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Contemporary Challenges Facing the Judicial Independence in Georgia

Introduction

Judicial independence is the cornerstone principle of the rule of law. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.¹ Independence means that the judiciary is free from external pressure and is not subjected to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.² The requirement of an independent judiciary is included in all rule of law definitions in the western liberal tradition. This excludes from the rule of law list those states whose organisation is not based on the *trias politica*.³ The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor.⁴

As scholars argue, the modern conception of judicial independence is not confined to the independence of an individual judge and to his or her personal and substantive independence. It must include the collective independence of the judiciary as an institution. Likewise, judicial independence should not be perceived only in terms of shielding the judge from executive pressures or legislative interferences. It must also encompass internal independence, namely, the independence of the judge from his

¹ Rule of Law Indicators, the United Nations, Implementation Guide and Project Tools, United Nations 2011, p. 70, <https://bit.ly/2T582Kf> (accessed: 2020.05.10).

² J. Moller, "The Advantages of a Thin View" [in:] European Commission For Democracy Through Law (Venice Commission) Rule Of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), p. 20, <https://bit.ly/35WlchU> (accessed: 2020.05.10).

³ *Handbook on the Rule of Law*, eds C. May, A. Winchester, Edward Elgar Publishing 2018, p. 40.

⁴ M. Sellers, "An Introduction to the Rule of Law in Comparative Perspective" [in:] *The Rule of Law in Comparative Perspective*, eds M. Sellers and T. Tomaszewski, Springer Science+Business Media B.V. 2010, p. 5.

or her judicial colleagues or superiors.⁵ Individual judges must enjoy both personal and substantive independence. Characteristics of personal independence include security of office, life tenure, and adequate remuneration and pensions. Substantive independence refers to the freedom of judges to perform their judicial functions independently.⁶

The independence of the judiciary also includes institutional or collective independence, internal judicial independence, and administrative independence. Scholars argue that interference with the collective independence of the judiciary also has an adverse impact on individual judges as they discharge their official duties. This stems from the fact that the traditional sense of social responsibility that the judiciary imparts on individual judges is a strong instrument for ensuring its independence. Judges must be free from directives or pressures from peers or those who have administrative responsibilities in the court, such as the chief judge of the court or the head of the division in the court. It is generally accepted that judges cannot claim independence from required and necessary guidance and supervision in administrative aspects of adjudication.⁷

Georgia, like other post-Soviet countries, has faced many common challenges in reforming the judiciary since the restoration of independence. Scholars argue that what is generally deplored in post-Soviet countries is the dependence of the judiciary on the presidential administration as well as the existence of hierarchical structures within the judiciary that do not leave enough room for the independent adjudication of individual cases.⁸ I agree with scholars that the factors that impeded judicial reform came not only from outside, but also from inside the judiciary. Generally, judges remained in their posts. Personal continuity would translate into the persistence of perceptions and ideas inherited from the past. Furthermore, it was also a challenge to abolish privileges such as the material goods provided to judges. Such changes were difficult to implement, and these problems have not been overcome even 20 years after initiating reforms.⁹ One of the greatest challenges for countries in transition regarding an independent judiciary is considered to be the establishment of a system of judicial administration that balances judicial independence and judicial accountability and ensures transparency. Two key organs of judicial administration are judicial councils and court presidents.¹⁰

⁵ S. Shetreet, "Judicial independence and accountability: Core Values in Liberal Democracies" [in:] *Judiciaries in Comparative Perspective*, ed. H.P. Lee, Cambridge University Press 2011, p. 3.

⁶ *Ibidem*, p. 15.

⁷ *Ibidem*, pp. 16–17.

⁸ A. Nußberger, "Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?" [in:] *Judicial Independence in Transition*, ed. A. Seibert-Fohr, Springer, Heidelberg, New York, Dordrecht, London 2012, p. 892.

⁹ *Ibidem*, p. 894.

¹⁰ L.F. Müller, "Judicial Administration in Transitional Eastern Countries" [in:] *Judicial Independence in Transition*, ed. A. Seibert-Fohr, Springer, Heidelberg, New York, Dordrecht, London 2012, p. 937.

The establishment of the judiciary in Georgia began after the adoption of the 1995 Constitution and was based on the first Organic Law on common courts,¹¹ which was changed in 2009 by a new law.¹² According to the Constitution of Georgia, judicial power shall be independent and exercised by the Constitutional Court of Georgia and the common courts of Georgia.¹³ After the Soviet era, establishing an independent judiciary in Georgia was one of the main challenges, and judicial reform was initiated shortly after the constitution was adopted. The reformers were faced with two choices: either dismiss all Soviet judges or gradually renew the judiciary with qualified judges, of which there was a shortage at the time. The authorities at the time passed a law requiring former judges to resign early and leave the judiciary. This decision became the subject of constitutional control in the newly created Constitutional Court. The court declared the law unconstitutional and said that the universal dismissal of judges should not be done for political reasons, the arbitrariness of the government, or for the reason of changes in the government.¹⁴

The judicial reform that started in 1997 had no real consequences, and the court remained one of the most corrupted systems. A new phase of reform for the judiciary began in 2005, when a new concept of reform was developed, new priorities were identified, and the judiciary advanced materially, technically, and organizationally, although judicial independence remained a major challenge. Thorough changes were made to the Constitution of Georgia on 27 December 2006, and the appointment and dismissal of judges was removed from the powers of the President of Georgia. This authority was transferred to the High Council of Justice of Georgia.¹⁵ The 2010 constitutional amendments introduced the appointment of judges for life, but at the same time the law provided that judges were to be appointed for a probationary period of not more than three years.¹⁶ Finally, in 2019, the High Council of Justice of Georgia appointed several dozen judges for life in the common courts of Georgia, including the Parliament of Georgia, which appointed judges for life to the Supreme Court of Georgia. The main challenge remains the independence of the judiciary, and I will discuss specific challenges in the following paragraphs.

¹¹ Organic Law of Georgia on General Courts of 13 June 1997, the Parliamentary Gazette, 31 July 1997, no. 33, p. 75, <https://matsne.gov.ge/ka/document/view/31684?publication=41> (accessed: 2020.05.10).

¹² Organic law of Georgia on General Courts, Legislative Herald of Georgia, 41, 08/12/2009, 04/12/2009, <https://matsne.gov.ge/en/document/view/90676?publication=34> (accessed: 2020.05.10).

¹³ Constitution of Georgia of 24 August 1995, <https://matsne.gov.ge/ka/document/view/30346?publication=35> (accessed: 2020.05.10).

¹⁴ *Avtandil Chachua v. the Parliament of Georgia*, Judgment of the Constitutional Court of Georgia, N2/80-9, 03/11/1998, <https://www.constcourt.ge/ka/judicial-acts?legal=80> (accessed: 2020.05.10).

¹⁵ The Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 27 December 2006, <https://matsne.gov.ge/ka/document/view/25852?publication=0> (accessed: 2020.05.10).

¹⁶ The Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 15 October 2010, <https://matsne.gov.ge/ka/document/view/1080890?publication=2> (accessed: 2020.05.10).

1. Main Challenges in Common Courts of Georgia

Prior to the change of government in Georgia in 2012, a major problem was the strong influence on the court of the executive branch, especially the prosecutor's office. During this period, systemic deficiencies were observed in the review of criminal and administrative law cases. One of the main promises of the Georgian Dream coalition during the 2012 parliamentary elections was to free the judiciary from the influence of political authorities and to achieve an independent, impartial judiciary.¹⁷ As soon as the Georgian Dream coalition won the election, Bidzina Ivanishvili, the leader of the party, said he planned to start legal proceedings against the judge who made an illegal decision against Georgian Dream during the pre-election period.¹⁸ After the election, he said that the court was still being influenced during this period and was trying to obstruct the new government.¹⁹ However, later Bidzina Ivanishvili met with the chairman of the Supreme Court, Kote Kublashvili,²⁰ and reported that they agreed that the court should be free of politics.²¹

The issue of the independence of the Georgian judiciary was not only related to the political influence of the government from outside. One of the challenges was also to create guarantees of independence within the court. During the legislative changes, the Venice Commission noted that the general principle that "judges are only subject to law" enshrined in several constitutions, protects the judges against undue external influence but is also applicable within the judiciary (internal independence): subordination of judges, for instance, to court presidents in their judicial decision making activity is a clear violation of this principle.²² Observers also confirmed that there was a group of judges in the judiciary who had the leverage to influence important decisions of the judiciary, including the High Council of Justice, where decisions were made on the basis of certain covert transactions among council members. Consequently, the High Council of Justice itself could not maintain its independence from the dominant group of the judiciary.²³

¹⁷ Founding Declaration of the Political Coalition "Georgian Dream", Tbilisi, 21 February 2012, p. 8–10. <https://bit.ly/2zva7YX> (accessed: 2020.05.10).

¹⁸ Bidzina Ivanishvili calls on the government to replace the prison staff with a patrol and release Tamazashvili, 2 October 2012, <https://bit.ly/2yLgjiX> (accessed: 2020.05.10).

¹⁹ Bidzina Ivanishvili, the government should not interfere in the administration of the court, 30 December 2015, <https://bit.ly/3dAOHlR> (accessed: 2020.05.10).

²⁰ The Prime Minister visits the court, 6 March 2013, <http://www.supremecourt.ge/news/id/334> (accessed: 2020.05.10).

²¹ The term of office of Kote Kublashvili, the Chairman of the Supreme Court expired on 23 February 2015. He headed the judiciary from 23 February 2005.

²² *Joint Opinion of the Venice Commission and the Directorate of Human Rights (Dhr) of the Directorate General of Human Rights and Rule Of Law (Dgi) of the Council Of Europe*, Strasbourg, 14 October 2014, Opinion No. 773/2014 CDL-AD(2014)031, <https://bit.ly/360OgVP> (accessed: 2020.05.10).

²³ *The State of the Judicial System (2012–2016)*, Transparency International Georgia 2016, p. 17, <https://bit.ly/2WGuBGh> (accessed: 2020.05.10).

In this situation, it was a great challenge to make legislative changes. The first major legislative reform of the justice system happened in several stages beginning on 1 May 2013.²⁴ During the so-called first wave of reform, changes were made to depoliticize the High Council of Justice by redistributing power between the High Council of Justice and the President of the Supreme Court and increasing the transparency of the system and the role of judges' self-government. Therefore, this reform was considered an important step forward.²⁵ When the second wave of changes were adopted,²⁶ the general rule for appointing judges for life was introduced; however, it was decided to appoint all judges for a three-year probation period, which was assessed negatively²⁷ and critically.²⁸ Despite the criticism, more than a hundred judges were appointed to the courts for probation.²⁹ On 15 February 2017, the Constitutional Court of Georgia declared unconstitutional appointing a person to the position of judge of the Court of Appeals and District (City) for a term of three years, who is a current or former judge and has at least three years of experience in judicial activity.³⁰ However, then parliament amended the constitution on 13 October 2017, and determined that with first appointments before 31 December 2024, a judge may be appointed for a term of three years before being appointed for life.³¹

After a long delay, the third wave of reform was adopted in February 2017.³² The council delayed the prospect of dozens of judges with a non-transparent appointment process and postponed the distribution of electronic rules. There were possible political deals, and the election of court presidents by judges was no longer under consideration. The proposal also contained negative changes³³ regarding the election of the High Council of Justice.³⁴ Experts called on the government to implement rapid reforms to ensure the independence of the judiciary.³⁵

²⁴ "Organic Law of Georgia" in *Amendments to the Organic Law of Georgia on Common Courts*, 1 May 2013, <https://matsne.gov.ge/ka/document/view/1924526?publication=0> (accessed: 2020.05.10).

²⁵ *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi 2017, p. 10.

²⁶ Organic Law of Georgia on Amendments to the Organic Law of Georgia on Common Courts, 1 August 2014, <https://matsne.gov.ge/ka/document/view/2455845?publication=0> (accessed: 2020.05.10).

²⁷ Coalition position regarding the appointment of judges for probation 2013, <http://www.coalition.org.ge> (accessed: 2020.05.10).

²⁸ Report on the independence of the judiciary (Part I), Venice Commission, (DHR), (DGI) joint report N774/2014, Strasbourg 2014, <http://bit.ly/2b7cVzP> (accessed: 2020.05.10).

²⁹ *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi 2017, p. 11.

³⁰ Judgment of the Constitutional Court of Georgia, No. 3/1/659, 15 February 2017, <https://matsne.gov.ge/ka/document/view/3584518?publication=0> (accessed: 2020.05.10).

³¹ Constitutional Law of Georgia on Amendments to the Constitution of Georgia, 13 October 2017, <https://matsne.gov.ge/ka/document/view/3811818?publication=1> (accessed: 2020.05.10).

³² Organic Law of Georgia on Amendments to the Organic Law of Georgia on Common Courts, 8 February 2017, <https://matsne.gov.ge/ka/document/view/3536739?publication=0> (accessed: 2020.05.10).

³³ *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi 2017, p. 11 <https://bit.ly/3cl8fRj> (accessed: 2020.05.10).

³⁴ "Coalition calls on parliament to take note of President's remarks on 'Third Wave' Justice Reform" 2017, http://www.coalition.ge/index.php?article_id=144&clang=0 (accessed: 2020.05.10).

³⁵ *Judicial System: Reforms and Prospects*, ed. G. Burjanadze, Tbilisi, 2017, p. 11.

In 2017, the Supreme Court of Georgia published the strategy for the judiciary for 2017–21. According to this strategy, changes in the court must be made in four strategic directions: independence and impartiality, accountability, quality and efficiency, and accessibility, transparency, and credibility.³⁶

The most recent fourth wave of judicial reform was adopted by the Parliament of Georgia on 13 December 2019. These changes concerned the status of judges' promotion, disciplinary responsibility, court overcrowding, the institution of an independent inspector, and the status of the High School of Justice.³⁷ The ruling party had high hopes for these changes, but observers have argued that the reform is not in the interests of the judiciary but in the interests of politics; the government is trying to maintain a friendly judiciary.³⁸ Ensuring the independence of the judiciary is also an international obligation of Georgia, and international partners have been monitoring and advising on reforms from the Georgian government for years.

2. The Temporary State Commission on Miscarriages of Justice

One of the first things the government did after the 2012 elections was to adopt a resolution on 5 December 2012, on political prisoners and people in political exile.³⁹ The government used the resolution of the Parliamentary Assembly of the Council of Europe (PACE) as the criteria for determining political prisoners,⁴⁰ and acknowledged the existence of political prisoners and people in political exile in Georgia.⁴¹ The bill stated that after the election there were thousands of complaints that various individuals were convicted illegally and/or unjustifiably in 2004–12, the verdicts came into force and there was no legal mechanism to appeal them, and the state wanted to restore justice, which required creating additional, temporary mechanisms of appeal.⁴²

In this regard it was important for Georgia to share international experience and the involvement of international experts in the process of establishing this new institution. The resolution itself was based on the conclusion of the Venice Commission

³⁶ Judicial System Strategy for 2017–2021, <https://bit.ly/2Wm8C8v> (accessed: 2020.05.10).

³⁷ Parliament adopted the Fourth Wave Legislative Package of Judicial Reform, 13 December 2019, <https://bit.ly/2LhCQmG> (accessed: 2020.05.10).

³⁸ G. Mshvenieradze, "We are very principled, but we are not destructive, as the government is trying to show" 10 April 2019, <https://cso.georgia.org/ge/post/giorgi-mshvenieradze> (accessed: 2020.05.10).

³⁹ Law of Georgia (draft) on The Temporary State Commission on Miscarriages of Justice, 20 May 2013, <https://matsne.gov.ge/ka/document/view/1924705?publication=0> (accessed: 2020.05.10).

⁴⁰ PACE reaffirms its support for criteria defining the notion of political prisoners, 3 October 2012, <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=4137&lang=2> (accessed: 2020.05.10).

⁴¹ Explanatory Note to the Resolution of the Parliament of Georgia on Political Prisoners and People in Political Exile, 5 December 2012, <https://info.parliament.ge/file/1/BillReviewContent/24676?> (accessed: 2020.05.10).

⁴² Resolution of the Parliament of Georgia Political Prisoners and People in Political Exile, 5 December 2012, <https://info.parliament.ge/#law-drafting/436> (accessed: 2020.05.10).

N 710/2012.⁴³ At the same time, Thomas Hammarberg, the EU's special adviser to Georgia, was actively involved in the process. It is true that the purpose of the commission was to restore justice, but there was a great risk that this mechanism could have been used for political retribution. This was especially so because one of the main political promises of the new government from the very beginning was to restore justice. This is why achieving impartiality was the main task. Hamburger's recommendation, for example, would ensure the restoration of justice for victims of injustice, although it was also inadmissible to create a parallel justice system, and the final decision was to be made by the courts.⁴⁴ In Hammarberg's view, the members of the commission should not be politicians or representatives of any party, and it was necessary for the commission to be staffed with professionals who would serve the truth and not political goals. If justice is afforded them, people should be given the opportunity to reconsider their actions in order to restore justice.⁴⁵ In addition, according to international recommendations, the High Council of Justice, which is authorized under the Constitution to appoint judges and assign duties, is not seen as scrupulously independent, so it should not be tasked for this function.⁴⁶ The Venice Commission's recommendation was focused on the division of powers, judicial independence, and international standards, and the commission should only report on the "reasonable suspicion" of the existence of judicial deficiencies, and only the court should determine the existence of deficiencies.⁴⁷

From the very beginning, Konstantine Kublashvili, the chairman of the Supreme Court at the time, viewed the creation of a commission to determine the shortcomings of the judiciary with suspicion. He also shared the views of the Venice Commission on the separation of powers, judicial independence, and international standards.⁴⁸ In his view, such commissions are rarely set up in Europe and only work on newly discovered and newly identified circumstances and do not imply a revision of all directions in the case as set out in the draft law of the Ministry of Justice.⁴⁹ He also expressed fears

⁴³ European commission for democracy through law (Venice Commission), *Opinion on the provisions relating to political prisoners in the amnesty law of Georgia*, Strasbourg, 11 March 2013, Opinion no. 710/2012, CDL-AD(2013)009 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)009-e) (accessed: 2020.05.10).

⁴⁴ T. Hammarberg, *Georgia in the Transition Period, Report on Human Rights: Past Period, Steps and Challenges*, 25 September 2013, http://myrights.gov.ge/uploads/files/docs/8987288_38635_607369_Hammarbergreport-getm.pdf (accessed: 2020.05.10).

⁴⁵ Hammarberg: Justice Commission should not serve political purposes, *Tabula*, 20 May 2013, <https://bit.ly/3fzrit2> (accessed: 2020.05.10).

⁴⁶ H. Verne, *Perspectives of Transitional Justice in Georgia*, February 2017, p. 40, <https://www.ictj.org/publication/transitional-justice-georgia> (accessed: 2020.05.10).

⁴⁷ European commission for democracy through law (Venice Commission), joint opinion of the Venice Commission, (DGI) Strasbourg, 17 June 2013, Opinion no. 728/2013, CDL-AD(2013)013\ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)013-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)013-e) (accessed: 2020.05.10).

⁴⁸ The Supreme Court responds to the conclusion of the Venice Commission, 19 June 2013, <http://www.supremecourt.ge/news/id/421> (accessed: 2020.05.10).

⁴⁹ A commission is set up to investigate the shortcomings of the judiciary, 16 March 2013, <https://www.radiotavisupleba.ge/a/justice-commission/24930501.html> (accessed: 2020.05.10).

that the commission's conclusion and subsequent hearing in court would not reflect disciplinary or other decisions against judges.⁵⁰ Opposition groups called for the beleaguered PM to resign, saying that this was a clear violation of the right to freedom of expression. They also did not recognize and protested the so-called resolution of the Parliament of Georgia on political prisoners and people in political exile, in which persons convicted of crimes against states were also listed.

Although the government was keen to set up a commission to investigate the shortcomings of the judiciary, it finally failed. In November 2013, the Minister of Justice announced that the issue of establishing a commission had been suspended, the only reason being that the country was not ready to make the expected compensations.⁵¹ This decision by the government came as a surprise and was criticized by those who expected their cases to be reconsidered, as well as by human rights organizations. The Public Defender stated that postponing the establishment of the Commission was unfounded because of financial reasons.⁵² NGOs also believed that the creation of the commission should not be delayed because it was the only way to restore justice.⁵³ Opposition parties stated that the commission was set up to influence the court, and its creation was reconsidered after it had an impact on the court.⁵⁴ If we look at the developments in the judiciary, this position should be shared.

3. The High Council of Justice of Georgia

The Council of Justice is a particularly important body in post-Soviet countries in the reform process to achieve judicial independence. The powers of the council of justice differ in different countries, but in recent times its power in Georgia has been significantly strengthened. Scholars argue that in countries with strong justice councils, there is a potential risk of facing the same deficiency in the long run by failing to perform a balancing act between guaranteeing judicial independence on the one hand, and ensuring that judges are to be held accountable on the other.⁵⁵ Judicial councils in these states do not just wield considerable influence over who is going to fill a judicial post but currently also have the power to dismiss the very same judges, or at least rec-

⁵⁰ Kublashvili: There are remarks on the points that endanger legal security, 16 March 2013, <https://netgazeti.ge/news/20206/> (accessed: 2020.05.10).

⁵¹ According to Tsulukiani, the establishment of a commission to determine the shortcomings of the judiciary has been suspended, Civil Georgia, 28 November 2013, <https://old.civil.ge/geo/article.php?id=27613> (accessed: 2020.05.10).

⁵² Ombudsman: Lack of Finance Argument is not Friday, Tabula, 29 November 2013, <https://bit.ly/3fBRL9q> (accessed: 2020.05.10).

⁵³ Statement on the postponement of the establishment of a commission to determine the shortcomings of the judiciary, 29 November 2013, <https://bit.ly/3dxQRJ6> (accessed: 2020.05.10).

⁵⁴ Restoration of Justice..., details of the unfulfilled promise Ketevan Ghvedashvili, 27 March 2014, Liberali, <https://bit.ly/2LeJREO> (accessed: 2020.05.10).

⁵⁵ L.F. Müller, "Judicial Administration in Transitional Eastern Countries" [in:] *Judicial Independence in Transition*, ed. A. Seibert-Fohr, Springer, Heidelberg, New York, Dordrecht, London 2012, p. 938.

commend their dismissal. In this regard, strong councils simultaneously perform tasks of initiation, prosecution, and judgment on disciplinary offenses allegedly committed by judges.⁵⁶

One suggested option to solve this problem is to distribute competences concentrated in strong judicial councils among different organs, such as sub-organs to the council.⁵⁷ This is also suggested by the so-called Kyiv Recommendations on Judicial Independence in Eastern Europe, in which the consensus is that the power of judicial councils need to be divided and exercised by different bodies rather than having a concentration of powers in one organ.⁵⁸ Scholars suggest that the councils could concentrate on just one aspect, e.g., judges' careers, namely their selection, appointment, and promotion, and that administrative tasks are distributed to different organs. Countries like Georgia have to work on two important aspects: the functions of the key administrative organs and their composition. Balancing independence and accountability and increased transparency should be at the heart of future reform steps with regard to the functions and composition of judicial councils.⁵⁹

The Justice Council of Georgia was established on 13 June 1997, based on the organic law on common courts. The status of the council has changed many times and the final status was completed in 2013 after the constitutional amendment. Since then, the High Council of Justice of Georgia consists of 15 members. Eight members of the High Council of Justice of Georgia are elected by a self-governing body of judges of the general courts of Georgia according to the procedure determined by this Law; five members are elected by the Parliament of Georgia, and one member is appointed by the President of Georgia. The chairperson of the Supreme Court is, by virtue of his/her position, a member of the High Council of Justice of Georgia. More than half of the members of the High Council of Justice of Georgia are elected by the self-governing body of Georgian general court judges according to this Law. The Parliament of Georgia elects five members of the High Council of Justice of Georgia in a competition by secret ballot and by a majority of three-fifths of the total number of members under the procedures established by the Rules of Procedure of the Parliament of Georgia. Candidates for membership of the High Council of Justice of Georgia are selected from among the professors and scholars working in higher education institutions of Georgia, members of the Bar Association of Georgia and/or persons nominated by non-entrepreneurial (non-commercial) legal entities of Georgia, upon recommendations of collegial management bodies of the organizations concerned.⁶⁰

One of the important roles of the Council of Justice is to complete the judiciary, which has a great impact on its independence. For the first time on 28 October 2016,

⁵⁶ *Ibidem*, p. 944.

⁵⁷ *Ibidem*, p. 945.

⁵⁸ Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, in this volume, Annex 1, par. 2.

⁵⁹ L.F. Müller, p. 968.

⁶⁰ Organic Law of Georgia on General Courts, <https://matsne.gov.ge/en/document/view/90676?publication=34> (accessed: 2020.05.10).

the High Council of Justice appointed 12 judges for life after they had passed the three-year probationary period.⁶¹ From the very beginning, the problem was that the Council of Justice evaluated the judges appointed for a probationary period in such a way that a detailed evaluation procedure was not established.⁶² This is why there was a demand for the council to stop the process of selecting judges, because the decisions were unjustified, the problem was to make decisions by secret ballot,⁶³ not to check the minimum criteria, and not to have the right to appeal.⁶⁴ This shortcoming was partially rectified by the adoption of the Law but not until January 2017. Consequently, judges with shortcomings were selected during this period. The reappointment of current and former judges raised doubts about the Council's selective approach.⁶⁵ According to various estimates, the reform has not yielded real results, and 141 judges have been reappointed on the basis of unsubstantiated and opaque decisions (including 67 for life).⁶⁶ This rule ensures the appointment of candidates acceptable to the ruling party and loyal to them, so that there was little opportunity to influence the process from the outside.

During 2017, the composition of the High Council of Justice was substantially renewed and 11 of its 15 members were replaced. Prior to that, the Fourth High Council of Justice had failed to elect a fifteenth member of parliament elected by a qualified majority in parliament with the participation of opposition political forces. According to observers, there was no will to reach a consensus and the authorities did not provide for the inclusion of even one member with a different opinion in the council. A change in the law later reduced the quorum, and parliament elected all non-judicial members of the council by a simple majority without the participation of opposition parties.⁶⁷ This strengthened the position of the ruling party in the Council of Justice.

In this situation, the only mechanism for influencing the process of appointment of judges could be to submit a constitutional claim to the Constitutional Court. Although a bit late, the Public Defender of Georgia has appealed to the Constitutional Court against the rules for selecting candidates to be elected to the Supreme Court. This claim argues that the Council's lack of any obligation to substantiate and appeal the decision does not ensure the selection of candidates solely on the basis of good faith and competence, and that such a court cannot be construed as constitution-

⁶¹ Judges appointed for life for first time, 28 October 2016, <https://civil.ge/ka/archives/155465> (accessed: 2020.05.10).

⁶² Monitoring Report of the High Council of Justice, N 5, Tbilisi 2017, p. 43, <https://bit.ly/3fH6jor> (accessed: 2020.05.10).

⁶³ Monitoring Report of the High Council of Justice, #7, 2019, p. 14, <https://transparency.ge/sites/default/files/geo.pdf> (accessed: 2020.05.10).

⁶⁴ Public Initiative – Stop! 9 February 2016, <https://bit.ly/35Kerji> (accessed: 2020.05.10).

⁶⁵ Monitoring Report of the High Council of Justice, N 5, Tbilisi 2017, p. 27, <https://bit.ly/2yJTpFd> (accessed: 2020.05.10).

⁶⁶ Monitoring Report of the High Council of Justice, N 6, Tbilisi 2018, p. 6, <https://bit.ly/3dvwdt3> (accessed: 2020.05.10).

⁶⁷ "Judicial System: Reforms and Prospects" [in:] *Coalition for Independent and Transparent Justice*, ed. G. Burjanadze, Tbilisi 2017, p. 12.

al.⁶⁸ On 30 July 2020, the Constitutional Court rejected the constitutional claim. The Court clarified that the existence of several stages in the selection of candidates and the individual assessment of the good faith and competence of the candidates at all stages ensure proper decision-making and the decisions of the High Council of Justice are not substantiated because it is a collegial body.⁶⁹ In this case, four of nine judges of the Constitutional Court expressed the dissent opinion and said that the procedure for selecting judges in the High Council of Justice does not provide the council members with the necessary mechanisms for the proper selection of candidates and does not guarantee arbitrariness and impartiality.⁷⁰

This decision of the Constitutional Court was influenced by the change in the composition of the court. Two months before the decision, two new judges were appointed⁷¹ by the Supreme Court of Georgia to the Constitutional Court. A month earlier, the vote of these judges had become crucial to the election of the President of the Constitutional Court, and then the vote of the President was crucial to the rejection of the Supreme Court's dismissal claim. The fact that the Supreme Court appointed a judge to the Constitutional Court in an expedited manner, including during a state of emergency, which was highly criticized,⁷² indicates that the Supreme Court could be interested in this outcome.

Following the court ruling, the ruling party initiated amendments to the law selecting members of the Supreme Court by open ballot,⁷³ which included a standard for substantiating the decision at all stages of the Supreme Court's selection process, appealing the High Council of Justice decision to the Supreme Court Qualification Chamber.⁷⁴ The changes have been criticized by NGOs monitoring reforms in the judiciary, who said the changes were fragmentary and would not change the proposed situation in the judiciary, it is necessary to reform the High Council of Justice itself to improve the procedures for the selection of Supreme Judges, including the selection

⁶⁸ Public Defender of Georgia v. Parliament of Georgia, Constitutional Claim, N1459, 11 November 2019, <https://constcourt.ge/ka/judicial-acts?legal=1904> (accessed: 2020.05.10).

⁶⁹ Public Defender of Georgia v. Parliament of Georgia, Decision of the Constitutional Court of Georgia, No 3/1/1459,1491 of 30 July 2020, <https://constcourt.ge/constc/public/ka/judicial-acts?legal=9956> (accessed: 2020.09.24).

⁷⁰ Dissenting opinion of the judges of the Constitutional Court of Georgia on the decision of the Constitutional Court of Georgia No. 3/1/1459,1491 30 of July 2020, <https://bit.ly/2EuCDwX> (accessed: 2020.09.24).

⁷¹ Top Court Picks Vasil Roinishvili as Constitutional Court Justice, 29 May 2020, <https://civil.ge/archives/354277> (accessed: 2020.09.24).

⁷² Top Court Picks Khvicha Kikilashvili as Constitutional Court Justice, 3 April 2020, <https://civil.ge/archives/345485> (accessed: 2020.09.24).

⁷³ Irakli Kobakhidze – Voting will be open when electing members of the Supreme Court, council members will know who gave what points to whom, 18 September 2020, <https://bit.ly/2G2SHX1> (accessed: 2020.09.24).

⁷⁴ Explanatory Card on the Draft Law on Amendments to the Organic Law of Georgia on Common Courts, Parliament of Georgia, September 2020, <https://info.parliament.ge/file/1/BillReviewContent/261832?> (accessed: 2020.09.24).

of candidates by the High Council of Justice, as well as the voting process in the Parliament of Georgia.⁷⁵

4. High School of Justice

The High School of Justice, as a legal entity under public law, is established on the basis of this law. The purpose of the school is the professional training of persons to be appointed judges in the system of common courts of Georgia. The school's governing bodies are the school's independent board and the school's management. Three members of the Council are judges, one judge member and one non-judge are elected by the High Council of Justice from among its members, two members are elected by the High Council of Justice from the academic faculties of universities. A student of Justice is a person who, as a result of winning a competition, is enrolled in the school by the decision of the High Council of Justice of Georgia.

In addition to meeting other requirements, a person who has completed a full training course of the High School of Justice and is on the Justice Trainee Qualifications List may be appointed (elected) as a judge. At the same time, the law provides for exemptions from studying in the High School of Justice. Persons nominated for the position of Supreme Court judge, as well as former judges who have passed the judge qualification exam, who were appointed to the position of judge on the Supreme Court or in a district (city) or through competitions to the court of appeals and has at least 18 months of experience as a judge, are exempted from studying at the High School of Justice.⁷⁶

In recent years, the main focus has been on the High Council of Justice, although the High School of Justice is no less important. With few exceptions, the school is a key part of preparing new staff and updating the judiciary. However, in 2013–18, the competition for judges was held only nine times and 243 judges were appointed, including 83 current judges, 88 former judges, two reserve judges, five Supreme Court judges, constitutional Court judges, and only 65 students from the High School of Justice. According to these statistics, from June 2013 to 20 August 2018, about 26.7% of the judges appointed to positions based on the results of competitions were students of the High School of Justice.⁷⁷ As we can see, the majority of candidates appointed are current or former judges.

During this period, the role of the school was very important because the term of office of large number of the judges expired, and this provided a great opportunity to

⁷⁵ Draft Law on Common Courts is Fragmentary and Cannot Meet Challenges – Coalition, 8 September 2020, <https://bit.ly/360UN4l> (accessed: 2020.09.24).

⁷⁶ Organic Law of Georgia on General Courts, 4 December 2009, LHG, 41, 08/12/2009, <https://matsne.gov.ge/ka/document/view/90676?publication=37> (accessed: 2020.05.10).

⁷⁷ K. Kukava, M. Orzhonia, G. Beraia, A. Chiabrishvili, S. Buadze, Professional Training of Judges System in Georgia, 2019, p. 65, <https://bit.ly/2YXjb3B> (accessed: 2020.05.10).

update the system. However, in the end, a number of former judges were re-appointed as judges, whose honesty and professionalism were critical. This is why the independence of the High School of Justice from the High Council of Justice is important, and the High Council of Justice should not be given a decisive role in the selection process. Such a mechanism would block the way for more than one professional who wants to work in the courts. This is why it is necessary for the High School of Justice to be authorized to appoint, conduct, and qualify students for the school qualification exam.

5. Independent Inspector's Office

The Independent Inspector's office was established on 8 February 2017, in the High Council of Justice to conduct objective, impartial, thorough investigations of the alleged disciplinary misconduct of judges and to conduct preliminary investigations. An independent inspector is elected by the High Council of Justice for a term of five years by a majority of the full members of the council. The inspector initiates disciplinary proceedings against judges, conducts investigations and submits substantiated conclusions to the High Council of Justice. If a judge faces a disciplinary charge, the High Council of Justice of Georgia makes a decision on the disciplinary action of the judge and sends the disciplinary case to the Disciplinary Board of Judges of the Common Courts, consisting of five members, three of whom are judges of the General Courts of Georgia, and two of whom are not judges. The final decision is made by the Disciplinary Board.⁷⁸

The creation of an independent inspector was important, although the legislation failed to ensure its independence. The appointment and dismissal rules mean that the inspector is fully dependent on the High Council of Justice. Instead of a law, the procedure for selecting an inspector is determined entirely by the High Council of Justice and the election of the inspector is made only with the consent of the judge members of the Council and not with the support of a qualified majority of the members. During the third wave of judicial reform, there was a proposal to elect the independent inspector not by the Council of Justice, but by Parliament upon a nomination from the President of Georgia, but this initiative was not adopted.

In addition to the legislative gap, the competition did not ensure the election of an independent inspector. The first competition announced in 2017 was canceled. A new competition was announced in October 2017, and an independent inspector was selected. In December 2019, parliament elected an independent inspector as a permanent judge of the Supreme Court, replacing him with a new head of the Department of Political Finance Monitoring of the State Audit Office in 2013–18 and a Deputy Director of the High School of Justice from August 2019. He was also a candidate for a Supreme

⁷⁸ Organic Law of Georgia on "Amendments to the Organic Law of Georgia on Common Courts", 8 February 2017, <https://matsne.gov.ge/ka/document/view/3536739?publication=0#DOCUMENT:1> (accessed: 2020.05.10).

Court judge in 2019, although the Council of Justice did not nominate him for parliament. The Council of Justice conducted closed-door interviews with independent inspectors and did not publish the selection or interview processes on its website.

6. Election of the Supreme Court of Georgia

The election of Supreme Court judges is important to ensure the independence of the judiciary in Georgia. This process started on 20 March 2015, with the election of Nino Gvenetadze as the Chairman of the Supreme Court. He was selected by the President of Georgia from 28 candidates and presented to the Parliament. Gvenetadze has been working in the judiciary since the 1990s, was a judge of the Supreme Court, and in 2005 was dismissed by the Disciplinary Board of the High Council of Justice. Gvenetadze had high hopes for the reform of the judiciary. Although suddenly in 2018, the chairman of the Supreme Court resigned.⁷⁹ Gvenetadze cited his health as the reason for leaving the post; however, this reason was unbelievable. In fact, there was controversy and pressure on him from members of the Council of Justice and certain groups of judges.⁸⁰ After his resignation, the President of Georgia began extensive consultations to select a new chairman of the court.⁸¹ However, the parliamentary majority did not participate in the discussion, no consensus was reached, and no candidate was named.⁸² The president's decision was criticized strongly by the NGO coalition.⁸³

The constitutional reform implemented in 2017–18 affected the structure and powers of the Supreme Court of Georgia. As a result of the changes, the number of Supreme Court judges increased from 16 to 28, appointment for life was introduced, and the High Council of Justice was given the power to nominate candidates submitted to parliament. Prior to the constitutional amendments, the Speaker of the Supreme Court of Georgia and the judges of the Supreme Court were elected by parliament for a term of at least ten years upon the recommendation of the President of Georgia.⁸⁴ Under the new process, the High Council of Justice openly selects candidates for the first time, determines the applicants' compliance with the minimum requirements, establishes a short list of candidates by secret ballot, verifies the accuracy of the data provided, and conducts individual public interviews with candidates. Board members

⁷⁹ The resignation letter of the Supreme Court of Georgia and the Chairman of the High Council of Justice Nino Gvenetadze, 2 August 2018, <http://www.supremecourt.ge/news/id/1769> (accessed: 2020.05.10).

⁸⁰ Illness or Coercion: Why did Nino Gvenetadze resign? RFE/RL, 2 August 2018, <https://bit.ly/35liGBP> (accessed: 2020.05.10).

⁸¹ President of Georgia on the Supreme Court chairperson's resignation, 2 August 2018, <http://web2.rustavi2.ge/ka/news/110488> (accessed: 2020.05.10).

⁸² The president will no longer nominate a candidate for the Supreme Court, 24 August 2018, <https://netgazeti.ge/news/300017/> (accessed: 2020.05.10).

⁸³ The Coalition Calls on President to Change the Decision to Refuse Chairperson of the Supreme Court Decision 31 August 2018, <https://bit.ly/2xUjmSk> (accessed: 2020.05.10).

⁸⁴ The Constitution of Georgia of 24 August 1995...

then evaluate the candidates and rank them by secret ballot. Each candidate with the highest scores is re-elected by secret ballot. The list of candidates who receive at least two-thirds of the total number of votes are submitted to parliament. After this process, a public interview with each candidate takes place in the Parliamentary Committee. Candidates who receive the majority of votes in parliament are appointed as judges.⁸⁵

This rule gave special power to the High Council of Justice. In 2018, the High Council of Justice came to the attention of the public. On 24 December 2018, the Council chose ten candidates as lifetime judges on the Supreme Court. The decision was not accompanied by any documents, including brief information about the candidates. All ten candidates were current judges, and two of them were also members of the High Council of Justice. The decision was particularly condemned by non-judge members Anna Dolidze and Nazi Janezashvili,⁸⁶ who asked to the Parliament to make changes so that a candidate for Supreme Court justice must be selected by consensus in the Council of Justice. At the same time, NGO coalition⁸⁷ and the Ombudsman⁸⁸ were against the decision. The nomination was made under conditions in which there was no legislation that defined the criteria and procedures for selecting candidates and without consulting the relevant stakeholders.⁸⁹ After the protest, the Chairman of the Parliament stated that the selection of the judges would be conducted in accordance with the pre-set procedure and criteria.⁹⁰ The ten judges of the Supreme Court rejected their candidacy.⁹¹ It was announced that in 2019 that the law would set up judge selection criteria for the list of judges.⁹²

Although some changes were made in the legislation, in 2019 this process did not go smoothly. On 10 May 2019, the High Council of Justice started the process of selecting candidates for the Georgian Parliament, which lasted almost four months. It ended on 4 September 2019, with the publication of a list of 20 candidates who had to be submitted to parliament for approval. This was controversial in the parliamentary majority itself. Eka Beselia, chairwoman of the legal committee, protested against the list and the non-transparency of the procedure for approving judges citing that there

⁸⁵ *Ibidem*.

⁸⁶ Nazi Janezashvili and Ana Dolidze demand to change the rule of nominating a judge, 29 December 2018, <https://bit.ly/3iZZHTh> (accessed: 2020.05.10).

⁸⁷ Coalition for "Independent and Transparent Judiciary" responds to the developments in the court and initiates the campaign "I want Wendo Court", 1 March 2018, <https://bit.ly/2VECZXw> (accessed: 2020.05.10).

⁸⁸ Ombudsman demands to stop the process of reviewing judges of the supreme judiciary, 26 December 2018, <http://pirveliradio.ge/index.php?newsid=119158> (accessed: 2020.05.10).

⁸⁹ Report of the First Stage of Presentation and Appointment of Judges of the Supreme Court of Georgia, June-September 2019, ODIHR, p. 7, <https://www.osce.org/ka/odihr/429491?download=true> (accessed: 2020.05.10).

⁹⁰ Parliament will discuss at the spring session of the Supreme Court Judges, 26 December 2018, <https://civil.ge/ka/archives/272474> (accessed: 2020.05.10).

⁹¹ The 10th Supreme Court Judge addresses the Parliament and does not consider their candidates, 21 January 2019, <https://bit.ly/2KEybr> (accessed: 2020.05.10).

⁹² The new criteria will be submitted to the Parliament by the renewed list of judges, 12 January 2019.

were candidates on the list who had been doing political work during the previous government. She then resigned from the post of chairman of the legal committee⁹³ and then the ruling party.

Public hearings of candidates in parliament revealed many shortcomings and showed that the majority of them did not even meet the minimum criteria of qualification and professional integrity. Nevertheless, the Georgian Parliament appointed 14 candidates to the Supreme Court of Georgia for life. These appointments were made without the participation of the opposition and in the wake of protests by civil society organizations. In fact, the ruling party completed the Supreme Court of Georgia in a one-party manner, which can be described as an attempt to influence the court.⁹⁴

The process of selecting judges was flawed by the legislation, which was criticized by the Organization for Democracy and Human Rights (OSCE/ODIHR)⁹⁵ and the Venice Commission.⁹⁶ Among other issues, it was very important to substantiate the decision of the High Council of Justice, the right to appeal to the court, the conflict of interest between the members of the Council and the candidates for judges.⁹⁷ The selection of candidates by the Council by secret ballot undermined the merit-based selection system.⁹⁸ Under these conditions, significant irregularities were observed during the selection process. For example, five candidates did not have master's degrees. The Council of ten members acted in a coordinated fashion, and the secrecy of the ballot, evaluation did not achieve the goal of transparency and impartiality of the selection process. There was manipulation of voting points due to unreasonableness, conflicts of interest among members and candidates based on ties of relationship, and more.⁹⁹ The Venice Commission criticized the lack of justification and appeal.¹⁰⁰ The ombudsman

⁹³ Eka Beselia resigns as chair of the legal committee, 27 December 2018, <https://bit.ly/2KJu5S5> (accessed: 2020.05.10).

⁹⁴ M. Nakashidze, "Georgia – The State of Liberal Democracy" [in:] *2019 Global Review of Constitutional Law*, eds R. Albert, D. Landau, P. Faraguna and S. Drugda, *Blog of the International Journal of Constitutional Law*, the Clough Center for the Study of Constitutional Democracy at Boston College 2020.

⁹⁵ Conclusion on the appointment of judges of the Supreme Court of Georgia on the draft amendments, Warsaw, 17 April 2019, Conclusion # JUD-GEO/346/2019, <https://bit.ly/2oUYqWf> (accessed: 2020.05.10).

⁹⁶ Urgent Opinion on the Selection and Appointment of Supreme Court Judges, The Venice Commission, Strasbourg, 24 June 2019, Opinion No. 949/2019, CDL-AD(2019)009, <https://bit.ly/30qSvpE> (accessed: 2020.05.10).

⁹⁷ Urgent Opinion on the Selection and Appointment of Supreme Court Judges, The Venice Commission, Strasbourg, 24 June 2019, Opinion No. 949/2019, CDL-AD(2019)009, <https://bit.ly/30qSvpE> (accessed: 2020.05.10).

⁹⁸ Conclusion on the appointment of judges of the Supreme Court of Georgia on the draft amendments, Warsaw, 17 April 2019, Conclusion # JUD-GEO/346/2019 <https://bit.ly/2oUYqWf> (accessed: 2020.05.10).

⁹⁹ Monitoring Report on Selection of Candidates for Judges of the Supreme Court of Georgia by the High Council of Justice, Public Defender of Georgia, 2019 <https://bit.ly/3bUmaNK> (accessed: 2020.05.10).

¹⁰⁰ Urgent Opinion on the Selection and Appointment of Supreme Court Judges, The Venice Commission, Strasbourg, 24 June 2019, Opinion No. 949/2019, CDL-AD(2019)009, <https://bit.ly/30qSvpE> (accessed: 2020.05.10).

also considered that the decisions of the council were biased in terms of integrity and the evaluation of competency.¹⁰¹

In addition to the appointment of judges, the issue of electing the leadership of the Supreme Court is important. As I have mentioned, after the resignation of Nino Gvenetadze, the new candidate for the post of the Chairman of the Supreme Court was not nominated and from 2 August 2018, to 17 March 2020, the Deputy Chairperson Mzia Todua was acting chairman of the court. Before the Supreme Court, she was a judge of one of the district courts from the Soviet period 1985–98, and chairman of the Chamber of the Court of Appeals in 1999–2005. In 2006–12, she was the head of the legal department of Bidzina Ivanishvili's Kartu Group, the chairman of the ruling party. After the Georgian Dream came to power, she was elected a member of the Supreme Court of Georgia in 2015.

Shalva Tadumadze, former Chief Prosecutor of Georgia, became the second Deputy Chairman of the Supreme Court and held this position in 2018–19 until his appointment for life to the Supreme Court. Prior to that, he was an independent lawyer at various times and, in 2008–12 he had his own law firm and was also the lawyer of Bidzina Ivanishvili, the leader of Georgian Dream. After Georgian Dream came to power, he was the Parliamentary Secretary of the Government of Georgia in 2012–18. Tadumadze has been criticized for accusing the former mayor of Tbilisi and then as a Supreme Court judge, he sentenced him and sent him back to prison. This was considered to be a violation of the right to a fair trial guaranteed by the Constitution. He was also involved in a scandal regarding a diploma proving his education. NGOs claimed that Tadumadze had no relevant education. Higher legal education is necessary not only for judges on the Supreme Court, but also for prosecutors, and the lack of appropriate education renders the Attorney General an unauthorized person and a thorough investigation is necessary.¹⁰²

Initially, it was known that Tadumadze would be elected chairman of the Supreme Court, which sparked protests. Eventually, Nino Kadagidze was elected chairman of the Supreme Court. Kadagidze was a judge of the Court of Appeals in 2000–02, and a Supreme Court judge in 2002–12. After the expiration of his ten-year term, he was reappointed, and in 2013–19 he was a judge on the Court of Appeals. In December 2019 he was elected a judge of the Supreme Court for life, and on 17 March 2020, he became the chairman of the Supreme Court for a ten-year term. However, at the same time, the former General Prosecutor has become the deputy chairman of the Supreme Court and chairman of the Criminal Cassation Chamber, and the second deputy chairman, Mzia Todua, is the chairman of the Chamber of Civil Cases.

¹⁰¹ Monitoring Report on Selection of Candidates for Judges of the Supreme Court of Georgia by the High Council of Justice, Public Defender of Georgia 2019, p. 41 <https://bit.ly/3bUmaNK> (accessed: 2020.05.10).

¹⁰² Coalition for Independent and Transparent Justice – It is necessary to investigate the authenticity of Shalva Tadumadze's diploma, 18 October 2019, <https://bit.ly/35NSPm4> (accessed: 2020.05.10).

7. Prospects of Independence of the Judiciary in Georgia

According to a 2020 report by Freedom House in, Georgia's Democracy Index is slightly worse than last year at 3.25 out of 3.29 points, and this deterioration is due to the independence of the judiciary. Freedom House reports that despite ongoing judicial reforms, executive and legislative interference in the courts remains a substantial problem, as does a lack of transparency and professionalism surrounding judicial proceedings. Oligarchic influence affects the country's political affairs, policy decisions, and media environment, and the rule of law is undermined by politicization.¹⁰³ The ruling majority in parliament granted lifelong tenure to 14 judges on the country's Supreme Court following a "highly dysfunctional and unprofessional" appointment process.¹⁰⁴

All the opposition parties and non-governmental organizations that observe the independence of the judiciary agree that the current government has gained political influence over the judiciary and has done nothing for its independence. A large number of opposition parties are in favor of radical changes in the courts after the change of government, and hopes are pinned on the 2020 parliamentary elections. They hope that the ruling party will lose the election and that the parties are planning joint judicial reform. About 20 opposition parties have signed a memorandum on judicial reform. The signatory political parties agree that after the defeat of Georgian Dream in the parliamentary elections of 2020, they will carry out reforms to achieve real judicial independence and to build confidence in the judiciary quickly.

According to the text of the memorandum, the parties agree to: 1) introduce juries for grave and particularly grave crimes during the first year of the reform and for all offenses involving imprisonment within the subsequent four years; 2) introduce of the election of judges in the first instance before the end of 2021; 3) through constitutional amendments, terminate the powers of the current members of the High Council of Justice, unify the Supreme and Constitutional Courts, and repeal all acts of appointment of judges from 2017; 4) appoint judges from the United States and the United Kingdom to the Supreme Court and Court of Appeal for long periods, which should be the majority of all possible panels; 5) recognize US Supreme Court decisions as case law in cases relating to freedom of speech, as well as disputes between the state and businesses or citizens (civil or administrative).¹⁰⁵

¹⁰³ Freedom House in the World 2020, Georgia, F Rule of Law, <https://freedomhouse.org/country/georgia/freedom-world/2020#PR> (accessed: 2020.05.10).

¹⁰⁴ Nations in Transit 2020, Dropping the Democratic Façade, p. 7, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf (accessed: 2020.05.10).

¹⁰⁵ Opposition parties sign memorandum on judicial reform, 13 March 2020, Interpressnews, <https://bit.ly/2SSbLeb> (accessed: 2020.05.10).

Conclusions

To summarize, without some fundamental changes, it will be impossible to achieve effective results for ensuring the independence of the judiciary. It is true that the opposition parties have agreed on the main issues of the changes, but there is considerable resistance to these proposals, and there are differences of opinion among the opposition parties themselves.

One of the most important issues will be the election of 14 members of the Supreme Court of Georgia. If we recall the process of election of the Supreme Court in 2019, it will be crucial for judicial independence to fill the court with professional, conscientious judges through a transparent procedure.

In order to ensure the independence of the judiciary, it is necessary to redistribute the powers of the High Council of Justice in such a way that it ensures independence from the government while retaining internal independence and accountability.

It will be important to implement legislative changes that will allow the judiciary to be updated with new judges. Primarily, this concerns the selection of judges from among graduates of the High School of Justice, which today, as we have seen, is limited. It is important to note that according to recent changes, students will be admitted to the school by the High School of Justice and not by the High Council of Justice.

It is important to ensure the real Independence of the independence inspector from the High Council of Justice. An official who initiates disciplinary proceedings against judges and conducts inspections and investigations cannot be under the full control of the High Council of Justice.

The Constitutional Court of Georgia rejected a claim of the constitutionality of the rule of selecting judges for the High Council of Justice, which provides for making decisions using secret ballots, does not require reasoned decisions, and does not allow decisions to be appealed. After rejecting this claim, the process of the fair selection of judges will be much more dependent on legislative changes that will be adopted after the new parliamentary elections to be held on 31 October 2020.

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Summary

Malkhaz Nakashidze

Contemporary Challenges Facing Judicial Independence in Georgia

This article analyses the ongoing processes in the judicial system of Georgia and the main challenges facing the country in ensuring the independence of the judiciary. In the article, the author reviews the legislative changes made in the system of common courts, as well as the legal and political aspects of the renewal of the composition of the courts. The article focuses on how the decisions made by government affected the independence of the judiciary. From this point of view, the results of several so-called waves of judicial reform and the peculiarities of the creation of new mechanisms, such as the temporary state commission on miscarriages of justice, are analyzed. The article also discusses the status of the High Council of Justice and the rules of formation and their roles in ensuring the independence of the judiciary and the problems related to the appointment of judges for life. Finally, appropriate proposals and recommendations are presented to ensure the independence of the judiciary in Georgia.

Keywords: Georgia, judicial independence, courts, the High Council of Justice

Streszczenie

Malkhaz Nakashidze

Współczesne wyzwania stojące przed niezależnością sądownictwa w Gruzji

Artykuł został poświęcony analizie procesów zachodzących w sądownictwie Gruzji oraz głównym wyzwaniom, które stoją przed tym krajem w zakresie zapewnienia niezawisłości wymiaru sprawiedliwości. Autor analizuje zmiany legislacyjne dotyczące ustroju sądów powszechnych, a także prawnych i politycznych aspektów odnawiania składu, koncentrując się na wpływie podjętych przez rząd decyzji na niezawisłość sądownictwa. Z tego punktu widzenia analizowane są wyniki kilku tzw. fal reform wymiaru sprawiedliwości oraz specyfika tworzenia nowych mechanizmów, takich jak tymczasowa państwowa komisja ds. pomyłek sądowych. W artykule omówiono również status Naczelnej Rady Sądownictwa oraz zasady jej powoływania, jak również rolę tego organu w zapewnieniu niezawisłości wymiaru sprawiedliwości. Autor odniósł się również do problemów związanych z dożywotnim powoływaniem sędziów. W konkluzjach przedstawione zostały propozycje i zalecenia zmierzające do zapewnienia niezależności sądownictwa w Gruzji.

Słowa kluczowe: Gruzja, niezależność sądownictwa, sądy, Naczelna Rada Sądownictwa