

**GROUP OF
INDEPENDENT
LAWYERS**



**COUNCILS FOR
THE JUDICIARY
IN GEORGIA AND
ABROAD, CHALLENGES
EXISTING IN GEORGIA**

TBILISI 2021

GROUP OF INDEPENDENT LAWYERS



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INTRODUCTION

Proper administration of the judiciary is of paramount importance to the smooth functioning of courts. The administration of the judiciary should ensure the independence of the individual judge from external and internal influences, accountability, efficiency, quality and public confidence in the judiciary. Unfortunately, the administration of the judiciary in Georgia does not achieve any of the minimum standards required for a democratic society.

At the end of the 20th century and the beginning of the 21st century, the model of collegial government of the judiciary became widespread in Eastern Europe, where judges play an important role. This model has been recommended in documents drafted by European advisory bodies - including the Council of Europe, the CCJE and the Venice Commission. Nevertheless, this model is not a mandatory standard: in both Western and Eastern Europe, a number of countries still have the so-called Ministry of Justice model.

With the support of the USAID Funded project of East-West Management Institute, USAID PRoLOG, the Group of Independent Lawyers studied European standards related to the Judicial Councils, models of the Judicial Council in European countries, their similarities and differences with the model in Georgia.

Both Georgian and Eastern European experience in the administration of the judiciary shows that there is a danger of using judicial administration mechanisms to influence individual judges. The introduction of the model of self-government of judges has helped to strengthen the corporativism of judges in many other Eastern European countries and to consolidate power in the hands of influential groups of judges.

The Georgian model of court administration, which placed more focus on the management of the courts by executive branch before 2007, has gradually been replaced by a model of self-government. Prior to 2013, the High Council of Justice was judicial self-government body with majority of judicial representation. However, judicial self government was a fiction as all important decisions were informally agreed with the Minister of Justice. After 2013, judges were given the opportunity to exercise self-government, although power in the judiciary was seized by a group of judges controlled by the previous government. The self-government became a mechanism for this group to consolidate its power.

The European standards of the High Council of Justice directly indicate that the Council of Justice should not become a source of corporatism, cronyism and concentration of power. Unfortunately, these threats have not been or could not have been taken into account in the drafting of the 4 Waves of Justice legislation since 2013. There was a concentration of power in the High Council of Justice, which in turn fell into the hands of an influential group of judges - the clan. In addition, an informal mechanism has been established in Georgia for years to enable the political authorities to interfere in the work of judges. This is done through the clan, which has secret communication with the current government.

The involvement of non-judicial members in the High Council of Justice, which should have been a mechanism of accountability to the public in the judiciary, has posed both legislative and practical problems. As it turned out, the removal of politicians from the High Council of Justice is not enough to depoliticize the judiciary, as a similar function can be assumed by non-judicial members appointed by the political majority.

Finally, the present study demonstrates the need for the High Council of Justice to undergo significant reform. Changes need to be made to increase power deconcentration, accountability and transparency. Their aim should be to reduce the power of influential groups of judges, to increase the individual independence of judges, the accountability and transparency of the judiciary.



1. HIGH COUNCIL OF JUSTICE OF GEORGIA

a. Regulation as defined by the Constitution and legislation.

The High Council of Justice (“the Council”) is a constitutional body in Georgia, the functions and composition of which are defined by Article 64 of the Constitution. The main purpose of establishing this body is to ensure the independence and efficiency of the judiciary. The Constitution does not define the function of the Council as ensuring accountability to the public in the judiciary. Instead, it is stipulated that the Council is accountable to the self-governing body of judges of common courts - the Conference. This cannot be equated with accountability to society. According to art. 64.4 of the Constitution of Georgia, HCOJ is accountable before judicial self-government body. Thus, this is not the same as accountability before public.

The task of ensuring the independence and efficiency of the judiciary as the function of the Council is in line with the original concept of the model of the Council of Justice developed by the European Union and the Council of Europe, when the independence and efficiency of the judiciary was considered its main asset.¹ However, over time, both the European Union and the Council of Europe have recognized other no less important goals for the establishment of the Judicial Councils: transparency, inclusion and accountability. Previously, in the academic literature, accountability of the judiciary as a no less important goal of the Judicial Councils was already considered in many academic papers², although the concept papers of the European Union and the Council Europe limited the concept of accountability only within Council of Justice³. Only from 2013-2014 can we find the accountability of the court in these documents equal to the independence of the judiciary.⁴

The text of Article 64 of the Constitution regarding accountability to the Conference of Judges of the High Council of Justice is specified in Article 47 of the Organic Law of Georgia (hereinafter “the Law”) on Common Courts. According to the law, the High Council of Justice of Georgia is accountable to the Conference of Judges of Georgia, which is reflected in the submission of the annual report on the activities of the High Council of Justice by the Chairman of the High Council of Justice of Georgia to the Conference of Judges.

In these circumstances, when the accountability of the Council is narrowly defined by the Constitution or organic law, more importance is attached to the principles of involvement and transparency recognized by the authors of the European model in, of which only Article 64 of the Constitution recognizes only the principle of involvement⁵.

Historically, the High Council of Justice has been represented in Georgia in three different models: Prior to 2007, the High Council of Justice was an advisory body of the President with 19 members, including the Chairman of the Supreme Court, the Minister of Justice, the Chairman of the Parliamentary Legal Committee,

1 On Independence: CCJE, Recommendation N10 (2007) Par. 8, Committee of Ministers CM / RE (2010) 17.11.2010 Par. 4, on effectiveness: Recommendation No. R (94) 12 of the Committee of Ministers, 13.10.1994, CCJE Recommendation N10 (2007) para. 10.; ENCJ, Report on Judicial Councils 2010-2011, para. 1.7 For

2 example Nuno Garoupa and Tom Gisburg, “Guarding the Guardians: Judicial Councils and Judicial Independence” (2009) American Journal of Comparative law. 110

3 David Kosar Perils of Judicial Self-Government in Transitional Societies, Cambridge University Press 2016, 139, CCJE Recommendation 10 (2007) Chapter IV. ENCJ, Report on Judicial Councils 2010-2011, para. 2.2

4 ENCJ documents on Independence and Accountability in the Judiciary <https://www.encj.eu/articles/71>

5 participation translates to engagement, although it can also be translated as participation.

2 members appointed by the President, 1 member appointed by Parliament and 9 members elected by the Conference of Judges on the recommendation of the President of the Supreme Court.

In 2007-2013, the High Council of Justice became an independent body from the President of Georgia. It consisted of 15 members, of which 8 judges were elected by the Conference of Judges nominated by the Chairman of the Supreme Court, 4 members were the Chairman of the Legal Committee and 3 members elected by the Parliament, and 2 non-judges were appointed by the President of Georgia.

Since 2013 and as of today, the High Council of Justice consists of 15 members, of which 8 judges are elected by the Conference of Judges on the basis of free nomination, by secret ballot, the Chairman of the Supreme Court is an ex-official member of the Council, 5 non-judges are elected by the Parliament (3/5 of the total membership). 1 member is nominated by the President of Georgia,

According to the Organic Law on Common Courts, the Parliament of Georgia and the President of Georgia may elect a citizen of Georgia who has a higher legal education with a master's degree or an equivalent academic degree / higher education, at least 5 years of work experience, high reputation, who is a recognized specialist in the field of law.

The functions delegated to the High Council of Justice by the Organic Law on Common Courts can be divided into the following main groups:

- a. Personnel function (appointment, promotion, dismissal, transfer, promotion of judges, determination of the number and specialization of judges in the courts, organization of qualification exams, approval of the staff list of court clerks, etc.).
- B. Disciplinary function (selection of an independent inspector, investigation of disciplinary complaints, accountability of a judge, support of disciplinary charges).
- C. Regulatory function (approval of organizational rules of work of courts, approval of rules of evaluation of officials, etc.
- D. Function of material support (hears the analysis of the Chairman of the Department of Common Courts)
- E. Function of administration and management of the judiciary, establishment of courts and definition of their areas of operation, analysis of statistics
- V. Other non-judicial functions (approval of mediation program, election of a member of the Legal Aid Council, etc.)



2. INTERNATIONAL STANDARDS ON SUPREME JUDICIAL COUNCILS

There are no mandatory international standards for the establishment and functioning of the Judicial Council, moreover, in some European countries (eg Germany, the Czech Republic, etc.) the Judicial Council does not exist in the classical sense and the judiciary is administered centrally by the Ministry of Justice. International documents related to the establishment and functioning of judicial councils are mainly of advisory character.

The most comprehensive document across Europe is the 2007 opinion of CCJE. N. 10 - Judicial Council in the service of society.

This document addresses the following key aspects of the establishment and functioning of the Council of Justice:

a. Mission:

- The mission of the Judiciary Council is to protect the independence of the judiciary and the individual independence of judges, as well as to ensure the quality and efficiency of the judiciary, to ensure public confidence in the judiciary⁶. The mission of the Judiciary Council is also to protect judges from political, ideological and cultural pressures and to ensure their unrestricted freedom⁷.

B. Regulatory framework

- It is recommended that key aspects of the Judicial Council be enshrined in the Constitution or other high-level legislation⁸.

C. Composition

- The Council of Justice may consist of either judges or judges and non-judges only⁹. Perceptions of self-interest, self-protection, and favoritism should be avoided in any case¹⁰. If the Council of Justice is composed of judges and non-judges, the majority should be judges elected by their colleagues¹¹.

D. Qualification

- selection of members should be based on competence, experience, knowledge of the functioning of the judiciary, a culture of discussion and independence (paragraph 21).
- Non-judge members may be selected from distinguished lawyers, university professors, or citizens of distinguished status (para. 23).
- Council members should not be incumbent politicians, members of parliament or representatives of the executive (para. 24).

6 CCJE Opinion N. 10, 2007, par. par. 9-10.

7 Ibid

8 Supra note, par. 9

9 Supra note, par. 16

10 Supra note, par. 16

11 Supra note, par. 18.

E. Selection of judicial members

- They should be selected by way of election, except for ex-official members (eg the Chairman of the Supreme Court).
- Judges should be elected by a procedure that ensures broad representation of the courts at all levels (para. 27), including on territorial grounds (para. 30).

Selection-judicial members

Non judicial members should not be elected by the executive. If members are to be elected by parliament, they must be elected by a qualified majority, which requires significant support from the opposition (32). Non-judicial members of the High Council of Justice should represent the wide public (para. 32).

F. Number of members and mandate

- The number of members of the Judicial Council should be commensurate with the scale of the judiciary and the functions to be performed by the Council (34).

G. Status of members

- Judicial Council must have guarantees of their impartiality and independence. Their remuneration should be commensurate with their position and activities on the Council for the Judiciary (36).

H. Budget and staff

- The Council must have adequate funding, staff and material resources for the proper conduct of its activities (paragraphs 37-38).

I. Decisions

- Decisions concerning the administration and management of the judiciary, as well as decisions concerning the appointment, transfer, promotion and discipline of judges, must be substantiated and appealable in court (para. 39).

J. Functions

According to CCJE, the Council must have following functions (para. 42)

- The selection of judges and the appointment
- Promotion of judges
- judges' evaluation
- the discipline and ethics
- training of judges
- control and management of separate budget
- of judges to protect the reputation
- Provide opinions to other state agencies.
- the cooperation with other relevant authorities at national, European and international levels.
- Accountability to the public.



The Advisory Council of European Judges recommends that the functions of the Council for the Judiciary be redistributed between its various chambers to avoid conflict between different functions (para. 43).

Additional provisions are provided by the Kiev Recommendations on the Independence of the Judiciary (2010). In particular, the Council of Justice should not include court presidents. If elected to the Council of Justice, they must resign as chairman¹².

At the same time, in order to prevent corporatism and concentration of power, the Kiev Recommendations propose that the various functions of the administration of the judiciary, such as the appointment, promotion and training of judges, discipline, evaluation, and budget, be redistributed to different bodies¹³.

The Venice Commission's 2021 report on the selection of members of the High Council of Justice in Ukraine focuses on ensuring the good faith of members of the Council of Justice and considers it permissible to set up a special commission to verify the integrity of future or already elected members¹⁴.

12 Kiev Recommendations on Judicial Independence, Par. 7.

13 See. Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia , Par. 2

14 Opinion of Venice Commission, On the draft law on amendments to certain legislative acts of Ukraine concerning the procedure for electing (appointing) members of the High Council of Justice (HCJ) and the activities of disciplinary inspectors of the HCJ (draft law no. 5068), [https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-PI\(2021\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdf-file=CDL-PI(2021)004-e)

3. JUDICIAL COUNCIL MODELS AND ACADEMIC OPINIONS

The composition of the Council of Justice is one of the key issues that ensures not only judicial independence but also its accountability. The principle of inclusion of non-judicial members in the Council is intended to ensure greater accountability and is to some extent reflected in the participation of members of the public or political circles in the decision-making process. This is especially important in European model councils, which are characterized by a wide range of competencies in almost all matters relating to the admission of judges and their careers. Such a model is often referred to as the French-Italian model,¹⁵ but at the same time such types of councils are composed of a majority of judges. However, the composition of the councils and the competence of the councils are often interrelated. Accountability is greater when non-judicial members of the board predominate, but at the same time the risk of court politicization is high, accountability may also be high if the council has broad powers, although it is necessary that most members of the judiciary do not act homogeneously. This is possible when judges from lower instances prevail on the board. Nuno Garupa and Tom Ginsburg described the councils with above criteria: competence and composition based on, see the table¹⁶:

<i>Competences</i>	<i>Dominated by the judges of Supreme Court</i>	<i>Dominated by judges of lower courts</i>	<i>Dominated by non judges.</i>
<i>intense (discipline, removal, promotion, appointment)</i>	strong hierarchical Judicial Council (Japan, Mexico, Thailand)	Strong Hierarchical Council (Italy, France)	Politicized Justice Council (Equatorial, Barbados, Singapore)
<i>Medium (Appointments Only)</i>	Hierarchical self-Regulatory judicial appointments Commission	Non hierarchical strong Council (Itali, France).	Judicial Appointments Commission (USA, UK, Canada, Netherlands, Germany)
<i>Minimum (Internal Arrangement Issues)</i>	Weak Council (Panama)	Weak Council (Brazil, Hungary)	Weak Council (Paraguay)

According to the authors, the majority of judges means that the council will be less politicized, although it is important whether the judges on the council act as a homogeneous entity. The authors relate this to a case where the majority of council members are from higher courts, as in this case they will seek to strengthen the judicial hierarchy.¹⁷ The authors' finding is also confirmed by the example of Georgia: 7 out of 9 members of the Council have recently been chairmen of various instances or chairmen of panels and chambers in the court, while in Georgia judge members act as a homogeneous group when making decisions¹⁸ (see below). The authors also believe that if board members represented different courts, in this case there would be domestic court policy, which would prevent court members from acting as a unified team.¹⁹

15 Nuno Garoupa, Tom Ginsburg "Guarding the Guardians: Judicial Councils and Judicial Independence" (2009) 57 American Journal of Comparative Law p. 110

16 Supra note, p. 103

17 Ibid., P. 121

18 See. Among other documents, the statement of the Public Defender on 26.12.2018, the statement on 28.06.2019.

19 Nuno Garoupa, Tom Ginsburg, p. 121

It is widely believed in academic research that the European model of a strong council, which until recently required a majority of judges, leads to a lack of judicial accountability in the long run at the expense of strengthening independence, as exemplified by many Eastern European countries.²⁰ Lack of accountability in turn limits the independence of individual judges. Councils' accumulation of power in Moldova, Georgia, and Ukraine has also been critically evaluated, as similar examples already exist in Romania and Hungary, where strong councils have often been criticized for lack of accountability.²¹ Lydia Müller's article was published in 2012, when judicial reform initiatives were implemented in Georgia shortly after the arrival of a new ruling coalition in Georgia. In this regard, Lydia Müller's analysis is also interesting: "Although no similar assessment [of lack of accountability] has been made towards Moldova, Georgia and Ukraine, the trend towards a strong council with multilateral competence in various areas of justice administration is noticeable and a cause for concern. Judicial councils in Moldova, Georgia, and Ukraine are responsible for appointing, promoting, and prosecuting judges, including imposing sanctions, and in the long run, raising the risk of lack of accountability²² . within a few years after the start of justice reform trends have been identified including lack of pluralistic environment, lack of accountability and independence of individual judges²³ .

The concept of involvement was changed by the initiators of the European model of the Council - the European Union and the Council of Europe. After initial opposition, they softened their stance and agreed on composition of council on parity between judge and non-judge members. For example in the ENCJ Justice Councils Report 2010-2011, para. 2.2. committee of Ministers Recommendation CM / Rec (2010) 12 on Judges: Independence, Efficiency and Duties, 17.11.2010, para. 17 the admission of half of the members of the Council by judges is considered acceptable, while earlier documents required a significant majority of judges in the Councils (CCJE, Recommendation No. 10 (2007) on Judicial Councils at the Service of Society, (Strasbourg, November 21-23, 2007).²⁴, Opinion of the Venice Commission no. 403/2006, which also stipulates that judges must have a majority in the Council of Justice.²⁵

After the collapse of the Soviet Union, the introduction of the Judiciary Council models in Eastern Europe led to mixed results and in some cases even earned strong academic criticism. Although the Judicial Council model was seen as a mechanism for ensuring the political independence of the judiciary, which was lobbied by European structures (EU, Council of Europe, Venice Commission, CCJE), post-Soviet mentality and lack of a culture of independence strengthened the power of influential groups, reduced the individualism of judges, encouraged corporatism, and the instrumentalization of Judiciary Councils.²⁶

20 Z. Fleck, *Judicial Independence in Hungary*, Chapter BI 2. C. E Printed by Anja Seibert-Fohr (ed.) *Judicial Independence in Transition*, Max Planck Institute for Comparative Public Law and International Law. Parau, *The Drive for Judicial Supremacy*, Chapter C. IV. In the same edition R. Coman / C. Dallara, *Judicial Independence in Romania*, Chapter BI 2; In the same issue Lydia F. Muller, *Judicial Administration in Transitional Eastern Countries*, in the same edition p. 938 David Kosar, cited in footnote 3, p. 139

21 Lydia F. Muller, *Judicial Administration in Transitional Eastern Countries*. P 944

22 Ibid p. 944

23 Fifth Report of monitoring HCOJ 30.05.2017. available at <http://ewmi-prolog.org/ka/publications/613-iusticiis-umaghlesi-sabtshos-monitoringis>

24 David Kosar , cited in footnote 3, p. 139

25 Court Appointments, Opinion of the Venice Commission no. 403/2006, 22.06.2017 / Fri. 50,

26 "Granting extensive self-administration powers to the judiciary before genuine internal reform is dangerous in a better scenario, the new institution will be a somewhat empty shell for a few years or decades to come. In a bad case scenario, which unfortunately appears more frequently, behavior and patterns start emerging which are very distant from anything the model was supposed to deliver: Individual judicial independence and impartiality is not only unprotected, it may be suppressed by judicial bosses. To speak of efficiency, quality, or transparency — other values apart from the judicial independence the system promised to deliver — would amount to idealism bordering on naivety". See. Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 2014.

The literature distinguishes between the Southern European and Northern European models of the High Council of Justice. In the Southern European model, the main function of the Council is to ensure the independence of the judiciary, the selection of judges (or participation in the selection process), discipline, and in the Northern European model, the Councils of Justice have broad powers in judicial administration (case oversight, uniform practice, logistics, electronic case management, training), budget, etc.)²⁷. Southern European model is most common in East Europe, which is assisted by court administrative functions.

Below we discuss more detailed models of Council composition, selection rules and functioning:

a. Composition and number of members.

The High Council of Justice is composed of members elected by different branches of government, in most cases these three different branches: the court, the parliament and the president (elected members).

In some countries a quota of court presidents is set aside separately for members of the judiciary, for example in France one member is the president of the appellate court, elected by his fellow presidents, and the president of the court of first instance, who is also elected by his fellow presidents²⁸.

In some countries (eg France, Italy) the Council of Justice consists of two chambers where one chamber is for the court and the other chamber is the administration of the prosecutor's office. Judges are represented in the Judicial Chamber, and prosecutors are represented in the Chamber of Prosecutors.

The number of members of the Council of Justice varies from country to country, depending on the size of the judiciary, the functions of the Council of Justice, and other contexts.²⁹ Also noteworthy is the fact that in some European countries the Council of Justice is not only managing court but also is a governing body of the prosecutor's office. Thus, Belgian Council of Justice has 44 members, 27 in Italy, 22 in France, 21 in Spain, 19 in Romania, 18 in Slovakia, 15 in Hungary and 8 in Montenegro³⁰

Proportion of Judicial and Non-Judicial Members

Judicial members of the Judicial Council in different European countries are either a majority (Slovenia, Spain, Italy), or half (eg Slovakia, Belgium), or less than half (Portugal, France).

In Lithuania, the Council of Justice consists only of judges. It consists of 20 members elected by the Conference of Judges and 3 ex-officio members (Presidents of the Supreme, Appellate and Administrative Courts).

C. Chairman of the Council.

In Slovenia, the Chairman of the Council is elected by the Council of Justice. In some countries, e.g. In Italy the Council is chaired by the President of the Republic. In Portugal, the High Council of Justice is chaired by the President of the Supreme Court. There is an interesting rule for the selection of the Chairman of the Council in Hungary, where the Chairman is elected by rotating the members of the Judiciary once every 6 months³¹. The rotation of judges and non-judges of the Board of Directors takes place also in Belgium³².

See. E.g. example of the Slovak Judicial Council, See. Ibid.

27 CEPEJ Report- Councils for the Judiciary in EU Countries, Prof. Wim Voermans and Dr Pim Albers, <https://www.vkksu.gov.ua/userfiles/doc/cepej/CEPEJ%20Report%20on%20Councils%20for%20the%20Judiciary%20in%20EU%20countries.pdf>

28 [https://fr.wikipedia.org/wiki/Conseil_sup%C3%A9rieur_de_la_magistrature_\(France\)](https://fr.wikipedia.org/wiki/Conseil_sup%C3%A9rieur_de_la_magistrature_(France))

29 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/hrj_csj_belgium.pdf

30 Inevitably, there are more members in Councils for the Judiciary where the prosecution's office is part of the judiciary.

31 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/obt_hungary.pdf

32 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/hrj_csj_belgium.pdf



D. Terms of office.

Different terms of office are envisaged: 6 years in Hungary and Romania , 5 years in Bulgaria, 4 in France,³³ Portugal has interesting rule, where the members of the Council are elected for the term of appointing authority (Parliament appoints for 4 years, President appoints for 5 years)³⁴.

E. Re-election

Reelection is limited in many countries. E.g. In Italy, in Bulgaria a council member is not eligible to be elected for two consecutive terms³⁵.

In Slovakia, Latvia they can be elected only twice in a row³⁶.

F. Rules for the election of judicial members.

In Hungary, members of the judiciary are elected by a conference of judges by secret ballot by a simple majority of votes³⁷.

In some countries (eg Hungary) quotas are set for judges of different courts.

Z. Functions

The following functions of Judicial Councils differ from each other in terms of comparative overview:

Careers of Judges

This includes the appointment - dismissal of judges (Bulgaria, Spain), promotion (Bulgaria, Spain), transfer (Bulgaria, Spain, Latvia).

In some countries the Judicial Council itself does not decide on the appointment of a judge, but rather makes a recommendation to the appointing authority (eg the President - Lithuania, Slovakia).

Training:

The functions of the Council of Justice in this regard are different. This could be e.g. approval of training guidelines (Belgium³⁸), administration of trainings (Lithuania), participation in the formation of the School of judges (Bulgaria, Slovakia), approval of the curriculum of the School of Judges (Romania, Slovakia), in some countries the Council of Justice has no such competence (Slovenia).

Judicial ethics

These can be: approving the rules of judicial ethics (Belgium, Hungary), consulting on judicial ethics (Slovenia).

Discipline

This can be the start of a disciplinary investigation (Slovenia), the substantive hearing of the case (Bulgaria, Romania, Italy), the appointment of members of disciplinary bodies (Lithuania, Slovakia).

33 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/bcc_vss_bulgaria.pdf

34 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/csm_portugal.pdf

35 https://it.wikipedia.org/wiki/Consiglio_superiore_della_magistratura

36 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/tp_latvia.pdf

37 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/obt_hungary.pdf

38 ENCJ webpage, https://www.ency.eu/images/stories/pdf/factsheets/hrj_csj_belgium.pdf



In some countries the Council of Justice has no disciplinary powers at all. In Latvia, for example, disciplinary cases are handled by a disciplinary committee and a disciplinary court³⁹.

■ **Appointment of Court Chairmen (Slovenia).**

■ **Receiving complaints about violations of the rights of judges (Slovenia).**

■ **Legislative activity:**

This could be the drafting of proposals for court-related bills (Belgium⁴⁰), submission of opinions (Latvia).

■ **Receiving complaints.**

This could include receiving complaints about court activities and investigating them (Belgium).

■ **Supervision of property declarations of judges (Hungary).**

■ **Judicial immunity:**

Issuance of a permit to detain a magistrate, search (Romania).

■ **Relations with other authorities (Lithuania)**

T. Appeal against decisions of the Council

In Spain the decisions of the Council are appealed to the Administrative Chamber of the Supreme Court.

In some countries the decisions of the Council are not subject to appeal (Belgium, Latvia, Slovakia).

In some countries only part of the decisions of the Council can be appealed, e.g. In Portugal and Romania, only HR related decisions are appealed.⁴¹. (Disciplinary decisions in Romania as well).

39 ENCJ webpage, https://www.encj.eu/images/stories/pdf/factsheets/tp_latvia.pdf

40 ENCJ webpage, https://www.encj.eu/images/stories/pdf/factsheets/hrj_csj_belgium.pdf

41 ENCJ webpage, https://www.encj.eu/images/stories/pdf/factsheets/csm_portugal.pdf



4. EXPERIENCE OF SEVERAL EUROPEAN COUNTRIES IN TERMS OF NON-JUDICIAL MEMBERSHIP

Detailed information on the procedure, powers and functions of nominating and electing European countries is provided in the Annex to the ENCJ 2015-2016 Report: *Participation of Non-Judicial Members in Judicial governance with Questionnaire and replies*⁴². For the purposes of this document, we shall review only those countries whose functions of the Council are similar to those of the current system in Georgia as well as in which are affected by Venice Commission Opinion no. 976/2019⁴³

Belgium

The Belgian Council makes decisions on the appointment of judges and other matters, although it does not have the power to discipline judges, it only has the power of inquiry. It has 22 judges and 22 non-judges equally.

Non-judicial members are elected by the Senate by a two-thirds majority. The 22 members are divided into 11 Dutch-speaking and 11 French-speaking members. Each group should have 4 members of the Bar Association with at least 10 years of experience, 3 professors of higher education institutions and 4 members with higher education and at least 10 years of experience in the relevant profession. Bar associations and universities can nominate candidates. At least 5 members must be nominated from each linguistic group, for a total of 10 members.

There is no functional difference between judge and non-judge members. The Board is chaired by a Bureau consisting of 2 judges and 2 non-judge members, each from a linguistic group, who chair the Board on a rotating basis for one year. Additionally, each of them chairs the Nomination and Appointment Committee or the Recommendation and Inquiry Committee. Bureau members work full time.

All bodies of the Council consist of an equal number of Judge and Non-Judge members. Decisions are usually made by a majority of the members present, although 10 of the 14 members are required to appoint a judge and decisions are made by a 2/3 majority.

Serbia

In Serbia, the High Council of Justice is composed of the Supreme Court Chair, the Justice Minister and the National Assembly (Parliament) Judiciary Committee chairman, as ex officio members, as well as 8 members elected by National Assembly, of which 6 are judges, and 2 the Practicing attorney and law professor with minimum 15 years professional experience. Non-judicial members receive additional remuneration for exercising the powers of a board member. Continuing to work in the profession Non-judicial members are not prohibited.

The Serbian Bar Association nominates a lawyer for the council⁴⁴. The Bar Association ensures the broad participation of lawyers in the nomination of a member of the Board. The mentioned procedure: Deadlines, nomination, election and nomination of the candidate are determined by the Act of the Bar Association. It is possible to nominate more than one candidate.

42 ENCJ webpage, https://www.ency.eu/images/stories/pdf/workinggroups/ency_pt_standards_vi_non_judicial_members_annex.pdf

43 Venice Commission and DHR Joint Urgent Joint Opinion No. 976/2019, 19.06.2020 The

44 representative of the Bar Association in France is elected by the President of the National Bar Association in Conseil supérieur de la magistrature.

The professor is elected as a member of the council by the deans of the law faculties of the country at a joint session.⁴⁵ The Joint Session of the Deans is convened and chaired by the Dean of the oldest Faculty of Law in the country, who also nominates the elected candidate to the National Assembly.

All members of the Board have equal authority, although the Chairman of the Council is the Chairman of the Supreme Court of Cassation. The judge also chairs the qualification commission.

Slovenia

The Council of Justice consists of 11 members, from which judges are 6 members, and 5 members are elected by the National Assembly from among the professors, lawyers and other jurists nominated by the President of the country. These lawyers can be notaries as well as business lawyers.

The President makes his submission based on applications he receives from law schools, the Slovenian Bar Association, the Notary Association and the Association of Business Lawyers. Non-judicial members are not prohibited from working in the profession.

The Board elects the Chairman from among its members. Non-judicial members may be elected as chairpersons, and in practice, the board has twice been chaired by a law professor.

The council makes decisions by a majority of votes, although important decisions are made by 2/3, namely: the nomination of a person to the National Assembly and the reappointment of an already elected judge to another position.

45 Croatia has a similar rule for electing an academy representative to the Council, where each law faculty is represented by 4 full professors, who elect 2 professors to the Council of Justice.

5. PROBLEMS RELATED TO THE SELECTION AND FUNCTIONING OF THE HIGH COUNCIL OF JUSTICE IN GEORGIA

Although the majority of members in the High Council of Justice in 2007-2012 were judges, until 2012 the High Council of Justice in Georgia was perceived not as a guarantor of the independence of the judiciary, but as a mechanism for pressuring and intimidating judges. The Minister of Justice, who was removed from the membership of High Council of Justice in 2007, was informally involved in the management of the judiciary, with all key decisions being agreed with the Minister of Justice⁴⁶. It was through the High Council of Justice that politically disobedient judges were punished and obedient judges were encouraged. Both the High Council of Justice and key administrative positions were concentrated in the hands of influential groups of judges through which political control over the court was exercised.⁴⁷

As a result of the 2013 reform, it is true that judges were given the opportunity to elect members of the High Council of Justice by free and secret ballot, but for a number of reasons⁴⁸, they re-elected members of the old elite (clan) as members of the council. In 2013-15, there was some controversy between judges and non-judges of the High Council of Justice. Often decisions could not be made due to a lack of necessary votes.

Since 2015, the High Council of judges and non members' positions got closer, behind which stands the alleged political deal that took place between Georgian Dream and the influential group of judges⁴⁹.

In 2013-2021 HCOJ turned from repressive mechanism to corporate defense mechanism in the hands of an influential group, the so-called clan. This is also demonstrated by disciplinary statistics. If in 2004-2012, 209 judges were disciplined, 39 of whom were dismissed, after 2012 only 10 judges were disciplined, with light disciplinary sanctions imposed on them.

The group of influential judges won all elections to the Conference of Judges (2013, 2017, 2021), but if there was still formal competition between the candidates by before, this competition disappeared in 2021: by an absolute majority of votes four candidates who had no competitors were elected to the four vacant seats⁵⁰.

It is worth mentioning the presence of court chairmen in the High Council of Justice. While the 2013 Legislative Amendments removed the Court Chairmen from the High Council of Justice, the 2017 Legislative

46 See. Tsikarishvili K. Clan governance in court since 2007, <https://dfwatch.net/%E1%83%99%E1%83%9A%E1%83%90%E1%83%9C%E1%83%A3%E1%83%A0%E1%83%98-%E1%83%9B%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%95%E1%83%94%E1%83%9A%E1%83%9D%E1%83%91%E1%83%90-%E1%83%A1%E1%83%90%E1%83%A1%E1%83%90-53161>

47 See. Tsikarishvili K. Clan governance in judiciary since 2007, <https://dfwatch.net/%E1%83%99%E1%83%9A%E1%83%90%E1%83%9C%E1%83%A3%E1%83%A0%E1%83%98-%E1%83%9B%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%95%E1%83%94%E1%83%9A%E1%83%9D%E1%83%91%E1%83%90-%E1%83%A1%E1%83%90%E1%83%A1%E1%83%90-53161>

48 among them by fear of losing the job, as well as by carrier aspirations: on the one hand, before 2012 the judges perceived the HCOJ as repressive body, therefore, after the change of government they elected the most discredited colleagues, who would not have moral right to punish their colleagues for the past misdeeds. On the other hand, the members of the clan were promising to the judges the full immunity, lifetime appointment and other privileges. (as opposed to the civil society, political parties and even the government who were threatening judges with liability, dismissal, revelation of their past misconduct and etc). see supra note.

49 See. Tsikarishvili K. Clan Based Governance in court since 2007, <https://dfwatch.net/%E1%83%99%E1%83%9A%E1%83%90%E1%83%9C%E1%83%A3%E1%83%A0%E1%83%98-%E1%83%9B%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%95%E1%83%94%E1%83%9A%E1%83%9D%E1%83%91%E1%83%90-%E1%83%A1%E1%83%90%E1%83%A1%E1%83%90-53161>

50 <https://1tv.ge/news/mosamartleta-konferenciam-iusticiis-umaghlesi-sabchos-otkhi-mosamartle-wevri-airchia/>

Amendments again reintroduced them into the HCOJ, signaling once again the deal between the ruling party and the judges' clan⁵¹.

Until 2013, there were 6 non-judicial members of the Council of Justice in Georgia, including 3 members elected by the Parliament, and the Chairman of the Parliamentary Committee on Legal Affairs was ex officio. 2 members of the Council were represented by the President of Georgia.⁵² The amendments in 2013⁵³ replaced parliamentarians with professors, lawyers, and representatives of non-governmental organizations involved in advocacy in court and elected by Parliament. The law initially provided for the election of six members by parliament, but the law was soon brought into line with the constitution, which gave the president of Georgia the power to appoint one member to the council, thus parliament retaining a quota of five members.

The law allowed each organization to nominate no more than 3 candidates, and members had to be elected by 2/3 of the vote, although if candidates could not get 2/3 of the vote, it was possible to nominate 4 of the 5 members nominated by Parliament by a simple majority⁵⁴. Venice Commission No. Opinion 701/2012 contained a recommendation that the non-judicial members be elected by a 2/3 majority of the parliament, although an anti-deadlock mechanism or other proportionate method should have been proposed to ensure that the opposition can influence the election of council members. At the same time, the anti-deadlock mechanism should not have been a means of circumventing an attempt to reach an agreement based on the participation of 2/3 of the votes.⁵⁵

It seems that the Parliament did not accept this recommendation of the Venice Commission and considered it desirable to move from the principle of qualified majority only to the principle of simple majority in order to exclude a deadlock. As a result, the ruling party appointed 4 non-judicial members without the consent of the opposition, and 1 member was vacant for 4 years, until the law was amended again in 2017⁵⁶ and the quota for electing all non-judicial members fell from 2/3 to a simple majority, as the result of which the ruling party fully staffed HCOJ, against the opinion of the Venice Commission without the involvement of the parties.

Only in 2018, in connection with the adoption of the new version of the Constitution, the wording of Article 47 of the Law was changed again and a 3/5 majority was determined for the election of non-judicial members, which is still less than the Venice No. 2/3 provided in Opinion 701/2012. However, compared to the previous regulation, it is a positive initiative to get opposition involved in the process.

1.1. Criticism of the selection of non-judicial members

Numerous critical statements have been made in civil society and professional circles regarding the procedure for electing non-judicial members and their independence. This is significantly due to the non-compliance with the recommendation of the Venice Commission in 2013, which resulted in non-judicial members being appointed to the ruling power without the consent of the opposition. It is true that the Organic Law on Common Courts provided for their submission by non-political entities, but the independence of the submitting entities from the government raised questions. Consider the informal deal that exists between the ruling clan in court and the ruling party, which is evident in many decisions of the Council of Justice.⁵⁷

51 See. Report of the Young Lawyers Association, Justice Reform in Georgia in 2013-2021, <https://gyla.ge/files/news/%E1%83%A4%E1%83%9D%E1%83%9C%E1%83%93%E1%83%98/2021/GetFileAttachment-4.pdf>

52 Organic Law on Common Courts, Art. 47.4

53 Organic Law of May 1, 2013 № 5 80

54 Amendment to the Law 01.05.2013 Par. 4

55 Venice Commission No. 701/2012 Opinion, 11.03.2013 Par. 52-53

56 Amendment to the Law 13.02.2017, Par. 24.b)

57 This is not the subject of this chapter and will not be discussed in detail.



Lack of independence

Back in 2015, when the votes of non-judicial members: Eva Gotsiridze, Vakhtang Tordia and Kakha Sofromadze were decisive, they issued a statement explaining the reason for their decision to appoint Levan Murusidze, one of the subjects of sharp criticism of the European Court. One of the arguments was a certain deal between judge and non-judge members, which resulted in the nomination of candidates supported by both judge members and non-judge members.⁵⁸ Non-judicial members acknowledged that they made decisions not on the basis of a particular candidate's good faith and competence, but on the basis of other, non-statutory considerations. According to a document drafted by the Coalition for Dependent and Transparent Judiciary (Judicial Reform and Perspectives), the statement confirmed the suspicions that the council was not guided by the criteria set by law in appointing judges, but decided on the basis of secret deals between council members.⁵⁹

The Transparency International and GYLA report, published in 2017, negatively assessed that members of the judiciary, who generally took a uniform position on all issues, always managed to gain the support of the required number of non-judges, with dissenting opinions from only the same non-judges and, in some cases, the Council Chair.⁶⁰

According to the authors of the report, the majority of the newly elected members failed to show proper steadiness and individualism.⁶¹ The same view is expressed in the above-mentioned document, Judicial System Reforms and Perspectives:: The pluralism achieved since 2015 has gradually changed and the positions of individual non-judicial members have increasingly coincided with the positions of judge members. The document suspects that decisions were made by prior agreement, as they were preceded by closed-door consultations with board members.⁶² It is therefore probable that part of the non-judicial members participated in such closed consultations.

The ombudsman outlined the apparent agreement of one non-judge member with a homogeneous group of judge members in a special report, stating, "We can assume that 10 members of the High Council of Justice (including all judge members of the Supreme Court) acted as one group in the process of selecting Supreme Court judges⁶³."

Part of the non-judicial members also agreed with the homogeneous group of judge members when, in December 2018, the council sent 10-member Supreme Court judges to parliament without any competition or public hearing, which was deemed unconstitutional by the ombudsman and non-governmental organizations. It is clear that even in this case, part of the non-judicial members acted in agreement with the clan.

Selection through a non-transparent process and failure of verification of minimum qualification requirements.

The procedure for selecting non-judicial members of HCOJ during the last 9 years is also subject to criticism. On June 21, 2017, the impossibility to ask questions to non-judicial members elected by Parliament was assessed as a closed process, while 5 minute oral introductions made by these candidates was assessed as a formal process.⁶⁴ The report also criticizes Shota Kadagidze, a person elected in May 2017, about whom

58 Statement of non-judicial members of the High Council of Justice. 25.12.2015

59 "Judicial System Reforms and Perspectives" 2017. p. 15, http://www.coalition.ge/index.php?article_id=150&clang=0

60 Council of Justice Monitoring Report # 6, p.6, <http://ewmi-prolog.org/ka/publications/613-iusticiis-umaghlesi-sabtshos-monitoringis>

61 Ibid. P. 6

62 Judicial Reforms and perspectives 2017. p. 12, http://www.coalition.ge/index.php?article_id=150&clang=0

63 საქართველოს სახალხო დამცველი, საქართველოს უზენაესი სასამართლოს მოსამართლეობის კანდიდატების იუსტიციის უმაღლესი საბჭოს მიერ შერჩევის მონიტორინგის ანგარიში, 2019 წ

64 Ibid., P.11; Also the appeal of the Coalition for Independent and Transparent Judiciary to the renewed composition of the High Council of Justice - 3.07.2017 03 July 2017

no public discussion was held and MPs did not ask questions, and the public was not informed about his background⁶⁵

It is clear that the degree of transparency in the election of non-judicial members has not improved since 2013, when the process was also assessed negatively. In 2013, interested organizations requested Parliament to hold a public interview with the candidates. However, the interview was held behind closed doors and the public was not allowed to follow the process.⁶⁶

In many cases, the verification of the required qualification requirements established by law is not performed by the Parliament, or is performed improperly.

On May 14, 2019, the Coalition for Independent and Transparent Judiciary addressed the Parliament of Georgia with a request to study the legality of the election of Zaza Kharebava, a non-judicial member of the High Council of Justice. According to the coalition, the requirements of the law were violated during the election of Zaza Kharebava, as his candidacy was submitted to the parliament by an unauthorized entity. According to the law, a non-profit (non-commercial) legal entity has the right to nominate a candidate for membership in the High Council of Justice of Georgia, if during the last 2 years before the announcement of the competition one of its activities was to exercise representation in court proceedings. Zaza Kharebava's nominating organization does not meet this requirement⁶⁷.

The Parliament of Georgia has not yet considered this request of the coalition.

According to the Organic Law on Common Courts, a recognized specialist in the field of law could be elected as a member of the Council of Justice. It is unclear in which field of law the recognized specialists are e.g. Shota Kadagidze, Zaza Kharebava, or Levan Gzirishvili who were elected as members of the High Council of Justice in 2017. At the same time, well-known professors of various fields of law (eg Irakli Dvalidze, Shalva Kurdadze, Paata Turava) took part in the competition for membership in the High Council of Justice in 2017,⁶⁸ but could not get the support of the Parliament.

In July 2020, the President of Georgia appointed Tamar Gvamichava, a member of the High Council of Justice, through an opaque procedure. Although 14 candidates participated in the announced competition, neither the names of the candidates nor their biographies were known to the public. The interview with them was also closed.

Lack of influence on important decisions

The next problem that has emerged is that a homogeneous group of judges has been able to decide without the participation of non-judicial members and, in some cases, without prior notice. For example:

- i. Independent Inspector can be appointed by simple majority of votes but dismissed by $\frac{2}{3}$ of votes of members of HCOJ. This allows judge members to appoint inspector acceptable to them to the position and release, with the support of one non-judicial member, as soon as the inspector is out of their control.⁶⁹
- ii. Gocha Mamulashvili, a non-judge member, while discussing the issue of the court presidents, noted that in four years it has never happened to ask for an opinion from non-judicial members, HCOJ does not need $\frac{2}{3}$ of members to elect a chairman and the judge member.⁷⁰

65 *ibid.* P. 11

66 "Monitoring Report of the High Council of Justice 2012-2014" GYLA, Transparency International-Georgia. 2015

67 GDI webpage, <https://gdi.ge/ge/news/zazakharebava.page>

68 Source - <https://ipress.ge/new/iustitsiis-umaghlesi-sabtch-14/>

69 GYLA and Transparency International Georgia, High Council of Justice Monitoring Report # 7, 2019, p. 10.

70 Monitoring Report of the High Council of Justice # 6, p. 54, available at <http://ewmi-prolog.org/ka/publications/613-iusticiis-umaghlesi-sabtshos-monitoringis>



- iii. Non-judicial members of the council, Vakhtang Mchedlishvili and Nazi Janezashvili, have repeatedly stated that information on issues to be discussed at the Monday session was uploaded to the internal system on Fridays or weekends, leaving them with unreasonably little time to prepare. There were also cases when non-judicial members did not have information before the hearing about the candidates whose appointment to the chairmanship of the court was to be decided by the Council; Non-judge members were not informed about the justification of the drafts that were submitted to the council,⁷¹

Despite the fact that the law provides for a 2/3 majority for taking of decisions, which means that members of the judiciary, who are basically homogeneous unity, need 1 vote, making of such decision is usually not a problem. (See para. “Lack of Independence” above.). Notwithstanding the above, the law provides for many important decisions for the justice system that do not require the vote of non-judicial members at all. This in itself diminishes the idea of including non-judicial members in the council and makes them significantly dysfunctional. The above information asymmetry between judge and non-judge members can also be caused by this.

It has already been mentioned above that an important institution for the accountability of judges - the appointment of an independent inspector and this can be done only by judicial members of the Council. As a result, non-judicial members of the Council are excluded from the important stage of proper functioning of another institution for judicial accountability - the Independent Inspector. Below are some important and sometimes critical decisions for the independence of individual judges that often do not require the consent of a homogeneous group of judges, not even the consent of 1 non-judge:

- a. appointment of district and city court chairpersons, as well as temporary appointment of a chairperson; (articles 32.1 and 32.3.)
- b. Appointment of the Chairperson and Deputy Chairperson of the Courts of Appeal, or the temporary assignment of their powers. (articles. 23.6 and 23.7.)
- c. Appointment of the presidents of chambers and investigation board of the Court of Appeal. articles. 23.5
- d. Establish narrow specializations and judicial panels in district and city courts, approve their composition, and appoint panel chairpersons. art. 30
- e. Nominations for the position of Chief Justice of the Supreme Court. art. 36
- f. Promotion of a Judge in the Court of Appeal Art. 41.
- g. Election of the Chairman of the Council of Justice. Mukh. 47.2.¹
- h. Avoiding the judge’s evaluating member as well as the board member in other cases. Mukh. 36.4⁵ and 35.5.
- i. Election of a majority of the members of the Independent Board of the High School of Justice. art. 66³.4

As a result, the exercise of the powers of non-judicial members in accordance with the principle of participation in the European model of the Council is hampered by the opaque procedure of electing these members, lack of independence of some members and their operation with a homogeneous panel of judges, sufficiency of judicial votes for many decisions. In the next chapter we will discuss the possibilities of solving these issues.

71 Ibid p. 24

CONCLUSION

The present study showed the similarities and differences that characterize the Georgian system of judicial administration in comparison with European systems. As the study found, the Justice Council model is an effective mechanism to ensure the external independence of the judiciary, but at the same time contains a number of risks that need to be considered when setting up national systems. When selecting a court administration model, it is necessary to take into account the local context, existing human resources and historical experience. It is unfortunate that these factors were not or could not be taken into account during the implementation of the 4 waves of justice reform in Georgia. Based on this research, in order to change the system, the Group of Independent Lawyers developed recommendations, which are presented in a separate document.

