ANOTHER ATTEMPT TO REFORM THE JUDICIARY

Analysis of the Parliamentary Working Group and the Draft Law

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Another Attempt to Reform the Judiciary - Analysis of the Parliamentary Working Group and the Draft Law

Social Justice Center

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Introduction

On June 17 of this year, European Commission issued 12 recommendations for Georgia, fulfillment of which is mandatory for acquiring the EU membership candidate status. 1 Among the recommendations is the one concerning judicial reforms, which includes the following directions:

- Development of a transparent and effective strategy and action plan for judicial reforms based on broad public and political consensus;
- Ensuring independence, accountability, and impartiality of all important layers of the judicial system;
- Distribution of power between different branches and ensuring adequate functioning of judicial and investigative institutions;
- Elimination of problems identified in the process of judicial appointments (especially nomination of candidates for the Supreme Court) in the previous years;
- Thorough reform of the High Council of Justice and appointment of 5 non-judge members to the Council;

It was indicated in the document that the changes need to comply with the best practices in Europe and the opinions of the Venice Commission.

As for other issues, in order to implement the recommendation regarding the judicial system, on August 4, the Parliament Legal Issues Committee created a Working Group of Judicial Reforms. The group was composed of MPs, representatives of relevant state agencies, professional groups, and civil society organizations (CSOs), and its goal was to prepare the judicial reform strategy and action plan, as well as the necessary draft bills.

In this manner, a formal mechanism for working on the systemic reform of the judicial system was created in the legislative body. However, the lack of representation of CSOs in the working group, disregard of their and other independent actors' recommendations, the superficial reform strategy, and the fragmented draft legislative amendments prepared on its basis show once again that the parliamentary majority does not have the political will for the systemic reform of the judicial system. Instead, the conception of the reform developed by the Georgian Dream once again offers only façade changes and represents another missed opportunity to devise appropriate legislative guarantees for the independent and transparent judicial system.

The composition of the working group and the quality of its work are analyzed in the present document; The document also discusses the judicial reform strategy developed by the working group and the package of legislative amendments prepared on its basis.

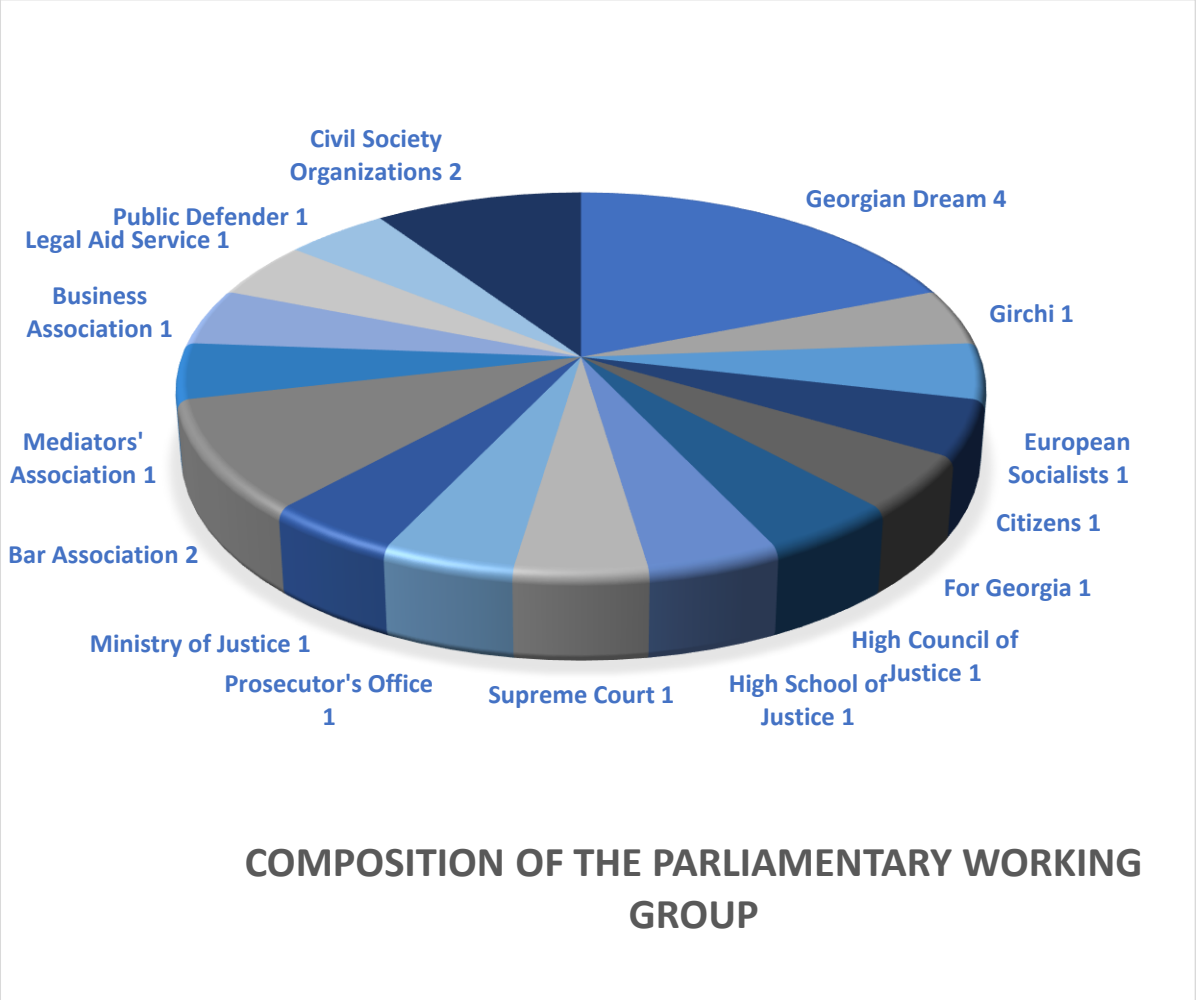
Composition of the Working Group

The Legal Issues Committee determined the concrete state agencies and organizations that would become members of the working group. Working group members were allowed to express their positions during the meetings and present their arguments/recommendations to the working group in writing. The Legal Issues Committee granted the working group an advisory role.

In total, the group was composed of 21 members, of which 8 members represented the Parliament (4 members - from the parliamentary majority, 4 - from the following opposition parties: Girchi, European Socialists, Citizens, For Georgia); One member for each represented the Ministry of

[1] See recommendations: https://bit.ly/3ZpTQvf

Justice, the Prosecutor's Office, the Supreme Court, the High Council of Justice and the High School of Justice, as well as Business and Mediators' Associations, the Legal Aid Service and the Public Defender's Office; Bar Association and CSOs each had two members in the working group (CSOs in the working group were represented by Social Justice Center and the Georgian Young Lawyers Association).



The composition of the working group in this manner was problematic as limiting the representation of CSOs to only two members did not ensure adequate representation and public involvement in the working process. While CSOs have diverse profiles, and different, unique expertise in the area of judicial reforms, wider involvement of CSOs in the working group should have been in the interests of the Legal Issues Committee, especially since the group had a consultative function and CSOs could not have directly influenced the decision-making process.

The mandatory criterion according to which only those CSOs that were members of the Eastern Partnership civic platform could become members of the working group, was ambiguous and unjustified. Due to this, organizations founded in recent years, or that do not have a formal organizational form, though have accumulated significant knowledge and experience in the field of judicial reforms over the years (for example, Georgian Court Watch, Group of Independent Lawyers) were automatically restricted from joining the working group.

The only argument for such a composition of the working group was flexibility, however, given the importance of the issue and its complex nature, it would have been reasonable to have a more

diverse representation of CSOs. It should also be taken into account that the involvement of civil society in working groups created on some of the other issues under the 12-point recommendation of the European Commission was not so limited, and a wider circle of organizations was given the opportunity to work on various issues. [2]

Performance of the Working Group

Between August 5 and November 4 (this is when the working group presented the results of its work), the working group of judicial reforms held a total of 5 meetings. In general, it should be noted that there was no unified, predetermined schedule of the work process, nor was the agenda of specific meetings agreed upon with the group members in advance. The members of the group were not informed about the specific issues to be discussed within a reasonable time prior to the meeting. As for the publicity of the meetings, despite numerous calls to that, the live broadcasting of the working group meetings was not ensured, and audio records of the meetings were posted on the Parliament website only later. [3]

Most of the recommendations voiced by representatives of CSOs and the Public Defender at group meetings were either only formally considered or entirely rejected by the ruling majority. For example, CSOs discussed the need for an in-depth evaluation of the existing problems in the judicial system, so that the reform strategy could be based on such an evaluation; CSOs also focused on informal influences and corporatism in the judiciary, concentration of power in the High Council of Justice and the need to solve these problems. Unfortunately, no thorough and in-depth discussion of the said points of CSOs and the Public Defender was undertaken within the framework of the working group.

It should be noted that CSOs participated only in the first two meetings of the working group. On August 18 of the previous year, Georgian Dream rejected the membership of the International Society for Fair Elections and Democracy (ISFED) in a parallel working group created on election issues. The reason for barring ISFED from participating in the group was the organization's civic activism and critical positioning, which was a dangerous precedent of limiting the freedom of expression of a CSO. In the same period, statements were made about the organization as if it was acting with a political agenda and partisan bias. In response to this, both CSOs in the Working Group of Judicial Reforms temporarily suspended their participation in the group's meetings until ISFED was given the opportunity to engage in the working process on electoral issues. [4] Since the ruling majority did not change the decision, GYLA and Social Justice Center also refused to participate in the remaining three meetings of the Working Group of Judicial Reforms.

As for the meetings themselves and the issues discussed there, the purpose of the present document is not a comprehensive and in-depth analysis of the positions taken by the representatives of various agencies or politicians at each meeting. The document only broadly summarizes the issues discussed at each meeting of the working group:

1st meeting (08.05.2022) - the first meeting was dedicated to defining the challenges and issues to be addressed in the justice system by the members of the group. Also, the members of the group agreed

[2] For instance, three CSOs were engaged in the working group under Human Rights and Civic Integration Committee created for implementation of the 11th recommendation of the European Commission.

[3] Minutes of Working Group Meetings are available at https://bit.ly/3medUCk

[4] See statements of CSOs engaged with various working groups in the Parliament at https://bit.ly/3majNR4

that prior to the next meeting, they would share their views on the challenges and problems in the justice system with the office of the Legal Issues Committee in writing. The subject of discussion at the meeting was the evaluation of the justice system. In particular, the CSOs voiced the demand that a parliamentary commission is created for an in-depth study of the problems existing on the legal and practical levels in the judicial system. They claimed that the work on a new strategy of judicial reforms must resume based on the reality described by the commission and the problems/findings identified by it. Unfortunately, the chair of the working group refused to discuss the said initiative with the argument that the decision on the creation of a parliamentary commission is taken by the parliament during a plenary session. However, by the same logic, the working group should not have discussed any reform, because the decision on the legislative changes, in the end, is also made at the plenary session of the Parliament.

2nd meeting (15.08.2022) - the main subject of discussion at the second meeting of the working group was the composition of the High Council of Justice. Initially, the representative of the High School of Justice put forward the initiative to foresee the passing of the judges' qualification exam as a mandatory professional criterion for the non-judge member candidates of the High Council of Justice. The working group did not agree with this initiative. At the meeting, CSOs and the representative of the Public Defender's Office voiced the initiative to limit the possibility of electing one judge for two consecutive terms in order to deconcentrate power in the High Council of Justice; also to restrict judge members of the High Council of Justice from simultaneously holding other administrative positions (Chair of the Court/Chamber/Panel or their deputies). None of these initiatives were shared by the ruling majority. Neither was the initiative of CSOs and Public Defender's representative to revoke changes adopted in December of the previous year allowing the High Council of Justice to decide on disciplining judges with a simple instead of a two-thirds majority shared. At the meeting, the ruling majority and the representatives of the judicial system voiced an initiative to improve the procedures for electing judge and non-judge members of the High Council of Justice.

3rd meeting (19.09.2022) - The main subject of discussion at the third meeting was again the composition of the High Council of Justice. Namely, the meeting discussed the possibility of automatic extension of non-judge members' authority, if the Parliament could not appoint new members after the expiration of their membership term; also, the possibility of revising the number of judge and non-judge members of the Council and appointing judge members based on the principle of rotation. None of these initiatives were supported by the ruling majority. The representative of the Public Defender's Office voiced the initiative that the Conference of Judges elect judge members of the Council based on the principle of one vote, namely, for each judge to cast only one vote at the conference, regardless of the number of vacant positions in the Council. The representative of the Public Defender also voiced the initiative that the High Council of Justice make decisions on important issues with a double two-thirds majority, that is, with the support of two-thirds of judge and non-judge members of the Council. This has been demanded by CSOs for a while now. Unfortunately, none of these initiatives were shared by the ruling majority. At the meeting, representatives of professional groups also voiced initiatives to expand the jurisdiction of jury trials, to more actively introduce the mechanism of mediation, and solve the problem of delays in the administration of justice.

4th meeting (29.09.2022) - The subject of discussion at the fourth meeting of the working group was the election of an independent inspector by the High Council of Justice with a double two-thirds majority, changing the rules on the composition of the High School of Justice to distance it more from the High Council of Justice; At this meeting, the opposition parties once again voiced the need

to evaluate the judicial system. Also, the subject of discussion was the exclusion of appeal courts' chairs from the composition of the Supreme Court Plenum. The ruling majority did not share these proposals. At the meeting, the issues of case distribution and equal workload of judges were also discussed. The Bar Association Chair drew attention to the need for the courts' communication strategy on high-profile cases.

5th meeting (04.11.2022) - at the fifth and final meeting, the ruling majority presented the summary document of the working group - "Judicial Reform Strategy and Action Plan". At the meeting, a discussion was held on the procedure for appointing judge and non-judge members of the High Council of Justice; on improving the publicity of court decisions and the procedures for appointing judges of general courts.

Judicial Reform Strategy

The document prepared by the Georgian Dream within the framework of the working group - Strategy and Action Plan of Judicial Reforms[5] ignores the fundamental problems in the judicial system. In particular, the strategy does not say anything about the problem of corporatism and informal influences, the deconcentration of the power in the High Council of Justice, and the strengthening of the independence of individual judges. [6]

In the document, future directions of the reform are issues related to the administration of justice. In particular, the issues of court workload, increase in the number of judges and electronic proceedings, also procedural improvements related to various significant human resources/competition issues. The need to increase the accessibility of judicial acts is also discussed. The document also stresses strengthening judges' social protection, adapting the environment for people with disabilities, and improving the services of interpreters. The resolution of the mentioned issues deserves a positive assessment, however, it should be emphasized that these changes do not in any way address the fundamental problems in the judicial system.

It is also significant that content-wise the document cannot be considered a strategy because it does not include a real, in-depth assessment of the judicial system. The document superficially and in a fragmented manner offers a retrospective of the reforms carried out in the judicial system since 2012, but it is not clearly defined - what the current problems are in the system. The document does not have specific objectives and only generally states that the goal of the strategy is "further improvement" of the judicial system and the fulfillment of the recommendation issued by the European Commission. Although the document is called "Strategy and Action Plan", there are no specific activities for each direction of the reform defined in it, deadlines for their implementation, responsible agencies, and necessary human/financial resources.

It should be noted that the development of another reform strategy on its own is not sufficient if the government does not show political readiness and will that this strategy will be effectively implemented in the future. Unfortunately, the experience shows that the ruling majority and the judiciary had not been fully faithful to the strategy they had devised themselves. Monitoring of the implementation process of the Judicial System Strategy for 2017-2021 showed that most of the activities foreseen in the action plan for 2017-2018 had not been implemented or had been

[5] The document is available at https://bit.ly/3Z87S4M

[6] See the statement of October 7, 2022 from the Coalition for Independent and Transparent Judiciary at https://bit.ly/3Y7hBqE

implemented only partially.[7] Also, the Action Plan of the High Council of Justice for 2019-2020 has not been approved yet, which once again illustrates how much priority the relevant agencies attach to the implementation of the strategy and the reforms outlined in it.

The Draft Law on Amendments to the Organic Law of Georgia "On Common Courts"

As it was mentioned above, based on the judicial reform strategy, MPs of the "Georgian Dream" worked on the draft amendments to the Organic Law of Georgia "On Common Courts".[8] The draft law, yet again, proposes fragmented and superficial changes, the result of which will not be real reform but only slight improvements in certain aspects of the legislation. It doesn't consider fundamental issues of the judiciary, the Public Defender, CSOs, and international partners have been pointing out for years.

Problems that are not addressed by the draft law

The concentration of power in the High Council of Justice - the draft law does not envisage a systemic or even minimal reform of the High Council of Justice. In particular, the excess power in the Council remains unchanged and the draft law does not incorporate its decentralization. For years, civic organizations and the Public Defender have pointed out the problems in this direction and have noted that it is necessary to delegate some competencies from the High Council of Justice. For example, the election of a court chairperson by the judges of a particular court; Granting real functional independence from the Council to the High School of Justice etc.[9]

Corporate interests in decision-making by the Council - the draft law does not say anything about the rule for decision-making by the High Council of Justice. In conditions where the risks of corporatism and clan-based rule[10] in the judicial system are high, civil organizations have been making it one of their fundamental demands for years that the Council should make decisions on important issues with a double 2/3 of judge and non-judge members. In this way, the risks of making decisions with internal corporate interests would be reduced, although representatives of both the judiciary and the ruling party strongly oppose this recommendation.

The undemocratic rule of staffing the Council - the draft law also does not provide for more democratic and fair rules of staffing the Council. In particular, over the years, civil organizations have identified a problem that judges in the High Council of Justice are usually chosen from a narrow group,[11] and fair regional and gender representation in the Council is not sufficiently ensured. Most importantly, the 4 judge members of the Council can simultaneously hold other

[7] Social Justice Center, IDFI, Second Shadow Report on Implementation of the Judicial Strategy and the Action Plan 2020 available at https://bit.ly/3TKRCog.

[8] The Draft Amendments are available at: https://bit.ly/3Y0AX0Q

[9] Social Justice Center, Georgian Young Lawyers' Association, Human Rights Council Universal Periodic Review, 2020, Joint Submission on Institutional Challenges in Judiciary and Law Enforcement System; Critical Issues of Criminal Justice, available at: https://bit.ly/41vdS9q

[10] Ana Papuashvili, The "European Model" of Judicial Institutional Arrangement: Salvation or Obstacle to Successful Judicial Reform, 2021, available at: https://bit.ly/3md3cMz

[11] See joint statement of civil organizations on the appointment of council members in 2021, available at: https://bit.ly/3SJl2D3

administrative positions (chairperson of the court, chairperson of the panel/chamber), which further contributes to the concentration of power in the hands of a narrow group of judges.[12]

Staffing of the Supreme Court based on political interests - according to the current legislation, the judges of the Supreme Court are appointed for life by the parliament with a simple majority of the full composition. This kind of legislative arrangement contributes to the appointment of judges in the Supreme Court by party interests and to the strengthening of political influences on the justice system as a whole. The processes of appointing judges guided by this logic have earned heavy criticism from local and international organizations,[13] and the question of the legitimacy of the current judges of the Supreme Court has been put on the agenda. The draft law does not envisage the issue of re-legitimization for already appointed judges nor changes in the procedure for appointing judges in the future, including the procedure for decision-making by the Parliament with a higher quorum.

Insufficient independence of the High School of Justice - the High School of Justice should ensure the qualification and integrity of personnel of the judicial system. In the existing institutional arrangement, the school does not have enough functional and institutional independence, and its activity largely depends on the High Council of Justice.[14] Against this background, it is natural that there is a constant shortage of qualified personnel in the common courts, which leads to overwork of judges and delays in the review of cases. The draft law developed by the ruling party does not foresee any changes in this direction either.

Nontransparent system of disciplining judges - there are a number of problems in the judicial disciplinary liability system, which have been aggravated by the legislative changes implemented at the end of December 2021. In particular, one of the most important links in the disciplinary process - the Independent Inspector - is not really independent, because he/she is elected to the position by the High Council of Justice by a simple majority; Moreover, the Council can disagree with the decisions/recommendations made by the inspector and stop the disciplinary proceedings on the case, or, conversely, against the position of the inspector, continue to discipline the judge. The types of disciplinary offenses are not clearly defined in the legislation, and the practice is inconsistent and nontransparent.[15] The draft law does not aim to solve the mentioned problems either.

Vulnerability of individual judges to internal influences - Several factors determine the vulnerability of judges in the system. Disciplinary system is one of them and it has already been mentioned. An important lever of influence on the judge is the involuntary secondment to another court. In this case, the changes adopted at the end of December 2021 substantially worsened the rules of judges' secondments - the term of involuntary secondments was increased to 4 years; The Council's obligation to select judges from the geographically closest courts for the assignment was

[12] Social Justice Center, Georgian Young Lawyers' Association, Human Rights Council Universal Periodic Review, 2020, Joint Submission on Institutional Challenges in Judiciary and Law Enforcement System; Critical Issues of Criminal Justice. available at: https://bit.ly/41vdS9q

[13] See Coalition for an Independent and Transparent Judiciary, December 2, 2021. Available at: https://bit.ly/3IOmGyF

[14] Social Justice Center, Georgian Young Lawyers' Association, Human Rights Council Universal Periodic Review, 2020, Joint Submission on Institutional Challenges in Judiciary and Law Enforcement System; Critical Issues of Criminal Justice. available at: https://bit.ly/41vdS9q

[15] Social Justice Center, The Judicial Disciplinary Liability System (2020-2021 Evaluation Report), available at: https://bit.ly/3IZLiFY

abolished; Also, the limitation of instance was removed and it became possible to assign the judge of the upper instance to the court of the lower instance involuntarily; The rule of selecting the visiting judge by random vote was terminated as well.[16] Allo

cation of cases continues to be a mechanism for influencing individual judges, and, unfortunately, the mentioned problem could not be eliminated even by the introduction of the electronic system of random allocation of cases. In the process of distribution of cases, excess powers are retained by the chairpersons of the courts and the High Council of Justice.[17] Unfortunately, the draft law does not address this problem either.

What changes does the draft law envisage?

Publicity and accessibility of court decisions - the draft law establishes the procedure for issuing the full or partially depersonalized text of the court decision/act adopted at an open court session as public information (chapter I[1] of the draft law). The objective of this amendment is to bring the legislation into compliance with the standards established by the decision of the Constitutional Court of Georgia on June 7, 2019.[18] In the mentioned case, the Constitutional Court established the presumption of availability of the decisions made at the open court session in the form of public information.[19]

Unfortunately, the amendments proposed by the draft law do not fully take into account the standards of publishing decisions, as established by the Constitutional Court. At the same time, the draft law establishes procedures that, on the one hand, delay access to the decisions made by the common courts, and on the other hand, raise the risks of overloading the courts. More specifically, the draft law does not recognize the general balance established by the Constitutional Court in favor of access to judicial acts. None of its provisions establishes a general rule of openness of the judicial act. As a result, the court will have to judge individually on every decision, what part of it should be made public, or whether it should be made public or not at all if the subject of any personal information contained in the decision does not grant preliminary consent to the disclosure of their data in the form of public information.

The dates of the availability of judicial acts are also problematic. Paragraph 8 of Article 13[4] of the draft law postpones the availability of decisions/acts issued before May 1, 2023, as public information, until May 1, 2025. Accordingly, interested parties will be granted to request the access to the judicial acts issued before the law came into effect after about two years. The draft law also unjustifiably delays the access to judicial acts adopted after May 1, 2023. In particular, according to paragraph 5 of Article 13[5] of the draft, it is impossible to receive the judicial act as public information one year before the adoption of the act if all the persons mentioned in it have not already waived their right to protect their personal data. Such provisions do not improve the standards of transparency of justice and, in a certain sense, they even worsen the existing rules for requesting and receiving public information. In addition, the draft law also does not provide for the procedure for issuing the act/decision taken at a closed court session, even in a depersonalized form.

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[16] Mariam Gobronidze, Another step back in the reform of the judicial system - analysis of legislative changes adopted on December 30, 2021, available at:https://bit.ly/3m9IxsH

[17] Social Justice Center, Electronic Case Distribution System in Courts (2020-2021 Monitoring Report), available at:https://bit.ly/3IZfRf6

[18] The decision of the Constitutional Court available at: https://bit.ly/3ZuPWRT

[19] See IDFI, Opinion on the draft law registered to enforce the decision of the Constitutional Court of Georgia dated June 7, 2019 N1/4/693,857, available at: https://bit.ly/3ZEzMWc

Submission of the Supreme Court judge candidates to the Parliament of Georgia - the draft law regulates in a new way the issue of appealing the decision made by the High Council of Justice in the process of selecting Supreme Court judge candidates. In particular, if, as a result of considering the complaint, the Qualification Chamber of the Supreme Court determines that a specific member of the High Council of Justice was biased/discriminatory in the process of selecting candidates, and/or he/she exceeded the authority, and thus violated the candidate's rights, this member of the Council will no longer participate in the process of making a new decision.

The mentioned change is logical and justified, as it excludes from the process of re-evaluating candidates the participation of such a member of the Council, whose bias is suspected. However, in this context, the issue of staffing the Qualification Chamber of the Supreme Court itself and the effectiveness of this mechanism in general, about which the draft law does not say anything, is more important.[20] As mentioned, in the process of appointing judges of the Supreme Court, it is especially problematic for the parliament to make the final decision by a simple majority, which gives the ruling political party the opportunity to make the decision unilaterally. The draft law does not focus on this problem at all.

The procedure for appointing district (city) and appellate court judges - the draft law regulates the procedure for appointing judges in courts of first and second instance in a new way. In particular, it is determined that the High Council of Justice will appoint a judge to the vacant position of a district (city) or appellate court judge in the manner established for the selection of a candidate of a Supreme Court judge to be submitted to the Parliament of Georgia. This change provides more procedural transparency, which is definitely commendable. However, the experience of staffing the Supreme Court shows that[21] only detailing the procedure and ensuring more transparency is not enough to staff the court with personnel who has qualification and integrity. In this process, it is necessary to develop such a rule of decision-making by the Council, which would exclude the risks of corporatism or informal influences.

The procedure for selecting members of the High Council of Justice - the draft slightly improves the procedure for selecting judge- and non-judge members of the Council. In particular, according to article 208 of the Rules of Procedure of the Parliament, the mandatory hearing of the members to be appointed by the Parliament at the public session of the Committee on Legal Affairs is established, where, *inter alia,* the compliance of the candidate with the legislation of Georgia must be assessed.[22] Incorporating this issue in the protocol is commendable.

Regarding the issue of appointing judge members of the Council, the draft law gives the Council membership candidate the right to address the conference of judges and present his/her views and opinions before the voting procedure (paragraph 3 of Article 65 of the draft law). The mentioned amendments do not improve the selection/appointment of the judge members of the Council because, theoretically, the candidates could address publicly to the members of the conference even before that. In the process of staffing the council, it is problematic that the judges participating in the conference do not have the right to ask questions to the candidates and to hear their views in advance. And instead of solving this issue, the draft law gives candidates the discretion to address the judges at the conference whenever they want.

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[20] See Georgian Court Watch, What did the creation of the Qualification Chamber of the High Court change? 20.02.2023, available at: https://bit.ly/3Y89B98

[21] See the coalition's assessment of the appointment of Supreme Court judges at the end of 2021: https://bit.ly/3EJXUOZ

[22] The draft law is available at: https://bit.ly/3IVwVBx

Concluding remarks

The recommendations issued by the European Commission for Georgia in the summer of 2022 created an important opportunity for the systemic refinement of the judicial system. Unfortunately, due to the lack of political will, this opportunity was not used effectively once again. The working group in the Parliament created only an illusory opportunity for civic engagement and in-depth discussions on judicial reforms.

Despite the opportunity for formal engagement of CSOs, Public defenders, and professional groups in the activities of the working group, not a single recommendation made by them, directed to systemic changes, or to the assessment of existing problems in the court, was shared by the parliamentary majority. Moreover, rarely were these initiatives even the subject of genuine analysis and debate.

Against this background, it is logical that the reform strategy developed by the working group does not even minimally address the systemic challenges in the judicial system. The package of legislative changes prepared on the basis of the mentioned strategy envisages fragmented, façade changes, which cannot be the source of hope for substantive refinement of the judicial system.