JUDICIAL SYSTEM REFORM IN GEORGIA

2013-2021

GEORGIAN YOUNG LAWYERS' ASSOCIATION

Georgian Young Lawyers' Association

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Research supervisors: NIKOLOZ SIMONISHVILI
VAKHUSHTI MENABDE

Author: SOPHO VERDZEULI

Editor: KHATUNA KVIRALASHVILI

Technical Editor: IRAKLI SVANIDZE

Translation from Georgian: NATO JMUKHADZE

Cover designed by: TEONA KERESELIDZE

J. Kakhidze street #15, Tbilisi, Georgia
(+995 32) 295 23 53, 293 61 01
www.gyla.ge

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INTRODUCTION

Several interesting studies are available on the Georgian Judicial System. Nevertheless, tendencies and issues related to reforms within the judiciary are still a matter of interest for researchers and policymakers. On one hand, this is due to the political significance of judicial reform internally as well as outside the country. On the other, a range of peculiarities and tendencies emerged especially throughout the past reforms the study of which may provide a basis for new perspectives.

At first glance, the judicial system has undergone several stages of reforms since 2013, reflecting a range of legislative amendments.[1] Despite the heavy legacy at hand,[2] a clear political decision was not to interfere in the composition of the judiciary. As means of achieving the systemic change, the strategy selected was the modernization of institutional framework and refinement of the legislation, instead of large-scale personnel and organizational transformations. Thus, the legislative innovations were supposed to address not only the goals of institutional reform but also become the ground for the "re-legitimization" of the existing judiciary. In other words, the system had to demonstrate a resource of self-development and progress within the new legal and political reality.

The study does not aim to assess whether the strategy of the political authorities towards the previous composition of the judiciary proved to be justified or effective. Despite the beliefs of the authors of the reforms or the court itself regarding the issue, public opinion polls show no substantial improvement of the attitude towards the judiciary in recent years.[3] Public opinion surveys certainly cannot be deemed the only way to analyze the situation at hand. However, the results show the sentiments of citizens towards the judiciary, as well as the strategies and reforms that the biased majority determined.

While individual judges, in certain cases, offer progressive substantiation of their decisions and the resolution of the disputes following high standards of human rights, the court stays submissive and obedient whenever the political hierarchy and the system of power demonstrate their interests.[4] In the process of balancing, controlling, and bringing the centers of power within the legal framework, the court fails to demonstrate itself. This does not only concern the dispute resolution process. In the implementation of reforms, personnel-related decisions as well as communication with the public, the court does not pose itself as an autonomous system distanced from the interests of internal and external, political, or other influential groups. The court seeks inviolability and institutional strength not by offering competent, fair, progressive ideas but rather by collaborating with the groups in power in certain circumstances and making deals with them.[5] During the process, the court

[1] Among them: the First Wave of the judicial reform approved by the Parliament on May 1, 2013; the Second Wave was approved on August 1, 2014; the Third Wave was voted for by the Parliament on February 8, 2017 in the third reading and the Fourth Wave became a part of the legal system on December 13, 2019.

[2] Thomas Hammarberg, "Georgia in Transition," 2013, p.15, available at: http://myrights.gov.ge/uploads/files/docs/8987288_38635_607369_Hammarbergreport-getm.pdf (Last viewed on March 1, 2021).

[3] Human Rights Education and Monitoring Center (EMC), CRRC-Georgia, Institute for Development of Freedom of Information (IDFI), "Knowledge and Attitudes of the Population of Georgia Towards the Judiciary ", 2018, p.10, available at: https://emc.org.ge/uploads/products/pdf/Baseline_Survey_Report_Geo_1544010352.pdf (Last viewed on March 1, 2021).

[4] Coalition for an Independent and Transparent Judiciary, "The Coalition is calling on the Parliament to adopt a resolution on the clan-based governance in the court system", 2020, available at: http://coalition.ge/index.php?article_id=244&clang=0 (Last viewed on March 1, 2021).

[5] Ana Abashidze, Ana Arganashvili, Giorgi Beraia, Sopho Verdzeuli, Keti Kukava, Olga Shermadini, Ekaterine

is introduced as a party involved in the negotiations, which uses justice as a subject of the bargain to gain/maintain influence.

In the given context, the strategy of the judicial reform is characterized by particular challenges and specifics in Georgia. It must respond, on the one hand, to the need of creating an institutional model essential for its independence and on the other, overcome the rationale of the informal, undemocratic organization of power. These are two independent aims of the reform. The institutional components of the judiciary are not directly translated into its actual independence, therefore the authors indicate the importance of using more diverse and complex methods in the process of studying the judicial system.[6]

The document does not intend to challenge the idea of consistent institutional reforms; however, the study shows that the path Georgia has taken for judicial reform is directed at providing the institutional framework and perceiving judicial independence only as a matter of "design"[7]. The overall analysis of the number of steps taken with regards to judicial reforms reviewed in this study, together with their consistency/similarity, the motivations behind them as well as their periodicity and results, reveals the preliminary intention and conscious choice/strategy of the government. According to the study, this strategy is inherently problematic and counterproductive. This is largely due to inferior steps on the way of reforming the judiciary in two senses – the institutional level and frequently neglected yet factually existing informal power and hierarchy.

The strategy chosen by the ruling majority neither changes the logic of organizing power nor confronts the systems of influence. Thus, the reforms carried out in the conditions of the established order are still tailored by the court, in particular, by a group of influential judges, to their narrow interests. Apart from strengthening the power of this group, the chosen strategy of the reform creates a sort of "labyrinth"[8] weakening the political accountability of the government over the situation in the court and complicating the process of finding a target of criticism.

In this situation, the dominant concept of judicial reform in Georgia, which substantially remains within the logic of detailing the legislation and modernizing the institutional framework, needs to be reconsidered. The purpose of the given publication is to strengthen this perspective.

RESEARCH OBJECTIVES AND STRUCTURE

Since 2013, visions about judicial reforms have largely pursued the idea of refining the legislation based on international acts and models recognized as best practices. The legislative amendments are focused on detailing the legal framework and modernizing the institutional arrangement. This, a sort of mainstream model, overlooks the debates over the possible side effects and undesired consequences of the reform.

Tsimakuridze, Giorgi Burjanadze (Edit.), Coalition for an Independent and Transparent Judiciary, "The Judicial System: Past Reforms and Future Perspectives", 2017, p.10, available at: https://bit.ly/3v6N2ni (Last viewed on March 1, 2021).

[6] Christoper M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis", The American Journal of Comparative Law, 1996, p.618.

[7] David Kosař and Samuel Spáč, "Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back", International Journal for Court Administration 9(3), 2018, p.39.

[8] Ran Hirschl, 'The Judicialization of Politics', The Oxford Handbook of Political Science, 2011, p.269.

The document aims to provide a systematic analysis of the judicial reform strategy and dynamics developed during the governance of the "Georgian Dream." More specifically, the study strives to answer the following key questions:

- What logic and pattern characterized the stages of the judicial reform for the past eight years?
- To what extent have the initiated reforms addressed the idea and need for structural transformation?
- To what extent has the chosen strategy of legislative changes manage to address the vices of the organization and management of the judicial system?

The purpose of the paper is not to discuss in detail all the amendments related to the judicial system since 2013. Instead, the document aims to present generalized conclusions on the directions and results of four main waves of the judicial reform and other collateral amendments by assessing aspects of systemic importance.

Based on the above criterion, the study reviews the issues that can be classified into three directions:

- Organization and administration of the common courts' system;
- Career and responsibility of an individual judge;
- Management of the court and the working environment of the justices;

The directions selected for the study are important components for the assessment of the independence of both the court as a collective institution and individual judges. The analysis of the issues will allow us to see the rationale behind the court management and organization as well as distribution of power and assessment of the results achieved in this respect.

The study has been designed according to the listed directions and consists of three parts. The first part of the paper assesses the general system of management of the court, the body of collective governance, and key agencies within the court; the second part is devoted to reviewing issues relating to the appointment and disciplinary liability of the judges; the third part analyzes other safeguards that are essential for the management of certain courts and the independence of individual judges.

METHODOLOGY

Reporting Period

The report analyzes and assesses the stages of judicial reforms and their consequences under the governance of the Georgian Dream in 2013-2021. Due to the strong connection and significance of the issue, the study also covers the amendments to the rule of selection procedures of Supreme Court Justices initiated in March 2021 by the Members of the Parliament. The reporting period of the research has been selected for the following reasons: Despite numerous studies published during this timeframe, the vision of the ruling political party concerning the judicial reform requires a systematic assessment, which envisages the individual analysis of certain legislative initiatives, as well as overall assessment of the strategy and reform dynamics.

Research Methods

The elaboration of the study is based on the interdisciplinary research method, which involves a consolidated review of the legal environment, judicial reforms, and accompanying institutional, political, and social factors. The theme of the research resulted in the choice of such a method, which is not limited to the doctrinal review of certain parts of the legislation and is more oriented at the analysis of the operation of law and the process of legislative reforms in a specific environment.

Research Sources

Constitution of Georgia and Relevant Legal Acts

The research period coincides with the Georgian Constitutional Reform, which has substantially changed the regulation of court-related matters. Significant amendments were introduced to the Organic Law of Georgia "On Common Courts" through several stages. Therefore, for the study, the context of the various stages of the reform, the texts of the Constitution, and the law in force at that moment have been processed (including the laws that have been repealed for the moment of publication of the study).

Subordinate Legal Acts (By-laws)

For the study, the following regulations adopted by the High Council of Justice and the High School of Justice have been scrutinized:

- Rules of Procedure of the High Council of Justice;
- Charter of the High School of Justice;
- Charter of the Independent Board of the High School of Justice ;
- Rules for Providing Bonuses to Remuneration and Accommodation for the Judges;
- Rules of Electronic Distribution of Cases;
- Rules of the Performance-based Assessment of the Judges;
- Decision on the Determination of Narrow Specializations of Judges in Tbilisi City Court and Court of Appeals;
- Charter of the Office of the High Council of Justice;
- Rules of the Selection of Judicial Candidates.

Decisions and Statistical Information

In the course of the research, several decisions, delivered after 2017, regarding the judicial career, responsibility, and management of the judiciary have been studied, including:

- Decisions on the Appointment of Chairpersons of Courts/Panels and Chambers;
- Decisions Related to the Secondments of judges;
- Decisions on the Appointment of Judges without a Competition;

- Decisions on the Appointment/Dismissal of Court Managers;
- Decisions on Assignment of Judges to Narrow Specializations;
- Decisions Concerning the Composition of the Council of Teachers and the Determination of Internship Coordinators in the High School of Justice;
- The Statistics of Disciplinary Liability and the Reports Prepared by the Independent Inspector on the Generalized Picture of the Responsibility of the Judges.

Some of the processed information has been obtained from public sources/websites and others from the freedom of information requests.

Academic Papers and Literature

For elaboration and refinement of the theoretical framework of the document, various pieces of literature concerning the critical understanding of the independence of the court and the accountability of judges, the state of the judicial system in post-Soviet and EU member states, the role of the judiciary in the process of democratization, the assessment of court management models, the role of both international and local agents of influence in the judicial reform, etc., have been studied.

Reports, Statements, Policy Papers

Reports, recommendations/opinions provided by local and international organizations on the state of the judiciary in Georgia, the progress of reforms were processed during the elaboration of the study. The paper refers to the above materials according to their relevance.

PART I: ORGANIZATION OF COMMON COURTS

This part of the study assesses the administration system of common courts, rules of the formation and operation of various governing bodies, including the High Council of Justice (hereinafter, the Council), the High School of Justice (hereinafter, the School), the Plenum of the Supreme Court (hereinafter, the Plenum), and the Conference of Judges. With each governing body, the paper analyzes the content of the reforms implemented during 2013-2021 and their influence on the existing challenges.

CHAPTER 1. THE HIGH COUNCIL OF JUSTICE

The idea of establishing judicial councils largely serves to strengthen the principle of separation of the powers in the government and ensure the independence of the judiciary from the political/elected bodies. That is why they are referred to as "buffers" between individual judges and political authorities.[9] In countries of continental Europe, including the former post-Soviet states, the formation of collegial bodies was seen as virtually the only valid model for increasing the independence and autonomy of the judiciary.[10] Such tendency was largely related to the requirements imposed by international organizations and financial institutions on the countries.[11]

However, the model of judicial councils has been increasingly discussed in recent years as the challenge in terms of the independence of individual judges.[12] It is acknowledged that collegial governing bodies, such as the High Council of Justice in Georgia, are usually capable of guaranteeing the independence of the judiciary from external interferences. However, the situation is unclear when it comes to the independence of judges from internal influences. In the relatively recent past, discussions over the idea and role of the councils with regards to increasing judicial accountability have commenced[13] and have become particularly relevant in the light of the growing power of the judiciary and its influence on politics.[14]

Given the history of the relationship between the judiciary and the government in Georgia, over the years, the main emphasis has been placed on the independence of the judiciary as a unified body and its autonomy from the political system. Yet, it is believed that the independence of an individual judge is not just a matter of institutional arrangement, and the situation within the court, including internal influences, is as dangerous to the independence of the judiciary as the direct pressure from the politicians.[15]

The issue is even more acute since, unlike direct political interventions, the influence from judicial hierarchies is politically less identifiable and hence more difficult to detect.[16] It is noteworthy that in recent years the European Court of Human Rights has broadened its perspective on the right to a fair trial in the cases of pressure on judges from inside the

[9] Tin Bunjevac, "From Individual Judge to Judicial Bureaucracy: The Emergence of Judicial Councils and the Changing Nature of Judicial Accountability in Court Administration", UNSWLI, 2017, p.822.
[10] David Kosař, "Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice", EuConst (13), 2017, p.97.
[11] Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence", The American Journal of Comparative Law 57(1), 2009, p.109.
[12] Tin Bunjevac, the cited paper, p.814.
[13] Nuno Garoupa and Tom Ginsburg, the cited paper, p.121.
[14] Ibid. p. 107.
[15] David Kosař, the cited paper, 2017, p.117.
[16] Ibid. p. 120.

court itself.[17]

While discussing the history of reforming the Council and discussing the matter of its independence as a key constitutional body in Georgia, it is important to note that increasing the autonomy of the court and, consequently, isolating it from other branches of the government does not necessarily foster the independence of an individual judge.[18] Some authors point out that the independence of the judiciary and the independence of a judge are "two different things."[19] This once again indicates that the perspective of the analysis of the reforms carried out in Georgia shall be expanded beyond the institutional design and political neutrality to identify the actual impact of the changes on the internal processes of the court.[20]

1.1. The First Wave of Judicial Reform

Owing to its special roles and powers, since 2013, the Council became one of the key targets of the reforms. The First Wave of Judicial Reform was mostly aimed at reorganizing the Council.[21] One part of the initiated amendments intended to change the rules of electing judicial and non-judicial members of the Council[22] and the other part aimed to renew its composition for the time being.[23]

The draft law on election of members of the Council proposed several important and progressive initiatives although, some aspects of the reform were critically assessed by the Venice Commission and local organizations,[24] leading the Parliament to eventually adopt its revised version.

As a result of the First Wave of the Judicial Reform in 2013, the following amendments were adopted:[25]

- The right to elect judge-members of the Council became the exclusive power of the Conference of Judges;
- The secret ballot was introduced for electing members of the Council with the support of two-thirds of the members present at the Conference of Judges;
- The right to nominate candidates for judge-members of the Council was awarded to each member of the Conference instead of the Chairperson of the Supreme Court;

[17] Joost Sillen, "The Concept of 'Internal Judicial Independence' in the Case Law of the European Court of Human Rights", European Constitutional Law Review 15(1), 2019, p.106.
[18] David Kosař, the cited paper, 2017, p.98.
[19] Ibid. p.98.
[20] David Kosař and Samuel Spáč, the cited paper, p.39.
[21] The explanatory note to the "Draft Organic Law on Amendments to the Organic Law of Georgia "On Common Courts," 29/12/2012, available at: https://info.parliament.ge/file/1/BillReviewContent/158436 (Last viewed on March 1, 2021).
[22] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 29/12/2012, Article 1, Paragraph 4, available at: https://info.parliament.ge/file/1/BillReviewContent/158435 (Last viewed on March 1, 2021).
[23] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 29/12/2012, Article 3, Paragraph 2, available at: https://info.parliament.ge/file/1/BillReviewContent/158435 (Last viewed on March 1, 2021).
[24] European Commission for Democracy through Law (Venice Commission), Opinion On the Draft Amendments to the Organic Law on Common Courts of Georgia, 2013, CDL-AD (2013) 007, para. 49, 50 and 74.
[25] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 01/05/2013, 580-IIს.

- The election of judges holding administrative positions in courts for the Council was limited. However, the right to membership was retained for the Deputy Chairperson of the Court who holds the passion as a chairperson of a panel/chamber. The law restricted the number of judge-members holding administrative positions in the courts for the Council members to three;
- The election of the non-judge members of the Council was supposed to be based on the participation of civil society instead of party quotas.[26] For the election of non-judge members of the Council, the support of two-thirds of the full composition of the Parliament became necessary, however, in the next rounds of voting, it was possible to elect the members with the majority. The law determined the restriction that out of the six non-judicial members of the Council[27] only four could have been elected by a majority of the Parliament;[28]
- The rules of decision-making of the Council on significant personnel-related matters were amended. Any decision regarding the appointment or disciplinary liability of judges was to receive the support of two-thirds of the full composition of the Council. A secret ballot was introduced as its mechanism;
- By the law, the powers of non-judicial members of the Council, as well as of judicial members elected by the Administrative Committee or those who held administrative positions, were terminated prematurely.

Although some parts of the First Wave of the Reform were criticized, the changes were substantially different in content and scope from all subsequent stages of the reform. The developed initiatives appeared as an attempt at landmark transformation of the court. According to the opinion of the Venice Commission, supporters of the amendments deemed it impossible to carry out fundamental reforms in the judiciary without a complete renewal of the Council.[29] Despite contradictory views on the premature termination of powers of members of the Council, sentiments at the time indicated that the newly elected government, in the early stages of gaining power, had the ambition to take radical steps towards the judicial system. Yet the initiative had a significant drawback - it retained the system tailored to the majority, where the idea of political consensus was neglected.

As it turned out, the initial attempts of the government were not as solid and well-thought as to ensure a sound foundation for consistent, long-term democratic reforms.

The results of the newly adopted rules of composition of the Council, the attitudes developed between judicial and non-judicial members of the body,[30] the shift of the informal agreements behind the closed-door substantially devalued the government's initial efforts.[31]

[26] Rules of Procedure of the Parliament of Georgia, 22/06/2012, №6533-Iს, Article 219, the version effective until April 5, 2013 (invalidated).
[27] Until November 29, 2013, Parliament had elected 6 non-judicial members to the Council. After the enactment of the constitutional norms, the Parliament elects 5 members and 1 member is appointed by the President of Georgia.
[28] The Rules of Procedure of the Parliament of Georgia, 22/06/2012, №6533-Iს, Article 219, Paragraph 12, the edition effective until April 5, 2013 (invalidated).
[29] European Commission for Democracy through Law (Venice Commission), the above cited opinion, Para. 68.
[30] Coalition for an Independent and Transparent Judiciary, "Coalition Statement in connection with the disrupted session of the High Council of Justice", 2014, available at: http://coalition.ge/files/frustrated_sitting_of_high_council_of_justice_ge.pdf (Last viewed on March 1, 2021).
[31] Coalition for an Independent and Transparent Judiciary, the cited paper, p.10.

1.2. The Second Wave of Judicial Reform

The next stage of the reform was formally related to the enforcement of the 2010 amendments to the Constitution of Georgia.[32] Following the 2013 presidential election, a constitutional rule envisaging the lifetime appointment of judges came into force. However, the supreme law also allowed for a probationary period of judges before their lifetime appointment.[33]

Formally, this was the context taken into account while beginning working on the Second Wave of the reform devoted to developing a rule for the appointment of judges for a probationary period.[34] The amendments drafted within the Second Wave were criticized by the local civil society organizations.[35] The idea of probing judges was negatively assessed by the Venice Commission back in 2010.[36] Despite the criticism, Parliament passed the law in 2014 authorizing a three-stage assessment system of judges appointed for the three-year tenure.[37]

Notably, the changes were being elaborated with the background of the "failure" of the First Wave of judicial reform, when it was already clear that even a radical political step (preterm renewal of the composition of the Council) did not influence the system appropriately. Thus, the controversial and problematic idea of appointing judges for probation[38] cannot be considered only in conjunction with the enactment of the new constitutional model. The approval of the probationary period for the judges in such a specific form was, in a way, a reflection of the collapse that followed the First Wave of the reform. The political authorities might have anticipated that the enactment of the probation period would send an alarm signal to the judiciary and facilitate a gradual renewal of the composition of the courts. It should be noted that at that moment, the three-year probation period concerned both newly and early appointed (having judicial experience) judges equally.[39]

1.3. The Third Wave of Judicial Reform

The next stage of the judicial reform vividly demonstrated the change in the strategy of the political authorities towards the judiciary. The preparations for the Third Wave of the reform began back in 2015 although due to formal and informal agreements, the amendments were finally adopted only in 2017. By that moment, all efforts to reform the judiciary had further faded away, unveiling a strategy of "concluding a truce" between the political power

[32] The Constitutional Law of Georgia "On Approval of the Amendments and Additions to the Constitution of Georgia", 15/10/2010, 3710-IIს, Article 1, Paragraph 34.
[33] Ibid. Article 1. Paragraph 34.
[34] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 01/08/2014, 2647-რს.
[35] Coalition for an Independent and Transparent Judiciary, "Opinions of the Coalition Regarding the Draft Law Prepared by the Ministry of Justice", 2014, available at: http://coalition.ge/files/opinion_on_draft_law_prepared_by_ministry_of_justice_ge.pdf (Last viewed on March 1, 2021).
[36] European Commission for Democracy through Law (Venice Commission), Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia", 2010, para.88-91.
[37] This issue is reviewed in more detail in the chapter on the appointment of judges.
[38] Coalition for an Independent and Transparent Judiciary, "Coalition's Statement on the Appointment of Judges for a Probationary Period", 2013, available at: http://coalition.ge/files/coalition_statement_september_2013.pdf (Last viewed on March 1, 2021).
[39] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 01/11/2013, 1489-Iს, Article 1, Paragraph 7.

and the judiciary,[40] and an obvious attempt to fit the legislative initiatives to the interests of a specific group.[41]

The process of the review and adoption of the Third Wave of the reform was the result of the above-mentioned truce. Despite some positive novelties (for example, the introduction of a random case distribution system), the amendments strengthened the power of a particular group - judges involved in court management - within the system. As a result of the amendments:[42]

- The court chairpersons restored their right to membership of the Council;
- The government refused to introduce a mechanism of electing court chairpersons, which was one of the progressive initiatives of that phase of the reform and the Council preserved the right to appoint court chairpersons;
- An only certain group, referred to as influential judges, was exempted from the three-year probation period;[43]
- The Parliament changed the number of votes required for the election of non-judge members of the Council and allowed a majority of the full composition of Parliament to appoint them.[44]

As reasoning to the delegation of the right to elect non-judge members of the Council to the parliamentary majority, the authors of the bill referred to the argument of ensuring "more flexibility and avoiding delays in the process."[45]

It is safe to say that the 2015-2016 period became a turning point in the relationship between the political power and the judiciary, followed by an alteration to the trajectory of the judicial reform. The analysis of the court-related reforms conducted after the above-mentioned period indicates a strategy through which the power returns to the influential group of judges, the legal framework for isolation of the judicial authorities is created, and political positions on the necessity of judicial reforms are weakened. In this regard, the word isolation is a synonym for "corporal independence" instead of political neutrality and serves to describe the situation which stresses out the "unaccountable" system and "professional privileges of independence" rather than "the democratic potential of the judiciary within the political system".[46]

[40] Coalition for an Independent and Transparent Judiciary, the cited paper, p.10.
[41] Human Rights Education and Monitoring Center (EMC), "Delayed Judicial Reform and Related Political Processes", 2016, available at: https://emc.org.ge/ka/products/gachianurebuli-sasamartlo-reforma-da-tanmdevi-politikuri-protsesebi (Last viewed on March 1, 2021).
[42] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 08/02/2017, 255-IIს.
[43] Coalition for an Independent and Transparent Judiciary, "Coalition Calls on Parliament to Consider the President's Objections to the "Third Wave" Judicial Reform Bill" 2017, available at: http://coalition.ge/index.php?article_id=144&clang=0 (Last viewed on March 1, 2021).
[44] The Rules of Procedure of the Parliament of Georgia-"On Amending the Rules of Procedure of the Parliament of Georgia", 21/04/2017, #638-IIს, Article 1.
[45] The explanatory note to the "Draft Organic Law on Amendments to the Organic Law of Georgia "On Common Courts," 02/07/2015, p. 8, available at: https://info.parliament.ge/file/1/BillReviewContent/84869 (Last viewed on March 1, 2021).
[46] Boaventura de Sousa Santos, "The Gatt of Law and Democracy": (Mis)Trusting the Global Reform of Courts", Oñati Papers (7), 1999, p. 75.

1.4. The Fourth Wave of Judicial Reform

The Parliament adopted the draft law on another wave of reform in December 2019. The changes concerned the composition of the Council, general rules of its operation, substantiation of decisions, and transparency of its work. With the adopted law:[47]

- The Council was obliged to hold consultations with the judges for selecting the court chairpersons;
- The norms regulating conflict of interests and recusal of members of the Council were expanded;
- The Council was required to substantiate any decision on the appointment of judges;
- The Council became accountable to the Conference of Judges;
- It was decided that each instance court shall be represented with at least one judge-member in the Council. ;
- The procedure for removing the Independent Inspector from the office was modified and for making this decision, the support of two-thirds of the full composition of the Council was required.

For the assessment of the above-mentioned amendments, it is important to note that the bill did not propose any groundbreaking changes concerning the key issues - the rule for electing court chairpersons and strengthening the internal democracy of the judiciary. Nor was the logic of the power distribution changed, therefore, the fourth stage of the reform did not create suspense for any qualitative changes.

1.5. 2017 Constitutional Reform and Altered Reality

It is worth noting that a possibility to reform the Council in 2013 was made by the text of the then-acting Constitution, which was short and flexible compared to the current edition.[48] According to the 2017-2018 constitutional reform, several issues previously arranged at the level of organic law were subjected to constitutional regulation.

In particular, if before the reform, the constitution had envisaged the mandate of the Council appointment and dismissal of judges,[49] after the reform the list was expanded to the obligation of the body to ensure the independence and efficiency of the judiciary.[50]

Besides, an extensive and detailed rule for the election of Council members was introduced to the Constitution.[51] Notably, the 4=year term of the members of the Council, which was previously regulated only by law, became guaranteed by the Constitution. Furthermore, the Constitution defined the number of Council members, which until then had been regulated only by the organic law. Before the reform, the main constitutional guarantee regarding the composition of the Council was the ratio of judicial to non-judicial members of the Council, according to which the judge members of the Council held the majority. The new edition stipulated that the Council consisted of 15 members with more than half being a judge;

[47] The Draft Amendments to the Organic Law of Georgia on Common Courts of Georgia, 13/12/2019, 5569-Ⅱს.
[48] Constitution of Georgia, 24/08/1995, 786, Article 86[1] (the edition of the Constitution before October 13, 2017).
[49] Constitution of Georgia, Article 86[1], Paragraph 1 (the edition effective until the constitutional reform 2017).
[50] Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 13/10/2017. 1324-რს, Article 1.
[51] Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 13/10/2017. 1324-რს, Article 1.

the Chairperson of the Supreme Court was no longer the Chairperson of the Council automatically. Under the Constitution, the right to elect the Chairperson of the Council was granted to the Council, and the right to elect the Secretary of the same body to the Conference of Judges. It is noteworthy that the right to hold both positions was awarded only to judge-members of the Council. The rule for electing non-judicial members of the Council was significantly amended as well. The Constitution provided for the election of non-judicial members of the Council by a majority of not less than three-fifths of the full composition of the Parliament. It must be said that the only ambitious initiative of the constitutional reform concerning the current context was the modification of the rule for electing non-judicial members of the Council.

Considering the new constitutional reality, the discussion on further reforms of the Council shall take into account the boundaries that have significantly narrowed the scope of action, namely:

- The constitutional number of Council members, which largely means maintaining the current balance of power and excludes, for instance, the development of new dynamics in the Council through increasing their quantity
- The four-year term of Council members, which has already become a constitutional guarantee;
- Awarding the positions in the Council (chairperson/secretary) to judicial members, further strengthening their power.

Considering the general context generated since 2016, these amendments served to strengthen the guarantees of the existing influential group and maintain the current order.

Nevertheless, the progressive provision of the recent constitutional reform increasing the number of votes required for the election of non-judicial members of the Council in Parliament is of particular importance. Increasing the role of the political process and political consensus in the composition of the Council may have a positive effect on both the collegial body and the dynamics of the judiciary. However, merely the composition of the Council is not sufficient to create a new logic of governance. The rules of operation of the Council, including the actual influence of non-judicial members on the activities and decision-making of the body, are the critical issues remaining as a challenge.

1.6. The Composition of the Council and Balance of Power in the Court

Following the 2013 reform, with the motives of de-politicization of the Council, the involvement of political subjects in the composition of the Council was restricted. However, the right to elect non-judicial members was practically retained to the parliamentary majority, which had been entitled to appoint only a part of the members until April 2017 and then all non-judicial members by a majority of its full composition.

Therefore, although direct political representation in the Council was banned, the law preserved a rule that allowed a single political force - the ruling majority - to nominate a preferable candidate to the Council unilaterally without holding political consultations or reaching a consensus. The simplicity of the procedure caused by the possibility of appointing a member by a single party made it clear that the First Wave of judicial reform failed to, in reality, achieve the abolishment of partisan/political representation in the Council. The direct political representation was replaced by one-party decisions that did not qualitatively change the essence of the election of non-judicial members of the Council.

This flawed rule was used to renew two compositions of the body and affected the quality of the Council's activities and the overall state of justice. In most cases, the Parliament would nominate such individuals for the position of non-judicial members of the Council whose values and past work, as well as visions on the challenges of the justice system, were either not known at all or did not create expectations for systemic reforms. This tendency was reinforced by the appointments made to the Council by the Parliament in 2017 as well as the President of Georgia in 2020. At a critical point for the judiciary, both the legislative body and the President appointed such candidates as non-judicial members of the Council most of whose visions and values about the judicial system were unknown to the public.[52]

At the same time, during the elections of judicial members of the Council, the Conference of Judges traditionally expressed confidence in either influential colleagues or the ones holding administrative positions at different times.[53] Despite the enhancement of the election process of the judicial members of the Council at various stages, it still faces the problem of proper representation.[54] Besides, the seats of the judicial members are mainly taken by persons simultaneously holding administrative positions or those who in the recent past served as chairpersons/deputy chairpersons of the courts.[55]

An adequate representation of judges of all ranks (especially lower instance court) in the judicial councils would enable such bodies to strengthen the degree of internal independence, as "ordinary" judges have the power to make decisions concerning the appointment of colleagues to the management/administrative positions in the court.[56] However, this power of the collegial body acquires a real significance when the representation of the "ordinary" judges in the council is adequate. If the council is entirely composed of court chairpersons or their favorites, then this model strengthens the chairpersons rather than individual judges.[57]

Court chairpersons undoubtedly hold different status, especially in the systems with only representative functions, which is connected to power and "information related asymmetry."[58] The realization of such unequal social and political capital became the basis for the restrictions in some European Union (EU) countries, by which chairpersons were limited to taking seats in judicial councils.[59]

The Conference of Judges in Georgia does not have the right to elect a judge appointed for a three-year term to the Council (unless they have five years of judicial experience).[60] The group of three-year judges consists of inexperienced staff, who in most cases, are appointed to the common court system for the first time. This restriction in the law practically excludes them from the right to introduce changes to the activities of the Council. Notably, the restriction concerning the "new" judges was approved in 2017 along with the changes aimed at strengthening the influential group of judges and restoring their membership in

[52] Nino Nozadze, Olga Shermadini, The Georgian Young Lawyers' Association (GYLA) and Transparency International - Georgia (TI), "High Council of Justice Monitoring Report # 6", 2018, p.12.
[53] Ibid. p.13.
[54] 2 judges out of 9 are the members of the Supreme Court, 4 judges seat in the Courts of Appeals, 2 represent Tbilisi City Court, 1 Bolnisi District Court.
[55] 7 out of 9 members are such members.
[56] Hammerslev, O., Piana, D., Langbroek, P., Berkmanas, T., & Pacurari, O. (Eds.), "Legal Education and Judicial Training: The Menu for Justice Project Report", Hague: Eleven International Publishing, 2013, p.12.
[57] David Kosař, the cited paper, 2017, p.115.
[58] David Kosař, "Perils of Judicial Self-Government in Transitional Societies", Cambridge University Press, 2016, p.394.
[59] Ibid. 401.
[60] The Organic Law of Georgia "On Common Courts," Article 47, Paragraph 4.

the Council. Although there were up to 20 judges appointed with a three-year term to the common courts' system as of the end of 2020, the rule was unfair and questionable from the very beginning.[61]

For the changes in the composition of the Council, it is noteworthy that several judges resigned from the membership of the body before the expiration of their term of office. In October 2020, a few days before the Parliamentary Elections, two judicial members resigned from the Council.[62] The former Secretary of the Council, Giorgi Mikautadze, left the office on the grounds of being elected as the chamber chairperson at the Supreme Court.[63] Revaz Nadaraia retired from the office as well, several months before the end of his term. The two newly-emerged vacancies enabled the extraordinary session of the Conference to elect two new members of the Council for the four-year term.[64] The chronology of the events is particularly interesting.

The information about holding a plenary session of the Plenum on October 22 appeared on the website of the Supreme Court on October 21, 2020. At this session, Giorgi Mikautadze was elected as the Chairperson of the court Chamber (with this decision, the number of judges holding administrative positions in the Councilexceeded the allowed limit). On the same day, October 22, a meeting of the Administrative Committee of the Conference of Judges was held, which decided to summon an extraordinary Conference and bring on the agenda the issue of electing two judicial members of the Council. Holding the meetings of two different bodies on the same day within short notice, especially a "spontaneous" meeting of the Administrative Committee to summon a conference, shows that the appointment decisions had been agreed in advance and it did not come as a surprise. Otherwise, it is hard to imagine organize the conference in such a limited period.

1.7. Summary

Following the reforms, all major levers related to the appointment of judges and the management of the judicial system are in the hands of the Council. Observations on the activities of the Council in recent years have revealed that despite supplying the legislative clarity and detailing the procedures, the motivation behind decisions of the Council in many cases is questionable and problematic.[65] This is largely due to the procedure of electing judicial and non-judicial members of the Council, decisions on the appointment of specific members, and the balance of power created within the Council. Most non-judiciary members appointed by single party decisions and the complete dominance of judges holding administrative positions and/or having such experience in the Council are a vivid demonstration of the problem.

The analysis of the Four Waves of the reform and constitutional amendments concerning

[61] There are a total of 277 judges in the first and second instance courts. Up to 230 of these are appointed for lifetime, 16 are appointed for three-year term, and 31 for 10 years. Terms of several judges were extended.

[62] Statement of the High Council of Justice of Georgia of October 23, 2020, available at: https://cutt.ly/MlZPLxE (Last viewed on March 1, 2021).

[63] Ibid.

[64] Coalition for an Independent and Transparent Judiciary, "Coalition for Independent and Transparent Judiciary Responds to the Extraordinary Judicial Conference", 2020, available at: http://coalition.ge/index.php?article_id=246&clang=0 (Last viewed on March 1, 2021).

[65] Nino Nozadze, Olga Shermadini, The Georgian Young Lawyers' Association (GYLA) and Transparency International - Georgia (TI), "High Council of Justice Monitoring Report #7", 2019, p.7.

the Council shows that detailing the legislation does not oppose the interests and power of the dominant group. On the contrary, the pattern of the legislative changes shows a tendency towards strengthening this group and isolating the judiciary. This has been proved by the return of court chairpersons to the Council, the retention of the right of the Council to appoint court presidents, and the recent constitutional reform, which somehow sealed the existing balance of power in the Council.

In the new reality, the prospect of reforming the Councilwithout changing the Constitution is obscure since all issues related to the composition of the Council (the number of members, its ratio, election of judges holding the administrative positions to the Council, tenures) are regulated by the supreme law. In this condition, electing non-judicial members of the Council through the amended procedure and with higher political support becomes even more important.

CHAPTER 2: THE HIGH SCHOOL OF JUSTICE

The purpose of the School in the judicial system is important in several areas. Through the professional training of judiciary candidates and the incumbent judges and court officials, the School significantly determines the general state of justice in the country. Since 2006, the School has been exclusively performing these functions. Such exclusivity obliges the state to develop a high-quality training/retraining system and prevent the commercialization of the matter of special public interest and value. Moreover, the centralized arrangement allows to conduct a routine, systematic evaluation of the eminence of the School, and most importantly, clearly pinpoints the target for the public in demand for quality and fair justice. Most European countries opt for such a "monopolistic" model to train candidates for justices and prosecutors envisaging the existence of a centralized or decentralized public training system instead of the intervention of the private sector in the process.[66]

In Georgia, the School as a filter largely determines the influx of new personnel into the court, as well as the quality, pattern, and ideology of justice. The importance of the training process of those willing to become judges is growing along with the increased role and political significance of the judiciary.[67] Therefore, expectations concerning the School are not limited to teaching the norms of substantive and procedural law. Several authors argue that the preparation process of the judges shall devote adequate time to the theoretical and philosophical disciplines as well.[68]

Undoubtedly, the teaching and training stage is particularly significant and this importance shall not be minimized to only evaluating the curriculum of the School. Institutional independence of the School and the issue related to the enrolment/graduation of students are rightly considered pivotal aspects in the court composition.[69]

[66] Hammerslev, O., Piana, D., Langbroek, P., Berkmanas, T., & Pacurari, O. (Eds.), the cited paper, p.128.
[67] Ibid. p.12.
[68] Ibid. p.13.
[69] Keti Kukava, Mariam Orjonia, Giorgi Beraia, Ana Tchiabrishvili, Saba Buadze, International Society for Fair Elections and Democracy (ISFED) and Institute for Development of Freedom of Information (IDFI), "Judges' Professional Training System in Georgia", 2019, p.6, available at: https://idfi.ge/public/upload/IDFI_2019/rule_of_law/ISFED_PrintBook_GEO2.pdf (Last viewed on March 1, 2021).

2.1. The First Wave of Judicial Reform

The interest in the institutional role of the School, the composition of its governing bodies, and the procedures of admitting students to the School has particularly increased in Georgia since 2012.[70] The interest was largely connected to the fear that the School would be used to eliminate undesired judicial candidates from the process.[71]

The steps taken within the reform of this institution in 2013 can be seen as a response to the above concerns, which resulted in amending the rules for composing the Independent Board of the School (hereinafter – the Independent Board).[72] In particular:

- The role of the Chairperson of the Supreme Court was limited and the right to elect members of the Independent School Board was redistributed between the Council and the Conference of Judges;
- The Chairperson of the Supreme Court was restricted from membership of the Independent Board;
- The Conference of Judges was awarded the right to elect the chairperson of the Independent Board;
- The confirmation of five members of the Independent Board upon the submission of the chairperson of the same body has become the competence of the High Council of Justice;[73]
- Following the approval of the law, the composition of the Independent Board was amended under the new procedures.

The changes, on the one hand, indicated the desire to weaken the role of the Chairperson of the Supreme Court and to change the previous composition, on the other.[74] However, it was also obvious that the initiative preserved the possibility for the judges to influence and control the processes. The authors of the amendment may have anticipated that the transfer of the power from the Chairperson of the Supreme Court to the judges to form the Independent Board would make the resolution of the issues more democratic. However, despite the motivation, it was clear that at this stage of the reform, the leverage of decision-making was fully handed over to the judges.

2.2. The Third Wave of Judicial Reform

The process of reforming the School introduced the following amendments to the roles of the Independent Board, and the matters below were regulated at the legislative level as follows:[75]

- The requirement to publish information about holding the sessions of the Independent Board in advance together with issuing points on the agenda;

[70] Coalition for an Independent and Transparent Judiciary, "The Judicial System in Georgia", 2012, p. 28, available at: http://coalition.ge/index.php?article_id=55&clang=0 (Last viewed on March 1, 2021).
[71] For example, please see: "Statement of High School of Justice 2013 Graduates," available at: https://idfi.ge/ge/news-32 (Last viewed on March 1, 2021).
[72] The Law of Georgia "On Amending the Law on High School of Justice," 01/05/2013, 582-IIს.
[73] The Law of Georgia "On Amending the Law on High School of Justice," 01/05/2013, 582-IIს, Article 1, Paragraph 4.
[74] The Law of Georgia "On Amending the Law on High School of Justice," 01/05/2013, 582-IIს, Article 2, Paragraph 3.
[75] The Law of Georgia "On Amending the Law on High School of Justice," 08/02/2017, 261-IIს.

– The obligation to substantiate decisions rendered and their publication on the website.

The changes aimed at increasing the transparency and publicity of the activities of the Independent Board. The amendments did not cover any key issues that would lead to a new redistribution of powers and authorities between the High Council of Justice and the School or would enhance the autonomy of the latter.[76]

2.3. The Fourth Wave of Judicial Reform

At the end of 2019, within the Fourth Wave amendments, the Law of Georgia on the School was abolished and the regulatory norms of the body were consolidated within the Organic Law of Georgia "On Common Courts,"[77] even though the provisions of the adopted Constitution did not require the regulation of school-related matters at the level of the organic law. The decision may have been motivated by ensuring the stability of the school-related legal framework and/or the complication of any subsequent amendments for the future.

With the 2019 reform, a significant amendment was introduced to the academic period of the School, which was extended from 10 to 16 months. The size of scholarships was also increased. Also, the obligation of any incumbent judge to devote at least five days in three years to professional development was stipulated.

In December 2019, the rules for the composition of the Independent Board were once again amended and were increased by one member.[78] Moreover, the quotas for the judiciary and non-judiciary members were specified.[79] Judicial members found themselves in the majority of the Independent Board. The right to elect judiciary members was transferred to the Conference of Judges, while the right to elect one judiciary and three non-judiciary members were designated to the High Council of Justice, the rules of procedure of which such decision requires a majority of votes of the Independent Board.[80] Thus, even in this part, the judges retained full control over the composition of the Independent Board.

The controversial provision regulated the election of the chairperson of the Independent Board. In particular, if previously, the chairperson had been elected by the Conference of Judges, with the 2019 amendments, the right to the election was granted to the High Council of Justice. It should be noted that the Council can elect its chairperson independently, from its members.[81] However, the legislators did not award a similar right to the Independent Board. Further, the provision against remuneration on the work of the members of the Independent Board compared to the School principal, the members of the Council and other personnel of the judicial bodies was again retained.[82]

These reservations can be seen as a continuation of the tradition stimulating an apparent power and functional asymmetry between the Council and the School. Although the role of the Conference of Judges has increased in the process of composing the Independent Board, the Council still preserves certain dominance over the School. Unlike the situation

[76] Coalition for an Independent and Transparent Judiciary, the cited paper, 2012, p.28.
[77] The Organic Law of Georgia "On Amending the Law on Common Courts," 13/12/2019, 5569-Iს.
[78] The Organic Law of Georgia "On Amending the Law on Common Courts," 13/12/2019, 5569-Iს, Article 1, Paragraph 11.
[79] Ibid.
[80] The Rules of Procedure of the High Council of Justice of Georgia, Article 12, Paragraph 2.
[81] The Organic Law of Georgia "On Common Courts," Article 47, Paragraph 2^1.
[82] The Organic Law of Georgia "On Common Courts," Article 66^3, Paragraph 8.

before the 2019 reform, the Council is no longer restricted even with the recommendation of the Chairperson of the Independent Board while selecting candidates. Moreover, out of the seven members of the Independent Board, the majority are members appointed by the Council.

One novelty of the legislative amendments of 2019 concerned the matter of admission of students to the School. If previously it was the Council who held competitions for the admission of students to the School,[83] now the function has been awarded to the School.[84] However, the law maintained a contradictory provision, according to which the competition for enrolment to the School is announced by the Council.[85] The minimum number of vacancies for a competition is determined by law,[86] and the number of students to be enrolled in the School is determined by the Council.[87] Given these reservations, there is no apparent need to maintain the role of the Council in the process as the School can perform the function independently.

The separation of the functions between the Council and the School intended to meet several legitimate goals. The first was to increase the autonomy of the School and distance it from the Council, and the second to reduce the excessive powers of the latter.[88] The separation was supposed to provide fairly redistributed functions, taking into account the constitutional and institutional roles of the Council and the School. However, the legislators preserved the Council's dominance over the School and the imbalance between the two.

2.4. Summary

The comprehensive analysis of the amendments of recent years unveils the legislator's strategy to preserve the controlling power over all important issues to the judges. The composition of the Independent Board is such an example, where the direct participation of actors other than the Conference of Judges and the High Council of Justice is excluded. In addition, the dominance of the Council over the School is still evident, which is not limited to the aspects of symbolic importance. Through the Fourth Wave of judicial reform, supposedly aimed at increasing the independence of the School, the members appointed by the Council formed a majority of the composition of the Independent Board. Retaining unnecessary functions to the Council, such as the election of a chairperson of the Independent Board and announcement of a competition for the admission of the School students, is a manifestation and maintenance of the dominance. Recent reforms have shown that the legislators are unable to ensure a fair separation and redistribution of functions and powers even within the court system. This once again is being expressed in the unbalanced role of the Council and the concentration of power in the hands of a single group.

[83] The Law of Georgia "On the High School of Justice," Article 13, Paragraph 1(invalidated).
[84] The Organic Law of Georgia "On Common Courts," Article 66^{14}, Paragraph 1.
[85] The Organic Law of Georgia "On Common Courts," Article 66^{12}, Paragraph 3.
[86] The Organic Law of Georgia "On Common Courts," Article 66^{12}, Paragraph 2.
[87] The Organic Law of Georgia "On Common Courts," Article 66^{15}.
[88] International Society for Fair Elections and Democracy (ISFED) and Institute for the Development of Freedom of Information (IDFI), the cited paper, p. 17.

CHAPTER 3: THE CONFERENCE OF JUDGES

The Conference of Judges, a self-governing body of judiciary, has acquired special importance in recent years and its activities have become an important indicator in the assessment of the general condition of the judiciary. Currently, the Conference of Judges brings together about 300 judges, and the importance and intensity of its activities vary according to the political context in the country. In recent years, the work of the Conference of Judges puts a heavyweight of politicization on the body.

3.1. The First Wave of Judicial Reform

Many changes of 2013 supported the idea of strengthening self-governance in the court system. The legislators deprived the Administrative Committee of the right to make decisions on matters of special importance and delegated the composition of the collective bodies exclusively to the Conference of Judges.[89] This change intended to increase the democracy of the process and the degree of legitimacy of decisions rendered. The same purpose was pursued by an amendment that deprived the Chairperson of the Supreme Court of the sole power to nominate candidates for elective positions and transferred this right to the judges participating in the Conference.[90] Significant amendments were also made to the decision-making procedure of the Conference. To make certain decisions of special importance, the support of two-thirds of those present at a session of the Conference was required instead of a simple majority of votes.[91] The law also offered additional guarantees for judges enabling them to make decisions in a safe and free environment. Consequently, the rule of voting through a secret ballot for making a range of decisions was implemented.[92] Nevertheless, one problematic provision remained according to which if the candidates nominated at the Conference fail to obtain two-thirds of the votes and the positions remain vacant, the candidates can be elected with lower support (at least one-fourth of the full composition).[93] This rule undermines the idea of promoting the decision-making process with high support and discourages the members of the Conference to seek consensual decisions acceptable to broader groups.

Despite the reform, the problem of separation of powers between the Conference and the Administrative Committee is not fully eliminated. The law and the rules of procedure of the Conference of Judges state that the Administrative Committee is entitled to make decisions that do not require the approval of the Conference.[94] Unfortunately, neither the law nor the rules of procedure list the issues on which the Administrative Committee can render decisions independently. These issues may be purely organizational (e.g., composing the Secretariat),[95] yet it is better if the powers of the Conference and the Administrative Committee are more clearly separated. The discussions should also focus on past experiences when the functions of the Administrative Committee were questionable and the body possessed a range of controversial powers.[96]

[89] The Organic Law of Georgia "On Common Courts," Article 65, Paragraph 1.
[90] The Organic Law of Georgia "On Common Courts," Article 65, Paragraph 2.
[91] The Organic Law of Georgia "On Common Courts," Article 65, Paragraph 1(a).
[92] The Organic Law of Georgia "On Common Courts," Article 66, Paragraph 2.
[93] The Organic Law of Georgia "On Common Courts," Article 66, Paragraph 5.
[94] The Rules of Procedure of the Conference of Judges, Article 23, Paragraph 4.
[95] The Rules of Procedure of the Conference of Judges, Article 25.
[96] Coalition for an Independent and Transparent Judiciary, the cited paper, 2012, p.11; European Commission for Democracy through Law (Venice Commission), the cited opinion, p.6.

3.2. The Third Wave of Judicial Reform

As mentioned, since 2013 a tendency of strengthening the Conference of Judges and increase in its powers have been observed. A positive aspect of the process was the return of the right of decision-making exclusively on matters of utmost importance to the self-government of the judiciary. However, the process has an alarming side as well. With the Third Wave amendments and afterward, in 2018, the Conference of Judges was conferred several problematic powers not directly falling within its scope.

For example, one-third of the Conference of Judges has the right to address the High Council of Justice with the request to dismiss the Independent Inspector if there are appropriate grounds.[97] The point that the removal of the Independent Inspector requires the consent of one-third of the judges may be seen as a kind of guarantee. However, the specific relationship between the Inspector and the judges shall be taken into account, showing the problematic nature of such consent. This rule may additionally stimulate the emergence of a group of constituent judges in the court, promote unnecessary discussions and mobilization among the judiciary, and "compel" the Inspector to tailor their views with the visions of the specific group of judges.

It is also unclear what is meant by the accountability of the constitutional body - the High Council of Justice - to the Conference of Judges, which was first written in the Constitution and then in the Organic Law in 2018. The law stipulates that the only form of accountability is the obligation to submit an annual report by the Council to the Conference.[98] This provision may have some sort of symbolic value just like the inclusion of the judges in the process of dismissal of the Inspector. The examples above are an illustration of the general logic within the court that through several mechanisms, constantly bringing back to life the idea of symbolic powers, creates "leaders" and their constituents around such powers.

3.3. Attempts to Instrumentalize the Judges

Although such discourse, at first glance, may create the impression that the center of power is concentrated in the self-government of judges, the problem of instrumentalization of the idea of self-governance and the Conference itself, is alarming. In recent years, the political significance of the Conference of Judges has greatly increased. Holding regular and extraordinary sessions during a crisis, their working formats and agendas, as well as the developments during the sittings showed that the idea of self-governance was exploited for demonstrating unity. Large-scale meetings within the format of the Conference of Judges were usually an attempt to symbolically validate the power and views of influential groups.[99]

This experience shows that transferring the important powers to the self-government of judges and the enhancement of its working procedures did not have a direct impact on strengthening the democratic process within the judiciary. The reform did not promote di-

[97] The Organic Law of Georgia "On Common Courts," Article 51^1, Paragraph 2.
[98] The Organic Law of Georgia "On Common Courts," Article 47, Paragraph 1^1.
[99] For example, please see: Coalition for an Independent and Transparent Judiciary, "The Statement on the Extraordinary Conference of Judges of Georgia", 2016, available at: http://coalition.ge/index.php?article_id=72&clang=0 (Last viewed on March 1, 2021). See also: "Public Statement of the Conference of Judges," 2016, available at: http://liberali.ge/news/view/20552/mosamartleta-konferentsia-mosamartleta-tsinaaghmdeg-kampaniashi-prezidentits-chaerto (Last viewed on March 1, 2021); Also, the Coalition for an Independent and Transparent Judiciary, the cited paper, 2017, p.15.

verse and meaningful discussions nor did it reveal dissenting views or differences in values in the court.[100] The participants of the Conference, though formally assuming the power, in fact, remained the captive of the influence and the agenda of the groups with narrow interests.

3.4. Summary

The legislative reforms improved the legal framework regulating the self-governance of the judiciary and enhanced the role of the Conference of Judges. However, the amendments did not have a tangible impact on de facto power and the internal democracy of the judiciary. This once again indicates that a change is extremely difficult to achieve merely through defining provisions in detail and refining the legislation in the systems where the hierarchies (even implicit) within courts and informal statuses have been evolving over the years. This aspect is particularly evident when the main emphasis in the course of reforms is placed on the independence of the court, as a unified system, from the political authorities, while the autonomy of individual judges, including from the internal influential circles of the judiciary, is lost in the debates.[101] In Georgia, the history of self-governance of the judiciary and accumulated experience can be described as a system of "dependent judges of the independent court".[102] This means it is of crucial importance to increase the democratization within the judiciary and strengthen the independence of individual judges.

CHAPTER 4: THE PLENUM OF THE SUPREME COURT

The system of administration of common courts system is characterized as "two-headed." The courts of first and second instances are governed by the constitutional body - the High Council of Justice, and the issues related to the administration of the Supreme Court are decided by the Plenum of the Supreme Court established per the law.[103]

The reforms of 2013-2020 did not concern the Plenum. Thus, the structure of this chapter is different from other parts of the document and does not follow the amendments of different waves of judicial reform.

4.1. "Duplication" of the Governing Bodies

The "two-headed" administration system of the common courts can have several explanations, conventionally grouped into the following three categories:

– Institutionally, the Supreme Court operates within the system of common courts, yet with a different format and mandate. The difference implies the dissimilarity of procedural rules as well as the distinctive process for the election and dismissal of judges. The legislative body together with the judicial authorities participates in the composition of the Supreme Court.[104] The judges of the Supreme Court can be removed from

[100] The Coalition for an Independent and Transparent Judiciary, the cited paper, 2017, p.6.
[101] David Kosař, the cited paper, 2016, p.408.
[102] Ibid. p.407.
[103] The Organic Law of Georgia "On Common Courts," Article 18, Paragraph 2.
[104] Constitution of Georgia, Article 61, Paragraph 2.

office only through impeachment.[105] These factors are not characteristic of the first and second instance courts. From the procedural point of view, the role of the Supreme Court to oversee the administration of justice through the established procedural form is also different.[106] These dissimilarities are obvious and may to some extent explain the existence of a separate body administering the Supreme Court. However, it is also apparent that the above differences do not require the operation of the "two-headed" management system in the court.

- Another factor can be the importance attached to symbolic and informal statuses in the justice sector. The separate body administering the Supreme Court somewhat isolates the latter away from the lower courts and exposes it to a different system of governance. The analysis of the contexts of different times reinforces this factor with another circumstance: over the years, the Secretary of the Council was an important figure and represented the Court to other branches of the judicial authorities and the courts. However, the Chairperson of the Supreme Court also has representative functions, which caused an intersection of authorities and powers between these bodies. The existence of the two major "speakers" on behalf of the Court cannot be merely perceived by the reader as a fight for power. They also provided an additional resource for the crises where for example one or the other representative may have hardships communicating with external actors. Thus, the two-headed administration system might simultaneously have served the purpose of maintaining the internal balance and diversification of responsible persons;
- The third historical and somewhat technical argument can be found in the history of the development of the common courts system. The Supreme Court was fully integrated within the common courts in 2009. This is confirmed by the legislative processes as well. It was in 2009 that the separate law on the Supreme Court was invalidated[107] and the work of the Supreme Court, like other instances, was regulated by the Organic Law of Georgia "On Common Courts." However, the reform failed to harmonize the legislation about administering the courts. These issues can be due to the problem of legislative techniques or the "doubling" can be explained by the two factors mentioned above.

4.2. The Composition of the Supreme Court Plenum

The Plenum consists of judges of the Supreme Court and chairpersons of the Courts of Appeals who are ex officio members of the Plenum.[108]

The rule for the composition of the Plenum is difficult to analyze as it is not clear what the real purpose and essence of this institution are. The Plenum can be seen as a model for the decentralization of the court management. Yet this reasoning is quite questionable due to several circumstances.

First of all, it should be noted that strengthening the autonomy of individual courts in terms of administration is a progressive idea, and the debates in favor of this have been on in

[105] Constitution of Georgia, Article 48, Paragraph 1.
[106] The Organic Law of Georgia "On Common Courts," Article 14, Paragraph 2
[107] The Organic Law of Georgia "On the Supreme Court of Georgia," 12/05/1999, #1947 (invalidated).
[108] The Organic Law of Georgia "On Common Courts," Article 18, Paragraph 1.

Georgia for many years.[109] However, the analysis of the applicable legislation and case law does not confirm that autonomy exists or there is a desire to strengthen it. On the contrary, the excessive competencies accumulated in the hands of the Council (including the establishment of the Management Department in the High Council of Justice) prove that the administration process is centralized and subordinated. Thus, an alleged desire to have the Plenum perceived by actors as the progressive idea of decentralization has been problematic from the outset.

The argument about decentralization is also weakened by the rule of the composition of the Plenum. The body consists of the Chairperson of the Supreme Court, its deputies, and judges of the Supreme Court, as well as the chairpersons of the Courts of Appeals. The participation of the chairpersons of the appellate courts in the administration of the Supreme Court is incompatible with the argument of decentralization and autonomous management. Provided that separate courts are viewed as autonomous units for decentralization, it will turn out that representatives of one body (in this case, the Court of Appeals) can be involved in the administration of another body (the Supreme Court), which cannot be deemed proper coordination since the chairpersons of the appellate courts have the right to vote and participate in the decision-making process.

4.3. Functions and Rules of Operation of the Plenum

The functions of the Plenum can be divided into three categories:

- Functions related to the management of the Supreme Court (for example, determining the composition of the chambers and bonuses of the judges);
- Composition of the collegial bodies in the Supreme Court (for example, the Chamber of Disciplinary Cases and the Chamber of Qualification);
- General matters related to the judicial system, which do not only concern the Supreme Court (for example, the appointment of members of the Constitutional Court).

The analysis of the functions once again indicates that the essence of the Plenum in its current form is obscure. The Plenum is not a body directly established to govern the Supreme Court as its functions in some cases are not limited to this court only. For instance, the Plenum can appoint three members to the Constitutional Court or prepare a report on the state of justice in Georgia (rather than on the activities of the Supreme Court).

An important issue along with the functions is the rules of operation of the Plenum. Today, no specific procedures are regulating the activities of the Plenum, which poses problems in terms of transparency and proper public awareness.[110] Although sessions of the Plenum are usually public,[111] the recent observations of the practice have shown that information about sittings of the Plenum is made available only one or two days prior.[112]

The aforesaid circumstances and special powers of the Plenum are once again the indications of the necessity to provide institutional reform of the body as well as to regulate its activities.

[109] An example of this is the discussion on the election of court chairpersons, the introduction of the position of court managers, etc.

[110] The sittings regarding the nomination of members of the Constitutional Court are noteworthy.

[111] The Organic Law of Georgia "On Common Courts," Article 18, Paragraph 7.

[112] The source of information: the website of the Supreme Court.

4.4. Summary

The simultaneous operation of the Plenum and the High Council of Justice in the current form indicates a duplication of the management system. Apart from the judges of the Supreme Court, the Plenum consists of the chairpersons of the Court of Appeals as ex officio members. Such establishment creates neither a self-governing nor a body that provides a full-fledged representation of the judiciary. Despite the Plenum's significant and, in some cases, exclusive powers, the forms of its activity are flawed. It is necessary to launch debates on the reform of the institution. The process should determine first the real essence/purpose of the Plenum and then separate its functions from the roles of other bodies within the court. Besides, in whatever form and content the Plenum continues its activities, it is apparent that the norms governing the work of the Plenum must be further clarified at the legislative level.

PART II: THE CAREER AND THE DISCIPLINARY SYSTEM OF THE JUDGES

This part of the research focuses on the issues deemed most pressing over the years, such as the prerequisites and procedures for the selection and appointment as well as the rules of rotation of the judges, the promotion and regular assessment system, the mechanisms of disciplinary liability, and activities of disciplinary bodies.

CHAPTER 1: THE APPOINTMENT OF JUDGES

Since 2013, a tendency towards the introduction of substantial amendments to the legal framework concerning the appointment and career-related matters of the judiciary has been observed, which was characterized by a common pattern. The period was full of both legislative reforms and appointment decisions in the judicial system. This timeframe also coincided with the introduction of the system of lifetime appointment of judges, as well as the expiration of the ten-year term for a majority of the judiciary. Thus, since 2013, the most intensive personnel-related processes in the courts concerned the appointment of judges. It is noteworthy that the reform of the appointment of judges has been fragmented over the years. This was largely due to completely different appointment timeframes and procedures devised for different groups of judges,[113] as well as the deteriorated state of the legislation in terms of legal drafting methodology.

1.1. General Picture of the Judiciary

As of the moment of drafting this report, up to 300 judges have been appointed to the common courts system, of which the vast majority holds office for a lifetime. Approximately 60 judges are appointed for three-year or ten-year terms.

More specifically, the situation regarding the number and terms of judges in the common courts system is as follows: there are **21 judges** in the Supreme Court of Georgia, 7 of them are appointed for a term of 10 years, and the remaining 14 judges - for a lifetime.[114] The composition of the Supreme Court is determined by 28 judges.[115] The seats of 7 judges were vacant at the time of writing this document.

The city (district) and appellate courts have **277 appointed judges**, 16 judges of which for 3 years; 32 judges - for 10 years; 228 judges - for a lifetime. The term of tenure has been extended for 1 judge.

1.2. The First Wave of Judicial Reform

Only a small part of the First Wave of the reform concerned the rule of appointment of judges. However, the novelty proposed by the reform proved to be of particular importance in the following years. If before 2013 the decision on the appointment of a judge had been made by a majority of the members of the Council present, the 2013 amendments stipulated that the decision to appoint a judge shall be made by a secret ballot with the support

[113] For example, some judges of the Supreme Court are appointed for life, and several others – for 10-year period.
[114] The information is available on the website of the Supreme Court: http://www.supremecourt.ge/judges/judges/ (Last viewed on March 1, 2021).
[115] The Organic Law of Georgia "On Common Courts," Article 14, Paragraph 3.

of two-thirds of the members of the same body.[116]

Given the context in which the amendments were being elaborated, the introduction of a secret ballot may have been intended to increase the independence of individual members of the Council and shield them against the influence of the then leaders of the Court. However, the practice of the Council in the following years confirmed that the secrecy failed to minimize the risks.

As for rendering decisions with the support of two-thirds, the practice of appointing judges over the years has shown unanimity between the full majority of judicial and non-judicial members of the Council. Therefore, the requirement for the increased number of votes has not ensured a basis for better and more democratic decision-making processes.

1.3. Amendments of November 1, 2013

The introduction of amendments to the system of appointment of judges began in 2013.[117] The requirements for those seeking the seat of a judge were changed and the age limit was increased to 30. Furthermore, it has become mandatory for judicial candidates to have a master's degree. In response to the enactment of the constitutional amendments, the rule of 10-year appointment of judges was abolished. The rule for the appointment of first and second instance judges with a 3-year probationary period before their appointment for a lifetime was established. However, after the introduction of the 3-year term appointment, the Parliament did not provide any detailed procedures for the assessment of the judges appointed for probation. The rules were developed only with the changes of the Second Wave of the reform. It should be noted that up until the elaboration of the detailed rules in the law, the Council had already appointed several judges for the 3-year term.

1.4. The Second Wave of Judicial Reform

The first comprehensive changes about the appointment of judges were observed during the Second Wave of Judicial Reform. The main goal of the amendments was to create a new system for the assessment of judges appointed for a probation period.

With the amendments introduced in this respect in 2014:[118]

- The Chamber of Qualification was established in the Supreme Court of Georgia and the possibility to appeal a decision of the Council was stipulated;
- A three-stage system was developed for the assessment of a three-year appointed judge by members of the Council (the assessors to be selected by lot);
- The assessment criteria and components were introduced to the law;
- The scoring system for the evaluation of a judge appointed for three years was defined;

[116] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 01/05/2013, 580-IIს, Article 1, Paragraph 7.
[117] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 01/11/2013, 1489-Iს.
[118] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 01/08/2014, 2647-რს.

- A provision stipulating the obligation to provide written substantiation of any decision to appoint/refuse to appoint a judge was introduced to the law;
- The mechanism of recusal/self-recusal of assessors was created;
- The rule for rendering a final decision on lifetime appointment by open ballot and with the support of at least two-thirds of the members of the Council was established;
- The Evaluation Department was set up in the Council;

The assessment rules as suggested by the law also concerned those who had been appointed to the office of a judge before the introduction of the amendments. The purpose of the three-year appointment is to monitor and evaluate the judge's performance before their appointment for a lifetime, which should "mitigate" risks associated with such an appointment. Despite the legitimate goal of insuring against the risks, the system was criticized primarily due to the constant evaluation process a judge is exposed to for three years, which may be a threat to their independence. During and after the amendments, the question of why the goal of mitigation of risks cannot be achieved at the selection stage has remained open.

1.5. The Third Wave of Judicial Reform

The Third Wave of judicial reform has significantly amended the rules for holding the office of a judge. The changes explicitly stipulated the obligation of the Council to announce a competition in case of the emergence of a vacant position. Previously, this issue had been obscure and the legislation had contained ambiguous provisions on allowance of the participation of students of the School and those exempted from attending the institution.

The changes also covered the rules for holding the competition:[119]

- The Council was obligated to publish information about candidates on the website;
- The criteria for the assessment of the candidates for the initial (for three-year term) appointment were provided in the law;
- The scoring system was extended to the initial appointment procedure;
- The rule for retrieving information about candidates was established;
- The obligation of interviewing the candidates was stipulated;
- The law also extended the requirements concerning conflict of interest to the initial appointments;
- The members of the Council were obliged to prepare the assessment paper regarding the candidates. However, the above information was made public only if a candidate was appointed as a judge;
- A provision allowing to appeal a decision of the Council rejecting the initial (three-year term) appointment was introduced to the law. A candidate failing to obtain the support of the Council was eligible to apply to the Chamber of Qualification of the Supreme Court.

[119] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 08/02/2017, 255-IIს.

Noteworthy was an initiative under which, incumbent and former members of the Supreme Court, along with the judges of the Constitutional Court, were exempted from taking the qualification exam and attending the School. The law also exempted judges of the Constitutional and Supreme Courts with at least three years of judicial experience from the probationary period of the same duration.

1.6. The Influence of the Constitutional Court Decisions on the Legislation

In June 2017, the Parliament of Georgia introduced significant amendments with regards to the implementation of the judgments rendered by the Constitutional Court.[120]

Through the amendments, the list of persons who can be appointed to the office for a lifetime, without a three-year probationary period, was expanded. In particular, the judges of the Constitutional Court, the Supreme Court, the courts of first and second instances were exempted from the probation period, if:

- They had at least three years of experience working as a judge;
- For the case of former judges, ten years have not elapsed since the termination of their office.

The above change did not automatically embrace judges who met the requirements of the amended law but had been appointed for the probationary period before the enaction of the amendments. The legislators developed a special rule for the lifetime appointment of such judges. In particular, judges who were no longer subject to a three-year probationary period were given the possibility to apply to the Council for lifetime re-appointment. The decision to appoint such judges for a lifetime required the assessment of the judge, an interview with them, and the support of two-thirds of the members of the Council by secret ballot. Those failing to gain the support of the Council were provided by the legislators with an opportunity to complete the three-year tenure of a judge.

1.7. The Fourth Wave of Judicial Reform

The amendments introduced at the end of 2019 specified the possible circles of conflict of interests and the rules governing such cases, which covered not only the competition for the selection of judges but also other important decisions to be made by the Council.[121]

The amendments of the Fourth Wave introduced the obligation of the Council to substantiate any decision on the appointment of a judge and specified the components of such substantiation.[122]

[120] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 16/06/2017, 1052-IIს.
[121] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 13/12/2019, 5569-Iს, Article 1, Paragraph 4.
[122] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 13/12/2019, 5569-Iს, Article 1, Paragraph 5.

1.8. Selection of the Supreme Court Justices - 2019 Amendments

The first three waves of judicial reform only amended the rules for the appointment of the judges for the first and second instance courts. The introduction of the changes to the rule of selecting judges for the Supreme Court began after the 2017 constitutional reform.

With the July 2018 amendments, the composition of the Supreme Court was determined by 28 judges.[123] The right to nominate candidates for the Chairperson of the Supreme Court and judiciary was granted to the Council instead of the President of Georgia.[124] However, the amendments did not specify the detailed rules for the selection of candidates.

The elaboration of the procedure for selecting the Supreme Court Justices began after the Council submitted ten candidates to the Parliament of Georgia without appropriate selection and the public discussions at the end of 2018.[125]

This was followed by the amendments to the law in May 2019, according to which:[126]

- A judicial candidate for the Supreme Court was exempted from the obligation to pass the qualification exam;
- The Council was obligated to publicly announce the commencement of the selection process of candidates;
- The Council became required to publish information on registered candidates (whose application documents met the requirements of the law) on the website of the Council;
- A secret ballot was established to decide the candidates to proceed to the next stage of selection. A member of the Council was made to vote secretly for no more candidates as the vacancies announced;
- The rule for retrieving information about candidates was specified;
- The procedure for a public hearing of the candidates passing to the next stage was established;
- After completing the hearing, the members of the Council became required to assess the candidates with the scores;
- Another secret ballot was stipulated to identify candidates matching the number of vacant positions;
- At the final stage, the candidates to be presented to the Parliament must have been identified through a secret ballot and the support of two-thirds of the Council members;
- It shall be noted that according to the above procedure only those candidates who were refused the registration at the initial stage of the selection had the right to appeal the decision.

As a result of the amendments, ten candidates nominated by the Council at the end of 2018 were considered withdrawn from the Parliament. The competition held after the reform underlined the nihilism and distrust from professional groups towards the process. The moni-

[123] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 21/07/2018, 3262-რს, Article 1, Paragraph 6.

[124] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 21/07/2018, 3262-რს, Article 1, Paragraph 9.

[125] The Coalition for an Independent and Transparent Judiciary, "Coalition Addresses to the Parliament of Georgia", 2018, available at: http://coalition.ge/index.php?article_id=197&clang=0 (Last viewed on March 1, 2021).

[126] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 01/05/2019, 4526-IIს.

toring organizations pointed out that despite a range of amendments to the legislation, "the candidates nominated by the Council were selected not based on the merit but rather on their loyalty." The new regulations did not prevent the "Clan" from submitting the desired candidates to the Parliament for confirmation."[127]

1.9. Further Amendments to the Rules for the Selection of the Supreme Court Justices - September 2020

Additional amendments to the rules for the selection of the Supreme Court Justices were adopted by the Parliament in September 2020.[128] A part of the initiatives reiterated a case heard by the Constitutional Court in which the Public Defender of Georgia was challenging the previous regulations on the selection of the Supreme Court Justices.[129] Interestingly, the Parliament did not share the applicant's opinions on any of the issues raised,[130] and the Constitutional Court deemed the appealed provisions to be under the Constitution.

In substantiating the decision in the part related to the selection of judicial candidates for the Supreme Court, the Court noted that both the judicial authorities and Parliament were involved in the process. It was with this reservation in mind that the Constitutional Court held that such a redistribution of the burden between the bodies somehow removed the need for the Council to substantiate the decision.[131] The Court also pointed the multi-stage and complex procedure for reviewing candidates in the Council, and among other factors, held that the procedure allowed the Council to make a "proper decision" on the nomination of candidates.[132] Particularly notable is the position of the Court concerning the obligation of the Council, as a collegial body, on the substantiation of the decision. The Court noted that the Council decides on the nomination of candidates by two-thirds of votes and therefore a decision made by individual votes "might not possible to substantiate."[133]

The Court's decision was accompanied by dissenting opinions of several judges pointing out that: "Undoubtedly, the Constitution grants the legitimate power of making expediency-based, important state decisions, with the temporariness of their authority in mind to members of the Parliament assuming that the public will be able to assess the accuracy of their policy through periodic elections. Awarding these powers to any state body on whose behalf decision-makers have permanent status and/or on whose appointment the influence of the public is minimal would immeasurably increase the risk of abuse of power and significantly undermine the idea of public sovereignty."[134] In the same dissenting opinion, the judges assessed as problematic the first stage of the selection of candidates and the initial ballot, during which members of the Council were forced to choose between the candidates "arti-

[127] The Georgian Young Lawyers' Association, "The High Council of Justice Monitoring Report №8," 2020, p.7., available at: https://bit.ly/3hpUVR5 (Last viewed on March 1, 2021).
[128] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 30/09/2020, 7205-Iს.
[129] The Judgment of the Constitutional Court of Georgia into the case "Public Defender of Georgia v. Parliament of Georgia ", July 30, 2020, N3/1/1459,1491
[130] Ibid. para. 16-21.
[131] Ibid. para. 20.
[132] Ibid. para. 47.
[133] Ibid. para. 48.
[134] The dissent opinion of the judges of the Constitutional Court of Georgia - Teimuraz Tugushi, Irine Imerlishvili, Giorgi Kverenchkhiladze and Tamaz Tsabutashvili concerning the decision №3/1/1459,1491 delivered by the Plenum of the Constitutional Court of Georgia on July 30, 2020, do3/1/1459,1491, para.18.

ficially, based on prejudiced views in the absence of objective preconditions."[135]

As it was mentioned, during the consideration of the above dispute, the Parliament did not share the position of the applicant regarding any of the challenged norms. However, later in September 2020, the Parliament supported the amendments, many parts of which reflected the applicant's positions and, to some extent, the dissenting opinions of the judges.

As a result of the amendments:[136]

- The first secret ballot on the list of candidates was abolished;
- Instead, after their registration, the rule of the public hearing the candidates was introduced;
- At the end of the public hearing, each member of the Council was required to elaborate a written substantiation for the score and assessment given for each candidate;
- The obligation to publish written assessments on the website of the Council without specifying the identity of the Council members was stipulated;
- Before the first ballot (to short-list the registered candidates to the number of the vacancies), the Secretary of the Council was obligated to submit the information summary on the assessment of candidates to the Council;
- The law introduced an additional percental threshold failing to reach of which restricts a candidate from moving to the secret ballot stage;
- After the casting the vote in the first ballot, members of the Council became obliged to submit written substantiation of the choice to the Secretary of the Council;
- The law stipulated a partially open voting rule, according to which the Council members were obliged to indicate their identifying information on a ballot paper. This information was being made available to other members of the Council without its public disclosure;
- A similar (partially open) voting rule was introduced for the identification of final candidates to be submitted to the Parliament. Also, any member of the Council who would have a different position between the first and second ballots was made obliged to submit written reasoning to the Secretary of the Council;
- The possibility of appealing decisions rendered by the Council at various stages of the procedure to the Chamber of Qualification of the Supreme Court became available.

After the adoption of the law, the previously nominated candidates were considered withdrawn. Although the selection process of the Supreme Court justices was improved in the Council and the controversial stages (e.g., the first secret ballot) were removed, the amendments did not set the high expectations.[137] This was mainly since, firstly, the amendments failed to liberate the process from the influences of a majority of decision-makers who can protect their interests efficiently through elaborating written substantiation as well as using

[135] Ibid. para.47.

[136] The Draft Organic Law on Amendments to the Organic Law of Georgia on Common Courts of Georgia, 30/09/2020, 7205-Ib.

[137] Coalition for an Independent and Transparent Judiciary, "The Coalition Statement on the Draft Amendments to the Organic Law of Georgia on Common Courts initiated in the Parliament of Georgia," 2020, available at: http://coalition.ge/index.php?article_id=245&clang=0 (Last viewed on March 1, 2021).

a scoring system alone. Furthermore, the changes granted the Secretary of the Council an obscure and unsubstantiated role in the selection process. The idea of semi-open voting and the obligation to prepare special explanation/substantiation for the Secretary of the Council held the members of the body somewhat accountable to the Council Secretary.

1.10. Further Amendments to the Rules for the Selection of the Supreme Court Justices - March 2021

The drafting of this document also coincided with another legislative initiative of the Parliament of Georgia on making additional amendments to the selection rules for the Supreme Court Justices. In March 2021, against the background of a severe political crisis, several legislators of the majority registered a draft law that, as stated by the initiators, aimed at reflecting recommendations of the Venice Commission in the Georgian legislation.[138]

The 2021 initiative introduced the following novelties to the selection process of the Supreme court Justices:[139]

- The obligation of equal treatment of the candidates during the selection process was directly stipulated in law;
- The partially open voting system introduced by 2020 amendments was abolished and scoring of the candidates as well as substantiation of the assessment submitted by members of the Council, including their identity, will be made public;
- If any member of the Council abstains to elaborate a substantiation of their assessment, their participation in the selection process will be voided and assessments given to the candidates will be repealed. In this regard, the competency of the Staff of the Council to check the completeness of the assessment prepared by the members is problematic;
- Per the amendments, the second ballot held after the public hearing of the candidates aiming at reducing their number to the total of vacancies was abolished. Instead, the Council will adopt the order based on which the candidates having the highest scores in the competency criterion pass to the next stage of the selection;
- After adopting the order, the Council commences the final stage of the selection process that envisages open voting on the candidates. The candidacy of the person receiving 2/3 of the Council votes will be submitted to the Parliament;
- The law obligates the members of the Council to prepare the justification of their position, which will be published on the website of the Council, at this stage of the selection process as well;
- The final decision of the Council has the form of address. The united list of candidates is submitted to the Parliament based on the Council address.
- These amendments dropped a boundary between the forms of the decisions of the Council by selection stages. Namely, the amendments stipulated the notions of the Council order and the Council address as well as established the right to appeal on both legal acts to the Chamber of Qualification.

[138] The explanatory note to the "Draft Organic Law on Amendments to the Organic Law of Georgia "On Common Courts," 24/03/2021, p. 1, available at: https://info.parliament.ge/file/1/BillReviewContent/272219 (Last viewed on April 2, 2021).

[139] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 01/04/2021, p. 1, available at: https://info.parliament.ge/file/1/BillReviewContent/272643 (Last viewed on April 2, 2021).

Similar to previous cases, these amendments also influenced the selection process that had commenced before which once again shows the reactiveness and spontaneity of the events. It is obvious that legislative novelties are neither based on the analysis of the severe reality that exists within the judiciary system nor the willingness to introduce crucial steps forward. The concept of these amendments reiterates the approach that characterized practically every previous reform. It is limited to addressing several shortcomings to such an extent that, in terms of content, it does not influence the interests and possibilities of the majority in power. Therefore, these amendments remain an "attempt to imitate the reform"[140] – and once again strengthens the opinion that numerous legislative novelties of the recent years served more to disguise the problems and the situation at hand rather than to the aim of qualitative enhancements.

1.11. The "Merit-based" Model and the Aspect of Judicial Legitimacy

Several models for the appointment/selection of the judiciary are utilized in Georgia. There is a tendency of approaching these models, mainly in favor of strengthening the "merit-based" appointment system.

The "merit-based" model is a system where an appointment decision is based on an assessment of personal, professional, and other relevant circumstances. This model, which differs from a political appointment, prioritizes the assessment of the candidate according to the criteria prescribed by law rather than the personal attitude of a decision-maker towards the values and past activities of the candidate. This model cannot certainly rule out subjectivity. However, the main characteristic of this model is the calculation of the candidate's abilities and its "mathematical correlation."[141] While the political appointment is not reduced to the "calculation," the formalized procedure of appointment envisages focusing on a "reason"[142]/ rational basis. In other words, as the Constitutional Court of Georgia puts it, this implies "the requirement for such substantiation that will enable us to evaluate the precision of the way through which the decision-maker arrived at the decision."[143] The utilization of political mechanisms (including appointment) is not required to demonstrate a reasonable basis,[144] whereas the merit/assessment-based appointment is just the opposite.

This difference is not sufficient to demonstrate the advantages of either of the models. Moreover, searching for an explicit advantage between these models without focusing on a specific context is wrong and misleading from the outset. While discussing the widespread use of the merit-based model and selection commissions, several authors argue that no solid evidence is available to confirm that this model directly endorses judicial independence.[145]

The appointment of judges is a complex matter due to several factors. First, the judiciary

[140] Coalition for an Independent and Transparent Judiciary, "The Coalition Reacts to the Announced Changes in the Rule of the Composition of the Supreme Court", 2021, available at: http://coalition.ge/index.php?article_id=252&clang=1 (Last viewed on April 2, 2021)

[141] Vakhushti Menabde, "Demise of Politics - Selection of the Composition of the Supreme Court on the Existing Notions of Status Quo and Prospects of the Reform," 2015, p. 76.

[142] David Kosař, the cited paper, 2016, p.54.

[143] The Judgment of the Constitutional Court of Georgia into the case "Citizens of Georgia - Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v. Parliament of Georgia, April 7, 2017, N3/2/717, para.25.

[144] Ibid.

[145] Nuno Garoupa and Tom Ginsburg, the cited paper, p.115.

is not formed, as a rule, through the path of direct legitimacy.[146] The legitimacy is not limited to compliance with formal-legal norms but has a much wider political and legal significance.[147] The appointment of judges through election is not the only way to legitimize the court. There are various forms of legitimizing the justice sector, including "normative" and "empirical" legitimacy.[148] In other words, legitimacy is determined, on the one hand, by the extent to which it complies with formal-legal requirements and on the other hand, how the public perceives institutional legitimacy. In this regard, the appointment system of judges is of crucial importance. Some authors point out that the judicial bodies acquire functional legitimacy through the appointment of judges.[149] Thus, it is critically important for the model of appointment of the judiciary to address this need.

In Georgia, in the cases of courts of first and second instance, the Council is the body that assesses the integrity and professionalism of candidates and appoints them. While the Supreme Court Justices are selected through a two-layer system, where the Council evaluates the candidates according to the criteria set, and the Parliament makes a political decision on their appointment. In recent years, the amendments introduced to the legislation have stipulated the norms regulating conflict of interests among members of the Council during the discussion of personnel-related matters; the Council members are required by law to fill out an individual assessment form about judicial candidates. If the Council rejects the appointment, the candidate is granted the right to appeal the decision to the Chamber of Qualification of the Supreme Court, etc. The purpose of the amendments was to make the appointment procedure more transparent. However, the key question here is whether the legislative changes addressed the core problem and provided a framework preventing the appointing authorities from any possible "arbitrariness." One of the main goals of the formalized appointment is to narrow the scope of "fundamental arbitrariness."[150]

To make such an assessment, it is necessary to analyze the two circumstances:

1. Whether the established system provides such rules of operation that ensure a sufficient degree of legitimacy to the appointment of judges; and

2. Whether this system is functioning coherently from a formal and legal perspective;

Some authors believe that the direct legitimacy in the formation of the judiciary can be substituted by the "consent"/consensus-based method.[151] In the case of Georgia, the existence of the consensus shall be reviewed at both selection stages in the Council and the Parliament.

The process of selection of judges for the first and second instance courts only involves the Council that renders the final decision on the appointment of a judge by two-thirds of its full composition.[152] As for the nomination of a judicial candidate for the Supreme Court, like in the appointment of judges of the first and second instance courts, the support of two-thirds

[146] Lars Trägårdh and Oñati International Institute for the Sociology of Law (eds), After National Democracy: Rights, Law and Power in America and the New Europe, Vol. 9, Hart Publishing, 2004, p.47.
[147] David Beetham, The Legitimation of Power, Macmillan International Higher Education, 1991, p.4.
[148] Mike Hough and Stefano Maffei, 'Trust in Justice: Thinking about Legitimacy', Criminology in Europe: Newsletter of the European Society of Criminology 12(2), 2013, p.5.
[149] Pierre Rosanvallon, Democratic Legitimacy: Impartiality, Reflexivity, Proximity, Princeton University Press, 2011, p.155.
[150] David Kosař, the cited paper, 2016, p.54.
[151] Pierre Rosanvallon, the cited paper, p.163.
[152] Constitution of Georgia, Article 63, Paragraph 6.

of the members of the Council is required to submit a candidate to the Parliament.[153] According to the Georgian legislation, the appointment of the Supreme Court Justices requires the support of the absolute majority of the Parliament.[154]

The analysis of current models of the appointment/selection of judges reveals a common problem, which might be fundamental to the understanding of the current crisis. The applicable constitutional and legislative regulations do not seek ways to reach consensus-based decisions in the process of composing the court. Instead, they provide the majority in power (in one case, the majority of the Council, and in the other – the parliamentary majority) a possibility to decide without considering the opinion of the minority. The reforms that have modified the model of appointing judges so far have been numerous, yet they have failed to substantially change the main mechanism of the system. The legislative innovations, instead of increasing the democratic legitimacy of the process and promoting consensus among members of the Council, only specified the forms and methods for the action of the majority of decision-makers.

The only exception during the eight years of reforms was the First Wave amendments in 2013. That year, a required majority of the members of the Council for the appointment of a judge was increased to two-thirds. Consequently, the consent of both judiciary and non-judiciary members was required for rendering the decision. This change was supposed to weaken the majoritarian rules of operation. However, one important circumstance needs to be considered in this reasoning - what procedure was applied for composing the Council in the country and whether the model of selecting the Council members as well as the rule of decision-making in the institution ensured a consensus-based management logic.

The relevant chapter of this study reviewed the procedures for selecting judicial and non-judicial members of the Council and the balance of power in the body. As mentioned, over the years, one of the main challenges of the Council was the selection of its non-judicial members with single-party support. In addition, filling the quota of judicial members by one powerful group and the dominance of influential judges within the Council. Therefore, during these years, the Council itself was not an institution composed through a broad consensus, nor did the selection of members of the Council require unconditionally high consent and the support of various groups in the Parliament or at the Conference of Judges.

It is clear that the answer to the first part of the question - whether the rule for composing the Council ensured a consensus-based logic - is negative. The second part of the issue is directly related to the decision-making rule by two-thirds in the Council. The quorum increased in such a manner requires the participation of different groups of Council members in the decision-making process. It should be noted, however, that these groups received power and legitimacy from only one source, i.e. from a majority holding the right to vote to decide at that particular moment. Thus, they did not represent diverse groups or interests to justify the logic of decision-making in the Council by two-thirds.

The overall assessment of the procedure for composing the Council (especially the rule applicable before the last constitutional reform) and the rules of its operations/decision-making clearly shows that the system of appointment of judges essentially remains in the logic of majoritarianism, which is a key problem when analyzing the system.

[153] The Organic Law of Georgia "On Common Courts," Article 34[1], Paragraph 13.
[154] The Organic Law of Georgia "On Common Courts," Article 36, Paragraph 2.

As for the formal-legal side of the appointments - despite several positive legislative novation discussed above, the legal regulation of the appointment of the judges is still problematic. First, it concerns the first and second instance courts. If the legislators were willing to fully move the country to the "merit-based" model, then the legal framework should have been more consistent in this respect. Although the law provided the criteria, scores, and assessment procedures, the final decision is still made by a secret ballot, during which a member of the Council is not limited to the assessments the candidates received previously. Thus, any candidate who for example has not received the highest scores according to the criteria can be appointed to the office of a judge, whereas a candidate who has obtained a better assessment than others might be left out of the court. A similar problem (prioritization of the secret ballot) characterized the appointment process of the Supreme Court Justices, which was somewhat improved with the April 1, 2021 amendments. However, this regime remained in the lower instance courts.

While discussing the model of the appointment of judges in 2017, the Constitutional Court underlined two circumstances - a candidate's assessment paper and the possibility of appealing the decision of the Council to the Chamber of Qualification.[155] With these circumstances in mind, the Court noted that, even in the absence of substantiation for the final decision made by the Council, "the procedure as a whole allowed for the identification of the actual preconditions for the final decision."[156] The judges providing dissenting opinions in the case argued that the existence of the assessment document alone could not be equal to the substantiation of the decision because "a member of the Council indicates in the assessment paper a score the candidate obtains and does not explain based on what specific factors the Council member reached the specific decision."[157]

Retaining the rule of voting practically deprives the assessment-based appointment model of its essence and further aggravates the situation. On the one hand, by detailing the procedures and ensuring transparency of the rules, the legislators lessen criticism over the fundamental shortcomings of the appointment of judges. On the other, through promoting the decision-making by secret ballot in the collegial body, they eradicate a target of the criticism. "Depoliticization" of the problems and avoidance of responsibility represents the concomitant phenomenon of legal detailing and technocracy and causes the main criticism of this strategy.[158] If in a less formal, flexible/political appointment, there is a responsible person who makes a decision, in the formal appointment process, where the decision is rendered by a collegial body through a secret ballot, it is virtually impossible to find an addressee if any problems emerge.

1.11. Summary

The common signature of the reforms implemented after 2013 was manifested in the desire to detail the legislation. The general procedures applicable previously have been replaced

[155] The Judgment of the Constitutional Court of Georgia into the case "Citizens of Georgia - Mtvarisa Kevlishvili, Nazi Dotiashvili and Marina Gloveli v. Parliament of Georgia, April 7, 2017, N3/2/717, para.52.
[156] Ibid. Para.51.
[157] The dissenting opinion of the Members of the Constitutional Court of Georgia - Irine Imerlishvili, Giorgi Kverenchkhiladze and Maia Kopaleishvili concerning the decision of the Plenum of the Constitutional Court of Georgia, April 7, 2017, Decision N3/2/717, para.20.
[158] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, Harvard University Press, 2007, p.12.

in many cases by detailed provisions, which, according to the originally stated motivation, should have served to the transparent and substantiated procedure of appointment of the judges. Although the legislation largely met the goal of detailing, it did not weaken the criticism over the judicial appointment process. The intensive appointments carried out over the years increased attention and criticism of the judicial appointment process. This, among other matters, has led to the understanding that even an explicitly defined legislative framework failed to meet the main goal - to provide efficient and fair filters for the selection of decent judicial candidates.

In light of the multitude of reforms carried out, it would be prudent to try to find the reasons for unresolved problems in other factors. The issues touched upon in this chapter indicate that the models for the appointment/selection of judges, both in the Council and in the Parliament, award full authority to the groups in the majority and rule out the influence of the minority on the process. Consequently, instead of seeking the ways for the consensual decision-making process, the legislative reforms only specify the forms of the use of power and fail to influence the logic of power distribution.

CHAPTER 2: THE ROTATION OF JUDGES

Over the years, apart from the appointment of the judges, the rules and practices related to the rotation of judges have attracted much attention. At some point, the monitoring has shown the viciousness of the rotation and brought the need for legislative changes to the agenda.[159] Like other legislative mechanisms, the legislation on rotation deviated towards achieving more transparency and substantiation of the actions of the Council.

Today the legislation provides several possibilities for the rotation of judges:

- Re-appointment of a judge without competition in the court of the first or second instance when there is a vacant position;[160]
- Sending a judge on secondment to another court;[161]
- Assigning judges to court panels/chambers and in narrow specializations.[162]

The attention over the issue of rotation has been raised due to two main factors: in one case, the change of place of office for an appointed judge is linked to their independence guarantees. The rotation can mean punishing a judge, creating a hostile environment, or awarding them with ungrounded privileges. In the other case, the rotation may indicate an interest in the hearing of a particular case and the tactics of assigning a specific case to a particular judge. Thus, the legislation needs to consider and insure against such potential risks.

2.1. The Third Wave of Judicial Reform

The first amendments concerning the rotation of the judges were made in 2017, within the Third Wave of judicial reform. The chairpersons of the first and second instance courts retained the right to assign a judge, if necessary, to hear a case in another judicial composi-

[159] Coalition for an Independent and Transparent Judiciary, the cited paper, 2012, pp.31-32.
[160] The Law of Georgia "On Common Courts," Article 37.
[161] The Law of Georgia "On Common Courts," Article 37[1].
[162] The Law of Georgia "On Common Courts," Article 30.

tion (panel/chamber) to avoid any delays in the administration of justice. However, the law provided two grounds restricting the powers of the chairpersons in the process, namely:[163]

- A judge must have been selected randomly, through the electronic system;
- A judge must have provided their consent.

Based on these changes, there is no longer a need for the chairperson to participate in the process since the judge is selected by the electronic program. If the judge selected by the program cannot participate in the hearing of a case for any objective reason, another judge shall be selected by the electronic program.

As for the re-appointment of a judge to another court without competition, the Third Wave of amendments stipulated that in the event of sending a judge to a higher court, the judge must have been assessed following the promotion criteria.[164]

The law has also amended the provision governing promotions. The re-appointment (promotion) of a judge to a higher instance court became possible if the judge holds the office for five years, instead of two. The amendments abolished the possibility of early promotion in exceptional cases.[165]

The amendments introduced through the Third Wave also significantly changed the rules of judiciary secondments and provided several mechanisms of protection, in particular:[166]

- The requirement to receive the consent of a judge to the secondment;
- In case of the need of secondment, the Council became required to propose firstly to judges enrolled in reserve and then to judges of the courts located nearby;
- The obligation of the Council to substantiate any decision on the secondment;
- Limitation of the duration of secondments;
- In case of receiving the refusal to the secondment, the selection of a judge by a lot.

2.2. The 2018 Amendments and Expansion of Narrow Specializations

When it comes to the rotation of judges, the risks associated with possible interests and tactics in hearing a particular case are noteworthy. These threats are largely related to the assignment of judges to panels/chambers and narrow specializations.

In 2018, the Parliament passed a law expanding the possibility of creating narrow specializations, thus giving rise to a legal basis for the establishment of narrow specializations in the Court of Appeals.[167]

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[163] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraphs 10 and 13.
[164] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraph 20.
[165] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraph 22.
[166] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraph 21.
[167] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 07/03/2018, 2034-IIს, Article 1, Paragraph 1.

Until 2018, narrow specialization had been created by the Council only in the Tbilisi City Court.[168] After the changes in 2018, the Council decided to do the same in the Tbilisi Court of Appeals.[169]

This issue is of special significance since the rule of determining the composition of narrow specializations is quite problematic. While the decision to assign judges to the panels and chambers established in the courts of first and second instance is made by the Council, the judges in narrow specializations are allocated upon the sole decision of the chairperson of the court.[170]

This matter is particularly noteworthy in terms of the random distribution of cases and will be discussed in detail in a relevant chapter.

2.3. The Fourth Wave of Judicial Reform

The amendments adopted in December 2019 did not largely address the issues of rotation of the judges. The only change in this direction was the rule of reappointment of judges without a competition.[171]

Before the amendments, a judge appointed to the office had been assigned to another court without competition if consented to do so. Besides, the judge could have been appointed only to a court of the same or higher instance. For example, the reappointment of a judge of the Court of Appeals to a lower instance court, even with their consent, had not been allowed by law.

The formulation of the new provision is interesting, which despite minimal changes, substantially amended the legal regulation of the reappointment of judges without competition. Since December 2019, the judge by their consent may be re-appointed to the district (city) and the appellate courts. This provision no longer has the logic that had existed before the amendments were introduced, which prevented the transfer of a judge to a lower instance court. The possibility of transferring a judge to a lower instance court even with their consent is a step backward in terms of the independence of the judge.

2.4. The Practice of Rotation of the Judges in Recent Years

The guarantees described above are important and in some cases indicate improvements of the legislation. However, regardless of the guarantees, the risks of affecting the independence of the judges or having an influence on the cases heard in the court have not been eliminated. This is evidenced by the "gaps" remaining in the legislation, as well as the practice of the Council demonstrating a formalistic approach to the amendments made in recent years.

The statistics on the re-appointment of judges without competition in 2017-2020 are as follows:

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[168] Decision №1/92-2006 of the High Council of Justice of Georgia of October 3, 2006; Decision №1/233 of the High Council of Justice of Georgia of July 24, 2017.
[169] Decision №1/175 of the High Council of Justice of Georgia of April 30, 2018.
[170] Ibid. Article 9.
[171] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 13/12/2019, 5569-Iს, Article 1, Paragraph 6.

- The Council initiated the reappointment of judges without a competition 15 times;[172]
- In total, 78 judges were reappointed without competition during the same period, which is quite a high figure considering the total number of judges;

The decisions of the Council initiating the reassignment of judges without competition usually envisaged a one-week deadline for the submission of applications.[173]

As for the decisions made on the reappointments, as a rule, the results do not summarize the number of applications received from judges and the methodology used to short-list the candidates. For example, it is impossible to establish what grounds the Council relied upon when selecting a judge to be reappointed if several other judges applied to the Council for the same vacancy.

The practice of assigning a judge to another specialization through reappointment was observed in several cases.[174] The decisions of the Council do not specify the need for the transfer, its rightfulness, or the ways of insuring against possible risks caused by the change of specialization.

In several other cases, the practice of re-appointing judges to a higher court was identified.[175] When so, as noted, the law requires the Council to assess a judge to be reappointed according to the promotion criteria. However, the Council does not provide the reasoning for the candidate's compatibility with the criteria in the decision on the reassignment and does not explain the expediency of the reappointment (actually – the promotion) to a higher instance.

The number and frequency of initiated reassignments raise the question of why the Council did not announce a competition for the vacant positions and why it opted for the method of reappointing the judges without competition.

Most of the content of the orders of the Council on the reappointment of judges without competition are dull and technical. The situation in this respect somewhat has changed since June 2020. From that period on, the Council has specified in its orders the total number of applications received, confirming that the Council had to choose between several judges. Nevertheless, the institution does not indicate based on what criteria and methodology one particular judge was selected and why it decided to appoint them at all.

As for the secondments of judges, according to the information received from the Council, in 2017-2020:

[172] The Council's decision №1/230 of July 17, 2017; The Council's decision № 1/198 of June 4, 2018; The Council's decision №1/214 of June 25, 2018; The Council's decision № 1/89 of May 31, 2019; The Council's decision №1/139 of June 25, 2019; The Council's decision №1/160 of July 9, 2019; The Council's decision №1/199 of September 4, 2019; The Council's decision №1/294 of November 22, 2019; The Council's decision № 1/333 of December 10, 2019; The Council's decision №1/364 of December 26, 2019; The Council's decision №# 1/2 of January 9,2020; The Council's decision №1/12 of January 24, 2020; The Council's decision №1/35 of March 17, 2020; The Council's decision №1/68 of June 5, 2020; The Council's decision №1/106 of July 23, 2020;

[173] The exceptions were the decisions delivered on September 4, 2019, November 22, 2019, and January 24, 2020.

[174] The Council's Decision №1/111 of June 20, 2019 on the re-appointment of Judge Ekaterine Partenishvili to Rustavi City Court.

[175] The Council's Decision № 1/141 of July 9, 2019 on the re-appointment of Judge Vladimer Kakabadze to the Tbilisi Court of Appeals; The Council's Decision №1/142 of July 9, 2019 on the re-appointment of judge Leila Mamulashvili to the Tbilisi Court of Appeals.

- The Council decided to extend the secondments and/or its term in 22 cases;[176]
- In 2 cases, the decisions on the secondments were declared invalid;[177]
- The secondment decisions largely concerned the courts of the first instance and were usually due to the availability of vacancies in the courts (in some cases the absence of a judge).

The role of court chairpersons in the secondment process is obscure. The Council in its decisions in some cases indicates that the consent of a judge was submitted to the Council by the chairperson of the court or panel. However, the law does not require the participation of the chairperson in the process. The communication might have taken place informally between the chairpersons, judges, and the Council. In several cases, it can be construed from the decisions of the institution that it directly contacted a specific judge with a proposal of the secondment, which is also not prescribed by law. The law stipulates that an offer shall be made to judges (irrespectively).

The decisions concerning secondments do not specify what happens if more than one judge consents to the secondment. The Council decisions generally do not state the number of judges who have agreed to the secondment. Besides, the law does not define how the Council shall make the final decision between several eligible candidates.

Noteworthy is the decision №1/24 delivered by the Council on June 20, 2019, confirming that after addressing the judges of a certain court, the consent was not obtained. The institution then re-applied to judges of another court located nearby concerning the secondment.

The intensity of secondments, like the reassignment mechanism, shows that the personnel policy and rotation issues in the common courts' structure generally lack a systematic understanding. Even though many vacant positions emerge, a competition is not announced, and the vacant positions are filled through the reappointment of existing staff, which in turn creates vacancies in other courts, ultimately leading to the necessity to hire new judges. The rotation mechanism cannot be considered as an alternative to the appointment of judges. Unless there are unforeseen situations or the need to mobilize staff in a particular court for a short period, rotation (reassignment/secondments) must not be used.

2.5. Summary

In recent years, the norms governing the rotation of the judiciary have been somewhat improved, which especially concerns the mechanism of secondments of judges. However, the legislation still preserves excessive powers for chairpersons of courts in terms of the

[176] The Council's decision №1/192 of June 5, 2017; The Council's decision № 1/192 of June 5, 2017; The Council's decision №1/196 of June 12, 2017; The Council's decision №1/319 of December 5, 2017; The Council's decision №1/148 of March 12, 2018; The Council's decision №1/149 of March 12, 2018; The Council's decision №1/199 of June 4, 2018; The Council's decision №1/200 of June 4, 2018; The Council's decision № 1/207 of June 11, 2018; The Council's decision №1/287 of December 10, 2018; The Council's decision № 1/324 of December 10,2019; The Council's decision №1/33 of April 1, 2019; The Council's decision №1/124 of June 20, 2019; The Council's decision №1/127 of June 20, 2019; The Council's decision №1/155 of July 9, 2019; The Council's decision №1/182 of August 15, 2019; The Council's decision №1/212 of September 23, 2019; The Council's decision №1/88 of June 26, 2020; The Council's decision №1/126 of August 11, 2020; The Council's decision №1/127 of August 11, 2020; The Council's decision № 1/132 of September 15, 2020; The Council's decision №1/135 of October 7, 2020;

[177] The Council's decision №1/298 of November 29, 2019; The Council's decision №1/299 of November 29, 2019.

re-allocation of judges. First of all, it is connected to the possibility to transfer a judge to another panel/chamber and the sole authority to redistribute judges among narrow specializations. The practice of rotation of judges also indicates that the arguments presented by the Council are usually not informative and cannot be considered as a justification for the decision rendered. In addition, the numerosity of decisions on the secondments, as well as, re-assignments of judges without competition and the high intensity of the utilization of exceptional mechanisms are evident, which primarily indicates the shortcomings of the appointment policy in the court, in general.

CHAPTER 3: THE ASPECTS OF JUDICIAL DISCIPLINE

The study of accountability and responsibility systems within the judiciary is associated with certain challenges. Nevertheless, it is considered that the principle of independence of the judiciary should be interpreted narrowly, only in favor of the freedom that implies the due conduct of justice.[178] Thus, the idea and value of the judge's independence are precisely linked to the interest of fair justice. This reservation implies the possibility of influencing the judge's conduct in the presence of legitimate preconditions. Understanding the inclusive concept of accountability, which, among other things, creates a system for affirmation of fundamental democratic values, naturally cannot exclude the judiciary, which bears an essential role in this regard.[179]

The "influence" on the administration of justice (decisions) and "influence" on the judge's conduct should be differentiated. If the first is exercised by judicial authorities following standard procedural norms, the supervision over the conduct is governed by disciplinary measures.

As putting the silver lining between the judge's conduct and the administration of justice requires extreme caution, disciplinary influence, along with the accountability of the judicial system, is also associated with risks of encroachment on the independence of the judge.[180]

The history of judicial liability in recent years can be divided conventionally into two stages: first, when disciplinary actions and prosecution of judges were a part of a substantial renewal of the judiciary and therefore used more intensively;[181] second, when the rate of initiation of disciplinary proceedings, amid a large number of complaints, drastically decreased and the effectiveness of the disciplinary mechanism was doubted.[182] Both stages were accompanied by a general political context in the country and the system of common courts. In general, the sound operation of the liability system of the judiciary bears a great political and legal significance.

A retrospective analysis of the legislation indicates these political contexts. For example, the system of disciplinary liability was much more flexible, ambiguous, and prone to interpretation in years when its measures were more actively imposed on judges. The recent years have observed a tendency towards the substantial alteration of both the disciplinary

[178] David Kosař, the cited paper, 2016, p.50.
[179] Richard Mohr and Francesco Contini, "Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries", European Journal of Legal Studies (1), 2007, p.262.
[180] Coalition for an Independent and Transparent Judiciary, the cited paper, 2017, p.120.
[181] Human Rights Education and Monitoring Center (EMC), Georgian Young Lawyers' Association (GYLA), Transparency International Georgia (TI), "Analysis of Responsibility System of Judges", 2014, p.96, also p.103.
[182] Coalition for an Independent and Transparent Judiciary, the cited paper, 2017, p.125.

procedures and the basics of disciplining itself. The statistics of recent years are also noteworthy, which indicate the inertness of the disciplinary proceedings against a large number of complaints. For example, in 2017-2019, the Office of the Independent Inspector received 664 complaints. After the investigation of the cases by the Inspector and rendering the decisions by the Council, only 8 cases were submitted to the Disciplinary Panel for consideration.

It is interesting to note the opinion of some authors regarding the low rate of disciplinary proceedings, arguing that it is generally difficult for citizens to initiate proceedings against judges when the disciplinary system is locked up inside the judicial body.[183] Analysis of recent tendencies, the above argument, and discussion about the closure of the system are also relevant for Georgia.

3.1. The First Wave of Judicial Reform

From 2013, a three-level system of disciplinary liability of judges commenced the establishment, which institutionally separated the stages of reviewing a disciplinary complaint, initiating a disciplinary proceeding, and making a final decision.

The First Wave of the reform amended the rules of composition of the Disciplinary Panel, distancing it from the Council. Up until 2013, the Panel had been fully composed of members of the Council. In particular, three members had been selected by the Conference of Judges based on the recommendation of the Chairperson of the Supreme Court.[184] Two non-judicial members had been selected by the Council from its members.[185] Besides, in the intervals between the sessions of the Conference, its Administrative Committee also had the right to select the members of the Chamber. Certainly, this rule of composition was flawed on the one hand due to the undemocratic procedure for selecting members. On the other, in such a legal reality, the Disciplinary Panel was fully controlled by the body conducting disciplinary proceedings - the Council.

The First Wave of judicial reform changed the rules for electing members of the Disciplinary Panel as follows:[186]

- Three judicial members of the Disciplinary Panel must have been selected by the Conference of Judges with the support of two-thirds of the present members (however, the quorum in the next round was lower);
- The right to nominate a candidate was awarded to each member of the Conference;
- The right to select two non-judicial members of the Disciplinary Panel was conferred to the Parliament by a majority of the listed members;
- Selecting judges holding administrative positions in the Panel was restricted;
- With the adoption of the law, the authority of the acting Disciplinary Panel was terminated.

[183] Richard Mohr and Francesco Contini, the cited paper, p.264.
[184] The Law of Georgia "On disciplinary liability and disciplinary Proceedings of judges of common courts," Article 24, Paragraph 1, the version effective until May 1, 2013 (invalidated).
[185] The Law of Georgia "On disciplinary liability and disciplinary Proceedings of judges of common courts," Article 24, Paragraph 1, the version effective until May 1, 2013 (invalidated).
[186] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 01/05/2013, 580-IIს.

The amendments were progressive for the content. They were supposed to guarantee impartial and fair processes conducted by the institutions independent from each other.

However, certain shortcomings were maintained in the process of composition of the disciplinary bodies. Unlike the Council, the legislators did not deem it necessary to provide safeguards about the composition of the Disciplinary Panel. As its confirmation, the law granted to the absolute majority of the Parliament the right to select its non-judicial members.

3.2. Amendments Introduced in 2015

The subsequent amendments to the system of disciplinary liability concerned the confidentiality of the proceedings. Until 2015, a disciplinary proceeding was fully closed, and only the final decisions of the Disciplinary Panel and the Chamber of Disciplinary Cases were published.

As per the 2015 amendments, a judge against whom the disciplinary proceedings are underway has been granted the right to demand public proceedings both in the Council as well as in the Disciplinary Panel and the Chamber of Disciplinary Cases.[187]

3.3. The Third Wave of Judicial Reform

The amendments concerning the confidentiality of disciplinary litigation were also implemented as part of the Third Wave of the reform. Relevant bodies were instructed to inform a complainant about the termination/suspension/resumption of a disciplinary proceeding.[188]

The amendments have also increased the list of grounds for initiating a disciplinary proceeding. In particular, the requirement to present an explanatory note of a member of the Council and a report/proposal of the Public Defender was added to the list.[189] In terms of ensuring the rights of judges involved in disciplinary proceedings, an important novelty was a provision added to the law stipulating an obligation to inform the judge of a complaint filed against them.[190]

The most significant innovation of the Third Wave was connected to the establishment of the institution of the Independent Inspector. With the passed amendments, the power to initiate a disciplinary proceeding was transferred from various bodies to the Inspector who became obliged to investigate the relevance of a filed complaint.[191]

At the same time, the exclusive role of the Secretary of the Council in disciplinary proceedings has been reduced. The right to decide whether to initiate prosecution against a judge after a preliminary examination of the case by the Inspector was transferred from the Secretary of the Council to the collegial body. The prosecution against the judge must have been

[187] The Law of Georgia on amending the law of Georgia on disciplinary liability and disciplinary Proceedings of judges of common courts," 27/10/2015, Article 1, Paragraph 2.
[188] The Law of Georgia on amending the law of Georgia on disciplinary liability and disciplinary Proceedings of judges of common courts," 08/02/2017, 256-s, Article 1, Paragraph 1.
[189] The Law of Georgia on amending the law of Georgia on disciplinary liability and disciplinary Proceedings of judges of common courts," 08/02/2017, 256-s, Article 1, Paragraph 2.
[190] The Law of Georgia on amending the law of Georgia on disciplinary liability and disciplinary Proceedings of judges of common courts," 08/02/2017, 256-s, Article 1, Paragraph 2.
[191] The Law of Georgia on amending the law of Georgia on disciplinary liability and disciplinary Proceedings of judges of common courts," 08/02/2017, 256-s, Article 1, Paragraph 3.

initiated with the support of two-thirds of the members of the Council.[192] The same number of votes is required for holding the judge accountable for the disciplinary violation, which is the last stage of the proceeding in the Council.

The creation of the Office of the Inspector was a step forward in establishing a three-level disciplinary process. However, the performance of the system essentially depends on the degree of independence of the involved in the proceeding, including the extent to which these institutions are independent of each other.

With the Third Wave, it was stipulated that the Inspector is selected based on the competition,[193] whose appointment was transferred to the Council (the decision is made by the majority of votes).[194] The law equates the appointment of the Inspector with other regular decisions that require a similar majority of the Council. It should be noted that in resolving some matters of particular importance, a higher rate of consensus among members of the Council is required. For example, such issues are the decision on an appointment or disciplinary liability of judges (requiring 2/3 support of the Council). It is obvious that the issue of appointing the Inspector is not perceived as a matter of crucial importance and the consensus among a large part of the Council members is not required. While the Inspector shall analyze the performance of a judge appointed with much higher support, it would be consistent if the position was filled with at least similar support.

The Third Wave of amendments awarded the Council the right to determine the rules for holding a competition to select the Inspector. The institution, in its rules of procedure, determines the general rule that the competition shall be held in two stages. In the first stage, the Council reviews the documents submitted by the interested parties, then holds an interview with the short-listed candidates and conducts the voting. During the selection of both the first and the second Inspectors to the office, the monitoring organizations indicated the unjustifiable closure and non-transparency of the procedure.[195]

3.4. The Fourth Wave of Judicial Reform

The Fourth Wave of judicial reform introduced several important changes to the system of disciplinary liability of judges.

At the end of 2019, the rules of removal of the Inspector from the office were amended and the number of votes required for the decision was increased. Instead of a majority of the full composition, the support of two-thirds of the Council is now required to resolve the matter.[196] Naturally, the issue of dismissal is particularly important for the independence of the

[192] The Law of Georgia on amending the law of Georgia on disciplinary liability and disciplinary Proceedings of judges of common courts," 08/02/2017, 256-s, Article 1, Paragraph 5.

[193] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraph 27.

[194] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraph 27.

[195] Coalition for an Independent and Transparent Judiciary, "The Coalition Criticizes the Independent Inspector Selection Competition for the Lack of Transparency ", 2017, available at: http://coalition.ge/index.php?article_id=171&clang=0 (Last viewed on March 1, 2021); "The Coalition Criticizes the Independent Inspector's Selection Process," 2020, available at: http://coalition.ge/index.php?article_id=238&clang=0 (Last viewed on March 1, 2021).

[196] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 13/12/2019, 5569-Iს, Article 1, Paragraph 9.

Inspector. In this regard, the adopted amendment was somewhat an acknowledgment of the shortcomings concerning the Independence of the Inspector. By increasing the number of votes required for the removal of the Inspector, the Parliament highlighted the special importance of the institution and somehow separated it from the decision-making process on other ongoing issues. Based on this reasoning, it is even more obscure why the appointment of the Inspector does not require a higher consensus among members of the Council.

With the amendments of December 2019, after several years of debates, the grounds for the disciplinary misconduct of judges were introduced to the law with a new formulation. Violations were grouped into six main categories and the specific nature of each offense was defined.[197] The law deemed as disciplinary misconduct any action of the judge that breaches:

- Independence,
- Impartiality,
- Integrity,
- Decency,
- Equality,
- Competence and due diligence principles.

The seventh type of misconduct was considered any other actions inside or outside the court that violates the established norms and infringes on the reputation of the court.

Although the types of disciplinary violations have been increased, the amendments have narrowed the possibility of carrying out disciplinary prosecution against a judge in several areas. For example, the law no longer deems improper performance of judicial duties as a violation, which was one of the most obscure and problematic norms. Moreover, the general provision concerning the violation of the Code of Ethics was removed from the law. Instead, the law provided a specific list of misconduct.

Although the provision concerning the improper performance of the judicial duties lacked clarity, in recent years, the majority of complaints filed with the Office of the Inspector have been referred to this particular aspect.[198] The Inspector interpreted the misconduct as an act or omission of a judge, "which contains a substantial violation of the imperative and fundamental norms and goes beyond the scope of a legal error."[199] Following the 2019 amendments, it is unclear which disciplinary violation is such and which type of complaints the content of the most common grievances of previous years pertains to.

As it has been mentioned, the practice of disciplinary proceedings in the past reflected the political context of that period to some extent. This was mainly manifested through intense or extremely indolent disciplinary procedures.

In the reforms of recent years, it is possible to detect a similar logic and assess the implemented reforms from both legal and political perspectives. From a legal point of view, a clearly defined and thoroughly worded list of violations makes the disciplinary system more transparent and accessible to the judge, public and professional groups. From a political

[197] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 13/12/2019, 5569-Iს, Article 1, Paragraph 12.
[198] The Independent Inspector 2019 Activity Report, p.12, available at:
https://dis.court.ge/wp-content/uploads/2020/07/dis2.pdf (Last viewed on March 1, 2021).
[199] Ibid. P.14.

point of view, the amendments show the legislator's desire to practically leave the law without any room for flexibility and interpretation. Unlike the previous years, the content of disciplinary misconduct becomes narrowly and specifically formulated.

Adopting legally sound and foreseeable provisions does not yet mean substantial transformations from a systemic point of view. This is indicated in the assessments offered by public organizations regarding the challenges in the field of disciplinary liability after the reform.[200]

While discussing the differences between carried out reforms and their actual results, some authors point to the role of actors in de facto power; they note that while the reforms of the legislation are being initiated/supported by international organizations, the implementation of the amendments in practice can be jeopardized by domestic actors in power, whose authority, whether formal or informal, has been weakened by the changes.[201] Thus, "more change" does not yet mean high-quality justice.[202]

Such a theoretical framework of the evaluation of the reforms is particularly noteworthy for Georgia, which is implementing the stages of legislative transformation largely with the encouragement and support of external actors. However, it must be noted that a large part of the amendments remain within the scope of "modernization" and do not change the logic of system management. The particular difficulty of judicial reform is that the change in legal norms does not directly affect the formal or informal branches of power that have evolved over the years and established strong internal organizational rules and traditions. Such "de facto powers" can be an obstacle to the proper implementation of the rules adopted.[203]

The relevance of the above argument is more evident in the statistics of recent years. An important innovation in the protection of the rights of the judiciary in the disciplinary proceeding was the introduction of the right to make the hearing public, the right to use the services of a defender, the right to recusal, etc. However, publicly available information shows that in 2017-2019, none of the judges exercised their right to have a public hearing or recusal.[204]

3.5. Summary

The reform of the judicial disciplinary liability system has gradually developed a three-stage model, which separates the examination of a disciplinary case, initiation of a disciplinary proceeding, and decision-making. In this regard, the establishment of the Office of the Inspector and the reform of the Disciplinary Panel were noteworthy. The changes contributed to the formation of the disciplinary system with an orderly logic at the institutional level.

However, the institutional independence of the Inspector remains a challenge whose appointment is in the hands of the majority of the Council. This and other legislative reserva-

[200] Coalition for an Independent and Transparent Judiciary, "The Coalition Statement On the Deficiencies of Judicial Disciplinary Proceedings", 2020, available at: http://coalition.ge/index.php?article_id=241&clang=0 (Last viewed on March 1,2021).

[201] Martin Mendelski, "EU-driven judicial reforms in Romania: a success story?", 2012, p.36.

[202] Ibid. p. 37.

[203] Mirte Postema, "Why Reforms Alone Are Insufficient to Strengthen the Judiciary: A Case Study of Guatemala's Judicial Selection Processes", 2016, p.266.

[204] The Independent Inspector's Activity Report 2018, available at: https://dis.court.ge/wp-content/uploads/2020/07/inspeqtori_new.indd_.pdf (Last viewed on March 1, 2021). Also, Independent Inspector's Activity Report 2019, available at: https://dis.court.ge/wp-content/uploads/2020/07/dis2.pdf (Last viewed on March 1, 2021).

tions (for example, the powers of the Conference regarding the dismissal of the Inspector) indicate a somewhat "subordinated" nature of the institution.

Apart from the institutional issues, the inert process of disciplinary proceedings and the low rate of prosecution against judges compared to the submitted complaints are worth noting. It is expected that the changes within the Fourth Wave of judicial reform will significantly affect the rate of complaints, as the legislators removed the basis of the disciplinary misconduct on which most complaints were registered. Once again, it is difficult to assess the judicial disciplinary liability system through the analysis of legal norms alone. Therefore, the practice of coming years will better show the real content and impact of recent changes.

PART III: THE WORKING ENVIRONMENT OF AN INDIVIDUAL JUDGE

The goal of this chapter is to analyze the important factors that affect the performance of an individual judge, its independence, and its quality of administration of justice. All the aspects discussed in the previous chapters also concern the issue of judicial independence and the administration of justice. However, this chapter is an attempt to shift the focus from the collegial and managerial bodies to an individual judge and look at problematic issues from a fresh perspective. For example, the vicious tradition of power distribution in the court and existing practice to be considered as an unhealthy working environment.

CHAPTER 1: THE WORKLOAD OF JUDGES AND CASE DISTRIBUTION MODEL

The distribution of cases in the courts and more or less equal workload of judges are related to efficient and prompt administration of justice, as well as the independence of an individual judge including against the influences within the court.[205] The workload must allow the judge to administer justice within the time limits prescribed by law so that their decent working conditions are secured.

This is particularly important for guaranteeing professional freedom and development of the judge, as well as their interaction with proficient groups. Excessive workload increases the risks of errors on the part of the judge. It also prevents them from being involved in continuing professional development activities and public discussions over the improvement of the justice sector.

Therefore, the fair distribution of cases among judges shall be seen as a necessary tool for ensuring an independent judiciary and a decent working environment for judges.

Currently, about 300 judges perform judicial powers, 21 of those in the Supreme Court and 277 in the courts of the first and second instance. It has been estimated that Georgia needs approximately 100 more judges.[206]

The lack of judges causes some systemic problems:

- It hinders the allocation of judges according to the fields of law that makes a judge in small courts hear cases of different specializations;
- It challenges the random distribution of cases in small courts;
- It promotes the vicious practice of constant rotation of judges;
- It increases the workload and prevents judges from taking part in important ongoing events inside and outside the court;

Since the proper specialization of the judiciary and the efficiency of the random case distribution system are of particular importance for the independence of the court, it is apparent that the comprehensive implementation of the above system in Georgia is not possible due to the lack of judges. Nevertheless, it is still unclear what the judicial authorities plan to compose the system with a sufficient number of judges.

[205] Joost Sillen, the cited paper, p.121.

[206] Jesper Wittrup, Tea Machaidze, Elene Janelidze, Mariam Makishvili, "Assessment of the need for Judges in Georgia", 2018, available at: http://ewmi-prolog.org/images/files/4319AssessmentoftheneedforjudgesinGeorgia-GEO.pdf (Last viewed on March 1,2021).

1.1. The Third Wave of Judicial Reform

The new model of the case distribution system was introduced within the changes of the Third Wave of judicial reform in Georgia and it has not changed at the legislative level since 2017.[207]

The main motivation behind the novelty was to guarantee random distribution of cases in the courts of all three instances through law. The law awarded the Council full authority to determine important regulations for the implementation of the reform. It is exactly the rules laid down by the institution that introduced several exceptions where the principle of random distribution does not apply.

Monitoring organizations point out that in 2018-2019, a total of more than 550,000 cases were distributed in the courts under the new rule, of which the principle of randomness was adhered to during the allocation of only up to 345,000 cases.[208]

Several bodies are involved in the administration of the new case distribution model. As per the general rule provided in the law, the Council develops the procedures of operation of the system, the Management Department of the Court established within the Council monitors the performance of the case distribution system, and the chairpersons of specific courts determine the succession and allocation of judges to narrow specializations, as noted in previous chapters.

1.2. The Exceptions Determined by the High Council of Justice

A wide range of exceptions determined by the Council is one of the main challenges the new case distribution system faces today. Although the organic law deems the "randomness" as the only manner through which cases shall be allocated (except for delays in the electronic system), the Council provided several exceptions to the rule that allows for the distribution of cases without the observance of the electronic and random allocation rules.[209] The exceptions include the cases where:

- There is only one judge with a specific specialization in the court;
- Only one magistrate judge exercises authority in the municipality;
- Cases are distributed in sequential order;
- Cases are transferred to a specific judge following the procedural legislation, etc.[210]

In recent years, the changes that the Council introduced to the provisions developed by the body show a tendency towards exceptions to the general rule. In some cases, these exceptions are due to the vicious practice of rotation of judges and problematic appointment policies.[211]

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[207] The Organic Law of Georgia on "Common Courts, Article 58[1].

[208] Ani Mukhigulashvili, Human Rights Education and Monitoring Center (EMC), "The Electronic Cases Distribution System in Georgia", 2020, p.11, available at: https://emc.org.ge/uploads/products/covers/GEO_WEB_1586245616.pdf (Last viewed on March 1, 2021).

[209] Decision №1/56 of the High Council of Justice of Georgia of May 1, 2017 "On Approval of the Rule for the Automatic Electronic Case Distribution System in the Common Courts of Georgia," Article 3.

[210] Center for Human Rights Education and Monitoring (EMC), the cited paper, p.13.

[211] Ibid. p.21.

1.3. The Management Department

The Management Department was established in parallel with the introduction of the new system of case distribution within the amendments of the Third Wave with the purpose to, among other things, ensure the proper functioning of the electronic system.[212] However, the law awarded the Department a range of ambiguous and controversial powers,[213] in particular:

- The monitoring of the workload of judges and the rate of hearing the cases;
- Supervision of the quality of citizen service in the courts;
- Elaboration of the conclusions on court administration issues, etc.

The Management Department, from an institutional point of view, is not a body superior to or supervising a particular court. It operates as one of the structural elements of the Council, while the courts have their independent system of internal administration the example of which are the chairperson and the manager of the court. The analysis of the functions of the Department shows that instead of encouraging the decentralization of policies it increases the level of centralization that is manifested in the power of the body to collect certain types of information and oversee the ongoing management processes in the courts, as well as prepare reports (the legal value of which is also obscure) and recommendations. In its current form, the Department is a sort of inspection reducing the degree of autonomy of courts. In addition, the functions of the chairperson of the court, the Department, and managers overlap in several areas, including in terms of analyzing the workload in the court.

1.4. The Role of Court Chairpersons in the Distribution of Cases

The role of court chairpersons in the automatic and random case distribution system is another red flag. It was exactly for the prevention of arbitrary redistribution of cases to judges within the courts that the electronic random distribution of cases was introduced. In this respect, certain roles of court chairpersons are interesting to note:

- In case of hearing a case in a panel, the chairperson of the court determines the composition of the panel (the initial judge participates in the work of the panel);[214]
- The chairperson of the court has the right, in certain cases, to change the workload of judges, to increase or decrease it.[215]
- The shifts of judges are approved by an order issued by the chairperson of the court and the cases to be reviewed within limited timeframes are allocated according to the schedule rather than randomly;[216]
- The chairperson of the court has the right to instruct a specific judge to hear a case in another composition, and in such cases, the workload of the judge is determined by the court head;[217]

[212] An explanatory note to the "Draft Organic Law on Amending the Organic Law on Common Courts," 02/07/2016, p.8. available at: https://info.parliament.ge/file/1/BillReviewContent/84869 (Last viewed on March 1, 2021).
[213] The Organic Law of Georgia "On Common Courts," Article 56^1, Paragraph 2.
[214] The Decision №1/56 of the High Council of Justice of Georgia of May 1, 2017 "On Approval of the Rule for the Automatic Electronic Case Distribution System in the Common Courts of Georgia," Article 4, Paragraph 7.
[215] Ibid. Article 5, Paragraphs 8 and 8^1.
[216] Ibid. Article 4, Paragraph 12.
[217] Ibid. Article 5, Paragraph 9.

Furthermore, as mentioned in the previous chapters, the chairpersons of Tbilisi City and Appellate Courts can independently assign judges in narrow specializations created within the panels/chambers. Unlike the Council, the chairperson makes decisions autonomously, without publicly discussing the issue. While the Council needs to convene a sitting and discuss the matter publicly to perform a similar function, the court chairperson can do the same behind closed doors in one day. The chairperson has no obligation to explain the principle or arguments behind the distribution of judges to specializations.

The seemingly "managerial" functions delegated to the chairperson in the process of distribution of cases affect the performance of the entire system. For example, while cases are allocated randomly among judges hearing specific specialization cases, the chairperson of the court is the person who can decide which judge will enter a specific specialization and among which judges the cases will be distributed randomly. Obviously, the "randomness" in such cases is conventional. The chairperson of the court may, solely, at any time, change the circle of judges. In the condition where even a minimum size of this circle is not determined by law, undoubtedly, the chairperson can practically secure that a specific judge will receive a specific case and in this way, they may indirectly affect the outcome of a particular lawsuit.

The power of the court chairperson is particularly problematic and noteworthy when high-profile/politically sensitive cases are filed within the court.[218] By changing the composition of the court, the chairperson can change not only the dynamics but also have a direct impact on the outcome of the lawsuit.[219] This power becomes even more alarming when we deal with the practice of narrow specializations and the chairperson can change the specialization of a judge.[220]

1.5. Rates of the Workload of Judges

Another important aspect of the case allocation system is a more or less fair distribution of cases among judges. The law does not require the adherence to the principle of "equal" distribution of cases between judges, which, among other reasons, is related to determining the complexity of cases as well.

The rule for the distribution of cases developed by the Council requires that cases "shall be as evenly distributed as possible" between judges.[221] However, in a number of cases, the rule provides for different rates of workload for judges.

For example, the case distribution rule determined by the Council envisages significant benefits for members of the Council and judges holding administrative positions:

- The workload of a member of the Council is 20%;
- The workload of a Council member who is also the chairperson/deputy chairperson of a court or chairperson of a panel/chamber is 10%;
- The workload of judges in small courts holding administrative positions is 50%;

[218] Human Rights Education and Monitoring Center (EMC), the cited paper, p.28.
[219] Adam Blisa and David Kosař, "Court Presidents: The Missing Piece in the Puzzle of Judicial Governance", German Law Journal 19(7), 2019, p.2045.
[220] Ibid.
[221] The Decision №1/56 of the High Council of Justice of Georgia of May 1, 2017 "On Approval of the Rule for the Automatic Electronic Case Distribution System in the Common Courts of Georgia," Article 5, Paragraph 1.

- The workload of judges with administrative positions in large courts is 20%;
- Cases to judges holding administrative positions in different courts, as well as the chairperson and secretary of the Council are distributed in "exceptional cases" and do not exceed 5%.

The practice of recent years also shows a significant difference between judges with and without administrative positions.[222]

This inequality expressed in the workload of judges points to the viciousness of the system governing the court entirely. The differences between the workload of judges give rise to the hierarchies within the court. The system has privileged judges who are largely disconnected from the judicial practice. In contrast, there is a large group to whom the bulk of cases are assigned and who, due to excessive workload, are prevented from participating in important events.

For example, in the process of the preparation of the study, according to the information received from the Council,[223] the rate of workload in the Tbilisi Court of Appeals, where there are about 80 judges, is as follows:

- Information on the workload of Mikheil Chinchaladze, the Chairperson of the Tbilisi Court of Appeals, is not available;
- 34 cases were distributed to Irakli Shengelia, Chairperson of the Chamber of Civil Cases and a member of the Tbilisi Court of Appeals, while hundreds of cases were assigned to specific judges in the same Chamber;
- 22 cases were allocated to Revaz Nadaria, a member of the same Chamber and a member of the Council;
- 21 cases were distributed to Irakli Bondarenko, a member of the same Chamber and a member of the Council;
- 37 cases were allocated to Levan Tevzadze, the Chairperson of the Chamber of Criminal Cases of Tbilisi Court of Appeals;

Such "informational" or "power-related asymmetry" between judges in administrative positions and the others show the problematic pattern of governance on the one hand and the problem of concentration of power in the court on the other.

1.6. Summary

The working environment, including the adequate and fair workload, is essential for the independence of the judiciary. The judge should have the possibility to administer justice without fear of making mistakes, take care of their professional development, and be involved in discussions over important ongoing issues as well as the reform of the judicial system within and outside the court. Therefore, the model of distribution of cases among judges ensures impartial consideration of cases and is important for the protection of individual judges. With the Third Wave of judicial reform, the system of random distribution of cases was a step forward in this respect.

[222] Human Rights Education and Monitoring Center (EMC), "What is the workload of Judges Reviewing Cases," 2019, available at: https://emc.org.ge/ka/products/ra-datvirtvit-ganikhilaven-sakmeebs-mosamartleebi (Last viewed on March 1, 2021).

[223] Letter №1225 / 2899-03-ო of the High Council of Justice of Georgia of November 26, 2020.

However, as presented in this chapter, the full-fledged operation of the random distribution system is hindered by several factors. Apart from the scarcity of judges, the factors include a range of exceptions introduced by the Council, questionable and problematic powers of the chairperson of the court (e.g., assigning judges in narrow specializations), the unequal environment between judges in administrative positions, and others. The substantially different workloads of the two groups of judges confirm the existence of privileges related to administrative positions in the court, as well as many asymmetries that create unhealthy hierarchies inside.

CHAPTER 2: THE MANAGEMENT OF THE COURTS

The administration of the court is an important component for the independence of the judiciary and the individual judge. In continental European countries, such a management system is somewhat hierarchical and hardly recognizes the autonomy of individual courts.[224] In Georgia, on the one hand, this is reflected in the relationship between individual courts and the Council and on the other hand, in the role of chairpersons within the courts. Both approaches are characterized by a high degree of centralization. The main challenge in the model is ensuring sufficient autonomy and professional space for judges.[225]

Today, the chairperson of the court, deputy chairperson, and the chairperson of the panels/chambers, as well as the court managers, are involved in the management of individual courts. However, the separation of powers and responsibilities between these bodies is problematic.

For example, according to the law, a court manager shall ensure the organizational management of the staff,[226] while the chairperson of the court shall oversee their day-to-day.[227] The provision does not make the relation of the chairperson of the court to its staff clear. It should also be noted that the law does not allow the court manager to appoint a court bailiff, assistant, and secretary of a hearing.[228] The law stipulates that the above persons shall be appointed to the office by the chairperson of the court who, because of such powers, turns out to be as a "managing" judge instead of a "judge considering" the cases.

The law does not strive to exempt the chairperson of the court from the administrative functions and delegate them to the court manager. Overall, this model facilitates the retention of a "bureaucratic justice system",[229] which creates an unjustified power asymmetry between the managing judges and the rest of the court. In contrast, there is a possibility to achieve horizontality, which primarily requires the roles of the court chairperson to be limited to a representative function. This is an essential element of the independence of an individual judge. It is important to note that the independence of the court does not in itself imply the independence of an individual judge, and strengthening the internal democracy in the judicial system requires introducing additional mechanisms for ensuring equality and redistribution of power.[230] An example of this is the collegial bodies set up in individual courts

[224] Philip Langbroek, "Court Administration in Europe – Management in a Different Context", International Journal for Court Administration (8), 2017, p.1.
[225] Ibid.
[226] The Organic Law of Georgia "On Common Courts," Article 56, Paragraph 2.
[227] The Organic Law of Georgia "On Common Courts," Article 25, Paragraph 1a and Article 32, Paragraph 2b.
[228] The Organic Law of Georgia "On Common Courts," Article 56, Paragraph 2.
[229] David Kosař, the cited paper, 2016, p.401.
[230] Ibid. P.408.

– "management councils," which is a common practice in different countries.[231]

2.1. The Third Wave of Judicial Reform

The original version of the Third Wave of judicial reform envisaged important innovations for management bodies of the court. The initial draft provided for the abolition of the position of the first deputy/deputy chairperson of the court.[232] Accordingly, at the moment of the adoption of the law, the persons appointed to the offices were subject to termination of deputy authorities. Besides, judges appointed to the office for a term of ten years could hold an administrative position for three years. The bill provided for the possibility that judges appointed to administrative positions at the time of enactment of the law could exercise their powers until the term was expired.

The initial version of the bill envisioned some reduction of bureaucracy and hierarchy within the courts. The abolition of the position of deputy chairperson of the court, who does not have its autonomous powers and content at all, was an important initiative in this direction.

However, the prolonged informal processes of reviewing the changes of the Third Wave of judicial reform and the influence exerted by various stakeholders on the process have significantly altered the essence of the changes. In reviewing the bill, the initiators refused to abolish the position of deputy chairperson. Therefore, the judges appointed to the administrative position at that time retained the power. In addition, the term of administrative office was increased from three to five years for judges appointed for ten years.[233]

Another provision that appeared to the law restricted three-year judges (respectively, new staff in the judiciary) the right to hold an administrative position in the court.[234] Before the Third Wave amendments, the law did not prohibit the Council to appoint a judge to an administrative position during the probationary period. Since 2017, the judge appointed for a probationary period cannot be appointed to an administrative position (unless they do not have five years of experience as a judge). The same amendments also introduced into the law the grounds for removal of the chairperson of the court, deputy chairperson, chairperson of panels/chambers from the office.

The changes of 2017 also affected the rules for selecting the composition and chairpersons of the chambers of the Supreme Court. Before the amendments, the composition of the chambers, as well as their chairpersons, were selected by the Plenum of the Supreme Court on the recommendation of its Chairperson. With the Third Wave of changes, the right to nominate a candidate was transferred to each member of the Plenum.[235]

The amendments also affected the powers of the chairperson and the deputy of the Court of Appeals. Before 2017, they simultaneously chaired one of the chambers or the Investigative Panel. However, with the amendments, instead of the automatic management of the

[231] Adam Blisa and David Kosař, the cited paper, p.2069.
[232] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 06/07/2015, available at: https://info,parliament.ge/file/1/BillReviewContent/84868 (Last viewed on April 13, 2021).
[233] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 2, Paragraph 1.
[234] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraph 10 and 13.
[235] The Organic Law of Georgia "On Amendments to the Organic Law of Georgia on Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraph 5.

chamber/ Investigative Panel, the law provided for a "possibility"[236] to hold these positions. Thus, the number of the judges holding administrative positions in the court increased. A similar logic was applied to the chairpersons of the district (city) and first instance courts, thus increasing the circle of judges holding administrative positions.

With the changes of the Third Wave, the problem of separation of powers between administrative officials was maintained. The law still does not define the powers of the chairperson of the panels/chambers. As for the separation of competencies between the chairperson and the deputy of the Court of Appeals, the latter does not have autonomous functions apart from the uniform and overlapping powers, which again calls into question the necessity to maintain the position.

2.2. The Amendments of 2018

Additional amendments to the law concerning the activities of the Deputy Chairperson of the Court of Appeals were made in 2018. The law stipulated that in the absence of the Chairperson of the Court of Appeals and their Deputy, the chairperson of one of the chambers or the Investigative Panel shall exercise the powers.[237] Until 2018, the law had not specified the rule for the selection of the chairperson of the chambers/Investigative Panel to exercise the authority of the chairperson and its deputy in their absence. Presumably, this was because, before the Third Wave amendments, the Chairperson of the Court and their deputy had simultaneously held the position of the chairperson of any chamber or Investigative Panel in the court. Thus, in their absence, the authority to perform activities was automatically transferred to the chairperson of one of the chambers/Investigative Panel.

As mentioned, the Third Wave increased the number of judges holding with administrative positions in the court and the 2018 amendments were a somewhat continuation of this, which gave the Chairperson of the Court of Appeals the right to select an acting judge if the chairperson or its deputy were absent.

Another change in 2018 is noteworthy - if previously the Deputy Chairperson of the Court of Appeals had to perform the duties of the Court Chairperson in case of their absence, the 2018 amendments abolished the prerequisite "absence of the Chairperson." Instead, it was stipulated that the Deputy Chairperson might exercise such powers "in the cases provided by law".[238] This change may be construed in such a way that, in the presence of the Chairperson of the Court of Appeals, their powers may be exercised by their Deputy. Given that the workload of the incumbent Chairperson of the Court of Appeals in the administration of justice is minimal,[239] there is no need for such delegation of power.

[236] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 08/02/2017, 255-IIს, Article 1, Paragraphs 11 and 12.
[237] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 07/03/2018, 2034-IIს, Article 1, Paragraph 2.
[238] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 07/03/2018, 2034-IIს, Article 1, Paragraph 3.
[239] For example, see the info graph prepared by the Human Rights Education and Monitoring Center (EMC).

2.3. The Fourth Wave of Judicial Reform

The last notable change in the appointment of chairpersons for the district (city) and appellate courts (and Deputy Chairperson of the Court of Appeals) was made through the Fourth Wave of the judicial reform in December 2019. The legislators obligated the Council to substantiate the decisions on appointing the chairpersons as well as the deputy chairperson of the Court of Appeals.[240]

Furthermore, as per the changes of December 2019, the Council is obliged to consult with the judges of a relevant court before making substantiated decision on the appointment of the court chairperson.[241] It should be noted that the requirement to hold consultations does not apply to the election of the deputy chairperson of the Court of Appeals, nor does the obligation to make a substantiated decision apply to the appointment of the chairpersons of the panels/chambers.

The amendments to the rules of the selection of the court chairperson shall be discussed to some extent in light of ongoing long-term debates in Georgia. The issues reviewed in the different chapters of this document confirm that the judges holding administrative positions have special influences and enjoy privileges that lead to unhealthy court management practices and the concentration of power in one group.

The rule for appointing the judges to administrative positions has a significant impact on the development of democratic processes within the court. On this ground, the professional groups in recent years have advocated for a fundamental change in the procedure of appointment of court chairpersons and supported their direct election by judges.[242] This model would have strengthened the autonomy of the courts, weaken the power concentrated in the hands of the Council, and increase the degree of accountability and collegiality of the chairpersons.

Nevertheless, the legislators maintained the centralized model of chairperson appointments and imposed on the Council the obligation to hold consultations and substantiate decisions.

The content, procedure, and impact of the consultations on the decision-making process by the Council are unclear. For example, the law does not specify in this process by whom or how a candidate for a chairperson is nominated and whether the consultation process is safe and equal for all groups. Also, if several candidates are nominated during the consultation process, what are the criteria that the Council applies to make a final decision.

There are 27 first and second instance courts and 277 judges in Georgia. At the time of writing this report, 21 judges are appointed to the position of the court chairperson for a five-year term, of which only two are women.[243]

From January 1, 2020, i.e. after the enactment of the 2019 amendments to the rules for the selection of chairpersons, four chairpersons have been appointed to the office. The appointment decisions made confirm a specific practice of using the "consultations" by the Council. In the decisions, the institution indicates that, following the initiation of the issue

[240] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 13/12/2019, 5569-Iს, Article 1, Paragraphs 2 and 3.
[241] The Organic Law on "Draft Amendments to the Organic Law of Georgia "On Common Courts," 13/12/2019, 5569-Iს, Article 1, Paragraphs 2 and 3.
[242] The Georgian Young Lawyers' Association, the cited paper, 2020, p.66.
[243] Letter №1130 / 2692-03 of the High Council of Justice of October 21, 2020.

of the appointment of a chairperson, the judges were given time to nominate candidates and the consultations were held with the judges of a relevant court concerning a specific candidate. This format of consultation is noteworthy as incumbent judges have to openly express their opinions concerning an already nominated candidate. The decisions do not clarify how the Council managed to provide a safe environment for judges to express their opinions freely. The decisions to appoint the chairpersons do not also specify how many applications the Council received and how the body managed to select one of them given the numerosity of submissions. Interestingly, in its reasoning, the Council relies entirely on the assessments made by incumbent judges about the colleague and does not provide its independent substantiation.

It must be reiterated that if the purpose of the preliminary consultations was the adoption of a more democratic rule for the selection of chairpersons, then requiring the judges to express their opinion openly concerning the already nominated candidates can be hardly deemed as such.

In addition, it is unfortunate that none of the waves of judicial reform have addressed two issues concerning the possibility of court chairpersons:

- On re-appointment for the position on a second term; and
- On the imposition of the powers of the chairperson.

Today the law does not impose any restrictions or reservations on how many terms the same judge can hold the office of the chairperson. Restricting the reappointment to the office would encourage the rotation of judges to this position and weaken the unhealthy strengthening of one group. This risk is real and is evidenced by the data showing a long or continuous practice of holding a managerial position by a narrow circle of judges.[244]

By law, the chairperson of the court shall be appointed to the office for a term of five years. This term is not so short as to give rise to the necessity of retaining the same person to the office with the argument of ensuring high-quality or stable management of the court. It should be noted that a similar restriction is stipulated by the legislation on the Constitutional Court. The election of the same person as Chairperson of the Constitutional Court for the second term is inadmissible.[245] The restriction of the re-appointment creates a sort of expectation that after some time the chairperson will become a judge like others, which is an important signal for their managerial activities while in the office.[246]

The practice of long-term appointment of acting chairpersons instead of the one appointed has proved to be a problem in recent years. There would be nothing significant if it was not for the law that fails to provide the preconditions and time limitations for such an appointment. Given the current order of law, the acting chairperson may be appointed for any term (for no more than the term determined for the chairperson). It is also unclear whether the obligations of consultations on selecting the chairperson also apply to the appointment of the acting head of the court. At the moment of elaborating this report, two judges were acting chairpersons. Both of them have been in office since 2017, which once again confirms that the practice is problematic.

[244] Nino Nozadze,"The Narrow Circle - Distribution of Clan Members to Managerial Positions ", 2020, available: https://gyla.ge/ge/post/vitsro-tsre-sasamartloshi-menejerul-tanamdebobebze-klanis-tsevrta-ganatsileba#sthash.iM4n0cW7.TN6L6GAk.dpbs (Last viewed on March 1, 2021).
[245] The Organic Law of Georgia "On the Constitutional Court," Article 10, Paragraph 1.
[246] David Kosař, the cited paper, 2017, p.109.

2.4. Summary

The court management model and vicious practices associated with it are one of the main challenges justice in Georgia is facing today. This is most evident in the rules for the appointment of court chairpersons, deputy chairpersons, and other administration officials and their powers. Unfortunately, in recent years the legislation has expanded the circle of the judges holding administrative positions, further strengthening the existing hierarchies in the court and increasing the group of privileged judges.

Although the role of the deputy chairperson of the court is obscure and they do not have an autonomous function, the legislators have not yet decided to abolish the office. The Parliament has also failed to create a substantially different and democratic model for the appointment of court chairpersons. The withdrawal or weak attempts of the authors of the reform, once again, indicate how much importance is attached to the managerial positions within the court and what influence the persons appointed to these positions exert. Judges involved in the management of the court, who enjoy significant privileges in terms of consideration of cases and the possibilities to influence the legislative or appointment processes, are the main cause of the unhealthy environment created within the court.

SUMMARY OF THE RESEARCH

This document assessed the important reforms carried out in the system of common courts in 2013-2021, the dynamics of the amendments, and the resources of their impact on the existing challenges. The analysis of the four waves of judicial reform and the relatively small or important changes that has taken place in the intervals exposes the strategies of the political authorities towards the judiciary.

The paper describes the alterations to these strategies from the First Wave of judicial reform up to the end of March, 2021. If the draft reform bill elaborated in 2013 was indicated the interest of the political authorities to take radical steps (although not positive in all cases), the subsequent stages of judicial reform were weak and inconsistent. The major signature of the reforms followed the vision of bringing more clarity to the legislation, detailing the norms, and modernizing the institutional and legislative framework. In 2013, after the failure of the first phase of the reform, the government did not show neither a desire nor a plan for a radical and systematic transformation of the judiciary. Since 2015, a completely changed strategy of the government towards the court has been observed.

An example of this is the third and subsequent stages of the reform. The content of the approved amendments and the procedure for their implementation showed that the “truce” between the political authorities and the judiciary had been reached. As a result of the reconciliation, the legislators gave up a number of progressive initiatives, increased the guarantees and powers for the Council and judges holding administrative positions, and created numerous occasions promoting the return of power to influential judges.

Even though the legislation has become more detailed in recent years increasing the responsibilities of the collegial bodies in terms of transparency and requiring them to produce substantiated decisions, the amendments still failed to change the logic of hierarchies and power established within the court. This was largely due to the negligence of such factors in the content of the reforms, as the existence of groups of interests and influences within the courts, their de facto power, formal and informal authorities, hierarchies, and statuses, which have been created and strengthened over the years.

After the First Wave, it can be argued that none of the reforms was aimed at strengthening the democratic processes, redistribution of power, and balancing influential groups within the court. As a result, the reforms carried out with the logic of modernization of the institutional framework served the existing order and interest groups. The amendments further enhanced the power of judges holding administrative/managerial positions, leaving the Council and the judiciary in complete isolation. This occurred in the circumstances when at the same time, the mechanisms providing the check and balance system, power redistribution, accountability, and responsibility do not exist within the common courts.

A fundamentally fallacious reform strategy and specific legislative resolutions created such legal framework and formed such personnel-related decisions that will have a long-term and irreversible impact on the judiciary. In this situation, it is difficult to envision the contours of further judicial reform. It is even more difficult to discuss the content of potential institutional reforms, while the strategy of these amendments has caused a number of side effects and had damaging consequences. In the first place, as mentioned before, it has strengthened the groups that are posing the main threat and challenge to internal independence.

Nevertheless, the somewhat disappointment with the judicial reform and the ambiguity of further steps may become the basis for discussing actual and groundbreaking changes. This, first of all, requires a critical assessment of the current dominant vision concerning the judicial reform. Until now, this approach has been creating the imitation of modernization and transformation of the system through institutional reform, instead of actual and tangible changes in the judiciary. Hopefully, this report will serve strengthening this perspective and help interested parties draw new conclusions.