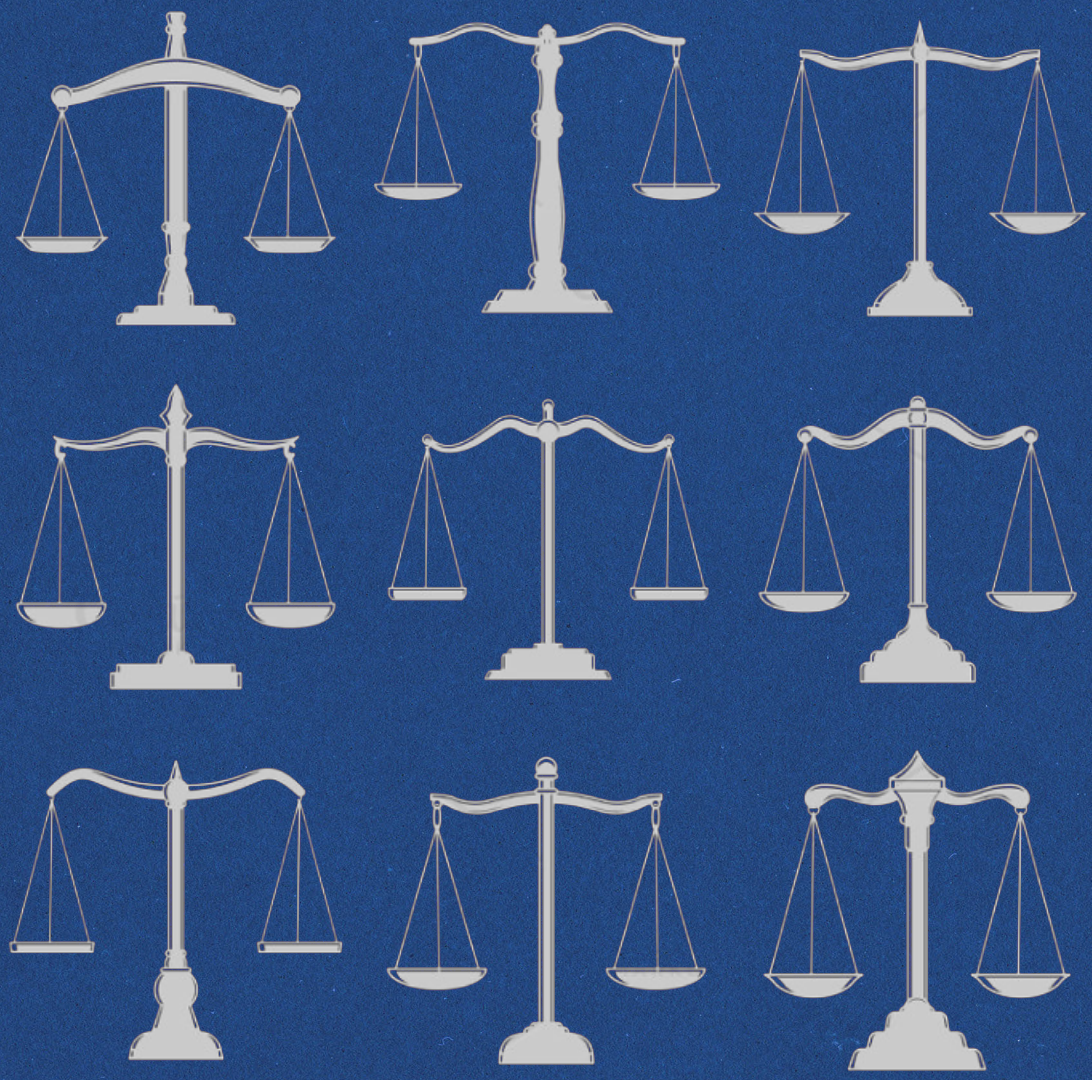
ANOTHER STEP BACK IN JUDICIAL REFORM



Analysis of legislative changes adopted on December 30, 2021

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Another step back in judicial reform

Analysis of legislative changes adopted on December 30, 2021

On December 30, 2021, the Parliament of Georgia, in an expedited manner, at an extraordinary session, without public involvement and consultations, adopted the legislative amendments to the Organic Law of Georgia on Common Courts.[1] Despite calls to the president from the ombudsman[2] and public organizations[3] to veto the changes and criticism of the bill by international actors[4], the president did not exercise his constitutional authority and signed the bill on January 13, 2022.[5]

As a result of the bill, changes were made in the norms regulating such essential issues as:

1. Secondment of a judge to another court;

2. Electing the same judge twice in a row as a member of the High Council of Justice;

3. Disciplinary proceedings;

4. The procedure for deciding on the judge's removal from the case.

This document assesses both the legislative package review process as well as the relevance and effectiveness of the changes to the context of the judiciary and analyzes its possible implications.

Deficiencies outlined during the parliamentary hearings

The process of initiating the bill was extremely opaque and the hearings in the parliament was conducted with improper involvement. Experts in the field, civil society organizations, representatives of the judiciary and individual judges were not involved in the drafting process. The High Council of Justice, as the constitutional body that should guarantee the protection of the independence of the individual judge, has remained silent on these changes, reinforcing the suspicion that the initiated changes were in fact ordered by an influential group in the judiciary. This is particularly problematic in the light of the current acute challenges in the judiciary, the elimination of which, under normal circumstances, should be a top priority for the Council. One such issue is the absence of 5 non-judge members of the council - in particular, for more than 7 months now the council has been functioning without 5 non-judge members and the ruling political team has been unreasonably delaying the decision making in the parliament. On the one hand, this is a serious challenge in terms of the

[1] The draft law adopted on the third hearing is available at: https://bit.ly/3B14r4Q.
[2] The Public Defender Negatively Evaluates the Draft Law on the Judicial System, 30 December 2021, available at: https://bit.ly/3guD9KG.
[3] Call to the President to veto the legislative change in the Organic Law on Common Courts, 13 January 2022, available at: https://bit.ly/332U6bY.
[4] Statement by the US Embassy on the hastily enacted legislative changes by the ruling party at the end of the year, 3 January 2022, available at: https://bit.ly/3qgO5kK.
[5] Statement by the President of Georgia, 13 January 2022, available at: https://bit.ly/3JbBnKQ.

legitimacy of the council and violation of the principle of separation of powers, on the other hand, a 10-member composition often fails to secure the required number of votes or quorum to make the necessary decisions.

Still at the initiation stage, the bill was critically evaluated by civil society organizations[6] and international actors[7], as well as by some of the judges themselves. Nevertheless, the legislature considered the bill in an expedited manner without any in-depth reasoning and discussion. Nor does the explanatory note substantiate the threat to the functioning of the judiciary as a result of the discussion of these changes at the spring session.

Civil society representatives were only formally given the opportunity to express their views at committee hearings. The process as a whole was not collaborative, and the public was only involved in the discussion of the bill superficially. Even at the time of the second hearing of the bill in the committees, its content was unspecified, and the updated version, which in a number of directions contained even more alarming provisions than the initiated version, was handed over to the civil organizations directly during the committee hearings. In addition, the hearing process clearly showed the intolerance of critical thinking by the ruling party. In particular, the process revealed that the bill's initiators did not have any resources or desire for an in-depth discussion on any important and substantive issues.

Secondment of a judge to another court

As a result of the changes, the positive legislative guarantees that followed the regulation of secondment rules after 2012 were abolished. Over the years, the vicious practice of secondment has been repeatedly criticized and discussed publicly. It is known that the secondment was used as an effective mechanism for punishing disobedient judges. Prior to the waves of reform, the use of secondment was at the discretion of the High Council of Justice, it was not subject to any restrictions and did not require the consent of a judge. [8]

Since 2012, legislative regulation has been improved to prevent arbitrary secondment practices by judges. A mandatory precondition for the use of the secondment mechanism was the consent of the judge, the secondment period was set at a maximum of one year and the possibility of extending this period by not more than an additional one year was determined. The council was obliged, in case of need for secondments, to first apply to the judges enrolled in the reserve, and then to the judges employed in the nearby courts. As an exception, the case of secondment without consent was also

[6] Coalition Responds to Accelerated Review of Amendments to Organic Law on Common Courts, 28 December 2021, available at: https://bit.ly/3HL9FDY.

[7] EU Delegation responds to expedited consideration of bills related to the Office of the State Inspector's Office and the Judiciary at the Parliament, 28 December 2021, available at: https://bit.ly/3teNfXJ.

[8] Judicial System: Reforms and Perspectives, ed. Collective, Coalition for an Independent and Transparent Judiciary, 2017, pp. 83-88, available at: https://bit.ly/34GB0Jf.

considered. In the absence of consent, the judge would be identified by casting lots. In addition, the council has an obligation to substantiate the decision on secondments.

Under the new wording, the maximum time it takes to go to another court without a judge's consent has been increased to a total of 4 years. At the same time, it became possible to refer a judge of the Court of Appeals to a court of first instance. The principle of territoriality, according to which a judge in a particular court was sent involuntarily from another court closest to the territory, was abolished. However, the process of selecting judges no longer provides for a mechanism for selecting a judge by lot. The situation is aggravated by the fact that the grounds for secondments are expanding and it is possible to send them to another court without the permission of a judge (in fact, compulsorily) for general reasons such as the interest of justice.

A vague criterion such as the "interests of justice" can not be considered a sufficient criterion for making such a decision. This is confirmed by the conclusion of the Venice Commission, which indicates that such an appointment/secondment to another court should be possible only on the basis of strict criteria, clearly defined in the law. Such criteria may be the number of cases in the receiving and sending courts, the number of cases heard by the judge to be appointed. In order to prevent the violation of the principle of irreplaceability of judges, it is necessary to write specific grounds and clear and objective regulations.[9]

However, the new record no longer implies an obligation for the High Council of Justice to make a reasoned decision regarding the secondment. Indeed, the arguments presented by the Council over the years have usually not been informative and in-depth, yet it has been an essential legislative guarantee avoiding arbitrariness and using this exceptional mechanism high-intensively.

Consequently, by deteriorating legislative guarantees in this direction, the acting government is trying to establish the same vicious practice for the management of judges, to eliminate of which took important steps itself a few years ago. To justify such an important decision, the explanatory note only mentions the problem of overcrowding in the courts and the overabundance of cases pending there. In light of the fact that civil society has been talking for years about the need for a systematic understanding of human resources management in the common court system, to allocate resources more efficiently in order to resolve the issue of workload in the court system, taking into account the weight and complexity of cases and puting effective steps forward in appointing judges, this argument can not be taken as valid. However, despite a number of vacancies, the oppening for these positions is not actually announced and they are filled by the relocation of existing staff, which does not change the overall shortage of human resources in the system. The legislature and the judiciary have the potential to take much more effective steps to actually address the problem of overcrowding, and the fact that they are not using that once again proves that the stated goals and the real motive behind the changes do not coincide.

[9] Venice Commission, CDL-AD (2014) 031, para. 36.

Electing the same person in a row for the position of a Council member

One of the other few favorable legislative provisions that reduced the risk of concentrating power in the High Council of Justice prior to the amendments was a ban on electing the same person as a member of High Council of Justice twice in a row. [10] However, with the changes under consideration, this ban was also lifted. Given that the primary basis of criticism is the practice of corporatism and clanism in the High Council of Justice, allowing the continuous holding of such an important administrative position by the same individuals is another step backward.

The rationale for lifting the ban, according to the explanatory note, was to ensure that the Council could be staffed on the basis of professional experience and merit. To substantiate all this, the authors also refer to the 2013 report of the Venice Commission[11]. First of all, the phrase mentioned in the conclusion does not explicitly address this issue and just sets a general principle. In particular, the conclusion is that it is desirable to impose as few restrictions as possible on the right of judges to choose from among their colleagues the persons they wish to represent on the Council. At the same time, the Venice Commission itself in its October 2020 report[12] pointed to the specificity of the situation in Georgia, stressing that general standards that are effective in other countries may not have similar positive outcomes in Georgia.

The model of court management and related vicious regulations is one of the main challenges of Georgian justice. Consequently, in the current context, when an influential group of judges is uniquely identified in the system, these changes further reduce the possibility of holding Council elections in a competitive environment. In the face of a lack of dissenting/critical opinion in the judiciary, it is vital that the legislative framework also facilitates conducting more dynamic processes and revitalizing the council. Unfortunately, the changes that have taken place have the opposite risk and encourage the concentration of power in the hands of one group.

Changes related to disciplinary proceedings

In order to increase trust toowards the High Council of Justice and ensure public involvement, the civil sector has been talking for years about the need for a consensus-based rule in important decision-making and strengthening the involvement of non-judge members. Consequently, reducing the quorum to a simple majority instead of a 2/3 majority to decide on disciplinary matters is clearly contrary to this spirit and makes the presence of non-judge members on the Council even less effective.

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[10] The ban was introduced with the following amendments: Law of May 1, 2013 “On Amendments to the Organic Law of Georgia".

[11] Venice Commission Opinion N701/2012 of 11 March 2013, available at: https://bit.ly/3HBUI7l.

[12] Opinion on the draft Organic Law amending the Organic Law on Common Courts, adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), CDL-AD(2020)021-e, available at: https://bit.ly/3J12Kam.

However, it should be noted that in the case of the election of 5 non-judge members to the High Council of Justice, the support of all ten current members is needed to discipline the judge, which can significantly complicate the decision-making process. It is noteworthy that the ruling team has so far refused to appoint non-judge members to the Council. This can be explained by the fact that the government does not have enough parliamentary seats to make a one-party decision on this issue and definitely needs the support of the opposition. Instead of appointing politically neutral and highly public-minded professionals to the High Council of Justice, the government seeks to remove the inconvenience created for an influential group in the judiciary by legislative changes that would allow the council to discipline the judges with a simple majority.

The explanatory note here also points to old findings issued by international organizations[13], which state that the establishment of such a qualified majority poses a serious threat that many complaints will go unanswered. As mentioned above, given the current situation, there is agreement at the international level that the direct implementation of universal standards in the context of Georgia may not be the best solution. It should also be noted that the interest of defending the independence of dissident judges should not be overshadowed by the goal of bringing disciplinary proceedings to an end.

Judges' freedom of expression is restricted on new grounds of disciplinary liability. In particular, according to the amendments, a judge's public expression of opinion in violation of the principle of political neutrality will be considered a disciplinary misconduct. It is true that maintaining the political neutrality of judges is a legitimate and expedient interest, but the interpretation of this norm in practice can be problematic and unreasonably restrict the freedom of expression of judges.

With regard to disciplinary proceedings, it is also important that the time limits for hearing the case have been changed and significantly reduced. The amendments separated the disciplinary sanctions of judges into main and additional punishments. In particular, given the content of the disciplinary misconduct (e.g., nature, severity), it became possible to impose both main and additional penalties at the same time. These changes may have been positively assessed, although it does not correspond to the existing reality. In particular, the Independent Inspector has for years raised in his conclusions[14] important issues to improve the efficiency of his activities, which were not reflected in the legislative changes. However, while the independent inspector was unable to respond appropriately to the complaint within 2 months, it is unclear how effective the reduction of the deadline would be if it were left as a mere legislative record, which in practice could never actually be implemented.

[13] Conclusion N774 / 2014 of 14 October 2014, para. 24, 66, 72, available at: https://bit.ly/3ALNv1S.
[14] Independent Inspector's 2019 Activity Report, available at: https://bit.ly/3sm3EHG; Independent Inspector's 2020 Activity Report, available at: https://bit.ly/34jpuUq.

Removal the judge from the case

With the amendments, the rule of removal of a judge from the case was newly established. In particular, in addition to the criminal prosecution of a judge, a new basis has emerged - the initiation of disciplinary proceedings against a judge of a district (city) or appellate court. However, given this factual circumstance, there must be a reasonable assumption that staying in the position of this person will yield at least one of the consequences:

1) it will impede disciplinary proceedings;

2) it will prevent compensation for damages caused by disciplinary misconduct;

3) he continues to violate work discipline.

According to the explanatory note, although no final decision on the judge's guilt has been made at this time, the removal of a judge's case is considered as a precautionary and deterrent measure to protect the interests of the litigation and its effective conduct. According to the authors of the bill, this provision excludes a negative impact on the disciplinary process and its consequences. Notwithstanding this explanation, it is noteworthy that it assesses the merits of initiating disciplinary proceedings against a judge and decides on the initiation of disciplinary proceedings against a judge by an already simple majority. In making this decision, the standard of reasoned assumption is used. Consequently, we can say that the removal of judges from the case at this stage, as long as the standard of proof is so low, cannot be justified.

However, the new norm is not foreseeable. It does not appear to apply to a particular case or to all the cases before a particular judge in general. The latter is unjustified because a violation in one or more cases does not make a judge a uniquely bad professional, and a complete removal from his or her case before disciplinary action is equated with a suspension of the right to work.

Summary

The content of the legislative changes under consideration, as well as the non-inclusive and expedited format of its hearing, do not meet either the interests of the judiciary in general or the obligations assumed by the ruling party according to the April 19 agreement. The changes run counter to the government's commitment to fundamentally reform the judiciary to establish and build trust in an independent and accountable judiciary. In order to plan an in-depth reform of the judiciary, it is necessary to assess the current situation and needs with the involvement of both broad political and community groups.

In today's reality and in the face of the hardships facing the judiciary, these changes unequivocally further weaken individual judges and reinforce intra-corporatism and clan influences within the system. The implemented changes unbalancedly strengthen the High Council of Justice and make individual judges more vulnerable to this institution.

It is safe to say that these changes are a complete reversal of the small positive transformations achieved as a result of the reform waves and a return to the status quo of 10 years ago, with an even more empowered and influential group of judges. All this will have a negative effect on the existence of critical and dissenting opinions in the judiciary, as well as on public trust in the justice system in general.