THE EVOLVING EUROPEAN STANDARDS ON JUDICIAL APPOINTMENTS: SCRUTINIZING THE COMPATIBILITY OF THE APPOINTMENT OF SUPREME COURT JUDGES IN GEORGIA IN 2019 TO EUROPEAN STANDARDS

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Abstract

Judicial Backsliding has been an emerging issue at the European level. Similar to several States in Europe, Georgia has also faced significant challenges regarding the independence and impartiality of the judicial system. In 2019, the self-governing judicial body High Council of Justice and the Parliament conducted the first selection/appointment process of Supreme Court judges, after Constitutional reform in Georgia, with significant irregularities. The evolving European standards provided by the European Court of Human Rights and Court of Justice of the European Union regarding the right to a fair trial extended its scope also to include the appointment process of judges and enabled challenging the manifest irregularities in the appointment process in light of this right. This study aims to determine whether the first nomination/appointment process of Supreme Court Judges after the Constitutional reform in the High Council of Justice of Georgia in 2019 is compatible with these case-law and European standards provided by authoritative bodies and organizations. If not, what are the possible consequences for the judges whose appointments contradict those approaches. The thesis demonstrates that Georgia's first selection/appointment process in 2019 is incompatible with evolving European standards on the right to a fair trial. Following this finding, the study as a potential solution for Georgia suggests applying to the European Court of Human Rights, claiming the violation of the right to a fair trial. The Court's judgment can be a ground to claim to reopen criminal law cases which were heard by 'irregularly' appointed judges in Georgia.

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Introduction

Before 2018, the President of Georgia was nominating Supreme Court judges, and the Parliament was appointing them.[1] After the Constitutional reform in 2018, the High Council of Justice of Georgia got the power to nominate Supreme Court judges.[2] Although, such development was the result of the implementation of the Venice Commission's recommendations and European standards in general, considering the Georgian context, the change had severe consequences.[3]

In 2018, the High Council of Justice submitted the list of ten judges to the Parliament without any formal requirements or criteria for the decision-making process.[4] This caused a protest in Georgia,[5] due to which the nominated judges withdrew their candidacies.[6] A new discussion regarding the necessary amendments in the law on General Courts of Georgia began.[7]

Against this Background, the first selection/appointment process in 2019, based on new rules implemented as a result of Constitutional reform and following amendments, included

[1] Parliament of Georgia, Constitution of the Republic of Georgia [13 October 2017] 786 art 90 <matsne.gov.ge/en/document/view/30346?publication=34> accessed 17 June 2022.

[2] Parliament of Georgia, Constitution of the Republic of Georgia [23 March 2018] 786 art 61 <matsne.gov.ge/en/document/view/30346?publication=35> accessed 17 June 2022.

[3] Venice Commission, 'Opinion on Draft Constitutional Amendments Relating to the Reform of the Judiciary in Georgia' (14 March 2005) CDL-AD(2005)005 para.5 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)005-e> accessed 17 June 2022; Venice Commission, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia (15 October 2010) CDL-AD(2010)028 para. 87 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-e> accessed 17 June 2022.

[4] Transparency International Georgia, 'The Coalition Assesses the Process of Selection of Supreme Court justices at the High Council of Justice' (13 September 2019) <www.transparency.ge/en/post/coalition-assesses-process-selection-supreme-court-justices-high-council-justice> accessed 17 June 2022.

[5] Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (Transparency International Georgia, Georgian Democracy Initiative Blog, 10 February 2020), 3; <transparency.ge/en/blog/chronology-one-year-long-process-selection-judges-supreme-court>

See also Coalition for an Independent and Transparent Judiciary, 'The Coalition's Address to the Parliaments' (2018) <coalition.ge/index.php?article_id=197&clang=1> accessed 17 June 2022.

[6] OC Media, 'Controversial Supreme Court Nominees Withdraw Candidacy in Georgia' (22 January 2019) <https://oc-media.org/controversial-supreme-court-nominees-withdraw-candidacy-in-georgia/> accessed 17 June 2022.

[7] Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (n 5) 4.

manifest irregularities.[8] There were doubts about the competence and conscientiousness of candidates who wished to become Supreme Court judges.[9] The Hight Council of Justice did not nominate some of the candidates with the highest scores.[10] The process failed to comply with the requirements of independence and impartiality of tribunal established by law determined under European standards.[11]

Similarly to illiberal regime rules,[12] in Georgia, different political ruling parties at different times were trying to achieve agreement with the judiciary to protect their interests.[13] Consequently, the judiciary itself built a strong, connected, an informal, influential group of judges so-called 'clan' mostly also occupying administrative posts in the judiciary.[14] On the one hand, the Scholarly work has widely covered the cases of Poland and Hungary in light of

[8] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (September 2019) 20. <www.osce.org/files/f/documents/1/9/429488.pdf> accessed 17 June 2022.

[9] ibid;

U.S. Embassy, 'U.S. Embassy's statement on supreme court nominees (December 12)' (*ge.usembassy.gov*, 12 December 2019) <ge.usembassy.gov/u-s-embassys-statement-on-supreme-court-nominees-december-12/> accessed 17 June 2022

[10] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8).

Public Defender of Georgia 'Monitoring Report on the Selection of Supreme Court Judicial Candidates by the High Council of Justice of Georgia' (October 2019) 29. <www.ombudsman.ge/res/docs/2019110317223567554.pdf> accessed 17 June 2022.

[11] Public Defender of Georgia 'Report On the Situation of Protection of Human Rights and Freedoms in Georgia' (March 2020) 91. <www.ombudsman.ge/res/docs/2021070814020446986.pdf> accessed 17 June 2022.

[12] András Sajó, Ruling by Cheating (Cambridge University Press 2021) 1.

[13] Transparency International Georgia, 'A New Perspective on Judicial Reform' (21 June 2021). <transparency.ge/en/post/new-perspective-judicial-reform> accessed 17 June 2022; Talander Jansen and Hannah Ahamad Madatali, Study of Association Agreement between the EU and Georgia European Implementation Assessment (Update) (European Parliamentary Research Service 2022) 39.

[14] U.S. Mission to International Organizations in Geneva, 'U.S. Statement at the Universal Periodic Review of Georgia', 37th Session, (26 January 2021). <geneva.usmission.gov/2021/01/26/us-statement-at-the-upr-of-georgia-2/> accessed 17 June 2022;

Zselyke Csaky, Freedom House, 'Nations in Transit 2020, Dropping the Democratic Façade', (2020) 7. <freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf> accessed 17 June 2022

See also Transparency International Georgia, 'A New Perspective on Judicial Reform' (n 13); Talander Jansen and Hannah Ahamad Madatali, Study of Association Agreement between the EU and Georgia European Implementation Assessment (Update) (n13); US Department of State, Bureau of Democracy, Human Rights, and Labor '2021 Country Reports on Human Rights Practices: Georgia' (April 2022) 21-24. <www.state.gov/wp-content/uploads/2022/03/313615_GEORGIA-2021-HUMAN-RIGHTS-REPORT.pdf> accessed 17 June 2022.

the issue of the judicial backsliding.[15] While Georgia, on the other hand, has been facing challenges regarding independence and impartiality of the judiciary, there is no broad discussion and comprehensive analysis of the Georgian context at the international level, in particular, the assessment of the challenges of the first appointment process of the Supreme Court judges based on new rules in 2019 in light of the recent developments at European level. Also, the analysis of implications of finding the first selection/appointment process of Supreme Court judges incompatible with European standards for Georgia is not accessible.

Against this background, the paper follows the specificities of the Georgian judicial system, which is relevant for better a understanding of the context and leads to the analysis to answer the primary research question of whether the first nomination/appointment process of Supreme Court Judges after the Constitutional reform, in High Council of Justice of Georgia in 2019, is compatible to the European standards and if not, what are the possible consequences for the judges whose appointment is 'irregular'. The thesis demonstrates that Supreme Court judges' selection/appointment process in 2019 is incompatible with European Standards. The consequence of this finding should be the possibility of applying a claim for violating the right to a fair trial in front of the ECtHR. If the Court finds violation as a first step, a person can claim to reopen the criminal cases discussed by 'irregularly' appointed judges.

The methodology of the paper includes the analysis of Georgian legal framework and practice regarding judicial appointments, decisions of the High Council of Justice of Georgia; The analysis of the European standards in light of authoritative European bodies and

[15] Laurent Pech, Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) Cambridge Yearbook of European Legal Studies Vol.19 3-47, 40. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280> accessed 17 June 2022; Petra Bárd, Barbara Grabowska-Moroz and Viktor Zoltán Kazai, 'The State of the Rule of Law in Europe' (*Recconect Blog*, 15 January 2021) <https://reconnect-europe.eu/blog/rule-of-law-backsliding-in-the-european-union-lessons-from-the-past-recommendations-for-the-future/> accessed 17 June 2022.

Scholars' assessments and case-law of the European Court of Human Rights and the Court of Justice of the European Union regarding an independent and impartial 'tribunal established by law.'

The first chapter provides a contextual overview of Georgia concerning the independence of the judiciary before and after the Constitutional reform. This analysis is essential to demonstrate the existing challenges that influenced the judicial reform and the first appointment process of Supreme Court Judges after the implementation of new rules. The first chapter also provides information on the amendments to appointment rules of Supreme Court judges. Moreover, it discusses the critiques regarding the identified flaws within the first selection/appointment process in 2019, after the Constitutional reform. This approach is crucial because it connects the existing challenges of judicial independence to analyzing the irregularities in the first appointment process in light of the European standards in the last chapter of the thesis.

The second chapter studies European standards on the 'tribunal established by law' requirement of the right to a fair trial. The chapter starting from the rule of law principle, continues by providing an overview of the case law of the European Court of Human Rights and Court of Justice of the European Union. Georgia is a member of the Council of Europe and a signatory of the European Convention on Human Rights.[16] Therefore, assessing the compatibility of the appointment of Supreme Court judges to the standards of the Convention is relevant. Even though Georgia is not the Member State of the European Union, the analysis of the judgments of the Court of Justice of the European Union is crucial since Georgia has

[16] Council of Europe, 'Georgia// 46 States, one Europe' <www.coe.int/en/web/portal/georgia> accessed 17 June 2022.

submitted a membership application to the EU and also this body plays a significant role in the development of human rights standards at European level.[17]

The last chapter of the thesis assesses the compatibility of the selection/appointment process of Supreme Court judges in Georgia in 2019 in light of the discussed European standards in previous chapters. Second part of the third chapter provides an analysis of the possible consequences of finding the appointment process incompatible with these standards.

[17] AA, 'EU starts membership application process with Georgia, Moldova' (2022) <www.aa.com.tr/en/europe/eu-starts-membership-application-process-with-georgia-moldova/2560958> accessed 17 June 2022.

1. National Context of Judicial Appointments of Supreme Court Judges in Georgia in light of European Standards

Introduction

Independence of the Judiciary is a crucial aspect of the right to a fair trial.[18] It is essential to have sufficient guarantees to safeguard the independence of the judiciary from both external and internal influences.[19] Georgia has been facing challenges in that regard, because on the one hand, the alleged existence of an influential group in the court system has been a facet of internal pressure within judiciary,[20] and on the other hand, the political influences from the ruling parties at different times demonstrated the external pressure on the independence of judiciary.[21]

In 2012, a major political change took place in Georgia, and a new ruling force came to power.[22] During the first several years of government, the judicial branch did not 'get along with' the new ruling party, and the ruling party suggested the complete renewal of the composition of the courts.[23] Afterwards, the head of the new ruling party and one of the leaders of the 'influential group' in justice system met and from that moment the new stage of mutual understanding and ensuring the protection of each other's interests started.[24]

In 2018 new Constitution entered into force, due to which the Parliament revised the appointment procedure of Supreme Court judges, and instead of the President, the High

[18] European Parliament, 'Council of Europe standards on judicial independence', (May 2021) 2. <www.europarl.europa.eu/RegData/etudes/BRIE/2021/690623/EPRS_BRI(2021)690623_EN.pdf> accessed 17 June 2022.
[19] ibid.
[20] US Department of State, Bureau of Democracy, Human Rights, and Labor '2021 Country Reports on Human Rights Practices: Georgia' (April 2022) (n 14).
[21] Guram Imnadze, 'Waves of Judicial reform that cannot reach the shore' (2021) Heinrich Boell Stiftung, Tbilisi, South Caucasus <ge.boell.org/en/2021/09/06/waves-judicial-reform-cannot-reach-shore> accessed 17 June 2022.
[22] ibid.
[23] ibid.
[24] Transparency International Georgia, 'Status of Judiciary 2016-2020' (2020) <https://transparency.ge/en/post/state-judicial-system-2016-2020> accessed 17 June 2022.

Council of Justice became the body responsible for the selection of Supreme Court judge candidates to nominate them to the Parliament for the final appointment decisions.[25] After the constitutional reform, in 2018 when the High Council of Justice announced the list of the ten candidates without any specific rules, the Parliament once again made amendments specifying the rules on new appointment procedure.[26]

The first selection/nomination process based on new rules revealed serious challenges questioning the independence, impartiality, and competence of selected candidates.[27] The reputable local and international organizations assessed the flaws identified within the process and indicated the possible violation of Article 6 of the European Convention on Human Rights – the right to a fair trial.[28] The applicability of problematic Georgian appointments of Supreme Court judges in 2019 to the possible violation of the right to a fair trial relates to the recent developments of European Courts, in particular, right to be tried by a court 'established by law', that includes appointment process as well.[29]

Against this background, the first chapter discusses the contextual overview of the existing appointment system before and after the Georgian Constitutional reform in light of European standards. Moreover, the chapter discusses the specific context of the Georgian judiciary and the role of the judicial council in light of the challenges of judicial independence. The following parts of the chapter discuss the legal framework as a result of amendments to the appointment procedure, the first process conducted with irregularities based on this new rule,

[25] Constitution of Georgia [13 October 2017] 786 (n 1); Constitution of Georgia [23 March 2018] 786 (n 2).
[26] Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (n 5) 7.
[27] U.S. Embassy, 'U.S. Embassy's statement on supreme court nominees (December 12)' (*ge.usembassy.gov*, 12 December 2019) (n 9).
[28] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8).
[29] *Guðmundur Andri Ástráðsson v Iceland* [GC] App no 26374/18 (ECtHR 1 December 2020); Cécilia Rizcallah and Victor Davio, 'The Requirement that Tribunals be 'Established by Law'A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2021) European Constitutional Law Review, 583.

and the principle of irremovability as a crucial aspect of discussion related to possible implications of identified irregularities in the appointment process.

1.1. Overview of Appointment of Supreme Court Judges before and after the Constitutional Reform

The independence of the judiciary establishes the protection of judges from external interference from legislative and executive branches as well as from internal intervention from other judges.[30] Article 6 of the European Convention on Human rights enshrines the 'right to independent and impartial tribunal'.[31] Article 19 of TEU and Article 47 of the Charter of Fundamental Right of EU also ensures these standards.[32] The European standard-setting bodies determine four main elements towards the independence of judiciary: 'manner of appointment, term of office, existence of guarantees against outside pressure,…, and appearance of independence and impartiality.'[33] The overview of Georgian context demonstrates the challenges on the independence of the judiciary in light of all these criteria except the term of office.

Before implementing the new rules for the appointment of Supreme Court judges, the President had the discretionary power to nominate candidates to the Parliament for ten years tenure by the majority of the full list of Parliament Members.[34] The minimum number

[30]European Parliament, 'Council of Europe standards on judicial independence', (May 2021) (n 18).
[31] Venice Commission, 'Report on the Independence of the Judicial System Part I: The Independence of Judges' (March 2010) para 12. <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e> accessed 17 June 2022.
[32] Charter of Fundamental Rights of the European Union 2009 [2012/C 326/02] art 47; Consolidated Version of the Treaty on European Union 2012 [C 326/13] art 19.
[33] European Parliament, 'Protecting the rule of law in the EU' (November 2019) 3. <www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf> accessed 17 June 2022; European Parliament, 'Council of Europe standards on judicial independence', (May 2021) (n 18) 7-8; ECtHR, 'Guide on Article 6 of the European Convention on Human Rights, right to a fair trial (civil limb)' (Last update December 2021) 28. <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 17 June 2022.
[34] Constitution of Georgia [13 October 2017] 786 (n 1).

requirement at Supreme Court was at least sixteen judges.[35] Nomination of candidates to the Parliament was President's discretionary power and there was no obligation or rules for the President to conduct process as a competition according to the criteria established by Georgian legal framework. Therefore, this process cannot be a comparator to the appointment process after the Constitutional reform, which determined specific legal requirements for the Council and the Parliament that they had to follow.

According to statistical data, the number of countries around the world where the President appoints judges is significantly high.[36] The CJEU, in its case law, has defined that the only fact that the President is appointing body does not automatically result in the assumption of the lack of independence and impartiality.[37] The Court looks at whether there are sufficient guarantees for independence after the appointment and whether the process of appointment 'give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process.'[38] The European Court of Human Rights also allows different types of appointment procedures and indicates that mere fact of the appointment by the Parliament does not directly lead to the conclusion that the tribunal is not independent and is incompatible with Article 6 requirements.[39]

In the Georgian context, the President was not an appointing but the nominating body. Also, President's nominations were not obligatory per se for the Parliament to appoint these candidacies. The President could nominate the same candidate only twice.[40] However, while

[35] Venice Commission, 'Georgia Urgent Opinion on the selection and appointment of supreme court judges' (16 April 2019) CDL-PI(2019)002, 4. <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2019)002-e> accessed 17 June 2022.

[36] Sultan Mehmood, The impact of Presidential appointment of judges: Montesquieu or the Federalists? (HAL open science 2021) 2. <https://halshs.archives-ouvertes.fr/halshs-03161933/document> accessed 17 June 2022.

[37] Mathieu Leloup, 'Repubblika: Anything new under the Maltese Sun?' (*Verfassungsblog*, 21 April 2021) <https://verfassungsblog.de/repubblika/> accessed 17 June 2022.

[38] Case C-824/18 *AB and Others v Krajowa Rada Sądownictwa and Others* EU:C:2021:153 para 129.

[39] European Parliament, 'Council of Europe standards on judicial independence', (May 2021) (n 18) 8.

[40] Civil Georgia, 'Parliament rejected the nominated candidates for Supreme Court vacancies' (2016) <old.civil.ge/geo/article.php?id=30385> accessed 17 June 2022.

Supreme Court had few judges and because of the high workload appointment of judges was necessary, the Parliament still rejected several times the nominated candidates by the President.[41] Although there is no one model for appointments determined at European level, the Venice Commission has indicated to the necessity to change the nomination body from the President to the High Council of Justice, because of the possible risks that nomination by the President might include.[42] During commenting on the draft Constitution, taking nomination power from the President deserved support from Civil society organizations.[43] Nevertheless, they clarified that in light of the specific Georgian context 'the aim of the Venice Commission's recommendation – ensuring judicial independence – cannot be achieved today by transferring the nominating function to the HCoJ.'[44]

Following the Constitutional reform, a new rule for the appointment of Supreme Court judges entered into force in 2018.[45] The explanatory note of the new Constitution regarding the change of nominating body referred to the Venice Commission's relevant recommendation on the matter from 2010 as a ground.[46] According to the amendments, the High Council of Justice should nominate the candidates for Supreme Court vacancies to the Parliament that by the majority of the total number of the members makes the decision and appoints a judge for lifetime.[47] However, neither the constitutional provision nor the law on the General Courts

[41] ibid.
[42] Venice Commission, Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia (15 October 2010) (n 3) para 87.
[43] Coalition for Independent and Transparent Judiciary, 'European Commission for Democracy through Law, the Venice Commission' (25 March 2017) 4. <coalition.ge/files/coalition_opinion_on_const._provisions_regarding_judiciary_-_for_venice_commission.pdf> accessed 17 June 2022.
[44] ibid.
[45] Constitution of Georgia [23 March 2018] 786 (n 2).
[46] The Parliament of Georgia 'Explanatory Note on the Draft Constitutional Law of Georgia, The Bill "On Changes to the Constitution of Georgia" (2017) 27. <info.parliament.ge/file/1/BillReviewContent/149115> accessed 17 June 2022.
See also Venice Commission, 'Opinion on Draft Constitutional Amendments Relating to the Reform of the Judiciary in Georgia' CDL-AD(2005)005 (n 3); Venice Commission, 'Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia,' CDL-AD(2010)028 (n 3).
[47] Constitution of Georgia [23 March 2018] 786 (n 2).

did explicitly state the required procedure for the High Council of Justice to conduct the nomination process.

1.2. Was the High Council of Justice of Georgia the Best Choice to Nominate Supreme Court Judges?

According to the Council of Europe's approach, the Judicial Councils are a preferred body to ensure the appointment of judges.[48] Moreover, as a good practice towards the tenure of appointment of judges is considered lifetime appointments.[49] Also, the case law of the ECtHR demonstrates that it is better to have the majority of Council judge members chosen by judges themselves.[50] The central body with a crucial role in the court management and appointment of the judicial branch in Georgia is the High Council of Justice.[51] The High Council of Justice's history starts from its establishment in 1997.[52] The self-governed body of the judges of the Common Courts of Georgia appoints eight judge members, the Parliament elects five members, the President appoints one, and the Chairperson of Supreme Court is automatically a member of the Council.[53] The Council has 15 members in total.[54]

Part of scholarly work followed the same positive idea of seeing judicial councils as a good way to ensure independence and avoid risks of outside pressure on the judiciary.[55] However,

[48] Venice Commission 'European Standards on the Independence of the Judiciary, A Systemic Overview' (October 2008) CDL-JD(2008)002 3. <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD(2008)002-e> accessed 17 June 2022.
[49] Ibid, p.4; Council of Europe, *Judges: independence, efficiency and responsibilities*, para.49.
[50] Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swedish Institute for European Policy Studies 2021) 103-104.
[51] High Council of Justice of Georgia, About Us, History. <https://bit.ly/3L1ZfCb>
[52] Ibid.
[53]The Parliament of Georgia, 'Organic Law of Georgia on General Courts' 2009 [2257], art 47.
[54] ibid.
[55] David Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' (2018) German Law Journal Vol. 19, 1586; <www.cambridge.org/core/services/aop-cambridge-core/content/view/664DE5677705E534D282A84E1134888A/S2071832200023178a.pdf/beyond-judicial-councils-forms-rationales-and-impact-of-judicial-self-governance-in-europe.pdf> accessed 17 June 2022;
Denis Preshova, Ivan Damjanovski and Zoran Nechev, 'The Effectiveness of the European model of judicial independence in the Western Balkans: Judicial councils as a solution or a new cause of concern for judicial reforms' (2018) CLEER Papers 2017/1, 24. <papers.ssrn.com/sol3/papers.cfm?abstract_id=3118942> accessed 17 June 2022.

the emerging critiques refer to the specific systemic context of a particular State as a decisive factor on whether judicial councils model work in practice or not.[56] The studies of Eastern European countries' experiences showed that there is frustration because of 'judicial nonperformance in the institutional context of judicial brotherhoods or even mafia-like structures.'[57]

Against this background, such 'judicial brotherhood'[58] of influential group within the Georgian justice system also called as 'clan' includes 'a group of interconnected people occupying high administrative or judicial positions in judiciary and controlling the judges through various formal or informal tools.'[59] This influential group 'switched their masters following the change of government in 2012.'[60] Even though, there is no legal proof of the existence of the agreement between the judge members and particular non-judge members of the Council in Georgia the voting and promotions after supporting significant decisions for the influential group might establish reasonable doubts for the objective person analyzing the system of the High Council of Justice in Georgia.[61] The Venice Commission also referred to the specific context of Georgia towards the lack of trust in High Council of Justice and in light of it, emphasized the importance to appoint only the number of judges that is 'absolutely necessary to render the work of the Supreme Court manageable,' so that the lack of trust in

[56] ibid; Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2013) Research Paper in Law 07/2013, 28-29. <http://aei.pitt.edu/47507/1/researchpaper_7_2013_bobek_kosar.pdf> accessed 17 June 2022.
[57] Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2013) (n 55) 28.
[58] ibid.
[59] Kakha Tsikarishvili, 'Evolution of clan based governance in Georgian judiciary since 2007', (2019) (*Democracy & Freedom Watch*, 19 April 2019) < https://dfwatch.net/evolution-of-clan-based-governance-in-georgian-judiciary-since-2007-53155> accessed 17 June 2022;
See also Transparency International Georgia, 'Dream Court Anatomy', (February 2019) <www.transparency.ge/en/blog/dream-court-anatomy> accessed 17 June 2022; Transparency International Georgia, 'Status of Judiciary 2016-2020' (2020) (n 24).
[60] David Zedelashvili, 'The Rule of Law in Georgia' (*Verfassungsblog*, 5 March 2021) <verfassungsblog.de/rule-of-law-georgia/#commentform> accessed 17 June 2022.
[61] Transparency International Georgia, 'High Council of Justice members who supported decisions based on clan principles must resign' (December 2018) < https://www.transparency.ge/en/post/high-council-justice-members-who-supported-decisions-based-clan-principles-must-resign> accessed 17 June 2022.

the Council will not become 'detrimental' to the required public trust level towards the last instance Court.[62]

1.3. The High Council of Justice's Mistake on 24 December 2018

After the new Constitution entered into force on 18 December 2018, it was logical that the Council would not nominate the candidates before the Parliament implemented specific procedures under the General Law on Common Courts of Georgia. Regrettably, instead of a promised transparency, after eight days from the entry into force of the new Constitution, on 24th of December, the High Council of Justice dismissively took out one paper with the list of ten candidates for Supreme Court vacancies and presented it without any consultations, public discussions or justification.[63] The particular Council members made this decision behind the doors, without transparency and several non-judge Council members did not even have the information that such decision existed.[64] This announcement caused protest in the civil society organizations and political parties.[65] With the procedural challenges, the identities of nominated candidates was another reason for such adverse reaction.[66] The nominated judges allegedly were the authors of politically motivated decisions and also most of them were the representatives/allies of the 'influential group' in judiciary.[67] The manifestation took place in front of the Council with the demand of rejecting the submitted

[62] Venice Commission, 'Georgia Urgent Opinion on the selection and appointment of supreme court judges' (16 April 2019) (n 35) paras 63-64.
[63] Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (n 5) 2.
[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid 3.

nominations and restarting the whole process by setting the specific rules of procedure,[68] due to which the nominated candidates withdrew their names.[69]

The Parliament started the discussion regarding the implementation of the new rules of procedure.[70] It is crucial to distinguish this step from the interference of the legislative body in the independence of the judicial Council. While the ECtHR found a violation of Article 6 in the case where the reform 'in the manner of electing the NCJ's judicial members'[71] (by the Sejm instead of by the assemblies of judges) 'considered jointly with the early termination of the terms of office of the previous judicial members meant that its independence is no longer guaranteed'[72] the Parliament establishing the specific rule of procedure for the appointment was the mere execution of its obligation. The ECtHR also gave great weight to the existence of explicit guarantees to reduce risks against judicial independence, among other things towards appointments.[73] The constitutional provision after the reform only established the new nominating body and the Council without waiting for the Parliament to implement clear rules under Georgian Legal framework ambushed the process with the list of ten candidates without any procedure. The discussion on required amendments towards clarifying the procedure followed accordingly.[74]

[68] OC Media, 'Controversial Supreme Court Nominees Withdraw Candidacy in Georgia' (22 January 2019) (n 6).
[69] ibid.
[70] Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (n 5) 4.
[71] *Grzęda v. Poland* [GC] App no 43572/18 (ECtHR 15 March 2022) para 322.
[72] ibid.
[73] Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the judiciary' (2021) European Law Journal.2021:1-17, 8. <archiwumosiatynskiego.pl/images/2021/02/EULJ_12377_Rev2_EV.pdf> accessed 17 June 2022.
[74] Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (n 5) 5-6.

1.4. Clarifying the Procedure for Appointment of Supreme Court Judges – Another Wave of Amendments

After the discussion on required amendments started, the European Commission for Democracy Through Law (Venice Commission) and to Organization for Security and Co-operation in Europe (OSCE/ODIHR) provided opinions regarding the suggested amendments to the law of the General Courts.[75] On the one hand, the Parliament agreed to implement some recommendations such as the issue of conflict of interest, in particular, the exclusion of the Council member from the selection process when he/she is also a candidate.[76] Also, they removed the requirement for non-judge candidates 'to pass the judicial qualification examination'.[77] On the other hand, the Parliament refused to take into account some significant points from these documents including the abolition of the secret ballot in the nomination process, other provisions of the conflict of interest, substantiation of the decision on the refusal of candidates, with the possibility for them to appeal the decision.[78]

As a result, the law on the General Courts established the main rules for the nomination process in May 2019.[79] According to the rules as it was at that time,[80] the selection process starts at least three months before the vacancy arises in Supreme Court of Georgia.[81] The first stage is the formal check of the applications and annexed documents and the Council decides regarding the registration of a person as a candidate if he/she satisfies the qualification

[75] ibid.
[76] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 7.
[77] ibid.
[78] Venice Commission, 'Georgia Urgent Opinion on the selection and appointment of supreme court judges' (16 April 2019) (n 35); OSCE/ODIHR, 'Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia' (17 April 2019) <www.osce.org/files/f/documents/7/1/417599.pdf > accessed 17 June 2022.
[79] Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (n 5) 7.
[80] After first several appointments took place, the Parliament made some additional changes, However the first nomination appointment process that is the main research area followed this procedural rules.
[81] Parliament of Georgia, 'Organic Law of Georgia on General Courts' 2 May 2019 [4526-IIS] art.34[1]. <https://matsne.gov.ge/ka/document/view/4550937?publication=0> accessed 17 June 2022

requirements for judges and provides the application form and annexed documents according to the Council's requirements.[82]

The candidate can appeal for two days after the publication of the Council's decision regarding the refusal of their registration in the Qualification Chamber of the Supreme Court.[83] The Council, during the selection process of nominees, should follow the criteria established by law.[84] After five days from the finalization of appealing procedures on registrations the Council conducts secret voting regarding moving the candidate to the next stage of the selection process.[85] Each member can choose the number of candidates following the available vacancies at that moment.[86] In case of receiving an equal number of votes by the candidates, the candidate who has a more extended working experience in the speciality goes to the next stage.[87] The Council publishes the list of candidates for the next stage on the website of the High Council of Justice.[88]

After the first selection stage the Council starts the interviews.[89] The Council Members get collected information by the Council administration to study the documents before interviews.[90] During the interviews each Council member can ask questions to each candidate.[91] The law does not determine time limits or number of questions.[92] After conducting the interviews with all the candidates, the Council before the earliest session assesses the candidates based on different criteria for judge and non-judge candidates.[93] The scores based on the assessments of each candidate are published on the official webpage of

[82] ibid.
[83] ibid.
[84] ibid.
[85] ibid.
[86] ibid.
[87] ibid.
[88] ibid.
[89] ibid.
[90] ibid.
[91] ibid.
[92] ibid.
[93] ibid.

the Council.[94] The Council conducts secret voting in the earliest session after the interviews.[95] The candidates with the best results move to the next stage.[96] The number of nominees is restricted with the number of vacancies in the Supreme Court.[97] The Council vote separately for each candidate that moved to the next stage in order to nominate them to the Parliament of Georgia.[98] For nomination, the Candidate needs to get at least 2/3 of the votes from secret ballot in open session of the Council.[99] If the Supreme Court Judge candidate also is the member of the Council, he/she does not enjoy the right to assess or vote any candidate.[100] Also, they do not have right to ask questions to the candidates.[101]

The amendments, on the one hand, improved the previous situation by providing a more detailed set of rules for the appointment of Supreme Court Judges but, on the other hand, left out the most crucial recommendations on abolishing the secret ballot in the nomination process, including issues of conflict of interest in the rules, substantiating the decision on the refusal of candidates, with the possibility for them to appeal the decision.[102]

[94] ibid.
[95] ibid.
[96] ibid.
[97] ibid.
[98] ibid.
[99] ibid.
[100] ibid.
[101] ibid.
[102] Venice Commission, 'Georgia Urgent Opinion on the selection and appointment of supreme court judges' (16 April 2019) (n 35); OSCE/ODIHR, OSCE/ODIHR, 'Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia' (17 April 2019) (n 77).

1.5. The First Nomination/Appointment Process in 2019 based on a New Rule: Challenges and its Results

During the discussion on legal amendments, there were only 11 judges at Supreme Court, and the number decreased to eight because their term ended.[103] As a result, when the Council announced the launch of the selection process on 10 May 2019, the number of vacancies was 20 out of 28.[104] The Council registered 139 candidates based on submitted applications.[105]

One of the most problematic aspects of the selection/appointment process related to the check of the compatibility of the documentation submitted by the candidates towards the education requirements. '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.'[106] The monitoring bodies/organizations referred that some of the candidates did not satisfy the education requirements provided under the law for the Supreme Court judge candidacy.[107] However, the Council ignored these objections and took the documents as satisfactory.[108]

The selection process included the unresolved cases of conflict of interest between Council members and candidates.[109] Also, the votes were distributed in a way that it was possible to guess with high predictability the scheme of who voted for whom, giving the impression that

[103] Venice Commission, 'Georgia Urgent Opinion on the selection and appointment of supreme court judges' (16 April 2019) (n 35) 4.
[104] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 3; High Council of Justice of Georgia, Decision 1/43, [10 May 2019] <hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/43-2019.pdf> accessed 17 June 2022.
[105] High Council of Justice of Georgia, Decision 1/108, [7 June 2019] <hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/108-.pdf> accessed 17 June 2022.
[106] Public Defender of Georgia 'Monitoring Report on the Selection of Supreme Court Judicial Candidates by the High Council of Justice of Georgia' (October 2019) (n 10) 6.
[107] ibid; Public Defender of Georgia 'Report on the Situation of Protection of Human Rights and Freedoms in Georgia' (March 2020) (n 11) 110; OSCE/ODIHR 'Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia, June-December' (January 2020) 4. <www.osce.org/files/f/documents/2/6/443494.pdf> accessed 17 June 2022.
[108] ibid.
[109] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 12.

it was priorly agreed.[110] In light of these irregularities, five candidates with the highest scores were not moved to the next phase of the selection process.[111] While, according to law, the Council members did not have an obligation to follow the scores during their final vote, logically the assessments demonstrated candidates' performance and who was the best fit for the vacancy in the Council's view. This approach was challenging towards transparency of the decision-making process.[112] Moreover, the only time when the candidates were directly allowed to appeal the Council's decision was pre-selection decision.[113] However, there were arguments that the possibility to appeal still existed for the candidates based on general rules during other stages of Selection.[114] Despite this discussion, the Council did not notify candidates about such possibility and the process stayed only within this body.[115] As a result of these irregularities, the Council selected and nominated 20 Candidates to the Parliament.[116] After the implemented changes the selection process in Council still resulted in having selected the same five candidates out of those ten candidates who were in the first list submitted to the Parliament in December 2018 without procedure.[117]

After the selection/nomination of judge candidates within the Council, the Parliament started appointment process and the monitoring bodies detected challenges in regard with reviewing the correctness of the submitted information of candidates and its compatibility with the requirements.[118] The Legal Committee of the Parliament established a working group to conduct compatibility check of nominated candidates, including towards education

[110] Public Defender of Georgia 'Monitoring Report on the Selection of Supreme Court Judicial Candidates by the High Council of Justice of Georgia' (October 2019) (n 10) 26-27.
[111] ibid 29; OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 20.
[112] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 8.
[113] ibid 21.
[114] ibid.
[115] ibid.
[116] ibid 20.
[117] ibid.
[118] OSCE/ODIHR 'Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia, June-December' (January 2020) (n 107) 4.

requirements.[119] Although the working group stated that they could not check compatibility with education requirement for all nominees, because of 'their documents being issued under an outdated education system,'[120] they still provided conclusion that the nominees were compatible with requirements, without even waiting for the assessment from Education center.[121] One of the nominated candidates, former chief of Constitutional Court withdrew his application because of the doubts regarding his compatibility with education requirements on Masters degree.[122] However, the former Chief Prosecutor became a Supreme Court judge without satisfying the sufficient higher education requirement, because the information he provided included contradictions and he did not submit his documents to the National Center for Educational Quality Enhancement for getting verification of his diploma.[123]

The legal committee voted to recommend the nominated 14 candidates out of 19 to the Parliament of Georgia without discussing further the compatibility of each candidate for Supreme Court judge vacancy.[124] On the same day, the Parliament of Georgia voted in favor of the recommended candidates.[125] Consequently, to these processes outside of the Parliament the local NGOs were protesting the voting.[126] The political situation was tense in Georgia, because of contradictions between the ruling party and opposition regarding the nature of the system of elections, whether it should be proportional representation voting system or majoritarian.[127] Despite all the critiques, the Parliament supported most of the candidates nominated by Council within the flawed process.[128] As a result of the first

[119] ibid 11.
[120] ibid.
[121] ibid.
[122] ibid 4.
[123] ibid 11.
[124] ibid 20.
[125] ibid.
[126] ibid 18.
[127] ibid 5.
[128] ibid 20.

selection/appointment process based on a new rule out of 20 vacancies in Supreme Court of Georgia, the Parliament filled 14.[129]

1.6. The principle of Irremovability of judges

In light of the appointment procedure, the noteworthy aspect is the irremovability of judges, which is an undividable principle of independence of judiciary.[130] Case-law of European Court of Human Rights and Court of Justice of European Union emphasizes the crucial importance of ensuring the principle of irremovability of judges as a part of judicial independence guarantee.[131] 'There can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality.'[132] Noteworthy, aspect in that regard is demonstrated in the judgment of *Baka v Hungary*, where the ECtHR found a violation of Article 6 and Article 10 of the Convention because of the President of Supreme Court's removal in Hungary caused by his exercise of freedom of expression, including critiques towards judicial reforms.[133] As a remedy, Baka got compensation, but because another judge occupied the President's post and it was not vacant anymore, the reinstatement of Baka to his old post was not possible.[134] This indicates that while, the irremovability principle is crucial, the attention should also be given to the newly appointed judge appointed on the removed judge's old post. The Court's conclusion is important in light of the discussion of possible implications such as removal of

[129] ibid.

[130] CCJE, 'Opinion No1 On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges' Recommendation No.R(94) 12 (November 2001) para 60. <www.legal-tools.org/doc/ca5224/pdf/> accessed 17 June 2022; Venice Commission 'European Standards on the Independence of the Judiciary, A Systemic Overview' (October 2008) (n 48) 5; Council of Europe, 'Judges: independence, efficiency and responsibilities' (November 2011) para 49. <rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d> accessed 17 June 2022.

[131] Case C-46/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, para 45.
Case C-619/18 European Commission v Republic of Poland EU:C:2019:531, para 96;
Case C-192/18 European Commission v Republic of Poland EU:C:2019:924, paras 113, 115.

[132] Case C-619/18 (n 131) para 76; Case C-192/18 (n 131).

[133] *Baka v Hungary* [GC] App no 20261/12 (ECtHR 23 June 2016).

[134] Gabor Halmai, 'The Early Retirement Age of the Hungarian Judges' (2017) ResearchGate, 472. <www.researchgate.net/publication/325629387_The_early_retirement_age_of_the_Hungarian_judges> accessed 17 June 2022.

already appointed judges in Supreme Court of Georgia with the flawed process, if the ECtHR finds that the process in Georgia in 2019 was incompatible with article 6 requirements.

The Constitution of Georgia determines that the issues related to dismissals of judges is allowed only in specified cases under law on General Courts of Georgia.[135] The same reference can be found regarding the principle of irremovability of judges.[136] However, the Constitution directly states that reorganization or liquidation of the Court cannot become the basis to dismiss the judge appointed for a lifetime.[137] According to the Organic law on General Courts, the Parliament with the rule of impeachment can dismiss the President of Supreme Court and its.[138] In case of breach of Constitution or/and the existence of crime signs in judge's actions the Parliament by the vote of one third of the total number of members can invoke the procedure of dismissal.[139] After the Parliament gets the report from Constitutional Court of Georgia regarding the matter, the Parliament can dismiss a judge by a majority of the total number of members.[140] The President of Supreme Court and a judge can be discharged from the position based on several grounds such as:

'personal application; being recognized by court as having limited competence or as a beneficiary of support, unless otherwise determined under court decision; entry into force of a final judgment of conviction against him/her; termination of Georgian citizenship; reaching the age of 65; death; appointment (election) to another court; appointment (election) to

[135] Parliament of the Republic of Georgia, 'Constitution of Georgia' 29 June 2020 [786] art 63.
[136] ibid.
[137] ibid.
[138] Parliament of Georgia, 'Organic Law of Georgia on General Courts' 2 May 2019 [4526-IIS] art 42.
[139] ibid.
[139] ibid.
[140] ibid.

another agency; expiration of tenure.'[141] The irregular appointment of the judge does not fall under the provided grounds for dismissal.

Conclusion

The first selection/appointment process based on a new rule had a crucial importance for the future of the independence and impartiality of the Georgian judiciary. The Supreme Court is the last instance court at the local level, which means that it is essential to appoint judges who are compatible with national and international standards. Moreover, the number of Supreme Court judges was increased to a minimum of 28 judges by the constitutional amendments. The number of existing vacancies was significantly high – 20, which meant that most of Supreme Court judges would be appointed by the first selection/appointment process for a lifetime. Against this background, the provided overview demonstrates the failed reform in light of the Georgian context and the success of the ruling party and 'influential group' within the judiciary to appoint the judges who would serve their interests.

[141] ibid art 43.

2. The evolving European Standards related to the Judicial Appointment

Introduction

Ensuring independence of judiciary is an important pillar of the rule of law.[142] The fair trial right guarantees the independence and impartiality of judiciary and determines that the tribunal should be established by law.[143] The definitions under a fair trial right related to the judicial appointments were provided under the case law of the European Court of Human Rights and the Court of Justice of European Union. According to the recent approach, a fair trial right ensures the appointment of judges without manifest irregularities and establishes a right of a person to have his/her case heard by the competent judges appointed with the compatible procedure to these European standards.[144]

The first Chapter of this paper discussed the existing challenges regarding external and internal pressure on the independence of judiciary in Georgia and identified challenges within first selection/appointment process in 2019, after the Constitutional reform. For the purposes of the study, to assess the nature of problematic aspects identified within the first appointment process of Supreme Court Judges in Georgia based on a new rule, it is crucial at first to provide the overview of the evolving European standards related to the rule of law and the judicial appointments. The chapter discusses the important aspects of the rule of law at European level and the approach developed by the European Court of Human Rights and the Court of Justice of European Union as the two most important standard setting human rights bodies in Europe in regard with independence of judiciary and judicial appointments.

[142] Council of Europe, Venice Commission, 'The Rule of Law Checklist' (March 2016) CDL-AD(2016)007rev, 20-21 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e> accessed 17 June 2022.
[143] Convention for the Protection of Human Rights and Fundamental Freedoms 1950 art 6.
Charter of Fundamental Rights of the European Union (n 32) art 47.
[144] *Guðmundur Andri Ástráðsson v. Iceland* (n 29); Case C-542/18 RX-II and C-543/18 RX-II *Erik Simpson and HG v Council of the European Union and European Commission* EU:C:2020:232.

2.1. The principle of the Rule of Law: access to justice, legal certainty

The rule of law, which originates from the Ancient Greece, is a vital principle for human rights protection under European level.[145] Although there is no precise and exhaustive definition of what rule of law fully acquires, the authoritative bodies and organizations at European level provided their understanding of this crucial principle. The principle is enshrined under the Preamble of the European Convention on Human Rights creating basis for ensuring the human right protection in Council of Europe Member States.[146] The Statute of the Council of Europe directly mentions the principle of Rule of Law as forming 'the basis of all genuine democracy'.[147] The statute also refers that every Council of Europe Member State must 'accept this principle'.[148] The principle of the rule of law is also established at European Union level as a fundamental rule for the functioning of the Member States and the Treaty on European Union enshrines it as one of the founding principles for the Union.[149]

According to the Venice Commission's approach the principle of rule of law includes: legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination and access to justice. [150] The principle of legality ensures the supremacy of law and compatibility of public authorities' actions to it.[151] Legal certainty should guarantee the accessibility of legislation and the court decisions, stability and foreseeability for a person of the laws enacted under national legislative framework and legitimate expectations.[152] The abuse of power's aspect includes the existence of sufficient safeguards in order to avoid

[145]Council of Europe, Venice Commission, 'The Rule of Law Checklist' (March 2016) (n 142) 11.
European Parliament, 'Protecting the rule of law in the EU' (November 2019) (n 33) 1; Matthieu Burnay, 'Chinese Perspectives on the International Rule of Law' (Edward Elgar Publishing 2018) 1.
[146] Convention for the Protection of Human Rights and Fundamental Freedoms (n 143) Preamble.
[147] Council of Europe, Statute of the Council of Europe, European Treaty Series – No.1 (1949).
[148] ibid art 3.
[149] Consolidated Version of the Treaty on European Union (n 32) art 2.
[150] Council of Europe, Venice Commission, 'The Rule of Law Checklist' (March 2016) (n 142).
[151] ibid 11.
[152] ibid 15-16.

arbitrariness by the public authorities.[153] 'Judicial or other independent review' and substantiation of administrative decisions should be ensured.[154] Access to justice which is the most closely related to the issues on appointment of judges requires the existence of legislative guarantees to the independence of judiciary as well as for an individual judge.[155]

European Commission in its communication related to the strengthening the Rule of Law in EU provides definition of the principle, according to which:

'The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.'[156]

2.2. Right to an independent and impartial 'tribunal established by law" – Approach of the European Court of Human Rights

Article 6 of European Convention on Human Rights enshrines right to a fair trial, which ensures a right to an independent and impartial tribunal established by law.[157] The 'established by law' aspect of the fair trial right is a reflection of the principle of the rule of law and refers to the compliance with domestic rules requirement.[158] The independence and impartiality are core elements of the tribunal under Article 6.[159]

[153] ibid 17.
[154] ibid.
[155] ibid 20-21.
[156] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, 'Further strengthening the Rule of Law within the Union' COM (2019) 163, I.
[157] Convention for the Protection of Human Rights and Fundamental Freedoms (n 143) art 6.
[158] ECtHR, 'Guide on Article 6 of the European Convention on Human Rights, right to a fair trial (civil limb)' (Last update December 2021) (n 33) 26.
[159] ibid 20.

The European Court of Human Rights in the judgment on the case of *Guðmundur Andri Ástráðsson v. Iceland* discussed the crucial aspects of a fair trial right and judicial appointments.[160] The Case concerned the judicial appointments in the newly established Appellate Court of Iceland based on judicial reforms.[161] The applicant argued that because of the irregularities based on which one of the judges was appointed in the Appellate Court and was hearing his Case violated a fair trial right enshrined under Article 6 of the Convention.[162] The Court found a violation.[163]

The Court emphasized the importance of ensuring the appointment of 'the most qualified candidates'[164] and also referred to the increasing standard for the higher tribunals, meaning that 'the more demanding the applicable selection criteria should be.'[165] These are important also for guaranteeing public trust and independence of judges.[166] The Grand Chamber provided its own test for the assessment and as a first step determined the identification of 'a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable as such.'[167] The ECtHR clarified that for finding such manifest breach it will give attention to the domestic courts' assessments in that regard unless their 'findings can be regarded as arbitrary or manifestly unreasonable.'[168] Nevertheless, the Court stated that not finding such breach does not directly lead to the conclusion that there was no violation.[169] The Court allowed the possibility when the appointment process is in compliance with determined national framework, however it is against 'the object and

[160] *Guðmundur Andri Ástráðsson v. Iceland* (n 29).
[161] ibid para 160.
[162] ibid.
[163] ibid para 290.
[164] ibid para 222.
[165] ibid.
[166] ibid.
[167] ibid para 244.
[168] ibid.
[169] ibid para 245.

purpose of that Convention right.'[170] In such case the Court moves to the next steps of the test.[171] Second step of the test is to assess the appointment process 'in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers.'[172] The third step of the test concerns the assessment of 'the review conducted by national courts'[173] and whether the legal consequences of such review was compatible with the requirements of a 'tribunal established by law.'[174] The Grand Chamber emphasized the principle of subsidiarity and relation between the ECtHR and the national courts, nevertheless pointed out that domestic 'authorities and courts must interpret and apply the domestic law in a manner that gives full effect to the Convention.'[175]

The Court gave great weight to the assessment in each particular case the correlation of identified challenges within the process to the crucial principles of the legal certainty and irremovability of judges.[176] However, the Court stated that despite the special importance of these principles for ensuring right to a fair trial, it would be even harmful for the guarantees of the rule of law and public trust in the judiciary to give it absolute protection at all costs.[177] The Court stated that with the time the weight of the legal certainty in the balancing between this principle and right to a tribunal established by law might increase.[178]

[170] ibid.
[171] ibid.
[172] ibid para 246.
[173] ibid para 248.
[174] ibid.
[175] ibid para 251.
[176] ibid paras 238-239.
[177] ibid para 240.
[178] ibid para 252.

Although the Court did not consider it neccessary to separately discuss the aspects of 'independent and impartial' tribunal under a fair trial right,[179] it emphasized the strong correlation between these requirements to the 'tribunal established by law' aspect.[180] The Court reiterated this approach in the following judgments on the issue, hence the separate reference under each judgment on this matter will not be provided.

The consequences of finding the violation in the present case was not clear. Nevertheless, the Court once again emphasized that the State itself decides the necessary measures to implement the judgement at national level under the supervision of the Committee of Ministers.[181] The Court clarified that this judgment does not mean the obligation for the respondent State to 'reopen all similar cases that have since become *res judicata* in accordance with Icelandic law.'[182]

The ECtHR used the same approach in the case of *Xero Flor v. Poland.*[183] The case concerned the irregularly appointed judges in Constitutional tribunal.[184] The applicant claimed that there was the violation of Article 6 – a 'tribunal established by law' because of the identified irregularities within the appointment process.[185] The Court reiterated the same test, emphasized the principles of independence, impartiality and the rule of law that the Court discussed under the *Guðmundur Andri Ástráðsson v. Iceland.*[186] The Court found the violation of Article 6, however, similar to the *Guðmundur Andri Ástráðsson v. Iceland*, judgment does not provide concrete practical consequences of its findings.[187]

[179] ibid para 295.
[180] ibid para 231.
[181] ibid paras 311-312, 314.
[182] ibid para 314.
[183] *Xero Flor w Polsce sp. z o.o. v Poland* App no 4907/18 (ECtHR 7 May 2021) para 254.
[184] ibid paras 211-212.
[185] ibid para 12.
[186] ibid paras 243-251.
[187] ibid para 291.

The ECtHR's approach regarding the assessment of irregularities within the appointment process and its compatibility to the established standards were also demonstrated in the judgment of *Reczkowicz v. Poland.*[188] The case concerned the appointment of Supreme Court's Disciplinary Chamber in Poland after the legislative reform.[189] The irregularities were identified within the appointment process.[190] Also, the case provided different approaches from national courts, in particular Supreme Court found the irregularities within the appointment process, while the Constitutional Court failed in that regard.[191] Important facet of the case was that the irregularities in the appointment process was the result of the lack of independence from legislative and executive branches of the reformed National Council of the Judiciary.[192] The Courts's assessment indicates that not only the breaches within the appointment procedure lead to the possible violation of Article 6 of the Convention, but also the lack of independence within the body which is responsible to ensure the appointment process in compatible manner with European standards. Therefore, the Court found the violation.[193]

The Court demonstrated similar approach as in Reczkowicz recently, when it needed to answer the question on violation of right to a fair trial in the case of *Advance Pharma sp. z o.o v. Poland.*[194] The Court referred to the Reczkowicz judgment and stated that the findings on lack of independence of judicial council applied to this case as well since there were no sufficient guarantees for ensuring independence from legislative or executive bodies.[195]

[188] *Reczkowicz v Poland* App no 43447/19 (ECtHR 22 July 2021).
[189] ibid para 177.
[190] ibid para 265, 277.
[191] ibid para 261.
[192] ibid para 280.
[193] ibid para 282.
[194] *Advance Pharma sp. z o.o v. Poland* App no 1469/20 (ECtHR 3 February 2022).
[195] ibid para 318.

In the case of *Dolinska-Ficek and Ozimek v. Poland,* the applicants argued that the Chamber of Extraordinary Review and Public Affairs of Supreme Court in Poland, which discussed their cases was not 'independent and impartial tribunal established by law' under Article 6 of the ECHR.[196] The applicants claimed that the Chamber was staffed with judges appointed with manifest breach by the President of Poland after getting the recommendations from the National Council of Justice.[197] The ECtHR applied the same test established under the judgment on the case of *Guðmundur Andri Ástráðsson v. Iceland.*[198] Under the first step of the test the ECtHR indicated to the existing conflicting judgments of the CJEU and the Supreme Court of Poland against the Constitutional Court's decision on the matter whether there was a breach of domestic law within the appointment process.[199] However, the Court emphasized that 'while the national courts have discretion in determining how to strike the relevant balance, they are nevertheless required to comply with their obligations deriving from the Convention when they are undertaking that balancing exercise.'[200] The Court after detailed analysis of the national law, decisions, assessments and reports regarding Poland from OSCE/ODIHR, Venice Commission and the CJEU case-law concluded that there was a breach of domestic law.[201] 'A procedure for appointing judges which, as in the present case, discloses undue influence of the legislative and executive powers on the appointment of judges is per se incompatible with Article 6 § 1 of the Convention and, as such, amounts to a fundamental irregularity adversely affecting the whole...'[202] In light of the third step of the test, the Court stated that parties did not question that there was no remedy available at

[196] *Dolińska-Ficek and Ozimek v Poland* App nos 49868/19 and 57611/19 (ECtHR 8 November 2022) para 237.
[197] ibid para 281.
[198] ibid para 282.
[199] ibid para 283.
[200] ibid para 286.
[201] ibid paras 320, 338.
[202] ibid para 349.

national level for the appeal of identified irregularities.[203] Therefore, the ECtHR found the violation.[204]

In the judgment of *Gloveli v. Georgia* the ECtHR discussed the right to access the court by the applicant who did not have the possibility to apply judicial review to the rejection decision regarding her appointment as a judge.[205] The Court found violation of Article 6 in light of the access to court aspect.[206] Since, the judgment concerns challenges in regard with judicial independence in Georgia which is of utmost importance for the purposes of this analysis this part of the Chapter provides more detailed overview of the judgment.

The applicant unsuccessfully participated several times in appointment competitions.[207] During one of such competition which took place in 2016 she got rejected and there was no possibility to seek judicial review against this decision.[208] However, after the implementation of amendments, the law determined the Supreme Court Qualifications Chamber as a body reviewing appeals regarding refusal in the judicial appointments.[209] In 2018 she once again applied for the vacancy in the Appellate court and after formal admission she got refused because of the lack of the scores based on the High Council of Justice's assessments.[210] The applicant submitted an appeal to the Qualifications Chamber and referred as evidence the comment of the non-judge member of the High Council of Justice who was stating that 'throughout the competition several HCJ members had had 'protégé' candidates and had arbitrarily lowered the assessment scores of the other judicial candidates.'[211] The Qualifications Chamber determined the complaint inadmissible because the High Council of

[203] ibid paras 352-353.
[204] ibid para 355.
[205] *Gloveli v Georgia* App no 18952/18 (ECtHR April 2022).
[206] ibid para 60.
[207] ibid para 5.
[208] ibid para 6.
[209] ibid paras 6-8.
[210] ibid paras 9-10.
[211] ibid para 11.

Justice did not vote for the applicant and she only achieved the previous stages of the competition.[212]

The Court applied Eskelinen test in order to assess the compatibility of these issues to the European standards. In the case of *Vilho Eskelinen and others v. Finland,* which concerned the police officers' right to their salaries, developed the *Eskelinen* test.[213] In light of this test the ECtHR assesses whether there exists a dispute over right which is 'genuine and serious'[214] and it has civil nature.[215] In the case of *Gloveli v. Georgia* in light of the *Eskelinen* test the Court determined that the test was satisfied and 'the dispute was "genuine" and "serious" as it concerned the fairness of the judicial selection and appointment procedure and could lead to the annulment of the contested decision and the reconsideration of the applicant's application for the post' and there were no justification on 'objective grounds.'[216] The Court noted that such exclusion of the applicant from the appointment competition without the possibility to have a judicial review of the refusal decision 'cannot be regarded … as being in the interest of a State governed by the rule of law.'[217]

The analysis of these judgments demonstrates that the ECtHR applies the test established in the case of *Guðmundur Andri Ástráðsson v. Iceland* in similar cases which indicates that the compatibility to the Convention of the appointment procedure needs to be analyzed in light of the 'manifest breach' test. However, the specific consequences of finding violation of 'a tribunal established by law requirement' remain vague.

[212] ibid para 12.
[213] *Vilho Eskelinen and Others v Finland* [GC] App no 63235/00 (14 April 2007) ECHR 2007-II.
[214] ibid para 40.
[215] ibid paras 40-42.
[216] *Gloveli v Georgia* (n 205) para 42, 51.
[217] ibid para 51.

2.3. Right to an independent and impartial 'tribunal established by law" – Approach of the Court of Justice of European Union

Another Crucial standard-setting body at European level is the Court of Justice of European Union which discusses matters that falls under the EU competence and assesses the actions of the Member States of the European Union to the established approach.[218] Although, Georgia is not a Member State of the EU, the State has recently submitted a membership application to the Union and also in light of the interpretation of European standards on judicial appointments the Court of Justice of European Union's approach is relevant.[219]

The CJEU developed its approach regarding the rule of law and independence of judiciary based on reference to the relevant provision of the Treaty on European Union for States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' and 'right to an effective remedy and a fair trial.'[220] The CJEU case-law indicates to the State's obligation to ensure effective judicial protection and the compatibility of national courts or tribunals to the determined requirements in that regard.[221] For these purposes the guarantees for judicial independence are crucial as established under Article 47 of the Charter of Fundamental Rights of the EU.[222] To overview the established approach on independence and tribunal established by law requirements this subchapter discusses the CJEU's relevant standards under its case-law.

The CJEU provided developments regarding the rule of law and independence of judiciary in the case of *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas,* also known as

[218] EU, 'Court of Justice of the European Union (CJEU)' <european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en> accessed 17 June 2022.
[219] AA, 'EU starts membership application process with Georgia, Moldova' (2022) (n 17).
[220] Consolidated Version of the Treaty on European Union (n 32)., art 19(1);
Charter of Fundamental Rights of the European Union (n 32) art 47.
[221] European Parliament, 'Protecting the rule of law in the EU' (November 2019) (n 33) 3.
[222] ibid.

Portuguese Judges case.[223] The case concerns the reduction of salaries of judges and its possible implications on the independence of judiciary in Portugal. The CJEU determined that the general reduction of salary was not as such precluded under the EU law.[224] Nevertheless, the judgment is important in regard with provided definition on independence of judiciary. According to the CJEU's approach, to ensure effective remedy the existence of independent tribunal is crucial.[225] Also, the Court emphasized the immense role of the effective judicial review for the rule of law.[226] The CJEU referenced the relevant aspects of the assessment of the 'court or tribunal' definition, including 'established by law', application of the rule of law and independence requirements.[227] The Court further elaborated on the features of independence and defined that: 'the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever.'[228]

Another crucial judgment related to the independence of judiciary was provided in the *European arrest warrant case* which concerned the execution of the arrest warrant and assessment of the judicial effectiveness and independence in receiving State in case of the execution of the warrant.[229] The CJEU emphasized the 'cardinal importance' of the independence of judiciary for the protection of individual's rights and the rule of law.[230] According to the CJEU, the safeguards of independence and impartiality includes conducting the appointment in a manner 'to dispel any reasonable doubt in the minds of individuals as to

[223] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (n 131)
[224] ibid para 53.
[225] ibid para 41.
[226] ibid para 36.
[227] ibid para 38.
[228] ibid para 44.
[229] Case C-216/18 PPU *LM* EU:C:2018:586.
[230] ibid paras 33-34, 48.

the imperviousness of that body to external factors and its neutrality with respect to the interests before it.'[231]

In the case of *Commission v. Poland* which concerned the lowering of the retirement age of Supreme Court judges the CJEU discussed the issue in light of an effective remedy and a fair trial right.[232] The CJEU referred to the Venice Commission's opinion towards Poland's action in that regard and concluded that it was doubtful whether the step of reducing the retirement age was aimed to standardize the retirement's age or to preclude certain group of judges from their posts.[233] The CJEU concluded that the new approach was incompatible with EU law because it was allowing the application of reduced retirement age to already appointed judges and also the President of the republic was given a discretionary power to allow certain judges to continue being on the post after the retirement age.[234] The CJEU reiterated the same approach was reiterated in the judgment regarding reducing retirement age of judges of ordinary courts.[235]

In the case of *AB v Krajowa Rada Sądownictwa,* the National Council of Judiciary in Poland did not select five candidates in the appointment procedure under Supreme Court judge competition.[236] According to the Poland's legal framework rejected candidates were only allowed to appeal the Council's decision if every participating candidate act so.[237] The CJEU assessed that although in general, the non-existence of appealing mechanism does not lead to violation of EU law 'the situation is different in circumstances in which all the relevant factors characterising such a process in a specific national legal and factual context, …are

[231] ibid para 66.
[232] *European Commission v Republic of Poland* [2019] CJEU Case C-619/18.
[233] ibid.
[234] ibid.
[235] Case C-192/18 (n 131) paras 113, 115.
[236] *AB and Others v Krajowa Rada Sądownictwa and Others* (n 38) para 2.
[237] ibid para 24.

such as to give rise to systemic doubts in the minds of individuals.'[238] This can have severe consequences for the public trust in the independence of judiciary.[239]

The first time when the CJEU made a clarification regarding 'the tribunal established by law' aspect of a fair trial right in light of the EU law was in the case of *Simpson and HG v. European Commission*.[240] In this judgment the CJEU reviewed the judgments on the cases of applicants decided by the General Court of the European Union, the Appellate Chamber, that set aside cases concluding that the Civil Service Tribunal deciding on the applicants' cases was not a tribunal established by law.[241] The Court concluded that the irregularity in these cases was attached to the 'Council's disregard for the public call for applications of 3 December 2013' which did not infringe 'the fundamental rules of EU law applicable to the appointment of judges to the Civil Service Tribunal'.[242] The CJEU concluded that the error made by the General Court was against the unity and consistency of EU law.[243] The Court set aside those judgments made by the General Court and referred it back to them.[244]

The CJEU referred to the established standard under the judgment of the ECtHR in the case of *Guðmundur Andri Ástráðsson v. Iceland*.[245] The CJEU provided the definition of irregularity which can be considered as such to conclude the existence of unlawful judge:

'Particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of

[238]ibid para 129.
[239] ibid para 139.
[240] *Erik Simpson and HG v Council of the European Union and European Commission* (n 144).
[241]ibid para 4.
[242] ibid para 81.
[243] ibid para 87.
[244] ibid para 90.
[245] Ibid, para.74.

the judge or judges concerned, which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.'[246] The CJEU's definitions is complementary to the ECtHR's approach.

Conclusion

The recent developments in the case-law of the ECtHR and the CJEU on the independent and impartial tribunal established by law demonstrates the response to the rule of law backsliding that have been occurring at European level for the last several years. **'**The ECJ is moving the meaning of judicial independence even further, helping the ECtHR, which has already done significant work in this direction.'[247]

These developments opened a way for the cases where the situation in regard with judicial independence is critically challenging to claim the violation of a fair trial right and have a legal tool to demand the required change from the State. Also, the crucial aspect of the recent developments relates to the systemic analysis of the facts that might if taken separately does not lead to the conclusion of incompatibility with established standards, but looking at it structurally demonstrates the real intent behind 'formally' correct steps.

Although, the ECtHR has not yet provided the concrete steps that must be taken by the State in response to the Court's judgment finding violation in that regard, however it establishes certain standards that must be followed. The three-step test provides the check of domestic law breach, whether it was fundamental in light of the object and purpose of the tribunal established by law requirement and what was the national courts response. Also, the judgments show that ECtHR does not consider it necessary to assess separately the issue of

[246] Ibid, para.75.
[247] Dimitry Kochenov, 'Upgrading Rule of Law in Europe in Populist Times' (2021) Pravni Zapisi Godina XII Researchgate,23.
<https://www.researchgate.net/publication/353348046_UPGRADING_RULE_OF_LAW_IN_EUROPE_IN_POPULIST_TIMES> accessed 17 June 2022.

the independence and impartiality of the tribunal. Despite the fact that, the Court sees these aspects as sole grounds it still emphasizes the strong correlation between, on the one hand, independence and impartiality and on the other hand, tribunal established by law requirements under a fair trial right. The third chapter assesses the compatibility of identified irregularities in the first selection/appointment process of Supreme Court judges in Georgia in 2019 in light of these standards and what are the possible consequences due to finding the incompatibility to the discussed European standards.

3. Assessing the Appointment Process of Supreme Court Judges in 2019 in Georgia in light of the European Standards

Introduction

The first chapter of the thesis provided the overview of the challenges regarding the independence of judiciary in Georgia, demonstrating the informal connections between so called 'clan' in the justice system and the ruling party and the identified challenges in the first selection/appointment process of Supreme Court judges in 2019 after the constitutional reform. This last chapter focusses on the assessment of these information in light of the evolving European standards on judicial appointments and its connection to the right to a fair trial. In particular, the chapter discusses whether the first appointment process was compatible to the European standards on the fair trial right, more specifically with the aspect of the 'independent and impartial tribunal established by law.' The second part of the chapter analyzes the possible consequences in Georgia if the appointment process was incompatible with these requirements.

3.1. Compatibility of appointments of Supreme Court Judges in Georgia in 2019 to the European Standards

To assess the compatibility of the appointment process in Georgia to the discussed European standards aligning ground to this analysis is the identified irregularities in the process discussed under the first chapter of the thesis in light of the three-step test established under the judgment on the case of *Guðmundur Andri Ástráðsson v. Iceland.*[248]

3.1.1. First step of Guðmundur Andri Ástráðsson test

The first step of the *Guðmundur Andri Ástráðsson* test is to examine the manifest breach in the appointment process.[249] Also, the Scholars clarified the CJEU's definition of irregularities

[248] *Guðmundur Andri Ástráðsson v. Iceland* (n 29).
[249] ibid para 244.

in the appointment process[250] and stated that the assessment should be made on a case-by-case basis asking the following question: 'does the irregularity concern fundamental rules forming an integral part of the establishment and functioning of that judicial system such as for instance, any fundamental rules applicable to the appointment of relevant judges…?'[251]

The Constitution of Georgia determines that the 'Judges of the common courts shall be selected based on their conscientiousness and competence.'[252] The High Council of Justice was supposed to assess the interviewed candidates in light of these set criteria.[253] However, the identified irregularities discussed in the first chapter of the thesis demonstrates that the Council conducted process in a manner that led to arbitrary decision-making. It did not ensure the selection/appointment of the most qualified and conscious candidates and breached the Constitutional requirement.

Moreover, the unanswered questions towards certain candidates regarding the authencity of their master's diploma violated the requirement of the Georgian law which establishes that judges should have master's degree as well.[254] The flaws in the legal framework, including secret ballot, the lack of the obligation to substantiate the selection decisions and also the non-existence of clear and effective possibility to appeal these decisions led to the arbitrariness to exclude the best fit candidates from being nominated, even the ones who got the best scores but the Council did not select under them under its final decision.[255] The case law discussed in the Chapter two also demonstrated the importance for the independence of judiciary to have a real appealing mechanism in the appointment process for the rejected

[250] *Erik Simpson and HG v Council of the European Union and European Commission* (n 144) para 75.
[251] Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, (n 50) 181.
[252] Constitution of Georgia (n 2) art 63(6).
[253] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 8.
[254] Public Defender of Georgia 'Report on the Situation of Protection of Human Rights and Freedoms in Georgia' (March 2020) (n 11) 110.
[255] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 29.

candidates.[256] The OSCE/ODIHR report referred to the possible challenges in light of Article 6 of the European Convention on Human Rights within the process, because of the lack of transparency in the procedures that could led to arbitrariness in decision-making process by the Council.[257]

3.1.2. Second step of Guðmundur Andri Ástráðsson test

Second step of the test includes the assessment of the fundamental nature of irregularity in the appointment process 'in the light of the object and purpose of the requirement of a "tribunal established by law".[258] The object and purpose according to the Court's definitions under the discussed case-law in Chapter two refer to the reflection of the rule of law principle and protection of judiciary from both external and internal 'unlawful influences.'[259] The Court also looks at the aim of the specific legal provision to assess whether the identified breach was fundamental.[260] There is also need to reiterate that the ECtHR and CJEU gave considerable weight to the arguments related to the lack of independence of the appointing/nominating body such as National Council of Judiciary in its case-law on the tribunal established by law requirement as contradictory to European standards.[261]

The explanatory note, of the suggested amendments in 2019 to the rules of appointment procedure in Georgia, stated that the aim of these changes was to ensure such transparent, public, open and time-consuming process that would lead to choosing of highly qualified and exceptionally conscious candidates.[262] The identified challenges within the

[256] *AB and Others v Krajowa Rada Sądownictwa and Others* (n 38) para 129.
[257] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 20.
[258] *Guðmundur Andri Ástráðsson v. Iceland* (n 29) para 245.
[259] ibid para 226.
[260] ibid para 257.
[261] *Reczkowicz v Poland* (n 189); *AB and Others v Krajowa Rada Sądownictwa and Others* (n 38).
[262]Explanatory Note on the Amendments to the Organic Law of Georgia on General Courts 8. <info.parliament.ge/file/1/BillReviewContent/216188 > accessed 17 June 2022.

nomination/appointment process were of such nature that failed to achieve this aim. Therefore, the breached rules within the process were fundamental.

The Monitoring Reports on the appointment process in 2019 refer to the challenges demonstrating the undue influences and lack of independence. Also, general critical assessments made in regard with the independence of the High Council of Justice and the judiciary as a whole in Georgia has relevance under this discussion.[263] The reports and statements provided in regard with the first appointment procedure criticized the conducted appointment process and referred to the problems in light of the rule of law, independence of judiciary and a fair trial right.[264] Moreover, the results got criticism from reputable international organizations such as Embassy of USA in Georgia, EU and Parliamentary Assembly of Council of Europe.[265] They shared their regrets regarding the expedited approach in the process under the challenges and criticized the appointment of these particular 14 candidates.[266] Despite the authoritative organizations' findings on the challenges and references to the possible risks of violation of Article 6 of the Convention in the process the Parliament of Georgia decided to proceed and appointed the majority of the nominated candidates.[267]

In the case of *Guðmundur Andri Ástráðsson v. Iceland* as a third-party intervener, the Ombudsperson in light of Supreme Court appointments in Georgia stated that 'the requirement of a "tribunal established by law" would not be satisfied where the breach of the

[263] Venice Commission, 'Opinion No. 1001/2020 on the Draft Organic Law Amending the Organic Law on Common Courts' para18; US Department of State Bureau of Democracy Human Rights and Labour '2019 Country Reports on Human Rights Practices: Georgia' (March 2020) 12. <https://www.state.gov/wp-content/uploads/2020/03/GEORGIA-2019-HUMAN-RIGHTS-REPORT.pdf> accessed 17 June 2022.
[264] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 8; OSCE/ODIHR 'Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia, June-December' (January 2020) (n 107) 21.
[265] ibid.
[266] ibid.
[267] Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia, June-December' (January 2020) (n 107) 3, 19-21.

applicable domestic rules raised doubts as to whether a court would have been composed differently but for the breach at issue.'[268] The analysis shows that the manner of appointment of the judges was irregular and did not 'dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.'[269] The existence of guarantees against outside pressure is also questionable since the Parliament refused to include the Recommendations of the Venice Commission and OSCE/ODIHR towards adding the substantiation and appealing mechanism requirements under the new rules on the appointment decisions and continued the appointment process despite the identified challenges in the nomination process within the Council.

3.1.3. Third Step of Guðmundur Andri Ástráðsson test

The third step of the test requires the analysis of the domestic courts review regarding the compatibility of the appointment process with these standards.[270] Since, Georgian legal framework did not determine real appealing mechanism for refused candidates within selection/appointment process, the rejected candidates lacked the possibility to appeal.[271] Therefore, there is not national court's decision on the matter.

However, the Ombudsperson of Georgia submitted a constitutional claim stating that the appointment rules were unconstitutional, because of the no substantiation requirement and appealing mechanism and was not guaranteeing the appointment of the most qualified candidates in light of the Constitutional criteria of the consciousness and competence.[272] The

[268] *Guðmundur Andri Ástráðsson v. Iceland* (n 29).
[269] Case C-216/18 PPU (n 218) para 66.
[270] *Guðmundur Andri Ástráðsson v. Iceland* (n 29) para 248.
[271] OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia, June-September' (n 8) 21.
[272] Public Defender Office of Georgia, 'Public Defender Demands the Rule of Selection of Supreme Court Judicial Candidates to be Declared Unconstitutional' (2019).

Court votes were divided equally four against four, which according to Georgian legal framework resulted in finding these provisions constitutional. Also, newly staffed Supreme Court appointed two new members of the Constitutional Court and allegedly the 'coincidental' appointments related to achieving final decision regarding this claim. Public Defender's office argued that this influenced the final conclusion of the Court on the Supreme Court's appointment's case.[273]

The majority's decision avoided incorporating European Approach that provides in its most recent judgments the assessment of similar situations in light of Article 6. Furthermore, the Constitutional Court's final judgment did not give enough attention to the existing challenges towards the independence and impartiality of the Council itself and accepted the arguments of the Parliament as an established fact that the body who selects the candidates is independent and impartial. The Constitutional Court decision avoided more detailed contextual analysis of the implementation process of the appointment rules. The judgment fully ignored findings presented under the monitoring reports.

The dissenting opinion of four judges discussed in detail the challenges related to the lack of the rule towards appealing opportunity of Council's decisions related to the applicants' selection. Next to this, referred to the non-existence of obligation to substantiate the decision which leads to the transparency issues within decision-making process by the Council.[274] The authors of the dissenting opinion reiterated the Constitutional Courts' established approach regarding the obligation to substantiate Council's decisions and defined that it is crucial in

<https://www.ombudsman.ge/eng/191018050024siakhleebi/sakhalkho-damtsveli-uzenaesi-sasamartlos-mosamartleobis-kandidatebis-sherchevis-tsesis-arakonstitutsiurad-tsnobas-itkhovs> accessed 17 June 2022.

[273] Public Defender of Georgia 'Report On the Situation of Protection of Human Rights and Freedoms in Georgia' (March 2020) (n 11) 92-94.

[274] Constitutional Court of Georgia, 'The Dissent Opinion of the Members of the Constitutional Court of Georgia Teimuraz Tughushi, Irine Imerlishvili, Giorgi Kverenchkhiladze and Tamaz Tsabutashvili' Regarding the Judgment N3/1/1459,1491.

order to avoid illegal, arbitrary and partial decisions.[275] The Court emphasized that non-existence of the obligation to substantiate causes the risks of improper use of power and deprives the candidate of the opportunity to enjoy a fair trial right, hardens and sometimes makes it even impossible for the court to check the legality of the decision.[276]

The opinion indicated that the determined procedure for the selection of Supreme Court judges failed to include necessary mechanisms for proper selection of the candidates and lacked the guarantees against arbitrariness.[277] They compared the selection procedure to the election because the Council has as much power as the voter in elections in front of the ballot box.[278] The dissenting judges concluded that the appealed norms are against the requirements of a fair trial right as it cannot ensure the nomination of Supreme Court judges according to the Constitutional requirements.[279] They indicated that these flaws create the risks of selecting candidates that are not qualified and in compatible with constitutional criteria for the vacancy.[280] They also referenced the results of monitoring reports and assessments by international society regarding the challenges.[281] That way judges in the dissenting opinion concluded that their assessment was not only theoretical analysis but can refer to practical challenges that the first selection process revealed.[282] While, the Court refused to declare the appealed norms unconstitutional the concerns raised under the claim was incorporated to some extent in legal amendments to the rules of the appointment of Supreme Court Judges after two month.[283]

[275] ibid para 29.
[276] ibid.
[277] ibid para 65.
[278] ibid.
[279] ibid Para.109
[280] ibid, para.110.
[281] ibid, paras.114-121.
[282] ibid, para.123.
[283] Public Defender of Georgia 'Report On the Situation of Protection of Human Rights and Freedoms in Georgia' (March 2020) (n 11) 96.

3.2. Possible implications of finding "irregularities" in the Judicial Appointment Process of Judges in Supreme Court of Georgia – Starting from a Blank Page?

The recent developments in the case-law at European level demonstrate that although the ECtHR finds irregularities in the appointment process and the violation of European standards of a fair trial right, the specific implications of these findings are not provided. The ECtHR leaves it to the national authorities to decide how to implement the judgment and what are the required steps from the State in response to Court's judgment. The CJEU's procedural implications will not be discussed in this part because Georgia is not a member State and the possible consequences of the CJEU's judgment such as for instance infringement procedure which EU applied towards Poland[284] are not applicable for Georgian Context as a response to the identified incompatibility. After demonstrating the incompatibilities with European standards of the appointment of Supreme Court judges in Georgia in 2019 in light of a fair trial right, the subchapter discusses what prospects does Georgia have to challenge the issue. While discussing the possible implications of finding manifest breach in the appointment process, the assessment of the outcomes must be regarded in light of the core principles of the irremovability of judges and legal certainty.

Some scholars predict that the most logical implication of the judgments of the ECtHR in light of the 'independent and impartial tribunal established by law' requirement of a fair trial right would be excluding the judges appointed with irregular procedures from adjudication process/removal of a judge from occupied post.[285] In addition to that, ensuring the independence of the appointing body is seen as another consequence, such as National

[284] European Commission 'Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal', (2021).

[285] Mathieu Leloup, 'The ECtHR Steps into the Ring' (*Verfassungsblog,* 10 May 2021) <https://verfassungsblog.de/the-ecthr-steps-into-the-ring/> accessed 17 June 2022; Marcin Szwed, 'Hundreds of Judges Appointed in Violation of the ECHR?' (*Verfassungsblog,* 29 July 2021) <https://verfassungsblog.de/hundreds-of-judges-appointed-in-violation-of-the-echr/> accessed 17 June 2022.

Council.[286] The most recently the Committee of Ministers ended its supervision on the execution of the judgment of *Guðmundur Andri Ástráðsson v. Iceland.*[287] After the judgment, Iceland stopped the case-allocation on 'irregularly appointed' judges and appointed new judges instead of them.[288] The State provided the possibility of reopening the cases discussed by 'irregularly' appointed judges and additionally took prevention steps through legislative changes and guidelines.[289]

The paper demonstrated that the appointment process in Georgia included irregularities of such nature which makes it incompatible with the established European standards. For Georgian context, one way of challenging the appointment process can be identifying the applicant whose case was discussed by Supreme Court judge(s) appointed under the incompatible procedure in 2019 and claiming the violation of independent and impartial tribunal established by law requirement in front of the ECtHR. The Ombudsperson of Georgia in the report indicates that in light of the identified challenges in the first nomination/appointment process, it creates real basis to appeal the judgments of the judges appointed under these irregularities at ECtHR.[290]

Nevertheless, the discussion on the possible consequences of the recent developments at European level cannot be conducted without assessing it in light of the principles of legal certainty and irremovability of judges. The ECtHR referred that legal certainty is an important facet of the principle of the rule of law and with time passing it might outweigh the

[286] ibid.
[287] Council of Europe Department for the Execution of Judgments of the European Court of Human Rights, 'Judicial Appointments in Iceland aligned with ECHR judgment' (2022) <https://www.coe.int/en/web/execution/-/judicial-appointments-in-iceland-aligned-with-echr-judgment> accessed 17 June 2022.
[288] ibid.
[289] ibid.
[290] Public Defender of Georgia 'Report On the Situation of Protection of Human Rights and Freedoms in Georgia' (March 2020) (n 11) 91.

interest of protection of a fair trial right.[291] However, it is vague what is such time period after which legal certainty argument wins over the right to have your case heard by a judge appointed in a compatible manner with established standards.

The discussed standards and the case-law of the European Court in Chapter two demonstrated the crucial importance of the principles of legal certainty and the irremovability of judges for the independence of judiciary. The Georgian Constitution ensures the guarantees for the irremovability of judges.[292] However, during the analysis of the European case law in that regard, despite the crucial importance of the irremovability of judges the bigger contextual picture is decisive. The irregularities identified in the appointment process of Supreme Court judges in Georgia was the demonstration of the systemic challenges of lack of independence of judiciary which is essential aspect of the Rule of Law. If we let the judges appointed with manifest breach, lacking public trust and independence to decide crucial issues as the last instance Court's judges at national level would it be compatible for the State governing with the Rule of law principles? 'Those arguments are just a smokescreen and do not detract from the intention to disregard or breach the principles of the rule of law. It must be recalled that law does not arise from injustice.'[293]

Scholars in light of the Poland's and Hungary's examples submitted that the CJEU should adopt an 'Orbán/Kaczyński test'.[294] This approach demonstrates how the populist, 'illiberal' leaders can abuse the established standards at European level because they are not honest, but 'clever'. While it is justified to determine certain limitation on a fair trial right to guarantee the legal certainty **'**these limitations must be narrowly construed and be proportionate,

[291] *Guðmundur Andri Ástráðsson v. Iceland* (n 29) para 252.
[292] Constitution of Georgia (n 5) art 63(5).
[293] Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, (n 50) 198.
[294]Laurent Pech, 'Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG' (2020) RECONNECT Working Paper No.8, 14. <https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf> accessed 17 June 2022.

especially in a situation where specific, individual, procedural and/or substantive, irregularities are part of a wider pattern of systematic capture or dismantlement of all checks and balances by national authorities.'[295] 'The overriding principle should be in any event that legal certainty cannot be relied upon to save authorities from the consequences of their own deliberately organised irregular appointment.'[296] Hence, the principles of the legal certainty and irremovability of judges cannot justify the existence of such irregularities in the appointment process in light of the Georgian example.

In light of principle of irremovability and grounds for dismissal determined under Georgian legal framework the possibility of removing 'irregularly' appointed judges from their posts is vague. However, the claim to reopen the cases discussed by irregularly appointed judges is more realistic. Criminal Procedural Code of Georgia as one of the grounds for reviewing a judgment due to newly revealed circumstance determines the existence of 'a circumstance that proves the illegal composition of the court that rendered the final judgment.'[297] The same article refers to the existence of 'an effective decision (judgment) of the ECtHR that has established that European Convention for the Protection of Human Rights and Fundamental Freedoms, or the Protocols to the Convention, has been violated with respect to that case, and the judgment subject to review was based on that violation.'[298] Interpreting this two provisions together, if the ECtHR finds violation of article 6 of the Convention because of identified irregularities in the nomination/appointment process of Supreme Court judges in 2019, this can be a one positive result of such conclusion. It can become a starting point of legally challenging the results of irregularly appointed judges.

[295] ibid.
[296] ibid.
[297] Parliament of Georgia, Criminal Procedure Code of Georgia art 310(b). <https://bit.ly/3aONq4K> accessed 17 June 2022.
[298] ibid art 310(e).

Conclusion

The recent developments demonstrated that there is a legal possibility to challenge the appointment process which was incompatible with discussed European standards. The united forces of Georgian Ruling party and 'influential group' within the judiciary achieved appointment of 16 Supreme Court judges in 2019 under process with irregularities. Submitting application to the ECtHR claiming the violation of a fair trial right is a way to challenge these appointments in Georgia. Under this claim, the application can also refer to the problematic nature of lack of independence of the High Council of Justice in the appointment context. Despite the fact that legal certainty and irremovability of judges are crucial principles, it cannot be justification for certain actors to claim that the identified irregularities does not matter and are not sufficient to challenge the process. The most practical way in light of the Georgian context as a starting point, is that if ECtHR finds violation to claim reopening criminal cases discussed by irregularly appointed judges. With the time and developments, the ECtHR might provide more specific reference to the implications of finding violation and the need of the systemic reform. 'Optimists will quote Alexandre Dumas – "Wait and Hope", the pessimists will quote Georges R. R. Martin – "Winter is coming!"'[299] I choose to be an optimist.

Conclusion

The thesis aimed to study the compatibility of first selection/appointment process of Supreme Court judges in Georgia in 2019, after Constitutional reform with European standards. Following this, to assess possible consequences due to the incompatibility of appointment process for 'irregularly' appointed judges in Supreme Court of Georgia. The European Court of Human Rights and the Court of Justice of European Union has been developing its case-

[299]Ewa Łętowska and Aneta Wiewiórowska Domagalska, 'A "good" Change in the Polish Constitutional Tribunal?' (2016) Osteuropa Recht, 62:1, 91.

law regarding a fair trial right, in particular the component establishing a right to an independent and impartial tribunal established by law. The recent developments which established that a tribunal established by law also includes the appointment procedure of a judge is a solid ground for the European States that face challenges related to the irregularities within the appointment procedure to claim the violation of a fair trial right.

Both, national and international organizations criticized the appointment process referring to the possible violation of Article 6. As a result of irregularities, the Council selected and the Parliament appointed the majority of Supreme Court who lacked the competence and consciousness and were not the most qualified candidates within the process. This was against the requirements of an independent and impartial tribunal established by law.

However, the answer to the possible consequences of finding the appointment process of Supreme Court judges conducted in Georgia in 2019 incompatible with Article 6 requirements remains unanswered by the European Court of Human Rights. The principle of the rule of law includes the component of legal certainty which is important in relation to challenging the post of already appointed judge despite the fact that it was conducted based on an irregular process. The Court avoided explicit directives to the State to find solution when the appointment procedure is in violation of the right to a fair trial. Therefore, potential response for Georgia in that regard might be to challenge the appointment process in front of the ECtHR and if the Court finds violation, to claim reopening criminal cases based on newly revealed circumstance as a form of ECtHR judgment.

Bibliography

Table of Cases

Judgments of the European Court of Human Rights

1. Advance Pharma sp. z o.o v. Poland App no 1469/20 (ECtHR 3 February 2022)
2. Baka v Hungary [GC] App no 20261/12 (ECtHR 23 June 2016)
3. Dolińska-Ficek and Ozimek v Poland App nos 49868/19 and 57611/19 (ECtHR 8 November 2022)
4. Gloveli v Georgia App no 18952/18 (ECtHR April 2022)
5. Grzęda v. Poland [GC] App no 43572/18 (ECtHR 15 March 2022)
6. Guðmundur Andri Ástráðsson v Iceland [GC] App no 26374/18 (ECtHR 1 December 2020)
7. Reczkowicz v Poland App no 43447/19 (ECtHR 22 July 2021)
8. Vilho Eskelinen and Others v Finland [GC] App no 63235/00 (14 April 2007) ECHR 2007-II
9. Xero Flor w Polsce sp. z o.o. v Poland App no 4907/18 (ECtHR 7 May 2021)

Judgments of the Court of Justice of European Union

1. AB and Others v Krajowa Rada Sądownictwa and Others (C-824/18) EU:C:2021:153
2. Associação Sindical dos Juízes Portugueses v Tribunal de Contas (C-46/16) EU:C:2018:117
3. Erik Simpson and HG v Council of the European Union and European Commission (C-542/18 RX-II and C-543/18 RX-II) EU:C:2020:232
4. European Commission v Republic of Poland (C-192/18) EU:C:2019:924
5. European Commission v Republic of Poland (C-619/18) EU:C:2019:531
6. LM (Case C-216/18 PPU) EU:C:2018:586

Table of Legislation

1. Charter of Fundamental Rights of the European Union [2009] 2012/C 326/02
2. Parliament of Georgia, Criminal Procedure Code of Georgia
3. Consolidated Version of the Treaty on European Union [2012] C 326/13
4. Constitution of Georgia [1995] 786
5. Convention for the Protection of Human Rights and Fundamental Freedoms [1950]
6. Organic Law of Georgia on General Courts [2009] 2257
7. Organic Law of Georgia on General Courts, [2 May 2019] 4526-IIS

Secondary Sources

Reports

1. Olga Shermadini, Tamta Kakhidze, Transparency International Georgia, 'Corruption Risks in Georgian Judiciary', (2018) <https://www.transparency.ge/sites/default/files/corruption-risks-eng.pdf> accessed 17 June 2022
2. OSCE/ODIHR 'Report on First Phase of the Nomination and Appointment of Supreme Court Judges in Georgia,' June-September' (September 2019) <www.osce.org/files/f/documents/1/9/429488.pdf> accessed 17 June 2022
3. OSCE/ODIHR 'Second Report on the Nomination and Appointment of Supreme Court Judges in Georgia, June-December' (January 2020) <www.osce.org/files/f/documents/2/6/443494.pdf> accessed 17 June 2022
4. Public Defender of Georgia 'Monitoring Report on the Selection of Supreme Court Judicial Candidates by the High Council of Justice of Georgia' (October 2019). <www.ombudsman.ge/res/docs/20191103172235675554.pdf> accessed 17 June 2022
5. Public Defender of Georgia 'Report On the Situation of Protection of Human Rights and Freedoms in Georgia' (March 2020) <www.ombudsman.ge/res/docs/2021070814020446986.pdf> accessed 17 June 2022
6. Talander Jansen and Hannah Ahamad Madatali, Study of Association Agreement between the EU and Georgia European Implementation Assessment (Update) (European Parliamentary Research Service 2022)
7. Transparency International Georgia, 'Status of Judiciary 2016-2020' (2020) <https://transparency.ge/en/post/state-judicial-system-2016-2020> accessed 17 June 2022
8. US Departament of State, Bureau of Democracy, Human Rights, and Labor '2021 Country Reports on Human Rights Practices: Georgia' (April 2022) <www.state.gov/wp-content/uploads/2022/03/313615_GEORGIA-2021-HUMAN-RIGHTS-REPORT.pdf> accessed 17 June 2022
9. US Department of State Bureau of Democracy Human Rights and Labour '2019 Country Reports on Human Rights Practices: Georgia' (March 2020). <www.state.gov/wp-content/uploads/2020/03/GEORGIA-2019-HUMAN-RIGHTS-REPORT.pdf> accessed 17 June 2022
10. Venice Commission, 'Report on the Independence of the Judicial System Part I: The Independence of Judges' (March 2010) <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e> accessed 17 June 2022
11. Zselyke Csaky, Freedom House, 'Nations in Transit 2020, Dropping the Democratic Façade', (2020) <https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf> accessed 17 June 2022

Blogs

1. David Zedelashvili, 'The Rule of Law in Georgia' (*Verfassungsblog,* 5 March 2021) <verfassungsblog.de/rule-of-law-georgia/#commentform> accessed 17 June 2022
2. Kakha Tsikarishvili, 'Evolution of clan based governance in Georgian judiciary since 2007', (2019) (*Democracy & Freedom Watch,* 19 April 2019) <dfwatch.net/evolution-of-clan-based-governance-in-georgian-judiciary-since-2007-53155> accessed 17 June 2022
3. Marcin Szwed, 'Hundreds of Judges Appointed in Violation of the ECHR?' (*Verfassungsblog*, 29 July 2021) <verfassungsblog.de/hundreds-of-judges-appointed-in-violation-of-the-echr/> accessed 17 June 2022.
4. Mathieu Leloup, 'Repubblika: Anything new under the Maltese Sun?' (*Verfassungsblog*, 21 April 2021) <verfassungsblog.de/repubblika/> accessed 17 June 2022
5. Mathieu Leloup, 'The ECtHR Steps into the Ring' (*Verfassungsblog*, 10 May 2021) <verfassungsblog.de/the-ecthr-steps-into-the-ring/> accessed 17 June 2022.
6. Petra Bárd, Barbara Grabowska-Moroz and Viktor Zoltán Kazai, 'The State of the Rule of Law in Europe' (*Recconect Blog*, 15 January 2021) <reconnect-europe.eu/blog/rule-of-law-backsliding-in-the-european-union-lessons-from-the-past-recommendations-for-the-future/> accessed 17 June 2022
7. Transparency International Georgia, Georgian Democracy Initiative, 'The Timeline of the One Year Selection Process of Supreme Court Judges' (*Transparency International Georgia, Georgian Democracy Initiative Blog*, 10 February 2020) <transparency.ge/en/blog/chronology-one-year-long-process-selection-judges-supreme-court> accessed 17 June 2022

Articles

1. Bobek M, Kosař D, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2013) Research Paper in Law 07/2013 <aei.pitt.edu/47507/1/researchpaper_7_2013_bobek_kosar.pdf> accessed 17 June 2022
2. Halmai G, 'The Early Retirement Age of the Hungarian Judges' (2017) ResearchGate <www.researchgate.net/publication/325629387_The_early_retirement_age_of_the_Hungarian_judges> accessed 17 June 2022
3. Imnadze G, 'Waves of Judicial reform that cannot reach the shore' (2021) Heinrich Boell Stiftung, Tbilisi, South Caucasus <ge.boell.org/en/2021/09/06/waves-judicial-reform-cannot-reach-shore> accessed 17 June 2022
4. Kochenov D, 'Upgrading Rule of Law in Europe in Populist Times' (2021) Pravni Zapisi Godina XII Researchgate <www.researchgate.net/publication/353348046_UPGRADING_RULE_OF_LAW_IN_EUROPE_IN_POPULIST_TIMES> accessed 17 June 2022
5. Kosař D, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe' German Law Journal Vol. 19 <www.cambridge.org/core/services/aop-cambridge-

core/content/view/664DE5677705E534D282A84E1134888A/S2071832200023178a.pdf/beyond-judicial-councils-forms-rationales-and-impact-of-judicial-self-governance-in-europe.pdf> accessed 17 June 2022
6. Łętowska E, Wiewiórowska Domagalska A, 'A "good" Change in the Polish Constitutional Tribunal?' (2016) Osteuropa Recht, 62:1
7. Pech L, Lane Scheppele K, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) Cambridge Yearbook of European Legal Studies Vol.19 3-47 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280> accessed 17 June 2022
8. Preshova D, Damjanovski I and Nechev Z, 'The Effectiveness of the European model of judicial independence in the Western Balkans: Judicial councils as a solution or a new cause of concern for judicial reforms' (2018) CLEER Papers 2017/1 <papers.ssrn.com/sol3/papers.cfm?abstract_id=3118942> accessed 17 June 2022
9. Rizcallah C, Davio V, 'The Requirement that Tribunals be "Established by Law" A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust' (2021) European Constitutional Law Review, 1-26
10. Rizcallah C, Davio V, 'The Requirement that Tribunals be Established by Law: A Valuable Principle Safeguarding the Rule of Law and the Separation of Powers in a Context of Trust, (2022)
11. Spano R, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the judiciary' (2021) European Law Journal.2021:1-17 <archiwumosiatynskiego.pl/images/2021/02/EULJ_12377_Rev2_EV.pdf> accessed 17 June 2022

Books

1. Burnay M, *Chinese Perspectives on the International Rule of Law* (Edward Elgar Publishing 2018)
2. Pech L and Kochenov D, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Swedish Institute for European Policy Studies 2021)
3. Sajó A, *Ruling by Cheating* (Cambridge University Press 2021)

Press Releases

1. AA, 'EU starts membership application process with Georgia, Moldova' (2022) <www.aa.com.tr/en/europe/eu-starts-membership-application-process-with-georgia-moldova/2560958> accessed 17 June 2022
2. Civil Georgia, 'Parliament rejected the nominated candidates for Supreme Court vacancies' (2016) <old.civil.ge/geo/article.php?id=30385> accessed 17 June 2022
3. Coalition for an Independent and Transparent Judiciary, 'The Coalition's Address to the Parliaments' (2018) <coalition.ge/index.php?article_id=197&clang=1> accessed 17 June 2022
4. European Commission, 'Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal' (2021) <ec.europa.eu/commission/presscorner/detail/en/ip_21_7070> accessed 17 June 2022
5. Public Defender Office of Georgia, 'Public Defender Demands the Rule of Selection of Supreme Court Judicial Candidates to be Declared Unconstitutional' (2019)

<www.ombudsman.ge/eng/191018050024siakhleebi/sakhalkho-damtsveli-uzenaesi-sasamartlos-mosamartleobis-kandidatebis-sherchevis-tsesis-arakonstitutsiurad-tsnobas-itkhovs> accessed 17 June 2022

Other Secondary Sources

1. CCJE, 'Opinion No1 On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges' Recommendation No.R(94)12 (November 2001) <www.legal-tools.org/doc/ca5224/pdf/> accessed 17 June 2022
2. Coalition for Independent and Transparent Judiciary, 'European Commission for Democracy through Law, the Venice Commission' (March 2017) <coalition.ge/files/coalition_opinion_on_const._provisions_regarding_judiciary_-_for_venice_commission.pdf> accessed 17 June 2022
3. Council of Europe, 'Georgia// 46 States, one Europe' <www.coe.int/en/web/portal/georgia> accessed 17 June 2022
4. Council of Europe, 'Judges: independence, efficiency and responsibilities' (November 2011) <rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d> accessed 17 June 2022
5. Council of Europe, Venice Commission, 'The Rule of Law Checklist' (March 2016) CDL-AD(2016)007rev. <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e> accessed 17 June 2022
6. ECtHR, 'Guide on Article 6 of the European Convention on Human Rights, right to a fair trial (civil limb)' (Last update December 2021) <www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 17 June 2022
7. European Parliament, 'Council of Europe standards on judicial independence', (May 2021) <www.europarl.europa.eu/RegData/etudes/BRIE/2021/690623/EPRS_BRI(2021)690623_EN.pdf> accessed 17 June 2022
8. European Parliament, 'Protecting the rule of law in the EU' (November 2019) <www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf> accessed 17 June 2022
9. European Union, 'Court of Justice of the European Union (CJEU)' <european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en> accessed 17 June 2022
10. High Council of Justice of Georgia, 'About Us, History' <hcoj.gov.ge/ka/%E1%83%A9%E1%83%95%E1%83%94%E1%83%9C-%E1%83%A8%E1%83%94%E1%83%A1%E1%83%90%E1%83%AE%E1%83%94%E1%83%91/%E1%83%98%E1%83%A1%E1%83%A2%E1%83%9D%E1%83%A0%E1%83%98%E1%83%90> accessed 17 June 2022

11. High Council of Justice of Georgia, Decision 1/108 (7 June 2019) <hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/108-.pdf> accessed 17 June 2022

12. High Council of Justice of Georgia, Decision 1/43 (10 May 2019) <hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/43-2019.pdf> accessed 17 June 2022

13. High Council of Justice of Georgia, Decision N1/136 (20 June 2019) <hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/136.pdf> 17 June 2022

14. High Council of Justice of Georgia, Decision N1/187, (4 September 2019) <hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/187-2019.pdf> accessed 17 June 2022

15. Mehmood S, The impact of Presidential appointment of judges: Montesquieu or the Federalists? (HAL open science 2021) <https://halshs.archives-ouvertes.fr/halshs-03161933/document> accessed 17 June 2022

16. OC Media, 'Controversial Supreme Court Nominees Withdraw Candidacy in Georgia' (22 January 2019) <oc-media.org/controversial-supreme-court-nominees-withdraw-candidacy-in-georgia/> accessed 17 June 2022

17. OSCE/ODIHR, 'Opinion on Draft Amendments relating to the Appointment of Supreme Court Judges of Georgia' (17 April 2019) <www.osce.org/files/f/documents/7/1/417599.pdf > accessed 17 June 2022

18. Pech L, 'Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG' (2020) RECONNECT Working Paper No. 8 <https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf> accessed 17 June 2022

19. Tabula, 'The list of Political Prisoners and Political Refugees' (21 November 2012) <tabula.ge/ge/news/550290-politikuri-devnilis-patimris-statusis-mkone-pirta> accessed 17 June 2022

20. The Parliament of Georgia 'Explanatory Note on the Draft Constitutional Law of Georgia, The Bill "On Changes to the Constitution of Georgia" (2017) <info.parliament.ge/file/1/BillReviewContent/149115> accessed 17 June 2022

21. Transparency International Georgia, 'A New Perspective on Judicial Reform' (21 June 2021). <transparency.ge/en/post/new-perspective-judicial-reform> accessed 17 June 2022

22. Transparency International Georgia, 'Dream Court Anatomy' (February 2019) <www.transparency.ge/en/blog/dream-court-anatomy> accessed 17 June 2022

23. Transparency International Georgia, 'High Council of Justice members who supported decisions based on clan principles must resign' (December 2018) <www.transparency.ge/en/post/high-council-justice-members-who-supported-decisions-based-clan-principles-must-resign> accessed 17 June 2022

24. Transparency International Georgia, 'The Coalition assesses the process of selection of Supreme Court justices at the High Council of Justice' (13 September 2019) <www.transparency.ge/en/post/coalition-assesses-process-selection-supreme-court-justices-high-council-justice> accessed 17 June 2022

25. U.S. Embassy, 'U.S. Embassy's statement on supreme court nominees (December 12)' (ge.usembassy.gov, 12 December 2019) <ge.usembassy.gov/u-s-embassys-statement-on-supreme-court-nominees-december-12/> accessed 17 June 2022

26. Venice Commission 'European Standards on the Independence of the Judiciary, A Systemic Overview' (October 2008) CDL-JD(2008)002. <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JD(2008)002-e> accessed 17 June 2022

27. Venice Commission, 'Georgia Urgent Opinion on the selection and appointment of supreme court judges' (April 2019) CDL-PI(2019)002 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2019)002-e> accessed 17 June 2022

28. Venice Commission, 'Opinion No.1001/2020 on the Draft Organic Law Amending the Organic Law on Common Courts' (October 2020) CDL-AD(2020)021 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)021-e> accessed 17 June 2022

29. Venice Commission, 'Opinion on Draft Constitutional Amendments Relating to the Reform of the Judiciary in Georgia' (March 2005) CDL-AD(2005)005 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)005-e> accessed 17 June 2022

30. Venice Commission, 'Final Opinion on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia' (October 2010) CDL-AD(2010)028 <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-e> accessed 17 June 2022