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Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions

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Abstract

This article investigates the formal and informal factors behind the persistence of judicial oligarchies in post-communist countries despite large-scale reforms. This case study on Georgia reveals that formal positions of power in these judiciaries can be monopolized by a close-knit group, with a handful of influential judges (i.e. judicial oligarchs) at the top of its hierarchical structure. Drawing on in-depth interviews with sitting as well as former judges and other stakeholders of reform processes, the article attributes the failure to dismantle the rule of judicial oligarchs at least partly to legislative flaws and loopholes. More importantly, it warns about the reliance of judicial oligarchs on informal rules and practices to undermine formal rules and procedures meant to facilitate the meaningful participation of all judges in governing the judiciary. It uncovers informal mechanisms allowing the network of powerful judges to suppress the emergence of competing judicial networks and cement itself into leadership positions. Finally, the article reflects on the implications of these findings for designing and implementing judicial reforms in Georgia and beyond.

Keywords

judicial councils – court chairpersons – judicial reforms – judicial independence – post-communist context

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1 Introduction*

Post-communist countries in transition have sought to insulate their judiciaries from political pressure and increase judicial independence by putting judge-dominated councils in charge of decision-making on judicial careers.[1] Such judicialization of governance has brought the question of how council seats allocated to judges were to be filled to the forefront of reform discussions. The selection of court chairpersons has emerged as another key item on the reform agenda, due to the formal and informal mechanisms of influence that they possessed, and the use of these mechanisms to pressure judges into deciding cases in the interests of the ruling elite.[2] The preferred solutions, consistent with the general trend of judicialization, have been either to empower these judge-dominated councils to appoint court chairpersons

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1 The establishment of judge-dominated councils was advocated by the Consultative Council of European Judges (CCJE) and the Venice Commission. See Opinion no. 10 (2007) of the CCJE, Strasbourg, 21–23 November 2007, paras. 15–20; Judicial Appointments, Report adopted by the Venice Commission, CDL-AD (2007) 028, 22 June 2007, para. 29. About judicial councils in general see Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians? Judicial Councils and Judicial Independence," 57(1) *American Journal of Comparative Law* (2009), 103–134. Regarding judicial councils in Central and Eastern Europe see Michal Bobek and David Kosař, "Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe," 15(7) *German Law Journal* (2014), 1257–1292; Christina E. Parau, "Explaining Governance of the Judiciary in Central and Eastern Europe: External Incentives, Transnational Elites and Parliament Inaction," 67(3) *Europe-Asia Studies* (2015), 409–442; Pablo Jose Castillo Ortiz, "Councils of the Judiciary and Judges' Perceptions of Respect of Their Independence in Europe," 9(2) *Hague Journal of the Rule of Law* (2017), 315–336; Peter H. Solomon Jr., "Transparency in the Work of Judicial Councils: The Experience of (East) European Countries," 43(1) *Review of Central and East European Law* (2018), 43–62.

2 Peter H. Solomon Jr., "Informal Practices in Russian Justice: Probing the Limits of Post-Soviet Reform", in Ferdinand Feldbrugge (ed.), *Russia, Europe and Rule of Law* (Brill Nijhoff, Leiden, 2006), 79–92, at 82–85; Peter H. Solomon Jr. "Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China," 43 *Communist and Post-Communist Studies* (2010), 351–362, at 353–354; Maria Popova, *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine* (Cambridge University Press, Cambridge, 2012), 135–136; Alexei Trochev, "Patronal Politics, Judicial Networks and Collective Judicial Autonomy in Post-Soviet Ukraine," 39(5) *International Political Science Review* (2018), 662–678.

or to allow judges of specific courts to elect chairpersons from among themselves.[3] Earlier scholarship has suggested that these reform efforts ultimately worked to the advantage of certain judges, typically those already serving as court chairpersons. As scholars have noted, incumbent court chairpersons not only kept their positions[4] and mechanisms to pressure rank-and-file judges,[5] but they even extended their influence beyond specific courts by becoming members of newly established councils or by installing their "marionettes" into these bodies.[6] Recent efforts to reduce the formal powers of court chairpersons – by limiting their terms of office and preventing them from occupying seats in judicial councils – have amounted to an acknowledgment that their powerful positions jeopardized the internal independence of individual judges.[7] However, it appears that these efforts have had only a limited impact.[8] In many post-communist countries court chairpersons continue to influence decision-making on judicial careers either formally or informally.[9]

3 Lydia F. Muller, "Judicial Administration in Transitional Eastern Countries", in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer-Verlag, Berlin and Heidelberg, 2012), 937–969.

4 Maria Popova, "Ukraine's Judicial Reforms", *VOX Ukraine* (15 December 2014), available at https://voxukraine.org/en/ukraines-judicial-reforms/ (pointing out that in post-Yanukovych Ukraine, even though the law enabled judges to elect chairpersons of their respective courts, over 80% of the elections resulted in the re-election of Yanukovych-appointed chairpersons, and over half of them were unopposed).

5 Rank-and-file judges are ordinary members of the judiciary who hear and adjudicate on cases. They can be distinguished from judges who participate in governing the judicial system, for example, as court chairpersons or members of judicial councils. The caseload of judges who participate in governance may be reduced, having regard to additional managerial tasks, for the duration of their mandates.

6 David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press, Cambridge, 2016), 401; Popova, *op.cit.* note 2, 135–136 (reporting that in the Russian Federation and Ukraine court chairpersons handpick candidates to run for seats in governing bodies and use the power they have over judges to get those candidates elected; in the absence of their backing, rank-and-file judges virtually never throw their hats into the ring).

7 Opinion of the Venice Commission on the Armenian Draft Law on Introducing Amendments to the Judicial Code, CDL-AD (2014)021, 16 June 2014, para. 26; Opinion of the Venice Commission on the Draft Judicial Code, Armenia, CDL-AD(2017)019, 9 October 2017, paras. 50–52. See also the CCJE Opinion no. 19 on the Role of Court Presidents, Strasbourg, 10 November 2016, para. 8 (suggesting that court chairpersons, "with their broad experiences", should "give their input" in the bodies of judicial governance, but "concentration of functions and powers in the hands of only a limited group of persons should be avoided.").

8 Kosař, *op.cit.* note 6, 401.

9 Aryna Dzmitryieva, "Becoming a Judge in Russia: An Analysis of Judicial Biographies," 73(1) *Europe-Asia Studies* (2021), 131–156 (suggesting that while judicial qualification boards are

This article focuses on the mechanics behind the rise of judicial oligarchies in the post-communist context and on the formal as well as informal factors behind their persistence. Earlier scholarship referred to court chairpersons as "oligarchs".[10] This article associates judicial oligarchy with the capture of all or most levers of judicial governance by a small number of judges by monopolizing access to formal positions of power. While judicial oligarchs may hold the positions of chairpersons and have leverage over judges in their respective courts, their true strength lies in their ability to influence the careers of judges beyond those particular courts. This can be achieved by relying on a network of loyal allies installed as members of governing bodies (for example, judicial councils) and as court chairpersons.

I chose to focus on Georgia, a relatively under-researched jurisdiction, to investigate the workings of judicial oligarchies.[11] For the most part, the Georgian judiciary has evolved in a similar way to its post-communist counterparts, keeping largely intact its hierarchical structure and the culture of the subservience of rank-and-file judges to judicial leadership – part of the Soviet heritage. A massive purge in the judiciary in the mid-2000s,[12] followed by legislative acts meant to shield newly recruited judges from external and internal pressure, failed substantially to change patterns of interaction. The obedience of judges remained the norm and worked to the advantage of the political and judicial leadership. In a surprising development, legislation passed by the newly elected parliament in 2013 provided an impetus for behavioral changes. The formation of a new grouping of judges willing to challenge the rule of the judicial oligarchs and their network of loyal allies was a departure from pre-existing behavioral patterns. This resulted in the emergence of intra-judicial conflict and competition between candidates of two rival judicial networks for seats in governing bodies, which was atypical in the post-communist context. These changes in the intra-judicial dynamics, even if short-lived, warrant careful investigation and serve as an important learning opportunity, as does the reversal of these legal and behavioral changes after the relatively brief period

formally in charge of judicial recruitment, the views of court chairpersons are decisive in practice). See also Katarina Šipulová, Samuel Spáč & Marína Urbániková, "Capturing the Judiciary from the Inside: The Story of Judicial Self-Governance in Slovakia," 19(7) *German Law Journal* (2018), 1741–1768, at 1750.

10 Alan Uzelac, "Role and Status of Judges in Croatia", in Paul Oberhammer (ed.), *Richterbild and Rechsreform in Mitteleuropa* (Manz'sche Verlags, Wien, 2001), 23–65, at 44; Matej Avbelj, "Contextual Analysis of Judicial Self-Governance in Slovenia," 19(7) *German Law Journal* (2018), 1901–1930, at 1912.

11 For some limited coverage see Muller, *op. cit.* note 3.

12 The court system was reorganized and judges were dismissed prior to the end of their terms of office.

of contestation. While this is a single-country case study its findings are generally relevant beyond Georgia, as they highlight the steps needed to dismantle judicial oligarchy as well as the risks of its reappearance.

To solve the puzzle of the persistence of judicial oligarchs, the article undertakes an analysis of not only the formal rules governing access to leadership positions[13] but also – and more importantly – informal relationships and patterns of interaction determining which judges gain access in practice.[14] This exercise shows that formal and informal rules can either form a complementary relationship or contradict and compete,[15] with well-entrenched informal rules probably prevailing over newly introduced formal rules and directing judicial behavior.[16] The case study demonstrates the risks stemming from the exploitation of loopholes by judicial oligarchs, as well as the distortion of new legal rules and the use of these rules as a façade.[17] It also looks into informal judicial networks[18] as well as the informal practices, such as mobilization and

13 Judges in leadership positions are those who hold the positions of court chairpersons or chairpersons of chambers within courts as well as those who occupy seats in governing bodies such as judicial councils. Judicial leadership involves the authority and responsibility to speak on behalf of judges and to intervene to protect their independence, if necessary. Judges in leadership positions may use formal powers as well as informal mechanisms to influence decision-making on judicial careers and the functioning of courts. These powers, if abused, may create the risk of developing or consolidating internal dependencies. It is thus possible that these judges endanger values they were expected to protect.

14 Andrea Pozas-Loyo & Julio Ríos-Figueroa, "Anatomy of an Informal Institution: The Gentlemen's Pact and Judicial Selection in Mexico, 1917–1994," 39(5) *International Political Science Review* (2018), 647–661, at 658 (likening formal institutions to the tip of the iceberg and emphasizing that informal institutions underneath them shape behavior).

15 About the interplay between formal and informal institutions see Gretchen Helmke and Steven Levitsky, "Informal Institutions and Comparative Politics: A Research Agenda," 2(4) *Perspectives on Politics* (2004), 725–740; Hans Joachim Lauth, "Informal Institutions and Democracy," 7(4) *Democratization* (2010), 21–50; Anna Grzymala-Busse, "The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes," 45(3) *Studies in Comparative International Development* (2010), 311–333.

16 Denis J. Galligan, "Legal Failure: Law and Social Norms in Post-Communist Europe", in Denis J. Galligan and Marina Kurkchiyan (eds.), *Law and Informal Practices, Post-Communist Experience* (Oxford University Press, Oxford, 2003), 4–23.

17 Solomon, *op. cit.* note 2, 354.

18 There is growing interest in the ways in which personal connections and interactions between judges and other actors affect the way judiciaries are administered: Bjorn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, "Courts and Informal Networks: Towards Relational Perspective on Judicial Politics outside Western Democracies," 39(5) *International Political Science Review* (2018), 573–584; Matthew C. Ingram, "Networked Justice: Judges, the Diffusion of Ideas and Legal Reform Movements in Mexico," 48(4) *Journal of Latin American Studies* (2016), 739–768.

lobbying, that these networks rely on to secure access to leadership positions.[19] This means looking at not only the ways of implementing laws, but also judicial participation in shaping the law itself.[20]

For these reasons, the case study allows us to examine some highly relevant issues that have nevertheless been insufficiently covered in the relevant literature, largely due to the shortage of empirical evidence.[21] This article draws on qualitative in-depth interviews with judges[22] and a multiplicity of other sources, including their biographies,[23] voting records[24] and statements, as well as newspaper articles, investigative reporting by journalists, and NGO reports. Judicial biographies have been systematically analyzed to trace judges' career trajectories and the connections among judges in leadership positions, thereby highlighting the fact that having connections is a better determinant of whether one will occupy a leadership position than a solid background and leadership qualities. Lists of nominees and voting records from the Conference of Judges reveal that judicial oligarchs were successful in discouraging judges from competing in the elections, and that as a result, the candidates they supported were unopposed.

19 See, for example, Alexei Trochev & Rachel Ellett, "Judges and their Allies," 2(1) *Journal of Law and Courts* (2014), 67–91 (focusing on networking as a way of countering external interferences); Onur Bankiner, "Judges Discover Politics: Sources of Judges' off-Bench Mobilization in Turkey," 4(1) *Journal of Law and Courts* (2016), 131–157.

20 Andrea Pozas-Loyo & Julio Rios-Figueroa, "The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils," 89(7) *Texas Law Review* (2011), 1807–1833.

21 Mariana Llanos, Cordula Tibi Weber, Charlotte Heyl & Alexander Stroh, "Informal Interference in the Judiciary in New Democracies: a Comparison of Six African and Latin American Cases," 23(7) *Democratization* (2016), 1236–1253.

22 The author conducted and recorded 19 interviews in May-June 2018 and December 2018-January 2019. All interviews but one took place in Tbilisi, Georgia. They were subsequently transcribed, coded and analyzed. Respondents included six sitting judges (three from the Supreme Court, one from the Appellate Court and two from the district/city courts), three former judges, including two former chairpersons, who had left their positions within the past few years (one Supreme Court judge, one Appellate Court judge and one District Court judge); three non-judge members of the HCoJ; one non-judge member of the Disciplinary Collegium, three representatives of NGOs, one former high-level employee of the Office of the Public Defender (Ombudsman), one expert (from a donor organization) and one politician. None of the acting judge-members of the Council I approached agreed to be interviewed. However, their public/media statements and recordings/transcripts of previous interviews were analyzed.

23 Judges' biographies are made available at the website of the HCoJ.

24 Voting records were provided by the Conference of Judges (Administrative Committee) at my formal request.

Section 2 focuses on the current state of legislation governing access to leadership positions in the Georgian judiciary. Section 3 relies on the official biographies of judges in leadership positions to argue that, in practice, legal provisions governing access to such positions work to the advantage of a certain close-knit group. It becomes clear that judges affiliated with this group are typically the ones who are elected or appointed. Section 4 focuses on the three-year period (2013–2015) during which the rule of judicial oligarchs was challenged, and the subsequent reconsolidation of the judicial oligarchy. Section 5 identifies the factors that enabled such challenge, as well as the factors that contributed to Georgia's backsliding to judicial oligarchy. Section 6 concludes by reflecting on the ways in which judicial oligarchy can be dismantled.

2 Access to Leadership Positions in the Georgian Judiciary: the State of the Law

The foundations for the existing system of judicial governance were laid in the mid-2000s, with reforms implemented by the Saakashvili-led National Movement. In line with standard reform prescriptions, the majority of seats in governing bodies were formally allocated to judges.[25] This was the case with the High Council of Justice (HCoJ), the body responsible for appointments, promotions and the initiation of disciplinary proceedings,[26] as well as with the Disciplinary Collegium, which examined any disciplinary charges brought by the HCoJ. Judge-members of both of these bodies were and still are elected by the Conference of Judges (i.e. by all sitting judges).[27] However, the legislative arrangements initially allowed the total sidelining of rank-and-file judges from election and appointment processes. The 2013 legislative amendments of the new ruling party (the Georgian Dream coalition) sought to decentralize election and appointment processes, facilitating better access to leadership positions by rank-and-file judges and improving the quality of their participation. While until 2013 only the Supreme Court Chairperson could nominate judges for HCoJ and Disciplinary Collegium membership,[28] the May 2013 legislation

25 Judicial Appointments, Report adopted by the Venice Commission, CDL-AD (2007) 028, 22 June 2007, para. 29.

26 The HCoJ was established back in 1997 as an advisory body to the President. It was transformed into an independent body about a decade later.

27 Saqartvelos Kanoni "Saerto Sasamartloebis Shesakheb" [Law of Georgia "on Common Courts"], No. 2257, 4 December 2009, Art. 65(1). All translations from Georgian into English are by the author of the present work unless otherwise noted.

28 "The State of Judicial System (2012–2016)", Transparency International Georgia (2016), 6–7, available at https://www.transparency.ge/sites/default/files/post_attachments/assessment_of_the_georgian_judicial_system_2012-2016.pdf.

enabled all judges to nominate themselves or their peers.[29] While previously the Administrative Committee of the Conference, chaired by the Supreme Court Chairperson,[30] could elect judge-members of the two bodies without convening the Conference,[31] since 2013 it has been mandatory to convene the Conference when there is a vacancy to be filled.[32] The same legislation introduced voting by secret ballot to ensure that judges would not fear repercussions for voting in a particular way.[33]

In the absence of formal constraints, until 2013 judges holding leadership positions in specific courts (as chairpersons of courts or court divisions) could simultaneously occupy seats in one or more of the governing bodies. As an example, the Supreme Court Chairperson chaired the HCoJ, the Administrative Committee of the Conference of Judges and the Independent Board of the High School of Justice (HSoJ) all at the same time.[34] The new ruling party introduced a few legislative amendments to prevent such accumulations of powers and to open access to as many judges as possible. Currently, the Supreme Court Chairperson remains a member of the HCoJ, but is not automatically its chairperson.[35] The Conference of Judges elects the chairperson of its own Administrative Committee.[36] The HCoJ appoints the chairperson of the Independent Board of the HSoJ from among the Board's judge members whom the Conference of Judges elects.[37] The law now precludes the Supreme Court Chairperson from being elected or appointed to these positions.[38]

The law now precludes the chairpersons of courts, their deputies and the chairpersons of court divisions as well as HCoJ members from being elected

29 Art. 65(2) of the Law of Georgia "on Common Courts". Subsequent changes, however, precluded judges serving a probationary term from being elected, unless they had five years' experience as judges. See Art. 47(4) of the same law.

30 Art. 64(3) of the Law of Georgia "on Common Courts".

31 The HCoJ Activity Report (2013–2017) indicates that 11 Conferences were convened between 2013 and 2017, whereas there were only three held between 2008 and 2012.

32 Art. 66(1) of the Law of Georgia "on Common Courts".

33 *Ibid.*, Art. 66(2).

34 "The State of Judicial System (2012–2016)", Transparency International Georgia (2016), 6–7, available at https://www.transparency.ge/sites/default/files/post_attachments/assessment_of_the_georgian_judicial_system_2012-2016.pdf.

35 The HCoJ Chairperson is elected from among its judge-members: Art. $47(2^1)$ of the Law of Georgia "on Common Courts".

36 *Ibid.*, Art. 65(1) (a.b.).

37 *Ibid.*, Art. 66^3 (5).

38 *Ibid.*, Arts. 64 (3) and 66^3 (3).

to the Disciplinary Collegium.[39] The chairpersons of courts, their deputies and the chairpersons of court divisions also cannot be elected members of the Administrative Committee of the Conference of Judges.[40] The May 2013 legislation precluded court chairpersons from being elected to the HCoJ.[41] Furthermore, the legislation limited to three the number of judges that could hold other leadership positions (chairpersons of court divisions) at the same time as HCoJ membership.[42] However, the restriction on electing court chairpersons was removed a couple of years later,[43] in spite of concerns that this would embolden court chairpersons, reinforce internal hierarchies and make the HCoJ less representative.[44] The maximum number of judges that could be elected to the HCoJ without losing their leadership positions in specific courts increased from three to four.[45] These recent changes amount to a setback in terms of opening access up to rank-and-file judges.

Another setback in terms of facilitating meaningful engagement from all judges was the rejection of a draft amendment allowing judges to elect the chairpersons of their respective courts from among themselves. The explanatory note accompanying the abovementioned draft bill indicated that the purpose of the proposed change was to secure greater engagement of judges in administering the judicial system and to deny the HCoJ the power to

39 *Ibid.*, Art. 75^{19} (4).

40 Art. 64(3) of the Law of Georgia "on Common Courts", Amendments of 1 May 2013, Georgian Law no. 5801I-S.

41 Art. 47(4) of the Law of Georgia "on Common Courts", Amendments of 1 May 2013, Georgian Law no. 5801I-S.

42 *Ibid.* The Venice Commission acknowledged local interlocutors' concerns about concentration of powers in the hands of particular judges due to their holding several leadership positions simultaneously. However, it did not consider those concerns to be sufficiently weighty to justify the complete exclusion of sitting court presidents from the HCoJ. It insisted on as few restrictions on the right of judges to elect their representatives as possible, noting "if the Council were to represent the judiciary as a whole then in principle it seems wrong to exclude any member of the judiciary from the possibility of being elected." It also noted that "it is for the electors to take these arguments into account when deciding whether a colleague deserves to be trusted with the power that a mandate in the Council provides." The Commission did however accept that the law could limit the maximum number of chairmen that could sit in the HCoJ. See Draft Opinion of the Venice Commission on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, CDL (2013)008, 21 February 2013, paras. 46–51.

43 Art. 47(4) of the Law of Georgia "on Common Courts", Amendments of 8 February 2017, Law no. 255 II-S.

44 See Presidential Remarks on the Law, 13–16.

45 Art. 47(4) of the Law of Georgia "on Common Courts", Amendments of 8 February 2017, Law no. 255 II-S.

appoint court chairpersons who were unacceptable to judges themselves.[46] The Venice Commission approved of the proposed changes, noting that they would increase the role of individual judges in judicial self-government.[47] However, the power to appoint court chairpersons ultimately remained with the HCoJ.[48] The Parliament went only so far as to impose the obligations to conduct consultations with judges and substantiate decisions to appoint court chairpersons.[49]

As demonstrated above, the results of the reform have been mixed. A range of legislative amendments served the purpose of decentralizing election/appointment processes and engaging more judges by, inter alia, precluding judges who held leadership positions in specific courts from simultaneously occupying seats in governing bodies such as the HCoJ and the Disciplinary Collegium. However, as the reform progressed, changes that were intended to serve the same purpose (for example, allowing judges to elect the chairpersons of their respective courts) were dropped, while some of the earlier changes (for example, the legislative amendment preventing court chairpersons from becoming HCoJ members) were even reversed. The subsequent sections show that the judicial reform worked to the benefit of a close-knit group of judges. This group monopolized leadership positions by shaping legislation to their advantage where possible, and by relying on informal connections and interactions to undermine formal constraints.

3 Access to Leadership Positions in Practice – Judicial Oligarchs and Networks of Loyal Allies

In Georgia, the following leadership positions are formally open to judges: eight seats in the High Council of Justice (HCoJ);[50] three seats in the Disciplinary Collegium of Judges, the body that examines disciplinary cases submitted by the HCoJ;[51] 26 positions as court chairpersons and 11 positions as chairpersons

46 See the Explanatory Note for the initial draft of the Georgian Law no. 255 II-s (8 February 2017).

47 Venice Commission, Opinion on the Draft Law on Amendments to the Organic law on General Courts, CDL-AD (2014)031, para. 84.

48 Arts. 23(6) and 32(1) of the Law of Georgia "on Common Courts".

49 Arts. 23(6) and 32(1) of the Law of Georgia "on Common Courts", Amendment of 13 December 2019, Law no. 5569-IS.

50 15 members, including nine judges. Currently, the Supreme Court Chairperson is an *ex officio* member (previously the *ex officio* chairperson). See Art. 47(2) of the Law of Georgia "on Common Courts".

51 The Disciplinary Collegium has five members, including two non-judge members elected by the Parliament. Art. 75^{19} (1) of the Law of Georgia "on Common Courts".

of court divisions in the two Appellate Courts and one District Court;[52] and the position of the Chairperson as well as the members of the Independent Board of the High School of Justice (HSoJ). The pool of potential candidates for these various positions consists of approximately 300 judges from District Courts, two Appellate Courts and the Supreme Court.

Systematic examination of the biographies of judges in leadership positions (serving, for example, as court chairpersons and members of the HCoJ) reveals a clear pattern: every judge who is elected or appointed to such a position is affiliated with a close-knit group of judges, which I will subsequently refer to as the "dominant judicial network".[53] As explained below, the dominance of this network stems from the monopolization by its members of leadership positions, providing them with material and other benefits such as, for example, reduced caseloads as judges and enabling them to decide on the careers of their peers. Continued support of rank-and-file judges, which is essential for keeping the network members in positions of power, is secured through promising patronage to some judges and exploitation of others' fear of being refused re-appointment or being subject to disciplinary or other sanctions.

Ties among members of the dominant network often predate their entry into the judiciary. A few of these judges worked as prosecutors (some in the same division) before they moved to the judiciary in the mid to late 2000s following a massive purge by a new ruling party.[54] This occurred in a concerted manner, compared to an "airborne troops' landing."[55] They immediately took leadership positions in specific courts, and have continued to occupy such

52 This is based on a letter received from the HCoJ on 26 December 2018 № 2436/2433-03-O in response to the request for public information.

53 For more reflection on judicial networks see Bjorn Dressel, Raul Sanchez-Urribarri and Alexander Stroh, "The Informal Dimension of Judicial Politics: A Relational Perspective," 13 *Annual Review of Law and Social Science* (2017), 418–420. Here I relied on these scholars' definition of judicial networks, which is centered on professional and social ties between judges and which explains their efforts to establish and strengthen those ties by reference to material benefits or ideational unity.

54 Eight prosecutors from a single division of the prosecutor's office moved almost simultaneously to the judiciary, directly into leadership positions in specific courts. Five of these eight judges were subsequently elected to the HCoJ. At least seven others from various divisions of the Prosecutor's Office followed the same path and were also appointed as court chairpersons.

55 A former Appellate Court judge (interview № 15, 12 December 2018) used this term to describe the concerted move of people from the Prosecutor's Office to leadership positions in the judiciary; A similar point was raised by a former judge and court chairperson (interview № 19, 4 January 2019): "Many from this group worked at the Prosecutor's office...then this group moved to the judiciary and became court chairpersons. This group governs the judicial system today".

positions ever since. Subsequent members brought into the network typically included former judicial clerks whom the members of the dominant network knew well. Certain members of the network have familial or other social ties, in addition to their professional ones.[56] The closeness of these ties makes the network stronger, facilitating concerted action by its members.

This close-knit group has created a pool of candidates to be utilized whenever there is a vacancy. Affiliation with this group appears to be a necessary precondition for being elected or appointed to governing bodies. Instead of facilitating the participation of as many judges as possible, this network has kept its members in leadership positions for as long as possible,[57] and where necessary has rotated them. Between 2004 and 2012, in the absence of legal constraints, judges holding leadership positions in specific courts occupied seats in the HCoJ and the Disciplinary Collegium at the same time. Notwithstanding the restrictions introduced by the 2013 legislation, the chairpersons of courts and court divisions retain four seats in the HCoJ. The remaining four seats that should be accessible to rank-and-file judges are normally occupied by former chairpersons or rank-and-file judges closely connected to the network.

The tendency to elect or appoint only judges affiliated with this network indicates that behind a legal façade that supposedly opens access up to all judges and embodies a bottom-up approach to governance, vacant leadership positions are still being filled through a highly centralized and controlled process that excludes outsiders, i.e. judges that are not affiliated with the network. Even if the law theoretically allows all judges to compete for seats in governing bodies, in practice the number of candidates is typically the same as the number of vacant positions.[58] These numbers are indicative of judges' lack of

56 The former HCoJ Secretary and later chairperson of the judicial association, Levan Murusidze, reflected on his relationship with other judges, emphasizing that he "knows their families" and "their hardships and successes"... He "tries to help them, if needed" and "regards them as family members". See "Levan Murusidze: Mimachnia, rom mosamartleebi chemi ojakhis tsevrebi arian" ["Levan Murusidze: I see Judges as My family"], *Liberali* (28 December 2018), available at http://liberali.ge/news/view/42240/levan-murusidze-mimachnia-rom -mosamartleebi-chemi-ojakhis-tsevrebi-arian.

57 Many members of the dominant network have served as court chairpersons for lengthy periods, ten years or even more.

58 For more information see the table in section 4.1 of this article. Foreign diplomats have recently expressed concern regarding the lack of competitiveness of the elections to the HCoJ. See "Remarks by EU Ambassador Carl Hartzell following the Appointment of Two Members of the High Council of Justice", 2 November 2021, available at https://eeas.europa.eu/delegations/georgia/106613/remarks- eu-ambassador-carl-hartzell-following- appointment-two-members-high-council-justice_en. See also "U.S. Embassy Statement on Conference of Judges", 6 November 2021, available at https://ge.usembassy.gov/u-s-embassy-statement-on-conference-of-judges-2/.

interest in seeking leadership positions, which may very well be due to the belief that competition with the dominant network's preferred candidates is futile.[59] While, as shown in Table 1 below, rank-and-file judges were initially enthusiastic about the prospect of being elected to governing bodies and as a result the number of candidates was high, the repeated success of candidates backed by the dominant network must have led to the evaporation of that initial enthusiasm. The relative irrelevance of candidates' credentials and the decisive role of connections with the dominant network can also be inferred from the way the elections are organized. The process is not tailored to help judges assess candidates' suitability. The law calls for publicizing the agenda seven days prior to the meeting,[60] but the process is often rushed and proper advance notice is not always given.[61] The law does not require judges to name candidates or candidates to submit their programs prior to the actual conference, so that judges have enough time and information properly to assess candidates' suitability. Nominations are made at the Conference shortly before voting, without candidates presenting their manifestos and answering questions from their peers.[62]

It is widely believed that certain members of the network are more influential than others, in the sense that they are the ones who define the agenda and shape decision-making. Such judges may be court chairpersons, but their influence goes beyond those specific courts. They may sit in the governing bodies, such as the HCoJ, or have close allies installed in these bodies to implement their wishes.[63] This type of influence justifies referring to these judges as judicial oligarchs. For an external observer, various factors can be taken as indicators of the influential position of a certain judge: career trajectory (for

59 Scholars have similarly explained judicial passivity in other post-Soviet jurisdictions. See, for example, Popova, *op.cit.* note 2, 135–136 (pointing out that in the Russian Federation and Ukraine judges are reluctant to compete for seats in the bodies of judicial governance since candidates backed by court chairpersons win as a rule).

60 Art. 66(1) of the Law of Georgia "on Common Courts".

61 The Conferences of Judges at which the HCoJ members are elected are often held in a rush, on the same day as or the day before events such as elections. As an example, a Conference was held on 30 October 2020, one day prior to parliamentary elections. See "US Embassy Statement on the Conference of Judges", 30 October 2020, available at https://ge.usembassy.gov/u-s-embassy-statement-on-conference-of-judges/. A year later, a conference was organised on 31 October 2021, a day before municipal elections. See the statements of the EU Ambassador and the US Embassy in this connection in note 58.

62 See Monitoring Report no 9 for 2020, prepared by the Georgian Young Lawyers' Association, Tbilisi 2021, 10.

63 As a former court chairperson, once affiliated with the dominant group, claimed: "The Council is governed by the people that do not sit on the Council. The Council's members do not make decisions themselves." Interview № 19, 4 January 2019.

TABLE 1 Election of Judge-Members of the Governing Bodies[74]

Conference date & number of judges attending	Type/number of vacancies	Number of nominees
9/16.06.2013 222/223 judges	3 HCoJ seats for chairpersons 4 HCoJ seats for rank-and-file judges	4 (1st round) 3 (2nd round) 20 (1st round) 9 (2nd round)
11.07.2015 264 judges	1 HCoJ	2
20.02.2016 227 judges	1 HCoJ	1
08.04.2017 205 judges	2 HCoJ	2
24.06.2017 271 judges	4 HCoJ	7
24.03.2018 276 judges	1 HCoJ	2
14. 03. 2020	1 HCoJ	1
30.10.2020 260 judges	2 HCoJ	2
26.05.2021 291 judges	4 HCoJ	4
31.10.2021 266 judges	2 HCoJ[a]	2

[a] Two seats became vacant in the HCoJ after the premature resignations of two female judge members, one of whom had been elected to the HCoJ only a year earlier. The two judges did not give reasons for their resignations.

example, rapid promotions), length of service in leadership positions, a record of holding several leadership positions simultaneously, a large number of judges in leadership positions with whom that judge has personal and/or professional connections (for example, a prior superior-subordinate relationship), personal connections with politicians, and instances in which the legislation has been crafted to fit their specific interests.

The strength of the dominant network lies in the concerted action of its members. One key aspect of the power of this network is its ability to influence decision-making in collective bodies such as judicial councils. By monopolizing access to governing bodies and other formal positions of power (reserving seats for judges willing to act and vote in the interests of the network, while excluding outsiders[64]) and by carefully distributing the roles and tasks within the group,[65] the network can maintain control over the system. Judges who are members of this network have to follow internal rules. However, in exchange for loyalty, they are given leadership roles, with all the attendant benefits and a limited workload as judges.

4 A Cautionary Tale of Failed Judicial Reform and the Reconsolidation of Judicial Oligarchy

4.1 *The Attempt to Dismantle Judicial Oligarchy through Opening Access to the Seats in Governing Bodies*

The complete overhaul of the Georgian judiciary in the mid-2000s ought to have helped to eliminate the well-entrenched culture of subordination to judicial leadership. However, close examination of subsequent developments, both in law and in practice, reveals that judges who occupied leadership positions under the new institutional arrangements cultivated a habit of judicial obedience to cement themselves into those positions. Maintaining a strong hierarchy served the interests of the political elite too; it meant it was easily able to influence the outcomes of cases at all levels of the judiciary by installing loyal judges in leadership positions.[66] Since rank-and-file judges did not

64 As noted by a non-judge member of the HCoJ (interview № 1, 31 May 2018): "This clan or group will decide who will join them.... And this very much matters for them, because their being a clan and their future depends on it."

65 A former court chairperson (interview № 19, 4 January 2019) noted: "There is a clan code and everything is regulated. It is an organized group. The clan members agree what they will say, divide the text. One will be assigned the role to be rude and offensive, another one will be asked to act constructively... the roles are agreed."

66 For empirical studies on informal political interference see Mariana Llanos, Cordula Tibi Weber, Charlotte Heyl & Alexander Stroh, *op.cit.* note 21; Popova, *op.cit.* note 2, 128–131; Alena Ledeneva, "Telephone Justice in Russia," 24(4) *Post-Soviet Affairs* (2008), 324–350.

have a say,[67] passive observance on their part became the norm. This experience justifies skepticism about the possibility of overcoming well-entrenched patterns of interaction through legislative change, especially in the absence of some powerful incentives.

The legislative package of May 2013 introduced by the new ruling coalition[68] was supposed to facilitate the meaningful engagement of all judges in governing the judiciary. Following the entry into force of those laws, more judges were expected to campaign and compete as candidates, or at least to scrutinize the candidates and vote. These reforms did indeed change the informal dynamics within the judiciary, prompting rank-and-file judges to become more vocal and demand meaningful involvement in governing the judiciary.[69] One group of judges established an association called "the Unity of Judges" and competed in the elections against the candidates of the dominant network which up to that point had monopolized leadership positions.[70] As Table 1 shows, the elections held on 9 June 2013 were marked by the unprecedented engagement of judges, with 24 candidates, including 20 candidates competing for the four seats allocated to rank-and-file judges.[71] They included candidates from the newly established association as well as several independent ones. In addition to seeking to make use of the new formal prerogatives, those judges sought to lay the foundations for new informal rules of behavior regarding

67 For changes in relevant legal rules see Section 3 of this article.

68 The legislative package allowed judges to nominate themselves and their peers in the elections for judge members of the HCoJ, precluded court presidents from competing for the seats in the HCoJ and restricted the number of judges who could hold other leadership positions at the same time as having HCoJ membership.

69 Two of the Supreme Court Judges issued a public statement in advance of the Conference, highlighting the "minimum participation of judges in administering the judiciary". They also expressed concern that the legislation governing elections to the Council still worked to the advantage of judges holding leadership posts and created an uncompetitive environment. "Uzenaesi sasamartlos ori mosamartlis gancxadeba mosamartleta konferenciis taobaze" ["The Statement of Two Supreme Court Judges about the Conference of Judges"], *Netgazeti* (3 June 2013), available at http://netgazeti.ge/opinion/22424/; "Politikuri shetanxmeba – Utanabro saarchevno garemo mosamartleebistvis ["Political Agreement – Unequal Election Environment for Judges"], *Netgazeti* (4 June 2013), available at http://netgazeti.ge/news/22476/.

70 A former appellate judge, a candidate for HCoJ membership in those elections, recalls (interview № 15, 12 December 2018): "We started campaigning, organizing meetings in the regions.... Our plan was to strengthen individual judges...We did not plan to kick someone out or something like that".

71 To be more precise, this category included judges who did not hold these leadership positions at the time (and perhaps also those willing to give up such positions, if elected). The legislation did not exclude former court chairpersons (i.e. members of the dominant network) from being able to compete for those seats.

participation in the process leading up to the voting, which remained unregulated. They also sought to challenge the culture of passive observance which judicial leadership had been instilling in rank-and-file judges for years. They encouraged other judges to become actively involved, to demand that candidates present their respective manifestos, and to pose questions during the lead-up to the voting in order to form opinions about the candidates.[72] While their initiatives garnered some approval, they were not widely supported.[73] As a result, these attempts to replace the existing behavioral patterns with ones that would be consistent with the spirit of legislative reform failed. Ultimately, the candidates affiliated with the dominant network won the HCoJ seats.

As Table 1 shows, in the later elections the number of candidates plummeted. The successful candidates were those connected with the dominant network of judges. Neither of the judges who competed with them in the 9 June 2013 elections nominated themselves in any of the subsequent elections. There was one more attempt at internal mobilization against the candidate put forward by the dominant network. In 2015, in what one former judge calls "the last competitive elections",[75] the candidate of the dominant network defeated his competitor. In the subsequent two elections to the HCoJ (2016 and 2017), there were as many candidates as there were vacancies. Ultimately, judges had no choice but to vote for the candidates put forward by the dominant group. Such candidates were elected to the HCoJ by judges without any discussion of their manifestos.[76] Not surprisingly, the rank-and-file judges interviewed

72 A few judges claimed that it was their legitimate right to listen to the candidates' programs and raise questions that would then be answered. "Iusticiis umaglesi sabchos archevnebze khmis micema daistyo" ["The High Council of Justice Elections Started"], *Netgazeti* (9 June 2016), available at http://netgazeti.ge/news/22608/.

73 The initiative allowing judges to pose additional questions was supported by only 64 judges. The Chairman of the Supreme Court declared that he could not require candidates to answer questions. "Iusticiis umaglesi sabchos archevnebze khmis micema daistyo" ["The High Council of Justice Elections Started"], *Netgazeti* (9 June 2016), available at http://netgazeti.ge/news/22608/.

74 This table was prepared on the basis of the information provided by the Administrative Committee of the Conference of Judges: Letter of 5 December 2018, No. AKS – 10–18. Information about conferences held in 2020 and 2021 was obtained from the HCoJ website as well as Monitoring Report no 9 for 2020 prepared by the Georgian Young Lawyers' Association, Tbilisi, 2021, 9–10.

75 A former Appellate Court judge (a sitting judge at the time of the elections) (interview № 15, 12 December 2018).

76 Some NGOs have claimed that at all the conferences conducted since 2013 decisions were made without any discussion, with an absolute majority of votes, which they saw as an indication that "the judicial corps is slowly becoming closed and monolithic, due to unhealthy/inappropriate influences"; "Corruption Risks in the Georgian

for this study failed to identify precisely what they rely upon when voting for candidates and displayed a general indifference towards this process.[77] One non-judge member of the HCoJ expressed concern about "297 judges blindly picking" the HCoJ members without listening to and discussing the candidates' programs.[78] An NGO representative raised the same point: "How is it possible that 200 people elect [their representatives in the Council] without raising a single question?"[79] It seems that in response to the criticism that the elections were not competitive the dominant network of judges put forward extra candidates on two occasions to create the illusion of competition, with those candidates ultimately getting only a symbolic number of votes, despite being generally well-connected.[80] However, as shown in Table 1, the network subsequently stopped making such efforts. As a result, its preferred candidates ran unopposed in all elections held in 2020 and 2021. This means that by 2016 the dominant network of judges had overcome the internal challenges triggered by the change of ruling party in late 2012 and the May 2013 legislation. The judicial oligarchy had reconsolidated, in the sense that the dominance of judicial oligarchs was no longer questioned or contested, either internally by judges or externally by the ruling party. There is no substantial difference between the pre-2013 and the post-2016 behavior of judges in terms of seeking access to leadership positions. The number of nominations has plummeted. Informal dynamics have rendered useless the legal entitlement to nominate candidates and compete in elections. Even though the law theoretically enables all judges to compete, candidates' success depends, in practice, not on the quality of their ideas or their skills, but on their connection with the dominant network of judges. This discourages judges from nominating themselves.

The case study on Georgia showcases the difficulties in overcoming informal patterns of interaction through formal change, a common concern for

Judiciary", Transparency International Georgia, Tbilisi, 2018, 34, available at https://www.transparency.ge/sites/default/files/corruption-risks-eng_0.pdf. See also Khatia Jamalashvili, "Anna Dolidze varaudobs, rom mosamartleta konferenciaze iusticiis sabchos akhal tsevrad Giorgi Tkavadze dasakheldeba" ["Anna Dolidze Believes that Giorgi Tkavadze Will Be Named as a New Member of the HCoJ at the Conference of Judges"], *Channel One* (23 March 2018), available at https://1tv.ge/news/ana-dolidze-varaudobs-rom-mosamartleta- konferenciaze-iusticiis-sabchos-akhal-wevrad-khval-giorgi-tyavadze-dasakheldeba/. Dolidze, a non-judge member of the HCoJ, declared: "The decisions will be made unilaterally, there will be one candidate and that candidate will be elected. This means that we did not embrace judicial self-government and independence. Everything is decided in a centralized manner, by the clan and not democratically".

77 A sitting District Court judge (interview № 17, 21 December 2018).

78 A non-judge member of the HCoJ (interview № 1, 31 May 2018).

79 An NGO representative (interview № 2, 28 May 2018).

80 A former Appellate Court judge (interview № 15, 12 December 2018).

post-communist countries, as earlier scholarship indicates.[81] Its findings signal that formal change can trigger behavioral change, as attested to by the formation of new judicial networks and the increased competitiveness of elections between 2013 and 2015. However, they also warn that pre-existing behavioral patterns can compete with and, ultimately, undermine or distort new formal rules.

4.2 *A (Failed) Attempt to Dismantle Judicial Oligarchy through Opening Access to the Positions of Court Chairpersons*

As indicated above, the HCoJ appoints court chairpersons. Having taken control over the HCoJ (as shown in Section 4.1), the dominant network is able to keep its members as court chairpersons for as long as they advance its interests;[82] if they no longer do so, the network removes them.[83] In the absence of formal criteria defined by legislation or the HCoJ regulations, informal considerations, such as loyalty to the network and observance of the rules it imposes upon its members, emerge as relevant.[84]

Conveniently, the legislation sets a low decision-making threshold for appointing court chairpersons (a simple majority).[85] Hence, the votes of judge-members (who occupy nine of the 15 seats) are enough to secure election. Non-judge members cannot block such appointments. It does not make sense for them to nominate an alternative candidate either. Consequently, the

81 See for example, Maria Popova, "Can a Leopard Change its Spots? Strategic Behavior Versus Professional Role Conception during Ukraine's 2014 Court Chair Elections," 42 *Law & Policy* (2020), 365–381.

82 An NGO representative (interview № 4, 1 June 2018), noted: "This group controls all administrative positions. Most court chairpersons are connected to this group or are appointed by them". A sitting District Court Judge (interview № 11, 7 June 2018) noted: "This is done to manage the situation with the help of the court chairpersons.... They appoint people that are their team members, anyone else is excluded".

83 In 2016, the HCoJ dismissed the chairperson of one of the largest courts soon after the latter publicly criticized its activities. The NGO coalition argued that court chairpersons could be removed prematurely only through disciplinary proceedings and that this dismissal clearly violated the law, showing that the HCoJ resorted to repression with regard to judges who did not follow the rules it imposed. For the coalition statement see http://www.coalition.ge/index.php?article_id=74&clang=0. In 2017, NGOs claimed that the HCoJ merged two divisions only to remove a particular judge from his position as a chairman of one of those divisions. On this latter removal see a critical statement by an NGO coalition (26 July 2017), available at http://coalition.ge/index.php?article_id=162&clang=0.

84 A former Appellate Court judge expressed an opinion that friendships are decisive in appointing court chairpersons: "The Judicial System: Past Reforms and Future Perspectives", Report prepared by the NGO Coalition, May 2017, 23, available at http://coalition.ge/files/the_judicial_system.pdf.

85 Arts. 23(6), 32(1) and 50 (2) of the Law of Georgia "on Common Courts."

process is uncompetitive, with one candidate (normally a network member) being named and ultimately appointed.[86] There have been instances where judges were moved from a different court or a different chamber only to be appointed as chairpersons.[87] The HCoJ has managed to keep judges as court chairpersons for longer than permitted by law (i.e. five years) by delegating chairpersons' responsibilities temporarily to those judges, instead of appointing them. In the absence of time limits on such delegation, those judges can effectively remain in those positions indefinitely.[88] While a draft law envisaged limiting such delegation to three months, this provision disappeared during parliamentary debates.[89]

The draft amendment allowing judges to elect chairpersons from among themselves by secret ballot and for limited terms would have decentralized the process, giving access to judges unaffiliated with the dominant network and making it difficult for one group of judges to monopolize all positions of power.[90] However, this provision was removed from the draft law, reportedly after judges voiced their objections at their meeting with the Minister of Justice.[91] The intense lobbying against the amendment on the part of the judiciary's leadership[92] is indicative of the power of court chairpersons to control the behavior of judges. This was implicitly acknowledged by a former chairperson and HCoJ member, who noted: "You only need the court chairpersons if you want to control the courts from the inside.... If you do not want to do that, it does not matter who the court chairperson will be".[93]

Legislative changes dated 13 December 2019 kept the HCoJ in charge of appointing court chairpersons, but imposed on it an obligation to consult judges of the respective court and substantiate decisions.[94] However, these legislative changes did not trigger the desired changes in judicial behavior. In

86 Monitoring Report no 6, prepared by the Georgian Young Lawyers' Association and Transparency International (covering 2017), Tbilisi, 2018, 52.

87 *Ibid.*, 57.

88 "The Judicial System: Past Reforms and Future Perspectives", Report prepared by the NGO Coalition, May 2017, 86, available at http://coalition.ge/files/the_judicial_system.pdf.

89 *Ibid.*

90 One cannot rule out that candidates of the dominant network would have been elected as chairpersons even under the new arrangement, as was the case in Ukraine: Popova, *op.cit.* note 4.

91 Monitoring Report no 5, prepared by the Georgian Young Lawyers' Association and Transparency International (covering 2016), Tbilisi, 2017, 33–34.

92 An (now former) MP who served on the Parliament's Legal Affairs Committee confirmed the lobbying efforts (interview № 14, 28 June 2018).

93 A former court chairperson (interview № 5, 1 June 2018).

94 See Arts. 23(6) and 32(1) of the Law of Georgia "on Common Courts", Amendment of 13 December 2019, Law no. 5569-IS.

particular, they did not persuade judges to apply for positions as court chairpersons or provide nuanced opinions on candidates to the HCoJ. While vacant positions are open to all eligible judges, very few apply. As a rule, only one candidate is under consideration by the HCoJ. This may be explained by judges' reluctance to compete with the dominant network's preferred candidates. As regards judges' engagement in consultations with the HCoJ, it emerges that judges give positive assessments to candidates.[95] Overall, it is fair to say that the reform did not impose any meaningful constraints on the HCoJ[96] and contribute to dismantling the judicial oligarchy.

Based on the above statement, it is possible to conclude that the dominant network closed off other judges' access to court chairpersons' positions by safeguarding the power of the HCoJ to appoint court chairpersons and by taking advantage of loopholes in the legislation governing the exercise of that power.

5 Explaining Backsliding into Judicial Oligarchy: Lessons from Georgia

Careful examination of both the law and practice shows that Georgian judicial reform largely failed to dismantle the judicial oligarchy and emancipate rank-and-file judges. The failure happened at the levels of both legislative content and implementation. This case study thus reveals a puzzle: why is judicial oligarchy just as strong in Georgia as it was before the implementation of reforms meant to dismantle it? Fieldwork has revealed that judicial oligarchs benefit from the ruling elite's lukewarm commitment to the reform (section 5.1) and the strength of the network of loyal judges (section 5.2).

5.1 *A Ruling Elite that is not Genuinely Committed to Reform*

The 2013 legislation introduced by the Georgian Dream coalition after it won the parliamentary elections in late 2012 constituted a promising start.[97] The

95 The decisions of the HCoJ (adopted since the entry into force of the abovementioned legislative amendments) have indicated in rather broad terms that judges approved of a candidate, acknowledging his/her qualifications and managerial skills. See, for example, Decrees Nos. 1/247 and 1/248 dated 29 December 2020, available at www.hcoj.gov.ge.

96 The legislation does not set out the criteria against which candidates for positions of court chairpersons are to be assessed, leaving the HCoJ with considerable discretion. As a result, in practice, the HCoJ's reasoning is mostly superficial and insufficiently nuanced.

97 The ruling party was still criticized for a lack of clear vision. See Ana Natsvlishvili, "Judicial Reform in Georgia and Association Agreement", Open Society Georgia Foundation, Policy Document, July 2016, Tbilisi, available at https://osgf.ge/en/publication/judicial-reform-in-georgia-and-the-association- agreement-old-wine-in-a-new-barrel-what-has-changed/.

coalition's initial hostility towards the incumbent judicial leadership and its declared commitment to emancipating rank-and-file judges, fueled by public demand for reform and the need to meet the expectations of international partners,[98] shaped that legislation. However, once the candidates of the dominant network of judges had won the June 2013 elections and occupied all the HCoJ seats allocated to judges, the network acquired a good bargaining position vis-à-vis the new ruling elite. Its position was further strengthened as judges started ruling against the interests of the new government in certain criminal cases involving former government officials.[99] Consequently, the parliamentary majority and government officials changed their rhetoric and started cooperating with the network.[100] This cooperation manifested itself in greater convergence between the judicial faction of the HCoJ and its parliament-appointed non-judge members,[101] which allowed the dominant network

98 For example, the Association agenda between the EU and Georgia required the creation of a judicial reform strategy. However, the expectations were formulated broadly, leaving considerable leeway to national authorities to shape specific arrangements.

99 Nona Mchedlishvili, "Mosamartlem Bacho Akhalaia meore saqmeshi gaamartla" ["The Court Acquitted Bacho Akhalaia for the Second Case"], *Radio Liberty* (31 October 2013), available at https://www.radiotavisupleba.ge/a/bacho-akhalaia-gaamartles/25153778.html.

100 In July 2015, Prime Minister Irakli Gharibashvili held a closed meeting with the HCoJ Secretary, Levan Murusidze, to hear his views about judicial reform. "Corruption Risks in the Georgian Judiciary", Transparency International Georgia, Tbilisi, 2018, 34, available at https://www.transparency.ge/sites/default/files/corruption-risks-eng_0.pdf. On 19 October 2015, the Minister of Justice, Tea Tsulukiani, met 160 judges led by the HCoJ Secretary, Levan Murusidze. After the meeting, the Minister announced that in light of the judges' objections, the legislative process would be stopped and certain proposed changes would be reviewed: "The Judicial System: Past Reforms and Future Perspectives", Report prepared by the NGO Coalition, May 2017, 13, available at http://coalition.ge/files/the_judicial_system.pdf.

101 In 2015, the re-appointment of the former HCoJ Secretary, Levan Murusidze, was made possible thanks to the votes of the three parliament-appointed non-judge members. In a statement published at www.hcoj.gov.ge on 25 December 2015, the non-judge members (Gotsiridze, Sopromadze and Tordia) admitted that in assessing Murusidze they were guided by considerations other than those envisaged by law. In defending their decision, they cited the need to avoid confrontation with the judicial faction of the HCoJ, the blocking of appointments and paralysis of judicial processes as likely consequences of their refusal to vote for Murusidze. The statement is available at http://hcoj.gov.ge/ka/%E1%83%98%E1%83%A3%E1%83%A1%E1%83%A2%E1%83%98%E1%83%AA%E1%83%98%E1%83%98%E1%83%A1-%E1%83%A3%E1%83%9B%E1%83%90%E1%83%A6%E1%83%9A%E1%83%94%E1%83%A1%E1%83%98-%E1%83%A1%E1%83%90%E1%83%91%E1%83%AD%E1%83%9D%E1%83%A1-%E1%83%90%E1%83%A0%E1%83%90%E1%83%9B%E1%83%9D%E1%83%A1%E1%83%90%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%9A%E1%83%94.html (in Georgian).

of judges to have its leaders re-appointed for new terms notwithstanding the civil society's protests.[102] In April 2017, the parliament even picked the candidate closely affiliated with the dominant network as a non-judge member of the HCoJ.[103] Even though the four-year terms of non-judge members expired in June 2021, the Parliament delayed the election of their successors without any explanation, thereby enabling the judicial faction of the HCoJ to make key decisions without any oversight or objection.[104]

The progress of the reform since 2015 leaves the impression that the political elite deliberately strengthened the judicial oligarchy in exchange for guaranteed outcomes in politically sensitive cases.[105] The changes that could have

102 Levan Murusidze was accused of abusing his position as the HCoJ secretary and violating conflict of interest laws in the process leading up to his appointment to a three-year probationary term in Tbilisi Appellate Court, after the expiry of his term as a Supreme Court judge in 2015. See "The Coalition for an Independent and Transparent Justice Calls for Suspension of the Ongoing Judicial Selection/Appointment Process", *Social Justice Centre website* (24 December 2015), available at https://socialjustice.org.ge/en/products/koalitsia-damoukidebeli-da- gamchvirvale-martlmsajulebistvis-moitkhovs-mosamartleta-shercheva-danishvnis- mimdinare-protsesis-shecherebas. Georgian NGOs saw Murusidze's appointment for life by the HCoJ on 27 December 2018 as a demonstration of power by the 'clan' ('clan' is the label that civil society uses to describe the group of influential judges). See Monitoring Report no 7, prepared by the Georgian Young Lawyers' Association and Transparency International Georgia, 2019, available at http://ewmi-prolog.org/images/files/3526HCOJreport7.eng.pdf. This appointment prompted a major public outcry and made it to the US State Department Country Report for 2019, available at https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/georgia/. NGOs demanded the resignation of the HCoJ's members, arguing that appointing judges implicated in politically motivated decisions such as Murusidze undermines public trust in the judiciary. See "High Council of Justice members who supported decisions based on clan principles must resign", 29 December 2018, available at https://transparency.ge/en/post/high-council-justice-members-who- supported-decisions-based-clan-principles-must-resign.

103 In April 2019, Studio Monitor journalists found that a non-judge member of the HCoJ, whom the Parliament had elected in 2017 (out of 33 candidates competing for four seats) was a close friend of a judge member of the HCoJ. See "Iusticiis sabchos tsevris danishvnis kanoniereba davis sagnad iqca" ["The Legality of Appointing the HCoJ Member has been Contested"], *Radio Liberty* (24 April 2019), available at https://www.radiotavisupleba.ge/a/29901288.html.

104 The NGO coalition criticized Georgian Dream for the unjustified delay in appointing non-judge members of the HCoJ and highlighted the implications of such delay for confidence in the justice system. See Coalition statement of 29 October 2021, available at http://coalition.ge/index.php?article_id=260&clang=0#_ftn4.

105 A District Court judge (interview № 11, 7 June 2018) indicated: "They [the ruling party] wanted to reform the system, but then they thought: 'Why reform? These people are ready to serve us.' They struck a deal and it was all over." An NGO representative (interview № 2, 28 May 2018) said: "Another problem is that very specific people should

dismantled the existing hierarchies and emancipated rank-and-file judges were reversed,[106] blocked[107] or delayed.[108] The content and pace of the reform process worked to the advantage of the dominant network, enabling it to monopolize all positions of power, maintain a firm grip on the rank-and-file judges and use levers of influence to shape the outcomes of cases, if necessary. Allowing a small group of judges to capture formal positions of power and corresponding mechanisms of control made sense for the ruling elite too, assuming that it sought to reduce unpredictability and guarantee favorable outcomes. Judicial independence and impartiality are still routinely questioned in politically sensitive cases, including those involving opposition politicians and media.[109] Such cases signal that the move towards greater judicial self-government does not eliminate external (political) and internal pressures on individual judges.

The political costs of the failure to reform do not seem to have been particularly high for the ruling elite for at least three reasons: first, the problem lies, to a great extent, in informal interactions which are conveniently hidden behind the façade of formal procedures and are relatively difficult to trace; the improvement of formal procedures creates a false impression of progress in terms of emancipating and empowering judges. Secondly, it appears that

have been dismissed from the system, but the ruling party did everything to maximize their power because they needed those people there, it seems". A non-judge member of the HCoJ (interview № 8, 5 June 2018) noted: "I think there is a deal between the judicial leaders and the Georgian Dream.... They told these judges: 'you are in charge of the system.' This is part of the deal they have with the ruling party that the system needs to work smoothly. They have to secure this. If there are disruptions, they will be told, 'We appointed you here to take care of things...you take care of the system and we will not touch you. In exchange, sometimes you have to do us favors on certain topics and this system has to work smoothly'".

106 The May 2013 legislation precluded court chairpersons from becoming HCoJ members and limited the number of chairpersons of chambers or collegia in the HCoJ to three. See Art. 47(4) of the Law of Georgia "on Common Courts", 1 May 2013 Amendments, Law no. 5801I-S. This restriction on the election of court chairpersons to the HCoJ was later revoked; the number of judges who can hold administrative positions in courts at the same time as HCoJ membership was increased from three to four. See Art. 47 (4) of the Law of Georgia "on Common Courts", 8 February 2017 Amendments, Georgian Law no. 255 II-S.

107 The HCoJ retained the power to appoint court chairpersons. Arts. 23(6) and 32(1) of the Law "on Common Courts".

108 The two-year delay in adopting legislative changes that were to improve the procedure for appointing judges of the first instance and appellate courts worked to the advantage of the HCoJ and the dominant network, as they could in the meantime appoint judges through flawed procedures.

109 "Corruption Risks in the Georgian Judiciary", Transparency International Georgia, Tbilisi, 2018, 34, available at https://www.transparency.ge/sites/default/files/corruption-risks-eng_0.pdf.

in Georgia and generally in post-communist countries the need to eliminate political influence over judiciaries was made a priority, and this was mainly done by transferring decision-making powers from politicians to judges; the dangers of judicial empowerment were initially underestimated, even by expert bodies advising on reforms.[110] Institutional changes served as a convenient façade, while in practice they empowered only some judges, reinforced internal hierarchies and left open channels for pressuring individual judges.[111] Thirdly, the reform process is long-term and incremental; this gives politicians room for maneuver and manipulation in the sense that within one legislative package they can include the changes demanded by the civil society as well as those that benefit judicial oligarchs and their associates. Where they have to introduce changes that would constrain influential judges, they may delay those changes for as long as possible. This helps to demonstrate some progress, but at the same time allows judicial oligarchs to be appeased.

5.2 *The Strength of the Dominant Network of Judges that the Judicial Oligarchs Rely on*

The dominant network of judges, a close-knit group with a hierarchical structure, a clear division of roles among its members and the ability to coordinate effectively had advantages over competing factions of judges, which

110 Expert bodies composed exclusively or predominantly of judges, such as the Consultative Council of European Judges (CCJE) and the Venice Commission, promoted putting judge-dominated judicial councils in charge of decision-making on judicial careers. See Opinion no.10 of the CCJE, 21–23 November 2007, paras 15–20; Venice Commission Report on Judicial Appointments, CDL-AD (2007) 028, 22 June 2007, para. 29. Scholars have criticized their prescriptions, arguing that they did not take into account the risks of judicial empowerment, particularly judicial corporatism or self-protection. See Cristina E. Parau, "The Drive for Judicial Supremacy", in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Dordrecht: Springer, 2012), 619–621; Anja Seibert-Fohr, "European Standards for the Rule of Law and Independent Courts," 20 *Journal für Rechtspolitik* (2012), 161–169; Michal Bobek and David Kosař, "Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe," 15 *German Law Journal* (2014), 1257–1292; Zoltan Fleck, "A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts", in A. Badó (ed.), *Fair Trial and Judicial Independence: Hungarian Perspectives* (Dordrecht: Springer, 2014), 3–24; James Moliterno *et al.*, "Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants," 42 *Fordham International Law Journal* (2018), 481–552.

111 The Venice Commission's advice also underestimated the danger of certain judges pressuring others to stay in leadership and counted on the guarantees, such those requiring that voting in the elections to fill the seats in the HCoJ be by secret ballot. See Draft Opinion of the Venice Commission on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia, CDL (2013)008, paras. 46–51.

were newly formed, non-hierarchical and not nearly as well connected as the dominant network. Even though the candidates put up by the newly formed association, the Unity of Judges, garnered some support in the June 2013 elections, they were not able to gather a critical mass of supporters. The vulnerability of judges in the changing political context worked to the advantage of the dominant network. Judges feared repression by the new ruling coalition,[112] especially after the Minister of Justice advertised the establishment of a government commission to study judges' errors.[113] The dominant network capitalized on this fear and promised judges protection in exchange for votes.[114] Consequently, the candidates supported by the dominant network succeeded in elections and took over the HCoJ. This success gave the dominant network a better bargaining position vis-a-vis the new ruling coalition. The resulting change in the political rhetoric in 2015 and the ways in which the Parliament blocked or delayed further changes to the advantage of the dominant network of judges (see section 5.1) must have signaled to the rest of the judiciary that resistance to the judicial oligarchy no longer made sense.[115] It explains the lack of competition at subsequent elections, with the candidates of the dominant network running essentially unopposed (see section 4.1).

Control over the HCoJ enabled the dominant network to force out those few judges who openly challenged its position by refusing to appoint them for new terms[116] or by exerting informal pressure to force them to leave prematurely. This must have dissuaded other judges from disagreeing with the leadership.[117]

112 Interview № 19 (with a former court chairperson), 4 January 2019; Interview № 15 (with a former Appellate Court Judge), 12 December 2018.

113 "Tsulukiani: Usamartlo gadatsyvetilebebs komisia gadakhedavs" ["Tsulukiani: Unfair Judicial Decisions will be Reviewed by the Commission"], *Netgazeti* (30 January 2013), available at http://netgazeti.ge/news/19070/. This initiative has since been revoked.

114 A now former court chairperson (interview № 19, 4 January 2019) (a sitting judge until 2016) explained the perspective of judges in positions of power: "The only way to be untouchable was to stay in power, and in order to stay in power, they had to convince judges that their success would guarantee these judges protection". As regards explanations for the behavior of rank-and-file judges, voting in favor of the dominant network was widely seen as a pragmatic calculation on their part: an expert consultant on justice issues (interview № 6, 5 June 2018); a District Court judge (interview № 11, 7 June 2018); an NGO representative (interview №4, 1 June 2018); a former MP (interview № 14, 28 June 2018). Another explanation for the behavior of rank-and-file judges is that they were used to being passive observers and adhered to the same behavioral pattern out of habit: an NGO representative (interview № 2, 28 May 2018).

115 One of the respondents (an NGO representative) made this observation (interview № 4, 5 June 2018).

116 One of the leaders of the Unity of Judges was refused reappointment.

117 A former court chairperson (interview № 19, 4 January 2019) noted: "If you resist them, you will not get a job, not only in the judicial system, but anywhere else, especially in

It is telling that by 2016 judges had started distancing themselves from the Unity of Judges, first by avoiding the events the association organized,[118] and then by resigning altogether. This process came to a head in May 2017, when the Unity of Judges criticized the process of making judicial appointments.[119] After this, all sitting judges left the association. To prevent the emergence of similar associations that could challenge its position, the dominant network labeled any new association as politically orchestrated and damaging for the judiciary.[120] This rhetoric appears to have shaped judges' thinking. One judge interviewed for this study insisted that such associations were "externally imposed" and established "for political purposes".[121] Another one argued that "there should not be several associations in the judicial system" and that "there should be a system unified around certain ideas".[122] This meant that the dominant network had closed the channels of mobilization for potential competitors. At the same time, it continued using the association under its control as an instrument of its mobilization, requiring all judges to become members.[123]

The dominant network rigorously promoted the idea of judicial unity.[124] This idea presupposes the judiciary's internal consolidation, a collective

governmental institutions. They will set an example, showing that whoever opposes them will find themselves in a difficult situation". Another noted (interview № 7, 5 June 2018): "The people in the judiciary today are not sufficiently qualified to find other jobs, if they have to leave the judiciary. Accordingly, they are very vulnerable. They have many benefits now and they want to keep them and it does not matter for them who gives them guarantees to stay in the system and whose instructions they follow".

118 A former Appellate Court judge (interview № 15, 12 December 2018).

119 "Over Twenty Judges Have Left the Unity of Judges", *Rustavi 2* (1 June 2016), available at https://www.rustavi2.ge/en/news/77081.

120 "The purposes of this association were quite far-reaching and unhealthy...This association had the aim of cleaning the system of judges lacking integrity...Many of the judges that joined this association were intentionally drawn into the confusion": the HCoJ member and Acting Chairman of the Kutaisi Appellate Court, Dimitri Gvritishvili, *TV Imedi, Kronika* (11 November 2017) (The recording of this interview is no longer accessible online, but is available to the author).

121 An Appellate Court Judge (interview № 13, 28 June 2018).

122 A District Court Judge (interview № 17, 21 December 2018).

123 It emerges that newly appointed judges are expected to join the association immediately. As one sitting judge (interview № 11 on 7 June 2018) recalled: "On the very first day they brought me an application for membership of the Association of Judges. This is the association of the Murusidze collective. They are stronger, because they stand together. If we are not together, we'll have to leave". This association is chaired by former HCoJ Secretary Levan Murusidze. For more information about judge Murusidze see notes 56, 100–102 and 124.

124 The former HCoJ Secretary, judge Murusidze, explained: "2012 elections triggered unhealthy processes in the judicial system. There was an internal division or confrontation. This was facilitated externally...My main idea was always to unite the

response to external challenges and limited critical engagement by individual judges. The leadership presented unity as a virtue and portrayed any internal division as a threat to the judiciary itself. My interviews revealed that this rhetoric considerably affected judicial thinking. Judges largely refrained from publicly criticizing or disagreeing with the leadership. A sitting Supreme Court judge addressed this development, wondering: "How can each and every one of 200 people gathered in the same room have exactly the same view?"[125] Another Supreme Court judge explained: "Whenever there is external pressure, the collective comes together. You perceive it as if your colleague is being attacked, the entire system is being attacked and you are being attacked too.... This hinders internal filtration; you are afraid of revealing your flaws".[126] This illustrates the fact that the rhetoric of "the judiciary is under attack" works well for the dominant network, making rank-and-file judges even more vulnerable and less likely to resist the rule of the judicial oligarchs. Greater pressure and criticism, for example from civil society, are exploited to further consolidate the judiciary.[127]

judicial system.... With respect to values, the judiciary stood together. This is not a clan. This is a relationship based on respect." See "Chemi mtavari mizani yoveltvis is iyo rom ertianoba shemenarchunebina sasamartlos sistemashi" ["My Main Goal was to Secure the Unity of the Judiciary – Levan Murusidze"], interview at the HCoJ, TV 1, 27 December 2018, available at https://www.myvideo.ge/v/3729857?fbclid=IwAR1fLGQvD4q__x1NSokdXNVeErITCvlc1C8bEBarJbKPiA_Xq0AASqZ1Wv4#. Another influential judge emphasized that there was a difference between clan governance and the corporate unity of judges, insisting that the former does not exist in Georgia. See "Chinchaladze: Klanuri mmartveloba ar arsebobs" ["Chinchaladze: Clan Governance does not Exist"], *Imedi TV*, 24 June 2017, available at https://imedinews.ge/ge/dzalovnebi/17341/chinchaladze-klanuri-mmartveloba-ar-arsebobs; Much earlier, the Chairman of the Supreme Court, Konstantin Kublashvili, emphasized the role of judicial unity, noting: "The unity of judges is important for us, unity in that we select the members of the High Council of Justice, not with some artificially introduced initiatives". See "Konstantin Kublashvili: mosamartleebs unda mivcet tavisufali archevanis sashualeba" ["Konstantin Kublashvili: We Should Give Judges Free Choice"], *Netgazeti* (30 April 2013), available at http://netgazeti.ge/news/21453/.

125 A sitting Supreme Court Judge (interview № 9, 6 June 2018). An NGO representative (interview № 2, 28 June 2018) made the same point: "All judges that currently speak on behalf of the judiciary say the same thing. Moreover, they try to publicly emphasize and signal everyone, where possible, that the judiciary is united. Everyone agrees on everything and it all is idyllic". Interestingly, an Appellate Court judge said in her interview that she did not see the Conference of Judges as a place where they would discuss how the judiciary could be improved (interview № 13, 28 June 2018).

126 A sitting Supreme Court Judge (interview № 16, 13 December 2018).

127 See "Murusidze: mosamartleebs jalatebs utsodeben, saubroben mat gayraze, stsored amis fonze ertiandebian mosamartleebi" ["Murusidze: They call Judges Executioners and Consider Kicking them Out, Against this Background Judges Unite"], *Interpress*

It emerges from the interviews that it is the court chairpersons who ensure that the judges of their courts do not challenge the dominance of the network they form part of. For this purpose, they explain to judges what is expected of them[128] and monitor their behavior, including their public statements, social activities and Facebook profiles,[129] in order to keep the HCoJ informed.[130] It is made clear to judges that if they follow the rules (i.e. do not go against the leadership), they "will not have any problems with appointments for life, or anything else".[131] If judges dare not to follow the rules of the game they are subjected to informal sanctions. Such judges can be verbally assaulted on the judiciary's intranet[132] or excluded from social events.[133] They may be openly criticized by the HCoJ members and by judges of their respective courts. It appears that the attitude of one court chairperson towards a judge also determines the attitudes of other court chairpersons towards him or her, and so

News (26 January 2019), available at https://www.interpressnews.ge/ka/article/530100-levan-murusize-mosamartleebs- jalatebs-ucodeben-saubroben-mat-gaqraze-zustad-amis-ponze-ertiandebian- mosamartleebi.

128 A District Court Judge (interview № 11, 7 June 2018) recalled what the court chairperson had told him when he was appointed: "We are brothers, we are together, so you should not make statements against us. [By 'us'] I mean 'the Murusidze collective'". Similar statements were also made publicly. As the Batumi City Court Judge, Irakli Shavadze, pointed out: "When I was appointed, he [the Chairperson] imposed an ultimatum: 'you will either be a member of our team or you will be alone and ostracized.' I was not going to confront him, but he wanted to influence my decisions, to dictate me how to decide". See Jaba Ananidze, "Mosamartle sakutari uflebebis dasacavad dakhmarebas saias da gamchirvalobas stkhovs" ["A Judge Asks GYLA and Transparency International for Help in Defending his Rights"], *Netgazeti* (23 February 2018), available at http://batumelebi.netgazeti.ge/news/118104/.

129 A former court chairperson (interview № 19, 4 January 2019) noted: "The court staff, as well as judges, control who 'shares' what, who 'likes' what, and then these judges are invited and ask to delete posts, asked why they do it and if they do not get the message after the first warning, they slowly begin to be intimidated, even to the extent that they are willing to leave the judiciary".

130 A former non-judge member of the Disciplinary Collegium (interview № 18, 4 January 2019) noted: "If 2–3 judges meet, the Council will know about it, because they are afraid of such gatherings". He added: "The court chairpersons are informally clan members and provide information to the clan about judges. ... They probably know everything about every judge, where they move to, who they are friends with, and so on".

131 A District Court judge (interview № 11, 7 June 2018).

132 "The Judicial System: Past Reforms and Future Perspectives", Report prepared by NGOs, May 2017, 13, available at http://coalition.ge/files/the_judicial_system.pdf.

133 A District Court judge (interview № 11, 7 June 2018) described the consequences of his standing up to the court chairperson: "They do not talk to me. When we go for conferences to Tbilisi, I ask judges: how are you getting there? They tell me they do not know. But they go with cars and do not leave a place for me. I have to go separately by mini-bus or train. I am ostracized".

seeking to transfer to another court is hardly a solution for judges who confront the chairpersons of their courts.[134] If the judge in question does not get the message, formal procedures can be employed to force him/her out of the judiciary. Such instances, even if rare, warn the rest of the judicial community about the consequences of breaking the rules.[135]

A handful of judges have recently started speaking out against the expectations of the judicial oligarchs. As an example, when interviewed by the HCoJ for a Supreme Court position in December 2020 one judge problematized too much judicial unity, manifested in the silence and passivity of her peers, in the lack of diversity of opinions inside the judiciary as well as in lack of competitiveness in elections for the HCoJ's judge members.[136] More recently, after the EU delegation[137] and the US Embassy[138] criticized the 31 October 2021 elections to the HCoJ as being neither transparent nor competitive, a handful of judges distanced themselves from a statement by the Administrative Committee of the Conference of Judges characterizing foreign diplomats' statements as unjustified and inappropriate.[139] While this statement stands out against the general background of passivity, the judges in question have not gone so far as directly to challenge influential judges or the HCoJ either rhetorically or in elections. Moreover, it does not seem that the number of outspoken judges is

134 A District Court judge (interview № 11, 7 June 2018).

135 A District Court judge (interview № 11, 7 June 2018) noted: "At that time, the Unity of Judges (association) was still active...It dared to confront Murusidze and his supporters. But then it was destroyed and these judges were forced to apologize".

136 The interview was held on 28 December 2020 and a recording of it is available at https://www.youtube.com/watch?v=0jmHEDLIoFY.

137 "Remarks by EU Ambassador Carl Hartzell", *op.cit.* note 58.

138 "U.S. Embassy Statement on Conference of Judge", *op.cit.* note 58.

139 "Mosamartleebi: yvelam unda gaigos rom mosamartleebis konferenciis es gadawyvetileba ara ukangadadgmuli nabiji, aramed sasamartlos khelisuflebis damoukideblobis gamoxatulebaa" ["Judges: Everyone Must Acknowledge that the Decision of the Conference of Judges is not a Step Backwards, but an Expression of Independence of Judicial Power"], *Interpressnews* (4 November 2021), available at https://www.interpressnews.ge/ka/article/682095-mosamartleebi-qvelam-unda- gaacnobieros-rom-mosamartleta-konperenciis-gadacqvetileba-arc-gaugebari-da-arc- ukan-gadadgmulime-5-nabijia-aramed-is-aris-sasamartlo-xelisuplebis- damoukideblobis-gamoxatuleba; see also Mikheil Gvadzabia, "16 Mosamartle emijneba mosamartleebis mier saelchoebis kritikas" ["16 Judges have Distanced themselves from Criticisms of Embassies by Other Judges"], *Netgazeti*, 5 November 2021, available at https://netgazeti.ge/law/573920/.

high enough to cause a shift in internal dynamics. It remains to be seen whether these judges will be subject to formal or informal sanctions and whether a proactive engagement of judges becomes a norm.

6 Concluding Reflections and Prescriptions for Future Reforms

This article focused on the rise of judicial oligarchies in post-communist countries and investigated the formal and informal factors behind their persistence. It associated judicial oligarchy with the monopolization of all or most levers of judicial governance by a handful of influential judges. The case study revealed that while these judges (i.e. judicial oligarchs) serve as court chairpersons they are able to influence judicial careers far beyond those particular courts. The ability to do this is rooted in the support of a network of allies whom they install as members of governing bodies such as judicial councils and as other court chairpersons.

The Georgian case reveals a puzzle: why is the rule of judicial oligarchs just as entrenched now as it was before the implementation of legislative reform meant to dismantle this rule? Why were promising behavioral changes which the abovementioned reform had instigated reversed? Fieldwork has revealed that the persistence of the judicial oligarchy is attributable to a combination of formal and informal factors. These factors are summarized in Table 2 below.

The case study showed that if judicial oligarchs have good political connections and/or a strong bargaining position vis-à-vis the political elite, they

TABLE 2 Formal and informal factors that help to sustain judicial oligarchy[140]

	Formal factors	Informal factors
Relationship of the dominant network and other judges	Misuse by a judge-dominated HCoJ of formal powers to reward loyalty and sanction disobedience.	Imposition by judicial oligarchs of informal rules of behavior on rank-and-file judges – the expectation of passivity and deference on their part. Enforcement of informal rules through – Monitoring judges' behavior to identify those challenging the rule of judicial oligarchs. – Applying informal sanctions (for example, withholding benefits, criticizing, ostracizing) to those not following the rules.
Relationship of the dominant network with the ruling elite	Adoption of legislative changes allowing the capture of leadership positions by judicial oligarchs and their affiliates; blocking and reversal of the changes that help avoid concentration of powers in the hands of a small number of judges.	Judicial oligarchs' reliance on political connections to

140 Table 2 sums up the author's own findings, discussed in greater detail in sections 4 and 5 of this article.

TABLE 2 Formal and informal factors that help to sustain judicial oligarchy[140] (*cont.*)

	Formal factors	Informal factors
	Concentration of powers in the HCoJ; Imposition of weak or incomplete legislative requirements that do not meaningfully constrain the HCoJ.	– Shape legislation to their benefit.
	Authorizing the HCoJ to appoint court chairpersons, setting a low decision-making threshold (simple majority), rendering the votes of non-judge members irrelevant.	– Ensure that parliament elects candidates they approve of as non-judge members of the HCoJ.

can successfully lobby for certain legislative changes and against others.[141] If legislation facilitating the decentralization and democratization of judicial governance and potentially endangering the judicial oligarchy is nevertheless adopted, for example, under international pressure, influential judges may rely on pre-existing informal norms or cultivate new ones to distort or undermine new formal norms with the ultimate goal of keeping themselves in positions of power. A systematic analysis of Georgian judges' behavior showed that judicial oligarchs largely succeeded in ensuring that judges think and act consistently with their expectations. They demanded and secured passivity and deference, rendering pointless legislative change that should have enabled the meaningful engagement of judges in judicial governance. They put forward a "judiciary is under attack" narrative and insisted on judicial unity as a means

141 The EU-mediated agreement between government and opposition party leaders of April 2021 envisaged a number of undertakings, including the undertaking to carry out substantial reform of the HCoJ to increase transparency and accountability, including in judicial appointments, promotions, transfers and disciplinary measures. For the text of the agreement see https://eeas.europa.eu/sites/default/files/210418_mediation_way_ ahead_for_publication.pdf. However, no such reform ensued. The ruling party withdrew from the agreement in July 2021. See Georgi Gotev, "Ruling party in Georgia dumps Charles Michel's agreement", *Euractiv*, 29 July 2021, available at https://www.euractiv.com/section/europe-s-east/news/ruling-party-in- georgia-dumps-charles-michels-agreement/.

of countering such an attack. By positing internal disagreement or division as damaging to the judiciary and judges, they sought to prevent the emergence of judicial networks that could challenge their rule. Silencing judges was made easy by careful court packing, the choice of judges based on loyalty or little likelihood of their seeking a change in the *status quo*. It emerged that demands were enforced by means of the close monitoring of judges' behavior by court chairpersons and the application of informal sanctions against those deviating from the informal rules imposed by judicial oligarchs, as well as through the misuse of formal procedures to sanction troublemakers.

The developments between 2013 and 2015 showed that a change of government and legislative reforms implemented under public and international scrutiny may encourage rank-and-file judges to become assertive, and openly challenge well-entrenched informal rules requiring them to be passive and deferential to judges in leadership positions. However, substantial and irreversible change in judges' behavior will happen only if (a) the government remains committed to judicial independence and consistently and immediately implements reforms that help to emancipate and empower individual judges, and (b) judges pushing for change are sufficiently numerous and well-organized to manage to prevail over judges who seek to maintain the *status quo*.[142]

One may ask how it is possible to dismantle a judicial oligarchy and prevent the monopolization of access to leadership positions by a handful of judges. Does increasing formalization make sense if new formal institutions meant to open access are subverted, undermined or used as a façade? The case study shows that legislation can play a role both in dismantling judicial oligarchy as well as in reinforcing it, depending on how it is shaped. The bottom line is that the legislative framework matters. The efforts that judicial oligarchs have invested in shaping legislation attest to its significance. It is essential that the ruling elite is consistent in implementing legislative reforms, so that any change serves, or at least does not undermine, the overall purpose of the decentralization of judicial governance and the emancipation of individual judges from the diktat of judicial oligarchs. Legislative changes are supposed to make the monopolization of access to formal positions of power more

142 Scholarship on parallel developments in Ukraine warns that legislative change does not always lead to immediate change in judicial behavior. See, for example, Maria Popova, "Can a Leopard Change its Spots? Strategic Behavior versus Professional Role Conception during Ukraine's 2014 court chair elections," 42 *Law & Policy* (2020), 365–381. See also Maria Popova and Daniel Beers, "No Revolution of Dignity for Ukraine's Judges: Judicial Reform after the Euromaidan," 28(1) *Demokratizatsiya: The Journal of Post-Soviet Democratization* (2020), 113–142 (problematizing the lack of strong internal constituency for reform within the judiciary).

difficult for judicial oligarchs and ultimately to dilute their influence. Changes in the legislation governing the election of judge-members of the bodies of judicial governance and the appointment of court chairpersons are necessary for opening access to leadership positions to more judges.

However, there are limits to what can be achieved through legislative change, as the findings of this study confirmed. The awareness of these limits makes some stakeholders of the process question whether there is any sense in continuing with legislative reform. One radical solution is the removal of the handful of judges who are members of the dominant network. This controversial measure, however, would not provide a long-term solution. Another group of judges could hijack leadership positions just as easily, as long as a majority of judges remain vulnerable and susceptible to pressure and manipulation. Backsliding into judicial oligarchy can, however, be avoided through judges' mental transformation. The Georgian case study signalled that behavioral change is possible. However, this requires a genuine commitment to reform by the political elite, as well as the creation of channels for mobilization and challenge, so that no single group of judges can take leadership positions for granted.

To be clear, informality is not necessarily a reason for concern. Informal rules and interactions can complement formal rules and procedures, i.e. fill in the holes. Informal judicial networks can serve as means of facilitating the meaningful engagement of all judges in governing the judiciary. The problem lies not in the existence of informal rules, practices and networks per se, but in the reliance by judicial oligarchs on those rules, practices and networks to monopolize access to leadership positions and, consequently, all levers of decision-making with regard to judicial careers. This makes judges not only voiceless, but also vulnerable to pressure regarding outcomes in specific cases.