

## **Key Recommendations for Judicial Reform**

The United States Embassy in Tbilisi presents the following judicial reform recommendations to Parliament, the judiciary, civil society organizations, and interested justice sector actors. The recommendations are informed by the Embassy's engagement with Parliament and other key stakeholders, as well as recommendations made by the Venice Commission, OSCE, CCJE and other international organizations. These recommendations are comprehensive but not all-inclusive, and we recognize there are other areas in need of improvement. We are hopeful these key recommendations will help Parliament and actors across the judicial sector work towards consensus, and that they will inform Parliament as it drafts comprehensive judicial reform legislation to improve the transparency, efficiency, and accountability of the judiciary to increase the public's trust in the institution.

The United States stands ready to support Parliament and the people of Georgia in working towards a strengthened, more independent judiciary.

### **Impartial General Recommendations**

**International Assessment on Judicial Reform Efforts:** An inclusive, participatory assessment should be carried out with the support of regional international experts, such as OSCE ODIHR and the Venice Commission, in accordance with Georgia's Summit for Democracies commitments. The assessment should not only evaluate legislative gaps but examine the impact of the implementation of the prior waves of reform to generate additional reform recommendations. Parliament should consider inviting regional international experts to assist with the assessment. Parliament should consider expanding its judicial reform working group to achieve balanced and appropriate results by including members of the judiciary, civil society, the Public Defender, the Georgia Bar Association, as well as other interested justice sector actors, legal scholars, and the international community. All stakeholders should have the opportunity to contribute their opinions to the discussion process and to identify areas of needed reform for inclusion in the final recommendations.

**Fully Implement Georgia's Summit for Democracy Commitments:** Further enhance transparency and merit-based selections in the appointment of judges to the First Instance and Appeal Courts; adopt the legislation implementing the ruling of the Constitutional Court of Georgia from June 2019 by setting rules for publication of judicial decisions.

**Publish All Court Decisions:** All court decisions should be published and available for public review absent an articulable exception, such as protection of victims or the integrity of an on-going investigation. When possible, even sensitive cases should be published with redactions or at the conclusion of the investigation stage.

**Gender Equality:** The judiciary has reached gender balance with more than 50 percent of judges in Georgia being women. However, the rate of women occupying key roles within the judiciary does not reflect this gender balance. Introduce guarantees "for balanced representation of both

genders” for judicial appointments and key leadership positions. Parliament and the HCOJ should guarantee gender-balance, while not undermining basic selection criteria requirements, throughout the judiciary, but especially in leadership positions.<sup>1</sup>

**Expand the Use of Jury Trials:** Expand jury trials to allow selection of jury trials in high-profile criminal and civil cases, such as cases of corruption and abuse of power, as well as high-value civil disputes. This would allow parties greater authority to select jury trial as a means to resolve matters and increase public trust in the outcome of important cases.

**Increase Transparency in Appointment and Selection Process:** All candidates should be strictly screened to ensure qualifications, such as legal education, are met. Elaborate procedures for conducting background and integrity checks, while considering all possible sources of information, and publish those results. To ensure transparency, provide sufficient notice and publication of results to allow for rigorous debate of the candidates.<sup>2</sup>

### **High Council of Justice**

**Appointment of HCOJ Non-judge Members–Parliament/President:** The HCOJ currently has no Parliamentary selected non-judge members on the council despite five vacancies which have been open for almost a year. Parliament should fulfill its obligation to appoint non-judge members to the HCOJ, in accordance with Georgian law and international best practice. Parliament should create a transparent selection process, which allows opposition parties, legal professionals, and civil society representatives to participate in interviewing candidates. Parliament should only consider highly qualified, *apolitical* candidates for these important judicial vacancies and should appoint non-judge members of the HCOJ with result of a cross-party support.<sup>3</sup> Legislation should also address the President’s appointment to the HCOJ to bring the process in line with the recommendations applying to Parliament.

**HCOJ Composition:** The composition of the HCOJ is a controversial topic based on the voting record and complete control of the HCOJ decision-making process by the judge members of the HCOJ, particularly given that Parliament has not made appointments to fill long-vacant non-judge positions. In order to give meaningful purpose to the non-judge members of the HCOJ, we recommend reconsidering the allocation of the HCOJ positions, between judge and non-judge members, with the ultimate goal of providing the non-judge members with a meaningful vote and

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<sup>1</sup> August 2021 ODIHR Fourth Report at p. 14. Also suggested in ODIHR Reports 1-3.

<sup>2</sup> August 2021 ODIHR Fourth Report at p. 14. Specifically with respect to Supreme Court appointments, but best practices for all courts and appointments.

<sup>3</sup> March 2013 Venice Commission Opinion at p 8 and 11: In 2013, the Venice Commission explained the importance of having non-judge members on the council and allowing those non-judge members to have a meaningful voice. Moreover, it was critical to the Venice Commission that the opposition parties have a voice the selection of the HCOJ. (Specifically, that “opposition has an influence on the composition of the Council.”)

the ability to take part in the decisions made by the HCOJ. We also recommend introducing staggered terms of office for HCOJ members so that the entire council is not replaced by new members at the same time.<sup>4</sup> Moreover, a member's term should only end upon the lawful election of a successor.<sup>5</sup> The best practice would be for the HCOJ not to lose more than one-third of its members during a rotation.

**HCOJ Term Limits:** Parliament should reverse December 2021 amendments to the Organic Law on Common Courts to reintroduce a prohibition on re-election of HCOJ members for a consecutive term. This would increase the independence of the HCOJ.<sup>6</sup>

**Election of HCOJ Judge Members–Conference of Judges:** The law should be amended to change the current procedures for electing judge members to the HCOJ. All candidates should be required to register in advance and to present qualifications so that members can review the qualifications before the vote. At the conference of judges, the candidates should be given an opportunity to speak to the conference and each participating judge should submit a single vote for one candidate only, despite the number of vacancies. Vacancies should be filled by the candidates who receive the most votes in ranked order. The existing requirement of 2/3 minimum conference of judge's support for election should be removed from the law. Once all positions are filled, the remaining candidates should form a reserve list, ranked in order by number of votes received. That list should be used to fill any future vacancies for the remaining period of the four years term of the respective HCOJ member.

**Membership on HCOJ–Court Leadership:**<sup>7</sup> To avoid concentration of power amongst a small group of judges and to reduce influence of judges holding several administrative and leadership positions in the judiciary, the law should be amended to prohibit court chairpersons, deputy chairs of court, and chairpersons of court chambers from serving on the HCOJ.<sup>8</sup>

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<sup>4</sup> CCJE Opinion No. 24 (2021) at 11: "Continuity and efficiency can be improved if not all terms of office expire simultaneously."

<sup>5</sup> CCJE Opinion No. 24 (2021) at 11: Except, in cases of death, retirement or removal from office, "a member's term should only end upon the lawful election of a successor to ensure that the Council is able to exercise its duties lawfully even if the appointment of new members has failed, because of a deadlock in parliament."

<sup>6</sup> CCJE Opinion No. 24 (2021): "In principle, re-elections of full-time members should be avoided in favor of longer fixed terms to ensure independence."

<sup>7</sup> In 2013, the Venice Commission, when examining a prior version of the Law on Common Courts, supported having a certain number of Court Chairs sit on the HCOJ, however, implementation of the law has shown a centralization of power within the judiciary.

<sup>8</sup> CCJE Opinion #19 (2016) on the Role of Court Presidents, Paragraph 8: Court presidents are judges and therefore part of the judiciary. The level, intensity, and scope of the participation of court presidents in the work of relevant bodies of judicial self-government and autonomy, such as the Council for the Judiciary, Congress of Judges, General Assembly of Judges, professional organizations of judges, depends on the national legal system. It is important that presidents, with their broad experiences, give their input in these bodies. However, concentration of functions and powers in the hands of only a limited group of persons should be avoided.

**Judicial Discipline:**<sup>9</sup> Similar to the recommended double 2/3 vote requirement for judicial appointment decisions, disciplinary decisions should also require a 2/3 vote from judge members and a 2/3 vote by non-judge members of the HCOJ. This will limit the opportunity for potential abuse and allegations of using potential disciplinary measures in order to influence judges in their decision-making. Reconsider changes to the December 2021 amendments to the Law on Common Courts regarding discipline of judges; in particular: (1) the ability to discipline a judge based on the undefined “political neutrality” standard because the vagueness may lead to arbitrary application or abuse; and (2) the ability to suspend a judge without pay pending the outcome of a disciplinary matter, because it has insufficient safeguards.

**Transparent HCOJ Meetings:** Increased transparency will improve public confidence in the HCOJ.<sup>10</sup> The law should be amended to define “openness” and “publicity” as it relates to HCOJ meetings. We recommend that all HCOJ sessions be made open to the public by livestreaming the session and posting audio/video recordings of its sessions on the HCOJ website. Furthermore, we encourage the HCOJ to implement existing rules, including publishing HCOJ meeting agendas on its website at least three days in advance of HCOJ meetings, which is not the current practice.

**Specialization of Judges:** The Organic Law on Common Courts should define specialization and sub-specialization of all courts in Georgia.<sup>11</sup> The HCOJ should have power to assign judges in relevant specialization and sub-specialization (exempting the Supreme Court), but such assignments should be based on merit and consent of a judge.

### Supreme Court

**Convert Current Fix Term Supreme Court Justices to Lifetime Appointment:** In order to retain qualified and experienced judges in the Supreme Court, it is recommended to transform those with a fixed term of office of the current Supreme Court judges to lifetime appointments.<sup>12</sup>

**Nomination and Appointment of Supreme Court Justices:** Although Parliament recently adopted legislation that requires open voting in the HCOJ, justification of decisions, and numerical ranking, there are still areas that require reform. Parliament should work across the political parties, civil society, judges, and legal experts through an inclusive process to draft comprehensive judicial reform, that includes adopting Venice Commission recommendations for the Supreme Court nominations and election by Parliament.<sup>13</sup> Legislation should require HCOJ nominations be made with 2/3 concurrence of judge members and 2/3 concurrence of non-judge members. Furthermore, legislation should increase the minimum number of votes required by Parliament to

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<sup>9</sup> In 2014, the Venice Commission said that a two thirds majority of disciplinary actions was “too high,” however, when reading this section in conjunction with the need for non-judge voices in the process, the current text of the law should be changed.

<sup>10</sup>CCJE Opinion No. 24 (2021): “As an essential element of the public confidence in the justice system, the Council for the Judiciary should act with transparency and be accountable for its activities, in particular through a periodical report suggesting also measures to be taken in order to improve the functioning of the justice system.”

<sup>11</sup> November 2012 CCJE Opinion 15 on the Specialization of Judges at paragraph 38 and 61.

<sup>12</sup> June 2019 Venice Commission Opinion at p 5 and 13.

<sup>13</sup> August 2021 ODIHR Fourth Report at p. 14.

appoint Supreme Court justices from the current simple majority (76 votes) to the 90 votes needed to appoint a non-judge member to the HCOJ.

**Increase Required Experience/Age:** Increase the required level of age and experience for Supreme Court judges to improve and enhance the quality of the candidates. Also consider requiring Human Rights experience when considering applications for the highest court.<sup>14</sup>

**Meaningful Appeal:** In order to ensure meaningful right to appeal, consideration should be given to modify the composition of the HCOJ for the subsequent decision by excluding those members who have been found to be biased or for other reasons provided under the law on Common Courts by the Qualification Chamber of the Supreme Court. It is also important to suspend the appointment procedure until a decision is rendered by the Qualification Chamber of the Supreme Court regarding the appeal.<sup>15</sup>

### **Constitutional Court**

**Constitutional Court Appointments:** The appointment process should be standardized between the Parliament, President, and judicial appointments. We recommend amending the necessary laws and Rules of Parliament to require candidates be selected based on merit and in an open and transparent process similar to that of the suggested improvements to the other court appointments.

### **Lower Courts**

**Judicial Appointments:** The law should be amended to ensure open voting, substantiation of appointments, and increase the number of votes needed for appointment. Current decisions are formalistic, not individualized, and do not follow the legal framework set out in the Law on Common Courts which lists competency and integrity criteria as the key components to be evaluated. Furthermore, the reasons why a candidate is rejected is not included in current substantiations. We also recommend that all judicial appointments made by the HCOJ should require 2/3 votes of judge members and 2/3 votes of non-judge HCOJ members.<sup>16</sup> The law should consider creating an adapted short course in judge-craft for experienced litigators with ten or more years of litigation experience that is compatible with outside employment. The professionals who successfully complete the courses should be allowed to participate in competitions for vacant judicial positions to expand the potential pool of qualified candidates. The law should also require the HSOJ to develop a refresher course on the law for former judges who have experience but have not served in the last five years in a judicial capacity. Former judges who take this course shall not be required to take additional initial training.

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<sup>14</sup> August 2021 ODIHR Fourth Report at p. 14; June 2019 Venice Commission Opinion at p. 13.

<sup>15</sup> July 2021 Venice Commission Opinion at p. 4.

<sup>16</sup> VC opinion, March 2013, Paragraph 55: The VC expressed concern that a 2/3 requirement could lead to deadlocks; however, given the current composition of the council and the lack of any Parliamentary elected non-judge members, the proposed amendment would ensure non-judge members have a voice, with judge members maintaining the overall majority.

**Appointment and Functions of Court Chairpersons:**<sup>17</sup> The law should be amended to ensure that the chairperson of each court is appointed by judges within their respective court or on a rotational basis for a limited, but renewable term. For larger courts, we recommend the judges assigned to the court should vote, through similar procedures as outlined above for election of HCOJ judge members, for the chairperson of their respective court.<sup>18</sup> For smaller courts, where there is a real risk that votes would not be anonymous, we recommend a rotation system. The law should also be amended to decentralize the tasks and authorities of current court chairpersons and court managers. Management-related functions such as budgeting and hiring/firing of court staff should be decentralized so one person is not making these decisions independently.<sup>19</sup> Where court chairs intend to make significant changes in the organization of the court, the judges within the court should be consulted. Furthermore, benefits of being court chairpersons, such as cars, drivers, salary supplement, and bonuses should be eliminated; moreover, adjudication of cases should be the primary responsibility of court chairs due to their judicial competence and training.<sup>20</sup> Also, the law should consider eliminating the positions of deputy court chairperson and chairs of chambers or panels as unnecessary positions within the court system.

**Judicial Promotions & Transfers:** Amend the law to introduce a comprehensive judicial promotion system, which should require promotions and court transfers be based on merit, and objective appraisals and only following a competitive process.<sup>21</sup> Also, judicial transfer decisions should be reasoned and appealable and for a limited time. Reverse changes made in December 2021 in the law on common courts, which made possible to transfer judge without consent and prolonged the duration of transfer.

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17 CCJE Opinion #19 (2016) on the Role of Court Presidents at Paragraph 38-40: “[T]he procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges. . . . the system of selection and appointment of presidents of courts should include, as a rule, a competitive selection process based on an open call for applications of candidates who meet pre-determined conditions set out in the law.” The Commission said that “in some member states, presidents of courts are not selected and/or appointed but are elected by their peers - the judges of the court. The CCJE is of the opinion that in such a system, objective criteria of merit and competence should also prevail.”

18 In the October 2014 opinion, the Venice Commission and the Directorate welcomed the “proposed system of election of court presidents by the judges of the same court by secret ballot which is in line with the requirements of the principle of internal independence of the judiciary, as well as the information given by the civil society that their input in this respect has been taken into consideration by the authorities.”

19 CCJE Opinion #19 (2016) on the Role of Court Presidents.

20 CCJE Opinion #19 (2016) on the Role of Court Presidents, at Paragraph 15: “The CCJE considers it very important that court presidents, after appointment, continue to perform as judges. A continuing practice is not only important to allow presidents to ensure their continuing professionalism and maintaining contact with other judges in accordance with the principle of *primus inter pares*, but also to best fulfil their organizational role through direct awareness of issues arising in daily practice. The caseload of court presidents may be reduced having regard to their managerial tasks.”

21 2012 VC Opinion: “The Venice Commission and the Directorate consider that a competition should be the rule for all promotions of judges in order to prevent any abuse. Also, there is the risk that the promotion procedure without competition negatively affects the development of regular promotion procedure and of its criteria which should be determined and developed by the High Council, as required by Article 41(1) of the Organic Law. It is recommended that the promotion procedure without competition be reconsidered by the authorities and if it is to be maintained in the draft, its exceptional character should also be made clear in the draft law.”

**Random Case Assignment:** Amend the law to provide an exhaustive list of exceptional circumstances for not using the existing random case assignment procedures, which will limit interference in the assignment process.<sup>22</sup> Publish and explain the circumstances when a case is being assigned through a process other than random case assignment.

### **High School of Justice**

**High School of Justice Management Structure:** Amend the law to reduce the control the HCOJ has over the appointment of members to the HSOJ Independent Board.

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<sup>22</sup> October 2014 Venice Commission Opinion at p 16: The Venice Commission and the Directorate reiterate that whenever there is an electronic case-attribution system, the rules according to which it operates must be clear and it should be possible to verify their correct application. . . . The rules laid down in the second paragraph of the draft article, concerning the case-allocation in case the electronic system is out of order, should also be amended in order to provide all technical indications needed, as in the current Law on distribution of cases (articles 4 to 9).