



## **Public Defender of Georgia**

# **Monitoring Report on the Selection of Supreme Court Judicial Candidates by the High Council of Justice of Georgia**

The document was prepared in accordance with subparagraph G of article 21 of the Organic Law of Georgia on the Public Defender of Georgia

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## Introduction

### 1. Prehistory

The process of selection of Supreme Court judges has recently been the subject of particular attention. The issue has been important mainly for two circumstances: the unprecedentedly high number of vacancies in the Supreme Court and the appointment of Supreme Court judges for life for the first time in the country's history. At the same time, low public trust in the justice system and particularly in the High Council of Justice is worth mentioning.<sup>1</sup>

The process was launched after implementation of constitutional amendments<sup>2</sup>, which re-defined the procedure for the selection of Supreme Court judges. Specifically, earlier, the President used to submit candidates to the Parliament, while the amendments granted this authority to the High Council of Justice. In addition, the amendments increased the number of Supreme Court judges to at least 28, compared to the earlier number of at least 16.<sup>3</sup> Due to the aforementioned legal changes and certain factual circumstances,<sup>4</sup> the number of vacancies reached 18 by the end of 2018 and 20 - in May 2019. A total of 10 judges served in the Supreme Court as of May 2019.

The new constitutional amendments, which defined the role of the High Council of Justice in the selection of Supreme Court judges and increased the number of judges, took effect on December 16, 2018, when the newly elected President took an oath. The new edition of the constitution led to the amendments to the legislation,<sup>5</sup> although the procedure for the selection and nomination of Supreme Court judges by the High Council of Justice and the evaluation criteria remained unclear. Unfortunately, in the absence of a special procedure, the High Council of Justice failed to demonstrate a high standard of reviewing the case and it adopted the submission No 2 on December 24, 2018, a week after the enactment of constitutional amendments, without any procedures, criteria, due review or justification. The content of the submission contained only one sentence and a list of 10 candidates submitted to the Parliament. It was not attached by any document, nor by brief information about the candidates. All 10 candidates were incumbent judges and 2 of them<sup>6</sup> were members of the High Council of Justice at the same time.<sup>7</sup> The hasty and unjustified decision-making by the High Council of Justice triggered sharp public criticism. We responded to the issue with a

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<sup>1</sup> The Venice Commission, in its urgent opinion on the selection and appointment of judges of the Supreme Court of Georgia, also speaks about this in paragraphs 14 and 63. The report was first published on April 16 2019 and was approved at the Venice Commission plenary session on June 24. Available at: <<https://bit.ly/30qSvpE>> [Last accessed: 18.09.19]

<sup>2</sup> Amendments made to the Constitution of Georgia on October 13, 2017.

<sup>3</sup> Article 14 (3) of the Organic Law of Georgia on Common Courts, the 2017 edition.

<sup>4</sup> The President of Georgia nominated candidates for the vacancies announced in the past, but the issue has not been discussed in the Parliament.

<sup>5</sup> Amendments of July 21, 2018.

<sup>6</sup> Giorgi Mikautadze and Dimitri Gvritishvili.

<sup>7</sup> The High Council of Justice consists of 15 members. In December 2018, a total of 14 members were represented in the Council (due to the resignation of the Chairman of the Supreme Court of Georgia).

public statement,<sup>8</sup> focusing on the Council's non-transparent decision-making regarding the judicial nominees, absence of evaluation criteria and selection procedure, and conflict of interest, as 2 of the 10 nominees turned out to be members of the Council. Due to these circumstances, we called on the Parliament of Georgia to suspend the process of reviewing the nominees and to immediately start drafting clear criteria and selection procedure.

The decision made by the High Council of Justice on 24 December 2018 was considered by the Bureau of Parliament on the same day, at 18:00, at the end of the working day. On the basis of the decision of the Bureau, the submission was forwarded to the Legal Issues Committee for consideration. In three days, on December 27, 2018, Eka Beselia, Chairperson of the Legal Issues Committee, publicly announced her resignation, explaining that the hasty and unjustified process of selection of Supreme Court judges was suspended this way.

Finally, the Parliament suspended the process of reviewing the candidates nominated by the High Council of Justice. In later statements, in response to the public reaction, MPs spoke about the need for determining procedures and criteria by law.

The Public Defender got involved in the process of drafting a bill, within a working group, where she presented her views and suggestions on the procedure and criteria for the selection of Supreme Court judges. Working on the bill was quite rapid and finally, on March 6, 2019, a bill drafted by the Cabinet of Parliament Speaker Irakli Kobakhidze and initiated by 7 MPs, was submitted to the Parliament.

The Public Defender concluded that the bill drafted by the Cabinet of the Chairman of the Parliament could not properly respond to the challenges facing the country at the critical time and published her opinions on 20 March 2019.<sup>9</sup> The Public Defender participated in the parliamentary discussions of the draft law as well – both within the framework of the committee meetings and the plenary session. For the first time in the history of our country, the Public Defender used the opportunity provided by the Rules of Procedure of the Parliament of Georgia<sup>10</sup> and requested a hearing at the plenary session, which was held on April 19, 2019, before the second reading voting of the draft law.

It should be noted that the OSCE Office for Democratic Institutions and Human Rights (hereinafter OSCE/ODIHR) presented its opinion on the draft law following the relevant request of the Public Defender.<sup>11</sup> The document, preparation of which involved highly qualified experts,<sup>12</sup> reviews in detail

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<sup>8</sup> Public statement of the Public Defender, December 26, 2018. Available at: < <https://bit.ly/2Wvf4IU> > [Last accessed: 18.09.19]

<sup>9</sup> Public statement of the Public Defender, March 20, 2019. Available at: < <https://bit.ly/2oBsvdH> > [Last accessed: 18.09.19]

<sup>10</sup> Article 154 of the Rules of Procedures of the Parliament of Georgia.

<sup>11</sup> Opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, OSCE/ODIHR, April 17, 2019, Warsaw. Available at: <<https://www.legislationline.org/countries/country/29/Georgia/show>> [Last accessed: 18.09.19]

the compliance of the draft law with international and regional standards, norms and practices, as well as with the country's OSCE commitments. The Venice Commission also prepared an urgent opinion on the draft law during the process of discussion of the draft law.<sup>13</sup>

The opinions of the OSCE/ODIHR, Venice Commission, Public Defender and NGOs were partly reflected in the law adopted by the Parliament, including: The Supreme Court judicial candidate shall no longer be required to pass a judicial qualification exam; the Parliament shall be provided with information about the candidates; the conflict of interest was largely regulated; MPs who are not members of the Legal Issues Committee shall be allowed to ask questions to the candidates in the Legal Issues Committee; the procedure for electing the Chairperson of the Supreme Court was determined. However, it is worth noting that the law does not reflect the important principles recommended by the Venice Commission, OSCE/ODIHR, Public Defender of Georgia and NGOs. In this regard, we should particularly emphasize the secret and unjustified decision-making during the selection of candidates by the High Council of Justice, lack of opportunity to appeal against the decision and non-determination of criteria for the election of the Supreme Court Chairperson.

The legislative amendments on the selection of Supreme Court judges were adopted by the Parliament of Georgia on May 1, 2019, and very soon, on May 10, applicants started submitting applications. At the end of May, the Public Defender addressed the OSCE Office for Democratic Institutions and Human Rights with a request to monitor the selection of the Supreme Court judges and the request was granted. At the same time, the Public Defender independently observed the selection process in the High Council of Justice of Georgia, on the basis of which, this special report was prepared.

## 2. Purpose and methodology of observation

Appointment/election of judges in accordance with international standards, including the European Convention on Human Rights<sup>14</sup> and the judgments of the European Court of Human Rights<sup>15</sup>, is an integral part of the right to a fair trial. The process, as a human rights issue, falls under the oversight

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<sup>12</sup> Professor Andras Sajó, Central European University in Budapest and former judge of the European Court of Human Rights; Ms. Michèle Rivet, C.M., Honorary Member and Former Vice President of the International Commission of Jurists and Mr. José Igreja Matos, President of the European Association of Judges and First Vice-President of the International Association of Judges.

<sup>13</sup> The Venice Commission's urgent opinion on the selection and appointment of judges of the Supreme Court of Georgia. The report was first published on 16 April 2019 and was approved at the Venice Commission plenary session on June 24. Available at: <<https://bit.ly/30qSvpE>> [Last accessed: 18.09.19]

<sup>14</sup> Article 6 (1) of the European Convention on Human Rights.

<sup>15</sup> For example, see the 12 March 2019 judgment of the European Court of Human Rights in the case of Gudmundur Andri Astradsson v. Iceland (Application No 26374/18).

function of the Public Defender of Georgia.<sup>16</sup> It is also noteworthy that article 25 of the Constitution of Georgia guarantees the right of every citizen of Georgia to hold public office, including that of a Supreme Court judge, if he/she meets the requirements of the law. Under article 18 of the Constitution of Georgia, everyone has the right to a fair hearing of a case by an administrative body. Accordingly, protection of these rights is subject to the supervision of the Public Defender and falls under her constitutional mandate.

It is important for the Public Defender to be sure that candidates with the best qualifications and reputation are selected as judges of the Supreme Court through a fair and transparent process. One of the goals of Public Defender's observation was also to assess the practical implementation and impact of new legislative amendments, to identify gaps and shortcomings and to suggest future steps to the decision makers for the elimination of the shortcomings.

The Public Defender observed all stages of the selection of Supreme Court judges – reception of documents, registration of candidates, secret ballots, interviews with candidates. During the observation process, official documents were requested from the High Council of Justice and other agencies, which served as basis for the findings of this report. The main focus of Public Defender's observation was to examine procedural issues, practical application of the principles and safeguards enshrined in the laws and compliance of the process with international standards.

### 3. Major findings

The process of selection of Supreme Court judicial candidates had been ongoing in the High Council of Justice of Georgia during a 4-month period from May 6<sup>17</sup> to September 6<sup>18</sup>, 2019. The Public Defender's Office observed the above process under her mandate. The results of the observation are broadly presented in this report. The major findings of the observation are as follows:

- The legislator does not allow persons with a bachelor's degree to be Supreme Court judicial candidates and requires at least a master's degree or an equivalent academic degree in law. Compliance with the aforementioned legislative requirement was to be checked by the High Council of Justice at the very beginning of the process, before registration of candidates. However, it turned out that both the list of 50 candidates and the candidates submitted to the Parliament included persons whose master's degrees in law were not properly proved or raised serious questions. In particular, at this stage, the Public Defender's Office has identified 5 such candidates on the list of 50 candidates. 3 of them (Zaza Tavadze, Shalva Tadumadze, Miranda Eremadze) are among the candidates submitted to the Parliament. In

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<sup>16</sup> Paragraph 1 of article 35 of the Constitution of Georgia; Articles 12 and 14 of the Organic Law of Georgia on the Public Defender of Georgia; Venice Commission Principles on the Protection and Promotion of the Ombudsman Institution, May 3, 2019, Principle 13.

<sup>17</sup> The first session of the High Council of Justice of Georgia was held on the theme of selection of judges of the Supreme Court of Georgia and important decisions were made.

<sup>18</sup> On this date, the High Council of Justice submitted candidates to the Parliament of Georgia.

the case of Zaza Tavadze, the official documents submitted by the candidate during the selection process and obtained by us clearly prove that his higher legal education does not meet the requirements of the Organic Law of Georgia on Common Courts. In the case of Shalva Tadumadze, the documentation submitted by the candidate himself during the selection process and the documentation available to the Public Defender's Office contain contradictory information and raise serious questions about his higher legal education. The case of Miranda Eremadze shows that, based on the decision of the court (substantiation of which was criticized by the Public Defender), after studying at the Jambakur Bakradze Tbilisi Institute of Law and Economics for four years, from 1991 to 1995, she was granted a master's degree as a lawyer and as an economist - in two professions simultaneously - which contradicts the law and the basic principles of the educational system.

- The High Council of Justice has not developed a procedure that would ensure the selection of judges on the basis of criteria of competence and good faith during the formation of the so-called long list of candidates (50 candidates). This made it possible to disqualify a candidate with better competence and good faith.
- The controversy between the two groups of members of the High Council of Justice was evident during the selection process of Supreme Court judges. Throughout the process, including during the secret ballot and evaluation of candidates, the Public Defender's Office was able to identify 10 ballot papers/evaluation forms that were characterized by a high degree of coincidence. It makes us presume that 10 members of the High Council of Justice (including all judge members of the Council) had a joint agenda and acted in a coordinated manner. Such agreements between the members of the Council once again highlights that internal independence of the judiciary still represents a significant challenge in Georgia and that the secrecy of ballot and evaluation cannot reach the goal of protecting the Council members from influences. Under given circumstances, the secrecy of ballot and evaluation only impedes public oversight over the process, which is of no value itself and, on the contrary, is harmful.
- As a result of observing the vote counting process during the formation of a 50-candidate list, we identified 10 ballot papers circled under the same scheme and carrying a high degree of coincidence. None of the 10 ballot papers included a candidate that failed to qualify for the next stage. The other 3 ballot papers did not show this degree of coincidence and the 5 candidates circled in them, who received no votes in the remaining 10 ballot papers, qualified for the next stage.
- During the entire process, the non-constructive attitude of certain judge members of the Council towards non-judge members - Nazi Janezashvili and Ana Dolidze - was evident. Aggression and cynical attitude towards non-judge members was also demonstrated by two candidates - Vladimir Kakabadze (active judge) and Paata Shavadze (active lawyer). Vladimir Kakabadze is currently on the list of candidates submitted to the Parliament.

- Some judge members of the High Council of Justice unjustifiably criticized the Public Defender during the selection of Supreme Court judges and thus attempted to discredit the national human rights institution.
- The candidates were evaluated only by 12 members of the High Council of Justice after interviews, whereas the law requires each member of the Council to evaluate the candidates.
- Although the law does not say anything about the confidentiality of evaluators when evaluating candidates, the High Council of Justice decided to make the identities of evaluators confidential. Consequently, the evaluation forms provided to us by the Council did not identify the evaluators.
- Only 6 out of 50 candidates were considered by all 12 members of the High Council of Justice as persons who could fully meet the criterion of good faith. Only 2 of them were submitted to the Parliament of Georgia (Mikaberidze Levan, Tsuladze Alexandre).
- The evaluation and scores granted according to the competence and good faith criteria are not substantiated. Under these circumstances, the risks of manipulating the evaluation (including scores) naturally increases, the process becomes more nominal and is deprived of the objective importance of evaluating the candidates' good faith and competence, exactly due to the lack of justification. And secret ballot cannot perform the function of protecting the Council members from internal or external influences and serves as a major obstacle to transparency of the process.
- Within 12 evaluators, there were cases when the difference between the scores granted by them to several candidates was quite large (30-57). Closeness between the highest and lowest scores (3-10) was also identified within the 12 evaluators. Studying the scores and forms of evaluation gave us the opportunity to identify 10 evaluators, the scores of which were very close to each other. In some cases, the so-called basket of scores could be identified and a question arose as to whether there was a pre-agreed threshold of scores between these members of the Council.
- Analysis of the results of the ballot conducted to select 20 out of 50 candidates showed that there was accumulation of high number of votes of 10 members of the Council in relation to 20 candidates, as well as complete refusal to grant average number of votes to the candidates and distribution of low number of votes among high number of candidates. This strategy used by 10 members of the Council and the refusal to grant average number of votes to the candidates prevented them from qualifying for the next stage even in case of coincidence of votes of the remaining members of the Council. Analysis of the data shows that the 10 members of the Council used 164 out of a total of 200 votes to support 20 candidates, guaranteeing their transition to the next stage, while the remaining 36 votes were distributed among 18 candidates, who had no chance of qualifying for the next stage, even in case of getting votes from the rest members of the Council.



- In a scoring system, where scores are not substantiated, we cannot say for sure that the higher the score is, the more competent the candidate is, but even under these circumstances, the decision of the 10 members of the Council, who gave a high score to a candidate, but did not vote for him/her, or vice versa, gave a low score to a candidate, but voted for him/her, is surprising. The 10 members of the Council made such a decision with regard to 4 candidates.
- The conflict of interest was also identified during the selection of Supreme Court judges in relation to Irakli Shengelia, since his wife's brother was one of the candidates. Despite this, contrary to paragraph 1 of article 11 of the Law of Georgia on Conflict of Interests and Corruption in Public Service, he did not withdraw himself from the process and on the contrary, denied any conflict of interest. Giorgi Mikautadze, Secretary of the High Council of Justice, was also involved in the conflict of interest. Although he withdrew himself from the process as a member of the High Council of Justice, he did not do the same as the Head of the Office of the High Council of Justice and thus violated paragraph 2 of article 11 of the Law of Georgia on Conflict of Interests and Corruption in Public Service.
- The new legislative amendments<sup>19</sup> and the following process of selection gave the public an opportunity to follow the interviews with the judicial candidates of the Supreme Court. In this respect, the contribution of the Georgian Public Broadcaster was significant, which offered internet users a live broadcast of interviews on its website. As for the Council, it made video recordings of the sessions available on its website only later. In the future, in order to prevent that such a degree of transparency of the process be dependent on any broadcaster's good will, it would be better the Council to ensure live broadcast of the interviews.
- The requirement of the Organic Law on Common Courts, according to which, the date and agenda of the session should be posted on the Council's website at least 7 days before the session, was not observed. Even some members and Office of the Council did not have information about the date of the session within the timeframe prescribed by law.
- At the early stage of the process, access to requested public information for observation organization was a problem, though this was later solved. In one case, information requested by the Public Defender was fully provided to her later.

### Selection of Supreme Court judicial candidates in the High Council of Justice

The selection of judicial candidates of the Supreme Court of Georgia started in the High Council of Justice on May 6, 4 days after the promulgation of the relevant amendments, when a lot of decisions

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<sup>19</sup> Amendments made to the Organic Law of Georgia on Common Courts on May 1, 2019.

were made,<sup>20</sup> and ended on September 6<sup>21</sup>, when the Supreme Court judicial candidates and information about them were submitted to the Parliament. This chapter summarizes this 4-month period. The entire process is divided into several parts in the report: registration of candidates, formation of the so-called long list of candidates, interviews, evaluation by scores, shortlisting of candidates and their submission to the Parliament. Each part includes information about the respective stage, after which, two important issues are discussed: conflict of interest and transparency of the process.

The Public Defender has been periodically publishing results of the observation of the selection process, which was followed by attacks by certain members of the High Council of Justice via media, social networks and even during interviews with candidates. Notwithstanding this, the Public Defender is eager to cooperate constructively with the High Council of Justice on problematic issues in the justice system.

The controversy between the two groups of members of the High Council of Justice was evident during the selection process of Supreme Court judges. Throughout the process, including during the secret ballot and evaluation of candidates, the Public Defender's Office was able to identify 10 ballot papers/evaluation forms that were characterized by a high degree of coincidence. We presume that the 10 members of the High Council of Justice (including all judge members of the Council) had joint agenda and acted in a coordinated manner. Such agreements between the members of the Council once again highlights that internal independence of the judiciary still represents a significant challenge in Georgia and the secrecy of ballot and evaluation cannot reach the goal of protecting Council members from influences. Under these circumstances, the secrecy of ballot and evaluation impedes public oversight over the process, which is of no value itself and, on the contrary, is harmful.

#### 1. Registration of candidates

On May 11, 2019, the High Council of Justice began receiving applications electronically for the 20 vacancies announced in the Supreme Court, which ended on May 31.<sup>22</sup> A total of 144 applications were submitted to the Council.

At the first stage of the selection process, the High Council of Justice of Georgia had to make a decision on the registration of candidates based on their compliance with the judicial requirements and proper submission of applications and attached documents. During this process, the Office of the

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<sup>20</sup> The application form to be submitted to the Parliament of Georgia for participation in the selection of judicial candidates of the Supreme Court of Georgia, the standard form of reference to be used when seeking information about the candidate and a special questionnaire, as well as the form of evaluation of a judicial candidate, were approved.

<sup>21</sup> Letter #995-02 of the High Council of Justice. Available at: <https://info.parliament.ge/file/1/BillReviewContent/229923?> [Last accessed: 18.09.19]

<sup>22</sup> Decision #1/43 of 10 May 2019 of the High Council of Justice of Georgia. Available at: <http://hcoj.gov.ge/files/43-2019.pdf> [Last accessed: 18.09.19]

High Council of Justice contacted a number of candidates to submit additional documents, which was explained by the established practice. However, no similar thing is envisaged in the legislation. In order to fully regulate the process and avoid ambiguity, it would be better the legislation to specify the role and powers of the Office of the High Council of Justice in communicating with persons participating in the selection process.

At the session held on June 7, 2019, where the issue of registration of candidates was to be resolved, Giorgi Mikautadze, Secretary of the High Council of Justice, who was at the same time participating in the selection of Supreme Court judicial candidates, withdrew himself, but continued to serve as the Head of the Office of the High Council of Justice. As the High Council of Justice did not have a chair in that period, it became necessary to select a chair of the session. After Giorgi Mikautadze withdrew himself, Dimitri Gvritishvili chaired the June 7 session, though the issue had not been brought to a vote. At each subsequent sessions, the Council members elected Dimitri Gvritishvili as the chair of the session through voting.<sup>23</sup>

Out of 144 people participating in the selection process, the Council registered 139 as candidates. 5 people were refused registration.<sup>24</sup> The reason for refusal in 2 cases was the failure to submit a document confirming 5-year work expertise in the relevant field; reasons for refusal in three other cases were: dismissal of the person from judge's position due to disciplinary violation, reaching the age of 65 years, and failure to submit a document certifying at least a master's degree or an equivalent academic degree in law. 2 persons appealed against the refusal to the Qualification Chamber of the Supreme Court of Georgia, but their requests were rejected.<sup>25</sup>

### 1.1. Candidates' compliance with the legal education requirement

Complete monitoring of this stage of the selection process became possible for the Public Defender after fully getting the copies of applications and attached documents submitted by the persons participating in the selection process.<sup>26</sup> The Public Defender's Office drew attention to the applicants' compliance with the qualification requirements, such as "Higher legal education, with at least a master's degree or an equivalent academic degree/higher education diploma".<sup>27</sup> This requirement

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<sup>23</sup> The legislation in the context of the High Council of Justice does not recognize the notion of a "chairman of the session" and empowers the Chairperson and the Secretary of the Council to chair the session. In the given situation, when the Council has no Chairperson, while the Secretary withdrew himself, the Council considered the election of a chairperson as an option, which was disputed by some members.

<sup>24</sup> Decision #1/108 of the High Council of Justice of Georgia, June 7, 2019. Available at: <<https://bit.ly/2nmiVLm>> [Last accessed: 18.09.19]

<sup>25</sup> Judgment delivered by the Supreme Court of Georgia on 12 June 2019 in the case #ssk-01-19; Judgment of the Supreme Court of Georgia of 13 June 2019 in the case #ssk-02-19;

<sup>26</sup> The Public Defender requested information by letter No.01-4/7030 of June 24, 2019, and received full information only on August 9, 2019, by letter #924/1971-03-o of the Supreme Council of Justice on August 7, 2019.

<sup>27</sup> Paragraph 1 of article 34 of the Organic Law of Georgia on Common Courts.

applies to judges of all instances of Georgia. The legislative amendment requiring higher legal education with at least a master's degree came into force on November 17, 2013. Of course, since then, the High Council of Justice of Georgia has always been obliged to consider this requirement when appointing judges. The wording of the respective norm of the Organic Law of Georgia on Common Courts **makes clear the legislator's will that persons with a bachelor's degree in law shall not be considered as judicial candidates. Accordingly, the task of the High Council of Justice in this process was to: 1) require participants of the selection process to submit documents that would undoubtedly prove that they had obtained a master's degree or an equivalent academic degree from a licensed/accredited/authorized higher education institution; 2) on the basis of the submitted documents, discuss in detail the fulfillment of this requirement by the participants of the selection process.**

**Examination of applications and attached documents made it clear that there were questions with regard to the compliance of a number of candidates with the abovementioned requirement.** The Public Defender's Office studied the documents submitted by the 50 candidates of the so-called long list, as a result of which, several suspicious circumstances were detected. **In some cases, it was questionable whether the higher education institutions/educational programmes indicated by the candidates were licensed/accredited/authorized, due to which, the Public Defender's Office requested official information regarding 11 higher education institutions/educational programmes.**

Questions also emerged regarding the fact of whether certain candidates actually met the requirement related to a master's degree or an equivalent degree due to the fact that the study period indicated by them or indicated in official documents was less than it is required for the relevant academic degree, or the documents did not say anything about the duration of education at all. In particular, article 89 (8) of the Law of Georgia on Higher Education stipulates that "The higher education diploma obtained after completing a one-stage, **at least five-year** educational programme before the start of the 2005-2006 academic year is equivalent to a master's degree. The diploma obtained after completing a one-stage, less than five-year educational programme before the start of the 2005-2006 academic year is equivalent to a bachelor's degree". According to paragraph 8<sup>2</sup> of the same article, the diploma issued after completing **at least five-year** educational programme at the end of 2004-2005, 2005-2006 and 2006-2007 academic years is equivalent to a master's diploma, the diploma of a certified specialist issued after completion of a 4-year educational programme is equivalent to a bachelor's diploma and the diploma of a certified specialist obtained after completion of at least 3-year educational programme is equivalent to a higher vocational diploma." With regard to this issue, the Public Defender's Office requested information from LEPL National Center for Educational Quality Enhancement about **8 candidates of the so-called long list.**<sup>28</sup>

The following shortcomings were identified after examining the official documentation obtained from LEPL National Center for Educational Quality Enhancement and LEPL Education Management Information System:

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<sup>28</sup> A list of 50 candidates.

## 1. Compliance of Zaza Tavadze's higher legal education with the requirement of the law

Zaza Tavadze is a Supreme Court judicial candidate nominated by the High Council of Justice. **Official documents clearly show that the higher education received by Zaza Tavadze does not meet the requirements of the organic law.** Zaza Tavadze studied at the Open Humanitarian Institute of Georgia in 1992-1996. The individual administrative-legal act<sup>29</sup>, issued by LEPL National Center for Educational Quality Enhancement on August 7, 2017, emphasizes that the mentioned education is equivalent to a bachelor's degree. Specifically, according to the document, "[...] the educational programme completed by Zaza Tavadze lasted four (4) years. In accordance with article 89 (8) of the Law of Georgia on Higher Education,<sup>30</sup> the education received by Zaza Tavadze is equivalent to a bachelor's degree." Since according to the same document, Tavadze has the right to apply for a doctoral programme, the Public Defender's Office sent a specifying letter<sup>31</sup> to the National Center for Educational Quality Enhancement. According to the reply letter,<sup>32</sup> the right to apply for a doctoral programme was related to Zaza Tavadze's master's degree in international business administration. According to the letter, "the applicable legislation does not provide for a restriction on admission to a doctoral programme (except for a master's degree requirement in any field) [...]" The Center referred to paragraph 1 of article 49 of the Law of Georgia on Higher Education, according to which, "Anyone with at least master's or equivalent degree has the right to apply for a doctoral programme."

In the process of selection of judges, Zaza Tavadze submitted a document certifying that he was enrolled in the doctoral programme, though he has not yet received doctor's degree at this stage. **Accordingly, at this moment, Zaza Tavadze's higher legal education is limited to a bachelor's degree, which does not meet the master's degree requirement.** Given these circumstances, the High Council of Justice not only should not have submitted Zaza Tavadze's candidacy to the Parliament, but it also should not have registered him as a candidate.

## 2. Compliance of Shalva Tadumadze's higher legal education with the requirement of the law

In the process of selection of judicial candidates of the Supreme Court of Georgia, the High Council of Justice also submitted Shalva Tadumadze's candidacy to the Parliament of Georgia. Shalva Tadumadze's higher legal education is limited to studying at the **N. Dumbadze Tbilisi Humanitarian Institute**. The diploma issued by the institute indicates that Shalva Tadumadze was admitted to the

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<sup>29</sup> Individual Administrative Act #MES 31700912617 of LEPL National Center for Educational Quality Enhancement, August 7, 2017.

<sup>30</sup> According to the norm, "Higher education diplomas obtained after completing a one-stage, **at least five-year** educational programme before the start of the 2005-2006 academic year, is equivalent to a master's degree." The diploma obtained after completing a one- stage, less than five-year educational programme before the start of the 2005-2006 academic year is equivalent to a bachelor's degree".

<sup>31</sup> Letter #01-4 / 9716 of the Public Defender's Office of Georgia, September 4, 2019.

<sup>32</sup> Response letter #MES 11901211917 of the National Center for Educational Quality Enhancement, September 17, 2019.

N. Dumbadze Tbilisi Humanitarian Institute in 1993 and he graduated from it in 1998. He was granted the qualification of a lawyer. The application submitted by Shalva Tadumadze in the selection process of the Supreme Court judges indicates that he had been studying at the said institute from October 1994 to June 1998 and that the duration of his studies was five years. However, the period from October 1994 to June 1998 covers only four years. It should also be noted that the information posted on the website of the Prosecutor's Office of Georgia indicates that Shalva Tadumadze "graduated from the Tbilisi Humanitarian Institute in 1999 [...]"<sup>33</sup>

According to the information received from LEPL Education Management Information System in response to the Public Defender's letter, "The Ministry of Education of Georgia issued higher education license No 01-17-08 / 839 for Ltd Tbilisi Humanitarian Institute (hereinafter N.Dumbadze Tbilisi University) on August 25, 1994. Under the licence, the institute was permitted to carry out a number of higher education programmes, including in the field of law. In addition, only the curriculum of the 1997-1998 academic year of the department of law of the Tbilisi Humanitarian Institute is kept in the archive. The curriculum is approved by the Rector of the Tbilisi Humanitarian Institute and comprises 4 (four) courses. On the basis of the decision made by Vake-Saburtalo Court on December 5, 2003, Ltd Tbilisi Humanitarian Institute was renamed as N. Dumbadze Tbilisi University. As of today, this institute is a suspended higher education institution".<sup>34</sup>

The documentation submitted by the candidate and the documents available to the Public Defender's Office raise serious questions about the higher education received by Shalva Tadumadze in the field of law. Specifically: 1. The diploma says that he was admitted to the N. Dumbadze Tbilisi Humanitarian Institute in 1993, whereas the institute was granted licence on 25 August 1994. 2. Shalva Tadumadze was only 15 years old in 1993.<sup>35</sup> 3. The diploma refers to the educational institution as N. Dumbadze Tbilisi Humanitarian Institute, whereas the institute received this name on the basis of the Vake-Saburtalo Court ruling of 5 December 2003, while the diploma was issued in 1998. 4. Only the curriculum of the 1997-1998 academic year of the department of law of Tbilisi Humanitarian Institute is kept in the archive and it comprises 4 (four) courses.

**The aforementioned circumstances raise questions as to whether Shalva Tadumadze's higher legal education is in conformity with article 34 (1) of the Organic Law of Georgia on Common Courts, which requires higher legal education with a master's degree or an equivalent academic degree/higher education diploma as a prerequisite for appointing a judge.** The aforementioned circumstances should have been considered by the High Council of Justice before registering Shalva Tadumadze as a candidate, which has not been done.

### **3. Compliance of Miranda Eremadze's higher legal education with the requirement of the law**

Miranda Eremadze is a Supreme Court judicial candidate submitted by the High Council of Justice to the Parliament. She had been studying at the department of law in the higher educational institution

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<sup>33</sup> Available at: < <http://pog.gov.ge/en/employee/chief> > [Last accessed: 07.10.2019]

<sup>34</sup> Letter #MES 31901236453 of LEPL Education Management Information System, September 20, 2019.

<sup>35</sup> He was born on January 22, 1978.

for only four years. However, she was appointed as a judge to the Chamber of Administrative Cases of Tbilisi Court of Appeal for a three-year term<sup>36</sup> in 2016 and for life - in 2017.<sup>37</sup> Examination of Miranda Eremadze's documents, including the materials provided by LEPL National Center for Educational Quality Enhancement and the court judgments revealed very serious problems.

Miranda Eremadze was originally appointed as a judge on August 29, 2006, for a 10-year term. The law applicable at that time required only higher legal education and not specifically master's or equivalent degree as a prerequisite for the appointment of a judge. This requirement was introduced in the Organic Law of Georgia on Common Courts by the amendment of November 1, 2013, which entered into force on November 17, 2013. Accordingly, since November 17, 2013, a person shall be appointed/elected as a judge only if he/she has a master's degree or an equivalent degree in the field of law.

Miranda Eremadze's degree in law is limited to 4-year studies at **Tbilisi Jambakur Bakradze Institute of Law and Economics**, where she was simultaneously awarded the qualifications of a lawyer and economist. In the final year of the judicial term, the judge requested confirmation of equalization of her diploma with a master's degree diploma<sup>38</sup> along with confirmation of her education. LEPL National Center for Educational Quality Enhancement rejected her request and made a negative decision on September 7, 2015.<sup>39</sup> The Tbilisi City Court ruled in favor of Miranda Eremadze on December 7, 2015,<sup>40</sup> annulled the order of September 7, 2015, and ordered the Center to issue a new individual-administrative act recognizing Miranda Eremadze's higher education equalized to a master's degree.<sup>41</sup> On February 19, 2016, the Tbilisi Court of Appeal upheld the decision of the court of first instance.<sup>42</sup> On May 18, 2016, the Supreme Court accepted the cassation appeal of the National Center for Educational Quality Enhancement<sup>43</sup> and on May 25, within 7 calendar days,

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<sup>36</sup> Decision #1/148 of the High Council of Justice of Georgia, July 14, 2016. Available at: <https://bit.ly/2oiQVbe>

<sup>37</sup> Decision #1/272 of the High Council of Justice of Georgia, October 20, 2017. Available at: <https://bit.ly/2ohABYE>

<sup>38</sup> Miranda Eremadze's application of 5 August 2015 to LEPL National Center for Educational Quality Enhancement.

<sup>39</sup> Decree #732 of the Director of LEPL National Center for Educational Quality Enhancement, September 7, 2015.

<sup>40</sup> The court judgments concerns Miranda Eremadze along with three others, but the evaluations of court judgments in the report is related to Miranda Eremadze, since the Public Defender's Office examined her documentation.

<sup>41</sup> The Tbilisi City Court's judgment does not specify when Miranda Eremadze filed a lawsuit, in which she demanded that the 7 September 2015 order be annulled and the Center be obligated to issue a new individual administrative-legal act. According to the 25 May 2016 judgment of the Supreme Court on the given case, the lawsuit was filed with the Tbilisi City Court on 1 October 2015.

<sup>42</sup> The Tbilisi Court of Appeal did not specify when the National Center for Educational Quality Enhancement filed an appeal.

<sup>43</sup> The judgments of the Supreme Court of Georgia do not indicate when the National Center for Educational Quality Enhancement filed a cassation complaint. The material provided by the Center is attached by a

declared the appeal inadmissible.<sup>44</sup> The cassation court held that there was no basis for accepting the cassation complaint,<sup>45</sup> "the present case is of no essential relevance for judicial practice and the cassation complaint has no prospect of success." **These circumstances make it clear that despite the overloaded regime of courts and systematic violation of the procedural terms by them, the courts of all three instances made timely and even unusually quick decisions on the case of judge Miranda Eremadze, which was essential for her re-appointment as a judge.** In about eight months after the issuance of the disputed act, the case passed all three instances of court and the final judgment was delivered as well.<sup>46</sup>

The content of the judgments in favor of Miranda Eremadze should be strictly criticized. Because of the lack of substantiation, they completely contradict the law and are absolutely unfair. The court refused to apply article 89 (8) of the Law of Georgia on Higher Education, according to which, "Higher education diplomas obtained after completing a one-stage, **at least five-year** educational programme before the start of the 2005-2006 academic year is equivalent to a master's degree. The diploma obtained after completing a one-stage, **less than five-year** higher educational programme before the start of the 2005-2006 academic year is equivalent to a bachelor's degree". The Court completely unreasonably found that application of this norm would be contrary to the principle of prohibition of retroactivity of the law.<sup>47</sup> Although a lot of norms are quoted in the judgment from the applicable law, including the definition of an individual administrative-legal act, the competences of the National Center for Educational Quality Enhancement, etc., no norm is quoted relating to the retroactivity of the law, despite the fact that the above was the main legal justification of the judgment. When discussing the principle of prohibition of the retroactivity of the law, the Court

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document indicating that the judgment of Tbilisi Court of Appeal of 19 February 2016 was sent to the Center by letter of 23 March 2016. According to article 397 (1) of the Code of Civil Procedure of Georgia, "The term for filing a cassation appeal shall be 21 days. This term shall not be extended (renewed) and shall commence on the day when the judgment is handed over to the party."

<sup>44</sup> According to paragraph 4 of article 34 of the Administrative Procedure Code of Georgia, "The term for accepting a cassation appeal and delivering a judgment is 6 months in the administrative case."

<sup>45</sup> According to the edition of paragraph 3 of article 34 of the Administrative Procedure Code of Georgia that was valid at the time of the delivery of the judgment, the Supreme Court of Georgia shall accept a cassation appeal if: (a) the case is important for the development of justice and establishment of uniform judicial practice; B) the decision of the Court of Appeal differs from the earlier practice of the Supreme Court of Georgia in this category of cases; (C) The Court of Appeal reviewed the case with significant procedural violations and it is suspected that the violations could have a substantial effect on the outcome.

<sup>46</sup> It should be noted that all judges of all three instances involved in Miranda Eremadze's case, except one (Supreme Court judge Vasil Roinishvili's term of office expires on December 18, 2019, and has not participated in the selection process), participated in the selection of Supreme Court judges. Natia Buskadze, judge of the first instance, was registered by the Council as a candidate, but she was not put on the list of 50 candidates. All three judges of the Court of Appeal - Giorgi Tkavadze, Merab Lomidze and Tea Dzimistarashvili - were put on the list of 50 candidates, while Supreme Court Judges Maya Vachadze and Nugzar Skhirtladze were submitted by the Council to the Parliament.

<sup>47</sup> Tbilisi City Court's judgment of 7 December 2015, case No.3/ 7740-15, page 36; Tbilisi Court of Appeal's judgment of 19 February 2016, case No. 3/B-170-16, pages 70-71.



develops arguments that have no legislative basis and writes: "The Court explains that under the general rule, the law has no retroactive effect. Exception to this rule should be provided in the law itself. No retroactivity of the law shall be used, if it damages or worsens the person's situation."<sup>48</sup> A quote from the relevant norm of the Law of Georgia on Normative Acts provides a different regulation. Article 24 of the aforementioned law, which consists of only two paragraphs, concerns the retroactive effect of the law. According to paragraph 1, "The normative act shall have retroactive effect only when it is expressly envisaged in this normative act", while according to paragraph 2, "The normative act that determines or toughens the liability shall not have retroactive effect." It is clear that the law prohibits retroactive effect of the normative act only if it determines or toughens the liability, while paragraph 8 of article 89 of the Law of Georgia on Higher Education naturally neither determined any liability nor toughened it. The second major argument of the Court was that Miranda Eremadze had legal confidence towards the diploma issued to her.<sup>49</sup> The reasoning and conclusions of the Court in this section are completely absurd. In the administrative law, legal confidence is related to the inadmissibility of invalidation of unlawful authorizing administrative-legal acts in certain cases,<sup>50</sup> which has not taken place in the present case and no one has invalidated the diploma given to Miranda Eremadze.

Georgia has joined the Bologna Process since 2005, when a three-stage system of higher education was introduced in the country, comprising undergraduate, postgraduate and doctoral studies. The amendment to the Law on Higher Education<sup>51</sup> regulated the compatibility of pre-reform higher education with the new system and indicated that higher education diplomas obtained after completing a one-stage, **at least five-year** educational programme before the start of the 2005-2006 academic year was equalized to a master's degree. Until 2005, no bachelor's, master's or doctor's degrees existed in the Georgian education system.

**Based on the court ruling, Miranda Eremadze was awarded a master's degree simultaneously in two professions - as a lawyer and as an economist - after studying at Tbilisi Jambakur Bakradze Institute of Law and Economics for four years, in 1991-1995, contrary to the applicable law and basic principles of the education system.**<sup>52</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> Tbilisi City Court's judgment of 7 December 2015, case No. 3/7740-15, pages 36-30; Tbilisi Court of Appeal's judgment of 19 February 2016, case No. 3/B-170-16, pages 73-75.

<sup>50</sup> Paragraphs 4 and 5 of article 60<sup>1</sup> of the General Administrative Code of Georgia.

<sup>51</sup> Legislative amendment of May 13, 2005.

<sup>52</sup> It should be noted that on the basis of decision #1/148 of the High Council of Justice of July 14, 2016, Miranda Eremadze was appointed to the Tbilisi Court of Appeal. She was able to submit documents for participating in the competition from May 3 to May 22, 2016 (decision #1/134 of the High Council of Justice of April 28, 2016). After the expiry of the said deadline, on May 23, May 30 was defined as the final day for submitting documents (decision #1/138 of the High Council of Justice, May 23, 2016), which also raises questions. Miranda Eremadze was appointed as a judge of Tbilisi Court of Appeal within the framework of the competition, but the Director of the National Center for Educational Quality Enhancement issued an order equalizing her one-stage, 4-year education to a master's degree on July 8, 2016, after the deadline for submitting documents, and on July 14, 2016, the Council made a decision on her appointment.

In addition to the above, the cases of **Giorgi Tkavadze** (incumbent judge) and **Shota Laitadze**, who were put on the list of 50 candidates, are also worth noting.

**Giorgi Tkavadze** had to answer the following question in his application: "Have you ever been a plaintiff, defendant or third party in litigation?" Although the question implied all types of disputes, Giorgi Tkavadze did not indicate the dispute over equalization of his diploma with a master's degree and answered: "No. In the period of serving as a judge - from November 2008 to date - I have not had a property dispute in the court." Giorgi Tkavadze was involved in a dispute with the Center for Educational Quality Enhancement, requesting the court to invalidate the negative decision and oblige the Center to equalize the lawyer's diploma granted to him by the Tbilisi Business and Marketing Institute to a master's degree. It is noteworthy that Giorgi Tkavadze appealed against the Center's decision #MES 91701197590 of 3 October 2017, while **the Tbilisi City Court's ruling<sup>53</sup> satisfying all of Tkavadze's claims was issued within 10 calendar days after the disputed act was issued - on 13 October 2017.**<sup>54</sup> Delivery of a ruling invalidating the disputed individual administrative-legal act within 10 calendar days of its issuance is unprecedented for the Georgian legal space and the Public Defender's Office is not aware of other cases of such a speedy decision-making by the court. This, of course, raises questions as to why the court hurried so much and whether the judicial system and personal ties were used for personal interests.<sup>55</sup>

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<sup>53</sup> Judge Nana Daraselia made the decision. The decision does not indicate when Giorgi Tkavadze's lawsuit was filed with the court.

<sup>54</sup> LEPL National Center for Educational Quality Enhancement did not appeal against the decision of Tbilisi City Court and on its basis, on November 21, 2017, the Center issued individual administrative-legal act #MES 21701423203, which indicates that the education received by Giorgi Tkavadze was equalized to a master's degree. It should be noted that on the basis of the decision #1/178 of November 16, 2015, the High Council of Justice appointed Giorgi Tkavadze as a judge of higher instance – to the Chamber of Administrative Cases of Tbilisi Court of Appeal - without competition, so that no administrative-legal act equalizing his higher education to a master's degree had been issued. This act was issued only two years later. Of course, before making a decision on the appointment of a judge, the High Council of Justice of Georgia should have carefully examined whether the person fulfilled the requirement of the Organic Law on Common Courts, namely whether he had a master's degree in law.

<sup>55</sup> The reason for making such a quick decision on Giorgi Tkavadze's case might partly be the fact that on October 16, 2017, on the basis of the decision #1/259, the Council announced judicial vacancies in the Court of Appeal and District (City) Courts. Giorgi Tkavadze participated in the competition. The term for submitting documents was from October 23 to November 13, 2017. According to the 20 November decision #1/313 of the High Council of Justice, as a result of formal examination of the documents submitted within the competition, Giorgi Tkavadze was among the candidates who had advanced to the second stage, though LEPL Center for Educational Quality Enhancement issued the administrative-legal act #MES 21701423203 on November 21. According to the decision #1/5 of the High Council of Justice of January 11, 2018, Giorgi Tkavadze was appointed to the position of a judge for life in the Chamber of Administrative Cases of Tbilisi Court of Appeal on the basis of a competition.

As for **Shota Laitadze**, he studied at the D. Guramishvili Georgian-Ukrainian International University Iberia in 2004-2008, where he earned a bachelor's degree in law. **Shota Laitadze had been enrolled in a bachelor's degree programme for three out of four years in an educational institution that even lacked institutional accreditation.**<sup>56</sup> In 2008-2010, Shota Laitadze studied at Davit Guramishvili International Teaching University Iberia, which granted him a master's degree in law in 2010. **Shota Laitadze had been enrolled in a master's degree programme for 1.5 out of 2 years in an educational institution that even lacked institutional accreditation.**<sup>57</sup> The High Council of Justice registered Shota Laitadze as a candidate and then selected him among 50 candidates without considering the above circumstances at all, which clearly demonstrates the shortcomings in the exercise of powers by the High Council of Justice.

At this stage, it can be concluded that the **High Council of Justice has not convincingly responded to the minimum requirement related to the legal education of all candidates and there are serious questions that undermine the high quality and conscientiousness of the process.** This failure directly affects the legitimate interests of those candidates who were left beyond the 50-candidate list, because if the Council had correctly checked the candidates' compliance with the requirements of the constitution and the law, they might have qualified for the next stage of the selection process. With regard to the internal independence of the judiciary, the decisions made by the court in relation to two judicial candidates of the Supreme Court and at the same time the incumbent judges regarding their higher legal education and their equalization to a master's degree are a subject of particular concern. Both decisions were made unusually rapidly and one of them is completely unjustified. The Public Defender's Office continues to study information about several other candidates and we will provide information to the public later in case of any shortcomings found.

## 2. First secret ballot and formation of the so-called long list

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<sup>56</sup> The information obtained from LEPL Education Management Information System makes it clear that initially the mentioned institution was called Ltd Tbilisi Independent University Iberia. According to Order #384 of the Minister of Education and Science of Georgia of April 23, 2008, on the basis of Order #15604/002-2/4-294 of Tbilisi Tax Inspection of April 11, 2008, Ltd Tbilisi Independent University Iberia was renamed as Ltd Tbilisi Davit Guramishvili Georgian-Ukrainian International University Iberia. On the basis of the decision #1-19/333 of the Accreditation Board of Higher Education Institutions of Georgia of 8 August 2005, Ltd Tbilisi Independent University Iberia was refused institutional accreditation.

<sup>57</sup> The information received from LEPL Education Management Information System makes it clear that on July 15, 2010, Ltd Davit Guramishvili Georgian-Ukrainian International University Iberia was renamed as Ltd Davit Guramishvili International Teaching University Iberia. According to the decision #130/s of the Accreditation Board of Educational Institutions of LEPL National Center for Accreditation of 30 December 2009, Ltd Davit Guramishvili Georgian-Ukrainian International University Iberia was granted institutional accreditation for a 5-year term.

At the next stage of the process, the High Council of Justice had to select 50 out of 137 candidates<sup>58</sup> by secret ballot. The ballot was held on June 20. The first secret ballot in the High Council contained a number of shortcomings that threatened the conduct of the process in accordance with high standards.

Under the law adopted on May 1,<sup>59</sup> the Council members shall select candidates at each stage on the basis of good faith and competence criteria. The aforementioned applies to the formation of the so-called long list of candidates as well. The law did not provide for any mechanism to ensure this for the first secret ballot, although it was indicated that the Council had to conduct this process in accordance with its own procedure. It is noteworthy that the **Council has not developed a procedure to ensure selection of judges on the basis of good faith and competence criteria. This situation created an environment which made it possible to disqualify candidates with better competence and good faith compared to other candidates.**

The first secret ballot in the High Council of Justice once again highlighted the weakness of the legislative framework and challenges in practice.

13 members of the High Council of Justice participated in the June 20 secret ballot, each with 1 ballot paper and 20 votes (in accordance with the number of vacancies). **Observation of the vote counting process showed that 10 out of 13 ballot papers were circled under the same scheme and carried a high degree of coincidence.** Namely:

- 20 out of 137 candidates circled in 4 ballot papers coincided with each other;
- Other 20 (and not those circled in the 4 ballot papers mentioned in paragraph 1) out of 137 candidates circled in 3 ballot papers coincided with each other;
- 15 candidates circled in the 3 ballot papers referred to in paragraph 2 and other 5 candidates were circled in 2 other ballot papers;
- 15 candidates circled in the 4 ballot papers referred to in paragraph 1 and the 5 candidates circled in the 2 ballot papers referred to in paragraph 3 were circled in another ballot paper.

Within these 10 ballot papers, 5 votes were received by 30 candidates, 4 votes - by 5 candidates and 3 votes – by 10 candidates (45 candidates in total). They all advanced to the next stage of selection. **None of the candidates circled in the mentioned 10 ballot papers have failed to qualify for the next round of selection.**

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<sup>58</sup> 2 of the registered candidates withdrew their candidacies at that stage.

<sup>59</sup> Paragraphs 6 and 7 of article 34<sup>1</sup> of the Organic Law of Georgia on Common Courts. Paragraph 6 of the mentioned article obliges the Council at all stages of the selection to apply the criteria of good faith and competence and indicates: "Members of the High Council of Justice shall be guided by the criteria set forth in paragraphs 3 and 14 of article 35<sup>1</sup> of this law, when selecting the Supreme Court judges". And paragraph 7 of article 34<sup>1</sup> says that a specific procedure shall be defined by the High Council of Justice: "Within 5 working days after the expiry of the term of appealing against the decision under paragraph 4 of this article, as well as the term of reviewing the appeal, the High Council of Justice of Georgia shall hold secret ballot on the basis of a procedure developed by it, in order to select candidates for the next stage."

**As for the remaining 3 ballot papers, no coincidence of the above-mentioned degree could be found in them and only 5 candidates circled in the mentioned 3 ballot papers, who did not receive any vote in the remaining 10 ballot papers, qualified for the next level.** The degree of coincidence in the 3 ballot papers was not as high as in the 10 ballot papers, namely:

- 6 out of 20 candidates coincided between the first and the second ballot papers;
- 11 out of 20 candidates coincided between the first and the third ballot papers;
- 10 out of 20 candidates coincided between the second and the third ballot papers.

A total of 30 candidates were circled in the 3 ballot papers, 18 of which qualified for the next stage, while 12 candidates failed. **Out of them, 6 candidates fully coincided within all 3 ballot papers.**

Such a high coincidence between the above 10 ballot papers raised questions. It should also be borne in mind that no mechanism had been determined for evaluating candidates according to the criteria of good faith and competence for this stage of selection, whereas article 25 of the Constitution of Georgia recognizes the right of all citizens of Georgia to hold public office if they meet the requirements of the legislation.

The Public Defender published the results of the secret ballot and they were made available to all stakeholders.

It is clear that the procedure for shortlisting 50 candidates by secret ballot involves the risks of arbitrary decision-making and are completely ineffective in identifying the best candidates according to their competence and good faith. Secret ballot is also an obstacle to transparency. According to the Consultative Council of European Judges, "Given the prospect of considerable involvement of the Council for the Judiciary in the administration of the judiciary, transparency in the actions undertaken by this Council must be guaranteed. Transparency is an essential factor in the trust that citizens have in the functioning of the judicial system and is a guarantee against the danger of political influence or the perception of self-interest, self protection and cronyism<sup>60</sup> within the judiciary."<sup>61</sup> Formation of so-called long list of candidates by secret vote revealed pre-agreed and coordinated activity of one group of members of High Council of Justice that could be led by personal interests especially in the absence of requirement to substantiate the decisions and possibility to appeal against them.

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<sup>60</sup> Biased attitude to friends or trusted colleagues when appointing them to positions or distributing various privileges.

<sup>61</sup> See Opinion No 10 (2007) of the Consultative Council of European Judges, "The Judiciary in the Service of Society", para. 91. available at: < <https://rm.coe.int/168074779b> > [Last accessed: 18.09.19]

### 3. Interviews in the High Council of Justice

Interviews with judicial candidates started on July 17, 2019, and ended on August 15, 2019. Interviews were conducted every working day,<sup>62</sup> with a total of 49 candidates.<sup>63</sup>

Interviews were planned in a dynamic manner. Initially, the Council made a decision to interview 5 candidates in a working day, but the plan failed and only three candidates could be interviewed on the first working day. Interviews in this regime lasted for 8 working days. After July 29, the Council started to interview only 2 candidates a day.<sup>64</sup> The duration of interviews became a matter of controversy in the Council. In the period from July 17 to July 26, interviews used to start at approximately 10:00 and end between 20:00 and 22:00, with a small, several-minute break during the day. The non-judge members of the High Council of Justice, Ana Dolidze and Nazi Janezashvili, complained that they were discriminated on the ground of sex because of the daily practice of interviewing judicial candidates during non-working hours, as they had little children. Eventually, the Council changed the practice. It is clear that the High Council of Justice was speeding while interviewing judicial candidates. However, there are a number of circumstances that need to be taken into account even in similar situation. Apart from the needs of the parent or caregiver, these circumstances also include the need to protect the interests of other participants of the process. Conducting interviews for 12 hours a day complicates the effectiveness of the process and it may also lead to a somewhat unequal attitude towards the candidates. Given all of this, late-night interviews had more damage to the process than benefits.

The interviews were mainly conducted in a calm environment and the candidates were given the opportunity to answer questions without any time limits. Interviews with each candidate lasted on average 3–4 hours.

**During the process, the non-constructive attitude of certain judge members of the Council towards non-judge members - Nazi Janezashvili and Ana Dolidze - was evident.** Their questiones were often interrupted. However, non-judge members still managed to ask candidates the questions they wanted to ask. When the non-judge members of the Council asked questions about the existence of the so-called clan in the judicial system, the judge members of the Council<sup>65</sup> almost always showed increased aggression. **Cynical attitude and aggression towards the non-judge members was demonstrated with regard to the same issue by two candidates - Vladimer Kakabadze (active judge) and Paata Shavadze (active lawyer) as well. As of now, Vladimer Kakabadze is on the list of candidates submitted to the Parliament.** Tamar Laliashvili and Roin Migriauli (active lawyer) expressed critical opinion on the existence of the so-called clan in the judicial system. **These two candidates received the lowest scores among 50 candidates and the most negative evaluations in good faith criterion.**

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<sup>62</sup> Interviews were not conducted only on August 6.

<sup>63</sup> Amiran Dzabunidze withdrew his candidacy before the interview.

<sup>64</sup> The last day of the interview, August 15, was an exception, when the Council interviewed 1 candidate.

<sup>65</sup> We basically mean Sergo Metopishvili, Vasil Mshvenieradze, Irakli Shengelia and Rezo Nadaraia.

#### 4. Evaluation of the candidates

13 members of the High Council of Justice participated in the process of selection of Supreme Court judges. **Although the law<sup>66</sup> obliges each member of the Council to evaluate the candidates, only 12 of them took part in the evaluation.**<sup>67</sup> Members of the High Council of Justice shall rate the candidates' competence with scores (highest 100 points). Separate forms were developed for the evaluation of candidates with and without judicial experience. Members of the High Council of Justice shall also evaluate candidates according to the good faith criterion. Pursuant to the law, candidates shall be evaluated in this criterion with one of the following three evaluations: "The candidate fully meets the good faith criterion", "The candidate meets the good faith criterion" and "The candidate cannot meet good faith criterion."

**Although the law does not elaborate on the confidentiality of evaluators,<sup>68</sup> the High Council of Justice considers that the identities of evaluators should be confidential. Accordingly, evaluators in the evaluation forms provided to us by the Council were not identified.** We believe that the Council's decision and generally similar practice are contrary to the law and do not allow for individual identification and even discussion of subjective evaluations.

**All 12 members of the High Council of Justice described only 6 out of 50 candidates as those who fully met the criterion of good faith.** They were: Berekashvili Diana, Iashvili Alexandre, Kopaleishvili Maia, Mikaberidze Levan, Chantladze Madi, Tsuladze Alexandre. **Only 2 of them were submitted to the Parliament of Georgia (Mikaberidze Levan, Tsuladze Alexandre).** Two candidates received the worst scores in the good faith criterion. Specifically, only 4 out of 12 members of the Council considered that Roin Migriauli fully met the good faith criterion. Only 6 out of 12 members of the Council considered that Tamar Laliashvili fully met the good faith criterion.

**The scores and evaluations according to the competence and good faith criteria were not substantiated. Under these circumstances, the risks of manipulating the evaluation, including the scores, naturally increases; the process becomes more nominal and is deprived of the objective importance of evaluating candidates' good faith or competence due to the lack of justification.**

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<sup>66</sup> Paragraph 11 of article 34<sup>1</sup> of the Organic Law of Georgia on Common Courts, according to which, "After the interviews, before the nearest session of the Council, members of the Council shall rate the candidates with no judicial expertise with scores [...]"

<sup>67</sup> The interviews with the candidates ended in the High Council of Justice on August 15. On the same day, according to the website of the High Council of Justice, members of the High Council of Justice would evaluate the candidates within two weeks, in accordance with the law, while the voting procedure would be held at the nearest session of the High Council of Justice. Information about the date of the session would be announced at the end of August and would be posted on the official website." <<http://hcoj.gov.ge/ge/kandidatebis-mosmena/3507>> The next meeting of the Council was held on September 4, though information about it was published with violation, on September 2, after the end of the working day.

<sup>68</sup> Paragraph 11 of article 34<sup>1</sup> of the Organic Law of Georgia on Common Courts.

The Public Defender's Office analyzed the evaluation forms of each member of the Council in relation to each candidate. The total number of evaluation forms filled in by 12 members in relation to 48 candidates was 576. **Within 12 evaluators, in some cases, difference between the scores given to candidates was quite large.** In particular, the table below shows cases, where the difference between the highest and lowest scores was 30 points or more:

Candidate	Highest points received out of 100 points	Lowest points received out of 100 points	Difference between the highest and lowest points
Shalva Tadumadze	98	41	57
Mamuka Vasadze	94	42	52
Miranda Eremadze	95	45	50
Vladimer Kakabadze	95	45	50
Zurab Aznaurashvili	84	36	48
Tamar Alania	97	49	48
Paata Shavadze	80	42	38
Giorgi Mikautadze	98	62	36
Kakhaber Sopromadze	87	55	32
Gocha Jeiranashvili	95	63	32
Roin Migriauli	90	59	31
Tamar Burjanadze	96	66	30

Such a high difference between the highest and lowest scores (from 30 to 57) highlights the weakness of the rating system and raises serious questions. It is also interesting to find out what was the reason for such different evaluations of one and the same candidates by the Council members and whether this was due to unjustified scores, anonymity of evaluators, lack of qualifications or good faith of evaluators, ambiguity of criteria or lack of detailed instructions. The reasons may be complex and all or several circumstances may be involved, which requires extensive discussion and response to the identified problems, including by the legislators. It is clear that the evaluations of above-mentioned candidates with competence criterion were most contradictory among the members of the Council.

**Within the 12 evaluators, closeness between the highest and lowest scores was also observed in relation to several candidates.** Cases where the difference between the highest and lowest scores did not exceed 10 points are presented below:

Candidate	Highest points received out of 100 points	Lowest points received out of 100 points	Difference between the highest and lowest points
Tamar Zambakhidze	87	84	3



Shota Laitadze	80	73	7
Nugzar Skhirtladze	94	87	7
Lali Papiashvili	94	87	7
Giorgi Tevdorashvili	79	71	8
Lavrenti Maghlakelidze	92	84	8
Madi Chantladze	90	82	8
Maia Vachadze	99	89	10
Giorgi Tkavadze	88	78	10

**Examination of scores and evaluation forms gave us the opportunity to identify 10 evaluators, the scores of which were very close to each other. In some cases, the so-called thresholds of scores could be identified and a question arose as to whether this was agreed between these members of the Council in advance. It is worth mentioning that the 10 evaluators drew our attention during the secret ballot in the process of formation of the so-called long list as well.**

In relation to the 10 evaluators, the so-called “baskets” of both higher and relatively lower scores were identified, within which the evaluators gave scores to the candidates. Several examples are presented below:

Candidate	Evaluated by the 10 evaluators within the given scales of scores
Giorgi Mikautadze	95-98
Gocha Jeiranashvili	90-95
Lasha Kochiashvili	90-94
Nino Kadagidze	90-95
Lali Papiashvili	90-94
Nugzar Skhirtladze	90-94
Levan Mikaberidze	91-94
Genadi Makaridze	90-93
Vladimer Kakabadze	90-95
Mamuka Vasadze	90-94
Miranda Eremadze	92-95
Merab Gabinashvili	91-95
Ilona Todua	85-90
Merab Lomidze	85-90
Tea Dzimistarashvili	87-90
Ucha Todua	81-85
Diana Berekashvili	75-80

**We believe that these data requires discussion in order to adequately assess the challenges. It is also clear that the secret ballot does not fulfill the function of protecting the Council members from internal or external influences and poses a big obstacle to the transparency of the process.**

## 5. Selection of 20 candidates by secret ballot and their submission to the Parliament

The next stage of the selection process involves selection of 20<sup>69</sup> out of 48<sup>70</sup> candidates, which is the number of vacancies in the Supreme Court of Georgia. The relevant session of the High Council of Justice of Georgia was held on September 4 and was attended by 12 members of the Council.<sup>71</sup> The Public Defender's Office monitored the ballot and vote counting processes. According to the ballot results, 20 candidates advanced to the next stage with a minimum of 7 and a maximum of 11 votes. Namely, 2 candidates received 11 votes, 3 candidates received 10 votes, 4 candidates received 9 votes, 6 candidates received 8 votes and 5 candidates received 7 votes. **None of the candidates received 6 or 5 votes**, 4 votes were received by 3 candidates, 3 votes were received by 5 candidates, 2 votes were received by 8 candidates, 1 vote was received by 7 candidates and zero vote was received by 5 candidates.

Number of votes received	Number of candidates
11	2
10	3
9	4
8	6
7	5
6	0
5	0
4	3
3	5
2	8
1	7
0	5

After circling the ballot papers under similar scheme in the first secret ballot<sup>72</sup> became the subject of widespread public scrutiny, no similar coincidence was identified during the second secret ballot,<sup>73</sup> which was not unexpected, **although impression of the use of some pre-agreed strategies remained**. In particular, the Public Defender's Office, when analyzing the ballot results, found that the results of 10 out of a total of 12 ballots papers were closer to each other. Specifically, when

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<sup>69</sup> Paragraph 12 of article 34<sup>1</sup> of the Organic Law of Georgia on Common Courts.

<sup>70</sup> The list of 50 candidates was reduced to 48 at this stage of the selection process, with one candidate withdrawing his candidacy before the interview and the other - after the interview.

<sup>71</sup> The session was not attended by the non-judge member of the Council, Ana Dolidze.

<sup>72</sup> Shortlisting of 50 candidates out of all registered candidates.

<sup>73</sup> Shortlisting of 20 out of 50 candidates.

counting votes according to the order of the ballot papers, 17 out of 20 candidates coincided with each other between the 2<sup>nd</sup> and 3<sup>rd</sup> ballot papers; 17 out of 20 candidates also coincided with each other between the 5<sup>th</sup> and 6<sup>th</sup> ballot papers; 16 candidates coincided between the 4<sup>th</sup> and 11<sup>th</sup> ballot papers, as well as between the 9<sup>th</sup> and 12<sup>th</sup> ballot papers. 15 candidates of the 10<sup>th</sup> ballot paper coincided with the pair of the 5<sup>th</sup> and 6<sup>th</sup> ballot papers, while 13 candidates of the 1<sup>st</sup> ballot paper coincided with the 5<sup>th</sup>, 6<sup>th</sup> and 11<sup>th</sup> ballot papers. No similar coincidence could be found in other 2 ballot papers. The total results of voting within these 10 ballot papers were interesting.

**It was identified that the candidates could not receive the amount of votes within the total of 10 ballot papers that would advance them to the next stage of selection in case of coincidence with the remaining 2 ballot papers.** Specifically, within the 10 ballot papers, none of the candidate received 6 or 5 votes, while the minimum required number of votes for advancing to the next stage of selection was 7 votes, and only 1 candidate received 4 votes. 18 candidates received 1, 2 and 3 votes and they could not qualify for the next stage. A total of 38 out of 48 candidates were circled in all, 18 of which failed to advance to the next stage. **Within the 10 ballot papers, all 20 candidates advanced to the next stage so that they did not need coincidence of votes of other ballot papers.**

Analysis of the voting results showed accumulation of a high number of votes of the 10 members of the Council in relation to 20 candidates, complete refusal of granting an average number of votes to the candidates and distribution of a low number of votes among a high number of candidates. This strategy of the 10 members of the Council and the refusal of granting an average number of votes to any candidate prevented candidates from advancing to the next stage even in case of coincidence of votes of the rest of the members of the Council.

**Analysis of the results shows that the 10 members of the Council used 164 out of a total of 200 votes<sup>74</sup> to support 20 candidates, thus guaranteeing their transition to the next stage, while the remaining 36 votes were dispersed among 18 candidates, who had no chance of advancing to the next stage even in case of getting votes from the rest of the members.** The distribution of votes of the 10 members of the Council is presented in the table below.

Number of votes	Number of candidates	Names of candidates
10	2	Giorgi Mikautadze, Maia Vachadze
9	5	Merab Gabinashvili, Shota Getsadze, Shalva Tadumadze, Nugzar Skhirtladze, Ketevan Tsintsadze
8	8	Alania Tamar, Eremadze Miranda, Vasadze Mamuka, Zambakhidze Tamar, Tavadze Zaza, Papiashvili Lali, Kadagidze Nino, Jeiranashvili Gocha
7	5	Kakabadze Vladimer, Silagadze Paata, Kochiashvili Lasha, Tsuladze Alexandre

<sup>74</sup> Each member had 20 votes at this stage of selection.

6	0	
5	0	
4	1	Sandodze Nino
3	4	Burjanadze Tamar, Lomidze Merab, Tkavadze Giorgi, Dzimistarashvili Tea
2	7	Gogiasvili Giorgi, Todua Ilona, Totosashvili Gogita, Iashvili Alexandre, Marsagishvili Nikoloz, Maglakelidze Lavrenti, Chantladze Madi
1	6	Aznaurashvili Zurab, Todua Ucha, Kopaleishvili Maia, Makaridze Genadi, Meskhishvili Ketevan, Sophromadze Kakhaber
0	10	Berekashvili Diana, Giorgadze Grigol, Tevdorashvili Giorgi, Kvantaliani Nunu, Laitadze Shota, Laliashvili Tamar, Meskhoradze Levan, Migriauli Roin, Shavadze Paata, Shalakashvili Moris

At the final secret ballot, all 20 candidates received two-thirds of votes and were submitted to the Parliament of Georgia as judicial candidates of the Supreme Court of Georgia. This decision is not substantiated nor is it subject to judicial supervision, despite the requirement of international standards. For example, the Consultative Council of European Judges indicates that some decisions of the Council for the Judiciary relating to the appointment or promotion of judges should include an explanation of their grounds and be subject to judicial supervision. "Indeed, the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision."<sup>75</sup>

It is interesting to see how the candidates submitted to the Parliament were evaluated by the members of the High Council of Justice according to the criterion of good faith. It turns out that out of the 20 candidates submitted to the Parliament, **only 2 were considered by all members of the Council as candidates that fully met the criterion of good faith, 2 candidates were considered by 2 members as candidates that failed to fully meet the criterion good faith,<sup>76</sup> 9 candidates were considered by one member as candidates that failed to meet the criterion of good faith and 7 candidates were considered by one member as candidates that met (unlike fully meeting) the criterion of good faith.** This information is presented in the table below.

Number of candidates	Names of candidates	Fully meet	Meet	Do not meet

<sup>75</sup> See Opinion No 10 (2007) of the Consultative Council of European Judges, "The Judiciary in the Service of Society", para. 39. available at: < <https://rm.coe.int/168074779b> > [Last accessed: 18.09.19]

<sup>76</sup> Of these, one member considered that the candidate met the criterion of good faith, but not fully, and another considered that the candidate did not meet this criterion.

2	Levan Mikaberidze, Alexandre Tsuladze	12 votes	0	0
7	Miranda Eremadze, Maia Vachadze, Tamar Zambakhidze, Zaza Tavadze, Nugzar Skhirtladze, Lali Papiashvili, Lasha Kochiashvili	11 votes	1 votes	0
9	Tamar Alania, Merab Gabinashvili, Shota Getsadze, Shalva Tadumadze, Giorgi Mikautadze, Paata Silagadze, Nino Kadagidze, Ketevan Tsintsadze, Gocha Jeiranashvili	11 votes	0	1 vote
2	Mamuka Vasadze, Vladimer Kakabadze	10 votes	1 vote	1 vote

#### 6. Correlation between the evaluation of candidates and subsequent ballots

We were interested to see how the evaluation with scores affected the second secret ballot when 20 of the 50 candidates were to be elected. Since all 20 of them were submitted to the Parliament of Georgia, we can automatically discuss the correlation of the scores with this process as well. Openness of the process, open voting would have allowed us to see the individual choices of each member of the Council. Within the given system, considering the closeness between the scores and evaluations made by the Council members, we were able to identify 10 evaluators/members and evaluate their action not at the individual level but at the level of a group of 10 members. Naturally, openness of the process would allow us to identify all the individual members. It should also be emphasized that the Public Defender's Office was able to identify 10 ballot papers and evaluation forms at each stage of the selection, the data of which were closer to each other. We can assume with high probability that the 10 members/evaluators identified at each stage of the selection are members of one and the same group. Many observers refer to the sharp internal disagreement and controversy between two groups of judges and non-judges in the High Council of Justice of Georgia. The latest such document was the report of the OSCE Office for Democratic Institutions and Human Rights.<sup>77</sup> This creates the impression that above-mentioned Council members acted in a group, made decisions in a group and their group self-identification was quite strong, which greatly reduced their individual action and sense of individual responsibility.

The correlation between the scores received by candidates and their transition to the next stage is interesting. It turned out that 5 out of the 20 candidates who advanced to the next stage did not have the best results. Given the lack of justification and the anonymity of the evaluators, we have naturally doubts about the arbitrary granting of scores, and it is difficult to say that those with the highest scores/evaluation were better candidates according to the criteria of good faith and competence. Justification of decisions is a requirement according to many international standards. In the context of Georgia, in order to achieve transparency and accountability, the Venice Commission requested that the Council's decisions be reasoned with regard to those same criteria that have been

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<sup>77</sup> Report on the first phase of the nomination and appointment of Supreme Court judges in Georgia, pages 3, 5, 12, 26. Document is available at: <<https://www.osce.org/odihr/429488?download=true>> [Last accessed: 20.09.19]

published beforehand.<sup>78</sup> According to the Venice Commission, regardless of the meticulous processes provided for and the meticulous criteria to be applied, there is no possibility for the individual candidate to be aware of (and challenge, for that matter) the reasons behind the decisions made by the Council.<sup>79</sup>

It was revealed that although the 10 members granted high scores to a candidate, he was not able to advance to the next stage. For example, Genadi Makaridze was granted between 90 and 93 points by 10 members and was ranked 16<sup>th</sup>, but in the end, at the secret ballot, he received only 1 vote from the 10 members, each of whom had 20 votes (200 votes in total). The second example is the case of Tamar Zambakhidze, who was granted much lower scores by each of the 10 evaluators - between 84 and 87 points, though she received votes from 8 out of 10 members at the second secret ballot. Gogita Totosashvili was granted between 76 and 84 points by each of the 10 evaluators, but eventually got 2 votes out of the total of 200 votes in the second secret ballot. Tea Dzimistarashvili, who scored between 85 and 90 from each of the 10 evaluators and ranked 21<sup>st</sup> according to the total number of votes of these 10 members, received 3 votes.

Naturally, **under the given system of evaluation, when scores are not substantiated, we cannot say that the higher the score is, the more competent the candidate is, although even under these circumstances, the decision of the 10 members of the Council who granted high scores to a candidate but did not vote for him/her, or vice versa, gave low scores to a candidate and voted for him/her, is surprising.**

## 7. Conflict of interest

Complete resolution of the conflict of interest by the new legislative amendments, namely conflict of interest between decision-makers - members of the High Council of Justice and persons involved in the selection of Supreme Court judges, was one of the key recommendations of the OSCE Office for Democratic Institutions and Human Rights, Venice Commission, Public Defender of Georgia and NGOs. Finally, the amendments adopted by the Parliament<sup>80</sup> provided a lower standard for the selection of Supreme Court judges than that established for the selection of judges of first and second instances.<sup>81</sup> In particular, the conflict of interests in the selection of judges of first and second instances implies any circumstance that casts doubt on the objectivity, independence and/or impartiality of a member of the Council. In contrast, the rule regulating the selection of Supreme Court judges requires only that a member of the High Council of Justice, who is at the same time a candidate, shall not enjoy the right to evaluate or vote at any stage of the procedure. He/she is also not authorized to ask questions to candidates during interviews. The cases of conflict of interest,

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<sup>78</sup> Urgent Opinion of the Venice Commission on the selection and appointment of Supreme Court judges. para. 36. Available at: <<https://bit.ly/30qSvpE>> [Last accessed: 18.09.19]

<sup>79</sup> Ibid, para. 37.

<sup>80</sup> Amendments to the Organic Law of Georgia on Common Courts, 1 May 2019.

<sup>81</sup> Article 35<sup>3</sup> of the Organic Law of Georgia on Common Courts sets a higher standard than part 16 of article 34<sup>1</sup> of the same law.

when a member of the Council is not a candidate himself/herself, although is a family member or a close relative of the candidate, is not regulated at all. However, article 11 (1) of the Law of Georgia on Conflict of Interest and Corruption in Public Service obliges a public servant, who makes decisions within a collegial body in respect of cases where he/she has property or other personal interests, to notify other members of that body of the above and to refuse to participate in the respective decision-making. In this regard, the case of Irakli Shengelia, a member of the High Council of Justice, whose wife's brother Levan Tevzadze participated in the selection process of the Supreme Court judges, is worth mentioning. Irakli Shengelia denied the existence of any conflict of interest and incompliance with the requirements of the law at all stages, and was involved in the decision-making process. Levan Tevzadze was put on the so-called long list of candidates and was interviewed as well.<sup>82</sup> He withdrew his candidacy before the selection of 20 out of 50 candidates by the Council. **Nonetheless, Irakli Shengelia's denial of conflict of interest and participation in the decision-making process at the earlier stages should be assessed as a violation of article 11 (1) of the Law of Georgia on Conflict of Interest and Corruption in Public Service.**

The case of Giorgi Mikautadze, Secretary of the High Council of Justice, is also worth mentioning in the context of conflict of interest. Being a candidate he withdrew himself and did not participate in the selection process as a member of the Council, although he was acting as the Head of the Office of the Council as the Secretary of the High Council of Justice.<sup>83</sup> The Office of the Council has important functions in the process of selecting Supreme Court judges. For example, it is the task of a relevant structural unit of the Office of Council to search reliable information about candidates, study their professional reputation and activities, check the accuracy of information submitted by candidates, as well as information about their criminal prosecution/disciplinary proceedings and/or administrative proceedings in the past. **The Secretary of the Council, as the Head of the Office, oversees the structural units of the Office as well. Accordingly, in this respect, Giorgi Mikautadze was still in the state of conflict of interest and should have acted in accordance with article 11 (2) of the Law of Georgia on Conflict of Interest and Corruption in Public Service, but he did not.** According to the mentioned norm, "A public servant, who is solely responsible for making a decision, in respect of which he/she has property or other personal interest, is obliged to withdraw himself/herself and to notify his/her direct supervisor (superior authority) about it in writing, who shall either make a relevant decision himself/herself, or assign this duty to another official." Accordingly, on the basis of the appeal of the Secretary of the High Council of Justice, the High Council of Justice should have charged another member, who was not in a similar situation, to administer the Office in relation to any matter related to the selection of Supreme Court judges.

During interviews, none of the candidates had challenged any member of the Council. As mentioned above, only limited self-withdrawal was declared by Giorgi Mikautadze, Secretary of the High Council of Justice. Ana Dolidze, a member of the High Council of Justice, withdrew herself during the

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<sup>82</sup> During the interviews, Irakli Shengelia had not asked a question to Levan Tevzadze, but participated in the process of asking questions to other candidates.

<sup>83</sup> Article 26 (2) (b) of the Rules of Procedure of the High Council of Justice. The Rules of Procedure was approved by the decision #1/208-2007 of the High Council of Justice of Georgia on September 25, 2007.

interview with candidate Ilona Todua and explained that she had expressed opinions about her in the past.

## 8. Transparency

**The new legislative amendments<sup>84</sup> and the following process gave the public an opportunity to follow the interviews with the judicial candidates of the Supreme Court. In this respect, the contribution of the Georgian Public Broadcaster was significant, which offered internet users a live broadcast of interviews on its website. The Council itself made video recordings of the sessions available on its website only later. In the future, in order to prevent that such a degree of transparency of the process be dependent on any broadcaster's good will, it would be better the Council to ensure live broadcast of interviews.**

In the process of selection of Supreme Court judges, the law requires proactive publication of minimum information, which was fulfilled by the Council. However, non-publication of information about the agenda and date of sessions of the High Council of Justice in advance, within the timeframe prescribed by law, shall be evaluated negatively. In particular, **the requirement of article 49 (4) of the Organic Law of Georgia on Common Courts, according to which, information on the date and agenda of the session of the High Council of Justice of Georgia shall be posted on the Council's website at least 7 days before the session, has not been observed. Even some members and the Office of the Council had no information about the session within the timeframe prescribed by law, not to mention the public.**<sup>85</sup>

**At the initial stage of the process, access to public information requested by observer organizations was a problem.** Specifically, on May 31, 2019, Transparency International Georgia asked the High Council of Justice to provide the copies of all applications and documents submitted by the applicants for 20 vacancies in the Supreme Court. In a reply letter of June 13, the Council refused to provide the requested information on the ground of personal data protection. The Public Defender examined the refusal of the High Council of Justice and considered that the decision unreasonably restricted access to information that was essential for monitoring the process and building confidence in the process. The amendment made to the Organic Law of Georgia on Common Courts on May 1, 2019, provided for additional levers against the closure of even sensitive personal information, unless it concerns the candidate's health condition. The Council's refusal not only failed to meet the standard of transparency established after the enactment of amendments, but also the previous standard, and inflicted irreparable damage to the process of selection of Supreme Court judges. Given that the Council selected candidates at each stage by secret ballot and that the decisions were unreasoned, little opportunities were left for monitoring the process. Under these

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<sup>84</sup> Amendments made to the Organic Law of Georgia on Common Courts on May 1, 2019.

<sup>85</sup> The problems related to the publication of the date and agenda of the Council's sessions were characteristic not only of the selection of Supreme Court judges; this is a systematical problem, which is admitted by the High Council of Justice as well.



conditions, the restriction of access to information and documents submitted by candidates made observation absolutely impossible and left the process completely closed.

On June 27, 2019, the Public Defender recommended the High Council of Justice to issue the information requested by the observer organization – the copies of applications and other documents submitted by the participants of the selection process. The High Council of Justice considered the Public Defender's recommendation of June 27 at its July 12 meeting and decided to implement it. Accordingly, copies of applications and attached documents submitted by 137 persons registered as candidates were made available to observer organizations and stakeholders. However, according to the Public Defender, the documents submitted by all 144 persons participating in the selection process should have been made public.

For the objectives of observation of the selection of Supreme Court judges, the Public Defender addressed the High Council of Justice several times and requested various types of information. There was a case, when we received information late. For example, the Public Defender's Office requested the applications and attached documents submitted by the participants of the selection process in its letter of June 24, 2019, and was provided with complete information only on August 9, 2019.<sup>86</sup>

## Conclusion

We indicated even with regard to the draft law on the selection of judges of the Supreme Court that “The development of procedures and criteria should not be only formal in nature. It should be able to substantially change the decision-making practice in the High Council of Justice and ensure justice. Otherwise, the procedures and criteria will be used for emphasizing only formal legality, without changing the content of unfair decisions.”<sup>87</sup>

Now, when the selection of Supreme Court judges is completed within the High Council of Justice and continues in the Parliament, we can say that despite the improved transparency, no public trust could be built towards the process due to the secret decision-making, lack of substantiation of decisions and lack of the opportunity to appeal against the decisions. Observation of the selection of Supreme Court judges in the High Council of Justice by the Public Defender identified many problems that had an essential impact on the fairness of the process and its compliance with high standards. In conclusion, it could be said that **the process in the High Council of Justice failed to convince an objective observer that ultimately the most competent and conscientious candidates were submitted to the Parliament of Georgia to be appointed to the 20 vacancies in the Supreme Court of Georgia for life.** The legislative amendments adopted by the Parliament could not substantially

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<sup>86</sup> According to article 18 (b) and article 23 (3) of the Organic Law of Georgia on the Public Defender of Georgia, the requested information shall be provided to the Public Defender not later than within 10 days. Before August 9, the High Council of Justice had provided only part of information via email.

<sup>87</sup> Public statement of the Public Defender of Georgia, March 20, 2019. Available at: < <https://bit.ly/2JGoQ5M> > [Last accessed: 18.09.19]

change the practice of decision-making in the High Council of Justice and failed to ensure fair conduct of the process. These amendments allowed the High Council of Justice to speak of the formal legality of the process, although the lack of fairness in its decision-making is evident. To ensure the right to a fair trial and realization of other human rights through this right, it is important that the Parliament draft and adopt amendments, which would eliminate arbitrariness of decision-making in the High Council of Justice, provide for a high standard for avoiding the conflict of interest, ensure transparency and full publicity of the process, including by imposing the obligation of open voting and substantiation of decisions on the Council, and provide the opportunity of appealing against the decisions made by the Council. Only such legislative framework would make it possible to select the best judicial candidates according to the criteria of good faith and competence for the appointment to the Supreme Court of Georgia for life.

### **Recommendation**

**To the Parliament of Georgia:**

**Draft and adopt legislative amendments, which would eliminate arbitrariness of decision-making in the High Council of Justice, provide for a high standard for avoiding the conflict of interest, ensure transparency and full publicity of the process, including by imposing the obligation of open voting and substantiation of decisions on the Council, and provide the opportunity of appealing against the decisions made by the Council.**