 Record of the meeting of the High Council of Justice of Georgia on June 27, 2022.

of a show of force than an effort to evaluate the candidate's managerial abilities. The Council members did not ask Mikheil Chinchaladze any pertinent questions considering he did not have an opponent in the process.

Rotation on Administrative Positions

The problem of rotation of key posts is another important dimension of the chairmanship institution. Specifically, observation on practice demonstrates that the more important the post, the greater the desire to select a judge who is a member of an influential group for the mentioned position. Thus, certain judges within the system hold crucial administrative posts permanently and for an extended period:

- Chairman of the Tbilisi Court of Appeal – Mikheil Chinchaladze, and his deputy – Irakli Shengelia, have been holding managerial positions since 2007;
- Vasil Mshvenieradze, chairman of the Tbilisi City Court, has been in a leadership position since 2008.
- Irakli Bondarenko, the chairman of the Court of Appeal of Kutaisi, has also held a continuous administrative post since 2011.
- Mamia Pkhakadze, chairman of the Rustavi City Court, has been in a leadership position since 2007.⁷⁰

70 N. Nozadze, “Distribution of clan members to managerial positions in the narrow circle-court”, Tbilisi, 2021

2. Individual Judges' Careers, Responsibilities, and Assurances of Their Independence

It is crucial to ensure the individual judge's independence and impartiality, as well as the independence of the administration of the system, to ensure an independent and impartial judiciary as a whole. However, according to the existing constitution and laws, the entities responsible for court administration, particularly the High Council of Justice, can considerably impact a judge's career progression and independence. Hence, in addition to the legislative framework, informal influences inside the court, on the part of those who nominate judges and their promotion, secondment, and disciplinary responsibilities, generate numerous chances to influence an individual judge.

2.1. Appointment (Selection) of Judges

The issue of the selection and appointment of judges, vital for the healthy functioning and legitimacy of the judicial system, remains inadequately governed by legislation despite multiple rounds of judicial reform. Furthermore, the legislative structure and practice of the appointment (election) of judges and the powers granted to the High Council of Justice on this subject and their practical application are problematic. In addition, the practice of appointing judges on a probationary basis remains relevant. Therefore, the method of appointing/electing judges in all three instances of common courts cannot enjoy a high degree of public confidence.⁷¹

2.1.1. Appointment of Judges in Courts of First and Second Instance

- The fact that the Council has exclusive control over the appointment/promotion of judges in the first and second instances poses the most significant challenge in this process.

71 According to the results of the public opinion survey conducted by CRRC Georgia for NDI, the performance of the courts was assessed as “good” by only 10%, as “average” by 29% and as “poor” by 45% and in 2019 By November of the year, it reached the maximum rate (counted from February 2012), p. 50 (survey results are available at: <https://bit.ly/3BERsXo>); Accessed on: 12.04.2023). According to a survey performed by the International Republican Institute (IRI) in September 2022, 37% of the public has a favorable opinion of the courts, while 63% have a favorable opinion of the police and 39-54% have a favorable opinion of the political institutions of government. , p. 27 (survey results are available at: <https://bit.ly/3lw1jdA> ; Accessed on: 12.04.2023).

The process of appointing judges is governed almost entirely by the Council.⁷² At the same time, it has the liberty to choose whether to announce a competition for vacant positions, examine candidates' preparedness, and make the final determination regarding their appointment.

- In light of the Council's preponderant role in appointing judges to the courts of first and second instance, the issue of the non-judge members' lack of decision-making authority and inaction becomes particularly apparent. This is owing to the Council's norm requiring a 2/3 majority for such decisions.

Consequently, unlike the Supreme Court, the appointment of judges in the lower courts, which is one of the primary opportunities to revive and improve the court system, is practically exclusive, does not account for tangible public representation, and creates favorable conditions for the maintenance of the system's internal, malignant influences.

Candidate Evaluation

As a result of the legislative amendments enacted as part of the third wave of judicial reform, judges are recruited based on two primary criteria: integrity and competence.⁷³ Although the fundamental aspects of both criteria are outlined in the organic law,⁷⁴ the procedure of evaluating judicial candidates fails to meet the need for objectivity and openness, leaving the High Council of Justice susceptible to biased judgments. In particular:

- In contrast to the competency criterion, the candidate's integrity is not assessed using a point system, and its assessment characteristics are vague and generic. Such a framework gives the board considerable latitude and the opportunity to conduct subjective evaluations;
- More than half of the entire composition of the Council must determine that the candidate for the judge position meets or fully meets the requirement of good faith for the vote to occur. In addition, when evaluating the candidate based on the competency criterion, the candidate's total score must be at least 70% of the highest possible score. Hence, if there is no valid rationale for the Council's decision on the

⁷² Article 35 of the Law of Georgia "On Common Courts"; Also, Decision N1/308 of October 9, 2009 of the High Council of Justice of Georgia "On Approval of the Rules for Selection of Judicial Candidates", is available at: <https://bit.ly/3Y6k2uo> ; Accessed on: 12.04.2023).

⁷³ Article 35¹ of the Organic Law of Georgia "On Common Courts".

⁷⁴ Ibid.

good faith criterion, candidates who cannot meet this criterion are disqualified and cannot go to the voting phase.

- At this time, the legislation does not permit an appeal of the Council's decision on disqualifying a candidate from the competition.⁷⁵ In particular, during voting, the person's name and surname will simply not be included on the list of candidates on the special card (bulletin). Hence, indicating the candidate's instant disqualification, the Council is not required to justify its decision, which is not subject to appeal.

Candidate Interviews

In the process of selecting candidates for the position of judge in courts of first and second instance, we also confront difficulties during the interview phase. It is troublesome in terms of the process's transparency and predictability that:

- Contrary to the principle of open discussion and decision-making by a collegial body, the High Council of Justice conducts interviews with prospective judge candidates in closed sessions.⁷⁶ It is mainly true that candidates grant permission for the interview process to be made public, but this is contingent upon the exercise of each candidate's right.

Considering the public's participation in selecting judges for the Supreme Court in recent years, it has become apparent that public interest in the judicial selection process is fairly high. Hence, the public and interested parties at the legislative level should be able to monitor the process and obtain information regarding how each candidate for the position of judge appeared before the council, what questions council members asked them, etc. However, at present, it is nearly impossible for the public to participate in this process when interviews are conducted in a closed setting, which severely diminishes public confidence in the process and the judiciary in general.

In 2018, on behalf of the Coalition for Independent and Transparent Judiciary, "Georgian Democratic Initiative" (GDI) petitioned the Constitutional Court⁷⁷ to declare the regulations that mandate conducting interviews with judicial candidates in closed sessions unconstitutional. The Constitutional Court has not yet decided on this case.

⁷⁵ Only the Council's decision to refuse appointment to the position of a judge for a period of 3 years or for life can be appealed to the Chamber of Qualification of the Supreme Court.

⁷⁶ Clause 2 of Article 127 of the Decision of the High Council of Justice of Georgia dated October 9, 2009 No. 1/308 "On Approval of the Rules for Selection of Judicial Candidates".

⁷⁷ "Democratic Initiative of Georgia" against the High Council of Justice of Georgia, constitutional lawsuit N1334 (available at: <https://bit.ly/3XUV15k> ; Accessed on: 12.04.2023).

2.1.2. Probationary Appointment

The current statute provides for appointing district (city) or appeals court judges for a probationary period, equating to appointing a judge for a 3-year period.⁷⁸ Then, as the judge's term expires, the High Council of Justice evaluates his or her performance and decides whether to permanently appoint him or her to the office. Both judge and non-judge members of the Council, who are selected by lot, are involved in the evaluation process.⁷⁹

The existence of the probationary period, the judge's review mechanism in this process, and the system for evaluating their lifetime appointment are flawed and pose a significant threat to the judge's independence. In particular:

- Establishment of a probationary period for judges, considering informal influences in the judicial system, provides the Council with significant leverage to affect the independence of judges.
- The organic law does not specify how the High Council of Justice should elect its evaluating members or how those members should exercise their authority. Yet, the law mandates that the judge be informed of the identity of his assessors and, if necessary, be given the possibility of avoidance.
- During the probationary phase, the procedure of evaluating judges is not sufficiently objective and transparent; it is unclear what information or sources are used to evaluate each judge. Thus, there may be disparities in the approaches of individual judges;
- The High Council of Justice may not vote on the subject of a judge appointed on a probationary basis being appointed for life. In particular, *“If, when assessing a judge based on the integrity criteria, more than half of the evaluators consider that the judge fails to meet the integrity criteria, and/or the sum of the points gained by the judge based on competence criteria does not make up 70% of the maximally available points”*, the High Council of Justice refuses to discuss the matter. The legislation does not provide for the obligation to justify the said decision,⁸⁰ although it can be appealed, only once again, to the council. Furthermore, the Council decides without consulting the judge. Thus, the judge is unable to express his/her position/explanation during this process;

78 Paragraph 4¹ of Article 36 of the Organic Law of Georgia “On Common Courts”.

79 Ibid, paragraph 4¹ of Article 36.

80 According to Article 364, Clause 13 of the Organic Law of Georgia “On Common Courts”, in such a case, “the Chairperson of the High Council of Justice of Georgia shall issue a legal act on the refusal by the High Council of Justice of Georgia to review the indefinite appointment of the judge to office”.

- Evaluation documents for a judge on probation are not available to the public. The release of such documents would significantly increase public confidence in the process of appointing judges for life and provide legitimacy to the selection of each judge.

The practice of appointing judges for a probationary period has been criticized repeatedly by the Venice Commission.⁸¹ The Commission noted that “*setting probationary periods can undermine the independence of judges since they might feel under pressure to decide cases in a particular way*” and called on the Parliament of Georgia to completely remove such a procedure from the legislation.⁸² According to the recommendation of the OSCE ODIHR, “*The HCOJ should develop regulations to complement provisions on monitoring and evaluation of judges on probation in the Law on Common Courts, should the probation period be retained in the law, taking into consideration recommendations on performance evaluation as established by international standards on judicial independence and accountability*”.⁸³

2.1.3. Nomination of Supreme Court Judges

The staffing process of the Supreme Court of Georgia in 2018-2021 remains to be one of the most serious manifestations of the problems in the judicial system, severely undermining public confidence in the judiciary, as well as that of local civil⁸⁴ and

81 CDL-AD (2010)028, Venice Commission, FINAL OPINION ON THE DRAFT CONSTITUTIONAL LAW ON AMENDMENTS AND CHANGES TO THE CONSTITUTION OF GEORGIA, Opinion no. 543/2009, Strasbourg, 15 October 2010, para. 85-91, Available at: <https://bit.ly/3JvD3ly>; Accessed on: 12.04.2023). CDL-AD (2014)031, Venice Commission, JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE OF HUMAN RIGHTS (DHR) OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE ON THE DRAFT LAW ON AMENDMENTS TO THE ORGANIC LAW ON GENERAL COURTS OF GEORGIA, Opinion N° 773 / 2014, Strasbourg, 14 October 2014, para. 30- 33, Available at: <https://bit.ly/40hnrzx>; Accessed on: 12.04.2023).

82 Ibid., para. 32.

83 OSCE Office for Democratic Institutions and Human Rights (OSCE ODIHR), “Trial Monitoring Report,” December 9, 2014, para. 56, available at: <https://bit.ly/3lYadRm>; Accessed on: 12.04.2023).

84 The Coalition’s Address to the Parliament, 27 December 2018 (Available at: <https://bit.ly/3Jvi6XY>; Accessed on: 12.04.2023); The Coalition’s letter to the Venice Commission and OSCE/ODHIR on the draft law on selection of Supreme Court justices, 25 March 2019 (Available at: <https://bit.ly/40h4Dcm>; Accessed on: 12.04.2023); The Coalition is assessing the ongoing process of selection of Supreme Court judicial candidates, 17 July 2019 (Available at: <https://bit.ly/3HOCdzc>; Accessed on: 12.04.2023); The Selection of Candidates for the Supreme Court Judges is Arbitrary and Unfair, 24 June 2021 (Available at: <https://bit.ly/3DsEttm>; Accessed on: 12.04.2023); The Coalition criticizes the appointment of Supreme Court judges, 02 December 2021 (Available at: <https://bit.ly/3Jx1hff>; Accessed on: 12.04.2023).

international organizations and international partners.⁸⁵ The election of the absolute majority of the current Supreme Court members (25 out of 28) took place in three stages,⁸⁶ amidst intense public protests and critical international assessments, following the implementation of the 2017 constitutional amendments that established the Supreme Court with 28 members.⁸⁷

The legislative regulation of this procedure was enacted during the same time;⁸⁸ however, the Parliament adopted these revisions gradually, in some cases initially dismissing (and then partially considering) the recommendations issued by international organizations.⁸⁹ As with other aspects of the judicial reform, these changes were primarily concerned with correcting existing procedural flaws to the extent that they did not have a transformative effect on the interests and capabilities of the majority in power in the court and did not alter the rules of decision-making based on majority rule rather than consensus.⁹⁰

Notwithstanding procedural improvements, it is evident that the Supreme Court of Georgia's staffing remains one of the most problematic issues to date. This issue is included

85 Statement of the Embassy of the United States of America, December 21, 2019, Available at: <https://bit.ly/3YafeUE>; EU External Action Service Spokesperson's Statement on the Confirmation of Supreme Court Judges, 13 December 2019, available at: <https://bit.ly/3JsHnIP>; Statement by the EU External Action Service Spokesperson on the Selection Process for Supreme Court Judges, April 7, 2021, available at: <https://bit.ly/3kPc3TS>; PACE Monitoring Committee Rapporteurs Regret Appointment of 14 Judges, 13 December 2019, Available at: <https://bit.ly/3l1BLox>; According to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) report, political infighting threatens the independence of Georgia's Supreme Court judicial appointment process, January 9, 2020, available at: <https://bit.ly/3jnUQAaw>; OSCE Office for Democratic Institutions and Human Rights (OSCE ODIHR) – Fourth Report on the Nomination and Appointment of Supreme Court Judges in Georgia, August 2021, available at: <https://bit.ly/3JANJPY>; Accessed on: 12.04.2023).

86 The Parliament of Georgia elected 14 judges of the Supreme Court of Georgia on July 12, 2019, 6 judges on July 12, 2021, 4 judges on December 1, 2021, and 1 judge on December 29, 2021.

87 Constitution of Georgia, Article 61, paragraph 2.

88 The legislative regulation of the selection of judges of the Supreme Court of Georgia was implemented in 3 main stages: on May 1, 2019 (Organic Law of Georgia “On Common Courts” on Amendments to the Organic Law of Georgia, 01/05/2019, 4526-II), on September 30, 2020 (Organic Law of Georgia Law “On Common Courts” on Amendments to the Organic Law of Georgia, 30/09/2020, 7205-I.) and April 1, 2021 (Organic Law of Georgia “On Common Courts” on Amendments to the Organic Law of Georgia, 01/04/2021, 447-IVms-Xmp).

89 For example, on March 20, 2019, the parliamentary majority adopted the amendments to the law “On Common Courts” in the first reading without waiting for the recommendations and opinions of the Venice Commission on this matter. The conclusion of the Venice Commission on the changes was published on April 16 of the same year, although most of the recommendations were not reflected in the final version of the law. Transparency International-Georgia, “Timeline of the 1-Year Selection Process for Supreme Court Judges,” February 10, 2020, available at: <https://bit.ly/3Y17Ifi>; Accessed on: 12.04.2023). Also, part of the recommendations indicated by the Venice Commission in the conclusion of October 8, 2020, was taken into account by the Parliament of Georgia with the amendments of April 1, 2021, explanatory card “On the draft of the Organic Law of Georgia “On Common Courts” in the Organic Law of Georgia”, 24/03/2021, p. 1, available at: <https://bit.ly/3DsV40k>; Accessed on: 12.04.2023).

90 S. Verdzeuli, “Reform of the Justice System in Georgia (2013-2021)”, Georgian Young Lawyers' Association, Tbilisi, 2021, p. 41.

in the section on judicial reform envisioned by the so-called "April 19 Agreement"⁹¹ and in the opinion and recommendations given by the European Commission in response to Georgia's application for EU membership on June 17.⁹² Due to a lack of faith in the process, neither the civil sector nor broader legal and academic community members are interested in participating in judicial competitions. It is practically impossible for an outsider to enter the system; as practice shows, only former judicial system employees (judge assistants, session secretaries, employees of the High Council of Justice, etc.) or former prosecutors are appointed to the position of judges.⁹³

Regarding the legislative arrangement, there are still structural faults in the process of appointing Supreme Court justices. In particular:

- The High Council of Justice nominates judicial candidates by a majority vote of two-thirds of its whole composition, which, given the setting of the judicial system, cannot rule out the possibility of corporate influence;
- The mechanism for appointing Supreme Court judges is also problematic, with the Parliament of Georgia deciding by a simple majority of the total composition;
- Members of the High Council of Justice are not required to consider a candidate's given score when voting. However, this may be permitted in exceptional circumstances provided that the requirement for merit-based evaluation is met and a justification supports the extraordinary circumstance.

According to the recommendations of the OSCE ODIHR, it is important to establish standards and guidelines regarding the requirement for decision justifications. They should apply equally to the selection of candidates for the shortlist and the nomination and recommendation processes before the Parliament. This recommendation aims to standardize assessments to make them more substantive, merit-based, and individualized.⁹⁴ Furthermore, the Venice Commission clearly states that legislation

91 A Way Ahead For Georgia, available at: <https://bit.ly/3WPAfTn>; Accessed on: 12.04.2023).

92 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL. Commission Opinion on Georgia's application for membership of the European Union, Brussels, 17.6.2022 COM (2022) 405 final, Available at: <https://bit.ly/3C3FS8n>; Accessed on: 12.04.2023).

93 For example, the High Council of Justice announced the selection competition for judicial candidates on November 25, 2022 for 76 vacant positions of judges. Initially, interviews were scheduled with 21 persons, but several of them withdrew their candidacy. On February 7, 2023, the competition for district (city) and appeal court judges ended. As a result of the competition, 8 judges were appointed, of which: 7 are acting judges, 1 is a former judge's assistant, court watchman, "No new personnel entered the judicial system as a result of the competition for the position of judges", 08.02.2023, available: <https://bit.ly/3xlfjCS>; Accessed on: 12.04.2023).

94 OSCE Office for Democratic Institutions and Human Rights (OSCE ODIHR) – Fourth Report on the Nomination and Appointment of Supreme Court Judges in Georgia, August 2021, p. 26, available at: <https://bit.ly/3RRNx0V>; Accessed on: 12.04.2023).

should “not allow for any interpretation to circumvent the initial ranking and thus the appointment of judges according to merit.”⁹⁵

- The decisions of the High Council of Justice and the assessments of individual members are not well substantiated.

In the ongoing competitions for Supreme Court judges over the past two years, the template-like nature of the candidates' assessment by the High Council of Justice has been emphasized. The reports issued following the interviews conducted with candidates for the 2021 competitions lacked sufficient individuality and frequently employed identical, succinct justifications for highlighting the candidate's compliance with the requirements.⁹⁶ Under such conditions, the Council members need to have more political and civic responsibility, and the accountability of the Council members to society should be apparent.

Ultimately, the same rules apply here as with the appointment of judges to courts of first and second instance,

- Current legislation cannot assure proper participation of non-judge members in candidate nomination decisions.

The nomination of a candidate by the Council requires the approval of at least two-thirds of the entire composition, which, given the number of judge members, requires the approval of just one non-judge member. As practice has demonstrated, such a decision-making approach is non-inclusive and generates favorable conditions for maintaining/strengthening the system's internal, vicious pressures on the Supreme Court.

2.2. Rotation of Judges – Promotion, Non-Competitive Appointment, and Secondment

In addition to appointing judges, the legislation and practices governing their

95 CDL-AD (2022)010, Venice Commission, OPINION ON THE DECEMBER 2021 AMENDMENTS TO THE ORGANIC LAW ON COMMON COURTS, Strasbourg, 20 June 2022, Opinion No. 1077 / 2022, para. 21-23, Available at: <https://bit.ly/3kTV4Qp> ; Accessed on: 12.04.2023).

96 Coalition for an Independent and Transparent Judiciary, Selection of Supreme Court Justice Candidates Is Arbitrary and Unfair, June 24, 2021, Available at: <https://bit.ly/3HKyEdp>; Accessed on: 12.04.2023).

rotation are notable. Observations of the court over the years have uncovered several heinous facets of this practice. As a result, the need for legislative changes was added to the agenda of the third wave of judicial system reform.⁹⁷ Similar to other processes, the initial intent of the amendments to this issue was to increase the process's transparency and to legitimize the Council's authority.⁹⁸ Nevertheless, the situation deteriorated as a result of legislative revisions enacted on December 30, 2021, when the Council's authority over the subject of judges' secondments expanded in inverse proportion to its accountability.⁹⁹

The significance of the rotation of judges and the attention paid to it are related to several important factors:

- Changes in a judge's place of exercise of authority are closely tied to his or her independence, and inappropriate regulation and practice of this subject create dangers of a judge's independence being compromised.
- Under improper control, the rotation mechanism might be used to "punish" a judge by demoting them, creating a hostile environment, or providing them with unwarranted privileges.¹⁰⁰

Thus, the rules governing the promotion, appointment without competition, and secondment of judges must adequately address these concerns. In light of the current state of the judicial system, internal influences, and the dangers of corporatism, it is crucial to identify and rectify existing legislation and practice gaps.

Promotion and Appointment of Judges Without a Competition

The legislation creates the possibility of appointing (promoting) a judge of a district (city) court to an appellate court. However, the High Council of Justice is responsible for establishing promotion requirements.¹⁰¹ The Venice Commission, back in 2014, recom-

97 Auth. Collective, "The Judicial System: Reforms and Prospects", Coalition for an Independent and Transparent Justice, 2017, p. 83-88, available at: <https://bit.ly/34GB0Jf> ; Accessed on: 12.04.2023).

98 S. Verdzeuli, "Reform of the Justice System in Georgia (2013-2021)", Georgian Young Lawyers' Association, Tbilisi, 2021, p. 46

99 The Organic Law of Georgia of December 30, 2021 "On Amendments to the Organic Law of Georgia on Common Courts" is available at: <https://bit.ly/3WS5opu>. Accessed on: 12.04.2023).

100 S. Verdzeuli, "Reform of the Justice System in Georgia (2013-2021)", Georgian Young Lawyers' Association, Tbilisi, 2021, p. 46.

101 Organic Law of Georgia "On Common Courts" Article 41.

mended that “the authorities reconsider the promotion procedure without competition and if it is to be maintained in the draft, its exceptional character should also be made clear in the draft law.”¹⁰² Accordingly,

- The lack of clear and objective standards for the promotion of judges presents the Council with a significant additional lever to affect the individual Judge’s independence.

Furthermore, the Council has delayed defining precise criteria for the promotion of judges for the past 13 years. In addition to the absence of legislative regulation, the practice of promoting judges is prominent and problematic:

- The High Council of Justice does not technically employ the promotion system. When transferring judges to a higher instance (essentially the same as promotion), it cites the norm of assigning a judge without competition to another court as a legal foundation.¹⁰³

The criteria established by the High Council of Justice apply to the procedure¹⁰⁴ for the appointment of judges without competition, according to which “A judge can be appointed as a judge of the Court of Appeal if his or her ability, experience, professional and moral character correspond to the high rank of a judge of the Court of Appeal and he or she has worked in the district (city) court for at least five years throughout the year.” The regulation also provides for their inspection mechanism.¹⁰⁵

- The assessment criteria for a judge's promotion are limited and do not provide an opportunity to thoroughly and fully examine a judge;
- In addition, the High Council of Justice routinely employs the procedure of selecting a judge without competition, even though this is an exceptional norm.

For example, the Council commenced the process of selecting a judge without competition 15 times between 2017 and 2020. Over the same time frame, 78 judges were chosen without competition, which is quite a high number.¹⁰⁶

102 CDL-AD (2014)031, Venice Commission, JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE OF HUMAN RIGHTS (DHR) OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE ON THE DRAFT LAW ON AMENDMENTS TO THE ORGANIC LAW ON GENERAL COURTS OF GEORGIA, Opinion N° 773 / 2014, Strasbourg, 14 October 2014, para. 65, Available at: <https://bit.ly/40hnrzx> ; Accessed on: 12.04.2023).

103 Organic Law of Georgia “On Common Courts” Article 37.

104 Decision N1/208-2007 of September 25, 2007 of the High Council of Justice of Georgia “On Approving the Regulations of the High Council of Justice of Georgia”, paragraph 11 of Article 131.

105 Ibid., Article 14.

106 S. Verdzeuli, “Reform of the Justice System in Georgia (2013-2021)”, Georgian Young Lawyers’ Associ-

Lastly, the justification of the Council of Justice's judgments becomes problematic when the extraordinary norm of appointment without competition is utilized:

- The Council does not justify the need to appoint a judge to another court without competition;
- The Council does not explain the rationale for its selection of a specific judge, and if the shift also caused a shift in the candidate's specialization, the mentioned is also not explained;
- The Council does not justify a judge's compliance with promotion criteria when assigning him or her to a higher court.

Hence, the promotion-like procedure employed by the High Council of Justice and the laws governing the promotion is flawed and inconsistent with meritocratic principles guiding judges' appraisal and career advancement.

Secondment of Judges

Seeing the corrosive practice of judge rotation prompted its inclusion on the third wave of the judicial reform agenda. With the 2017 legislative amendments, the requirement of a judge's consent to a secondment was established, as were the obligations of applying to the judges initially enrolled in the reserve and then to the judges employed in nearby courts, justifying the decisions of the High Council of Justice on secondments, shortening the terms of secondments, and selecting a judge by lot.¹⁰⁷ These modifications were in accordance with the 2014 Venice Commission recommendations.¹⁰⁸

Contrary to what was stated, the obligation of the Council to make a reasoned decision, the requirement of consent for secondment from the Court of Appeal to the district (city) court, the selection of a judge from a nearby court, the holding of lots, and the secondment for up to one year without consent were all repealed with the December 2021 legislative changes. In addition, the proposed amendments extend to four years, the maximum time that a judge may serve in another court

ation, Tbilisi, 2021, p. 49.

107 The Organic Law of Georgia "On Common Courts" of February 8, 2017, regarding amendments to the Organic Law of Georgia, Article 1, Clause 21, Available at: <https://bit.ly/40mvi7y>; Accessed on: 12.04.2023).

108 CDL-AD(2014)031, Venice Commission, JOINT OPINION OF THE VENICE COMMISSION AND THE DIRECTORATE OF HUMAN RIGHTS (DHR) OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE ON THE DRAFT LAW ON AMENDMENTS TO THE ORGANIC LAW ON GENERAL COURTS OF GEORGIA, Opinion N° 773 / 2014, Strasbourg, 14 October 2014, para. 34-44.

without his/her consent.

It is also important to note that the legislator initially viewed the secondment of a judge to another court, including the transfer of an appellate court judge to a district (city) court, as a punitive measure, and this matter was included in the original version of the draft law's article on disciplinary punishment and disciplinary impact measures.¹⁰⁹

The revisions implemented in December 2021 have been criticized at the local level by the civil sector,¹¹⁰ international organizations and partners,¹¹¹ as well as certain judges.¹¹² It is important to note that several judges and the Public Defender's Office contested some of the amendments with the Georgia Constitutional Court.¹¹³ The court has not yet reached a final decision.

In its 2022 report on the amendments above, the Venice Commission deemed the new legislation governing the secondment of judges and the Council's authority in it “*excessive and unjustified*.”¹¹⁴ In particular, the commission highlighted three significant issues in its assessment:

- The Commission viewed the removal of the restriction on the involuntary secondment of judges as unfavorable and elaborated that the authors of the proposed legislation did not provide enough evidence to comprehend how the change to a non-random selection procedure with no geographical limitation can be justified;¹¹⁵
- The Commission emphasized the lack of precision of the criterion defined by the

109 The draft of the Organic Law of Georgia “On Common Courts” on Amendments to the Organic Law of Georgia”, Article 1, Paragraph 10, Available at: <https://bit.ly/3HKX8mQ>; Accessed on: 12.04.2023).

110 Coalition Responds to Expedited Review of Organic Law “On Common Court” Amendments, 28 December 2021, available at: <https://bit.ly/3HL9FDY>; Accessed on: 12.04.2023).

111 Representation of the European Union in the Parliament responds to the expedited review of bills related to the State Inspectorate and the judiciary, 28/12/2021, Available at: <https://bit.ly/3teNfXJ>; Accessed on: 12.04.2023).

112 A part of judges addresses the Parliament of Georgia with an open letter and requests clarifications about the changes initiated in the law “On Common Courts”, 28/12/2021, available: <https://bit.ly/3FhRjIL>; Accessed on: 12.04.2023).

113 “Eka Areshidze, Ketevan Meskhishvili, Madonna Maisuradze, Mamuka Tsiklauri and Tamar Khazhomia against the Parliament of Georgia”, constitutional lawsuit N1693, Available at: <https://bit.ly/3kYakvA>; “Public Defender of Georgia v. Parliament of Georgia”, Constitutional Lawsuit N1700, Available at: <https://bit.ly/3kYaxim>; Accessed on: 12.04.2023).

114 CDL-AD(2022)010, Venice Commission, OPINION ON THE DECEMBER 2021 AMENDMENTS TO THE ORGANIC LAW ON COMMON COURTS, Strasbourg, 20 June 2022, Opinion No. 1077 / 2022, para. 40, Available at: <https://bit.ly/3kTV4Qp>; Accessed on: 12.04.2023).

115 *Ibid.*, para. 32.

legislation for the secondment without consent;¹¹⁶

- The Commission did not receive any justification/information regarding the extension of the term of the secondment without consent from one year to two years, with the extension possible for another two years, and called such a measure “clearly disproportionate”.¹¹⁷

Hence, the new legislative administration of judges' secondments substantially enhances the High Council of Justice's authority over individual judges, which, given the current situation, may harm their independence and impartiality.

According to the Venice Commission, the Council's jurisdiction to forcefully transfer a judge to another court for a total of four years is disproportionate and unreasonable. This decision is backed by an imprecise record such as “necessary in the interest of justice.”¹¹⁸

Lastly, it should be noted that,

- The Council is not required to clarify its judgment on the secondment of a judge, violating the judge's ability to challenge a decision made against his or her will. In the case of an appeal, there are no defined criteria against which the court would evaluate the conformity of the Council's decision.

If the rule of secondment of judges, valid until December 30, 2021, was positively evaluated by local or international organizations, regardless of the ambiguities regarding individual issues, the current model provides the High Council of Justice with significant leverage and unbalanced power to compromise the independence of individual judges.

2.3. System of Disciplinary Liability of Judges

The history of several sovereign states demonstrates that the court's independence is simply one of the tools for forming an impartial and just judicial system and that accountability is equally vital.¹¹⁹ That is why democracies have developed a disciplinary liability system as one of the most important means for ensuring court accountability.

116 Ibid., para. 35.

117 Ibid., para. 37-38.

118 Ibid., para 40.

119 Social Justice Centre, Judicial Disciplinary System, 2020-2021 Evaluation Report, 2022, pp. 8-9 available at: <https://bit.ly/3BV4lwA>; Accessed on: 12.04.2023).

The system of judicial disciplinary liability assumes its current shape from 2013. At present, disciplinary procedures consist of four phases and involve the participation of several judicial system entities.¹²⁰ Until 2021, even though there were still several gaps in the legislation and practice, the system of disciplinary liability of judges was significantly improved via the enforcement of initiated amendments.

In contrast, the changes implemented on December 30, 2021, were a regressive step that diminished the predictability of legislation, increased the risk of using disciplinary responsibility to exert pressure on individual judges, and streamlined the process of initiating disciplinary proceedings against them. The Parliament of Georgia hastily adopted the legislative changes, neglecting the recommendations of the civil sector and the Independent Inspector Service.¹²¹ Local civic organizations,¹²² judges,¹²³ international partners,¹²⁴ and the Venice Commission¹²⁵ voiced harsh criticisms against the modifications.

In its 2022 opinion, the Venice Commission mostly echoed the negative assessments formed over time by civil society organizations regarding the flaws in the Georgian justice system.¹²⁶ The Commission noted that the authors of the proposed law could not provide meaningful justification for the legitimate purposes, essence, and needs of the adoption of amendments through the accelerated procedure, neither during the commencement phase nor subsequently.¹²⁷ According to the conclusion, the content of the reform and the resultant expansion of the High Council of Justice's powers, along with the particular

120 Study/Investigation of Disciplinary Case – Independent Inspector, Initiation and Commencement of Disciplinary Prosecution – High Council of Justice, Summary Decision Making – Disciplinary Panel of Judges of Common Courts, Summary Decision Appeal – Disciplinary Chamber of the Supreme Court of Georgia.

121 Social Justice Centre, Appeal to the President to Veto Legislative Amendment to Universal Courts Act, January 13, 2022, Available at: <https://bit.ly/3KAKeWH>; Accessed on: 12.04.2023).

122 Coalition Responds to Expedited Review of Organic Law “On Common Court” Amendments, 28 December 2021, available at: <https://bit.ly/3HL9FDY>; Accessed on: 12.04.2023).

123 A part of judges addresses the Parliament of Georgia with an open letter and requests clarifications about the changes initiated in the law “On Common Courts”, December 28, 2021, available at: <https://bit.ly/3FhRjIL>; Accessed on: 12.04.2023).

124 Representation of the European Union in the Parliament reacts to the consideration of draft laws related to the State Inspectorate and the judiciary in an accelerated manner, 28 December 2021, available at: <https://bit.ly/3teNfXJ>; Accessed on: 12.04.2023).

125 Opinion on the December 2021 amendments to the organic Law on Common Courts, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), CDL-AD (2022)010-e Georgia, Available at: <https://bit.ly/3tSfb3a>; Accessed on: 12.04.2023).

126 Ibid., Par. 61, 81(4).

127 Ibid., Par. 14, 33.

circumstances in Georgia, have a chilling effect on individual judges' independence and freedom of expression.¹²⁸ Thus, a group of judges¹²⁹ and the Public Defender's Office filed an appeal with the Constitutional Court against the amendments above.¹³⁰ After that, the parliamentary opposition also filed a case with the Constitutional Court.¹³¹

Existing deficiencies in the system of judicial disciplinary liability, both in terms of legal regulation and practice, impede the establishment of a healthy balance between judicial independence and accountability. As a result, the existing system poses substantial threats to the independence of individual judges and ultimately impedes the delivery of impartial and fair justice.

Institutional Safeguards and Performance of the Independent Inspector

An independent inspector is one of the critical links in the system of judicial disciplinary liability, responsible for conducting an objective, impartial, and thorough assessment of the case in the event of alleged disciplinary misconduct by a judge.¹³² Accordingly, the efficacy of Inspector's service is determined first and foremost by its functional independence and degree of autonomy from the High Council of Justice. As of today:

- The High Council of Justice elects the Inspector by a majority of the Council's whole composition, which significantly decreases the role of non-judge members in the process and thus raises the risks of making judgments with corporate interests.
- Legislation does not require the transparency of the Inspector selection competition and its participants' information, which harms the expectation and quality of the institution's independence.
- The Inspector has the authority to commence disciplinary proceedings and to investigate the case, but the Council decides whether or not to initiate/discontinue prosecution. Observation of practice reveals that, in most instances, the Council does not concur with Inspector's conclusions on the presence of disciplinary misconduct in the activities of judges.¹³³

128 Ibid., Par. 67.

129 “Eka Areshidze, Ketevan Meskhishvili, Madonna Maisuradze, Mamuka Tsiklauri and Tamar Khazhomi against the Parliament of Georgia”, constitutional lawsuit N1693.

130 “The Public Defender of Georgia against the Parliament of Georgia”, Constitutional Lawsuit N1700.

131 “Parliamentary opposition MPs are preparing a constitutional lawsuit against the changes implemented in the organic law “On Common Courts”, September 8, 2022 Available at: <https://bit.ly/3fwTaTa> ; Accessed on: 12.04.2023).

132 Article 51¹ of the Organic Law of Georgia “On Common Courts”.

133 For example, in 2020, in 46 cases out of 137 conclusions reviewed by the Council, and in 2021, in 17 cases out of 50 conclusions reviewed, the inspector recommended the initiation of prosecution against the judge. However, the Council did not consider most of them – Social Justice Centre, Judicial Disciplinary

Hence, most cases are settled at the stage of their review by the Council and do not reach the Disciplinary Chamber,¹³⁴ which brings the system's effectiveness into serious question.

Decision-Making Procedure of the High Council of Justice and the Disciplinary Chamber

As a consequence of the revisions implemented on December 30, 2021, the quorum for the Council's decision-making on disciplinary cases has been decreased from two-thirds of the whole composition to a simple majority. In the explanatory note, the Parliament referenced the 2013-2014 recommendations provided by international organizations, which warn that having such a qualified majority creates a considerable danger that an excessive number of concerns would go unaddressed.¹³⁵ Nevertheless, the Parliament did not pay attention to the most recent conclusions of the same organizations, which noted that, given the "unusual" situation of the Georgian legal system, the direct implementation of international standards may not be the best approach.¹³⁶ In addition, evaluations of current practice indicate that the Council's delay or lack of willingness to consider the cases is to blame for the overwhelming number of unresolved disciplinary complaints.¹³⁷

- The High Council of Justice's decision-making on disciplinary issues based on a simple majority of its members is less focused on improving the consideration indicators of disciplinary cases; however, it eliminates the possibility of effective involvement of non-judge members of the Council and increases the risk of improper influence on individual judges.

Moreover, the process in which the Disciplinary Chamber renders a summary judgment is also problematic:

System, 2020-2021 Evaluation Report, 2022, p. 31.

134 For example, in 2020, the Council adopted a total of 158 decisions, and in the period of 2021 – 55. Of these, only 10 related to the initiation of disciplinary proceedings against a judge and the forfeiture of an explanation – Social Justice Centre, System of Disciplinary Accountability of Judges, 2020-2021 Evaluation Report, 2022, p. 30.

135 Social Justice Centre, "Another Step Backward in Judicial Reform – An Analysis of Legislative Amendments Adopted on December 30, 2021," 2022, p. 8, available at: <https://bit.ly/3KBTQR3>; Accessed on: 12.04.2023). Conclusion No. 774/2014 of the Venice Commission of October 14, 2014, paragraphs 24, 66, 72, (available at: <https://bit.ly/3ALNv1S>); Accessed on: 12.04.2023).

136 Opinion on the draft Organic Law amending the Organic Law on Common Courts, adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), CDL-AD(2020)021-e, Available at: <https://bit.ly/3J12Kam>; Accessed on: 12.04.2023).

137 Social Justice Centre, Judicial Disciplinary System, 2020-2021 Evaluation Report, 2022, p.23.

- If the judgment of the Disciplinary Chamber is backed by a majority of its full composition, it is deemed accepted.¹³⁸ The Chamber consists of five members, with a quorum of three required for a valid ruling.¹³⁹ Such a clause jeopardizes the impartiality of disciplinary processes, as it is theoretically feasible for two of the Chamber's five members to declare a judge guilty and impose responsibility and a fine.

Timeframes of Disciplinary Processes and Prolonged Proceedings

The fact that the processes are being handled with a major disregard for deadlines indicates the inefficacy of the system of disciplinary responsibility. This is partly due to the passivity of the High Council of Justice, which has infrequent sessions and utterly disregards¹⁴⁰ the numerous complaints the Inspector's Office received.¹⁴¹ In contrast to the existing situation, the shortening of legal procedures due to legislative changes on December 30 introduces an additional challenge and makes the system even less efficient.

Risks of Undermining the Independence of Individual Judges

- In terms of maintaining the independence of individual judges in the system of disciplinary processes, the new rule of removing a judge from case consideration based on the commencement of disciplinary proceedings against a district (city) or appellate court judge is particularly disturbing;¹⁴²

Given the existing system, it is unclear if the removal from case consideration pertains to a specific case or all cases handled by a certain judge. As a result, at the commencement stage of the prosecution, such severe and non-transparent limitation, based only on reasonable suspicion criteria, greatly undermines the judges' independence and performance.

138 The second paragraph of Article 7540 of the Organic Law of Georgia "On Common Courts".

139 Ibid., first paragraph of Article 75²⁴.

140 For example, the High Council of Justice of Georgia held 4 disciplinary sessions in 2020 and reviewed 137 conclusions prepared by an independent inspector. In 2021, a total of 1 disciplinary session was held, where 50 conclusions prepared by the inspector were discussed. – Social Justice Center, Judicial Disciplinary System, 2020-2021 Evaluation Report, 2022, p. 28.

141 For example, according to the 2020 and 2021 activity reports of the Independent Inspector Service and statistical information published by the High Council of Justice, 151 disciplinary complaints were received by the Independent Inspector Service in 2020, and 156 in 2021. Assessment Report, 2022, p. 25.

142 Article 45 of the Organic Law of Georgia "On Common Courts".

Additionally, despite the definition of a specific and exhaustive list of types of disciplinary misconduct, some misconduct is broad in content, and practice is sparse and inconsistent. with that,

- The addition of a new act ("public expression of opinion by a judge in violation of the principle of political neutrality")¹⁴³ to the list of misconducts, which repeats a similar principle already present in the law, creates an additional problem for the predictability of the law and the protection of the independence of judges.

Closeness of the System

In addition to the ineffectiveness of the system of disciplinary liability, the exercise of authority by judges and the High Council of Justice members during hearings demonstrates the excessively closed nature of the judicial system and the absence of critical thought within it. more specifically,

- Notwithstanding the opportunity provided by the law, judges do not request disclosure of disciplinary hearings, and members of the High Council of Justice do not voice dissenting opinions in writing during disciplinary proceedings.¹⁴⁴

2.4. Case Distribution and Workload of Judges

Distribution of cases in common courts and ensuring an equal workload for all judges are closely tied to the administration of justice in a timely and effective manner, as well as to the independence of individual judges from internal and external influences.

As previously stated, the common court system currently requires around 100 additional judges.¹⁴⁵ The insufficient number of judges substantially influences the system of case allocation and workload distribution and impedes the administration of justice in a timely and efficient manner. In addition, the overcrowding of current judges severely affects the quality of justice, the independence of individual judges, their professional development, and the overall development of the judicial system.

143 Ibid., Article 751, Clause 8, Sub-Clause B.Z.

144 Social Justice Centre, Judicial Disciplinary System, 2020-2021 Evaluation Report, 2022, p. 31; 2020 Activity Report of the Independent Inspector Service, p. 14-15; 2021 Activity Report of the Independent Inspector Service, p. 13-14.

145 S. Verdzeuli, "Reform of the Justice System in Georgia (2013-2021)", Georgian Young Lawyers' Association, Tbilisi, 2021, p. 59; Jesper Vittrup, Tea Machaidze, Elene Janelidze, Mariam Makishvili, "Assessment of the required number of judges in Georgia", 2018, Available at: <https://bit.ly/3vmhY2G> ; Accessed on: 12.04.2023).

- Regarding justice system overcrowding alleviation, the High Council of Justice's strategy remains obscure. Nevertheless, even when the judges' corps is fully staffed, the system of case distribution and workload of judges has several significant flaws that prevent the protection of individual judges from internal and external influences and increase the likelihood of manipulation and artificial interference in the process of case distribution.

The new electronic distribution system of cases in common courts was implemented as part of the "third wave" of judicial reform. It was one of the most significant improvements that, from the outset, received positive feedback from international and local organizations.¹⁴⁶ In recent years, however, system monitoring has revealed that its enhancement is no longer a priority. Furthermore, the reforms done in the legal system over the past several years are insignificant and primarily technical and cannot address the difficulties and challenges in the judicial system.¹⁴⁷

Recent statistical data reveal that more than one-third of cases are still dispersed without the protection of the random allocation principle, indicating a fault with the case distribution mechanism.¹⁴⁸ This is also closely connected to the long list of exceptional cases compiled by the High Council of Justice, in which cases are assigned without the protection of the randomization principle.¹⁴⁹

- In recent years, the modifications made by the Council to the norm governing the electronic distribution of cases show an increasing number of exceptions to the general rule (the random distribution of cases). This raises the likelihood of arbitrary case allocation and improper interference with the independence of individual judges. In other cases, exceptional cases are caused by the pernicious practice of judge rotation and poor personnel policy.¹⁵⁰

146 European commission for democracy through law (Venice commission), joint opinion on the draft law on amendments to the organic law on Common courts CDL-AD(2014)031, Available at: <https://bit.ly/3t-Nj8Gr>; The Coalition's views on the 'third wave' of judicial reform are available at: <https://bit.ly/3xewD2J>; Accessed on: 12.04.2023).

147 Social Justice Center, Electronic Court Case Distribution System, 2020-2021 Evaluation Report, 2022, p. 11-12, Available at: <https://bit.ly/3y6NN3z>; Accessed on: 12.04.2023.

148 Ibid., p. p. 13; Also, "Human Rights Education and Monitoring Center" (EMC), "Electronic Case Distribution System in Georgia", 2020, Available at: <https://bit.ly/3HlYgVv>; Accessed on: 12.04.2023).

149 Social Justice Center, Electronic Court Case Distribution System, 2020-2021 Evaluation Report, 2022, p. 14.

150 S. Verdzeuli, "Reform of the justice system in Georgia (2013-2021 years)", Georgian Young Lawyers' Association, Tbilisi, 2021, p. 61.

Judge's Workload

- Particularly troublesome in the case distribution system is the mechanism that allocates different, substantially lower percentages of cases to personnel holding certain administrative positions.¹⁵¹

Workload indicators defined by the legislation appear unfair from the outset when one considers that the group of judges who do not hold administrative positions work at full capacity and, in certain instances, even consider cases within 250-300% of the workload.¹⁵²

- The workload discrepancy across judges indicates a systemic flaw in court management. Privileged judges in the system have been removed from the judicial practice. On the contrary, there is a huge group to which most cases are assigned. As a result, they are excluded from participation in crucial processes due to an exorbitant workload.¹⁵³

Hence, comparable informational or power asymmetries between judges with administrative positions and the rest of the group of judges demonstrate both the problem of management and the problem of power concentration in the court.¹⁵⁴

Regarding privileged judges, it should be noted that it is common practice for the system to conceal their workload information. For example, in 2022, the chairman of the Supreme Court, Nino Kadagidze, the chairman of the Kutaisi Court of Appeal, Irakli Bondarenko, and the secretary of the Supreme Council of Justice, Nikoloz Marsagishvili, had their percent workload indicators omitted from the list. Thus, the High Council of Justice merely excludes them from the list of judges and does not explain why their workloads are kept secret.¹⁵⁵

151 The workload of a member of the High Council of Justice – 20%, and if the member is at the same time the chairman of the court, his deputy, chairman of the collegium/chamber – 10%; Judges with administrative positions in small courts – 50%; in large courts – 20%; Cases are distributed to judges with administrative positions in individual courts, as well as to the chairman and secretary of the council in “special cases”, no more than 5%. – Decision No. 1/56 of the High Council of Justice of Georgia dated May 1, 2017 “On approving the rule of automatic distribution of cases in the common courts of Georgia through an electronic system”, paragraphs 6-12 of Article 5.

152 Ibid.

153 S. Verdzeuli, “Reform of the Justice System in Georgia (2013-2021)”, Georgian Young Lawyers’ Association, Tbilisi, 2021, p. 64.

154 Ibid.

155 Social Justice Center, Electronic Court Case Distribution System, 2020-2021 Evaluation Report, 2022, p. 22.

The Role of Court Chairpersons in the Case Distribution Process

The involvement of court chairpersons is one of the most problematic aspects of the case allocation system.

- The legislation either vaguely defines the appropriate procedural framework for the decisions of the chairpersons in the process of distribution of cases or does not establish them at all, and the decisions themselves are not subject to justification.

In 2014, when analyzing the current case distribution system and the "third wave" of judicial reform, the Venice Commission noted the hazards posed by the chairpersons' broad and ambiguous discretionary powers. The Commission noted that the unexpected and unbalanced authority possessed by those in administrative positions of the court might be exploited for illegitimate purposes, including exerting pressure on individual judges.¹⁵⁶ Despite this, the critical challenges of the electronic case distribution system remain unresolved.

Under the current context, unchecked Chairmen of courts powers include:

- The authority of the chairpersons to view and increase or reduce the workload rates of judges;
- The authority to determine and modify the duty schedule of judges;
- The power to determine and change the composition of judges in narrow specializations without a clearly established procedure;
- Involvement of the chairpersons in the self-recusal/recusal of judges;
- Involvement of the chairpersons in the process of determining the composition of judges in the panel/chamber.¹⁵⁷

Hence, the ostensibly "managerial" tasks assigned to the chairmen in case distribution influence the system's overall operation and indirectly create opportunities to influence the case's outcome.¹⁵⁸

156 European commission for democracy through law (Venice commission), joint opinion on the draft law on amendments to the organic law on general courts CDL-AD(2014)031, para. 78-79.

157 Social Justice Centre, Electronic Court Case Distribution System, 2020-2021 Evaluation Report, 2022, p. 24.

158 S. Verdzeuli, "Reform of the Justice System in Georgia (2013-2021)", Georgian Young Lawyers' Association, Tbilisi, 2021, p. 63.

3. Accessibility to Court Decisions and Transparency of the Judicial System

Access to information about the activities of the judiciary is a necessary prerequisite for a democratic state that upholds the rule of law. Transparent justice is one of the determining factors of public trust in the court system.¹⁵⁹ Consequently, in conditions of low confidence in the court, effective public control over its activities becomes especially important.

In the scope of the "first wave" of judicial reform, significant steps were taken toward the openness of the judicial system, and standards for the court's judicial process were established at the legislative level.¹⁶⁰ In addition, in 2013, the High Council of Justice adopted the norm for electronic requests for public information and the regulation for proactive publishing.¹⁶¹ The third wave of the reform entailed, among other things, the introduction of the requirement to make public the court judgment reached as a consequence of an open session of substantive consideration of the matter.¹⁶² The legislative reforms of 2019 largely determined the directions of the High Council of Justice's public relations activities.¹⁶³ The introduction of a website¹⁶⁴ for court judgments in the same year, through which it could search for the needed ruling using the proper specific criteria, was positive news regarding ensuring transparency. The Constitutional Court of Georgia's ruling from June 2019 is especially significant since it established a new threshold for access to court decisions while considering the security of personal data.

Notwithstanding the reforms mentioned above, the judiciary still has significant obstacles in terms of transparency, which hinders not only the openness and accountability of the third branch of government but also the capacity to effectively and qualitatively control

159 Institute for the Development of Freedom of Information (IDFI), Transparency of the judicial system in Georgia, 2021, p. 1, available at: <https://bit.ly/3TgcJh5> ; Accessed on: 12.04.2023).

160 "On Common Courts" on Amendments to the Organic Law of Georgia" Organic Law of Georgia, 01/05/2013, 580-II, Amendments to Articles 13 and 131 of the Organic Law, Social Justice Center (former EMC), Freedom of Information Development Institute (IDFI), State of Implementation of the Judiciary Strategy and Action Plan, Second Shadow Report, 2020, p. 86, Available at: <https://bit.ly/3E2WzCH> ; Accessed on: 12.04.2023).

161 Decision N1/225 of the High Council of Justice of Georgia dated December 27, 2013, Available at: <https://bit.ly/2YqRFe5>; Accessed on: 12.04.2023).

162 Regarding making changes to the Organic Law of Georgia "On Common Courts" Organic Law of Georgia, 08/02/2017, 255-II. Paragraph 3¹ of Article 13 of the Organic Law.

163 Regarding making changes to the Organic Law of Georgia "On Common Courts" Organic Law of Georgia, 13/12/2019, 5569-I.

164 The website is available at: <http://ecd.court.ge/> ; Accessed on: 12.04.2023).

it. Among the difficulties cited are the following:

- Partial/deficient practice of publication of court judgments;
- Flawed practice of granting public information requests.
- Absence of uniform methodology for producing and processing statistical data;
- Low level of awareness regarding ongoing processes in the Judiciary;
- Low level of public trust towards the Judiciary;
- Absence of effective communication mechanisms with the public on the side of the Judiciary;
- Inconsistent practice of communication between NGOs and professional circles in the process of working on the ongoing reforms in the Judiciary.¹⁶⁵

Hence, the civil sector has pointed out for years that the practice of closeness of the system, which has been more prevalent in recent years, raises public mistrust of the court on the one hand and makes it harder to debate the system's flaws openly on the other.¹⁶⁶

In addition, ensuring the openness of justice is important, notably in accomplishing the tasks defined within the European Union's obligations. The development and implementation of a transparent framework for the judicial system and ensuring the accountability of each branch of the justice system are underlined in the 17 June 2022 recommendation of the European Commission, which outlines 12 priorities for the state to fulfill.¹⁶⁷ Thus, the lack of openness and transparency continues to be a significant obstacle to the existing judicial system.

165 Social Justice Centre (former EMC), Freedom of Information Development Institute (IDFI), State of Implementation of the Judiciary Strategy and Action Plan, Second Shadow Report, 2020, p. 88.

166 Coalition for an Independent and Transparent Justice, *The Judiciary: Reforms and Perspectives*, 2017, p. 10, Available at: <https://bit.ly/3bdyGrp> ; Accessed on: 12.04.2023); Social Justice Centre (former EMC), Freedom of Information Development Institute (IDFI), State of Implementation of the Judiciary Strategy and Action Plan, Second Shadow Report, p. 87

167 European Commission, Opinion on Georgia's application for membership of the European Union, 17 June 2022, Available at <https://bit.ly/3rPqR5e>; Accessed on: 12.04.2023).

It should be noted that it is generally a problem to fulfill the obligation of the courts to proactively publish public information established by the decision of the High Council of Justice. Courts publish public information in an imperfect form. The rate of fulfillment of the obligation determined by the High Council of Justice itself is quite low, for more details, see IDFI, *Transparency of the Judicial System in Georgia, 2021*, available at: <https://bit.ly/3TgcJh5> ; Accessed on: 12.04.2023).

Accessibility of Acts issued by Common Courts

From the standpoint of judicial transparency, the availability of court rulings remains a significant problem. Without the assurance of openness, it is impossible to determine the objectivity and impartiality of judicial decisions, which severely influences the right to a fair trial. Moreover, without access to the whole text of judicial acts, the public will be unable to have faith in the impartiality of justice and be confident that there is no selective justice.

Since October 2015, the degree of access to court rulings in Georgia has worsened dramatically. Before that, courts issued copies of decisions in perfect form, but later, courts began refusing to release copies of decisions on the grounds of personal data protection. The courts do not consider the heightened public interest in certain cases. The equilibrium between personal data protection and public information availability has been thrown off because personal data protection has been given priority.¹⁶⁸ As a result, the public has not yet had access to, for instance, the verdicts in criminal cases involving former/current government officials. This makes it impossible to:

- Examine the decisions rendered in cases of high public interest and assess the quality of court justification;
- Case monitoring and in-depth analysis of misgivings on selective justice – confirmation or denial;
- Monitoring and evaluation of court cases using a random/selective approach;
- Furthermore,
- In the event of a request for a large number of court documents or/and to identify a specific court document by the date of receipt or in another form, courts decline to release such court records due to a lack of resources or the inability to depersonalize them.

Given that the publishing of the decisions of the first and second instance courts has been fully discontinued, this practice breaches the norms of openness and public accountability of the judiciary in a substantial way. In addition, it impedes the public's or interested parties' ability to examine court practice, makes substantive evidence-based criticism difficult, and eventually erodes public confidence in the courts.

¹⁶⁸ Institute for the Development of Freedom of Information (IDFI), Transparency of the judicial system in Georgia, 2021, p. 12.

The ruling of the Constitutional Court of June 7, 2019

Regarding the accessibility of court decisions, it is noteworthy that on June 7, 2019,¹⁶⁹ the Constitutional Court of Georgia adopted a decision based on the lawsuits of the "Institute for Development of Freedom of Information" and the "Media Development Foundation."

According to the court's definition, judicial acts are information accessible through a public institution whose access is of heightened public interest. Public access to court decisions is crucial for ensuring public control of the judiciary, public trust in it, the right to a fair trial, and preserving constitutional principles of legal certainty. Thus, acts approved during an open court session should be accessible to all interested parties. Moreover, the court emphasized that in exceptional cases, considering the sensitivity of the information described in the decision, covering a person's data may be necessary to protect the right to private life. However, this should not be a dominant practice. In this case, the impact of the disclosure of personal data on private life should be evaluated to determine whether or not it outweighs the public interest in access to the judicial act.

As a result, the Constitutional Court ruled that the contested provisions of the "Personal Data Protection" Law and the General Administrative Code of Georgia were unconstitutional and ordered the Georgian Parliament to resolve the matter following the requirements of the Georgian Constitution. Nevertheless, unfortunately, even after three years, the higher legislative body has not met the stated standards.

Proactive Publication of Court Decisions

In terms of enhancing the court's openness, the 2019 introduction of a website containing court judgments that allow users to search for the needed judgment using the appropriate criteria greatly improved transparency. Covering personal data, the court judgments rendered between January 1, 2018, and April 30, 2020, are published in the court decision search system.

- Following April 30, 2020, none of the judgments made by the Common Courts is published on ecd.court.ge, which is a serious breach of the law since the organic law "On Common Courts" requires the publishing of the decision resulting from the substantive consideration of a matter in an open session.

169 Decision No. 1/4/693,857 of the Constitutional Court of Georgia of June 7, 2019 on the case "Media Development Fund" and "Information Freedom Development Institute" against the Parliament of Georgia, available: <https://bit.ly/3TdtI3w>; Accessed on: 12.04.2023).

At present, interested parties can look for Court of Cassation rulings/decisions exclusively using the decision search software on the Supreme Court's website, but without getting information on personal information. Acts considered by courts of first and second instance are not publicly available.

Conclusion

Despite four waves of judicial reform and countless legislative amendments over the past decade, the judiciary continues to face substantial systemic challenges. The reforms were primarily targeted at refining the institutional framework and procedural concerns of the court, leaving intact the problems associated with the court's informal system of power and influence. In addition, the reforms enacted in recent years have significantly enhanced the influence of the High Council of Justice. Given the excess power concentrated within the Council, it continues to be the primary focus of influential groups within the court. In contrast, there is a major threat to the independence of individual judges, and the system discourages divergent critical views. Moreover, international organizations and partners are becoming increasingly critical of the existing state of the judicial system. Thus, prompt, effective, and fundamental reform of the judiciary remains on Georgia's political and public agenda.

In June 2021, the Coalition for an Independent and Transparent Judiciary provided a new perspective on judicial reform, which deemed it essential for the Georgian Parliament to assess challenges within the judiciary. Hence, first, it is necessary to conduct a comprehensive evaluation of the justice system, examine the shortcomings in the law and practice, and then formulate the appropriate strategy for implementing the fundamental reform. Moreover, in the years to come, judicial reform should address the following critical issues:

- **Reform of the High Council of Justice:**
 - The Georgian Parliament must elect five non-judge members to the Council based on the broad political accord. In addition, it is crucial to identify candidates whose integrity, competence, and political neutrality are uncontested by the public;
 - Important decisions (appointment of judges, secondment of a judge to another court, disciplinary action against judges, nomination of candidates for the position of Supreme Court judge, appointment/dismissal of an Independent Inspector) must be made by the Council with a double 2/3 majority vote to increase the inclusiveness and legitimacy of the process;
 - The right of judge members of the Council to simultaneously hold other administrative offices (Court Chairman/Deputy, Collegium/Chamber Chairman and Deputy) should be prohibited. It is vital to restrict the possibility of a judge being elected to the Council twice in succession. Concurrently, it is essential to document and implement clear processes for the nomination and selection of Council member candidates at the Conference of Judges;
 - It is vital to redistribute the excessive authority the High Council of Justice accumulated to other judicial institutions.

- **Improving independence guarantees of individual judges:**
 - It is essential to refine the system of judicial disciplinary liability to eliminate the possibility of its selective and arbitrary use;
 - It is necessary to enhance the system of electronic case allocation further to limit the danger of unlawful intervention and provide the most equitable workload distribution among judges.

- **Improving access to acts adopted by the court:**
 - For the effective execution of the Constitutional Court's 7 June 2019 ruling, it is essential to implement pertinent legislative amendments;
 - The proactive publishing of court acts on the appropriate portals should be assured, and the scope of court acts susceptible to proactive publication should be expanded.

- **Repeal the legislative amendments issued on December 30, 2021.**

