



Office for Democratic Institutions and Human Rights

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

**June – December 2019**

**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. In April 2019, the OSCE/ODIHR reviewed proposed amendments relating to the appointment of judges to the Supreme Court of Georgia. The legal opinion prepared at the request of the Public Defender (Ombudsman) of Georgia, was published on 17 April and provided an assessment of the compliance of the draft amendments with international standards and OSCE commitments and noted several shortcomings.<sup>1</sup>

In light of the importance of the appointment process to strengthening judicial independence in Georgia and following a further request from the Public Defender, ODIHR monitored the process on the basis of the commitments OSCE participating States have made to upholding the rule of law and ensuring the independence of the judiciary.<sup>2</sup> OSCE participating States have specifically confirmed that judicial independence is a “*prerequisite to the rule of law and [...] a fundamental guarantee of a fair trial.*”<sup>3</sup>

The ODIHR monitoring team consisted of two national monitors and one international monitor and began its work on 29 June, which included the monitoring of all candidate interviews before the High Council of Justice (HCJ) and hearings of the nominees by the Parliament’s Legal Issues Committee (Legal Committee) and related sessions, and the final vote on the nominees in the parliament. Monitors strictly adhered to well-established OSCE/ODIHR monitoring principles of non-interference, impartiality, objectivity, confidentiality and professionalism. The HCJ and Parliament facilitated unhindered access of ODIHR monitors to follow the entire process.

On 10 September, ODIHR published a report assessing the first phase of the judicial selection process before the HCJ that resulted in the nomination of 20 candidates for parliament’s consideration (the nomination phase).<sup>4</sup> While aiming to provide a comprehensive assessment of the whole appointment process, as well as recommendations going forward, this report primarily focuses on the parliamentary stage of the selection process, and should therefore be read in conjunction with the earlier report on the first phase.

## EXECUTIVE SUMMARY

Recent reforms of the appointment system for Supreme Court judges in Georgia represent a significant step toward enhancing the independence of the judiciary, however, the legal framework

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<sup>1</sup> OSCE/ODIHR, [Opinion on Draft Amendments Relating to the Appointment of Supreme Court Judges of Georgia](#), 17 April 2019 (2019 ODIHR Opinion).

<sup>2</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).

<sup>3</sup> [Brussels Declaration on Criminal Justice Systems](#) (MC.DOC/4/06 of 5 December 2006). For a complete overview of all applicable international standards on judicial appointments see also OSCE/ODIHR, [Opinion on Draft Amendments Relating to the Appointment of Supreme Court Judges of Georgia](#), 17 April 2019 (2019 ODIHR Opinion).

<sup>4</sup> ODIHR, [Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia](#), June – September 2019.

does not sufficiently prevent the influence of partisan politics in the process nor guarantees that decisions are taken on the basis of objective, merit-based criteria, contrary to international standards and good practice. In the implementation of the process more efforts were needed from the High Council of Justice and the parliament to regulate the process to ensure objectivity, fairness, consistency and order and address the issue of public trust in the institutions and the process. Further, the decision to proceed with a plenary vote on the judicial appointments amidst a political crisis, opposition boycott, widespread calls for postponement and serious disruptions in the committee and plenary brings into question the genuineness of authorities' aim to have an open, transparent process that garners wide political support and builds public confidence in the judiciary.

Recent amendments to the appointment process significantly improved the openness and transparency of the selection of Supreme Court Judges and the granting of nomination authority to the judicial oversight body is in line with international good practice. However, a number of key shortcomings in the legal framework remain that undermine the aim of a merit-based selection process, including the use of secret votes and the lack of obligation for substantiated decisions, insufficient provisions on conflict of interest, the absence of safeguards against arbitrary decision-making, the granting of unfettered discretion to parliament, and the lack of guarantee of the right to appeal against decisions at all stages.

The High Council of Justice (HCJ) and parliament generally implemented technical aspects of the process in line with the law and met legal deadlines, though neither sufficiently exercised their authority to regulate the process to ensure objectivity, fairness, consistency and order. Clearly defined procedures for hearings before the HCJ and parliament were needed to adequately safeguard the equal treatment of candidates.

The recruitment process for 20 vacant seats yielded 144 candidates, 38 percent women, and was open and inclusive. Following eligibility screening, 50 candidates were shortlisted by the HCJ through secret vote and interviewed in public hearings. ODIHR monitors observed that the substance of the hearings widely differed with regard to the number and content of questions, the manner of questioning and the length of the interviews, contrary to the principle of equal treatment.

In the nomination process, the collegial nature of the HCJ was challenged by the strong internal divisiveness between its majority judge and minority non-judge members, observed during the hearings. Further, while the law does not sufficiently regulate recusals for conflict of interest, two HCJ members refused to recuse themselves despite arguable grounds based on in-law or former in-law relations with applicants. This, the divisiveness, HCJ members indicating in various ways their support or opposition of a candidate, and allegations of colluding amongst the majority of HCJ members to ensure certain candidates are selected, further diminished the perception of impartiality and integrity of the HCJ.

Following the hearings, candidates were scored by each HCJ member, ranked through a secret vote and the nomination of highest ranking candidates was confirmed by another secret ballot. On 4 September, the HCJ voted to nominate 20 candidates for parliament's consideration. The 20 nominees included fifteen sitting judges from all court levels, including the Head of the Constitutional Court and the HCJ Secretary, and five non-judges, all of whom were either former

judges or current or former public officials, including the sitting Prosecutor General. Thirty-five per cent were women. The HCJ provided complete application documents on each candidate, but as decisions are taken by secret ballot the legal framework does not provide for reasoned decisions and this left parliament uninformed on the basis for the nominations. Following the vote, ODIHR published a report on the nomination phase that raised serious questions about the integrity of the process. These concerns were reiterated by a number of stakeholders, both international and Georgian.

Hearings before the HCJ and parliament were generally transparent and access for observers was ensured. However, for the HCJ hearings, advance public notice was very short, the size of the venue could not accommodate the high level of interest, and media had to watch a live streaming of the hearing. In parliament, sufficient notice was provided, the hall accommodated all interested observers, media and public but access procedures were at times unclear or inconsistently applied. Still, for the first time, the legislation guaranteed the holding of public, live broadcast parliamentary hearings of the Supreme Court nominees, allowing the public to assess the merits of the candidates and significantly enhancing transparency of the process.

Contrary to international good practice, the law foresees a decisive role of parliament as the final decision maker on judicial appointments. At the same time, in this particular case, the hearings in parliament provided opportunities for public scrutiny of the process. The legal framework does not clearly define the parameters of parliament's role, and appears to envision a second evaluation of the nominees' merits and to give unfettered discretion to appoint or not appoint any particular nominee. The nominees are first reviewed by a working group, then hearings are held before the Parliament's Legal Issue Committee (Committee), the Committee votes on recommendations for appointment and the final appointment is discussed and voted on in the plenary.

The Legal Committee established the working group and mandated it to confirm the nominees meet all eligibility requirements: age, years of experience and education. Despite widespread criticism from the opposition and civil society alleging that multiple candidates did not have the minimum legal education required, the working group confirmed all candidates' eligibility before being able to verify the diplomas. The verified information was never published. One candidate, the Head of Constitutional Court, withdrew his candidacy after the hearings, amidst persistent allegations he did not have the requisite legal education. The failure of the HCJ and parliament to take sufficient measures to ensure the nominees met the education requirements and to ensure that the public was properly informed, diminished the transparency and integrity of the process.

Hearing procedures, developed through consultations with political factions, provided some structure and order to the proceedings but were insufficient to address the dynamic nature of the hearings. ODIHR monitors observed frequent debates and conflicts over the procedures and noted that the Chairperson was inconsistent in his application of the rules and announced new procedures during the process. The required opening quorum was not met in a number of hearings and attendance by Committee members beyond their own time for questions was generally low, particularly during the period for questions from the representatives of the Public Defender, civil society and academia.

Under the procedures dedicated time for questioning candidates was allocated to party factions, not per committee member, and one collective time slot for independent members of parliament. Additional time was frequently although inconsistently granted. Additionally, as a positive measure, parliament offered the opportunity for representatives of key stakeholders to question nominees, which contributed to the quality and openness of the hearings. The allocated time slots provided structure to the hearings and allowed for in-depth questioning, but the allocation of the time to factions unjustly impacted the ability of Committee members to fulfil their role and the Chairperson's inconsistency in extending time led to unequal treatment of committee members and factions.

The legal framework does not provide sufficient safeguards against the influence of partisan politics in the appointment process and in practice members of parliament from all political sides did not refrain from using the hearings as a political platform. Questioning from all political sides was intense and critical, particularly concerning judicial independence, influence and pressure on the judiciary, affiliations of the candidates, and high-profile court decisions that were widely perceived to be politically-motivated. During hearings and in the media, members of parliament from all political sides openly showed their support or contempt for nominees, at times using harsh and accusatory language and incidents of ruling party parliamentarians offering nominees, who were widely perceived to be in the party's favour, a sympathetic questioning approach were observed. Nevertheless, overall questions covered a range of topics relevant to evaluating the candidates' merits and assessing their suitability.

Committee chairpersons are required by law to exercise their powers in a fair and impartial manner. The Legal Committee Chairperson's efforts to maintain neutrality and treat all participants fairly were negated by some of his statements, comments and warnings that were partisan in nature and the inconsistency in application of the rules. In general, the hearings proceeded in an orderly manner, though there were incidents where the Chairperson was ineffective in addressing inappropriate behaviour and conflicts. ODIHR monitors observed a number of incidents of members of parliament insulting and criticizing each other and engaging in heated arguments with nominees. A few such incidents caused extended delays and one resulted in a physical confrontation.

The final appointments took place during an opposition boycott, initiated following parliament's failure to adopt a proportional election system, and amidst a high level of political tension and public protest. On 12 December, the Legal Committee recommended appointment of 14 of the 19 nominees based on votes cast almost exclusively by ruling party members and absent any substantive discussion or reasoning on the candidates' merits. This approach undermined a transparent, merit-based selection process, failed to adequately inform parliament, and increased the risk that partisan preferences would guide the plenary vote.

Despite calls for postponing the vote, requests from members of parliament for further debate and serious disruptions in the plenary session, parliament immediately proceeded to call for a vote only minutes after the Legal Committee voted on its recommendations for the plenary. The opposition parties and all but one of the independent members of parliament boycotted. The plenary voted to appoint the 14 recommended nominees, with the vast majority of ruling party members of parliament supporting the appointees, and to reject the remaining five with almost no support.

Regrettably, just before and following the vote numerous statements were made that the appointees lacked the necessary competence and integrity for holding a post on the highest court.

The HCJ was required to submit new nominees to parliament within two weeks from the vote to fill the remaining six vacant posts, and did so on 26 December. However, a motion by the Public Defender for temporary suspension of the applicable legal framework pending determination of its constitutionality remains under judicial consideration.

## BACKGROUND

Constitutional amendments that entered into force on 16 December 2018 included changes to the composition of the Supreme Court and to the process for the selection and appointment of Supreme Court judges. The amendments increased the minimum number of Supreme Court judges from 16 to 28 and changed the 10-year terms to lifetime appointments. Under the reforms, the power formerly held by the president to nominate the Supreme Court candidates for appointment by parliament was granted to the HCJ.

Subsequently, a selection process was initiated to fill the 8 seats that were vacant and the 12 new seats on the Supreme Court. The process to fill such a critical number of lifetime appointments on the country's highest judicial body occurred at a time of low public trust in the judiciary and parliament.<sup>5</sup> Public interest and scrutiny of the process was consequently very high, and the responsible institutions faced intense public pressure to ensure that the process was fully transparent and only those candidates who met the highest standards for high court judges were appointed. Further, the appointment process was initiated in a period when the political environment was characterized by extreme polarization. The ruling party, Georgian Dream, maintained an overwhelming majority in parliament since the last election and at the start of the appointment process had 106 out of 150 seats.<sup>6</sup>

On 6 September, the HCJ submitted 20 nominees to parliament following the recruitment, shortlisting and interviews of candidates, and a final secret vote. The nominees consisted of 15 sitting judges from all court levels, including the Head of the Constitutional Court and the HCJ secretary, and five non-judges, all of whom were either former judges or current or former public officials, one of which was the sitting Prosecutor General. Thirty-five per cent of the nominees were women.

## OVERVIEW OF NOMINATION PROCESS

ODIHR's report on the nomination phase conducted by the HCJ highlighted a number of key shortcomings in the legal framework and in its implementation that raised serious questions about

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<sup>5</sup> According to a [Transparency International Georgia Survey](#) from February – March 2019, public trust in the judiciary and parliament are at 24 per cent and 20 per cent respectively; 53 per cent of respondents believe that the judiciary is under the influence of the ruling party and 43 per cent consider that there is a “clan-based” rule in the judiciary; of those respondents 87 per cent believe that the so-called “clan” is supported by government officials and 94 per cent think that influential groups of judges should leave the judiciary; 46 per cent of respondents think that the courts should be filled with new judges to increase public trust in the judiciary.

<sup>6</sup> By the time of the final plenary vote to appoint the judges the Georgian Dream majority in parliament was 92 out of 148 (two members of parliament had resigned from parliament).

the integrity of the process and its outcome. The report highlighted that while the HCJ generally implemented the technical aspects of the selection process in line with the law, ODIHR monitors noted that in performance of its duties the HCJ was characterized by strong internal divisiveness and animosity between two groups of judge and non-judge members. Further, the law does not sufficiently regulate recusals for conflict of interest or the replacement of HCJ members that have conflicts and two HCJ members refused to recuse themselves despite in-law or former in-law relations with applicants that arguably present conflicts of interest.

The report noted the openness of the recruitment to fill the 20 Supreme Court seats, which was open to all eligible citizens and yielded 144 applicants, with 38 per cent women. The vast majority of applicants were deemed eligible, while two of the five ineligible lodged unsuccessful appeals. Despite the intense public interest in the process, the HCJ initially released very little information about the applicants. This and the lack of requirements for the HCJ to provide any reasoning or justification for the shortlisting and nominations to demonstrate they were grounded on genuine consideration of the legal criteria of competence and integrity, limited opportunities for public scrutiny of the candidates and the process.

Throughout the process, ODIHR monitors observed that the HCJ could have done more to regulate the process and introduce procedures to ensure consistency and certainty of the law. As a result there was a lack of clarity on the procedures for assessing the applicants' qualifications and conducting the short-list vote as well as a lack of transparency on the methodology to be followed when conducting background checks that led to concerns about the thoroughness and effectivity of the checks. Monitors also noted there was insufficient time given for the consideration of the long-list of candidates or review of background information in preparation for interviews. HCJ members were given five days to evaluate the applicants before, through a secret ballot, the pool was reduced to 50 candidates. Thirty-four percent were women. The results of the background checks were provided to HCJ members only five days prior to the hearings leaving them limited time to adequately prepare for the interviews.

Following the vote on the short-list, the Public Defender issued statements raising serious concerns about voting patterns identified in the analysis and making strong allegations of colluding amongst the majority of HCJ members to split votes to ensure a specific 45 applicants were short-listed.<sup>7</sup> These allegations, which were echoed by some civil society organizations, further diminished confidence in the process.

Positively, the public interviews of the candidates were open to international and civil society monitors and generally transparent but advance public notice of the hearings was very short and the size of the venue could not accommodate the high level of interest to observe and report on the process. The Public Broadcaster on its own initiative live-broadcasted the hearings on social media and audio recordings of the hearings were posted on the HCJ website.

The HCJ did not adopt procedures or a code of conduct for the hearings to ensure a fair and orderly process, ODIHR monitors noted that this enabled the unequal treatment of candidates, further

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<sup>7</sup> See [www.ombudsman.ge](http://www.ombudsman.ge) for the statements issued by the Public Defender that analyze the voting patterns. The judge members denied any prearranged voting and publicly accused the Public Defender of a partisan agenda. Further, the judge members noted that the voting patterns of two non-judge members were identical.

limited transparency and contributed to highly disorganized interviews. In addition, tensions within the HCJ were very high during the process, which resulted in frequent hostile remarks and heated arguments that dominated interviews and created an unprofessional atmosphere.

ODIHR monitors observed that the substance of the hearings widely differed with regard to the number and content of questions, the manner of questioning and the length of the interviews, contrary to the principle of equal treatment. While overall, the questions posed covered issues related to the evaluation criteria of competence and integrity, ODIHR monitors noted significant differences in how candidates were questioned and treated and at times HCJ members indicated in various ways their support or opposition of a candidate.

After the HCJ members each privately scored the candidates the consolidated points received per candidate were posted on the HCJ website, almost three weeks after completion of the hearings. The 20 candidates selected by secret ballot did not coincide with the top 20 based on the scores received, as five of the top-scored candidates were not among the 20 selected.

The 20 nominees included fifteen sitting judges from all court levels, including the Head of the Constitutional Court, and five non-judges, all of whom were either former judges or current or former public officials, including the sitting Prosecutor General. Thirty-five per cent were women, notably less than the proportion of all women judges.<sup>8</sup> All 20 candidates received at least 2/3 of the members' votes in the second secret ballot held on 4 September and were subsequently nominated to parliament. One of the non-judge members did not participate in the voting. The HCJ is not required to provide a reasoned explanation of the decisions taken on short-listing, determining the ranking, or the final selection of the 20 candidates to be put up for nomination.<sup>9</sup> Therefore, the opportunity for legal redress is significantly hindered. Further, the right to effective legal remedy against HCJ's actions and decisions is not sufficiently guaranteed in the legal framework. This left the nomination process under the final authority of a judicial oversight body, rather than a court of law, challenging OSCE commitments and international standards.<sup>10</sup>

The Public Defender, civil society groups, and the international community raised similar concerns in their public statements and reports issued after the nomination process.<sup>11</sup> There were multiple

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<sup>8</sup> As of October 2018, 53 per cent of the total 306 judges were women, but similar to the significant gender imbalance in managerial judicial positions 15 per cent of court chairpersons and 22 per cent of chamber chairpersons are women.

<sup>9</sup> The lack of transparency in the HCJ's decision-making procedures may result in arbitrarily decided judicial appointments, potentially undermining the integrity of the appointment process and resulting in a violation of Article 6 of the European Convention on Human Rights, which provides basic guarantees for an independent and impartial tribunal. See e.g., European Court of Human Rights (ECtHR), *Guðmundur Andri Ástráðsson v. Iceland* (Application no. 26374/18, judgment of 12 March 2019), paras. 97-103 and 112-123.

<sup>10</sup> [Copenhagen Document](#), 1990, para. 5.10 that states: "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity." See also [2019 ODIHR Opinion](#), para. 78; 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.

<sup>11</sup> [The Public Defender noted](#) that the process before the HCJ, "failed to convince an objective observer that the most competent and conscientious candidates would eventually be presented to the Parliament of Georgia." [Civil activists alleged](#) that many of the nominees were affiliated to an influential group of judges within the judiciary and/or had a track record of politically-motivated decisions and judgements. [The Parliamentary Assembly of the](#)



calls for the parliament to set aside the nominee list or to appoint only the minimum number of judges necessary for proper functioning of the court. On 1 November, the Public Defender filed a petition with the Constitutional Court challenging the legislation regulating the nomination process on the grounds that it violates the constitutional rights of citizens to hold public office and to have access to a fair trial, and the constitutional principle of an independent and impartial trial.<sup>12</sup> The petition requests suspension of the disputed norms until the case is fully resolved.<sup>13</sup> At the time of publishing this report, the case had not yet been concluded.

## LEGAL FRAMEWORK

On 1 May 2019, both the Organic Law on the Common Courts and the Rules of Procedure of the Parliament (hereafter Rules of Procedure) were amended to regulate the newly established constitutional process for the nomination and appointment of Supreme Court judges.<sup>14</sup> Under the constitution, the Supreme Court judges are appointed by parliament and the legislative amendments mandate the HCJ to submit nominees to parliament, and adopt criteria, conditions and procedures for the selection process. Key aspects of the process required supplementary legal acts but the bodies responsible for implementing the selection process failed to exercise their regulatory and procedural making powers to adequately develop the legal framework.

Shortly prior to their adoption, ODIHR assessed the draft amendments for consistency with OSCE commitments and international standards as well as international recommendations for judicial appointment processes.<sup>15</sup> The assessment concluded that while the adoption of provisions on criteria, conditions and procedures for the selection was a positive development, particularly the introduction of transparency measures and elements of a merit-based process, the draft amendments fell short of guaranteeing an adequate, open, transparent, and merit-based selection system and were not fully in line with international standards and recommendations. The final amendments addressed very few of ODIHR's recommendations and key shortcomings remain.

As noted in the ODIHR opinion, the legal framework does not clearly and sufficiently define parliament's role in the appointment process, though it appears to envision a second evaluation of the nominees' merits. The Legal Committee is mandated to "determine compliance of the nominee

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[Council of Europe urged parliament](#) to "come to well-reasoned decision[s]" and "since questions have arisen about the qualification of judicial candidates...must appoint the minimum number of judges necessary for the work of the Supreme Court. The remaining vacancies should be filled on the basis of a new list of candidates, duly constituted by the HCJ...".

<sup>12</sup> The [lawsuit](#) argues that the legislation fails to exclude the risk of arbitrariness, as under the disputed norm, the secret ballot does not oblige the HCJ to substantiate its decision to favour one candidate and reject another and that in the absence of a right to appeal, candidates are unable to prove in court that their rejection was unlawful. It claims that the rules fail to ensure a fair process and that candidates who meet the requirements of the law are unjustifiably prevented from being selected in accordance with their own professional or personal merits.

<sup>13</sup> The Public Defender's requested interim measure would not impact the consideration of the 20 candidates that was underway when she submitted the case.

<sup>14</sup> See the [Organic Law on the Common Courts](#) and final consolidated version of [the Rule of Procedures](#) (the latter is only available in Georgian).

<sup>15</sup> The Council of Europe's European Commission for Democracy through Law (Venice Commission) also issued an opinion of the draft law at the request of the then chairperson of parliament: [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).

with the requirements defined in the constitution and/or any other law”, conduct individual public interviews, and report its conclusions to the plenary for a vote. The Legal Committee and the plenary have full discretion to reject or approve any nominee. In assessing the legal framework, one of ODIHR’s key findings was that the amendments fail to provide safeguards to prevent the politicization of the appointment process, for instance by strictly circumscribing parliament’s role to one of supervising compliance with the applicable procedures rather than undertaking what amounts to a re-assessment of the competence and integrity of the candidates.<sup>16</sup>

Nominees who receive a majority of the plenary votes are appointed to the Supreme Court. If any of the vacancies remain unfilled, within two weeks the HCJ is to nominate additional candidates from its original shortlist and if vacancies still remain the process is to restart within one month.<sup>17</sup> On 26 December the HCJ voted on nominating six additional candidates from the short-list to fill the six seats that remain vacant. These nominations were sent to parliament for consideration.

## HEARING PREPARATIONS

The Legal Committee is to be composed of a minimum 10 members determined proportionally to the representation of factions and the number of those Members of Parliament (MPs) who are not in any faction. The Committee currently has 19 seats but at the start of the hearings only 15 seats were occupied: 10 Georgian Dream (GD), including the chairperson, 3 European Georgia (EG), 1 Alliance of Patriots/Social Democrats and 1 independent MP.<sup>18</sup> Three of the members, or 20 per cent, are women. Two Committee seats were vacated midway through the hearings.<sup>19</sup>

The HCJ forwarded the application and background check materials of the nominees to parliament as required by law.<sup>20</sup> While not required, the HCJ did not, on its own initiative, provide an assessment of the candidates or consolidated information, which left parliament uninformed of the basis for the nominations. The application and background check materials were published on the parliament’s website as required by law, which contributed to transparency of the process.

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<sup>16</sup> [2019 ODIHR Opinion](#), paras 13 and 82-84. See also Venice Commission, [Report on Judicial Appointments](#) (2007), CDL-AD(2007)028-e, paras. 10-11; Council of Europe (CoE), [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), 17 November 2010, para 46; [OSCE/ODIHR Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia](#) (2010), para. 8; [1998 European Charter on the Statute for Judges](#), para. 1.3; and Consultative Council of European Judges (CCJE), [Opinion no. 10 \(2007\) on the Council for the Judiciary at the Service of Society](#), para. 48 and Recommendation D(b); and [Opinion No. 18 \(2015\) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy](#), para. 15.

<sup>17</sup> The Public Defender’s Constitutional Court petition requested temporary suspension of the provisions while the case is considered, including suspension of appointing candidates for any unfilled vacancies after the initial appointment process for the 20 vacancies.

<sup>18</sup> The 19 seats are allocated: 13 GD, 3 EG, 1 United National Movement, 1 Alliance of Patriots/Social Democrats, and 1 independent MP; the four vacant seats are allocated to 3 GD and 1 UNM.

<sup>19</sup> One GD Committee member resigned from parliament following a confrontation with another Committee member in a hearing session and an EG member formally withdrew from the Committee without formal reasons. These seats remained vacant throughout the remainder of the hearing process.

<sup>20</sup> The health certificates were forwarded following parliament’s request and based on its undertaking to provide for their adequate security due to data-protected status.

The Committee is required to establish a working group to assist in fulfilling its mandate. The group was composed of 13 members, one representative of each parliamentary faction, one independent MP, the Head of Legal Aid, and two academics. Three members, or 23 per cent, were women. In a Committee session, the group was tasked to review the eligibility of each nominee (age, years of experience, and education) within 10 days.<sup>21</sup> This limited mandate was opposed by opposition MPs and a ruling party MP who called for the working group to assist in examining the merits of nominees.<sup>22</sup> The EG publicly boycotted the group due to its limited mandate and the exclusion of civil society, and civil society groups publicly criticized their exclusion and called for the working group's composition and mandate to be broadened.<sup>23</sup> The Public Defender and Head of the Georgian Bar Association declined the invitation to be members.

After three closed meetings, the working group reported to the Committee that they are unable to determine the level of education of most of the nominees, due to their documents being issued under an outdated education system. The Committee requested the National Center for Educational Quality Enhancement to verify these nominees held the equivalent of a Masters of Law, one of the eligibility requirements. The education center was also requested to authenticate the documents of one candidate, the Prosecutor General, due to detected irregularities. Prior to obtaining the requested information, on 20 September, the working group submitted its conclusion that all nominees complied with the eligibility criteria.<sup>24</sup> The failure of the HCJ and parliament to take sufficient measures to ensure the nominees met the education criteria led to public controversy and lengthy questioning at hearings of some candidates about their level of legal education.<sup>25</sup> The education center responded several weeks after the requests were submitted, near the end of the hearing process, but the content was not announced or published on the parliament's website.<sup>26</sup>

Under the Rules of Procedure, the Committee chairperson must define, in coordination with Committee members, hearing procedures. The Committee adopted procedures which offered a level of structure and order to the hearings and which addressed some of the shortcomings observed in the HCJ hearings. However, the measures were not sufficiently comprehensive. In addition, there were technical irregularities in the adoption of the procedures; instead of consulting

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<sup>21</sup> The Committee did not adopt any legal instrument to define the working group's composition, terms of reference, powers and procedures.

<sup>22</sup> While Article 205 of the Rules of Procedure of the Parliament provide that the working group is to assist the committee in carrying out its mandate, the Committee chairperson justified limiting the group's mandate by noting that under the law the working group has no authority to assess the competence and integrity of judicial candidates.

<sup>23</sup> See the [statement of the chairman EG](#) and the Coalition's [Assessment of the Working Group Creation Process by the Legal Committee](#).

<sup>24</sup> The findings of the working group were not formally published but were reflected in the minutes of the session. The independent MP, UNM MP, and MP Alliance of Patriots/Social Democrats did not sign the conclusion.

<sup>25</sup> The Public Defender's [Monitoring Report on the Selection of Supreme Court Judicial Candidates by the High Council of Justice of Georgia](#) and [the statement](#) of the Coalition for an Independent and Transparent Judiciary raised concerns about a number of candidates not possessing the required level of legal education, including the Prosecutor General and the Head of the Constitutional Court. The Coalition called on the parliament to suspend the consideration of the Prosecutor General until his legal education could be verified and during the hearings an opposition MP called on the withdrawal of his candidacy (and resignation from his post).

<sup>26</sup> The Committee provided ODIHR with a copy of the education center's response. The center verified that 16 candidates had the equivalent of a Masters of Law, one according to a court decision that overturned the center's decision. The center noted that the Head of the Constitutional Court did not have the relevant higher legal education. In addition, the center was unable to review and verify the diploma of the Prosecutor General as he had not referred the matter to the center, despite the Legal Committee requesting him to submit his documentation.

with the Committee members, as required, the chairperson consulted with representatives of the parliamentary factions, and the independent Committee member was not consulted.<sup>27</sup> The majority of Committee members voted in favour of the procedures that had stemmed from the consultations. The independent Committee member strongly opposed the procedures and lack of consultation. In addition, the procedures were not adopted through a written legal instrument nor reflected in the minutes of the session, limiting the legal certainty and transparency of the process.

The procedures were as follows: one-two candidates to be interviewed per day; time slots of 20 minutes for each of the 12 parliamentary factions (not per Committee member), a total of 60 minutes for all independent MPs, and a total of 75 minutes for the five invited representatives (see next paragraph); a fixed order of questioning with the factions starting (a GD faction first), independent MPs next, and the invited representatives last. Factions could give unused time to other factions within the same party and MPs could interrupt candidates' answers or ask clarification questions.<sup>28</sup> The lack of sufficiently developed, comprehensive procedures caused or allowed heated discourse during the hearings, and arguments on procedural issues. In addition, the chairperson at times unilaterally announced rules and procedures throughout the hearing process.<sup>29</sup>

As a positive step contributing to the inclusiveness and transparency of the hearings, one representative from the Public Defender, Bar Association, Legal Aid, academic community, and civil society sector were invited to attend and participate in the hearings.<sup>30</sup> Stricter rules applied to their questioning which excluded the possibility to ask for clarifications or follow up questions.

## TRANSPARENCY OF HEARINGS

For the first time, parliament was mandated to hold public hearings for the appointment of Supreme Court candidates.<sup>31</sup> The hearings offered a high level of transparency which allowed the public and civil society sector to evaluate the merits and suitability of the candidates. In line with the law, the hearing agendas were published three days in advance. The Committee hall had sufficient seating, was accessible to persons with disabilities and journalists were given access.<sup>32</sup> In addition to ODIHR's full-time presence, representatives of international community periodically attended. The hearings were broadcast live on television as required by law, as well as on the parliament's website and Facebook page, and videos were uploaded to the parliament's website.<sup>33</sup> Also as

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<sup>27</sup> The Speaker of Parliament consulted an independent MP who is not a Committee member.

<sup>28</sup> Independent MPs could not be granted unused time of factions and invited representatives could not interrupt candidates' answers or ask clarification questions

<sup>29</sup> Rules announced on the spot related to matters such as the timing and manner of questioning and public attendance; for instance, the chairperson unilaterally decided to impose a blanket ban on citizen attendees directly posing questions to candidates' and to pre-screen any submitted questions.

<sup>30</sup> The Rules of Procedure provide that the Committee can invite to attend the sittings, and give the floor to interested representatives of the public. Various legal academics represented the academic community. Civil society was represented by the Coalition for an Independent and Transparent Judiciary, an umbrella organization that unites 40 non-governmental organizations.

<sup>31</sup> Article 34(3) and 205(3) of the Rules of Procedure.

<sup>32</sup> The media was barred from the hearing room for about one hour following a heated confrontation between two MPs and after the hearing resumed.

<sup>33</sup> Microphones were controlled by the chairperson and at times he intentionally did not turn on or turned off MP's microphones so that audio in the broadcast and recordings did not capture the content, especially during some political debates or heated discussions, including exchanges in which the chair was involved.

required by law, the minutes of each hearing were published on a timely basis, but were very brief and only offered technical information; the parliament's website provided news on each hearing including reference to some topics of the questions.

Parliament announced that the hearings are open to the public and provided contact information for this purpose although only a small number of private citizens were present. The lack of procedures and parameters on attendance led to several heated incidents between the Chairperson and private citizens (or between the Chairperson and MPs who spoke on behalf of citizens), who were restricted or delayed in some way to enter parliament or attend hearings.<sup>34</sup> Moreover, public accessibility was inconsistently controlled by the Chairperson which further exacerbated the issue.<sup>35</sup> In addition, during hearing of the Prosecutor General, a police contingent barred or unduly delayed the public, journalists and civil society representatives from entering the building, even those with entry permits, and the Chairperson did not effectively react to resolve the situation.

On several hearing days, small-scale but vocal protests against specific candidates or the slate of candidates were held without incident outside parliament by independent lawyers, citizens initiatives, and political activists.

## CANDIDATE HEARINGS

The hearings of candidates, in alphabetical order, took place from 23 September – 8 November, some two weeks following the HCJ's submission of nominees. The chair did not state the objective, scope or procedures of the hearings but occasionally informed candidates they would be subjected to critical questioning. Hearings lasted on average some nine hours, six hours of the structured time slots plus granted extended time.<sup>36</sup> This afforded an opportunity for in-depth questioning of candidates. The lack of formalized, comprehensive hearing procedures challenged the order and decorum of the hearings and put an unnecessary strain on the proceedings.

The law requires a quorum of a majority of Committee members to be present at the start of a session and at the time of voting, but not throughout the hearing, which allowed for low attendance. At least five sessions were formally opened without a legal quorum, especially in the last week of the hearings. Moreover, while some candidates attracted more interest and attendance, throughout the hearing process often only one, two, or no Committee members were present in addition to the chairperson.<sup>37</sup> The absence of Committee members crossed party lines and frequently resulted in the unintentional repetition of questions previously posed.

Regrettably, attendance was at its lowest at the end of the day when the representatives of the Public Defender, civil society, legal profession and academia were questioning candidates. This undermined the significant benefit of inviting these participants. In addition, those Committee

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<sup>34</sup> Confrontations were around whether prior authorization was required to enter, where citizens were allowed to sit, whether they had the right to ask questions or make statements, etc. Incidents involved an HCJ non-judge member, a Tbilisi City Councillor, and several citizens all interested in attending the hearings of particular candidates.

<sup>35</sup> The chairperson was lax or strict on public attendance in the main hall, as opposed to the balconies, depending on who was attempting to attend the hearing and/or who was being interviewed.

<sup>36</sup> The shortest hearing was some 6.5 hours and the longest 11.5 hours, sometimes without breaks for long periods.

<sup>37</sup> Attendance of Committee members was especially low in the last week of hearings, with factions missing time slots and very few members present throughout the day. Attendance became a contentious issue at this time.

members who were present at hearings were often distracted while candidates answered questions, on their electronic devices (including watching videos) or talking with each other, or on the phone. As Committee members were responsible for evaluating nominees and recommending them for appointment, their absence and distraction from hearings challenged the key objective of informed decision-making in the appointment process.

While the Rules of Procedure envisions Committee members questioning the candidates during Committee hearings, the hearings were *de facto* quasi-plenary hearings, as all MPs were invited to ask questions. MPs from all parliamentary parties as well as a number of independent MPs who are not Committee members attended all or many of the hearings and actively participated. About half of all MP interviewers were not on the Committee and they often dominated the allotted time.<sup>38</sup> While this approach provided an opportunity for MPs to become more familiar with the candidates and to exhaust their pressing questions, it was not strictly in line with the amended legislation and impacted the ability of Committee members to fulfil their role.<sup>39</sup>

According to international good practice it is of utmost importance that the influence of partisan politics be prevented when appointing judges to the highest court<sup>40</sup> and “the authority taking decisions on the selection and careers of judges should be independent of the executive and legislative powers.”<sup>41</sup> Further, where the final decision relating to a judges’ appointment is not adopted by an independent judicial council, it is recommended that the decision is subject to guarantees to ensure that it is not taken other than on the basis of objective criteria.<sup>42</sup> The legal framework in Georgia does not provide sufficient safeguards against the influence of partisan politics in the appointment process and in practice MPs from all political sides did not refrain from using the hearings as a political platform.<sup>43</sup> A significant amount of the MP’s allocated time was used to make political statements and/or to pose political questions that either outright promoted or criticized past or current governments or attempted to get candidates to do so.

The legal framework does not forbid and MPs did not exercise restraint in showing their support or contempt for certain candidates. In particular, ruling party factions had a less critical questioning approach to a number of candidates widely perceived to be in their favour, including the Prosecutor

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<sup>38</sup> At each hearing, some 15 MPs asked questions with a total of some 65 MPs (Committee members and non-members) asking questions throughout the entire hearing period. At times, some MPs dominated the hearings when other factions transferred their unused time, even tripling time slots.

<sup>39</sup> The Rules of Procedure foresee the committee hearings as led by committee members but also gives discretion to the Committee to invite others to ask questions.

<sup>40</sup> See 2019 ODIHR Opinion, paras. 26, 28 and 82-84. See also Council of Europe’s Consultative Council of European Judges (CCJE), [Opinion no. 18 \(2015\) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy](#), para. 15; and Venice Commission), [Report on Judicial Appointments \(2007\)](#), CDL-AD (2007)028-e, paras. 12 and 47.

<sup>41</sup> Council of Europe, [Recommendation CM/Rec\(2010\)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities](#), 17 November 2010, para. 46.

<sup>42</sup> CCJE, [Opinion no. 1 \(2001\) on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges](#), para. 37; and [Opinion no. 18 \(2015\) on the Position of the Judiciary and its Relation with the Other Powers of State in a Modern Democracy](#), para. 15.

<sup>43</sup> Early on in the hearing process, the chairperson urged MPs “not to use too much political context” but this warning was not heeded and these cautions essentially ceased.

General and Head of the Constitutional Court.<sup>44</sup> At the same time, MPs on all political sides, but particularly opposition and independent MPs, often criticized and mocked the answers of candidates, insulted candidates and harshly criticized their past court decisions. Strong, often lengthy statements, were made in the hearings and in media asserting that specific candidates (or the slate of candidates) lack impartiality and integrity, have given into political influence, are not trustworthy, do not deserve to sit on the highest court, or that they would not vote for them. MPs criticized the appointment process or attempted to get candidates to criticize the process.<sup>45</sup>

Despite political overtones, questioning from all political sides was generally very challenging and critical although at times it became intense and aggressive. Questions often focused on issues of public interest such as the questionable integrity of many of the candidates and their role in the judiciary that the MPs argued has lacked independence. Candidates were questioned at length on political pressures on judges, their affiliations to the alleged influential group of judges, and their impartiality in judicial decision-making on many high-profile court cases.

Citing a judges' duty of impartiality, candidates often refused to answer, or avoided answering questions of a political nature even when arguably the question touched on legitimate issues of judicial independence or the judges' legal position on issues of public interest. Candidates also refused to respond to questions that called for explanation of their past court decisions (at times on-going cases) or those of their colleagues even if the cases were publicly controversial and raised concerns about the judge's motivations and impartiality.<sup>46</sup> Some candidates outright refused to answer any questions posed by specific interviewers on grounds of conflict of interest or bias.<sup>47</sup> At times, MPs prevented candidates from answering or responding to their critical questions, commented on or challenged candidates' answers, asked questions in rapid succession, or repeatedly asked unanswered questions.

Overall, despite the politicized nature, the hearings covered a broad range of issues relevant to assess the merits of the candidates.<sup>48</sup> Further, the participation of representatives of the Public Defender, civil society, the legal profession and academia enhanced the quality of the hearings by broadening the issues covered and providing relief from the more political and highly contentious subjects. These invited representatives generally attended daily and some remained present throughout the hearings. In a positive initiative, the chair allowed a civil society organization to supply MPs with a user-friendly booklet that provided comprehensive background information

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<sup>44</sup> Ruling party MPs praised the experience of certain candidates, made supportive comments during questioning, posed questions aimed at countering others' critical questions, or asked questions that would facilitate these candidates making a positive impression with their answers.

<sup>45</sup> One opposition MP used a whole time slot just to criticize the slate of candidates without posing any questions.

<sup>46</sup> Candidates often cited a judge's right not to account for judgements as a basis for not answering the questions.

<sup>47</sup> The Prosecutor General refused to answer any question posed by the NGO Coalition's representative due to its public allegations that the Prosecutor General did not possess a higher legal education; a judge candidate refused to answer questions from two MPs who had been personally affiliated with past court cases on which he had ruled. The chairperson advised candidates they were not required to answer any questions, while some MPs asserted it was a contempt of parliament to refuse to answer an MP's questions.

<sup>48</sup> Other topics of questions related to human rights, judicial ethics, legal norms and principles, judicial doctrine, court practice, constitutional law, judicial reform, personal values and integrity, freedom of expression, challenges in the judiciary, current social issues, judicial precedence, management of the judiciary, access to justice, etc.

relevant to the competence and integrity of each candidate.<sup>49</sup> Notably, MPs from all political sides often reviewed, and directly quoted from, its contents in their critical questioning of candidates.<sup>50</sup>

In a positive development, the chair allowed private citizens to submit questions to the Committee, which were read by the Chairperson at the end of each hearing. However, the right to submit questions was not publicized and citizens were not well informed of the method and procedures to do so.<sup>51</sup> In addition, the chairperson screened the questions and generally did not treat them with importance.<sup>52</sup> Several requests from private citizens to directly question a candidate were denied, though the law allows the chairperson to give the floor to interested representatives of the public.

The assigned time slots for questioning provided a degree of structure to the hearings, with the chairperson maintaining flexibility and extending time where questioners wanted to run over. However, the rules for extended time were unregulated and inconsistently applied and at times repeated extensions allowed MPs to go significantly beyond the allotted time. Other times, the chair would urge MPs to finish an extended question period. Arguments with the chairperson about extension of time were common, with some MPs demanding that overtime be accounted for and extensions be equally applied to all. As a positive measure, MPs unable to attend during their faction's time slot were granted permission to question the candidate later in the day.

The hearings generally progressed in an orderly manner, but there were times when the chairperson ineffectively handled or let go unaddressed some inappropriate behaviour and clashes. Not unduly constraining the MPs apparently took precedence over keeping the order and decorum of these important sessions. These disturbances took various forms; from time to time MPs interrupted each other, criticized or mocked questions or the candidates' answers or uttered insults. Some MPs engaged in heated arguments and shouting matches with other MPs or with candidates. While occasionally giving warnings, the chairperson did not sufficiently or consistently assert his control over these situations.<sup>53</sup> Moreover, several extremely heated clashes caused extended disruptions in the hearings and at times necessitated the involvement of security. One such incident between two MPs had sexist overtones and resulted in a provoked physical assault.<sup>54</sup>

Under Article 36 of the Rules of Procedure, Committee chairpersons are obliged to exercise their powers in a fair and impartial manner. While the chairperson generally maintained neutrality, at

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<sup>49</sup> The Open Society Georgia Foundation (OSGF) published a [detailed methodology for the booklet](#); its sources included social media activities, public speeches and interviews, lectures, trainings and similar educational activities, published articles, books and other types of academic activities and covered judicial decisions and public addresses, candidates' financial situation, and conflict of interest and disciplinary matters.

<sup>50</sup> MPs did not refer to the unconsolidated background materials provided by the HCJ which were also available.

<sup>51</sup> On average, only a couple questions from private citizens were received by the chairperson for each hearing. Some MPs asked questions they received directly from private citizens or civil society representatives.

<sup>52</sup> Questions deemed to be inappropriate or repetitive were screened out and some were paraphrased or truncated by the chairperson. At times, the chairperson ridiculed or mocked the content and form of questions.

<sup>53</sup> The deputy chairperson, who replaced the chairperson during his absence, took a stricter approach than the chairperson and asserted greater control over the conduct of the hearings.

<sup>54</sup> The incident involved a male ruling party Committee member uttering an apparently sexist remark against a female independent Committee member who consequently slapped the male MP. A women's protest in support of the female MP took place outside parliament and the First Deputy Speaker, Chair of the Parliament's Gender Equality Council, publicly stated her support for the female MP. The male MP subsequently resigned from parliament.



times his statements, comments and warnings in hearings and in the media,<sup>55</sup> were partisan in nature or the rules were inconsistently applied. For example, at one hearing the chair called for the opposition to be fully present in the process but during times when the ruling party was absent he did not issue similar calls. In another instance, an opposition MP was warned to refrain from posing political questions, while ruling party MPs were left unchecked in this respect. On occasions, the chairperson criticized questions of opposition MPs or directly engaged them in political debates and some opposition MPs abruptly left the hearing room saying they perceived unfairness or bias treatment. After the physical altercation between the two MPs, one from GD and one independent, the chairperson took a strong stance against the female independent MP and announced that legal action will be taken against her. Occasionally, the chair indirectly supported candidates by assisting or defending them.

## POST-HEARING DEVELOPMENTS

Shortly after the hearing process ended, an H CJ non-judge member submitted a dissenting opinion to parliament concerning the nominations, arguing illegitimacy of the H CJ's nomination process and the resulting nominees. Another H CJ non-judge member, initiated a "Fail the List" protest campaign to urge MPs not to vote for any of the nominees.<sup>56</sup> Following the hearing process, opposition and independent MPs protested against many of the candidates, alleging tarnished professional records, and called on citizens to protest. Some ruling party MPs also raised concerns about the quality of candidates, but emphasized the importance of ensuring the Supreme Court could function. The Public Defender noted that many of the candidates lacked the necessary competence for the Supreme Court and called on parliament to appoint only the number of judges vital for the Supreme Court.<sup>57</sup> On 2 December, the Head of the Constitutional Court, withdrew his candidacy due to widespread allegations that he does not possess the requisite legal education.<sup>58</sup>

Following the hearings, the Legal Committee held consultations with stakeholder representatives to discuss the committee vote. However, a parliamentary crisis related to another matter than the hearing process delayed finalization of the appointments. On 14 November, following the parliament's failure to adopt a constitutional change to a proportional election system, large-scale protests by the opposition and civil society began. Protests continued daily for two weeks and then expanded to the regions.<sup>59</sup> Protestors demanded early parliamentary elections under an interim government and independent election administration. Counter-protests by groups affiliated with the ruling party ensued, with violent clashes between the two sides.

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<sup>55</sup> Midway through the hearings, the chairperson criticized the opposition in the media for "damaging the whole process [by] discrediting the candidates for the judiciary" and in reference to the opposition stated that "if anyone tries to discredit the process of hearing candidates of the Supreme Court it is an attack on the state interests."

<sup>56</sup> On 1 November, H CJ judge members requested the president to terminate the member's appointment, arguing her protests against the judicial appointment process constituted prohibited political activity by an H CJ member; to date she remains a member.

<sup>57</sup> The [Public Defender commented](#) on this issue to the media on International Human Rights Day.

<sup>58</sup> Initially, on 22 November, the candidate requested parliament to postpone consideration of his nomination until he could fully verify compliance of his diploma with the legal requirements, but following adverse public reaction to this initiative including claims he was attempting to garner public sympathy, he withdrew his candidacy.

<sup>59</sup> Instances of physical clashes with police and special armed forces occurred. After the large-scale protests ended, small groups of protestors maintained a round-the-clock presence outside parliament.

Fourteen MPs resigned from the ruling party, including the Deputy Speaker. Six former ruling party MPs subsequently formed a faction of independent MPs. On 15 November, the EG announced its boycott of parliament until a process has begun that results in a proportional election system and padlocked the parliament, bringing parliamentary activity to a halt for a brief period. The other opposition parties subsequently announced their boycotts.

The composition of the Legal Committee significantly changed, prior to making their recommendations on appointments, undermining the stability and effectiveness of the process, with 4 of the 13 members from the start of the hearings withdrawing or losing their seats and two new members joining. On 28 November, as part of its boycott of parliament, EG announced its members withdrawal from most committees, including its two members on the Legal Committee. The resignations of the ruling party MPs led to the dissolution of the party's conservative faction, and consequently the faction's member on the committee lost her seat. The newly-registered independent MPs faction was granted one seat. In addition, one GD member from the main faction withdrew from the committee and was replaced; the reason was not made public.

## COMMITTEE CONCLUSIONS

The legal framework does not adequately elaborate on the nature of the report to be submitted by the Legal Committee to the plenary, leaving the Committee with significant discretion. The Rules of Procedure provide that after the hearings, the Committee shall adopt a Conclusion that "shall include the committee's recommendation regarding a nominee's election."<sup>60</sup> It also provides that the Conclusion "should contain an assessment and/or concrete measures of responses".<sup>61</sup> The Committee did not adopt any decisions to elaborate the law in this respect, rather the Committee chair unilaterally decided that they would vote on each candidate whether to recommend for appointment or not, and only the results of the vote would be reflected in the Conclusion. That is, the Committee would not adopt a substantive conclusion with a reasoned recommendation (evaluation) on each of the candidates approved by a majority vote of Committee members.<sup>62</sup>

When the Committee session for 12 December was held, the opposition, including EG and UNM parliamentarians, and civil society joined ongoing demonstrations outside parliament, with some 200 protesters gathered around the building. Protestors stated their opposition to the appointment of what they saw as unqualified or affiliated candidates, including some without the required level of education. The parliament's perimeter remained blocked by the police and special forces and brief physical clashes broke out. One former opposition MP and more than a dozen citizens were arrested throughout the day on charges of civil disobedience and minor hooliganism.

On the day of the vote, the committee consisted of 11 members (8 GD, 1 independent MP, 1 Alliance of Patriots/Social Democrats member, and 1 representing the independent MPs faction). The two committee members (Alliance of Patriots/Social Democrats and the independent MPs faction) boycotted the vote while other opposition and independent MPs were present in the hall. An HCJ non-judge member was reportedly denied permission to observe the committee session.

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<sup>60</sup> Article 205(4) of the Rules of Procedure.

<sup>61</sup> Article 42(2) of the Rules of Procedure.

<sup>62</sup> The chair informed stakeholders and observers that this was to avoid the inevitable situation of not getting unanimous support for a written recommendation on each of the nominees (though only a majority is required.)

Procedures were also not adopted for the conduct of the voting session. The session began with statements from Committee members; despite his duty to remain neutral, the chairperson praised the ruling party for an inclusive and transparent process while independent and opposition MPs strongly criticized the process, nominee list, and the ruling party. An unsuccessful motion was put forward by the independent MP member, supported by non-member independent and opposition MPs, to postpone the voting on the grounds that Committee sessions are not allowed to take place during a plenary week, and the opposition boycott would prevent inclusive discussions on the nominees; heated debates broke out. The independent MP member was not allowed to give her opinion on each of the candidates, but was eventually permitted to make a brief statement in which she criticized the candidates and called for their withdrawal. The situation became chaotic and security was called to intervene multiple times and remove opposition MPs that were disruptive. The chair held the vote amidst loud disruptions.

Disorder led to journalists, camera operators, and reportedly two opposition MPs, being physically forced out of the room by security guards, and one female journalist dragged out.<sup>63</sup> The chairperson's lack of control over this situation diminished the transparency and openness of the process and led to accusations that he was behind the event, and calls for his removal while the chaos continued.

Each candidate was individually voted on (in favour, against, or abstention). Nine out of eleven committee members took part in the open voting – eight from the GD and the one independent MP who voted against all the nominees.<sup>64</sup> Fourteen of the nineteen nominees received the majority of votes of the participating members. In almost all votes there were a number of abstentions.<sup>65</sup> Of those 14 candidates, almost half of them received only 6 out of 9 votes. Without further discussion, the committee voted to recommend to parliament those candidates that received the majority of votes. The conclusion submitted to the plenary was only the names and voting results of the recommended nominees, without substantive findings on the merits of the candidates.

The lack of a Conclusion that, to the highest extent possible, assessed the merits and qualifications of each candidate, limited parliament's ability to vote on the candidates on the basis of their professional merits rather than political preferences. This is a key risk of a system of parliament appointed judges and limited transparency. The Committee's Conclusion was immediately submitted to the Bureau of Parliament and within ten minutes the start of the plenary voting was announced. The results of the Committee's votes were posted on the parliament's website but not broken down by how each member voted on each candidate, further limiting transparency.

Of the 14 recommended nominees, ten were current or former judges, including two sitting Supreme Court judges, six appeal court judges, one first instance court judge, and a former justice

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<sup>63</sup> In media reports authorities have said the Legal Committee Chairperson had announced a technical break.

<sup>64</sup> EG had already pulled its two members as part of their boycott of all parliamentary activities and two members (Alliance of Patriots/Social Democrats and the independent MPs faction). The independent MP member resigned from the committee subsequent to the voting session.

<sup>65</sup> The most abstentions occurred during the votes of candidates that ended up not receiving the majority of votes.

of the Constitutional Court.<sup>66</sup> Six were women. In addition, the sitting Prosecutor General and Deputy Prosecutor General were recommended. Two of the recommended nominees were a former and current civil servant in the judicial system, including the Independent State Inspector at the HCJ, the youngest nominee is 31 years old. Of the five rejected nominees, four were lifetime-appointed appeals court judges and one a trial court judge.

## PLENARY VOTE

The Rules of Procedure of the Parliament provides that the plenary is to discuss the candidates in session and openly vote on each candidate individually.<sup>67</sup> Those who receive the majority of votes of the plenary are appointed to the Supreme Court. It was unclear whether the plenary session was open, while ODIHR monitors and some media representatives were given access and it was broadcast live, some journalists reported being denied entry to the hall.

The opposition parties and all but one of the independent MPs boycotted the plenary vote.<sup>68</sup> As the session began 94 MPs were in attendance; the quorum of 76 met. MPs were given an opportunity to raise procedural issues and the independent MP committee member made a statement alleging illegality of the Committee session due to procedural irregularities and called for the plenary's vote to be cancelled.<sup>69</sup> All MPs, except one, abstained from voting on the motion.

Shortly thereafter, a security incident arose, with the hall evacuated due to the release of an unknown chemical substance causing a foul smell. Two MPs and a staff member were taken for a medical check. The ruling party accused the opposition of sabotaging the vote and the speaker announced that an investigation into the incident would be launched, while a physical clash and insults between two MPs broke out. When the session resumed, another MP disrupted proceedings with insulting shouts and the independent MP committee member made last attempts to urge that the nominees be voted down.

There was no opportunity for debate or a substantive discussion on the merits of each of the nominees, which is not in line with the Rules of Procedure.<sup>70</sup> At the time of the vote, 92 MPs were registered in attendance with the opposition parties and all but one independent MP boycotting.<sup>71</sup> Fourteen of the 19 nominees received the majority of votes and lifetime appointments on the Supreme Court, the same 14 that the committee had recommended.<sup>72</sup> The successful nominees were favourably voted by the vast majority of the MPs, on average 87 votes or 95 per cent in favour, and the five unsuccessful candidates received an average of one vote (1 per cent) in favour. The vast majority of MPs abstained from the vote for the five unsuccessful candidates.<sup>73</sup> Notably,

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<sup>66</sup> Three of the recommended judge nominees had been on the initial list of ten nominees submitted to parliament in December 2018 and who withdrew amidst public controversy over the lack of transparency in their nominations. Two of the five nominees rejected by the Legal Issues Committee had been on the December 2018 list of nominees.

<sup>67</sup> Article 205(6) of the Rules of Procedure.

<sup>68</sup> Despite Alliance of Patriots/Social Democrats' announced parliament boycott, two of seven members participated.

<sup>69</sup> The grounds for the motion cited by the committee member included, among others, the failure to provide for substantive discussion and the boycott of opposition committee members.

<sup>70</sup> Article 205(6) of the Rules of Procedure.

<sup>71</sup> After the 17th candidate was voted, two MPs left the hall leaving 90 MPs in attendance for the last two candidates.

<sup>72</sup> The broken down results of the vote were published on the parliament's website on the same day.

<sup>73</sup> The five unsuccessful nominees received between zero and six votes against their appointment.

almost all GD Committee members had inconsistent abstention patterns between their committee votes and plenary votes, indicating that at plenary they were aligning their votes with their party.<sup>74</sup>

In the days following the plenary vote, strong statements were made by the United States Embassy in Georgia, the European Union, and the Council of Europe Parliamentary Assembly, expressing regret that the Georgian authorities went ahead with the vote at this time after a flawed process and criticizing the selection of the 14 appointees.<sup>75</sup>

Following the vote, six of the 20 Supreme Court vacancies remained vacant. The Law on Common Courts provides that if the parliament does not elect one or more of the nominees, within two weeks the HCJ is to re-conduct the secret vote from amongst the remaining shortlisted candidates to determine new nominees. On 26 December, the HCJ voted and sent to parliament a list of six new nominees from the original short-list. If parliament does not appoint one or more of the new nominees the HCJ is to restart the entire selection procedure within one month. At the time of this report, the Constitutional Court's decision on the Public Defender's motion for temporary suspension of the legal framework for appointment of Supreme Court justices, including for the selection of the remaining vacant posts, had not yet been issued.

## RECOMMENDATIONS

The aim of the ODIHR monitoring report is to provide an independent assessment of the judicial appointment process and its compliance with OSCE commitments, international standards, and guiding principles of judicial independence. Recommendations are therefore given with the aim of improving the legal framework for judicial appointments and its implementation.

Concerning the current legal framework, the Constitutional Court should give timely and due consideration to the recent complaint lodged by the Public Defender that challenges the legislative provisions governing the nomination process. In the interim, suspension of the current legal framework as challenged by the Public Defender would allow the Parliament time to address the identified shortcomings in the legal framework. Parliament should consider, without delay, amending the legislation in line with unaddressed recommendations in the 2019 ODIHR Legal Opinion<sup>76</sup> to bring the legal framework further in line with international standards and recommendations, and OSCE commitments. Some key legislative amendments called for include:

- ✓ Reconsider the parameters for the parliament's role in the appointment process to ensure judicial appointment decisions are made on the basis of objective criteria and introduce legal and procedural safeguards to prevent the politicization of the appointment process;

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<sup>74</sup> In the plenary session, almost all of the GD Committee members abstained to vote for a candidate who they voted for in the committee session (and who had not received a majority in committee) and cast a favourable vote in plenary for candidates who they abstained to vote for in the committee (who received the majority in the plenary).

<sup>75</sup> United States Embassy [statement](#) from 12.12.19, European Union [statement](#) from 13.12.19 December and the Council of Europe Parliamentary Assembly [statement](#) from 13.12.2019.

<sup>76</sup> See also the Council of Europe's European Commission for Democracy through Law (Venice Commission) also opinion on the draft law at the request of the then chairperson of parliament: [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).

- ✓ Establish eligibility criteria that requires more years of experience and extensive human rights experience to ensure higher standards for the candidate pool;
- ✓ Repeal of the use of secret votes for shortlisting and nomination of candidates, to be replaced with a wholly transparent, merit-based selection process;
- ✓ Include a requirement for reasoned decisions based on clearly defined selection criteria, including for shortlisting, nominations, and recommendations to plenary, and require them to be published on a timely basis;
- ✓ Introduce enhanced protections against conflict of interest in the selection process;
- ✓ Amend timelines to allow a thorough examination of candidates' merits prior to shortlisting and schedule hearings that allow for sufficiently substantive interviews;
- ✓ Establish an explicit right to appeal decisions and actions of the nominating body to a judicial body, at all stages of the nomination process;
- ✓ Ensure inclusive, extensive and effective consultations with civil society on any initiatives for legal reform of the judicial system and to involve civil society throughout judicial selection process.

If the current legal framework is going to be implemented before comprehensive reforms are introduced, the responsible institutions could take the following recommendations into consideration many of which are also applicable to appointment processes in general:

- ✓ Ensure adequate regulations and procedures are adopted to supplement the legislation on key aspects of the nomination and appointment process, including on assessment of the candidates' merits;
- ✓ Strictly screen all applicants to ensure they fulfil established eligibility criteria, including the requirement for higher legal education;
- ✓ Further elaborate procedures for conducting background checks to be more transparent and more substantive, and ensure rigorous research on matters of competence and integrity;
- ✓ Strictly interpret conflict of interest rules to ensure no perceived conflict of interest exists throughout the selection process;
- ✓ Provide sufficient advance notice of hearings and publish minutes of hearings on a timely basis including substantive information;
- ✓ Comprehensive, detailed hearing procedures and codes of conduct should be adopted by legal instrument through an inclusive consultative process, and should be published, applied fairly and consistently, and strictly adhered to;
- ✓ Venue should be adequate to ensure attendance of journalists and citizens, including persons with disabilities, and public accessibility rules should be transparent, and fairly and consistently applied;
- ✓ Live broadcast of all hearings should be arranged by the responsible institutions and videos uploaded on institutional websites;
- ✓ Procedures should require a majority quorum throughout the hearings, which should be strictly adhered to, and participants should commit their undivided attention to the process;
- ✓ Candidates should be treated fairly and equally throughout the selection process and be provided with respectful and respectable conditions;
- ✓ Hearing chairpersons should undertake duties with strict political neutrality and fairness toward all members and candidates, and exert sufficient control over hearings to ensure an orderly and respectful process;

- ✓ Adoption of measures in the selection process that would facilitate diversity on the highest court, including appointment of reputable and experienced independent legal professionals and academics, and facilitate representation of more women, minorities and persons with disabilities.