VETTING OF THE JUDICIARY IN THEORETICAL AND COMPARATIVE PERSPECTIVE

(SHORT VERSION)

RECOMMENDATIONS FOR GEORGIA

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EXECUTIVE SUMMARY

Political regimes in transition to constitutional democracy often face the problem of the delegitimized and dysfunctional judiciary. For them, the institutional reconstruction of the judiciary is not only the main task in the transitional period but also a necessary precondition for the successful completion of the transition and consolidation of the constitutional democracy. In this respect, a failed transition is a correlate of a delegitimized and dysfunctional judiciary.

In recent years, there has been a consensus in the Georgian public-political sphere regarding the fact, that the Georgian judiciary is fundamentally delegitimized, which substantially hinders the process of consolidation of Georgia as a constitutional democracy. Both, in Georgian civil society, as well as in international partners, there is growing frustration with the failed institutional reforms of the judiciary, which have been implemented during the thirty years of the transitional period.

the radical personnel reform, which so far has never been implemented in the Georgian judiciary is also viewed as a countervail to the failed institutional reforms. In turn, personnel reform in combination with institutional reforms is an effective mechanism for the institutional reconstruction of the judiciary. In practice, we can find a few examples of successful institutional reconstruction, that has led to the consolidation of constitutional democracy.

The authors of this paper intend to explore the issue of personnel reform in the judiciary from theoretical and comparative perspectives, specifically to study the mechanism of vetting and its potential for the

promotion of a comprehensive institutional reconstruction of the judiciary. The overall aim is to use its analytical findings as a foundation for the elaboration of general and specific recommendations on personnel reform measures to be used in the process of reconstruction of the Georgian judiciary.

The first part of the paper consists of theoretical and comparative analysis. It discusses the concept of vetting of public employees, and its typology, goals, and contexts. This mechanism of personnel reform is analyzed as one of the tools of transitional justice and its application is evaluated through the prism of normative and practical issues of a transitional period to constitutional democracy.

Based on theoretical and comparative insights, inter alia, European human rights law, the paper identifies the main normative problems of judicial vetting and the institutional and legal ways to solve them.

The comparative analysis focuses on the ongoing process of judicial vetting in Albania, and the institutional model used there. This model is interesting insofar, as its core institutions and norms have undergone the test of compliance with the European human rights and the constitutional standards, conducted by both, the Venice Commission and the European Court of Human Rights.

The second part of the paper is devoted to an in-depth and contextual analysis of the process of vetting judges in Albania and related normative and institutional frameworks. It dwells in detail on all the critical institutional and normative elements of the vetting mechanism and highlights all the important contextual factors.

In the third part of the paper, the causes of institutional dysfunction

of the Georgian judiciary are analyzed, in a comparative context of the judicial systems of Eastern and Central European countries. This section also discusses the main goals of the reconstruction of the Georgian judiciary, and the holistic institutional and personnel reform plans, necessary to achieve these goals. Concerning the personnel reform, the third section provides detailed recommendations on what should be the objectives of the process of judicial vetting in Georgia, and what normative and institutional framework should be suitable, given the current state of the judiciary.

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To assess the state of the judiciary branch in Georgia, in particular, in terms of the use of mechanisms of transitional justice, we need to look at the Georgian context from a comparative perspective of post-communist judicial systems. This need is preconditioned by several factors.

Firstly, the post-communist judicial systems are characterized by similar challenges. This is due not only to the common communist legacy but also - especially in the case of the judiciary - to the pre-communist legacy. In given regard, it is important, that the judicial systems of Eastern Europe and the Russian empire were characterized by a high degree of bureaucratization and centralization.[1]

It was through this institutional characteristic that the communist regimes transformed courts into parts of the totalitarian political regimes.[2] The communist party elites perceived the courts as their executive instruments. This so-called "Telephone justice" required a hierarchical and

1. Peter H. Solomon, *The Accountability of Judges in the Post Communist States: From Bureaucratic to Professional Accountability*, *in* Judicial Independence in Transition 909–935 (Anja Seibert-Fohr ed., 2012).

2. Angelika Nußberger, *Judicial Reforms in Post-Soviet Countries – Good Intentions with Flawed Results?*, *in* Judicial Independence in Transition 885–907 (Anja Seibert-Fohr ed., 2012).

highly disciplined body of judicial bureaucracy. At the head of this hierarchy and its key points were the presidents of all levels of the courts.[3]

The power of court presidents in bureaucratic judicial hierarchies is much broader than in non-bureaucratic systems: the president of the court is a key figure, in the hands of whom are all legislative and disciplinary instruments for incentivizing and holding judges accountable.

Consequently, in post-communist European countries, where judicial reforms have been carried out in such a way, that the powers of court presidents have not been restricted, the problems of judicial independence, impartiality, and accountability have persisted.

Particularly damaging to the establishment of an independent, impartial and accountable judiciary was the institutional transfer of powers concentrated in the hands of court presidents to the judicial councils.[4] Since the 1990s, the Council of Europe institutions considered the so-called "European Model" of Judicial Councils as the best institutional practice of arranging the judiciary. Consequently, many post-communist European countries opted for this model during the period of transition

3. *Supra*, footnote 174.

4. Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 German Law Journal 1257–1292 (2014).all major players engaged in legal reform and building a rule of law have diverted significant resources to this issue. For instance, the United Nations created the office of Special Rapporteur on the Independence of Judges and Lawyers in 1994. The World Bank has been investing heavily in judicial reforms in Latin America and Asia. In Europe, the Council of Europe has been pushing for judicial independence and judicial reform throughout the continent. Additionally, the European Union included judicial independence among its core requirements for the accession countries. Both organizations, the European Union and the Council of Europe, then jointly encouraged legal and judicial reforms in Central and Eastern Europe (CEE

to democracy.[5] This system only institutionalized the power of the elite of the judicial bureaucracy, in cases, where convergent reforms were not carried out to curb the powers of court presidents.[6]

Bureaucratic elites of court presidents have gained control of the Judicial Councils and thus taken over all the mechanisms for the appointment, promotion, imposition of disciplinary measures, and accountability of judges. Therefore, the institutional isolation of Judicial Councils from the political branches of the government has made the courts neither independent nor accountable.

Following the consolidation of the accountability mechanisms in the hands of the judicial elites, the networks of the court presidents who control the Councils, strike favorable bargains with the groups seeking influence and control of the judiciary - be it the political elites (which also control political branches), or other influential groups within the society, including the organized criminal groups.

These corrupt deals between the political elites and public influence groups, and the elites of the judicial bureaucracy have undermined the independence and impartiality of the judiciary and have caused their engagement in deep and institutionalized corruption in most countries of Central and Eastern Europe and the former Soviet Union. This, in turn, led to both - their dysfunction and public delegitimization. Consequently, citizens' perceptions of dysfunctionality and corruption within the judiciary were strengthened, which caused further damage to their

5. Lydia F. Müller, *Judicial Administration in Transitional Eastern Countries*, *in* Judicial Independence in Transition 937–969 (Anja Seibert-Fohr ed., 2012).

6. David Kosař, *The least accountable branch*, 11 International Journal of Constitutional Law 234–260 (2013).

legitimacy[7], while at the same time, allowing populist political forces and leaders to undertake steps towards further subordination of the judiciary through legislative and constitutional changes, conducted under the banner of reforming dysfunctional and corrupt courts.[8]

Critics have often cited the "European model" of the judicial councils as the main reason for the failure of judicial reform in the post-communist countries[9]. However, the focus only on the institutional form of councils and their influence is excessive. The failure of the "European model" of the councils in the post-communist countries is linked to the instrumentalization of this institutional form in the hands of judicial bureaucratic elites.

Instead of a self-governing and independent judiciary, there emerged corrupt judicial systems, interdependent on political elites and influential social power groups, where strong and consolidated networks of court presidents have taken control of the judiciary.[10]

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7. David Kosař, *Perils of Judicial Self-Government*, *in* Perils of Judicial Self-Government in Transitional Societies 389–432 (2016).

8. Kriszta Kovács & Kim Lane Scheppele, *The fragility of an independent judiciary: Lessons from Hungary and Poland—and the European Union*, 51 Communist and Post-Communist Studies 189–200 (2018).

9. *Supra*, note 180.

10. For Georgian experience of introduction of the European model of the Judicial Councils, see also: "European Model of Judicial Institutional Arrangement: Salvation or Obstacles towards Successful Judicial Reform - lessons learned in Georgia", Social Justice Center, 2021. https://socialjustice.org.ge/uploads/products/covers/%E1%83%A1%E1%83%90%E1%83%A1%E1%83%90%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%9A%E1%83%9D_%E1%83%AE%E1%83%94%E1%83%9A%E1%83%98%E1%83%A1%E1%83%A3%E1%83%A4%E1%83%9A%E1%83%94%E1%83%91%E1%83%98%E1%83%A1_%E1%83%98%E1%83%9C%E1%83%A1%E1%83%A2%E1%83%98%E1%83%A2%E1%83%A3%E1%83%AA%E1%83%98%E1%83%A3%E1%83%A0%E1%83%98_%E1%83%9B%E1%83%9D%E1%83%AC%E1%83%A7%E1%83%9D%E1%83%91%E1%83%90_1639583946.pdf [Last accessed on 12.01.2022].

Thus, taking into consideration the example of post-communist Europe, the bureaucratic elites of the court presidents form networks, that play a leading role in the political subordination and corruption of the courts, which is the central cause of their delegitimization and dysfunction. That is why comprehensive institutional reform is needed, which implies dismantling the influential bureaucratic networks within the judiciary.

In the following sections, we provide the overview of judicial reforms in Georgia, enacted since the country gained its independence, including the entire period of transition to democracy to date (taking into consideration, that by consensus of international academic and rating agencies, Georgia remains a hybrid regime), followed by an examination of ongoing systemic problems of corruption, independence and impartiality in the judiciary, as well as causal links among these.

In this context, special attention will be paid to the influential network of judicial bureaucracies, the creation, modification, and entrenchment of which has been the focus of all judicial reforms. Thus, the influential network of judicial bureaucratic elites, now referred to as the "Judicial Clan", which is considered to be the main cause of dysfunction and delegitimization of the Georgian judiciary, has deep institutional and political roots in Georgia's recent political history.

"Councils of Justice in Georgia and Abroad, Challenges in Georgia", Independent Lawyers Group, 2021,
http://ewmi-prolog.org/images/files/63253(Kart.)_MartlmsajulebisSabchoebi.pdf
[Last accessed on 12.01.2022].

3.2. JUDICIAL REFORMS AFTER INDEPENDENCE: TRANSFORMING THE JUDICIAL BUREAUCRACY AND ENTRENCHMENT OF ITS POWER

3.2.1. Failure of the process of reappointment of Soviet judges (1997-2004).

The judiciary was one of the rare exceptions among the power structures of the USSR period, which did not completely disintegrate in 1991-1992 Georgia. The first attempt at the transformation of the judicial system inherited from Georgian Soviet Socialist Republic under the 1995 Constitution was undertaken within the framework of the judicial reform of 1997.

The newly enacted Organic Law on Common Courts[11] has included the measure of reappointment of judges, which we have discussed above. However, despite the apparent radicalism, the reappointment measure was not part of a comprehensive reconstruction program and was quite modest in terms of transitional justice objectives as well.

In particular, judges were reappointed only after passing a qualification examination. Accordingly, only the minimum professional competence required for the position of a judge was taken as the major criteria for the new judiciary under the liberal democratic constitution.

From a formal point of view, proof of minimal professional competence was not a sufficient condition to be appointed. Accordingly, as a counterargument to the limited scope of the reappointment of judges' reform of 1997, it can be stated, that the President appointed a person as

11. Organic Law of Georgia on Common Courts, the Gazette of the Parliament of Georgia, 33, 31/07/1997, Articles 85, 86.

a judge upon the recommendation of his deliberative body, the Council of Justice, and at that time it was possible and necessary to consider other requirements, such as values and qualities required for the judicial office, as provided by the law.

Despite this formal argument, we can state, that the reorganization of the remaining institutions of the Soviet judiciary based on the rule of law required a clearer, broader, and more in-depth examination of integrity and compatibility than it was possible in the context of appointment solely by the President.

The elite Georgian Soviet judges opposed the reappointment process[12], but qualification examinations were conducted, and judges were reappointed. Nevertheless, the reforms implemented by the President, the Ministry of Justice, and the Council of Justice have not led to a substantial overhauling of the judicial bureaucracy, nor fundamental changes in the situation within the judiciary.

The reform built on a solidly rooted Soviet foundation could not ensure the real independence and efficiency of the judiciary without substantial dismantling of that foundation[13]. As a result, the confidence of the public towards the judiciary, and its independence continued to be undermined.

12. See Judgment N2 / 80-9 of the Constitutional Court of Georgia Avtandil Chachua v. the Parliament of Georgia, 3 November of 1998.

13. U.S. Department of State – Country Reports on Human Rights Practices, Georgia, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 reports. [last accessed12.01.2022].

The high level of corruption and various external interferences in the work of the judges was particularly noticeable in this regard,[14] which turned them into "notaries" of the powerful.[15] Neither the increased remuneration nor the qualification examinations of judges during the reappointment process were able to eliminate this problem.[16]

14. The US Department of State highlights the high level of corruption and political and other influences in its reports of 2000-2006. At the same time, one of the most critical reports in terms of influencing the judiciary was the report of 2006, which read as follows: "Ex parte negotiations between lawyers, parties, and judges was a frequent phenomenon, which contributed to the formation of the Soviet-style "telephone justice". According to available information, lawyers, prosecutors and the parties to the dispute have reportedly used such means to exert pressure on judges, so that they decide in their favor".
The reduction in the level of corruption has been observed since 2007, however, it was noted, that corruption among public officials remains high. Starting from 2008, corruption is no longer the focus of the US Department of State. However, the presence of influences is also noted in the reports prepared after that period. Moreover, the 2010 report focuses on the influence of the upper echelon judges, while the 2013 report directly points to the existence of external and internal influences. U.S. Department of State – Country Reports on Human Rights Practices, Georgia, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 reports. [last accessed12.01.2022].

15. U.S. Department of State – Country Reports on Human Rights Practices, Georgia, 2004, 2005, 2007, 2008, 2009 reports. [last accessed12.01.2022].

16. "Corruption within the judiciary should be considered as one of the key problems. The hopes of the public, that the high salaries of judges, envisaged within the framework of the proposed reform, would result in justice, almost entirely remained hopes, and today, when we again encounter unlawful court decisions, the above cannot be attributed to their lack of professionalism, as all of them have passed the qualification exams. "Perhaps we should look for the reasons for unlawful decisions in corruption." See the Report of the Public Defender of Georgia on the State of Affairs in the Sphere of Human Rights and Freedoms in Georgia in 2000 (from January 1 to November 1), p. 21-22. https://www.ombudsman.ge/res/docs/20190729162155603OO.PDF [last accessed12.01.2022].

3.2.2. Judicial Reforms after the Rose Revolution (2005-2010): Dissolving the Old Judicial Bureaucracy and Creating a New Bureaucratic Elite

After the change of government following the "Rose Revolution", numerous reforms were conducted to "cleanse the judiciary of the corrupt judges". Among them, the judges were offered a "free exit",[17] with retention of the pension amount for the rest of their life, while the remaining judges were subject to strict disciplinary review. Because of their focus on rapid reforms, post-revolution reformers have not used any form of vetting. The reform was focused on indirect forms of mass cleansing (offering a permanent pension) and disciplinary proceedings.

However, the process of disciplinary responsibility and disciplinary proceedings was conducted with significant violations of the requirements of the rule of law, which harmed the legitimacy of the reform and its continued success. In its conclusions on the Law of Georgia on Disciplinary Liability and Disciplinary Proceedings, the Venice Commission also assessed the process of dismissal of judges based on this law in 2005-2007: „Although the Law of Georgia on disciplinary responsibility and disciplinary prosecution of judges of common courts is founded on the good intention of providing a legal basis for sanctions against judges who fail to carry out their responsibilities and thereby, inter alia, fight against corruption of the judiciary - its vaguely worded provisions pose a real threat to the indepen-

17. "In case of early termination of the term of office voluntarily, the permanent pension provided for in Article 36 of this Law shall be granted to those judges, whose term of office was terminated from January 1 of 2005 to December 31 of 2005", the Organic Law of Georgia on the Supreme Court, LHG, 14 (21). 13/05/1999, (23/06 / 2005-25 / 11/2005), Article 40 (7)

dence of the judiciary and ultimately to the rule of law. This Law should therefore be revised and its provisions redrafted in a clearer and more precise manner to bring it into line with European standards".[18]

Possibly, these measures have indeed cleansed the system of individual corrupt judges, however, it is debatable, to what extent they have been able to replace them with independent and principled successors. During that period (1990's-2000's) the Venice Commission was specifically recommending the introduction of the European model of Judicial Councils. A similar recommendation, related to the strengthening of the Judicial Councils and their approximation to the "European model" is consistently found in the Venice Commission's opinions on judicial or constitutional reforms in Georgia.

According to this European recommendation, in the wake of the cleansing and establishment of the new judicial bureaucracy, the High Council of Justice gradually acquired all the powers of the Judicial Council (European model) (appointment of judges, career-related issues, and their dismissal). These functions of the High Council of Justice were constitutionally entrenched by the 2010 constitutional reform.

The Organic Law on Common Courts, adopted in 2009, solidified the power of the newly established judicial bureaucracy in the High Council of Justice and introduced the veto mechanisms of political powers over judicial elites.[19] At the heart of the given model of the Council, as estab-

18. *OPINION ON THE LAW ON DISCIPLINARY RESPONSIBILITY AND DISCIPLINARY PROSECUTION OF JUDGES OF COMMON COURTS OF GEORGIA*, adopted by the Venice Commission at its 70 Plenary Session (Venice, 16-17 March 2007), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2007)009-e [last accessed12.01.2022].

19. Organic Law of Georgia on Common Courts, LHG, 41, 08/12/2009

lished by 2009 reform, is the President of the Supreme Court, who is also ex officio Chairman of the High Council of Justice.

The President of the Supreme Court was assisted in managing the Council and the judiciary by members of the Council, who represented the highest echelons of the judicial bureaucracy (Presidents of courts or chambers in the appellate and supreme courts; the latter were also ex officio vice-presidents of the respective courts). The law guaranteed that the President of the Supreme Court had a decisive influence in selecting members of the judicial bureaucracy for the Council membership.

Judicial members of the Council (including the Chairman of the Supreme Court, 9 judges in a 15-member Council) were democratically elected by the self-governing general assembly (conference) of judges. Nevertheless, only the Chairman of the Supreme Court and another body of the judicial bureaucracy - the Administrative Committee of the Conference of Judges, could nominate candidates for membership in the High Council of Justice. With such a mechanism, only members of the elite of a particularly trusted judicial bureaucracy were guaranteed the position in the High Council of Justice. Indeed, in 2012, at the time of the change of political power, all eight judges of the High Council of Justice were either Presidents or vice presidents of courts /chambers.

The newly formed judicial elite was given all the reins of governing the judiciary, mostly through control over the Council. In the Council, the veto power of the political branches (the President, the parliamentary majority) was also guaranteed. The organic law stipulated, that a 15-member Council would adopt key decisions (appointment/dismissal of judges) by a 2/3 of the qualified majority. Of the 6 non-judicial members of the Council, 3 were members of the Parliament (two from

the parliamentary majority, and one from the opposition), and 3 were appointed by the President.

This veto power has become an important tool in the hands of the political authorities, the aim of which was to subjugate the judicial bureaucracy to their own will and achieve their accountability to their whims. Thus, the creation of the Judicial Council in Georgia following the European model, fortified the full authority of the judicial bureaucracy over the judiciary, as well as the veto mechanisms ensuring their ultimate accountability to the political authorities.

In parallel with the reduction of corruption among individual judges, on the constitutional and legislative levels, the growing influence of strong bureaucracies and "elite judges" were solidified, which had a significant impact on the independence and impartiality of judges from within.

It can be said that undue internal influences have become more dangerous for judicial independence than undue external influences. The 2010 report of the Georgian Young Lawyers Association focuses on this problem. The report states: "Weaknesses in the judiciary often arise from within the system itself. Individual judges receive "instructions" in each particular case from the presiding judge at routine meetings, or "hearings." "In case of disobedience to these instructions, such mechanism, for example, assigning a judge to another court, is triggered which means that a "disobedient" judge of the Tbilisi City Court may be transferred to the most distant regional court for an indefinite period for no valid reason at all ..." [20]

20. Georgian Young Lawyers Association - Justice in Georgia, Tbilisi, 2010, p.40. See. https://gyla.ge/files/news/2010%20წლის%20გამოცემები/მართლმსაჯულება%20საქართველოში.pdf [last accessed12/01/2022].

Consequently, the realization of the right to a fair trial in such circumstances depended only on the good faith and principled attitudes of individual judges. According to GYLA, "in such an environment, the main burden of the fair administration of justice depended on the judge's courage and, to some extent, 'heroism', while for those without such an attitude, it was virtually impossible to act against the system."[21]

3.2.3. Transforming the UNM Judicial Bureaucracy into a "Judicial Clansmen" - Georgian Dream's Justice Policy since 2013

One of the main promises of the political party "Georgian Dream" before winning the 2012 general elections was to free the judicial system from external or internal influences, to ensure a fair trial, and in particular, to staff the system with qualified, honest, and principled judges.[22]

However, the attitude and rhetoric of the Georgian Dream regarding the judicial system of the old regime and its elite publicly changed shortly after it came to power. In particular, the current leaders of the ruling party claim, that those people, who "did bad things en masse", have turned a new leaf and started doing good things.[23]

The change in the rhetoric and attitude also indicates, that a coopera-

21. *Ibid.* გვ.41.

22. Election bloc "Bidzina Ivanishvili - Georgian Dream" Election Program for the 2012 Parliamentary Elections, p. 8 http://www.ivote.ge/images/doc/pdfs/ocnebis%20saarchevno%20programa.pdf [last accessed12.01.2022].

23. Irakli Kobakhidze - "... the system has changed without the change in the composition and people, who did bad things en masse are now doing good things." Tabula, February 5, 2019. See: https://tabula.ge/ge/news/619462-kobakhidze-mosamartleebi-romlebits-tsud [last accessed12.01.2022].

tion pact has been reached between, on the one hand, the "Georgian Dream" and its founder Bidzina Ivanishvili, and, on the other hand, the judicial bureaucratic elite. As a result of this pact, the so-called "Clansmen rule" was supported by the political authorities, and the influence of the elite of the judicial bureaucracy, i.e., the "judicial clansmen" and those associated with them, has increased substantially in Georgian judiciary.[24]

Before securing the informal Pact on Cooperation with the Judicial Bureaucracy - which strengthened the power of the judicial clansmen - the "Georgian Dream's" original confrontational policy (in 2013) aimed to dismantle and replace the judicial bureaucracy inherited from the *ancien regime*.

Tea Tsulukiani, the Minister of Justice in the government of the "Georgian Dream", initially led the process of judicial reforms. The so-called "first wave of judicial reform" aimed at dismantling the power of the existing bureaucracy and sought its eventual replacement. Amendments enacted to the Organic Law on Common Courts in the spring of 2013 introduced the following changes:[25]

a) the authority of the High Council of Justice was terminated prematurely.

b) The rule for electing judicial members of the High Council of Justice has been changed: the rule of the nomination of candidates for mem-

24. 2020 Report of the Public Defender of Georgia on the State of Affairs in the Sphere of Human Rights and Freedoms in Georgia, p. 115-116. https://www.ombudsman.ge/res/docs/2021040110573948397.pdf [last accessed12.01.2022].

25. Organic Law of Georgia on Amendments to the Organic Law of Georgia on Common Courts, 580-II, webpage, 20/05/2013.

bership by the President of the Supreme Court and the Administrative Committee has been abolished. All judges were given the right to nominate their candidacy. The court presidents and their deputies (vice-presidents) were barred from the election to the High Council of Justice. Following criticism from the Venice Commission, vice presidents of the courts were granted the right to become members of the Council.

c) The rules for appointing non-judicial members were changed: the Parliament elected 5 members of the Council by 2/3 supermajority (in fact, the so-called "deadlock breaking mechanism" made the requirement of a qualified majority a sham. The law provided that in case of failure of reaching a 2/3 supermajority, it was possible to appoint 4 members by an absolute majority. This made it possible for the "Georgian Dream" to elect its political loyalists as non-judicial members of the High Council of Justice).

d) The draft law initiated by the Parliament on "Establishment of a Temporary Commission for Miscarriages of Justice" aimed at reviewing the court judgments on criminal cases, adopted from January 1, 2004, to November 1, 2012, as well as restoring of the law and justice for all those persons who were convicted unlawfully and/or unjustly.

These measures were designated to cleanse the High Council of Justice of the elite of judicial bureaucracy, which was loyal to the old regime. The newly composed Judicial Council and the Commission for Miscarriages of Justice were supposed to carry out a systematic cleansing of the bureaucracy and judges loyal to the old regime through disciplinary proceedings.

However, the plan failed. Most of the judges supported the candidates

of the existing bureaucratic elites.[26] This tactical victory of the old regime judicial bureaucracy over the political authorities quickly turned into a strategic victory. Namely, the new regime's strategy towards them was revised. Although the first wave of reforms could not quickly dismantle the judicial bureaucracy, the new regime retained a broad range of constitutional instruments to tame judicial bureaucracy.

In particular, in 2013 a constitutional guarantee for the appointment of judges of the first and appellate instances for life (till reaching the mandatory retirement age) came into force. However, the "Georgian Dream" parliamentary majority adopted another inherited constitutional veto mechanism from the old regime, which was then used to discipline the judiciary - the possibility of appointing judges for a three-year probationary period before their appointment for life.

The parliamentary majority of the "Georgian Dream" left unchanged during the "second wave of judicial reform" the general rule of a three-year probationary period before the appointment for life, which, in the opinion of local NGOs[27] working in the sphere of justice, as well as according to the Venice Commission, contained risks of exerting undue influence on the independence of judges.[28]

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26. Transparency International Georgia - Risks of Corruption in the Judiciary, 2018. p.22 https://www.transparency.ge/sites/default/files/corruption_risks-geo.pdf [last accessed12.01.2022].

27. Coalition for an Independent and Transparent Judiciary - Coalition's position on the appointment of judges on probation, see http://www.coalition.ge/files/coalition_statement_september_2013.pdf [last accessed12.01.2022].

28. Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the council of Europe on the draft law on amendments to the Organic Law on General Courts, N 773/2014, CDL-AD(2014)031, §32. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)031-e [last accessed12.01.2022].

As a result, in 2013-2016, approximately 2/3 of the entire corps of judges (whose ten-year term of office expired and needed reappointment for life) was appointed for a three-year probationary period.[29]

The probationary period[30] and the prospect of indefinite appointment has made those appointed for a three-year term even more vulnerable to both internal, as well as external influences[31]. The main promise of the judicial clansmen, which united the judges around them, was the promise of an appointment for life in exchange for obedience.

The cooperation pact between the "Georgian Dream" and the judicial clansmen was played out in the High Council of Justice. It was best manifested in the coordinated actions of the non-judicial members, appointed by the parliamentary majority, and judicial members controlled by the Judicial Clansmen.

Coordinated actions first became apparent after the adoption of a decision on the appointment of Levan Murusidze for life term. Non-judicial members of the council issued a public statement in support of this decision. The important elements of their reasoning given there were often repeated by the government of the "Georgian Dream" afterward.

29. *Supra*, footnote 199, p. 25-26.

30. It should be noted that the Constitutional Court of Georgia in its decision of February 15, 2017, found the appointment for a probation period of those persons, who already had 3 years of judicial experience, as an excessive and unreasonable barrier, especially given, that it was objectively possible to study their activities. See Judgment of the Constitutional Court of Georgia 3/1/659 of February 15 of 2017 on the case *Omar Jorbenadze, a citizen of Georgia v. Parliament of Georgia*, § 44. https://constcourt.ge/ka/judicial-acts?legal=916 [last accessed12.01.2022].

31. Supra, footnote 199, p. 25-26 https://www.transparency.ge/sites/default/files/corruption_risks-geo.pdf [last accessed12.01.2022].

It is noteworthy, that the members of the Council stated regarding this decision, that it was a kind of a deal, a compromise with judicial members of the council.[32]

The deal between the "Georgian Dream" and the elite of the judicial bureaucracy also affected the ongoing judicial reforms. During the so-called "third wave" of the reform legislative amendments initiated by the then-Supreme Court President, a person, not affiliated with the bureaucratic judicial elite/clan, were blocked. These reforms could have potentially weakened the central pillars of the power of judicial bureaucracy- the court presidents and the High Council of Justice.

In 2017, as a result of the reforms of the "third wave" and the constitutional reform, carried out by the constitutional majority of the "Georgian Dream" unilaterally, the control of the so-called "judicial clansmen" over the judiciary, as well as the tools of political control and veto mechanisms over the "judicial clansmen" power, were constitutionally and legally entrenched.

The number of members of the Council and the procedure for their election was constitutionally fixed, including the election procedure of 5 non-judicial members of the Council by a qualified majority (3/5 of all votes). In addition, the rule for electing the Supreme Court judges was changed and favorable conditions were created for packing the Supreme Court with loyalists agreed upon by the "Georgian Dream" and the Judicial Clansmen. In particular, the power to nominate Supreme court judges was transferred from the President to the High Council of

32. The High Council of Justice of Georgia - "Statement of non-judicial members of the High Council of Justice", December 25, 2015, http://hcoj.gov.ge/en/number-of-the-high-justice-of-the-Senior-Council.html [last accessed12.01.2022].

Justice. Also, the minimum number of members of the Supreme Court (28 judges) was fixed by the Constitution.

The Georgian Dream parliamentary majority did not consider candidates for the Supreme Court nominated by the President, thus artificially reducing the number of incumbent judges. As a result, by December 2018, when the constitutional amendments came into force, there were about 10 judges left in the Supreme Court. The tenure of several of them was expiring within the next year. Accordingly, it was in the hands of the Georgian Dream and the elite of the judicial bureaucracy to fill in simultaneously 18-20 vacancies in the Supreme Court.

The process of packing the Supreme Court with loyalists began in December 2018. On December 24 of 2018 the then Secretary of the High Council of Justice, Giorgi Mikautadze, unexpectedly approved at the High Council of Justice and presented to the Parliament[33] the list of 10 candidates for judges of the Supreme Court.[34]

The list was compiled hastily, without transparency and proper legislative procedures. Not only non-judicial members of the Council, who were in confrontation with the Judicial Clansmen, were not informed about it, but even those members, who supported the candidates, had difficulties in reasoning their vote. Against the backdrop of widespread public outcry, the Parliament was forced to suspend the abovementioned process. To formally terminate the process, the candidates themselves withdrew. Under the pressure from international partners

33. On December 16 of 2018, the constitutional amendments came into force, according to which the minimum number of Supreme Court judges was increased from 16 to 28, and the rule of appointment for a 10-year term was changed to appointment for life.

34. See: http://hcoj.gov.ge/ka/იუსტიციის-უმაღლესმა-საბჭომ-უზენაესი-სასა1.html [last accessed12.01.2022].

and civil society, the Georgian Dream has promised to develop fair procedures, according to which the High Council of Justice would select and approve the Supreme Court judges.

Amid a year of deliberation and controversy, legislative changes and the "improved" process of appointing supreme court judges have ultimately failed to instill in the public the perception, that the Supreme Court is staffed with qualified, conscientious, and independent judges. This was perception facilitated by the fact, that the parliamentary majority of the Georgian Dream did not take into account the key recommendations of either the Venice Commission or the OSCE/ODIHR Group of Experts on the selection procedures.

Consequently, on December 12 of 2019, the appointment of 14 judges of the Supreme Court by the Parliament was legitimately followed by harsh assessments both locally and internationally.

According to NGOs, "a large proportion of elected judges are perceived as pursuing the interests of influential judges or the authorities. Among the appointees are also those, who did not meet the minimum requirements of professional competence for the Supreme Court judgeship.[35]

The Embassy of the United States expressed its concern, that some of the approved candidates failed to demonstrate sufficient legal knowledge or commitment to impartiality.[36] The co-rapporteurs on Georgia of the Monitoring Committee of the Parliamentary Assembly of the Coun-

35. Transparency International Georgia – the Chronology of the one-year-long process of selection of the Supreme Court Judges, p. 15. See: https://transparency.ge/sites/default/files/uzenaesi_sasamartlos_mosamartleebis_sherchevis_1_cliani_procesis_kronologia_0.pdf [last accessed12.01.2022].

36. US Embassy to Georgia - US Embassy Statement on the Supreme Court Nominations (December 12), see https://ge.usembassy.gov/ka/u-s-embassys-statement-on-supreme-court-nominees-december-12-ka/ [last accessed12.01.2022].

cil of Europe also condemned the election of judges, who were said to lack the legal competence and degree of independence required for this high position.[37]

According to the Office for Democratic Institutions and Human Rights (OSCE / ODIHR), "neither the Council nor Parliament has taken sufficient steps to ensure objectivity, fairness, and consistency of the selection process".[38] Also, they failed to ensure an impartial, merit-based process that would have been protected from external influences.[39]

Given the general public and international consensus on the existence of influential groups and challenges in the justice system, the assessments of the Public Defender are also noteworthy. A number of the reports[40]

37. See: https://pace.coe.int/en/news/7737?__cf_chl_jschl_tk__=sOwBeCljCcxy-9DglKsN2g3a.7QjXimksJbx_vQtZ9uw-1641988444-0-gaNycGzNCBE [last accessed12.01.2022].

38. Office for Democratic Institutions and Human Rights - Second Report on the Nomination and Appointment of Judges of the Supreme Court of Georgia (ODIHR Report), June-December 2019, p.4 https://www.osce.org/files/f/documents/3/1/443497_0.pdf [last accessed12.01.2022]. „ The lack of a Conclusion that, to the highest extent possible, assessed the merits and qualifications of each candidate, limited parliament's ability to vote on the candidates based on their professional merits rather than political preferences. This is a key risk of a system of parliament-appointed judges and limited transparency." p. 30.

39. „These assessments concluded that while legal reforms regulating the appointment of Supreme Court judges in Georgia were in principle an important step toward improving the independence of the judiciary, in practice they failed to ensure an impartial, merit-based process free from extraneous influences. See Office for Democratic Institutions and Human Rights - Third Report on the Nomination and Appointment of the Supreme Court Judges in Georgia (OSCE / ODHIR Report), December 2020 - June 2021, pp.1-2. https://www.osce.org/files/f/documents/c/3/492196.pdf [last accessed12.01.2022].

40. 2015 Report of the Public Defender of Georgia on the State of Affairs in the Sphere of Human Rights and Freedoms in Georgia, p: 443 https://drive.google.com/file/d/1_VN-AwGDBAc-ocqskoTm0OSPXcrb9Cup/view; [last accessed12.01.2022]. 2018 Report of the Public Defender of Georgia on the

of the Public Defender directly or indirectly point to shortcomings in the judicial system, lack of independence, and low public confidence towards it. However, in this regard, the 2020 Parliamentary Report stands out with particular intensity, where there is a direct and clear statement regarding the existence of the clan. At the same time, it is noted that the judicial system lost public trust.[41]

"The judiciary is governed by influential groups that control the system through the High Council of Justice and the chairmen of the courts." [42]

According to the Public Defender, these influences were especially noticeable in the process of staffing the system with new judges and reappointment of old judges, which eventually led to the appointment of judges who did not meet the criteria required by the Constitution.[43]

State of Affairs in the Sphere of Human Rights and Freedoms in Georgia, p.94. https://www.ombudsman.ge/res/docs/2019042620571319466.pdf; [last accessed12.01.2022]. 2019 Report of the Public Defender of Georgia on the State of Affairs in the Sphere of Human Rights and Freedoms in Georgia, pp. 135, 141-142;147-148. https://www.ombudsman.ge/res/docs/2020040215365449134.pdf [last accessed12.01.2022].

41. "In Georgia, the main challenge of the judiciary is its lack of independence and low public confidence. Over the years, flawed rules for the selection and appointment of judges have ultimately caused the loss of credibility of the judiciary. 2020 Report of the Public Defender of Georgia on the State of Affairs in the Sphere of Human Rights and Freedoms in Georgia, p. 115 https://www.ombudsman.ge/res/docs/2021040110573948397.pdf [last accessed12.01.2022].

42. 2020 Report of the Public Defender of Georgia on the State of Affairs in the Sphere of Human Rights and Freedoms in Georgia, p.115-116. https://www.ombudsman.ge/res/docs/2021040110573948397.pdf [last accessed12.01.2022].

43. "The public saw, that certain candidates significantly lacked relevant competence, and there were doubts regarding their integrity due to their past actions, and despite this, they were still appointed to positions. "This is a clear indication, that decisions were based on some other interests and agreements, and not on the criteria set by the Constitution." Ibid. pp. 115-116.

On April 19 of 2021, an agreement was reached between the political parties in the Parliament, mediated by the European Union, known as the "Charles-Michel Document"[44], according to which the process of appointing judges to the Supreme Court should have been temporarily suspended until the necessary legislative changes. Nevertheless, this process continued[45] and finally ended on July 12, with the forced election of 6 judges by the Parliament, in the background of heated controversy.[46]

Opposition parties and civil society boycotted the process. According to the assessment of the Office for Democratic Institutions and Human Rights (OSCE / ODIHR), "the Supreme Court justice candidates were nominated in an environment, where public confidence in the independence of the judiciary is low."[47] However, the report focuses on the fact, that the Parliament continued to hear the candidates for judges, in violation of the April 19 agreement and did not fulfill its obligations stipulated by the agreement.[48]

44. The future path for Georgia: https://docs.rferl.org/ka-GE/2021/04/18/7724addb-bd54-4563-8147-6fde36aa3b03.pdf [last accessed12.01.2022].

45. Parliament of Georgia - N2 submission of the High Council of Justice of Georgia of June 17, 2021 "On Nomination of Judges of the Supreme Court of Georgia", June 25, 2021, https://info.parliament.ge/#law-drafting/22419 [last accessed12.01.2022].

46. The Parliament of Georgia - Parliament Supports 6 Candidatures of judges for appointment in the Supreme Court of Georgia, July 12, 2021, https://parliament.ge/media/news/parlamentma-sakartvelos-uzenaesi-sasamartlos-mosamartleobis-6-kandidats-dauchira-mkhari?fbclid=IwAR0ZgNV1w9sXjBz0OAB3CV3MHj3r-wdVhxaXMzKOm6WJ0MvUCQQG-OfHmmEI [last accessed12.01.2022].

47. *Supra,* footnote 212, p.3. https://www.osce.org/files/f/documents/c/3/492196.pdf [last accessed12.01.2022].

48. „The commitments made by the parties in the April 19 Agreement were not implemented for the pending Supreme Court appointments, and legislation aimed at bringing the legal framework fully in line with the Venice Commission recommendations was not introduced. As parliament failed to provide a formal legal basis for the HCJ

The spokesperson of the European Commission had a strongly worded reaction to the violation of the agreement. In a statement issued on July 14, he stressed that "voting is a missed opportunity for the Georgian government to reaffirm its commitment to genuine and comprehensive judicial reform. These events pose a threat to the independence of the judiciary and public confidence towards it." Moreover, according to the statement, this step may have a negative impact on the allocation of the second tranche of macro-financial assistance to Georgia, which is provided by the current EU program.[49]

The appointment of judges in violation of the agreement was strongly criticized by the US Embassy in Tbilisi. The statement highlighted the specific negative consequences of such a hasty and unilateral process. Taking into consideration the results, the Embassy considered that *"The decision means, that a significant opportunity in terms of strengthening confidence in the Georgian judiciary and democratic development was missed."*[50]

US Secretary of State Anthony Blinken also responded to the process. According to him *„the United States is deeply concerned about the approval by the Georgian Parliament of candidates for Supreme Court justices, which is contrary to the April 19 agreement. Ambitious judicial reform is critical to Georgia's success*."[51]

to halt its nomination process, the HCJ continued with the nomination process in the first competition (for nine pending vacancies). ***Ibid.***

49. European Union in Georgia - https://www.facebook.com/europeanunioningeorgia/posts/4082993781816098 [last accessed12.01.2022].

50. US Embassy Tbilisi, 15 July 2021, https://www.facebook.com/usingeo/posts/10159347287372954 [last accessed12.01.2022].

51. პირველი არხი - 16 ივლისი, 2021, https://1tv.ge/news/entoni-blinkeni-ashsh-ghrmad-shewukhebulia-saqartvelos-parlamentis-mier-uzenaesi-sa-

NGOs are also talking about the penetration of influences of the judicial clansmen in the Constitutional Court.[52] The Public Defender of Georgia also shares this opinion. While the Public Defender's constitutional complaint on the procedures of electing judges of the Supreme Court was being under constitutional review, the Public Defender focused on the parallel processes taking place in the Constitutional Court. In particular, the Public Defender is referring to the filling of two vacancies in the Constitutional Court from the quota of the Supreme Court.[53] In both cases, the decision to appoint a constitutional judge was made by the Plenary session of the Supreme Court, whose members, according to the Public Defender, were directly interested in denying the constitutional complaint.[54]

The Public Defender particularly emphasizes the fact, that these two newly elected judges of the Constitutional Court decided the fate of the Public Defender's constitutional claim, along with incumbent constitutional judges[55], and contrary to the opinion of the other four judges,

samartlos-mosamartleta-damtkicebis-gamo-rac-ewinaaghmdegeba-19-aprilis-shetankhmebas/ [last accessed12.01.2022].

52. Transparency International Georgia - The State of the Judiciary 2016-2020, October 2020 https://transparency.ge/ge/post/sasamartlo-sistemis-mdgomareoba-2016-2020-clebi?fbclid=IwAR1t7ZxueyfvZd1AvYVtRIGumxjjxKBj42-zKRPGF-bf-dr9egQKAbl3tPec [last accessed12.01.2022].

53. In April and June 2020, the Plenum of the Supreme Court elected two judges to the Constitutional Court, Khvicha Kikilashvili and Vasil Roinishvili.

54. "The session of the Plenum of the Supreme Court, arranged for the election of a judge of the Constitutional Court, was attended by only 18 members, 17 judges out of whom were elected or participated in the selection process of a judge of the Supreme Court based on the rule, appealed in the Constitutional Court. And consequently, they were directly interested, that the procedure for selecting of candidates for judges of the Supreme Court would not be unconstitutional." Supra, footnote 115, p. 119.

55. Judges Khvicha Kikilashvili, Manana Kobakhidze, Merab Turava, and Eva Gotsirid-

deemed the procedures regulating nominations of candidates for the Supreme Court constitutional[56]. According to the Public Defender, *"the decision of the Constitutional Court is not a legal act adopted based on the Constitution, but only a document, pursuing the interests of an influential interest group of the common courts."*[57]

3.4. MAIN PARAMETERS OF DELEGITIMIZATION OF THE GEORGIAN JUDICIARY AND SYSTEMIC REFORM IMPERATIVES

The present review and analysis show that the main problem of the judiciary in Georgia at the post-communist transition stage was, on the one hand, the concentration of internal institutional power in the hands of the elite of the judicial bureaucracy, and their subordination to political and other power groups on the other hand.

Despite trying different models of institutional arrangements (model of the Ministry of Justice, variations of the European model of the Council of Justice), the overall situation has not changed. The measures taken so far to reform judicial personnel and to create an independent judiciary were not sufficient, and for the most part, were driven by changes in the judicial bureaucracies and the creation of the corps of judges, subjugated to this bureaucracy.

The current state of the judiciary requires comprehensive reform. How-

ze did not support granting of the claim. The decision of the Plenum of the Constitutional Court of Georgia N3 /1/1459,1491 on the case of the Public Defender of Georgia v. the Parliament of Georgia, July 30 of 2020.

56. The dissenting opinion was prepared by judges: Irine Imerlishvili, Giorgi Kverenchkhiladze, Teimuraz Tugushi, and Tamaz Tsabutashvili. Ibid.

57. *Supra,* footnote 115, p.122.

ever, when planning this reform, it is necessary to take into account the failures of the past, as well as the analysis of the current situation.

Comprehensive reform requires broad public and political consensus. The reform should be based on a special plan, adopted through the participatory process, which will have a constitutional basis and its main parameters will be defined by the relevant Constitutional amendment.

For comprehensive reforms to succeed only separate institutional, or personnel reform is not sufficient. It is necessary to integrate both components and to consistently implement a unified, comprehensive institutional reconstruction project.

An in-depth examination of the institutional foundations of delegitimation of the judiciary in Georgia and the presentation of a comprehensive concept of institutional reform goes beyond the scope of the present study. This paper focuses on the institutional aspects of reform to emphasize the need for tightly integrated institutional and personnel reforms, and in particular, to align the objectives of these two components of reform.

In the present brief overview, the concentrated power of the judicial bureaucracy was identified as the main reason for the delegitimization of the Georgian judiciary. Consequently, the central objective of the institutional reconstruction of the Georgian judiciary, which implies both institutional and personnel reform, is at least, to dismantle the concentrated power of the judicial bureaucracy and at best, the complete abolition of the bureaucratic model of the judicial organization.

Georgian civil society and opposition political parties are reaching a widening consensus regarding this main objective of the reform. The

consensus is mainly focused on undermining the influence of the elite of the judicial bureaucracy - the judicial clan. The existing visions of the reform are mainly related to the High Council of Justice. However, as we have already mentioned, the reform of the High Council of Justice is necessary for the institutional reconstruction of the judiciary, but not sufficient.

The reform of the High Council of Justice is necessary to deconcentrate the mechanisms of accountability of judges in the hands of the elite of the judicial bureaucracy, and to divest them of these mechanisms fully or partially. On the other hand, there is a need to establish effective mechanisms of public accountability in the judiciary itself, as the institution of non-judicial members of the High Council of Justice fails to achieve this goal.

Reforms can be considered within the model of the Council of Justice, and it is also possible to change the model of the institutional organization of the judiciary. In any case, the institutionalized mechanisms of power of the elite of the judicial bureaucracy must be dismantled.

The power of the judicial bureaucracy is institutionalized not only in the Council of Justice but also in the power of the court presidents. Consequently, the dismantling of this power, along with the proper institutional reform, requires personnel reform as well. Only through the combination of vetting and consistent, integrated institutional reform will it be possible to dismantle the concentrated power of the court presidents.

In this regard, it should be noted that the elite judicial bureaucracy sitting at the High Council of Justice exerts its power over the day-to-day activities of an individual judge through court presidents. Thus, substantial reform is needed of those institutional aspects of the power of court

presidents, that are most detrimental to the internal independence of the judiciary and are major pillars of subjugation of individual judges to the bureaucratic elites.

The following institutional reforms are necessary to dismantle the institutionalized power of court presidents: appointment mechanisms, career advancement, accountability mechanisms; access to administrative-bureaucratic positions in the judiciary (for example, the terms and conditions of election to the High Council of Justice); the scope of discretion in the distribution of cases and removal of a judge from a particular case; the scope of discretionary powers in respect to the individual judge's promotion, other incentives, and disciplinary measures.

These institutional reforms will not be successful if they are not implemented in conjunction with the personnel reform. Thus, the program of judicial vetting should prioritize the scrutiny of court presidents and other central figures of the bureaucratic elite.

Offering a full concept of institutional judicial reform is not the purpose of this study, but in the recommendations provided below we will further discuss the details of institutional reform, that will be necessary for carrying out the personnel reform, in particular, the establishment of the judicial institutions undertaking the vetting, their composition, powers, and procedures.

3.3. VETTING OF THE JUDICIARY IN GEORGIA - KEY RECOMMENDATIONS

a) Constitutional mandate

The constitutional amendment to the transitional provisions of the Constitution should provide for a mandate to implement the chosen form of judicial vetting; as well as the necessary temporary derogations from individual and institutional guarantees of judicial independence, in particular, the possibility of dismissal of a judge who has been appointed for life through the procedure of vetting. In addition, it should specify vetting criteria, procedures, and procedural guarantees; as well as the mandate of vetting institutions and their further integration into the reformed judiciary.

The transitional provisions of the Constitution should also clearly define the grounds for the dismissal of a judge in the vetting procedure.

Depending on the institutional reconstruction plan, changes to the body of the Constitution may also be necessary. In particular, it may be necessary to amend the constitutional norms related to the terms and conditions of appointment as a judge, the powers of the High Council of Justice, the Supreme and Constitutional Courts, and other institutional arrangements.

b) the purposes of judicial vetting

It is important to clearly define the objectives of the judicial vetting and to link them to the overarching objective of the institutional reconstruction of the Georgian judiciary. The main result of vetting should be

cleansing of the judiciary from the current elite of the judicial bureaucracy, i.e. from the influence of the judicial clansmen. Nevertheless, it is inadmissible for vetting to serve predominantly punitive/ penological purposes.

This does not mean that a judicial clansman or another judge should be absolved from liability in the event of committing an offense or disciplinary misconduct. However, imposing such liability may not be the predominant purpose of the vetting process.

The dismissal of a judge in a vetting process should carry as minimally as possible the content and purpose of a sanction. Guarantees of procedural fairness and imposition of individual legal responsibility following a fair trial should exclude collective responsibility based solely on the ground of affiliation to the "judicial clan".

c) choice of the form of judicial vetting

The choice between the procedures of reappointment and review may not be as dramatic as it seems at first glance. Given that the existing judges will continue to fulfill their duties during the reappointment process, this procedure may not even factually differ much from the review procedure.

For maximum efficiency, both forms require rapid implementation. The time constraints for reappointment can be relatively stringent. However, if, according to the preliminary assessment, there is a resource to carry out the reappointment process within an appropriate time, then the time stringency argument cannot be used against choosing the reappointment.

In any case, the choice between these two types of procedures is largely dictated by contextual factors. Based on the comparative and theoretical analysis conducted in the first part of the given paper, we can identify several contextual factors that will be important when choosing a form of judicial vetting in Georgia:

- *The degree of resilience of the political will* - since the commencement of the judicial vetting requires a constitutional amendment; it is implied that the political will is important and weighty for its implementation. Although, it should be kept in mind, that beyond the constitutional majority in the formal sense, there may be significant political contradictions, failure of taking into consideration which would lead to the failure of the vetting process. The form of reappointment anitude which could potentially sabotage the process;

- *Risks of possible institutional and other types of resistance to the vetting of the judiciary* - as resistance from within the justice system, as well as from other governmental institutions, the representatives of the legal profession, and various segments of society is inevitable, the degree of the risk of such resistance should be assessed in the process of choosing each form of vetting. Preference should be given to the form of vetting, that best addresses these threats.

- *Evaluation of human and material resources* - here it is important to evaluate the bureaucratic and material resources needed to carry out the process. At the same time, first and foremost, the ability to fill vacancies is created as a result of the process in an appropriate period. It should be taken into consideration, that

when reappointing judges, there may be a need to fill more judicial vacancies in a shorter time than during the review process. If a choice is made to involve foreign nationals in the process and appoint them to a judicial position, the guarantees for the selection of these individuals and continuity of guarantees, including appropriate international assistance, should also be considered.

- *Quality and duration of international involvement* - it should be clear from the outset, how dependent the implementation of the process and sustainability of its outcomes is on international assistance. It must be determined whether it will be possible to mobilize and maintain adequate and timely international assistance, as deemed necessary.

- *The nature of the information to be used in the process of vetting and the risks related to its obtaining and processing* - depending on the criteria of such examination, different information will need to be obtained and processed to decide in the review process. In the reappointment process, the burden of obtaining and processing information is reduced, as the burden of proof shifts to the candidate. Difficulties in obtaining and processing information during the vetting process may significantly impede/damage the vetting process.

Thus, the essential difference between the two major forms of judicial vetting - the reappointment process and review process, is the burden of proof. In reappointment, compared to the review process the compatibility to the judicial position is to be proven by a candidate for a judicial position himself. As mentioned above, this feature has its advantages, as well as risks in terms of proper and timely implementation

of the vetting process. Weighing these risks will be necessary to make the optimal choice.

It is important, that in the reappointment process, shifting the burden of proof upsets the balance of procedural fairness requirements. Consequently, it will be difficult to establish a procedure that is fully compatible with the standards set by the European Court of Human Rights. In this regard, adhering to the standards set by the European Court of Human Rights regarding review procedures in Albania seems to be a more optimal/safe way.

Alternatively, the Georgian state should take the risk and argue before the European Court, that due to the complicated context created by the delegitimization-dysfunction of the judicial system, the lowering of the standard of procedural guarantees in the reappointment process is a proportionate measure. As Georgia will not have a precedent set here, the risk, that the Court shall not uphold this argument is high.

If evaluated by these criteria, in the current conditions in Georgia the choice of the form of reappointment will be problematic due to the insufficiency of the political will. It is also expected that there will be strong resistance and sabotage of the process from the so-called "judicial clan" and related social or political actors (including within the legal profession). In given conditions, there are no sufficient local resources, or international assistance, necessary for ensuring its success. International partners are frustrated by the failure of their substantial efforts to the judicial reform in Georgia, and it will be difficult to achieve their proper involvement.

However, on the other hand, these factors will also hinder the review process. Also, in the review process, the problem of obtaining relevant

information may arise. As a result, in the conditions of a high threshold of procedural guarantees, the so-called judicial clan may escape the review filter, which would be tantamount to the failure of the entire process of the reconstruction of the judiciary.

It should be noted that before the full and comprehensive institutional restructuring of the judicial system, which includes some form of judicial vetting, appropriate preparatory work needs to be done to create the conditions outlined here.

This means that in the case of proper efforts, as well as in the wake of developments and changes in the political situation, these contextual factors will also change. Therefore, the choice will be made based on the changed circumstances, taking into consideration the factors/criteria set out here.

If we assume, that the Georgian political regime shall take effective steps towards the consolidation of constitutional democracy, and that there will be sufficient political consensus and international support regarding this, it will be possible to use both forms of vetting in the process of reconstruction of the judicial system.

Given that the main target group of personnel reform is the elite of the judicial bureaucracy at all levels of the system (including the Supreme Court and the Constitutional Court), including the court and chamber presidents, and the members of the High Council of Justice, it would be advisable to use the reappointment mechanism in combination with compatibility examination. In particular, within the framework of the reform, the court and chamber presidents, and the members of the High Council of Justice should be removed from administrative offices.

The dismissed person will retain the status of a judge and will be subjected to the review process. If the review process is completed, the person should be allowed to hold a bureaucratic position, or another position, which is equivalent to the position he held previously, if he or she meets the appropriate conditions set by law.

With this in mind, personnel reform should be conducted in several phases. In particular, the first phase involves the dismissal of judges from the above named bureaucratic positions; the second phase envisages the process of vetting of judges dismissed from bureaucratic positions, the third phase is related to the process of vetting of the Supreme court and the Constitutional Courts, the fourth phase – is the process of vetting of the courts of appeal, and the fifth phase includes the process of vetting of all other judges.

Personnel reform must be carried out in a relatively short period. It is especially important to conduct the first three phases efficiently and quickly. The optimal duration is considered 6 months to one year. Further prolongation of this process would be an indication, that the bureaucratic elite retains positions in the judiciary and has effective leverages to sabotage the process.

Upon completion of the first three phases in one year, the fourth and fifth phases may last from 12 to 18 months. It should also be noted that time constraints are essential in the vetting process, of the bureaucratic elite, while there is more flexibility regarding reviewing judges in lower-level courts, as there are fewer effective mechanisms for sabotaging reform at these levels and resistance to reform is more manageable.

d) Relation to other mechanisms of transitional justice

On the background of the growing autocratization of the Georgian political regime, we can assume that the vetting measures discussed here will be used only in conditions of liberalization and democratization of the current regime. Depending on when and under what circumstances this event will occur, it may be necessary to use other transitional justice mechanisms. In particular, concerning the courts, in combination with the vetting and in addition to criminal and disciplinary mechanisms, it is possible to use the mechanism of the truth and conciliation commission.

Also, as there are reasonable grounds to assume, that the State Security Service exercises significant control over the judiciary, it may be necessary to undertake concurrent institutional restructuring measures for both the Security Service and the judiciary.

Thus, vetting of the judiciary based on collaboration with the State Security Service may also take the form of lustration. In the latter case, the archives of the State Security Service and the materials stored there will acquire central importance.

The materials generated by the State Security Service mustn't become the exclusive grounds for the dismissal of a judge. When vetting judges, these materials should be considered in conjunction with other information/evidence. Vetting courts should assess, whether, based on this information, the objective observer could perceive the judge as biased and/or his/her independence compromised.

e) review judicial institutions responsible for vetting

Vetting in the Supreme Court and other institutions of the common courts will be carried out by the Vetting Chamber, which will be established in the Supreme Court. The Vetting in the Constitutional Court will be carried out by the Vetting Collegium. Constitutional Court will also include the Vetting Appeals Chamber, which shall be authorized to review decisions of the Supreme Court Vetting Chamber and the Constitutional Court Vetting Collegium.

Both, the Vetting Chamber/collegium and the Appeals Chamber will be integrated into the relevant judicial institutions (the Supreme Court, the Constitutional Court). Following the completion of the vetting process, the judges of the Vetting Chamber, the Collegium, and the Appeals Chamber will continue to exercise their judicial powers per the term of their respective offices (the concurrent institutional reform may provide for institutional reforms and temporarily or permanently increase the number of judges in respective courts).

c) Composition of the Vetting Chamber / Collegium

The vetting Chamber and the Collegium shall consist of judges who shall be appointed as Supreme Court (in the case of the Chamber) and the Constitutional Court (in the case of the Collegium and the Chamber of Appeal) judges. The number of judges in the Chamber/Collegium should be odd - not less than 5 and not more than 9 judges.

The number of judges in the Constitutional Court is determined by the Constitution. Therefore, the transitional provisions shall make it possible to temporarily increase the number of judges, or amendments to the body of the constitution could permanently increase the number

of constitutional judges within the institutional reform of the court and revise internal institutional organization.

A citizen of Georgia who meets the general criteria of a judge of the relevant court, as well as a qualified foreigner may be elected as a member of the Chamber/Collegium.

In the case of a citizen of Georgia, the candidate must not have previous judicial experience, as well as an employment record as a prosecutor or employee in the Ministry of Internal Affairs and Security services, or served at elected or appointed political positions. This restriction is necessary to exclude the possibility of undue influence and sabotage of the judicial vetting by the judicial bureaucracy and other informal networks.

In turn, due to the importance of judicial experience in the vetting process, such experience should be required of foreign candidates. At the same time, at least one of the foreign national candidates should have an employment record as a judge in a high court. It is desirable, that a foreign national with such experience serves as the president of the vetting Chamber / Collegium / Appeals Chamber.

Additional criteria should be considered when selecting foreign nationals: Judicial experience in the European Union, the United States, and other jurisdictions, with a high degree of upholding the rule of law and the independence of the judiciary. Also, an adequate balance should be maintained between candidates with experience in different legal systems.

g) Selection of the members of the vetting Chambers/collegium and selection commissions

To protect the judicial vetting process from the influence of local political or informal networks, the members of the Chamber and the Collegium conducting vetting must be selected by an international commission. The legal basis for the establishment of the Commission will be the relevant constitutional amendment, as well as the international agreement concluded based on this constitutional amendment among Georgia and the relevant international/supranational organizations and the governments of the partner states.

Setting up the selection committee based on an international agreement, on the one hand, will protect the process from the influence of the current political process, and on the other hand, will guarantee proper legal and democratic legitimacy. To achieve this legitimacy, a constitutional amendment may require a qualified majority to ratify an international treaty defining the mandate and personal composition of the Commission.

The work of the commission should be supported by the administration, which will have an adequate number of staff with the required qualifications, who shall be both, Georgian and foreign citizens. It's dependent on the work of the administration staff, to properly acquaint the foreign members of the Commission with the local context, without which the latter will not be able to properly perform their functions.

The members and the chairperson of the commission shall be appointed by an international/supranational organization supporting the conformity assessment process, or a partner state, per the relevant agreement, concluded with the state of Georgia. The agreement with these

subjects of international law shall set out the quotas of the members to be appointed by each of them, as well as the rules of the Commission's work and decision-making.

Qualification requirements for foreign members of the Commission should be Judicial experience, including in a high court of the home jurisdiction, significant contribution into academic or practical areas of law, as evidenced by relevant publications, and organizational recognition.

The International Commission will check whether the candidates for the membership of the vetting Chamber / Collegium meet the established requirements. If the relevant professional qualification of a candidate is not confirmed by relevant documents, the administration of the Commission may conduct a qualification exam, the content of which is determined by the Commission itself.

The International Commission, based on the examination of a candidate's profile and an interview with him/her, decides whether he/she meets the qualification required for the highest judicial position, as well as integrity requirement, and demonstrated potential for adherence to the moral and political principles of constitutional significance. For the International Commission, the decisive criterion for appointing a judge to the vetting Chamber / Collegium should be not only the candidate's eligibility for the highest judicial office but also his/her readiness to perform the delicate function of vetting.

In particular, the most important criterion here will be the professional and personal authority of the judge assessing compatibility, which will strengthen the legitimacy of the decision made by him. Any doubt about this authority can become an excuse for the emergence of perceptions that will delegitimize the process.

h) General criteria for the review of judges

Judicial bureaucracy elite, presidents of courts/chambers, and members of the High Council of Justice will be removed from their positions based on constitutional amendments. These positions will be staffed following the institutional reform carried out concurrently with vetting. They will retain the position of judges, and together with other judges, will be subject to vetting. Uniform criteria will apply during the vetting process. However, depending on the level of the judge's position in the bureaucratic hierarchy, the specific contexts in which these criteria are applied will vary.

Professional Qualifications

The professional qualification of a judge may be examined during the vetting process if any of the following circumstances exist: the authenticity/reliability of the documents certifying his/her qualification is doubtful; the superior courts regularly review the decisions of the judge based on the legal error; the European Court of Human Rights has found a violation of the European Convention in a case, regarding which a judge has adopted a final decision.

Integrity and commitment to constitutional values

Vetting also includes a financial check. A judge must prove the origin of his /her own and related persons' property and proceeds. The notion of a related person can be interpreted under current anti-corruption legislation in Georgia on public officials. However, it is also possible to clarify /expand the concept of a related person.

In addition to proving the origin of the property, it is important to investigate the following circumstances- whether the property under review was acquired with income, received within the framework of statutory or discretionary salary supplement/ bonus/statutory social security assistance; whether granting of the financial benefit served as a "soft" tool (so-called "cake" or "carrot") for subordination/accountability of a judge to the elite ("clan") of the bureaucracy.

Confirmation of "accountability to the judicial clan" may serve as grounds for dismissal of a judge if it is established that "accountability to the judicial clan" was manifested in such a way, as to give rise in the objective observer to the perception of a judge's lack of independence or impartiality.

In examining "accountability to the clan", the vetting Chamber should consider not the only application of "soft" instruments of accountability of financial nature over the judge, but also other instruments of accountability of soft or "hard" (disciplinary, punitive) nature, namely:

a) Decisions related to the promotion of a judge and the assignment and reassignment to the specific geographic locations – i.e., whether the promotion of a judge, his/her reassignment to another court was justified by objective circumstances; Is there any connection between such decisions and the judge's involvement in cases, that are considered by authoritative national and international organizations to represent cases of "political justice" or of "political interest"?

b) other measures of "soft" accountability, such as remunerated business trips abroad, participation in international training programs.

c) in the case of judges appointed to bureaucratic positions, whether

soft and hard measures of accountability were applied personally towards them, or by them to the judges subordinated to them collegially, to achieve their "accountability to the judicial clan", which gave the objective observer the perception, that such judges lacked independence and impartiality. Among the hard measures of accountability, the following needs to be examined: initiation of disciplinary proceedings against a judge, reassigning from urban center courts to regional courts, termination of material benefits, and social security guarantees provided by law.

As part of the integrity check, it is possible to use information in the archives of the State Security Service about the violation of a judge's independence or impartiality. The vetting Chamber should investigate this information, without confirming its factual accuracy, in conjunction with other information about the judge and evidence, to establish whether an objective observer would form a perception of the violation of the judge's independence or impartiality. If this standard is met, information from the State Security Service archives may serve among the grounds, though not an exclusive one, for the dismissal of a judge in the vetting procedure.