



Office for Democratic Institutions and Human Rights

**THIRD REPORT  
ON THE NOMINATION AND APPOINTMENT  
OF SUPREME COURT JUDGES IN GEORGIA**

**December 2020 – June 2021**

**OSCE/ODIHR Report**



**Warsaw**

## INTRODUCTION

The OSCE Office for Democratic Institutions and Human Rights (ODIHR) provides support, assistance and expertise to participating States and civil society to promote democracy, rule of law, human rights, and tolerance and non-discrimination. OSCE participating States have committed to ensuring judicial independence as a “*prerequisite to the rule of law and [...] a fundamental guarantee of a fair trial*”.<sup>1</sup> The establishment of credible processes for selection of judges is a fundamental component of judicial independence.

As part of its mandate to support participating States to strengthen rule of law, including judicial independence, in 2019 ODIHR monitored the process for nomination and appointment of half of the Supreme Court judges of Georgia, based on a request of the Public Defender (Ombudsman) of Georgia. ODIHR presented its monitoring results in two reports that provided an independent assessment of the process and its compliance with OSCE commitments, international standards and guiding principles of judicial independence, as well as domestic legislation.<sup>2</sup> These assessments concluded that while legal reforms regulating the appointment of Supreme Court judges in Georgia were in principle an important step toward improving the independence of the judiciary, in practice they failed to ensure an impartial, merit-based process free from extraneous influences.

In November 2020 the Public Defender of Georgia invited ODIHR to continue its monitoring of the nomination and appointment process for filling the remaining vacancies on the Supreme Court. The ODIHR team, comprising of two national monitors and one international monitor, began its work on 7 December 2020, including monitoring all candidate interviews before the High Council of Justice (HCJ) and related sessions of the HCJ. Monitors strictly adhere to well-established OSCE/ODIHR monitoring principles of non-interference, impartiality, objectivity, confidentiality and professionalism. The HCJ has facilitated the unhindered access of ODIHR monitors to follow the process to date.

This report presents an assessment of the current nomination processes for 11 Supreme Court vacancies.<sup>3</sup> ODIHR monitors will continue to follow the process through the next stage, when the

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<sup>1</sup> See the [Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe](#) (Vienna Document, 1989), the [Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE](#) (Copenhagen Document, 1990), [Charter of Paris for a New Europe](#) (Paris, 1990), [Document of the Moscow Meeting of the Third Conference on the Human Dimension of the CSCE, Moscow](#) (Moscow Document, 1991), and the [Brussels Declaration on Criminal Justice Systems](#) (MC.DOC/4/06 of 5 December 2006).

<sup>2</sup> See OSCE/ODIHR, [Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia](#), June-September 2019 (10 September 2019); OSCE/ODIHR, [Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia](#), June-December 2019 (9 January 2020).

<sup>3</sup> During the monitoring exercise, three simultaneous but staggered processes for filling vacancies were underway: the first one for nine vacancies and the second and third for one vacancy each. The monitors fully observed the nomination process for the first competition and undertook limited monitoring of the second and third processes which were still in the early stages. This report focuses on the first process and makes reference to the other processes when necessary.

HCJ nominations are considered by the parliament of Georgia, and will issue a final report providing a comprehensive assessment of the entire process as well as recommendations in an effort to inform future appointment processes.

## EXECUTIVE SUMMARY

The nomination of judicial candidates for the Supreme Court took place in an environment where there is a lack of public trust in the independence of the judiciary. In recent years civil society and international observers have raised numerous concerns relating to the integrity and efficacy of Georgia's judiciary, including that of its judicial oversight body, the HCJ, empowered to nominate Supreme Court candidates to parliament. The appointment of 14 Supreme Court judges in 2019, monitored by ODIHR, was criticized by civil society and international actors.

Following the 2019 appointments, the parliament has now been moving to fill several remaining and new vacancies on the Supreme Court through three discrete but overlapping appointment processes initiated in the fall of 2020 for 11 seats. However, during the course of these three nomination processes, the legal framework applicable to Supreme Court appointments has undergone several important changes, calling into question the fairness and equality of the processes.

In response to public calls for transparency and meritocracy and the recommendations of international observers including ODIHR and the Venice Commission, parliament adopted amendments to the legal framework for Supreme Court nominations in September 2020 and April 2021, which further enhanced the amendments introduced in 2019. The Venice Commission and some key international partners of Georgia, including the EU, assessed the latest amendments as generally positive measures for strengthening transparency, accountability and equality in the proceedings, but noted that several shortcomings of the legislation remained. On 19 April 2021, the ruling party and part of the opposition in parliament signed an EU-brokered agreement committing themselves to suspending the nomination of new Supreme Court judges until these issues were addressed.

In spite of this, parliament failed to provide a formal legal basis for the HCJ to halt its nomination process for pending vacancies. As a result, the HCJ proceeded with the recruitment, hearings, and evaluations of candidates in three concurrent competitions throughout the spring of 2021. The overlapping rounds of recruitment, with three different processes for filling vacancies underway simultaneously, raised efficiency and conflict of interest concerns. ODIHR noted the application process resulted in limited diversity of the candidate pool, potentially caused by the HCJ's omission to widely circulate the vacancy notice and proactively encourage a wide range of candidates to apply; in addition, the application form raised concerns with respect to the right to private and family life in accordance with international standards. The procedures assessed by ODIHR pertaining to applications, background checks, and interviews established by the HCJ for these nominations fell short of international standards.

In the first competition (for a total of nine vacancies), the HCJ interviewed 43 candidates in public hearings. The HCJ failed to establish clear standards and guidelines for the format of certain application components as well as the interviews themselves, which led to variations in the length, structure, and tone of the hearings. Furthermore, rules of procedure adopted immediately prior to the commencement of the hearings were inadequate to ensure consistency and fairness of conditions. These disparities called into question the equality afforded to candidates in the process and may have materially harmed some candidates' chances for success. ODIHR monitors observed that while the HCJ took measures to increase the transparency of the process and access, proper notice for hearings was not provided and this as well as technical issues limited the effectiveness of these measures.

Despite recent changes in its composition, the functionality of the HCJ continued to be characterized by internal divisions, which manifested throughout the nomination process, undermining the collegial nature of the body and impacting its efficacy and public image. The hearings were frequently marred by a lack of professionalism as members of the HCJ criticized one another and the candidates.

Furthermore, although the law provides clear mechanisms to avoid conflicts of interest in the appointment of Supreme Court judges, ODIHR observed significant breaches of relevant standards and recommendations during the three overlapping competitions to fill vacant seats that may undermine judicial independence and public trust. Of these, the most concerning was the failure of an HCJ member who was participating in one ongoing nomination process as a candidate to recuse himself from the other two concurrent competitions. Other potential conflicts of interest arising during the process were inadequately addressed.

ODIHR monitors noted major improvements under the new amendments to the scoring, ranking, and final voting procedures for the nomination process, especially the elimination of secret voting; however, some concerns remain. After completing the hearing process, the HCJ members participating in the evaluation process each completed an evaluation and scoring form for every candidate along with a written justification, all of which were published on the HCJ's website. The publication of the scores and identities of the evaluators significantly strengthened transparency and accountability, and bolstered the right of appeal for candidates. However, large variation in the type and quality of reasoning left some evaluations inadequately explained.

On the basis of these scores and evaluations, the HCJ ranked, shortlisted, and published the names of nine final candidates. Each HCJ member then voted in an open session on the nomination of the shortlisted candidates, all nine of whom were ultimately nominated to parliament in a letter on 17 June. The nominations were submitted together with each member's written justification for his or her vote for, or against, a candidate – another improvement in accountability.

As of 9 July 2021, contrary to its commitment to suspend the pending Supreme Court nominations under the 19 April EU-brokered Agreement, pending legislative amendments to address previous

recommendations and deficiencies in the process, parliament had taken the nine nominations under consideration and was preparing to proceed to a vote on their appointments.

## BACKGROUND

In the midst of persistent calls for strengthened judicial independence,<sup>4</sup> Georgia has undergone several waves of judicial reform in recent years. Constitutional amendments that came into force in December 2018 increased the minimum number of Supreme Court judges from 16 to 28 and changed the 10-year terms to lifetime appointments. The amendments granted the HCJ the authority to nominate Supreme Court candidates for appointment to parliament, a power previously exercised by the president. A new legal framework adopted in May 2019 established criteria, conditions, and procedures for the selections but did not fully adhere to international standards and recommendations.<sup>5</sup>

Public trust in the judiciary and the HCJ remains low following the widely criticized appointments of 14 Supreme Court judges in late 2019.<sup>6</sup> Georgian citizens appear to believe that an influential group of judges exerts significant influence on the judiciary in collaboration with certain government officials.<sup>7</sup> Against this backdrop, ODIHR continues to call on Georgia to prioritize strengthening independence of the judiciary, including by ensuring a genuine merit-based judicial selection process.<sup>8</sup> At the same time, civil society actively monitors and assesses the independence and transparency of the judiciary, and the selection of judges.<sup>9</sup>

As set forth in ODIHR's comprehensive assessment of the proceedings, in the appointment of 14 of 20 Supreme Court candidates in December 2019, the authorities failed to ensure an impartial process based on clearly defined and objective criteria without the influence of partisan politics.<sup>10</sup> Although the HCJ defended the process as transparent, merit-based, and in line with international

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<sup>4</sup> For example, see [Transparency International Georgia's report on The State of the Judicial System 2016–2020](#).

<sup>5</sup> OSCE/ODIHR, [Opinion on Draft Amendments Relating to the Appointment of Supreme Court Judges of Georgia](#), 17 April 2019 (2019 ODIHR Opinion). The Council of Europe's European Commission for Democracy through Law (Venice Commission) [Urgent Opinion on the Selection and Appointment of Supreme Court Judges of Georgia](#), published on 16 April and endorsed by the Venice Commission on 21-22 June 2019 (2019 Venice Commission Urgent Opinion).

<sup>6</sup> In a December 2020 National Democratic Institute [poll](#), only 13 per cent of respondents positively assessed the performance of the courts. According to a February 2020 [poll](#) conducted by the Institute for Development of Freedom of Information, 40 per cent of respondents distrust the HCJ, 41 per cent distrust the Supreme Court, and 43 per cent distrust the court system.

<sup>7</sup> According to a Transparency International Georgia [survey](#) conducted in early 2020, 47 per cent of respondents believe that the judiciary is governed by an influential group of judges; 84 per cent of those respondents think that this group is supported by government officials; and 88 per cent think the group should leave the judiciary.

<sup>8</sup> The issue of independence of the judiciary and judicial reform is part of the EU-Georgia Association Agreement. See [European Union's 2021 Association Implementation Report on Georgia](#).

<sup>9</sup> The Coalition for a Transparent and Independent Judiciary (Coalition), comprises 40 non-governmental organizations. See <http://coalition.ge> and <https://www.facebook.com/CoalitionGe>.

<sup>10</sup> ODIHR, Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia (January 2020).

standards,<sup>11</sup> the Public Defender,<sup>12</sup> civil society groups,<sup>13</sup> international actors, the political opposition, and much of the public<sup>14</sup> viewed the process as politicized and lacking impartiality. The selection of one of the newly appointed judges as Supreme Court chairperson in March 2020 led to renewed criticism and protests by civil society, which regarded the process as biased.<sup>15</sup>

Parliament attempted to fill the remaining vacancies and several new vacancies that since arose through a series of nomination processes. In January 2020, at the urging of international actors, parliament halted the pending hearings of seven candidates<sup>16</sup> until after the fall general elections.<sup>17</sup> In October 2020, following the elections in which the ruling party won 91 of the 150 seats,<sup>18</sup> the HCJ restarted the recruitment for these seven vacancies and an additional two that had been previously advertised. The HCJ later advertised two new vacancies, for a total of 11 out of 28 Supreme Court posts to be filled in three ongoing competitions amidst a climate of political crisis.

## LEGAL FRAMEWORK

The legal framework applicable to the selection of the 11 pending Supreme Court judicial posts changed several times during the pending appointments, raising serious concern with respect to the perceived fairness and legitimacy of the appointment process.

The nomination and appointment of Supreme Court judges is regulated by the Constitution, the Organic Law on Common Courts (hereafter Organic Law) and the Rules of Procedure of the Parliament. Under the Constitution, the HCJ – the constitutional body mandated to oversee the judiciary<sup>19</sup> – nominates candidates to the parliament, which in turn makes the appointments by majority vote. In May 2019, a revised legal framework introduced an open recruitment process, merit-based criteria, and transparency measures, most notably public hearings at the nomination and appointment stages. In a legal opinion from April 2019, ODIHR welcomed the amendments but identified several shortcomings that were not addressed in the adopted law.<sup>20</sup> Remaining flaws,

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<sup>11</sup> See [HCJ's comments](#), 1 December 2020.

<sup>12</sup> See the [report](#) of the Public Defender of Georgia.

<sup>13</sup> See Coalition's report on [Assessment of Candidates for Supreme Court Judges](#); see also the [report](#) of the Georgian Democracy Initiative assessing the 2019 Supreme Court nomination and appointment process.

<sup>14</sup> See the National Democratic Institute for International Affairs December 2019 [survey](#); see also the Institute for Development of Freedom of Information March 2020 [survey](#).

<sup>15</sup> The new Supreme Court Chairperson was also elected as the new chairperson of the HCJ. See [statement](#) of the Coalition and [statement](#) of the Human Rights Education and Monitoring Center.

<sup>16</sup> The HCJ nominated one candidate in early December 2019 for a vacancy advertised in September 2019 and nominated six candidates (replacing the six earlier rejected nominees) to parliament in late December 2019.

<sup>17</sup> The postponement was welcomed by national and international actors alike, including ODIHR. See ODIHR [statement](#) of 15 January 2020.

<sup>18</sup> ODIHR's observation [found](#) the parliamentary elections to be competitive and administered efficiently despite challenges posed by the COVID-19 pandemic, but also the widespread allegations of pressure on voters and the blurring of the line between state and ruling party reduced public confidence in some areas of the process.

<sup>19</sup> For a description of the HCJ's function, see OSCE/ODIHR, [Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia](#), June-September 2019 (10 September 2019), p. 9.

<sup>20</sup> These included: the transparency-limiting use of secret votes through the nomination process; the lack of any requirement for the HCJ to provide justification for its scoring of candidates; the lack of an explicit right for

including the use of secret voting and the absence of substantiated decisions at the nomination stage, were unsuccessfully challenged by the Public Defender before the Constitutional Court.<sup>21</sup>

Hastily adopted amendments to the legal framework for selection of Supreme Court judges in September 2020 addressed some concerns but failed to alleviate many problematic aspects of the procedure. Urged on by the conditionality attached to EU funding to Georgia,<sup>22</sup> the amendments were discussed and adopted in just a few weeks without the participation of civil society or opposition parties, who were boycotting parliament at the time. The requested Venice Commission Opinion issued a week later, concluded that while some problematic aspects had been addressed, key issues remained, including many of those previously identified in ODIHR's reporting.<sup>23</sup>

The September 2020 amendments introduced three significant, though limited, improvements. First, they strengthened transparency by eliminating the first round of secret voting (for the shortlisting of candidates)<sup>24</sup> and required that all candidates be interviewed by the HCJ. Second, the amendments bolstered accountability and the right to legal remedy by requiring that each HCJ member provide written justification for their post-hearing scoring and voting on each candidate based on the established evaluation criteria; the amendments also required the justifications to be published.<sup>25</sup> Finally, the amendments mandated the nullification of all pending nominations as of September 2020 in light of the flaws in the legal framework underpinning these proceedings and the HCJ canceled ongoing nomination processes. However, deficiencies in the legal procedure still remained when the selection process for the 11 Supreme Court vacancies began in fall 2020.<sup>26</sup>

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candidates to challenge HCJ decisions before a judicial body; and no mechanism for limiting politicization of the selection process of nominated candidates by parliament. For a comprehensive analysis of the proposed amendments, see the 2019 ODIHR [Opinion](#) and the 2019 Venice Commission [Urgent Opinion](#).

<sup>21</sup> On 30 July 2020, the Constitutional Court dismissed the case (and a second case relating to new vacancies advertised in March 2020) in a split 4-4 decision. One of the nine judges recused himself since he had been nominated (though later withdrew) in one of the 2019 Supreme Court selection processes. A dissenting opinion argued in part that the decision was erroneous because it contradicted the court's previous case law, which could only be overturned by five votes. The Public Defender criticized the decision in a public [statement](#).

<sup>22</sup> On 22 September 2020, shortly before the legislative amendments were adopted, the [Memorandum of Understanding](#) (MoU) was signed, conditioning release of a 150 million-euro commitment on the fulfilment of certain judicial reforms. These include bringing the legislation regulating the Supreme Court selection process in line with the 2019 Venice Commission's Opinion, with specific reference to repeal of the secret voting and introduction of reasoning for the decisions in the nomination phase, and a staggered approach to the appointments.

<sup>23</sup> See Venice Commission, [Opinion on the Draft Organic Law Amending the Organic Law on Commission Courts](#). Although parliament had requested a Venice Commission opinion on the draft amendments, it did not wait to receive the opinion before adopting them.

<sup>24</sup> Prior to the amendments, two secret votes were conducted during the nomination process: the first to determine a preliminary list of nominees (those who received the most votes by the HCJ members) and a second to determine the final list of nominees (those top nominees that receive the votes of at least two-thirds of the HCJ members).

<sup>25</sup> See Legal Remedy section below.

<sup>26</sup> The cancelation of pending nominations left nine renewed and two new appointment processes for the eleven vacancies to be carried out under the revised legal framework.

Following international pressure and a failed attempt at a political agreement,<sup>27</sup> another set of amendments were adopted in early April 2021<sup>28</sup> that addressed many of the ODIHR and Venice Commission recommendations but raised new concerns with respect to the hasty manner of their passage. At the time when the amendments were introduced, more than half of the Supreme Court candidates had already had their HCJ nomination hearings. While the efforts to bolster the equality and transparency of the process were welcomed, the authorities were urged to seek a legal review of the changes and ensure the equal application of the procedures to all applicants.<sup>29</sup>

Most importantly for accountability and the right to remedy, the amendments eliminated secrecy in the nomination process, expanded appeal opportunities and explicitly required equal treatment of all candidates in hearings.<sup>30</sup> They mandated public disclosure of the identity of HCJ members and the publishing of their scoring and written evaluation of candidates to reach the short-listing stage, as well as the justification of each HCJ member when voting on the final nomination for parliament's consideration. This allows unsuccessful candidates to make a reasoned appeal. In addition, candidates now have a second opportunity for appeal when the court returns a matter to the HCJ for re-examination. The Venice Commission's Urgent Opinion from 28 April acknowledged key improvements to the legislation but pointed to some outstanding concerns and importantly noted the possibility of unequal treatment of candidates and indicated that the proceedings may need to be started anew.<sup>31</sup>

The uncertainty surrounding the 11 pending appointments was not alleviated by the EU-brokered agreement in parliament on 19 April 2021 which included, as one of its terms, the introduction of yet another round of amendments to the legal framework for selection of Supreme Court judges to

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<sup>27</sup> See [the 16 March 2021 statement by the EU representative of the EU-Georgia Association Council](#) stressing that "Georgia must deliver on its justice reform commitments, including by reforming the selection process of Supreme Court judges to ensure public trust" and [joint press release](#) of the same day following the 6<sup>th</sup> Association Council Meeting between the EU and Georgia. The EU publicized the [proposed terms](#) of the agreement on 31 March, the day that the negotiations failed and one day prior to adoption of the 1 April amendments.

<sup>28</sup> The draft bill was initiated on 24 March 2021 by three GD members of parliament and was adopted on 1 April.

<sup>29</sup> The EU's [April 7 statement](#) expressed disappointment that the parliament had "hastily designed and adopted these amendments without an inclusive consultation process" and warned that further disbursement of EU funds to Georgia were conditioned on implementation of related Venice Commission recommendations.

<sup>30</sup> Additional key aspects of the April 2021 amendments include: (1) a requirement for each HCJ member to score/evaluate all candidates; (2) repeal of the HCJ's first vote to shortlist candidates, instead shortlisting the highest-scored/evaluated candidates (provided the candidate meets the minimum scoring/evaluation threshold); and (3) a requirement that each shortlisted candidate receive at least two-thirds of the votes, and that any shortlisted candidate that is rank after a candidate who does not receive at least two-third votes is automatically eliminated.

<sup>31</sup> For example, the Opinion generally criticized voting procedures for judicial appointments, noting: "it is difficult to base an efficient merit-based appointment on a voting procedure. However, while voting is imperfect, the level of transparency now proposed together with an appeal process...should be of some help." [Venice Commission's Urgent Opinion](#) on the Amendments to the Organic Law on Common Courts (28 April), para. 12. Recommendations were that 1) the HCJ change its composition when, following an unsuccessful candidate's appeal to the Supreme Court Qualification Chamber, a member of the HCJ is found to have acted with bias; 2) that the HCJ stay an appointment procedure that is subject to appeal until final decision by the Qualification Chamber; and 3) that the HCJ consider restarting the pending appointment process for 11 Supreme Court vacancies to ensure equal treatment of all candidates.



bring it in line with the recommendations of the Venice Commission. This Memorandum of Understanding, signed by the ruling party and part of the opposition (“the April 19 Agreement”),<sup>32</sup> set forth a number of commitments related to the Supreme Court appointments process, including: 1) the introduction of draft legislation that would fully implement the Venice Commission’s 2019 opinion on the matter;<sup>33</sup> 2) the suspension of all pending appointments until the new legislation was adopted;<sup>34</sup> and 3) the introduction of measures to reform the HCJ to increase transparency, integrity, and accountability, which the parties agreed would eventually be subject to review and assessment by the Venice Commission and the OSCE/ODIHR.

The commitments made by the parties in the April 19 Agreement were not implemented with respect to the pending Supreme Court appointments, and legislation aimed at bringing the legal framework fully in line with the Venice Commission recommendations was not introduced. As parliament failed to provide a formal legal basis for the HCJ to halt its nomination process, the HCJ continued with the nomination process in the first competition (for nine pending vacancies). This has raised serious fairness concerns, and it has been strongly criticized by opposition parties, civil society, and international actors.<sup>35</sup>

## CURRENT COMPOSITION AND DYNAMICS OF THE JUDICIAL OVERSIGHT BODY

As the body overseeing the judiciary as a whole – and the selection of Supreme Court nominees in particular – the HCJ has been subject to criticism. HCJ membership significantly changed in 2020, with one-third of its members being newly elected or appointed,<sup>36</sup> in several cases amidst public controversy. The appointment of three HCJ judge members and one presidential appointee member in 2020, as well as an additional four members in 2021, were met with criticism.<sup>37</sup> Although it did not cause a problem in practice, the fact that the term of appointment of nine HCJ members expired during 2021 might have been potentially problematic as there are no clear rules on whether newly appointed members may vote to nominate candidates whose hearings they did

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<sup>32</sup> See “[A way ahead for Georgia](#)”. The signing of the agreement broke the political deadlock and ended the opposition boycott of parliament, although the United National Movement and European Georgia did not sign the MoU.

<sup>33</sup> Regarding timeline, the MoU provides that the draft legislation must be tabled and sent before 1 July 2021 to the Venice Commission for opinion; a first vote is to take place in the autumn session of 2021; and parliament adopts the legislation no later than the spring 2022 session.

<sup>34</sup> The MoU was not clear as to whether the ongoing selection processes had to be cancelled and then completely restarted after adoption of the legal reforms, or if a temporary suspension and subsequent resumption was to occur.

<sup>35</sup> See for example the US Ambassador’s [statement](#) to the media, the [joint statement](#) signed by seven NGOs, the [statement](#) of Georgian Transparency International, and an example of many [statements](#) made by opposition.

<sup>36</sup> The HCJ is composed of 15 members serving four-year terms, eight elected by and from the Judicial Conference of Judges, one member is ex officio the Supreme Court chairperson, and six non-judge members, five elected by parliament and one a presidential appointee. One positive recent change has been an increase in representativeness in the HCJ, 7 out of 15 members are women, including the chairperson, as opposed to just four a year ago.

<sup>37</sup> See [Coalition statement](#) issued 30 October 2020. The US Embassy in Georgia also [publicly criticized](#) the appointments of the judge members as insufficiently transparent and consultative. In a [statement](#), the Public Defender urged the adoption of new rules on selection of HCJ members to increase trust and reduce undue influence in the judiciary.

not participate in. Parliament failed to appoint a replacement for its five HCJ members within the legal deadline, casting further uncertainty on the Supreme Court nomination proceedings.<sup>38</sup>

ODIHR's monitoring found that, despite changes in its composition, the functionality of the HCJ continued to be characterized by internal divisions. Some of its members continued to criticize each other publicly, including in relation to the 2019 Supreme Court nomination proceedings. Ideological divisions and adversarial dynamics undermined the collegial nature of the body, impacting its efficacy and public image throughout the selection process.

## TRANSPARENCY AND MONITORING

ODIHR monitors observed that, although the HCJ did take some measures to increase public access to the nomination process, repeated procedural violations and technical issues limited the actual transparency of the proceedings. For example, throughout the nomination process, the HCJ did not meet the legal requirement to provide three working days of advance notice for its public sessions.<sup>39</sup> Specifically for the candidate hearing sessions, the HCJ adopted a one-working-day advance notice requirement in the rules of procedure, with hearing notices and candidate names typically posted on the HCJ website only one day prior. ODIHR monitors found that the one-day advance notice requirement that the HCJ put in place for candidate hearings did not ensure proper notice to the candidates and is contrary to the rule for normal HCJ sessions.

At times, sessions were postponed or the agendas changed at the last minute, and some candidates were given more advance notice of their upcoming hearing than others. Although the HCJ's formal decisions in the nomination process were posted on its website in a timely manner, other key information was rarely posted, such as the recusal of HCJ members and withdrawal of candidates.

In a positive move, the HCJ held the candidate hearings and related public sessions in the Supreme Court premises, which was wheelchair-accessible and open to the public, observers, and journalists and provided adequate space for physical distancing during the COVID-19 pandemic. The interviews were also livestreamed on a screen in another hall where a small number of journalists and camera operators observed the proceedings. Media cameras were barred from the hearing room, except for the first few minutes of each hearing.

In addition, in line with a previous ODIHR recommendation and the Public Defender's request, the HCJ live broadcasted the hearings on its YouTube channel, posting the daily links on its social media profile as well as on its website. The streaming contributed to the transparency of the process and allowed interested citizens to generally assess the quality of the candidates and of the hearing

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<sup>38</sup> The Rule of Procedure of the Parliament, Article 208(1) provides that parliament must replace an HCJ member not earlier than 30 calendar days before, and not later than 7 calendar days after, the expiration of his/her term.

<sup>39</sup> See Article 49(4) of the Organic Law. By legislative amendment in December 2019, the seven-day advance notice requirement was reduced to three days.

process.<sup>40</sup> The Public Broadcaster did not air the proceedings, reportedly due to the excessively short notice of the HCJ's invitation to do so.

The mainstream media provided limited coverage of the nomination process, while civil society organizations monitored and posted highlights from hearings.<sup>41</sup> Although generally the public did not attend hearings, many watched the recorded and live-streamed hearings, with interest peaking for certain candidates.<sup>42</sup> Online viewership waned over the course of the hearing process, possibly due to the erratic nature of the selection process and significant delays over many months.<sup>43</sup>

Rather than providing written minutes or transcripts of the discussions, the HCJ uploaded audio recordings of the proceedings, which sometimes failed to capture the full extent of the discussions and limited opportunities for review for persons with impaired hearing. In addition, the files were uploaded with delays of up to one month and in a file format that was difficult for users to access. The HCJ website underwent a system upgrade, which hindered access to information during the nomination process for a prolonged period.

## RECRUITMENT AND CANDIDATE POOL

ODIHR's monitoring of the application process for the 11 Supreme Court posts found inefficiencies in recruitment procedures, with the HCJ adopting a rather piecemeal approach. ODIHR also observed limited diversity in the applicant pool. For the 11 vacancies in late 2020, the HCJ initiated one recruitment process for nine vacancies in early October 2020; a second recruitment process for a single vacancy in early November 2020;<sup>44</sup> and a third recruitment process for another single vacancy in late November. In the absence of any clear justification for its approach, the HCJ's staggering of the processes provoked conflict of interest concerns (see below).

The HCJ's advertisement of the nine vacancies in October 2020 broadly complied with the legal requirements but failed to take into account best practices and recommendations for ensuring transparency of process and diversity of applicants. For example, while the vacancy notice was

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<sup>40</sup> Audio was not fully captured in the livestream as microphones were not always used and once the livestream cut out for a period of time during a heated exchange between HCJ members. The HCJ uploaded the video that had been edited to remove the exchange, but later uploaded the full-length video following civil society pressure.

<sup>41</sup> Although it did not provide a systematic assessment of the candidates as it had in the 2019 appointment process, throughout each interview, the Coalition uploaded to its social media profile multiple graphic cards with select questions and answers to provide the public with accessible extracts of the hearings.

<sup>42</sup> There was an average of some 160 live views per hearing, with a maximum 400+ live views. At any one time, an average of 30 persons were simultaneously viewing the livestreamed hearings, with a maximum 100+ simultaneous views of some hearings. Views of the video-recorded hearings was much higher; mid-way through the hearing process, an average of 1,000 views accumulated per video recording, with up to 4,000+ views for a select few.

<sup>43</sup> The hearing process began with two interviews scheduled each working day, with a total of ten per week; mid-way through the process, the interviews dwindled to two, one, or none per week, without sufficient explanation.

<sup>44</sup> This announcement was nine days past the legal deadline for advertisement. Article 34.1.(1) of the Organic Law requires the HCJ to start the procedure for appointing a Supreme Court judge to an upcoming vacancy no later than three months before the expiration of the term of the sitting judge.

published in accordance with the law,<sup>45</sup> the eligibility and evaluation criteria and the nomination procedures were not included in the notice, contrary to international standards.<sup>46</sup> Furthermore, contrary to previous ODIHR recommendations, the notice did not include messaging encouraging applications from women, minorities, and persons with disabilities.<sup>47</sup> While the HCJ received 53 applications,<sup>48</sup> one was found ineligible,<sup>49</sup> 18 withdrew their candidacies at different stages of the process,<sup>50</sup> and two were de-registered.<sup>51</sup> For the second and third competitions for one vacancy each, all 22 and 25 applicants, respectively, were deemed eligible. There was significant overlap amongst the three candidate pools, with a total of 97 registered candidates amounting to only 62 individuals competing for a total of 11 posts, even after re-opening the vacancies following the April 2021 amendments.<sup>52</sup>

In addition to its size, the applicant pool was also limited in diversity. The fall 2020 competition attracted only about one-third the number of candidates that participated in the 2019 selection process.<sup>53</sup> Of the 52 eligible candidates in the first process, 36 were sitting judges (69 per cent), with a disproportionate (89 per cent) from Tbilisi-based courts.<sup>54</sup> The non-judge candidates included three former judges, four judicial staff, two prosecutors/investigators, four private lawyers/businessmen, and three academics. The conspicuous lack of qualified candidates from the

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<sup>45</sup> The vacancy notice was published on the HCJ and Legislative Herald websites and through the Public Broadcaster and other national broadcasters (by law, at least two are to be notified.)

<sup>46</sup> See *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* (2010), para. 12.3; and *Cape Town Principles on the Role of Independent Commissions in the Selection and Appointment of Judges* (February 2016), Principle 9, which provide that in order to ensure the transparency of the process, the vacancy notice should reiterate the selection criteria and specify the process of selection.

<sup>47</sup> See 2019 ODIHR Opinion, paras. 46-49 and all references contained therein.

<sup>48</sup> Initially, HCJ received 51 applications, however two additional candidates (both women, non-judge candidates) joined the recruitment process when the application was re-opened following signing of the April-19 agreement.

<sup>49</sup> The eligibility criteria are: Georgian nationality, knowledge of the state language, higher legal education with a master's degree or equivalent, at least 30 years old and five years' experience as a judge or specialist of distinguished qualification in the field of law. One applicant, a non-judge male, was rejected on the basis of failure to submit proof of his five years of legal experience. He subsequently applied and was registered for the second and third competitions, apparently having submitted the necessary proof of his five years' experience.

<sup>50</sup> Seven candidates withdrew before hearings, six withdrew after being interviewed, while one candidate (former Supreme Court judge) withdrew after being scored and evaluated. 56 per cent of withdrawn candidates are women.

<sup>51</sup> The HCJ de-registered two non-judge candidates, one male and one woman. One of the candidates, a male private lawyer, was de-registered on the basis that he had postponed or failed to appear for a series of hearings, although such grounds for de-registration are not established in the law (or rules of procedure) and a formal decision was not issued on a timely basis. At the very end of the process, the woman non-judge candidate was de-registered as the HCJ did not accept her request to postpone the hearing to after the April 19 Agreement judicial reform was implemented. The HCJ did not provide a written decision for the de-registration, which was without legal basis.

<sup>52</sup> While the HCJ had no basis to suspend the on-going nomination processes the April 2021 amendments required the HCJ to issue a one-week reopening of the vacancies for all three selection processes. The renewed recruitment attracted just three new applications, all from individuals who were already registered in one or two of the three ongoing selection processes.

<sup>53</sup> In the 2019 selection process, 144 persons applied to compete for the 20 vacancies on the Supreme Court.

<sup>54</sup> While some one-third of all judges are based in courts outside Tbilisi, only 11 per cent of judge applicants were from courts in the regions. Applicants included two former Supreme Court judges whose terms recently expired one sitting Supreme Court judge whose term is expiring.

broader legal community, civil society sector, and academia may indicate an absence of trust in the impartiality and legitimacy of the selection procedures.<sup>55</sup> Of the 52 registered candidates for the first competition, 29 (56 per cent) were men and 23 (44 per cent) were women, which is significantly less than the percentage of women judges in the country (57 per cent).<sup>56</sup> There appeared to be no ethnic minority candidates in any of the candidate pools for the three ongoing competitions, despite the diversity of the population in Georgia.<sup>57</sup> The lack of proactive measures from the HCJ to ensure diversity of the candidate pool will impact on the representativeness of the Supreme Court.

## APPLICATION PROCESS AND BACKGROUND CHECKS

Assessed procedures pertaining to applications, background checks, and interview preparation established by the HCJ for these nominations fell short of international standards. The application form itself raised concerns with respect to the right to private and family life in accordance with international standards.<sup>58</sup> While available fully online for the first time, the form remained substantively unchanged from that used in the 2019 process,<sup>59</sup> which ODIHR and the Venice Commission previously found opened potential for discrimination and violation of private and family life by incorporating unnecessary questions.<sup>60</sup>

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<sup>55</sup> No legal professionals from within the civil society sector applied for any of the three ongoing competitions. As an indication, the 2019 candidate pool consisted of 53 per cent non-judge candidates, of which 42 per cent were independent lawyers and academics compared to only 14 per cent in the current candidate pool. A [January 2021 survey](#) of practising lawyers conducted by the Independent Group of Lawyers found that 64 per cent of respondents believe an influential group of judges are informally involved in appointment of judges; 72 per cent think it is either impossible, or possible only in some cases, for a qualified professional to become a judge without outside influence or other informal interference; and more than 50 per cent of respondents evaluated the process of selection of judges for the Supreme Court as completely or mostly unfair, biased, and lacking objectivity.

<sup>56</sup> The breakdown by gender of the candidate pool is similar to the breakdown for current Supreme Court judges, but significantly lower than the 57 per cent women judges amongst all common court judges (as per 2019 statistics).

<sup>57</sup> According to the 2014 national census, 13.2 per cent of Georgians self-identify as an ethnic minority, the highest numbers being Azerbaijanis and Armenians. In Georgia, ethnic minorities generally face systemic disadvantage and social exclusion, with a 2018 [survey](#) conducted by the Caucasus Resource Research Center finding that zero per cent of the respondents from ethnic minorities held a master's degree in law (compared to seven per cent of ethnic Georgians). This lack of legal education broadly disqualifies ethnic minorities from pursuing a post on the Supreme Court, a problem that would need to be addressed at a systemic level.

<sup>58</sup> The HCJ has informed ODIHR that the Office of State Inspector has examined in detail the content of the application form and aim of data processing as well as the issues of data storing and data security, and by the Decision of 3 October 2019 № 1/330/2019 concluded that while processing the personal data, the HCJ does not violate the provisions of the law of Georgia "On Protection of Personal Data".

<sup>59</sup> While the HCJ did not publish the application form for public scrutiny, the HCJ secretariat reported that it was the same form used in the 2019 process.

<sup>60</sup> These include, for example, questions about the personal data and criminal convictions of family members. See e.g., on information requested or collected from candidates to judgeship in Georgia, Venice Commission, [Joint Opinion of the Venice Commission and the Directorate of Human Rights \(DHR\) of the Directorate of Human Rights and the Rule of Law \(DGI\) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia](#), CDL-AD(2014)031-e, 14 October 2014, paras. 51-54. Discrimination on the ground of marital status was expressly acknowledged by ECtHR in [Petrov v. Bulgaria](#) (Application no. 15197/02, judgment of 22 May 2008). See also CCJE, [Opinion no. 21 \(2018\) on Preventing Corruption among Judges](#), para.

Although the HCJ conducted background checks on the 52 eligible candidates in the first process in accordance with the law,<sup>61</sup> it neglected to establish a clear methodology and procedure, in discord with international standards and previous recommendations.<sup>62</sup> The lack of established clear methodology when coupled with the fact that the HCJ did not publish the completed applications and supporting materials, limited transparency of this aspect of the process.<sup>63</sup> By general notice on the HCJ website, candidates were informed of their right to review the collected information and to file an objection with the HCJ or submit additional information. As noted in the 2019 ODIHR Opinion, the two-day period for filing an objection may hinder opportunities for such a challenge.<sup>64</sup> According to the HCJ secretariat, few candidates requested to review the information, which could be attributed to the lack of personal notice and/or the short review period.<sup>65</sup>

In accordance with the law, the HCJ published the curriculum vitae (CVs) and/or biographies of each of the 52 eligible candidates, however, substantial variation in form and a lack of procedures for verifying the data provided limited the utility of these documents as indicators of the candidates' qualifications. Having omitted to provide a template or establish objective standards, the HCJ received CVs/biographies widely varying in type, detail, and length, making comparisons challenging. Equally problematic, the HCJ did not appear to have taken any steps to address discrepancies between the CVs and the financial declarations of the candidates, even given the existence of grounds to suspect that some candidate declarations may be incomplete or inaccurate.<sup>66</sup> While the HCJ challenged the accuracy of CV/biography information of some candidates during the hearing process, it took no apparent measures to address alleged irregularities, undermining the integrity of the process. In addition, the HCJ failed to establish regulations on the submission of other required documents, including health certificates<sup>67</sup> and drug testing certificates, the latter

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26. The application form was unsuccessfully challenged with the State Inspectors Service in 2019 by a previous candidate on similar grounds.

<sup>61</sup> Article 34.2(2) of the Organic Law provides that background checks are to thoroughly examine the candidates' professional reputation and activities, verify the accuracy of the information submitted by the candidates, and examine information on any past criminal prosecutions, disciplinary measures, and administrative proceedings.

<sup>62</sup> For previous recommendations to this effect, see 2019 ODIHR Opinion, para. 73. See also 2010 ODIHR Kyiv Recommendations, para. 22; and the 2014 VCDHR-DGI Joint Opinion on Draft Amendments to the Organic Law on General Courts of Georgia, para. 55.

<sup>63</sup> The HCJ did release this information to an NGO and the Public Defender upon requests for the information.

<sup>64</sup> See 2019 ODIHR Opinion, para. 75, and 2010 ODIHR Kyiv Recommendations, para. 22.

<sup>65</sup> HCJ later informed ODIHR that all candidates were notified by phone and that up to 50 per cent of candidates took the opportunity to review their documents.

<sup>66</sup> Article 34.2(2) of the Organic Law requires the HCJ to conduct background checks and that the checks should verify the accuracy of information submitted by the candidates. In addition, by law, candidates must submit financial declarations to the HCJ within five days of registration. One candidate, a sitting judge, openly admitted during his hearing that he was unwilling to make full disclosure in the declaration. Verification of the accuracy of financial declarations falls within the competence of the Legal Entity of Public Law (LEPL) Civil Service Bureau (an administrative body).

<sup>67</sup> The Organic Law requires that the HCJ determine the form of the application and the supplementary list of documents to be submitted; one such document required by the HCJ is a health certificate. However, having set no deadline for the validity of a health certificate, the HCJ accepted some applications with no health certificate and others that were up to one year old.

of which led to the de-registration of several candidates in some of the selection processes, although the same candidates remained eligible in other concurrent competitions.<sup>68</sup>

Finally, the HCJ did not give itself adequate time to thoroughly review the qualifications and background information of each candidate prior to the start of hearings. Although the members received this information by the legally established deadline of five working days prior to the commencement of the process, given the number of candidates and the complexity of the task, this was insufficient lead time to meaningfully prepare for the interviews.<sup>69</sup> This, together with the above-described unregulated areas of the application process, created uncertainty and the risk of arbitrariness in the proceedings.

## CONFLICT OF INTEREST

In spite of the existence of a legislative basis to address conflicts of interest in the appointment of Supreme Court judges in Georgia and extensive international recommendations in this regard, ODIHR observed serious breaches of these standards in the fall 2020 nomination proceedings that may undermine judicial independence and public trust.<sup>70</sup>

The law itself provides a broad, if insufficiently detailed, basis for recusals. It requires the withdrawal from nomination proceedings by HCJ members applying for judicial posts, including Supreme Court vacancies,<sup>71</sup> and by those who are close family members of applicants.<sup>72</sup> The

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<sup>68</sup> While the law requires the submission of drug testing certificates within five days after the expiry of the appeal period, the HCJ set no explicit requirement for the period of validity of such certificates. Consequently, four candidates in the second competition submitted the same drug certificates they submitted in the first competition (by then over four months old), and one submitted the certificate shortly after the deadline; the HCJ de-registered all five on these grounds. Later, the HCJ de-registered six of the candidates in the third competition also due to submitting previously-submitted drug certificates. All deregistered candidates remained registered in one or both of the earlier competitions. The uncertainty surrounding validity requirements may undermine candidates' right to appeal against these administrative decisions.

<sup>69</sup> One HCJ member raised concerns with ODIHR monitors that the candidate background information provided by the secretariat was insufficient to effectively prepare for the interviews and evaluate candidates based on the merit-based criteria. Civil society organizations provided independent background research at the request of this member.

<sup>70</sup> See, e.g., CCJE Opinion no. 10, Recommendation D(a); Bangalore Principles of Judicial Conduct (2002), endorsed by the UN Economic and Social Council in its resolution 2006/23 of 27 July 2006, Preamble, which states that "institutions established to maintain judicial standards [should be] themselves independent and impartial"; and Principle 7 of 2016 Cape Town Principles. See also the 2019 ODIHR Opinion, paras. 63-64; the 2019 Venice Commission Urgent Opinion, para. 51 and OSCE/ODIHR, [\*Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia\*](#), June-September 2019 (10 September 2019), pg. 12.

<sup>71</sup> Article 35(3) of the Organic Law provides that "a member of the HCJ shall not participate in the competition procedures for a vacant position of a judge, as a member of the HCJ, if he himself participates in the competition for this vacant position of judge". Art. 34.1(16) states: "If a candidate for a judge of the Supreme Court is a member of the HCJ, he/she shall not exercise the right to evaluate and vote for candidates at any stage of the procedure. He is also not authorized to ask questions to candidates while being heard by the HCJ."

<sup>72</sup> Article 35.3(1) of the Organic Law states that "the member of HCJ does not participate in the procedure of the appointment process if s/he is a family member of a judicial candidate, a relative of a direct ascending or descending branch, or [the HCJ member is] the sister, brother or son/daughter in law [of the candidate], sister,

legislation grants candidates the right to file a motion on recusal of an HCJ member if there is a conflict of interest – and the HCJ did in fact ask each candidate in the fall 2020 nomination process whether s/he wanted to request the recusal of any member<sup>73</sup> – although it does not define specific circumstances amounting to conflict of interest other than those mentioned above.<sup>74</sup> Although the law requires an HCJ member to announce the existence of a specific conflict of interest prior to recusal, members who eventually recused did not clearly state their grounds for doing so, and the HCJ did not mandate the public posting of written justifications for recusals.<sup>75</sup>

Most concerningly, one HCJ member who applied for the second competition (for one vacancy), while recusing himself as an HCJ member from that process, declined to recuse himself from the first process (for nine vacancies) and third process (for one vacancy), in spite of the enormous overlap in candidates in these proceedings, as described above.<sup>76</sup> Consequently, this member participated in the interviews of thirteen candidates in the first process against whom he would soon compete in the second competition. This created both the appearance and objective existence of a conflict of interest, as the member had a direct interest in these candidates' performance, evaluations and/or nomination results in the first process. The member also attended and participated in HCJ sessions at which de-registration of several of his competitors in the second competition was discussed and decided on. Although the member did not cast a vote, he participated in the deliberations, in violation of the legal requirement to recuse himself from competition procedures in which he is participating as a candidate.<sup>77</sup> Moreover, the same member-candidate participated in the process of drafting the new procedural rules for the hearing process in which he would soon compete, prompting an adversarial public exchange between the member and another HCJ member, as well as a statement by a group of civil society organizations.<sup>78</sup>

Another conflict of interest arose and went inadequately addressed by the HCJ when one HCJ member whose brother-in-law was a candidate in the first and third competitions recused himself from those rounds, but declined to recuse himself from the second process, despite the significant

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brother or parent of the spouse [of the candidate].” This provision was added upon ODIHR’s recommendation in the November 2019 amendments.

<sup>73</sup> No candidate requested a recusal, however, as detailed below, some members self-recused.

<sup>74</sup> Article 35.3(1) provides that “in the appointment process of a judge, a judicial candidate has the right to file a substantiated motion on the recusal of a member of the HCJ if there is a conflict of interest, in particular, if there is a circumstance that casts doubt on the objectivity, independence and /or impartiality of this member of the HCJ.”

<sup>75</sup> Article 35.3(2) requires members to make a statement in advance about any conflict of interest and to voluntarily recuse themselves. The HCJ member who recused from the second competition due to his being a candidate did not announce any reason. The other member announced his recusal in reference to the named candidate but without stating that they had a family relationship or the nature of it. An HCJ non-judge member [publicly accused](#) the latter HCJ member of having failed to announce his cousin relationship with another candidate in the first competition.

<sup>76</sup> On 3 March 2020, the member [publicly defended](#) his decision not to recuse from the other two selection processes.

<sup>77</sup> Article 35(3) of the Organic Law.

<sup>78</sup> The [Coalition](#) also issued statements criticizing the HCJ judge member for his involvement in the drafting of the rules. The recused member did not attend the 9 December HCJ session in which the draft rules were discussed and ultimately adopted.



overlap of candidates in all three competitions.<sup>79</sup> Public calls between HCJ members for other members' recusal on the basis of bias further raised doubts about the integrity of the process.

Further, when viewed in light of the breaches of conflict-of-interest principles inherent in the participation of two HCJ members in some of the competition processes while they recused themselves from others despite the overlapping pool of candidates participating in all processes, the HCJ's decision to hold three separate competitions, rather than to consolidate the processes, although in line with the legislation, raises significant concerns about the potential manipulation of the process to allow one or more of its members to evade conflict-of-interest legislation to their apparent benefit.<sup>80</sup>

## RULES OF PROCEDURE

The HCJ adopted Rules of Procedure (RoPs) for the candidate hearings on 9 December 2020, as mandated by the legal framework adopted in 2019,<sup>81</sup> in this way helping to establish some structure to the previously unregulated interview process but falling short of ensuring true consistency and equality of conditions for the candidates.

The process of adopting RoPs was marked by a number of problematic aspects. The version of the RoPs presented and discussed at the HCJ session prior to public consultations was reportedly not published in advance or circulated to all HCJ members. This prompted tension during the session at which the draft RoPs were discussed and allegations that some of the proposed rules sought to suppress certain HCJ members in exercise of their duties.<sup>82</sup> As noted above, immediately following the adoption of the RoPs, an HCJ member who actively took part in the drafting was a candidate.

Although the HCJ published and gathered public comments on the draft RoPs as required by law, and it incorporated some feedback, the final version of the RoPs failed to ensure structured and respectful proceedings that would provide candidates with consistent and equal opportunities to be heard. In early December, the HCJ posted the draft RoPs online for a mandatory seven-day

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<sup>79</sup> This included the recused members' participation and voting in the sessions that de-registered five candidates in the second process who were competing with his relative in the first and third competitions. In addition, one HCJ member called for the recusal of two other HCJ members alleging an (indirect) conflict of interest in regards to the same candidate due to alleged familial or other ties; these members did not recuse.

<sup>80</sup> According to Article 34 1 (1) of the Organic Law of Georgia on Common Courts, the HCJ shall initiate the procedures of selecting a candidate to be nominated to the Supreme Court no later than three months before the position of a judge of the Supreme Court becomes vacant. A vacancy for one judge became vacant in January 2021 and a second position became vacant in February 2021. According to these provisions, the HCJ initiated the process of opening three separate recruitment processes. However, the law would not have prevented the HCJ from combining the three processes in order to potentially avoid some of the problematic issues mentioned in this report.

<sup>81</sup> Article 34.1(10) of the Organic Law provides that the public hearings of candidates for Supreme Court posts are held in accordance with the rules set by the HCJ. See [Rules of Procedure](#) for Holding Public Hearings of the Persons Participating in the Procedure for Selection of Candidates to be Elected as a Judge of the Supreme Court.

<sup>82</sup> The most disputed proposed rules included those limiting each HCJ member's questioning of a candidate to 30 minutes; establishing a right of HCJ members to object to other members' questions; and allowing the chair to remark on and overrule HCJ member questions on the basis of bias or relevance.

period of public comments, which garnered substantial feedback.<sup>83</sup> To its credit, the HCJ did respond to many recommendations by removing the most problematic provisions from the final RoPs;<sup>84</sup> unfortunately, it ignored other suggestions that would have helped to ensure a more orderly and transparent process.<sup>85</sup> In spite of abundant recommendations available to the HCJ to guide the process,<sup>86</sup> the interviews remained largely unregulated, lacking standards as to the number and content of questions or the total length of interviews.<sup>87</sup> Moreover, the HCJ's failure to mandate a respectful hearing process or instate a code of conduct did nothing to ensure professional and decorous proceedings befitting the selection of the country's highest judicial office holders.

## CANDIDATE HEARINGS

Commencing on 10 December 2020 and concluding on 27 April 2021, the hearing proceedings of the 52 candidates for the first selection process (for nine Supreme Court vacancies) began within the legal deadline amid some public and internal protests,<sup>88</sup> and were characterized by delays, inconsistencies, and significant variation in the treatment of candidates, which tarnished the perceived legitimacy and fairness of the process. The hearing proceedings for the second nomination process (one vacancy) started on 29 June 2021, while the third nomination process (one vacancy) had not yet commenced at the time of publication.<sup>89</sup>

Although the April 19 Agreement committed parliament to placing all three of the proceedings on hold, parliament failed to provide a formal legal basis for the HCJ to halt its nomination process for pending vacancies. Further, the HCJ made no effort to notify the public of the reason(s) for the

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<sup>83</sup> The Coalition made a public [statement](#) criticizing the same proposed rules that were criticized among HCJ members. The Public Defender and the US Embassy also provided feedback which was not made public.

<sup>84</sup> Incorporated recommendations of the Public Defender included, for instance: removal of a provision that excluded attendance of media representatives; extension of time for each member's question period; a requirement that candidates be interviewed in a fair and respectful manner; and removal of the provision that allowed members to comment on each others' questions or for the chair to intervene on the basis of bias or relevance.

<sup>85</sup> For example, the HCJ declined to incorporate into the RoPs the Public Defender's recommendations that: the live broadcast of the hearings be made mandatory; that the HCJ chair explain to candidates in what circumstances they can request an HCJ member's recusal for conflict of interest; and that the chair conduct the hearing process in a respectful manner (to ensure that HCJ members treated each other, not only the candidates, respectfully).

<sup>86</sup> See, e.g., 2019 ODIHR Opinion, para. 62, which recommended developing a more structured approach to the interview process and considering a standardised format for interviews to reduce the scope of subjectivity in the questioning of candidates and ranking. See also CoE, [Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights – Explanatory Memorandum](#), CM(2012)40-add, 29 March 2012, para. 57; [Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers](#) (2018), para 3.7.

<sup>87</sup> The only rule related to the content of questions was excessively broad, requiring that the questions be necessary to obtain information for the evaluation of candidates in accordance with the established merit-based criteria.

<sup>88</sup> Article 34.1(8) of the Organic Law provides that the latest start date for hearings is 20 working days after the expiration of the period for consideration of a complaint on denial of registration [which is two days to appeal and two days to render decision]. The law does not provide a deadline for completion of the proceedings.

<sup>89</sup> The legal deadlines for the start of the hearings for the second and third competitions were in January and February 2021 respectively. In February 2021, the HCJ extended the term of a sitting Supreme Court judge whose ten-year term had expired and whose post was to be filled by the third competition. Due to the delays in the selection process it was not filled in time. Extension of a judge's term past the ten-year term limit is not provided for by law.

extended delays or the expected scheduling of the proceedings and continued to hold hearings in the first selection process.

Vast discrepancies in the length, form, and tone of monitored candidate interviews cast doubt on the HCJ's respect for the principle of equal treatment and may have materially damaged some candidates' prospects for nomination. Having neglected to adopt a standardized interview format in its RoPs, the HCJ conducted the hearings in a patently ad-hoc manner. While in general two candidates were interviewed each hearing day, the length of the interviews ranged widely, from under 1.5 hours to more than 4 hours (on average 2.5 hours), with a threefold variance in the number of questions per candidate.<sup>90</sup> Candidates were provided an opportunity to make an opening motivation statement but the duration was not regulated, allowing the chairperson to interrupt one candidate's statement on the basis of length as she spoke about her personal experience with unfairness in the judicial system, while permitting other candidates to speak longer on less controversial topics.<sup>91</sup>

The subject and format of questions posed by HCJ members to candidates evinced a lack of coordination and consistency. While the topics covered throughout the hearing process were wide-ranging and generally related to the evaluation criteria,<sup>92</sup> each HCJ member asked their own independent set of questions, sometimes the same from hearing to hearing and other times changing without apparent justification. The practice of some members to ask identical or very similar questions across hearings advantaged candidates heard later in the process.

Furthermore, variance in complexity of questions may have favored some candidates over others. In some hearings, questions were relatively simple and/or covered a limited range of subjects, casting doubt on whether these interviews were sufficiently rigorous. Other candidates were subjected to stringent questioning on complex legal issues. There were also isolated instances of inappropriate and possibly discriminatory questions, such as one inquiry about a candidate's religious views and references to another candidate's age.

ODIHR monitors also observed discrepancies in the tone in which each candidate was interviewed, which further undermined the perception of fairness in the proceedings. Members would openly disagree with, criticize, and aggressively debate some candidates' answers, while seemingly

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<sup>90</sup> According to statistics tracked by the [Coalition](#), the average number of questions asked per candidate was 50, with a range of 24-88 questions per hearing.

<sup>91</sup> The candidate, a former judge, spoke in her statement about of unfairness in the judicial system and personal intimidation, coercion and pressures by the HCJ and higher judges that led to her dismissal, and was abruptly cut-off by the chairperson citing she was speaking for too long, while other candidates were permitted to give longer opening statements without interruption

<sup>92</sup> Topics covered broadly included: Supreme Court precedents and practice; constitutional law and principles; role of the Constitutional Court; legal and judicial principles; criminal, civil and administrative law; court proceedings; judicial ethics; human rights and freedoms; international law and jurisprudence; independence of the judiciary; court management; existence of influential group of judges; nepotism in the judiciary; judicial reform; characterization of candidates' personal traits and values.

encouraging and assisting others.<sup>93</sup> The lack of time limits on candidate answers allowed for blatantly unequal treatment, with some allowed to provide lengthy and detailed responses<sup>94</sup> – leading to fewer questions and topics covered overall – and others routinely interrupted or inundated with a wide range of questions. Overall, ODIHR monitors noted an apparent deference within the HCJ to longer-standing HCJ members in terms of questioning time, with new members, both judge and non-judge, spending significantly less time questioning candidates.

In addition, the chair's failure to ensure consistent attendance and adequate attention by HCJ members to the candidates' hearings diminished the perception of a genuine and equal evaluation of each candidate. While a majority quorum was always met to start each hearing<sup>95</sup> – albeit often with significant delay<sup>96</sup> – some members missed multiple hearings. HCJ members often arrived late and left early, and frequently left the venue for extended periods in the midst of a hearing, at times leaving in groups and seen discussing matters in the hallway. On occasion, such absences resulted in a lack of a quorum and the proceedings were either temporarily halted or continued without quorum. In addition, members were often distracted from the interviews, texting and speaking on phones, or talking with HCJ staff and each other. ODIHR monitors noted that during interviews many members did not appear to be taking notes for use in the subsequent evaluation phase, which under the new legal framework would require written justifications.

Although the hearing process generally progressed in an orderly manner, ODIHR monitors observed that internal divisions in the HCJ continued to manifest during the hearing procedures, with accusations and reproaches exchanged between members during candidate interviews. At times, members – including the chair – interrupted the question period of other members to make remarks and comments and, counter to the hearing rules, interjected to ask follow-up questions without seeking permission of the other member.<sup>97</sup> These interruptions often led to tense exchanges between HCJ members during the questioning of candidates that undermined the professionalism and propriety of the proceedings.

## SCORING, RANKING, AND FINAL SELECTION

In spite of the significant improvements introduced in 2021 to the legislative basis for the scoring, ranking, and final voting procedures, ODIHR monitors observed some inconsistencies and

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<sup>93</sup> ODIHR monitors noted that some HCJ members simplified or reformulated their questions or asked counter-questions, gave hints and tips to answers, supplemented and defended candidates' answers, and even outright answered questions.

<sup>94</sup> For instance, apparent deference was observed by HCJ judge members toward a sitting Supreme Court judge candidate (whose ten-year term was expiring), who showed apprehension to interrupt the candidate's answers.

<sup>95</sup> Quorum did not require physical presence; some HCJ members participated online for some hearings due to self-isolation during the COVID-19 pandemic.

<sup>96</sup> For instance, one hearing started 1.5 hours after the scheduled time due to a lack of quorum.

<sup>97</sup> Article 4(10) of the hearing rules provides for each member to have a question period on request and according to a determined order, and that any member who wishes to intervene in a question period is to first seek the other member's permission.

deficiencies in the HCJ’s selection process for the first candidates to be nominated to parliament under the new framework.

After finalization of the hearing process for the first competition (for nine vacancies), the 12 HCJ members participating in the evaluation process completed a scoring/evaluation form for each of the 32 candidates remaining and submitted them to the secretariat.<sup>98</sup> As required by the recent amendments, each member provided a written justification for their scoring/evaluation of each candidate, broken down by sub-criteria.<sup>99</sup> In line with the law, on 31 May 2021, the HCJ posted scanned copies of the original scoring/evaluation forms and justifications of each HCJ member for each candidate on its website.<sup>100</sup> The publishing of the justifications together with the identities of the HCJ evaluator significantly strengthened accountability and transparency in the process.

In addition, the evaluations did include substantive justifications for each of the sub-criteria in the legislatively provided scoring system for Supreme Court candidates.<sup>101</sup> This practice adopted by the HCJ increased the perceived legitimacy of the evaluation process while helping bolster candidates’ right to legal remedy by providing concrete grounds for appeal.

At the same time, the evaluations varied widely in the quality of their reasoning in both the competence and integrity categories. Some HCJ members often relied on generic, stereotyped phrasing taken from the criteria in the Organic Law, without personalizing the assessment for the candidate at hand. Others would provide data from a candidate’s background – such as the number of seminars attended – as a justification for a high score, but without explaining how the data was relevant to the particular sub-criteria. In many cases, the assessment of candidates’ compliance with the high integrity criteria were substantiated only with a sentence stating that a referee had confirmed they met all the integrity sub-criteria, without explaining the specific substance of the referee’s comments. Moreover, most of the evaluations made only short and superficial reference to the candidates’ interview performance, at times neglecting to note significant incidents that may reflect on their character or fitness for high judicial office.<sup>102</sup>

In addition, due to the HCJ not adopting any standards or guidelines for the evaluations beyond the legislative framework, candidates received evaluations of significantly varying length, form,

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<sup>98</sup> One HCJ non-judge member announced on 25 May 2021 that she would not participate in the final nomination and voting process as she considered that the selection process continued in a forced manner and should be halted.

<sup>99</sup> Article 34.1(11) of the Organic Law states in part that the “HCJ member shall provide written justification for each score given under paragraph 16 of Article 35.1 and paragraph 8 of Article 36.4, and for each characteristic of integrity under Article 36.3 of this law.”

<sup>100</sup> HCJ [post](#), 31 May 2021.

<sup>101</sup> The Organic Law establishes a 100-point scoring system for competence (divided into six sub-criteria) and a three-point evaluation system for integrity (“fails to comply,” “complies,” or “fully complies”). The competence point allocation system differs for judge and non-judge candidates.

<sup>102</sup> Some candidates, including several who were ultimately shortlisted, engaged in heated exchanges with one HCJ member during their interviews. Such exchanges were generally not mentioned in the evaluation forms.

and detail, at times making them difficult to compare.<sup>103</sup> Candidates received detailed substantive assessments from some HCJ members and laconic, impersonal evaluations from others. In addition, the length and detail of evaluations also varied from one candidate to the next, with certain HCJ members drafting shorter evaluations for some candidates and longer ones for others. While making comparisons challenging, the substantial variation in format also spoke to the individualized nature of each HCJ member's evaluation, which arguably increased the legitimacy of the process by demonstrating that the evaluations were not preconceived or entirely generic.

On the basis of these scores and evaluations, the HCJ held a session on 1 June 2021 ranking and shortlisting nine candidates, subsequently publishing its list on the HCJ website on the same day.<sup>104</sup> The nine highest-ranked candidates were all sitting judges,<sup>105</sup> hence none of the non-judge candidates were shortlisted. Of those nominated, only two were women, well below the proportion of women in the country's judiciary overall (57 per cent).

On 17 June 2021, the HCJ held a public session for its members to vote on whether or not to submit the nine shortlisted candidates as nominees to parliament. In accordance with the law, all 12 participating HCJ members submitted their justifications for voting for or against a candidate's nomination, which the HCJ published on the same day together with its letter of nomination for all nine candidates to parliament.<sup>106</sup> All nine shortlisted candidates overwhelmingly passed the voting threshold of at least two-thirds of the votes of all HCJ members; from a total of 108 votes (12 HCJ members voting on nine candidates' nominations), only three were cast against a nomination.<sup>107</sup> No participating HCJ members filed a dissenting opinion, as permitted by law. The nomination letter provided the names of the nominated candidates and total votes they received, as well as the right to appeal the decision within a week in accordance with the law.

The new requirement under the April 2021 amendments for justification of each members' vote (or non-vote) enhanced transparency and individual accountability in the selection process, although the voting justifications provided no additional substantive assessment beyond the evaluations. They were generally short and superficial (none exceeding 1.5 pages), with the majority of the HCJ members using identical text for each candidate, changing only the name and score. However, the justifications – and the ultimate voting decision – were consistent with each HCJ members' earlier evaluation of each candidate, which lent legitimacy to the votes and represented a major improvement on the previous system of secret voting.

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<sup>103</sup> The average length of the evaluations was 10-12 pages, but they ranged from 6 to 16 pages. In addition, the form of the evaluation ranged across each HCJ member, with some using a matrix, others drafting only narrative, and still others using a combination of both.

<sup>104</sup> [Post](#) of the HCJ, 1 June 2021.

<sup>105</sup> A majority of six shortlisted candidates were from the Tbilisi Court of Appeals; one candidate was a sitting judge in the Tbilisi City Court; one candidate from the regional Mtskheta District Court; while one candidate was a sitting Supreme Court judge whose term expired in 2020, but was extended twice by the HCJ.

<sup>106</sup> HCJ [letter](#) nominating nine candidates for Supreme Court posts to parliament, 17 June 2021.

<sup>107</sup> One HCJ member voted against the nomination of two candidates; another HCJ member voted against the nomination of one candidate.

## LEGAL REMEDY

The September 2020 and April 2021 amendments to the legal framework for nomination of Supreme Court judges significantly strengthened the right to legal remedy in line with international standards and commitments.<sup>108</sup> As noted above, one of the September 2020 amendments to the legal framework strengthened accountability by granting unsuccessful candidates a right to seek judicial review of HCJ nomination decisions.<sup>109</sup> Such appeals, which may be made under one or more enumerated grounds,<sup>110</sup> fall under the jurisdiction of the Supreme Court Qualifications Chamber, which may annul the HCJ's decision and remand the case for renewed decision if the breach is deemed to have affected the final outcome of the nomination process. While the HCJ has the discretion to adopt the same decision irrespective of the grounds that led to the annulment of the initial HCJ decision, under the April 2021 amendments candidates are granted an additional right to appeal against the HCJ's second decision.

The April 2021 amendments further bolstered the right to legal remedy and increased transparency by mandating disclosure of the identity of the HCJ members' scores and evaluations of candidates as well as their final votes and written justifications. This change is particularly important for candidates' right to appeal on the basis of alleged bias or discrimination by a specific member. However, remedy is limited in such cases, since although the Supreme Court Qualification Chamber may annul and remand an HCJ decision on the basis of bias, the law does not provide for the exclusion of an HCJ member found to have taken a biased or discriminatory stance.

Other gaps remain in the fulfilment of a robust right to legal remedy in the nominations process. While the Organic Law provides for appeals against decisions on eligibility, for example, it does not envisage appeals against other decisions during the process, such as de-registration for failure to submit documentation or other reasons.<sup>111</sup> As pointed out in the 2019 ODIHR Opinion, this gap

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<sup>108</sup> OSCE participating States have committed to providing an effective means of redress against administrative decisions. The Copenhagen Document, 1990, para. 5.10 states: "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity."

<sup>109</sup> Article 34.3 of the Organic Law details the grounds, requirements and procedures for challenging the decisions of the HCJ during the selection process. The first decision (vote) on the preliminary list of nominees and the second decision (vote) on the final list of nominees are appealable. Appeals must be lodged within one week of the publication of the decision and the court must render its judgement within two weeks. The nomination process must be suspended pending the final outcome of the case.

<sup>110</sup> Legal grounds for appeal of nomination decisions are: an HCJ member's bias or discriminatory approach; an HCJ member exceeding his/her authority that results in a violation of a candidates' rights or jeopardizes judicial independence; reliance on false facts in making the decision; or a serious breach of the established legal procedure.

<sup>111</sup> While Article 22 of the Law on Administrative Procedure which grants a right to challenge in court any individual act of an administrative body applies to the HCJs actions and decisions, it is unclear whether it applies only to those HCJ acts of a solely administrative not constitutional nature or to all its actions and decisions.

means that the right to legal remedy may fall short of international standards for granting unsuccessful judicial candidates the right to appeal or seek judicial review of the decision.<sup>112</sup>

One candidate exercised his right to appeal during the nomination process. In challenging the HCJ's decision not to include his name in the shortlist of candidates for the final nomination vote, he argued that 1) the HCJ failed to appropriately evaluate and substantiate their assessment of his candidacy; 2) that the HCJ discriminated against him based on his critical views on the High School of Justice, which is a state organ managed by the HCJ; 3) that the HCJ exhibited bias against him as a non-judge candidate; and 4) that the HCJ violated the principle of equal treatment in his hearing based on procedural violations. The Supreme Court Qualification Chamber, sitting as a panel of three judges, all appointed in 2019, rejected his appeal on all four grounds, leaving the HCJ's decision in place.

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<sup>112</sup> See 2019 ODIHR Opinion, para. 78. See also CoE Recommendation CM/Rec (2010)12, para. 48; CCJE Opinion no. 10, para. 39; [Universal Charter of the Judge](#) (1999, as last updated in 2017), Articles 5-2 para. 3; 2012 ENCJ Dublin Declaration, Indicator no. I.10; and 2016 Cape Town Principles, Principle 17.