



**Coalition**  
for an Independent and  
Transparent Judiciary

# THE JUDICIAL SYSTEM: PAST REFORMS AND FUTURE PERSPECTIVES



**USAID**  
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*Promoting Rule of Law  
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**THE JUDICIAL SYSTEM  
PAST REFORMS  
AND FUTURE PERSPECTIVES**

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## METHODOLOGY

The present report aims to analyze reforms and changes implemented in the judicial system following 2012, identify challenges that exist and develop corresponding recommendations. For purposes of the research, our activities were focused on the following two areas:

### a. Qualitative survey of judges and former judges

To study the processes in the judicial system, examine improvements that have been made following 2012 and challenges that exist, the CRRC-Georgia conducted a qualitative survey of judges and former judges, on behalf of and in partnership with members of the Coalition for an Independent and Transparent Judiciary (hereinafter, 'the Coalition'). The survey entailed interviews with a sample of current and former judges and compilation of their views about the following issues:

- Accomplishments and challenges in the judicial system following 2012;
- Role of media and NGOs in development of the system of justice;
- Public trust and confidence in courts, and factors that contribute to it;
- The High Council of Justice (HCoJ) and the High School of Justice (HSoJ) following 2012;
- Judges following 2012 – their independence, the process of selection and appointment, specialization and categorization, court presidents and distribution of cases;
- Gender issues in the judicial system.

Judges were selected according to the following criteria: specialization (civil, criminal, administrative), level of court, administrative office held in court, geographic location, and gender. Out of 28 judges selected, 12 were interviewed in Tbilisi, Kutaisi and Zugdidi. The survey is confidential and the report contains information about the respondents' general characteristics only.

The field-work was rather lengthy and lasted from October 18 to December 2 due to certain challenges encountered when conducting interviews, ranging from difficulty to get a hold of judges, refusal of judges to be interviewed and their busy work schedule. In addition, some judges believed it was wrong to be interviewed about the issue of independence of judges.

When we first conducted similar surveys, we paid a particular attention to the issue of gender in the judicial system. Based on the in-depth analysis of interview transcripts provided by the CCRC, we were able to evaluate sensitivity of judges towards gender issues. Analysis of gender issues on the basis of interviews held with judges was prepared by a member of the Coalition, Partnership for Human Rights (PHR). PHR has previous experience working on gender issues in the system of justice.

### b. Evaluation of the existing judicial system and development of subsequent recommendations by authors of this research

The research conducted by members of the Coalition: *Georgian Young Lawyers' Association (GYLA)*, *Transparency International – Georgia*, and the *Human Rights Education and Monitoring Center (EMC)*, focused on the following areas:

- the situation in the judicial system following 2012 (key trends);
- the judiciary reform;
- guarantees for independence of judges;
- administration and management of courts;
- the system of disciplinary proceedings and liability against judges.

We relied on the following methodological tools to analyze these issues:

- Retrospective evaluation of reforms implemented following 2012 (including the Third Wave of judicial reform);
- Compilation and secondary analysis of research/findings of the Coalition and individual organizations (including reports of monitoring trials and the High Council of Justice);
- Analysis of local and international normative framework;
- Studying international standards and best practice;
- Requesting access to/analyzing public information;

Findings of this research are true as of March 2017.

## EXECUTIVE SUMMARY

Implementation of the “First Wave” of judicial reform was an important phase for empowering the judicial system and individual judges. Most part of the reform was based on recommendations developed by civil society. However, the research shows that despite many positive changes made in the legislative framework following the 2012 parliamentary elections, the authorities have failed to demonstrate a strong political will for making any meaningful and consistent changes in the judicial system. In the process of implementation of the reform, the political system refused to fully give up its leverages and gradually made concessions to dominating and influential groups in the judicial corps. The High Council of Justice (HCoJ) failed to protect the judicial system from external or internal influences, while its decisions often posed a threat to independence of the judiciary. As a result, no meaningful safeguards could be ensured for independence of judges and the system encountered new challenges.

Direct or indirect support of influential groups of judges by the ruling political force encouraged suppression of dissent and strengthened the practice of cronyism, which left the judiciary facing important challenges in terms of independence. One of the key challenges affecting the judicial system and the HCoJ is the lack of different opinions and meaningful discussions. Representatives of the judiciary are reluctant to discuss problems that exist in the system, while important decisions are made behind closed doors, without justification and through informal negotiations.

Judicial appointments by way of informal arrangements have proven to be an important problem in the process of formation of the judicial system. This is further encouraged by the fact that despite the reforms that have been implemented, transparency of the admission process at the High School of Justice (HSoJ), institutional independence of the HSoJ from the HCoJ, and objective and transparent procedure for selection of judges have not been ensured. In addition, despite the criticism of the Venice Commission, the practice of appointment of judges for a definite term (probationary periods) was not abandoned, while the existing regulations for evaluation of judges allows making of subjective and arbitrary decisions. The research also suggests that the HCoJ has not yet adopted the methodology for determining the required number of judges; neither has it implemented effective measures for evaluating workload of judges.

To ensure judicial independence and impartiality, it is important that a progressive system of electronic distribution of cases is introduced in a timely manner. The system should operate freely, distributing cases randomly. Current flawed regulations for distribution of cases allow pre-selection of a judge for presiding a concrete case and delegates court presidents with unreasonably broad discretion in the process of distribution of cases. Assignment of a judge to a case by a court president without respecting his/her specialization and the fact that the law does not regulate duration of assignment of a judge to a case are a matter of concern. After examining the issue of specialization of judges, it was found that no unified and systemic regulations exist, while mixing specialization of judges can clearly jeopardize independence of an individual judge as well as the right of an individual to a trial by a professional judge.

Recently threats related to assignment of judges (sending on a mission, appointment without competition and promotion) that exist at the legislative level have been significantly reduced. However, the research suggests that these mechanisms can still be abused to influence a concrete case or as a punitive measure against an individual judge. The research has also revealed importance of periodic review of performance of judges for a quality and independent court system. Today individual assessment of judges lack adequate legal basis. The Council adopted a system of periodic review on its own initiative but the system fails to live up to internationally recognized standards for evaluation of judges and puts independence of individual judges at risk.

To ensure independence of individual judges, the need to improve the legislation that regulates communication with judges has been highlighted. The research shows that existing regulations are ineffective and fail to shield judges from internal influences.

The research puts a special emphasis on the importance of effective administration and management of courts. After examining this issue closely, we found that the key challenge in the process of management of courts is the risks that threaten internal independence and autonomy of courts. Until recently, the institution of a court president with its strong administrative leverage was one of the main sources of these risks. In this regard, changes implemented within the Third Wave of judicial reform are important, as they aim to empower court managers and reimagine functions of court presidents; however, these changes have failed to address problems like undemocratic system of appointment of the court presidents, ambiguity of dismissal procedures and duplication of functions among different administrative institutions (e.g. court president, manager, management department, etc.). Another factor that limits effective administration of the court system is the lack of legal separation of competencies between the Supreme Court and the HCoJ in some cases.

The research includes a separate chapter analyzing the system of disciplinary liability of judges. Effective sys-

tem of disciplinary liability is essential for accountability. However, existing basis for instituting disciplinary proceedings against judges falls short of the foreseeability requirements and can easily lead to abuse for influencing a judge. Subjecting a judge to a disciplinary liability due to a decision that was made during the process of administration of justice and defects in the process of disciplinary proceedings are a cause of a particular concern. In addition, the law fails to supply adequate guarantees for activities of an independent inspector.

In a sociological survey with participation of judges and former judges, lack of foreseeability of the system of disciplinary liability was named as a possible leverage for influencing a judge. According to the survey, other factors that may influence a judge include the institution of court president, concentration of important powers in the hands of the HCoJ, lack of social welfare guarantees and ambiguity of the mechanism of promotions. According to the research, most judges believe that improved independence of the judicial system is the biggest gain following 2012; they also believe that the judiciary reforms are worthy of recognition. When we first conducted similar surveys, we paid a particular attention to gender sensitiveness of judges and found that gender issues are not a priority in the judicial system while the topic of gender is still new and majority of survey participants are not aware of the substance of gender equality and its interdisciplinary dimension.

Important and urgent problems identified by the research are indicative of many fundamental problems that continue to exist in the court system and illustrate the need to launch a substantial reform. We hope that findings and recommendations provided in this report will help initiate a new stage of the judiciary reforms and facilitate their consistent implementation.



**MAIN TRENDS  
IN THE JUDICIAL SYSTEM**

**1**

## Introduction

The Coalition for an Independent and Transparent Judiciary published a report in 2012 summarizing the situation in the judicial system in Georgia.<sup>1</sup> The report identified the need to implement reforms in several different areas in the judiciary. Challenges that existed at that time included: unreasonable limitations placed on rights of judges; politicized HCoJ, too much power in the hands of court presidents, uncontrollable leverage for influencing judges, including assignment of a judge and disciplinary proceedings, etc.

The new government that came into power following the 2012 parliamentary elections announced that it would focus on restoring justice, liberating the judiciary from political influences and ensuring independence of judges. To this end, the government started gradually implementing important legislative reforms;<sup>2</sup> however, the process of implementation of these reforms makes it clear that the government failed to show a strong political will for any meaningful and consistent changes in the judicial system. It gradually made concessions to groups that dominate the judicial corps, including during the pre-election period. Any disagreements between judicial and non-judicial members of the HCoJ gradually disappeared and eventually, their views started to coincide on virtually every issue. Such relations between the dominant judicial group and the authorities encouraged the practice of cronyism and suppression of dissent; as a result, the courts system encounters important challenges in terms of independence. Basis for independence of a judge are fragile on the account of expiration of judgeship term for many of the judges. Today challenges related to independence of judges are first and foremost evident by questions about politically charged cases in the process of administration of justice.<sup>3</sup>

Although from 2012 to present, a number of positive changes have been made at the institutional level, monitoring of the HCoJ meetings is possible and often the principle of openness is formally observed, the judicial system has encountered new challenges that include closed system and informal negotiations behind closed doors. Such situation makes it difficult to discern the problems that exist in the system or to analyze the situation in the judiciary in a systemic manner. The present chapter offers a summary of reforms and changes made in the judicial system following 2012, and evaluates the existing context.

## Judicial System Reform

First important legislative reform in the judicial system after the 2012 parliamentary elections was implemented on May 1, 2015. Majority of changes made within the First Wave of judicial reform was based on earlier criticism and recommendations by NGOs. As a result of the reform, important step was made towards depoliticizing of the HCoJ, broad powers that were previously unfairly held by specific institutions (the HCoJ, the Chairperson of the Supreme Court) were distributed, and transparency of the system and the role of judicial self-government were increased. In light of this, the reform was recognized as an important step forward<sup>4</sup> while at the same time the need to continue this and other reforms was emphasized.

Unlike the First Wave of judicial reform, the government failed to demonstrate a strong and consistent political will for strengthening judicial independence during the Second Wave of reforms<sup>5</sup> and introduced judicial appointments for probationary term. A general rule for lifetime appointment of judges was adopted, conditional on successful completion of a three-year probationary term. Enactment of the mandatory probationary period for all appointed judges was criticized by NGOs<sup>6</sup> as well as the Venice Commission.<sup>7</sup> Such practice poses significant risks that threaten court's independence. Despite the criticism of international consulting bodies and local NGOs, today over one hundred judges are on a probationary term in the Georgian system of common courts.

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<sup>1</sup> „The Judicial System in Georgia”, Coalition for an Independent and Transparent Judiciary”, 2012, available at: <<http://bit.ly/2bvktL6>> [accessed 5 March 2017]

<sup>2</sup> „Assessment of the Judicial System (2012-2016)”, Transparency International – Georgia, 2016, available at: <<https://goo.gl/c5ETF0>> [accessed 5 March 2017]

<sup>3</sup> „Concerns about Politicized Justice”, Human Rights Watch World Report 2017-Georgia, 2017, available at: <<https://goo.gl/4073Uz>> [accessed 5 March 2017].

<sup>4</sup> „Comparative Analysis of New Judicial Reforms”, Transparency International – Georgia, 2013, available at: <<http://bit.ly/2b8llv>> [accessed 5 March 2017].

<sup>5</sup> The “Second Wave” of the judicial reform implies the legislative changes made on 1 August 2014. This reform was preceded by the changes carried out on 1 November 2013, which aimed at bringing the Organic Law of Georgia on Common Courts in compliance with the constitutional amendments enacted on November 17, 2013.

<sup>6</sup> Statement of the Coalition about Appointment of Judges for a Probationary Period, the Coalition for an Independent and Transparent Judiciary, 2013, available at: <<http://bit.ly/2btwUYy>> [accessed 5 March 2017]

<sup>7</sup> Joint Opinion N°773/2014 of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Draft Law on Amendments to the Organic Law on General Courts, Strasbourg, available at: <<http://bit.ly/2bKgOJQ>> [accessed on 5 March 2017]

First parliamentary committee hearings on the draft law for the Third Wave of judicial reform were held as early as September and October 2015 but it was not adopted until February 2017. The initial draft was changed substantially several times<sup>8</sup>, which resulted in weakening of some of the positive initiatives. Delay of the reform allowed the HCoJ to appoint dozens of judges in an ambiguous process that lacked transparency. Introducing of an electronic system of case distribution was postponed, including during electoral period. The reform was preceded by lengthy negotiations “behind closed doors” and possible political deals, including during final, third hearing of the draft. Despite several important and progressive changes, the final version of the legislative package does not reflect majority of the substantive recommendations that were presented by local NGOs and the Venice Commission. In particular, the legislative package no longer envisages election of court presidents by judges and contains negative changes regarding composition of the HCoJ.<sup>9</sup>

To this day, the judicial reform has not addressed principally important issues including ambiguity of disciplinary liability of judges, lack of norms that regulate activities of the HCoJ, flawed rule of election of court presidents and other important problems that NGOs have expressed their concern about for many years. Recognizing these challenges and implementing prompt and consistent reforms to solve them is principally important for creating meaningful guarantees for independence of the judiciary.

### **Changes in the High Council of Justice**

As part of the First Wave of judicial reform, substantial changes were made in regulations for selection of the HCoJ members, both by the Conference of Judges and the Parliament. In light of this, a special attention was paid to the process of selection of new members of the HCoJ that took place in May-July 2013. Overall the Conference of Judges that lasted two working days received a positive evaluation. No procedural violations were found and the process was transparent; however, majority of participants followed a narrow definition of the Conference as the authority of the supreme self-governing body and by doing so, judges themselves placed certain limitations on their power to approve the agenda and ask questions to candidates. As to the competition announced by the Parliament of Georgia for selection of non-judicial members, it lacked transparency. Although interested organizations requested that the Parliament conduct an open interview with candidates and obtain information about their views, the interviews were conducted behind closed doors and public was not allowed to follow the process.<sup>10</sup>

Today the HCoJ is comprised of 14 members. For the fourth year in a row, the Parliament has failed to elect the 15th member of the Council by way of qualified majority voting and with participation of representatives of the opposition political parties. This clearly illustrates the lack of will to achieve a consensus and failure of the government to ensure that the Council has at least one member with opposing views. The draft law on the Third Wave of judicial reform reduces the quorum to allow election of all non-judicial members of the Council by the Parliament through a simple majority. The term of office of 10 members, including the HCoJ secretary expires in summer 2017, and the Council will be re-staffed at that time. Here we must also note that the applicable legislation prohibits election (appointment) of an individual as a member of the HCoJ for two consecutive terms.

### **Pluralism of Opinions and Involvement of Third Parties in the HCoJ's Activities**

The HCoJ composition was almost fully renewed in June 2013, which had a positive impact on discussions within the Council and the quality of its performance. The HCoJ Monitoring Report notes that under the initiative of non-judicial members discussions about several important issues were started and their active participation led to emergence of different opinions in the HCoJ.<sup>11</sup> In this regard, the state of pluralism and representativeness achieved by the diversity of opinions held by judicial and non-judicial members of the Council gradually changed since 2015, with individual non-judicial members of the Council moving closer to the positions of judicial members. In addition, consultations between the HCoJ members behind closed doors before making decisions gave rise to suspicions that decisions of the Council members were based on agreements made in

<sup>8</sup> „Statement of the Coalition about Delay of the Third Wave of Judicial Reform, the Coalition for an Independent and Transparent Judiciary, 2016, available at: <<http://bit.ly/2b6nMsM>> [accessed 5 March 2017].

<sup>9</sup> „The Coalition Calls on Parliament to Consider President’s Objections in Relation to the “Third Wave” Judicial Reform Bill”, the Coalition for an Independent and Transparent Judiciary, 2017, available at: <<https://goo.gl/NG2FWg>> [accessed 5 March 2017].

<sup>10</sup> “Monitoring Report of the High Council of Justice Three-Year Summary (2012-2014)”, Georgian Young Lawyers’ Association, Transparency International – Georgia, 2015, available at: <<http://bit.ly/2b9ooZw>> [accessed 5 March 2017].

<sup>11</sup> „The High Council of Justice Monitoring Report N3”, Georgian Young Lawyers’ Association, Transparency International – Georgia, 2015, available at: <<http://bit.ly/2cbgioj>> [accessed 5 March 2017].

advance, rather than on individual views of the Council members.<sup>12</sup>

Here we must note that the new chairperson's tenure of office was marked by improved engagement of stakeholders in the Council discussions. The chairperson would often ask for opinions of representatives of non-governmental and international organizations attending the Council meeting, which led to an improved communication from other Council members (mostly non-judicial) as well. In 2016, the situation changed for the worse and amid criticism by the civil society of the process of selection/appointment of judges and other problematic issues, the Council members including the chairperson changed their attitudes. During the Council meetings judicial and non-judicial members openly expressed their discontent about criticism of the Council and stated that it was "too much" criticism. One of the Council members openly suggested limiting freedom of expression to protect reputation of the judiciary.<sup>13</sup>

### **Transparency and Conflict of Interest**

Over the last four years significant improvements have been made in certain areas. However, certain problems continue to exist. These problems include lack of adjournment and conflict of interest regulations, problems related to drawing up of agendas and preparation of sessions in general.

Conflict of interest is a serious problem. During a competition for selection of judges, we found several instances<sup>14</sup> where a member of the Council who also competed for judgeship participated in the process of selection of candidates, and this problem was not a one-time occurrence. Failure to regulate the issue put independence and impartiality of the Council's performance in question, in the process of judicial promotions (involving 7 judges that were promoted to Tbilisi Appellate Court) and judicial appointments.<sup>15</sup> The practice of voluntary recusal introduced by the Council members to abstain from participation in voting for positions that they have applied for themselves is worthy of recognition. However, here we must also note that creating a level playing field for all candidates requires preclusion of candidates who are also members of the Council from participation in the process of the competition in any other way – e.g. having access to application documents of other candidates and participation in interviews with other candidates.<sup>16</sup>

### **Judicial Selections/Appointments and Transfers without Competition**

Years of monitoring the HCoJ performance has revealed the following problems in the process of judicial appointments – one of the key functions of the Council:

- Lack of transparency and openness;
- Unsubstantiated decisions made about appointment of judges.

Here we must also note that attending public meetings of the Council did not allow us to evaluate the reason why individual members of the HCoJ voted for a certain candidate or changed their position about a candidate between the first and the second rounds of the competition. Consultations about these issues took place behind closed doors as the HCoJ members left to conduct their talks outside of the meeting hall. The reason why a member of the Council supports or does not support a candidate is important not only in terms of transparency but also to evaluate whether the procedures and goals of the competition have been fulfilled and professional candidates with qualities and skills prescribed by the law have been appointed.<sup>17</sup>

Questions that public has about objectivity and impartiality of judicial selections and appointments were further intensified after a possible leaking of judgeship examination tests from the Council. On February 2, 2016, president of Tbilisi City Court MamukaAkhvlediani met with NGO representatives to inform them that written tests for judicial certification exam held on November 21, 2015, had been possibly leaked. On February 22, 2016, the HCoJ dismissed MamukaAkhvlediani from his office as the president of Tbilisi City Court and the

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<sup>12</sup> „The High Council of Justice Monitoring Report N4”, Georgian Young Lawyers' Association, Transparency International – Georgia, 2016, available at: <<http://bit.ly/2bx4dd4>> [accessed 5 March 2017]

<sup>13</sup> „Unfounded restriction of freedom of expression to protect the court's authority is impermissible”, Transparency International – Georgia, 2015, available at: <<http://bit.ly/2bx4dd4>> [accessed 5 March 2017].

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> „Monitoring Report of the High Council of Justice Three-Year Summary (2012-2014)”, Georgian Young Lawyers' Association, Transparency International – Georgia, 2015, available at: <<http://bit.ly/2b9ooZw>> [accessed 5 March 2017]

Board of Criminal Cases of the Court. So far no conclusions or explanation about the possible leaking of the tests have been made public.

According to the 2011-2015 data, following judicial appointments the Council was actively using the legal mechanisms for transferring judges to other courts. The HCoJ decisions about transfer/promotion of judges without a competition were made without any substantiation and as a result of only a formal implementation of procedures, which creates serious suspicions about deliberate, strategic distribution of judges in different courts bypassing vacancies that existed at that time and disregarding the universally recognized principle of irremovability of judges. This directly affected independence and impartiality of a judge.

### **Internal Independence of the Judiciary**

Today the judicial system is facing important challenges to internal independence. Over the recent years it has come to light that there is a group of judges within the judicial corps that holds the leverage for influencing the process of making important decisions about the judicial system, including the HCoJ decisions.

The problem was especially evidence during the process of judicial selections/appointments. On December 25, 2015, the HCoJ voted for election of Levan Murusidze to the Appellate Court. As non-judicial members of the Council explained,<sup>18</sup> main argument in favor of Murusidze's candidate was the support of the judicial corps. The statement of non-judicial members essentially confirmed suspicions that the Council did not follow the legally prescribed criteria for judicial appointments but rather, the appointment decisions were based on some covert deals.

The situation was further exacerbated by the fact that the Parliament delayed passing of the Third Wave of judicial reform without providing any valid reason, while the initial draft of the law would have been more effective in improving the procedure of judicial appointments. Such delays reinforce doubts that the government made certain concessions in the face of resistance from the judicial corps. Here we must note that on October 19, 2015, after the draft laws developed by the Ministry of Justice (MOJ) about the Third Wave of the reform had already been initiated in the Georgian Parliament, Minister of Justice Tea Tsulukiani met with 160 judges including the HCoJ Secretary Leval Murusidze. Chair of the Supreme Court of Georgia Nino Gvenetadze was not invited to the meeting. Following the meeting the Minister of Justice provided a list of issues that were envisaged by the Third Wave draft laws but an agreement was reached during the meeting with the judges that these issues would be regulated in a different manner. The Minister also announced that number of issues included in the Third Wave draft laws under the initiative of the newly appointed Supreme Court Chair would be revised because the judicial corps did not agree with these changes. As a result, discussions about the draft of the Third Wave laws were suspended in the parliament.<sup>19</sup>

Developments that occurred prior to suspension of the Third Wave of judicial reform, especially, the comprehensive revision of the draft law following a meeting of the Minister of Justice with judges, when an agreement was reached with the HCoJ Secretary and other judges and the initiatives proposed by the Supreme Court Chair were declined, have given rise to suspicions that the government does support the dominant group of judges, which increases their influence on the judicial system.

The fact that the HCoJ and the dominant group of judges do not tolerate criticism from their peers is also a problem, as evidenced by dismissal of the Tbilisi City Court president Mamuka Akhvlediani by the HCoJ two months after he made the criticizing statements.

On December 29, 2015, Tbilisi City Court president Mamuka Akhvlediani met with representatives of NGOs and media to discuss problems in the judicial system. Akhvlediani criticized performance of the HCoJ and the Supreme Court Chair. His statement was responded by Kutaisi City Court saying that Tbilisi City Court president aimed to discredit, weaken and reduce the importance of the court system, which was "immoral, unethical and unworthy behavior on his part". Akhvlediani's criticism of the HCoJ was disapproved by his peers, with individual judges expressing a strongly negative attitude about Akhvlediani on the Intranet of the judiciary.

On February 10, 2016, the Coalition for an Independent and Transparent Judiciary filed a disciplinary complaint with the HCoJ in connection to the said statements, contending that public statements made by Kutaisi City Court about Mamuka Akhvlediani, as well as unethical and insulting comments of individual judges on the

<sup>18</sup> „Statement of Non-Judicial Members of the High Council of Justice, 25 December 2015, available at: <<http://bit.ly/2bUCGn4>> [accessed 5 March 2017].

<sup>19</sup> „The High Council of Justice Monitoring Report N4“, Georgian Young Lawyers' Association, Transparency International – Georgia, 2016, pp.68-69, available at: <<http://bit.ly/2bx4dd4>> [accessed 5 March 2017].

Intranet violated the rules of judicial ethics and constituted behavior unsuitable for judges that undermines the authority of and the public confidence in the judiciary, which amounts to a disciplinary violation under the applicable legislation.<sup>20</sup>

On February 1, 2016, an extraordinary conference of judges was held, where some judges delivered remarks demonstrating their loyalty for the HCoJ. Judges expressed their concern about assessments made by NGOs, political forces and the president, which they viewed as an influence on the HCoJ activities.

On February 2, 2016, MamukaAkhvlediani met with NGOs to inform them about possible leaking of tests of the judicial certification held on November 21, 2015. Chair of the HCoJ responded to the report of possible leaking of the examination tests. According to Nino Gvenetadze, MamukaAkhvlediani's statement had a different purpose and intention but high standards of ethic prevented her from discussing what these purposes were. On February 22, 2016, the HCoJ made a decision to dismiss MamukaAkhvlediani from presidency of Tbilisi City Court and its Board of Criminal Cases. The decision was supported by all members of the Council, except MamukaMchedlishvili who stated that by making such decision the Council violated the principle of fairness and acted beyond the scope of its authority.

Chronology of events<sup>21</sup> following MamukaAkhvlediani's statement confirms that criticism of the system by an individual judge is unacceptable by a large majority of judges and is viewed as an attack on the judiciary. This creates serious suspicions about clan-based governance in the judicial corps, which undermines independence of individual judges.<sup>22</sup>

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<sup>20</sup> Coalition files a disciplinary complaint in the High Council of Justice, the Coalition for an Independent and Transparent Judiciary, 2016, available at: <<http://bit.ly/2bzenFU>> [accessed 5 March 2017].

<sup>21</sup> „Chronology of events from the first statement of MamukaAkhvlediani to his dismissal”, Transparency International - Georgia, 2016, available at: <<http://bit.ly/2b7iK05>> [accessed 5 March 2017].

<sup>22</sup> Coalition files a disciplinary complaint in the High Council of Justice, the Coalition for an Independent and Transparent Judiciary, 2016, available at: <<http://bit.ly/2bzenFU>> [accessed 5 March 2017].

# SOCIOLOGICAL SURVEY RESULTS

2

## Overview of the Survey Results

According to judges, improved independence of the judicial system is one of the biggest gains following 2012. They also believe that insufficient number of judges and their heavy workload is the biggest challenge, affecting quality of court's decisions and how long it takes to make these decisions.

According to respondents, media plays an important role in creating the court's image. Respondents also highlight the need for media to remain objective and abide by the norms of ethic. Besides media, public confidence towards the judiciary is also determined by reasoning of decisions made by courts. Judges highlight the need to raise public awareness about performance of the judiciary and they recommend creating a TV program to that end.

NGOs also play an important role. Respondents believe that their criticism and comments are useful and are taken into consideration. However, they also state that NGOs need to remain objective.

Judges' comments about the HCoJ and the HSoJ are positive. They believe that performance of the Council has become more transparent since 2012, and communication with the Council is easier. Similarly, the HSoJ is transparent and objective. Most respondents are graduates of the School; however, it was also stated that the Council has a full control over the HCoJ and there are suspicions that the Council is abusing its powers.

According to respondents, independence of judges has grown since 2012. They believe that judicial selections and appointments are fair and objective, and judge's preferences are taken into consideration during specialization. However, certain ambiguous issues remain and may be abused to influence judges. As an example, these issues include judicial promotions and disciplinary liability of judges since appropriate grounds are not clearly defined, which leaves room for interpretation. Three-year probation somehow limits independence of judges. Majority of respondents believe that the probationary period is unacceptable, especially for judges that are re-appointed after ten years of service. According to respondents, another leverage to influence judges is the position of a court president, which is why they believe that it needs to be abolished or its functions need to be limited. Distribution of cases is among functions of a court president. Respondents believe that cases between judges should be distributed on a random basis, through electronic system.

## Judicial Accomplishments and Challenges following 2012

Judges believe that improved independence is the biggest accomplishment in the judicial system following 2012. Other important changes include opportunity to participate in legislative and public discussions. The biggest challenge identified by respondents is insufficient number of judges and correspondingly, their heavy workload, which affects quality of decisions and length of proceedings, and does not leave time for judges to work on self-development and capacity building.

### Judicial Accomplishments

Majority of respondents believe that improved independence is the biggest accomplishment in the judicial system following 2012. Some respondents also believe that the new regulations that allows election of the HCoJ members and judges through a secret ballot is another biggest accomplishment because it is an important precondition for increasing independence of the judicial system.

„The biggest accomplishment following 2012 is election of the Council members through a secret ballot... I believe that this way is more objective [since it allows] judges to support candidates that they believe is worthy and [best] represent them in the Council of Justice of Georgia” (current female judge, Tbilisi City Court).

Another important accomplishment according to judges is their ability to participate in legislative and public debates. They are now able to actively talk about problems and challenges in legislation. Some judges have named transparency and openness of the HCoJ as another positive change, since judges now have the opportunity to watch the Council meetings and the voting process live on air.

Other positive changes that occurred following 2012 according to the survey respondents include:

- Improved system for evaluation of integrity and competence of judges;
- Life-time appointment of judges;
- New regulations about media access to court trials;
- Increasing judge salary;

- Increasing number of judges;
- Institutional separation of the Disciplinary Board from the Supreme Council;
- Changes in the Juvenile Justice Code.

### **Existing Challenges**

According to judges, despite important accomplishments that have been made, certain challenges persist in the judicial system. Nearly each respondent has pointed out that there are numerous cases pending before courts and judges find it difficult to handle so many cases. In addition, heavy workload affects quality and degree of substantiation of decisions made by judges. Quality of decisions is also affected by the lack of judges' time for self-development and capacity building.

Another important problem is infrastructure due to insufficient number of courtrooms. As a result, proceedings are greatly delayed and parties are dissatisfied.

„We have a shortage of employees, number of judges need to be increased. It is difficult to handle so many cases. Number of judges is very low in our court and in the judicial system in general. This may affect quality of decisions. Often there is an excessive delay in proceedings simply due to shortage of courtrooms. We don't have [enough] courtrooms...” (Current male judge, Tbilisi City Court)

Some judges are concerned by the level of public trust in the judiciary. They believe that the judiciary has a poor public image, even though it doesn't deserve to be criticized so harshly by public. A judge from Tbilisi Appellate Court believes recommends setting up a group that will work on the image of the judiciary.

„My biggest concern is the lack of public confidence in the judiciary... This is caused by many different reasons. I think a body or a group needs to be created that will work on the image of the judiciary” (current female judge, Tbilisi Appellate Court).

Here we must note that although current judges state that increased independence is the biggest accomplishment in the judiciary, one of the former judges is concerned by the lack of internal independence of judges. The respondent believes that although the judicial system has become independent, judges themselves depend on the HCoJ and the Disciplinary Board, and the HCoJ does not tolerate judges that hold different opinions.

In addition to these challenges, another respondent - the Supreme Court judge believes that old mentality about functions and the rule of the chamber chairpersons continues to exist in the judicial system, meaning that hierarchy between chairpersons, chamber chairpersons and ordinary judges is yet to be overcome. Chairpersons refrain from handling cases and refuse to fulfill functions of a judge, which the respondent believes is wrong. However, the respondent states that there is no hierarchy in the Supreme Court and believes that the Supreme Court Chairperson is setting the best example.

„I believe that old mentality about functions and the role of presidents and chamber chairpersons still remains, meaning that outdated approach towards these issues continues to exist and has not been overcome. Change is evident only at the level of individual courts – for instance, in the Supreme Court where the chairperson is setting the best example. She volunteered to be the Chair of the Criminal Chamber and is personally involved in making of a lot of decisions” (current female judge, Supreme Court).

In addition, some judges are concerned by lack of social welfare, meaning that when judges no longer perform their duties, they are left unemployed, without any state assistance.

Judges believe that these challenges cannot just be solved by willingness of the judiciary to solve them; rather, adequate financial resources are needed and these resources should be allocated by the state for the judicial system.

### **Media and NGOs in judiciary field**

*Judges believe that media and NGOs play important role in the judicial system, as media greatly affects the image of the judiciary and subsequently the level of public trust in the system. According to judges, media must remain objective and abide by ethic norms.*

*Respondents have stated that increasing public awareness about the judicial system is important for improving public trust. To this end, they recommend creating a TV program. However, public trust is defined not only by the*

*image of the judiciary but also by well-substantiated decisions, so that none of the parties feel that the court was unfair.*

*As to NGOs, respondents believe that their criticism is necessary and beneficial for development of the judicial system but they also underline the need for NGOs to remain objective.*

## **Media and the Judiciary**

Judges discussed how media influences public opinion about the judicial system, highlighting that media plays a critical role in creating the image of the judiciary and subsequently, affects the level of public trust towards the system of justice. In addition, some respondents believe that sometimes media tends not to be objective and portrays the judiciary only in a negative light. Judges find it peculiar that cases that will promote public trust in the judiciary are often not reported by media.

In addition, respondents emphasized violation of ethical norms and biased criticism of judges by media, stating that such actions of media are a mechanism not only for shaping public opinion about the judiciary but also for disturbing judges' state of mind.

„Media certainly plays an important role, because when they criticize media and say, the criticism becomes excessive, this may affect the outcome. If a judge has an unstable state of mind, he or she may break under the pressure from press, say, television or other media outlets. This is the best mechanism, perhaps the most effective mechanism against a judge with unstable state of mind” (current male judge, Tbilisi Appellate Court).

Some judges believe that journalists should attend a special training for learning how to communicate the information in the right way and using correct terms.

Despite all this, judges are not against media converge of the courts and their proceedings and believe that it promotes transparency of courts; however, the proceedings must be covered within the limits of objectivity and ethics, meaning that journalists must refrain from making any premature conclusions about a case or a judge concerned before a judgment is delivered. One of the judges stated that there should be the law that will place certain restrictions on media and the parties to prevent them from making any comments or conclusions about cases that are still pending before court.

„I believe that the law should be amended in some way or form and I'm not sure which law, perhaps the Constitution, to subject media and the parties to certain restrictions when the case is still pending, in order to prevent a stir [about the case], because this has an effect, including on a judge” (current female judge, Tbilisi City Court).

It was also stated that for security purposes it is important to keep the judge and his/her name out of the television.

## **Factors that Affect Public Trust towards the Judiciary**

According to judges, in addition to media public trust towards the judiciary is mostly affected by decisions made by judges. Therefore, decisions need to be comprehensible and substantiated, especially for the losing party in order to dispel any suspicions and questions about the proceedings. Judges also note that there have been cases where a losing party was happy with the judge's decision because it was well-reasoned and comprehensible, but the problem is that such cases are rarely covered by media and public continues to have a negative opinion about the judicial system.

Judges note the importance of raising public awareness about the status of a judge, the amount of labor that goes into each decision, and how the judicial system operates. Judges recommend creating a TV program that will inform public about these issues and contribute to transparency of the judicial system. Judges believe it is important to raise legal culture and awareness among public, as a result people will respect the judiciary more.

„Poor level of education is a problem in our country and in our population. Another thing is the negative PR campaign waged by different political groups in any given period, because this is beneficial, there will always be someone who is not happy and their criticism of a concrete judge or the judiciary in general will always benefit someone else. So when the civil society does not feel the responsibility to respect the judiciary, not a particular person but the institution itself, this happens. This is the sad reality” (current female judge, Tbilisi City Court).

## **Role of NGOs in Development of the Judicial System**

Respondents believe that NGOs are important and they have a vital role in development of the judicial system. In view of judges, constant control and criticism of the judiciary is necessary for elimination of faults in the system. Some judges state that NGOs play a leading role in implementation of legislative changes. Judges have taken comments and suggestions of NGOs into account on numerous occasions and they support healthy criticism; however, they also state that the criticism should not turn into subjectivity; however, some judges are under the impression that some NGOs are following instructions of a third party and they don't serve their intended cause of objective evaluation and analysis.

Respondents expressed their desire to engage in active communication with NGO representatives and stated that their close cooperation may bring about many positive results for the judiciary.

„I'd like them to approach us even closer and take a closer look at our activities; I'd like for us to be able to get to know each other better, to explain how we work, what our inner attitudes are for each case. This will be good for our country because they deliver the analysis of our work to citizens as well as outside the country” (current female judge, Tbilisi Appellate Court).

## **The High Council of Justice following 2012**

*Judges believe that following 2012, transparency of the HCoJ has increased and its activities have improved. They also find it much easier to communicate with the Council today.*

Judges state that current model of the HCoJ is much more democratic and acceptable now; however, some believe that the HCoJ does not fulfill the functions adequately or at all:

- delivering substantiated decisions;
- authority to cancel judge's immunity;
- the HCoJ members having clearly defined functions that are regulated by legal norms.

Most judges find it much easier to communicate with the Council, without any problems. Furthermore, often the Council is the initiator of communication with judges. However, one of the respondents stated that he does not communicate with the Council any more, after his different opinion caused discontent among the Council members.

Only a few judges believe that the HCoJ should take actions in response to biased criticism of judges, in order to protect their independence, because judges themselves have no right to engage in a polemic with anyone.

„When they are saying something wrong about a judge, when a judge is criticized unfairly and denounced for no reason, and denouncing of a judge is always wrong, the Council should protect the judge because judges are unable to say anything themselves; they have an obligation to tolerate criticism to the extent that even if someone says something horrible about them, they cannot say anything in response” (current female judge, a district court).

## **The High School of Justice following 2012**

*Current judges speak positively about the HSoJ. Those judges that have attended the School state that the processes are transparent and objective. Only one of the former judges stated that the HSoJ is controlled by the HCoJ and the latter may be abusing its power over the School.*

Some judges state that as far as they've heard, admissions are transparent and they are not aware of any problems. Others can't comment about the School because they have never dealt with it. Some judges believe that decisions of the School must absolutely be substantiated; otherwise they will raise suspicions and questions. A former judge stated that the HCoJ has a full control over the process of admission at the HSoJ and it has to do with the HCoJ abusing its powers.

## **Judges following 2012**

*Respondents believe that a number of changes took place following 2012 that have improved the situation of judges and their independence. They think that judicial selections and appointments are fair and objective. Most judges approve of the existing model of appointments, i.e. selection of judges by way of a secret ballot.*

*As to the three-year probationary term for judges, it is unacceptable to a large majority of respondents, especially when it concerns a judge that has served the 10-year term already and is being re-appointed.*

*According to judges, the practice of transfer and sending on a mission of judges is no longer a problem, because it has been terminated. As to promotions and disciplinary liability, judges state that their bases are not clearly defined and it is ambiguous when a judge will be promoted or subjected to a disciplinary punishment.*

*When talking about specialization and categorization of judges, respondents from a city court state that unlike before their preferences are now taken into account.*

*Respondents state that the above-stated three-year probationary term, promotions, disciplinary liability – may affect degree of independence of a judge; however, they also believe that independence is first and foremost created by internal independence of a judge, his/her qualifications and responsibility.*

## **Judicial Selections and Promotions Today**

Majority of respondents believe that the process of judicial selection is objective and fair in today's judicial system. However, some underline that certain changes need to be made, especially for introducing the obligation to provide reasons for appointment decisions. One of the judges said that because there is no requirement to provide justification for decisions, it is difficult to evaluate fairness of judicial selections.

Judges that support introducing the obligation to provide justification also recognize that it may violate ballot secrecy. Majority of judges support secret ballot and suggest developing a model in which a secret ballot and the obligation to provide reasons for appointment decisions will co-exist.

„Let's say I wasn't selected, I should have a chance to appeal [the decision], right? But there is another problem, like I said earlier, who should provide reasons [for the decision]? So this will result in violation of ballot secrecy. It means that a special office needs to be set up under the [High] Council of Justice, an office for providing reasons for decisions” (current male judge, Tbilisi Appellate Court).

Further, some respondents believe that the following changes must be implemented for judicial appointments:

In addition to the obligation to provide reasons for appointment decisions, the following factors are thought to contribute to fairness of judicial selections and appointments:

- Clear and concrete definition of criteria for selection of judges;
- Basing selection on the system of references and points, to be supported by justification;
- Accepting the HCoJ graduates in the court system and paying a particular attention to candidate's reputation;
- Life-time appointment of judges;
- Right to appeal a decision refusing to appoint a candidate.

## **Three-year probationary period**

An important issue related to appointment of judges is the three-year probationary period. Most respondents criticize this rule and believe that a trial period must only exist only as an exception. According to respondents, use of the probationary term for candidates that have already served a ten-year judicial term and are being re-appointed is especially peculiar.

Judges believe that observing candidates before appointment is possible while they attend the HSoJ. Only one of the respondents has no strong feelings about the trial period; however, the respondent also stated that the probationary term does not serve the declared purpose.

According to respondents, the three-year probationary period can potentially be used as leverage for undermining the independence of judges. Respondents also stated that monitors should be more qualified than judges on a trial period, which one of the respondents believes is difficult to define. Another respondent also highlighted the lack of objective criteria for evaluating judge's performance during a probationary period.

„Generally, I was against introducing [probationary] period in Georgia, because a judge undergoing a trial period is appointed for three years and then he waits for the last day of the probationary period to come, [he waits for] the decision whether he will be appointed as a judge

or not, and then he is appointed for a life time, right?! This judge cannot be fully independent, because he knows that it is up to the Council to decide whether he will be appointed or not after the three-year term... The trial period should apply to new, inexperienced judges and only then it can be justified because [if a judge] fails to successfully perform during the three years, he should not be appointed [on a permanent basis] and there is some logic to that..." (Current male judge, Tbilisi Appellate Court)

### **Judicial Transfers, Promotions and Sending on Mission**

According to some respondents, the practice of judicial transfers and sending on mission was actively used prior to 2012, and some believe that more than anything, it was used as a punitive measure because a judge's preferences were not taken into account.

Most respondents state that the practice of sending on mission has been completely abandoned today. As to judicial transfers, some respondents believe that such practice has also been essentially abandoned but others note that preferences of a judge are not taken into account during such transfers. One of the judges believes that a legislative action must be taken to repeal the practice of transfers and sending on mission.

With regards to judicial promotions, most judges underline the need for clear and detailed criteria, in order for judges to know in exactly which case he or she will be promoted. According to a city court judge, the practice of promotions is essentially suspended today because the only way a judge can be promoted is if s/he participates in a general competition announced in a higher instance.

„How many [judges] should be transferred for a promotion, what are the criteria for promotion, selection. We don't know anything about this... We don't know why [they chose] that particular judge and not the other one, whysomeone was promoted, we don't know... A set of criteria needs to be established. A system should allow me to manage my own evaluation. A judge should be able to know how to perform in order to improve his evaluation; otherwise, when you are in Category A you may suddenly find yourself in Category C not knowing the reason why. No one knows why because these things are unforeseeable" (former female judge, Tbilisi Appellate Court).

Respondents recommend the following to improve the practice of promotions:

- Enactment of the norm about promotions in the Law on Common Courts;
- Tightening the legal requirement about a two-year experience for a promotion in the appellate court;
- Taking into account opinion of NGOs about judicial promotions;
- Monitoring and evaluating performance of judges and taking their performance into account for a promotion;
- An individual with no experience working as a judge in a lower court should not be appointed in the Supreme Court.

### **Disciplinary Liability of Judges**

When talking about the system of disciplinary liabilities, most respondents note that bases for liability need to be improved and defined in detail. Judges sometimes are unaware of which actions may lead to a disciplinary punishment and what is meant by improper performance of duties. Some respondents noted that interpretation of a law, a norm, or overturning a decision of a lower court should not be used as a basis for instituting disciplinary proceedings.

One of the judges stated that disciplinary liability related to the timeframe for handling a case leaves room for influencing a judge. Due to heavy workload sometimes judges are unable to handle cases in due time, meaning that there is at least one reason that can be used for instituting disciplinary proceedings against a judge.

„As to the disciplinary liability related to the timeframe [for handling of a case], I believe that in today's situation it can be used as a mechanism against a judge's independence because considering the number of judges, the number of cases and the timeframe [for handling these cases], it has no other purpose but to hang over a judge's head like a sword of Damocles..." (Current female judge, Supreme Court)

One of the judges also stated that issues related to disciplinary liability must be completely separated from the

HCoJ authority and must be reviewed without the Council's involvement. It was also stated that unless the HCoJ receives at least minimum votes required for referring the case to the Disciplinary Board for further actions, the proceedings must be terminated.

### **Specialization and Categorization of Judges**

It was difficult for representatives of appellate courts and the Supreme Court to evaluate the process of specialization and categorization of judges in the judicial system because the process takes place only in first-instance courts. City court judges stated that the Council usually takes their preferences into account.

With regards to specialization, one of the judges recommended narrowing down specializations because it will expedite handling of cases. It was also stated that there are certain gaps in the law related to specialization, because a HSoJ student takes a final exam in the field of his/her choice, while the law does not prohibit assignment of judges to chambers and boards that are different from the specialization that they chose (administrative, civil and criminal).

„As to specialization itself, unfortunately the law does not contain a provision that would tie specialization to the exam taken by a judge and later to graduation of the HSoJ. However, I'm sure you'd agree if I say that when I have a specialization, when the exam that I passed was in civil law, there is no way I can practice in the field of criminal law because I don't know anything about it. However, there are people who are specialists of civil law but practice in criminal law or vice versa" (former female judge, Tbilisi).

### **Independence of Judges**

Judges touched upon the issue of independence of judges when talking about the three-year probationary period, judicial promotions and disciplinary liability. In addition, when talking about the issue of influencing a judge, respondents highlighted internal independence of a judge and stated that high degree of internal independence, qualification and responsibility should prevent judges from being influenced. At the same time a few respondents named several factors that may influence a judge:

- The institution of the court president;
- Concentration of important powers in the HCoJ
- Appointment of judges for a definite term – probationary periods;
- Social vulnerability of a judge.

Some believe that despite high remuneration, to protect independence of a judge it is important to introduce financial incentives that commensurate with experience. This will motivate judges and increase their productivity. To ensure independence of a judge it is important to provide retirement benefits – a judicial pension.

Some respondents also noted that the Council should introduce an electronic system of distribution of cases to ensure independence of judges.

### **The Role of a Court President in the Judicial System**

*According to respondents, court presidents, chairs of boards and chambers play an important managerial role in the judicial system. Their functions include: distribution of roles between the judiciary personnel and their control, ensuring material/technical base, distribution of cases, etc. Some judges believe that the of the office of a chairperson is excessive and it must be abolished, or chairpersons should no longer have administrative functions and should become more active in the field of public relations. A former judge suspects that candidates favored by the HCoJ are appointed as court presidents, allowing the Council to maintain its influence on courts.*

*Cases in courts are distributed among judges in the sequential order but judges support the idea of electronic distribution of cases as a way to ensure random distribution of cases and dispelling of all suspicions related to this issue. In the process of random distribution of cases, it is also important to consider complexity of each individual case.*

## **Court presidents, Chairs of Boards and Chambers**

According to judges, court/board/chamber chairpersons have administrative roles/functions (e.g. making sure that administrative personnel fulfills its functions and obligations, appointing/dismissing administrative personnel, ensuring material/technical base, distributing cases, etc.). Some respondents highlight that a court chairperson is not the head of the court with more powers than a judge. In addition to fulfilling a judge's functions, court chairpersons also have to fulfill managerial functions. Only a few judges stated that there is absolutely no need to have a court chairperson.

As to the procedures for appointment of a chairperson, according to judges chairpersons are selected in compliance with the criteria envisaged by the law. Chairpersons of civil and appellate courts are appointed by the HCoJ, while the chairperson of the Supreme Court is appointed by the parliament. Some judges could not provide concrete criteria for selection of a chairperson.

„You should ask the Council about it because we don't know what criteria they use to select [chairpersons]” (current female judge, Tbilisi Appellate Court).

According to a former judge, the Council's criteria for selection of chairpersons is not objective, while judges tend to nominate candidates based on their close social ties.

„Based on friendships, companionships, I don't know, in every possible way. I mean, the [High] Council of Justice appoints them; no one knows exactly how judges were appointed, same is true [for chairpersons]... They nominate themselves, I mean they nominate their favorite candidate. There was one case when judges nominated an individual that was also favored by the Council...” (Former female judge, Tbilisi Appellate Court)

Respondents have different perceptions about the role of a chairperson. Some support the existing model and they see no need to make any changes, while others support the following changes in functions of a chairperson:

- Administrative functions should be removed from a chairperson and transferred to a manager instead;
- A chairpersons should be actively engaged in relations with public and media;
- A judge should be able to select his/her own secretary, assistant.

One of the respondents stated that changes need to be made in chairpersons' term of service, so that chairpersons are no longer appointed for the term of five (civil and appellate courts) or ten (the Supreme Court) years. Their term of office should be reduced, in order to allow other judges to serve as chairpersons.

## **Distribution of Cases in Court**

Most respondents support an electronic system of case distribution as the best way to dispel any suspicions about the issue. Respondents stated that the electronic system should ensure distribution of cases on a random basis. One of the judges pointed out that to guarantee equality it is important to consider not only quantity of cases but also their complexity. It was also stated that the electronic system of case distribution should not be used for cases that are urgent, as a judge may not be unable to handle a case the same day it was admitted and s/he may have a valid excuse for that. Cases that need to be handled in one day should not go through the electronic system and the software should not rule out human factors.

„The system of distribution of cases should limit human interference as much as possible. I may be assigned 50 cases and another judge may also be assigned 50 cases; however, my 50 cases may equal a single case because they are so simple, or they may equal to 500 cases. Therefore, weight of a case needs to be established somehow to ensure equal distribution. Equal distribution should reflect not only the number of cases but also their complexity, how difficult they are...” (Current female judge, Tbilisi Appellate Court)



# GENDER SENSITIVITY OF JUDGES

3

## Introduction

Based on the in-depth analysis of qualitative survey of judges we have found that gender issues are not a priority in the judicial system while the topic of gender is still new. Clearly, majority of survey participants are not aware of the substance of gender equality and its interdisciplinary dimension. Many fail to identify gender stereotypes, gender violence and harassment, gender discrimination, even when signs of such crime are evident. Reproduction of gender stereotypes and self-stigmatization are especially striking.

Many of the respondents point out that they have not viewed the lack of female judges in management positions as a manifestation of inequality and they don't know the reason for that. They don't talk about gender inequality that exists in the country in general and don't view gender inequality in the judicial system against this background.

Most respondents believe that women and men have equal chances of succeeding in the judicial system. However, while some judges that participated in the survey declare that traditional gender roles of women do not limit career for female judges, others point out that often women turn down promotions due to their gender-related responsibilities.

As to safeguards against gender violence, respondents state that incidents of violence have never occurred in the judicial system and therefore, there is no need to have these safeguards in place. At the same time, some respondents have pointed out that victims of gender violence are often reluctant to speak out because they fear to be stigmatized.

## Reducing the Importance and the Urgency of the Issue of Gender Equality

For majority of respondents, gender equality in the judicial system is not a topic of priority in general. Some do not acknowledge sex and gender distinctions in the judicial system and believe that a judge is a gender-less individual: "I think there is a saying that a judge has no gender... the judicial system doesn't have a problem of gender" – (a male judge). Some female judges share this opinion, saying: "we are gender-less, cases are equally distributed among all of us" (a female judge).

Limited interpretation of gender equality as a phenomenon offered by respondents is mostly based on the notion of gender balance, i.e. "headcount". They point out that 52% representation of women in the judicial system is indicative of gender equality and female judges don't face any gender barriers:

„Majority [52%] of judges are female and if there were any barriers, their number couldn't have exceeded [the number of male judges]" (a female judge).

To prove that gender equality exists in the judicial system, they cite a widespread stereotypical argument, according to which having a woman as the head of the system means that gender equality exists. Such view of gender equality, which reflects a mechanical understanding of equality, amounts to a formal equality<sup>23</sup> and was challenged in the Supreme Court of the U.S. as early as in 1971.<sup>24</sup> As a result, the concept of equality was broadened from formal to substantive equality.

## Talking about Women's Experiences instead of Women

We have found that male judges often declare instead of women that gender equality exists and there is no gender violence. They convincingly talk about women's experiences in the judicial system, even though they can never go through these experiences themselves:

„There is no gender violence in the judiciary. Here everyone is protected and no one feels that because she is a woman she will be oppressed or will be assigned to more cases or to more difficult cases..." (A male judge)

Only one of the judges surveyed asked what female judges think about gender equality in the judicial system. This was the only exception and a very important equality-oriented position.

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<sup>23</sup> Abashidze A., Arganashvili A., Gochiashvili N., Natsvlshvili A., Dekanosidze T., (2016). Gender and Law, Gender Analysis of Georgian Legislation, Partnership for Human Rights, p.21; EU Commission (2012) Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India, p. 51. available at: < [goo.gl/YqzvBR](http://goo.gl/YqzvBR)> [accessed 23 March 2017]

<sup>24</sup> *Giggs v Duke Power Co.* 401 US 424, 91 S Ct 849 (1971).

## **Indirect Discrimination of Women due to their Care Responsibilities**

Leadership positions in the judicial system are clearly dominated by men (positions of court, board and chamber chairpersons). When we asked respondents about the reason why women continue to lag far behind men in management positions in the judiciary, they responded that it has nothing to do with discrimination and everything to do with the fact that females are less active than their male counterparts. The reason why females are less active is their lack of time, which means that according to respondent, female judges find themselves in unfavorable position because they are not active and have no desire to be promoted:

„Being a chairperson of a court is not an easy task because of the workload and the number of judges. It is possible that women are less motivated to serve as court chairpersons... Often women have to take care of their families and whatever little free time they have left, they don't want to spend it on court. I think this is the reason more than anything else" (a female judge).

This means that women who spend time on fulfillment of gender roles are put at a disadvantage compared to individuals that don't have or don't recognize any such rule.

In addition, according to a preconceived opinion, holding a managerial position means spending "too much time" on court, as opposed to activities performed during working time. Naturally, a female judge, who in reality has more parenting responsibilities than her male counterpart, is required to spend more time on work for a promotion, on top of the regular working hours defined by the legislation. As a result, she is forced to turn down a promotion. It may seem that a female judge passes up a promotion based on their free will but in fact they are forced to turn down promotions.

Such discriminatory requirements and expectations about female judges is not viewed as discrimination in the judicial system, despite the fact that turning down a position due to one's caring responsibilities (for both sexes) or disadvantaging an individual due to his/her caring responsibilities is classified as indirect discrimination by international human rights standards.<sup>25</sup>

## **Glass Ceiling – Challenges in Balancing Professional and Personal Life**

The research materials clearly illustrate that female judges are forced to make a choice between professional and personal lives because the socially recognized gender roles are not taken into account in the judicial system with regards to female judges. Many female judges state that assuming a leadership position in the judicial system means neglecting caring responsibilities, which they are not willing to do:

"For instance, as a woman I don't want to be a chairperson because it's a huge team, numerous employees, and I will no longer be able to pay attention to my family. I don't want to forget my family. I want to have both a family and a job" (a female judge).

According to respondents, challenges in balancing professional and personal life, gender roles, can be addressed by provision of support for female judges after they return to work following a maternity leave, when their responsibilities have grown significantly and they find themselves in stressful situations:

"When we were appointed [my female colleague] was pregnant and she had three more children after that. She has returned from her maternity leave and things are difficult for her – you need to hire a nanny for help. Not everyone has parents by their side. This takes a toll on you because while you're working on a case your child is crying, you're getting phone calls, asking when you are going to be back... Half of your salary goes [to the nanny]. They need to take this into account; they need to create more guarantees for a judge to have time for her children and family... (A female judge)

Survey participants stated that many of their initiatives for supporting women's gender roles, their professional and personal lives were not taken seriously and were met with laughter:

"We had a number of initiatives to create special rooms for children in larger courts where children of nursing mothers [would spend time]. Not many female judges have [small children] and it wouldn't have been noisy in court; there [could have been] nannies also and co-funding could have been provided but this was met with laughter. The response that we got was "Don't we have bigger problems?!" (Former female judge)

As a result, women that work in courts blame themselves for being "bad parents", for not being able to fulfill

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<sup>25</sup> The European Network of Legal Experts in the Non-discrimination Field (2007), European Anti-Discrimination Law review, p. 21., available at: < <https://goo.gl/maZrRc> > [accessed 23 March 2017].

a parent's responsibilities because of their work, which naturally takes a fundamental toll on women's self-realization and reduces their chance of success:

"Workload of a female judge is different from workload of a woman with any other job. Female judges are completely engulfed by a case, emotionally and psychologically. I remember a secretary of my trial once told me, I didn't even ask how my child is doing today, I completely forgot that I have a child. ... She didn't remember to ask how her child was doing. We were at a hearing all day and she had a small child, two or three years old, she had recently returned from a maternity leave. These children are working together with us..." (A female judge)

Some respondents believe that female judges should be provided with more benefits in view of the double burden placed on them because of women's gender roles. Here we must also note that equalization of opportunities for female judges to help them fulfill their gender roles is not viewed as a positive action measure but as a "benefit" provided to female employees. These measures are considered a good will "support" provided to women as opposed to legitimate means for ensuring substantive equality. Such approach is damaging mostly for women and hinders their success in the judicial system.

It is especially unfortunate that voice of female judges requesting positive action measures is weak and hesitating. They don't express clear and principled positions to demand gender equality and dignified working conditions:

"For the last three years I no longer have to work on weekends because I was somehow able to overcome this and now I feel relieved" – said a female respondent, who believes that working on weekends and staying in court until 10pm is damaging for her family and her children. However, she is also concerned that her strive for gender-fair labor conditions may hinder her career advancement and starts making excuses:

"I heard that a judge [who works on] weekends... I don't want to name any names but because he [or she] works on weekends and takes additional workload, his [or her] bonus should be defined individually. Why should it? What if I finish my work during the workweek? Judges shouldn't have to work on weekends. You should create such conditions [that judges don't have to work on weekends]. They should have time for their personal life. This is what I think" (a female judge).

The research has clearly shown that glass ceiling, a form of gender inequality, is manifested in the judicial system through the choice that female judges have to make: personal and family life or professional life and career advancement. Researchers of gender and feminist law believe<sup>26</sup> that female lawyers that find themselves in a fierce competition and are also burdened with a traditional responsibility to care for others have to choose between the following three strategies for solving the problem: (1) some opt for a masculine or rigid approach following the norms of the legal system and subjugate their professional life to subordinate and hierarchic model offered by a well-established working environment; (2) others are split between the aspirations to excel in professional life and in caring for a family, both at the same time; (3) and there are female lawyers who are trying to redefine the role of a lawyer and initiate changes in the power system based on their inner beliefs and professional maturity.

The present research clearly demonstrates that women that opt for the third strategy are a few and far between and therefore, forms of gender equality that disadvantage female lawyers continue to exist.

### **Parental leave – a right or a privilege**

The research has identified stereotypical approaches in discussions about use of parental leave by female judges. Firstly, we must note that nearly all respondents view parental leave as a leave for women – a temporary period of absence for pregnancy, childbirth and caring for children. Male judges have essentially never used a parental leave. Respondents believe that raising and caring for a child is a woman's function and in some cases it is viewed as a primary responsibility of a woman.

Some also state that use of maternal leave by female judges increases a workload for male judges, even though court employees that continue to work in their counterpart's absence are both men and women.

"While they care for their children and their families, men are always ready to deal with everything [court cases], without complaining about it, to administer justice and help our female [counterparts] that have important functions not only at work but also in their families" (a male judge).

Here we must also note that often a maternity leave is viewed as a time off to rest for female judges:

"They continue to receive a salary for six months, and they are still entitled to an additional month off, i.e. they

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<sup>26</sup> Jack, R & Jack D.C. 'Moral Vision and Professional Decisions: the Changing Values of Women and Men Lawyers' (1989, CUP).

can take seven months off from work, rest and take care of children, which I think is an additional incentive after so much routine work” (a male judge).

The research has also revealed that a parental leave, which is tied to reproductive and child bearing functions of a woman, is implicitly perceived as a privilege that men don't have:

“According to the law, if you miss work for more than four months, even for a valid reason, you may be dismissed – like for instance, when you are sick for four months, but this doesn't apply to women, I mean pregnant women” (a male judge).

Viewing parental leave as an opportunity exclusively for women means that responsibilities related to caring for a child are viewed as exclusive responsibilities of women, which naturally does not agree with the concept of gender equality because the double burden that falls on women only must be equally distributed among both sexes in a society that strives for realization of the principle of equality. In such case, parental leave will no longer be viewed as a privilege or a break from work but rather, a legal right for both sexes guaranteed by the human rights law.

### **Gender Stereotypes as a Manifestation of Gender Inequality**

Majority of research participants does not acknowledge gender stereotypes that exist in the judicial system and their contribution to creating an atmosphere damaging for female judges. However, during interviews respondents have expressed stereotypical views and phrases, conveyed using a humorous tone to reduce their discriminatory content:

A respondent provided the following answer to a question about a reason for the lack of women's representation in leading positions: “let me give you a humorous response: there is a saying that a man is the head of the family and a woman is the neck, you understand, right? (A female judge)

Another respondent provided the following example to illustrate that male judges support female judges: “it certainly wouldn't be fair for me to say that our male colleagues, including chairpersons or the Council, don't [provide support]. They even joked about it: what will it take for you to get married? I don't remember what they were talking about exactly...”

However, according to some respondents, the fact that female judges don't enjoy equal conditions for promotion and success has to do with patriarchal attitudes, stereotypes and mentality:

“I think it is completely unfair that they [women] are not equally represented in positions of court chairpersons or chamber chairpersons. This is a typical problem that exists in many agencies, in public agencies in particular, where women are represented in lower positions, as to management positions, it is considered that women don't make good managers. It is a problem of mentality” (a female judge).

Another respondent noted the following about discriminatory attitudes:

“I think it is the spirit of the decision making bodies [author's note – here the respondent means decisions about appointment of women as court chairpersons] that women cannot handle responsibilities of a court chairperson” (a female judge).

“Decision makers are also humans influenced by stereotypes according to which chairmanship requires some other force that women don't have but men do” (a female judge).

We also found gender stereotypes about men:

“Men are objectively lazy in Georgia... I think women are more hard working” (a male judge).

Gender stereotypes were also evident in discussions about gender violence:

In response to the question about safeguards that exist in the judicial system against gender violence, a respondent stated the following:

“I don't think these things happen in Georgia, especially against a judge. I don't understand how a female judge can be subjected [to gender violence]” (a female judge).

As early as in the 1970s, U.S. courts found that gender stereotypes, as a clear manifestation of gender inequality, were damaging to the judicial system. For instance, in 1987 a task force was set up under the initiative of the Minnesota Supreme Court Chair comprising of 30 judges, lawyers, public officials and civil society representatives. Over the course of two years the Task Force worked to determine what kind of stereotypes exist in the

judicial system and how they affect decisions that judges make.<sup>27</sup> Having examined cases, Judge Rosalie Wahl found that gender stereotypes in the judicial system create “institutional sexism” which according to Wahl is equals to “institutional racism”. This way, she underlined gravity and systemic nature of the problem.<sup>28</sup> Judge Wahl gave an overview of the Task Force’s findings, according to which gender bias manifested during handling of cases that involved divorce, property division, alimony, attorney’s fees, child custody, child support, domestic violence and sexual violence on children.

The research clearly demonstrates the need to perform similar works in the judicial system in Georgia, in order to combat widespread gender stereotypes. This will not only improve gender equality within the judicial system but will also promote making of gender-balanced and gender-sensitive decisions in courts.

### **Lack of Safeguards against Gender Violence**

There are no safeguards against gender violence in the judicial system. Respondents unanimously state that gender based violence has never taken place in the judicial system, they haven’t even heard about any such fact, so they believe that there is no need to have any safeguards in place in addition to the law.

Majority of respondents stated that the law protects female judges against violence and harassment in the judicial system.

However, one of the respondents made an important point as to why female judges are reluctant to talk about gender violence and gender harassment. According to the respondent, this has to do with the fact that issues of gender violence and harassment are viewed through a stigma:

“The problem is that there is a certain stigma, meaning that whether it is a female judge or a female employee of a public sector or a private sector, if she raises her voice about the problem she will be criticized for it and because of this stigma, they are reluctant to talk about the issue. We don’t have the internal environment and culture where such issues will be strictly controlled” (a female judge).

Another respondent believes that women are reluctant to report gender violence due to fear:

“I think they are afraid that the society will blame them for it and say there was no sexual violence by a man, that he was provoked by the woman, you know, the stereotypes that exist in Georgia about relationship between woman and man. There are no safeguards to protect ourselves from it, except that you must have internal courage and [be brave enough] to talk about it and report it and protect yourself this way” (a female judge).

When talking about safeguards against gender violence, another respondent stated that she was a victim of vicious rumors [author’s note – a possible harassment] but was able to overcome the challenge on her own. She doesn’t think it is an individual problem and believes that it is the result of widespread social attitudes:

“This is Georgia and when you are a woman, whether you are a judge or not, if there is something special about you, you will be targeted by gossips but you have to learn to deal with it... I’ve heard some unpleasant gossips about myself and it’s a little heartbreaking but... sometimes they ascribe your success to other things, bad things. These things happen but I don’t think that I’m the only one with this problem. It generally exists in our society and they gossip less about men...” (A female judge)

### **Conclusion**

Important changes have been made in the judicial system following 2012: the rule for lifetime appointment of judges was adopted, the judicial system became more open, judges are now able to freely express their opinion, work of the HCoJ is more transparent, so are judicial selections and appointments. However, certain challenges remain, including too much workload of courts and insufficient number of judges, as well as gaps that allow influencing of a judge. In particular, the three-year probationary period that judges have to successfully complete before their lifetime appointment, issues related to promotion and disciplinary liability of judges where certain ambiguities exist, specialization of cases in courts and distribution of cases by chairpersons.

The research clearly illustrates the need to conduct an in-depth research of gender inequality in the judicial system in consideration of all the reasons why female judges are reluctant to openly talk about the issue, to allow the system to address these gaps and develop an effective mechanism. This will have a positive impact on female judges as well as the product of the judiciary.

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<sup>27</sup> Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *William Mitchell Law Review*: Vol. 15: Iss. 4, Article 1, available at: <<http://open.mitchellhamline.edu/wmlr/vol15/iss4/1>> [accessed 21 March 2017].

<sup>28</sup> Minnesota Supreme Court Justice Rosalie E. Wahl, “The task force on Gender Bias in the Court: Establishing a Framework for Change, “second national Conference on Gender Bias in the Court, Williamsburg, Virginia (March 18-21, 1993), pp. 6-7.

# FORMATION OF THE JUDICIARY

4

## 4.1. THE HIGH SCHOOL OF JUSTICE

### Key Findings

- Lack of organizational independence of the High School of Justice from the High Council of Justice – 5 out of 6 members of the School are selected by the HCoJ;
- Lack of functional independence of the HSoJ from the HCoJ – judicial certification exams and admissions fall under the functions of the HCoJ. The School does not participate in making of decisions about judicial promotions;
- Admission criteria lack adequate guarantees against biased decisions;
- Means for researching information about the HSoJ admission process and sources of information are not defined by the legislation;
- Lack of transparency of the HSoJ competitive admission process;
- Neither the legislation nor the rule established by the HCoJ defines criteria for selection of members of the judicial certification examination commission. The HCoJ enjoys broad discretion and unlimited powers when it comes to composition of the Commission.

### Right to a trial by a competent judge

In many of its opinions the Consultative Council of European Judges (CCJE) recognizes that high level of professionalism of a judge is an important guarantor of court's independence and impartiality.<sup>29</sup> According to these documents, learning and developing practical skills (through education and training) is both the right and the obligation of a judge. High level of professionalism of a judge guarantees independence and impartiality of the judicial system, protection of human rights, respect of the judiciary, and strengthens public confidence in the judicial system.<sup>30</sup> The important role of training and education of judges in independence of the judiciary has been recognized in a number of international documents.<sup>31</sup> The European Charter on the Statute of Judges puts a particular emphasis on adequate level of professionalism of a judge. In light of the above, training of judgeship candidates and continuing education of judges is an essential component of an independent and impartial judiciary, and strengthens the right to a trial by a competent judge.

### School Education – International Standards on Training and Education of Judges

In view of international recommendations about competence of judges<sup>32</sup>, we have identified the following important approaches:

1. We must differentiate between initial education as a necessary precondition for discharging powers of a judge and further training (continuing education) of a judge. Relevant international standards recognize equal importance of training of judicial candidates before they began to carry out their responsibilities, and further (in-service) training of judges;<sup>33</sup>
2. Initial education and in-service training should entail theoretical and practical methods of teaching;
3. Initial education and in-service training should be fully sponsored by the states;
4. The authority responsible for training of a judge should be independent;
5. The decision to appoint or promote a selected candidate should be taken in consideration of a recommendation of the authority responsible for training of a judge;
6. It is an ethical duty for judges to maintain and update their knowledge by attending different training programs at the HSoJ or other similar institutions and by making own efforts to acquire knowledge and skills necessary for quality administration of judges;

<sup>29</sup> CCJE Opinion N1(2001) on standards concerning the independence of the judiciary and the irremovability of judges, para.11; CCJE Opinion N3 (2002) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality, para.25 and 50ix; CCJE Opinion N4 (2003) on appropriate initial and in-service training for judges at national and European levels, para.3

<sup>30</sup> CCJE Opinion N4 (2003), paras. 2-5.

<sup>31</sup> (1) The United Nations Basic Principles on the Independence of the Judiciary; (2) the Council of Europe Committee of Ministers Recommendation #R(94)12 on the independence, efficiency and the role of judges, paras. 56 and 57; (3) The European Charter on the Statute of Judges.

<sup>32</sup> The Council of Europe Committee of Ministers Recommendation #R(94)12 on the independence, efficiency and the role of judges, para.58.

<sup>33</sup> CCJE Opinion N1(2001), paras. 10-13; CCJE Opinion N3(2002), paras. 25, 50ix.

7. The system of training is necessary for judges who are recruited at the start of their professional career, as well as for judges who are chosen from the ranks of experienced lawyers;<sup>34</sup>

### **The model of initial education for judicial candidates and in-service training in Georgia – the High School of Justice**

The Georgian legislation envisages education of a judicial candidate until he or she is appointed as a judge and starts discharging judicial powers.<sup>35</sup> A judicial candidate is trained by attending a full course of training at the state-funded HSoJ. According to the law, one of the functions of the School is to educate judicial candidates. Therefore, activities of the HSoJ constitute initial education of judicial candidates and the training must be subjected to international standards.

On the one hand, initial education of judgeship candidates and in-service training of judges is an important guarantor of an independent and impartial judiciary, while on the other hand, according to the law, in order for a person to be appointed as a judge s/he must successfully complete a training course at the HSoJ. This way, chances of appointment of competent judges are largely determined by institutional and financial independence of the HSoJ and objective and transparent admission process.

The HCoJ was established in April 2006. Before that, by virtue of the Organic Law of Georgia on General Courts 1997, judges were appointed by the President of Georgia upon nomination by the HCoJ. In this regard, the HCoJ announced a competition for selection of judicial candidates. In addition to other general requirements, candidates were required to pass a qualification examination. Here we must note that back then the HCoJ served as the president's advisory council and was responsible for judicial independence. As the president's advisory council, the HCoJ was staffed by executive, legislative and judicial officials and therefore, rules of the HCoJ composition lacked political neutrality.<sup>36</sup>

The primary reason why the HCoJ was created in April 2006 was to create a merit-based system of appointment of judges,<sup>37</sup> while after the Law of Georgia on General Courts was amended in 2013, the rules of composition of the HCoJ were changed in an attempt to free the process of judicial selections and appointments from political influences. As a result, the HCoJ members no longer include political officials.

The quality of training of judicial candidates at the HSoJ is very important. It is expected that overtime the HSoJ role in training of judicial candidates will be increased and judges appointed for life will no longer be subjected to re-appointment, number of candidates that are former judges will be reduced<sup>38</sup> and the number of candidates that are recent graduates with relevant experience acquired during their initial training at the HSoJ will be increased.

Merit-based selection of judges is not ensured by the HCoJ's institutional arrangement and functions, which is discussed in more detail later in this report. However, here we must also note that currently the HSoJ trains as many students as requested by the HSoJ (over the last two years only 20 students were admitted by the HSoJ). The Council is able to influence the School and decide not to announce or terminate admission of new students for no apparent reason, just like it did in 2015-2016. Therefore, existing model of the HSoJ creates a significant obstacle to participation of new faces in judicial competition and fails to ensure competitive environment for judicial competition, as it essentially has no say in the competition process. This is confirmed by the fact that although the Council usually announces a judicial competition twice a year, candidates that participate in these competitions are the same (mostly former and current judges). Although there are many vacant positions and new judges are needed in courts, many positions are still vacant following a competition largely due to the fact that candidates that participate in the competition are poorly prepared. As a result, the Council resources are spent ineffectively because conducting a competition is a labor consuming process. In addition, the Council has many other important functions but it spends most of its time on repeatedly conducting competitions.

Apart from ensuring the HSoJ independence and competitive selection, reforming the HCoJ has other objectives. Leaving a broad range of functions related to training and education of candidates in the hands of the Council causes excessive concentration of power, which may pose a threat to judicial independence. Here we must also note that international standards reflect the same approach. The CCJE separates functions related

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<sup>34</sup> CCJE Opinion N4 (2003).

<sup>35</sup> According to the Law of Georgia on the High School of Justice, para.2 of Article 1, "it is the purpose of the School to provide professional training of a person to be appointed as a judge in the system of courts - a judicial student.

<sup>36</sup> The Organic Law of Georgia on General Courts, as of 1997

<sup>37</sup> The information available on the official website of the HCoJ: [http://www.hsoj.ge/geo/about\\_us/history/](http://www.hsoj.ge/geo/about_us/history/)

<sup>38</sup> There is an exception allowed for former judges and certain judicial experience exempts them from training at the HSoJ.

to training of judges from other functions of the Council and recommends that where independent councils of justice exist, the function of training of a judge should be clearly separated from other functions of such councils.<sup>39</sup> The recommendation is especially fitting for Georgia where the HSoJ is a separate agency, which provides an opportunity to separate functions related to judicial selections, appointments and promotions from training functions.

### **Judicial Qualification Exam**

According to the law, judicial qualification exams are announced and held by the HCoJ.<sup>40</sup> Passing of the judicial certification exam is a precondition for admission to the HSoJ<sup>41</sup> and therefore holding the qualification examination should fall under the functions of the HSoJ as a precondition for functional independence of the School. In addition, because the Council is responsible for organizing the qualification exam it has a broad power to exert an improper influence on the process of admission to the HSoJ. Here we must also note that the last decision of the HCoJ about scheduling of judicial qualification exam was made on 19 October 2015.<sup>42</sup> The Council has not scheduled any other exams since. This may have a negative effect on creating of a competitive admissions environment for the HSoJ admissions.

Another important issue related to judicial qualification examination is staffing of the qualification examination commission. Because purpose of the commission is to grade tests, it is important that the commission is staffed by objective, highly qualified and highly reputable graders. Under the existing regulations, composition of the qualification commission is determined by the HCoJ. Here we must also note that criteria for membership of the commission do not exist. Therefore, the HCoJ is not bound by any objective requirements for determining members of the commission.

In European countries legislation provides stringent requirements for membership of judicial qualification examination commission. For instance, the examination committee in Italy has 29 members and is chaired by a judge/a prosecutor with at least 24 years of professional experience. 20 members of the commission are judges/prosecutors with at least 12 years of experience, 5 members are law professors and remaining 3 members are lawyers.<sup>43</sup>

The law on the High Council of Justice should provide criteria and rules for selection of members of the examination commission. The High School of Justice should be responsible for defining composition of the examination commission, appointing the commission chairperson and approving the commission regulations.

### **Admission to the High School of Justice**

Under the law, the High Council of Justice has the power to announce and conduct a competition for admission to the High School of Justice. Announcing a competition and admitting students to the HSoJ is an issue of functional independence. Therefore, it should be the HSoJ itself that announces a competition, determines the number of students and admits them. A system that will rule out any improper influence of the HCoJ on the process of admission of students and will create a competitive environment for selection of judges should be put in place.

Number of judges in the judicial system should not be the only criteria for making a decision about conducting a competition for admission to the HSoJ, as defined by the law.<sup>44</sup> The law should imperatively stipulate minimum number of students that must be admitted to the School when a competition is announced, while the number of students should be defined by the School itself, in agreement with the HCoJ. This will rule out any artificial impediments to the process of admissions. In addition, announcement of admission and training of judicial candidates should occur on a regular basis, and the School should make a full use of its financial and other re-

<sup>39</sup> CCJE Opinion N4 (2003), para. 18. CCJE Opinion N10 (2007) paras. 65-66.

<sup>40</sup> According to the Law of Georgia on General Courts, Article 47, "The High Council of Justice of Georgia shall be created to ensure the independence of courts (judges) and the quality and effectiveness of justice, to appoint and dismiss judges, to organize judicial qualification examinations, to formulate proposals towards implementing a judicial reform, and to accomplish other objectives determined by law".

<sup>41</sup> According to the Decision of the HCoJ, dated September 25, 2007, on approval of the rules for conducting a judicial qualification examination, Article 1, purpose of the judicial qualification examination (or the qualification examination) is to select highly-qualified lawyers for participation in a competition announced in the High School of Justice for admission of judicial students.

<sup>42</sup> The HCoJ Decision #1/168 on scheduling of judicial qualification examination, dated October 19, 2015.

<sup>43</sup> Venice Commission, CDL-UDT(2009)013, 'Independence Through the Appointment Procedure, Status of Judges and Adoption of the Budget of the Judiciary', para. 80.

<sup>44</sup> According to para.3, Article 11 of the Law of Georgia on High School of Justice, "a decision to conduct a competition for admission to the School is made by the High Council of Justice of Georgia, in consideration of the number of judges in the system of general courts of Georgia."

sources to that end. Large number of candidates will ensure a competitive environment for selection of judges and will promote merit-based selection. This model will provide more chances for selection of highly qualified candidates and vacant positions will no longer remain vacant.

Further, the process of admission of students to the School should be reformed to ensure merit-based admission, compliance with standards of objective criteria, reasons for admission decisions and an effective mechanism for any grievances. Under the existing legislation, admission to the HSoJ is based on passing of the qualification examination, no more than within past 7 years, and passing of an interview. During an interview, a candidate is evaluated against the following criteria: a) qualification examination scores; b) moral reputation; c) personal characteristics; d) professional skills; e) qualification; f) ability to argue and articulate; g) analytical and logical reasoning and decision-making skills. Similar to the process of selection of judges, there is no common standard for evaluating an applicant against the established criteria – evaluation sources and evidence that must serve as the basis for a decision about admission of an applicant are not defined. This allows the selection authority to make biased decisions in the process of selection of applicants.

It is also equally important that evaluation of the HSoJ applicants according to the set criteria follows a system of scores, similar to the process of selection for judicial appointments. This will ensure that substantiated and objective decisions are made. Applicants should be able to appeal a rejection.

Here we must note that a number of European countries practice a different model for admitting judges to a training institution. For instance, in Germany and Italy everyone that passes the state qualification examination will be admitted to a training institution. However, eventually only a small part of trainees will be appointed as judges.<sup>45</sup> Such model clearly ensures a maximum competitive environment but it is also far more costly and may be rejected by the reform implementers for this reason.

### **Transparency of Admission to the High School of Justice**

The process of admission to the HSoJ should be transparent. Evaluation of applicants is done by the HCoJ based on the application documents and interview performance. There are two parts of the evaluation: first, application documents are evaluated in absence of the applicant concerned. If needed, the Council will interview the candidate. The law does not define sources of information or evidence for evaluating candidates against a set of criteria, which prevents use of a uniform approach for evaluation of applicants, leaves room for arbitrary evaluation and precludes transparency.

In addition, the law does not envisage the obligation to substantiate admissions or rejections, or the obligation of proactive publication of information. Transparency of the HCoJ activities can be greatly increased by establishing the obligation to publish information proactively, e.g. posting the information about the Council meetings and decisions on the website.

### **Independence of the training authority**

The High School of Justice is not independent from the authority in charge of judicial appointments and disciplinary liability. Independence of the process of education and training of judges from outside influence and independence of the authority in charge of training programs should be guaranteed by the legislation.<sup>46</sup>

Based on the CCJE recommendations, training of judges is a matter of public interest<sup>47</sup>, while independence and composition of the authority responsible for training and drawing up training programs is crucial. This echoes general principles of judicial independence.<sup>48</sup>

The authority responsible for training of judges should be independent of the Executive and the Legislature, as well as the authority responsible for both training and disciplining judges.<sup>49</sup>

<sup>45</sup> Venice Commission, CDL-UDT(2009)013, "Independence Through The Appointment Procedure, Status Of Judges And Adoption Of The Budget Of The Judiciary", para. 82; Fiona O'Connell & Ray McCaffrey, *Judicial Appointments in Germany and the United States*, 2.2.1. available at: < [goo.gl/jvgPhY](http://goo.gl/jvgPhY) > [accessed 25 March 2017].

<sup>46</sup> CCJE Opinion N4 (2003) para. 14.

<sup>47</sup> *Ibid.* Para. 15.

<sup>48</sup> The European Charter on the Statute of Judges. para. 2.3

<sup>49</sup> CCJE Opinion N4 (2003), paragraphs 13, 17 and 18 – the same authority should not be directly responsible for both training and disciplining judges; the same authority should not be directly responsible for both training and disciplining judges."

Under para.18 of the Opinion, „Those responsible for training should not also be directly responsible for appointing or promoting judges. If the body (i.e. a judicial service commission) referred to in the CCJE's Opinion N° 1, paragraphs 73 (3), 37, and 45, is competent for training and appointment or promotion, a clear separation should be provided between its branches responsible for these tasks."

Separation of the authority responsible for training of judges from the authority responsible for judicial promotions and appointments is important for creating an objective merit-based system of training and education.

Authorities responsible for training and education of judges vary across different countries. Two most common models include: initial education and in-service training of judges is carried out by a special training institution – School of the Judiciary (France, Poland, Latvia); educational institutions are in charge of judicial training and education, while the law clearly stipulates the requirements that such educational institutions and training programs should meet (Germany).

The High Council of Justice of Georgia has an independent organizational form and is managed by an independent council; however, inconsistencies in rules about composition of the council and the fact that the School has not been delegated with a number of important powers, infringe upon its independence and allows the agency in charge of judicial appointments (the HCoJ) to influence the process of admission.

The independent council has 6 members; five members are approved by the High Council of Justice upon nomination of the chair of the independent council. The independent council is one of the main governing bodies of the School and because the HCoJ is involved in composition of the independent council to such extent, independence of the High School of Justice may be jeopardized.

The list below gives an overview of how functions of the High School of Justice and the High Council of Justice are distributed in the process of judicial selections:

1. Organizing and conducting judicial qualification examination – the HCoJ;
2. Determining the number of students to be admitted at the HSoJ – the HCoJ;
3. Deciding to announce a competition for admission – the HCoJ;
4. Accepting applications and verifying them against the application standards – the HSoJ;
5. Deciding to admit students at the HSoJ – the HCoJ;
6. Training students at the HSoJ – the HSoJ;
7. Judicial selections/appointments/promotions/disciplining – the HCoJ.

Clearly, the HCoJ has an enormous role in judicial selections/appointments, while the HSoJ only has supportive functions and does not play a decisive role in a judicial career of an individual. In light of this subordination, independence of the HSoJ is only formal.

Another function that the HSoJ should have is participation in making of decisions about judicial promotions. The School should be able to submit its opinion about promotion of a judge, after determining whether the training completed by the judge is adequate for the position concerned and in view of the duty for judges to maintain and update their knowledge. Today neither the law on the High School of Justice nor the regulations established by the Council for judicial promotions require taking into account of the HSoJ opinion.

### **Recommendations:**

- Regulations for composition of the independent council of the HSoJ should be amended and the authority responsible for judicial appointments – the HCoJ, should no longer be able to influence appointment of members of the independent council of the School;
- For strengthening functional independence of the HSoJ, the latter should be delegated with the following functions: scheduling and conducting judicial qualification examinations, approval of the composition of the examination commission and the commission regulations, announcing a competition for admission of students to the HSoJ, defining examination program and determining composition of the examination commission, approval of the examination commission regulations. In addition, the HSoJ should submit its opinion to the HCoJ about promotion of a judge in the decision-making process;
- The law should imperatively establish minimum number of students to be admitted following competitions announced every year. This will rule out any artificial impediments of the competition process and promote participation of new candidates in the judicial competition;
- The law must establish main principles of conducting a judicial qualification examination and the criteria for selection of members and composition of the examination commission. This will ensure that exams are graded through an objective process, by an impartial grader. The process of admission to the HSoJ should be transparent; in particular, the law should establish objective criteria for admission of students to the HSoJ; sources of information and evidence needed for evaluation of students against established criteria, the obligation to provide justification for evaluation and rules of appellate procedure should be defined.

## 4.2. JUDICIAL SELECTIONS AND APPOINTMENTS

### Key findings

- Criteria established by the existing legislation for selection of judges falls short of the standard of objective criteria; there is no list of sources and information published in advance about the criteria established for selection of judges;
- The criteria established for selection of judges apply to the first-instance and appellate courts equally, not taking into account the fact that different levels of court require different skills and experience;
- The process of selection of judges falls short of the standard of transparency - selection procedure is not adequately regulated in view of the standard of transparency;
- The process of interviewing candidates is not sufficiently formalized; interview weight in the overall score is not determined, which leaves a significant room for evaluator's arbitrariness;
- The model of probationary periods for judges practiced in Georgia does not envisage guarantees for independence of a judge appointed for a definite term and poses a risk to independence of the judiciary;

### Judicial appointments – merit-based selection free from political considerations

There are two types of appointment systems – elective appointments and direct appointments. The Venice Commission favors the latter system of appointment because it believes the model of direct election poses a significant danger that political considerations will prevail in the process of appointments. Relying on the CoE Recommendation, the Venice Commission recommends using the model of direct appointments (appointment upon recommendation and directly by independent councils) because the elective system make sit impossible to appoint judges based on objective criteria and merit.<sup>50</sup>

Evaluation of a candidate against objective criteria is an important precondition for a judicial appointment. According to recommendations about judicial appointments, a judge should be appointed by an independent authority, based on objective criteria, while in systems where judges are appointed by the Executive, guarantees should exist to ensure that appointment decisions are made solely on the basis of the criteria. To create such guarantees, judges should be among members of committees that are responsible for selection of judicial candidates.<sup>51</sup>

This way, according to the European standards, no matter the state's system of judicial appointments, judicial selections should be based on objective criteria. Evaluation of judges against such criteria constitutes the process of selection of judges free from political considerations and based on the principle of merit-based selection. According to European standards, any system of judicial appointments should envisage fulfillment of concrete, objective criteria by a candidate as a precondition for appointment as a judge. Such criteria are based on merit, professionalism and integrity.<sup>52</sup>

### Definition of Pre-Published Objective Criteria for Selection of Judges

The process of judicial selections/appointments is a component of the right to a fair trial and especially, the right to an independent tribunal. Court's independence may be questioned if rules<sup>53</sup> or practice of judicial appointment is not satisfactory.<sup>54</sup>

International standards do not establish an exhaustive list of criteria that should be used to evaluate an individual for the position of a judge. However, the international community has agreed that in order for an individual to be able to properly perform the role of a judge, he or she must possess the following characteristics:

<sup>50</sup> Venice Commission, Judicial Appointments, CDL-AD (2007)028, para. 47: 'Appointments of judges of ordinary (non-constitutional) courts are not an appropriate subject for a vote by Parliament because the danger that political considerations prevail over the objective merits of a candidate cannot be excluded'. available at: < [goo.gl/zpyEHJ](http://goo.gl/zpyEHJ)> [accessed 10 February 2016].

<sup>51</sup> (1) CCJE Opinion N1 (2001). (2) The European Charter on the Statute of Judges; (3) Recommendation of the CoE Committee of Ministers #R(94)12, Principle I, para.1.2.c; (4) Venice Commission, judicial appointments, CDL-AD (2007)028.

<sup>52</sup> CCJE Opinion N1, para. 25, CoE Recommendation CM/Rec(2010)12, para. 44, CoE Recommendation No. R(94)12, para. 1.2.c. Venice Commission, Judicial Appointments, CDL-AD(2007)028, para. 12.

<sup>53</sup> ECHR decisions in cases of *Sramek v. Austria*; *Brudnicka and others v. Poland*; *Clarke v. the UK*. In these decisions, the Court considered regulations about judicial selections/appointments as part of the right guaranteed by Article 6 of the Convention – the right to an independent tribunal.

<sup>54</sup> ECHR decision in *Posokhov v. Russia*.

independence, impartiality, competence and integrity.<sup>5556</sup>

Although the international community has not agreed on an exhaustive list of criteria that must be used for measuring independence, impartiality, competence and integrity of an individual, international standards establish basic principles that the selection criteria should live up to. For instance, it has been established that **the criteria should be objective**<sup>57</sup> and ensure selection of judges based on merit, having regard to qualifications, integrity, ability and efficiency.<sup>58</sup> In addition, **the authority responsible for appointment of judges should be independent** and the guarantees must be in place for ensuring selection of judges based on the criteria and not any other opinions.<sup>59</sup> **Judicial selection criteria should be pre-established and published**, to ensure that they are accessible for candidates as well as the public at large.<sup>60</sup> These principles are established to ensure transparency of the process of judicial selection.

The CoE has found<sup>61</sup> a widespread lack of any such published criteria. Many countries rely on the integrity of independent councils of judges responsible for judicial appointments. In some countries proposal of the relevant advisory board about appointment includes the reasons for its decision. **The giving of reasons** is regarded as a healthy discipline by the CoE.

In light of the above, there must be pre-agreed conditions in place in a state – in particular, the state and the society must agree on requirements that will ensure that the authority responsible for judicial selection (in Georgia's case – the HCoJ) will use a consistent approach to determine whether a candidate meets the criteria or not. To this end, an agreement must be reached about sources that will be used for assessment of a candidate or information that will be used for measuring whether the candidate meets the requirements. Such information must be published in advance and accessible for judicial candidates as well as public at large.

International standards also envisage different criteria for different levels of court.<sup>62</sup>

### Judicial Selection Criteria in Georgian Legislation

Until 2017, the Georgian legislation did not provide any criteria for selection of judges and it therefore failed to live up to international standards according to which issues related to judicial independence must be regulated by norms at the highest possible level.<sup>63</sup> In addition, absence of legal regulations for judicial appointments violates the standard of transparency for the process. Establishing the criteria for judicial selections and appointments under the decision of the HCoJ is insufficient to guarantee objective and transparent process of selection of judges.<sup>64</sup>

It was not until 2017, within the so-called Third Wave of judicial reform that criteria for selection of judges based on professionalism and integrity were defined under the organic law of Georgia on General Courts and a set of characteristics for evaluating candidates against the criteria were determined. However, selection criteria and rules for evaluating judicial candidates introduced under the new regulations still fall short of the required

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<sup>55</sup> Based on the UN Basic Principles on the Independence of the Judiciary, persons selected for judicial office must be individuals of integrity and ability. Para. 1.1. of the reads: "The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights." The Kiev Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, developed in view of the judicial situation in certain countries including Georgia, which is why it is especially relevant for Georgia's reality, underlines selection of judges based on their professionalism.

<sup>56</sup> The Kiev Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, para.17

<sup>57</sup> The UN Basic Principles on the Independence of the Judiciary, para. 13. CoE Recommendation R (94) 12, Principle 1. CCJE Opinion N1 (2001), para. 17.

<sup>58</sup> CCJE Opinion N1 (2001), para. 25.

<sup>59</sup> CoE Recommendation R (94) 12, Principle 1. CCJE Opinion N1 (2001), para. 37.

<sup>60</sup> CCJE Opinion N10 (2007), paras 92, 93.

<sup>61</sup> CCJE Opinion N1 (2001), para. 26.

<sup>62</sup> The Commonwealth Latimer House Principles, The Appointment, Tenure and Removal of Judges under Commonwealth Principles, para. 1.2.8. "A flexible approach to the weighing of criteria is further justified by the fact that their relevance may vary depending on the judicial vacancy that has to be filled. For example, whereas oral communication and courtroom management skills may be particularly valuable in a first-instance court, in the case of appellate courts there is generally a premium on written communication skills and the intellectual qualities needed to develop the law. There may also be a need for additional criteria when filling the position of Chief Justice or other senior positions with significant leadership responsibilities."

<sup>63</sup> CCJE Opinion N1 (2001), para. 16.

<sup>64</sup> Criteria and regulations for selection of judges is established under the HCoJ decision, which does not constitute a legislative act. Therefore, establishment of criteria and regulations for selection of judges under the HCoJ decision may not be considered as an adequate legal regulation of the important matter.

standards of impartiality and transparency, and allow the HCoJ members to make biased decisions. In particular, the set of characteristics for evaluating candidates against the criteria do not set the type of information that can be used to determine whether a candidate is honest, has strong moral principles, is sincere, modest, etc. The law only stipulates the requirement of integrity and further explains that a candidate must be honest, sincere, modest, etc. However, it doesn't say anything about how an evaluator should justify his/her decision to find a particular candidate to have all these characteristics.<sup>65</sup> Not having a common pre-agreed standard in place for evaluating candidates against the criteria means that each evaluator may follow different, subjective measures. As a result, candidates may find themselves in unequal conditions. This is exactly what is meant by the criteria established according to international standards and published in advance.

The principle of selection of judges based on objective criteria and merit is also contravened by the rule established under the Law on General Courts, according to which a point system will be used for evaluating competency of candidates, but the rule for evaluating integrity of candidates does not envisage any such system. This leaves the Council with a wide discretion and an opportunity for a biased evaluation.

Evaluation of candidates against the criteria of integrity and competence is followed by another stage of the competition – making of the decision about appointment of a candidate as a judge by voting. Establishing a secret ballot for candidates identified as a result of evaluation makes the evaluation based on the system of scores useless, rules out any possibility of making substantiated decisions, and allows the Council members to appoint judges without considering results of evaluation.

Here we must also note that the criteria introduced by the law were same as the criteria established under the HCoJ decision, while for many years the criteria established under the HCoJ decision raised serious questions about the use of the established criteria by the Council in the process of judicial appointments. The HCoJ monitoring reports<sup>66</sup> illustrate that for many years selection of judges according to the criteria established by the Council lacked transparency and substantiation. This proves once again that the new regulations introduced under the draft laws of the Third Wave of judicial reform, which are similar to the rules established by the Council, will lead to the same problems in practice.

In addition, because there are restrictions in Georgia according to court levels, an individual without any experience of performing judicial powers can be appointed as a judge in the appellate court. The nature of work that judges perform differs across different levels of the judiciary and requires different skills and qualifications. This should be taken into account during evaluation of candidates. Requirements for judges of first instance courts and higher courts should not be identical.

### **International Standards for Judicial Selections/Appointments**

According to applicable international standards, the process of judicial selections should be seen as legitimate by public. No matter the state's system of judicial appointments, judicial selections should be based on objective criteria, and the selection of judges should be based on merit, free from political considerations,<sup>67</sup> which just like the criteria, serves the purpose of ensuring transparency of the process. To be more specific, according to international standards, judicial selections should be based on the following criteria:

- appointment of judges through an open competition;
- all participants should enjoy equal opportunities;
- interviews are mandatory at least for shortlisted candidates;
- subject of an interview and interview weight in the overall score must be defined in advance;
- the process of background check should not entail security clearance of a candidate. Rejections following a background check must be reasoned;
- discrimination on any grounds during selection process must be prohibited;
- interested parties should be able to monitor the process of judicial selections and be able to check that the responsible authority applied the established rules.<sup>68</sup>

<sup>65</sup> For instance, personal and professional integrity should be evaluated based on the following characteristics: honesty, integrity, sincerity, humility, personal strength, consistency and impregnability, fondness of justice, a person that keeps his/her word, is able to recognize his/her weakness, mistakes, etc.

<sup>66</sup> GYLA and Transparency International – Georgia, the High Council of Justice Monitoring Reports 2012, 2013, 2014, 2015.

<sup>67</sup> CCJE Opinion N1 (2001), para. 17.

<sup>68</sup> CCJE Opinion #10(2007) paras. 92-93 „All decisions by the Council for the Judiciary on appointment, promotion, evaluation, discipline and any other decisions regarding judges' careers must be reasoned... Any interested party should be able to look into the choices made and check that the Council for the Judiciary applied the rules and criteria based on merits in relation to appointments and promotions..“

Based on the principles of the Commonwealth Latimer House, general transparency of the judicial selection process is no longer sufficient. For instance, publishing information about the procedures that are followed, time periods that may be applicable, participants and the competition are no longer sufficient. Instead, individual transparency is also needed, not only for candidates that were rejected, to ensure effective remedy for him/her; but also for the public at large, to enable them to scrutinize the way in which the councils discharges its mandate. Individual transparency entails providing a reasoned rejection and the right to appeal the rejection.<sup>69</sup>

To ensure transparency of the judicial selections, it is important to strike a balance between the right to respect for one's private life and openness of the process. There are a number of recommendations about what the right degree of the balance is, based on what stage of development a country is in and what is the level of public trust in the judiciary. For instance, according to the UN Special Rapporteur on the independence of judges and lawyers, in countries in transition, open interviews can promote increased confidence in integrity of candidates.<sup>70</sup> Open interviews can also be viewed as a mechanism for ensuring accountability of the HCoJ members.

### Flaws in the process of judicial selections/appointments in Georgia

According to the monitoring of the HCoJ activities in 2012-2016<sup>71</sup>, and recommendations issued by international<sup>72</sup> or local organizations<sup>73</sup>, key flaws that exist in the process of judicial selections/appointments in Georgia are as follows:

#### 1. The probationary period for judges may threaten independence of the judiciary

In its Opinion on the Draft Constitutional Law on Amendments, the Venice Commission expresses its concern about the three-year probationary period for judges and warns that the initiative may put independence of the judiciary at risk, because judges "might feel under pressure to decide cases in a particular way".<sup>74</sup> The Venice Commission also notes: "despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance appraisal. If one must choose between the two, judicial independence is the crucial value."<sup>75</sup>

The practice of appointment for a probationary period also exists in Austria and Germany; however, unlike Georgia newly appointed judges on a probationary term do not exercise judicial functions; instead, they undergo a practical training in courts. After successful completion of the probationary period, they are conferred judicial functions. This way, such model of temporary appointment of judges rules out undermining of independence of judges on a probationary period.<sup>76</sup>

The German model offers a different method for reducing risks of undermining independence of a judge on a probationary period. In particular, it limits participation of such judges in trials allowing them to participate proceedings of a collegial court.<sup>77</sup>

Georgian model of probationary period does not envisage a mechanism for protecting independence of a judge

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Venice Commission Report on the Independence of the Judicial System – Part One: The Independence of Judges (n3), para. 26. According to the opinion, merit is the key criteria. Selection process must be open and everyone that fulfills the requirements should be able to participate in it.

<sup>69</sup> The Commonwealth Latimer House Principles, The Appointment, Tenure and Removal of Judges under Commonwealth Principles, para. 1.7.8.

<sup>70</sup> Report of the UN Special Rapporteur A/HRC/11/41 24 March 2009 on the independence of judges and lawyers, para. 31.

<sup>71</sup> GYLA and Transparency International – Georgia reports: the High Council of Justice Monitoring Report 2012; the High Council of Justice Monitoring Report #2, 2013; the High Council of Justice Monitoring Report #3, 2014; the High Council of Justice Monitoring Report #4, 2015; Monitoring Report of the High Council of Justice Three-Year Summary (2012-2014).

<sup>72</sup> (1) Joint Opinion CDL-AD(2014)031 of the Venice Commission and the Directorate of Human Rights (DHR) of the Council of Europe, para.13, section c.; (2) Assessment and Recommendations by Thomas Hammarberg in his capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, GEORGIA in Transition, para. 1.1; (3) The U.S. Department of State Reports 2012, 2015, on the human rights situation in Georgia; (4) the Coalition for an Independent and Transparent Judiciary, statement made on July 4, 2016, "The Coalition Evaluates the Judicial Competition", available at: <[http://coalition.ge/index.php?article\\_id=127&clang=0](http://coalition.ge/index.php?article_id=127&clang=0)> [accessed 2 March 2017].

<sup>73</sup> the Coalition for an Independent and Transparent Judiciary, statement made on July 4, 2016, "The Coalition Evaluates the Judicial Competition", available at: <[http://coalition.ge/index.php?article\\_id=127&clang=0](http://coalition.ge/index.php?article_id=127&clang=0)> Statements of the Coalition about independence of the judiciary are available at: [www.coalition.ge](http://www.coalition.ge)

<sup>74</sup> Venice Commission, CDL-AD(2010)028, para. 90.

<sup>75</sup> Venice Commission, CDL(2010)062, paras. 71-74.

<sup>76</sup> Venice Commission, CDL-UDT(2009)013, paras. 82.

<sup>77</sup> German Judiciary Act, Section 29.

on a probationary term in the process of making decisions. The purpose of the model is not to train judges but to evaluate whether a candidate is qualified to be a judge, whereas the model of appointment for a probationary period practiced in Austria, Italy and Germany aims to train a judge, and until the judge proves that s/he fulfills all applicable requirements s/he is not authorized to handle a case or his/her vote is not a decisive one. Such approach not only undermines independence of a new judge but also jeopardizes the right of an individual to a trial by a competent judge.

Certainly the fact that under the applicable legislation in Georgia, a judge on a probationary period must fulfill functions of a judge undermines his/her independence. Because the HCoJ exists, appointment of judges for a probationary period is not an absolute necessity to accomplish the standard of competence.

## 2. Legal regulation of judicial appointments falls short of the standard of foreseeability, applicable procedures are ambiguous, which fails to ensure transparent process of judicial selections in practice

According to the Organic Law on General Courts, the regulations of judicial appointments are established by the HCoJ. The process of selection of judges was not guaranteed at least in the form of basic principles by the supreme legal document – the Constitution or by the law. Within the Third Wave of judicial reform, the organic law was amended and it was not until 2017 that the procedure for selection/appointment of judges was established by the organic law. Within the reform, the organic law envisaged a number of regulations about judicial selections/appointments: procedure for appointment competition, publishing of information about the competition, publishing of short biographies of candidates, conducting a competition on the basis of the principles of equality and impartiality, prohibition of discrimination, etc. However, the organic law did not envisage several issues that are important for administering the process of judicial appointments in a transparent manner, in compliance with the international standards. In particular, the law does not provide for at least a minimum standard for a background check, while according to the law looking up and compiling information about a candidate is a mandatory stage of a competition and serves as an important source for the candidate's evaluation. It is ambiguous what sources the Council should or shouldn't use to find information about a candidate. Defining sources of information is important to ensure equality for candidates; in addition, the organic law does not require that interviews with judicial candidates be open.<sup>78</sup>

The regulations for selection of judges approved by the HCoJ are mostly non-binding, i.e. the Council is authorized not obligated to conduct individual selection procedures. In addition, the HCoJ monitoring reports provide a number of instances where the Council violated its own rules for selection/appointment of judicial candidates.<sup>79</sup>

## 3. Flaws in the process of interviewing judgeship candidates

The process of interviewing judgeship candidates is inadequately formalized; the weight of the interview in overall score is not established by the legislation, leaving evaluators with wide discretion.

Here we must note that interviews with judgeship candidates have often been harshly criticized. Usually the HCoJ conducts interviews with candidates for the sake of formality, while the Council members employee inconsistent approach towards candidates and often put some candidates at a disadvantage, favoring others. The latter have easy access to the vacant judgeship positions, while many candidates are rejected even if there are vacant positions that need to be filled.<sup>80</sup>

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<sup>78</sup> Interviewing judicial candidates at a Council meeting behind closed doors is envisaged by the judicial selection/appointment regulations established by the Council. In addition, during the reporting period in 2015, monitoring of the HCoJ has found several instances in which, upon consent of the candidates concerned, the process of interviews were closed. The monitoring report 2015 of GYLA and Transparency International – Georgia states that individual members of the Council made an extra effort to explain the right to a closed interview to candidates, hinting at possible negative effects of an open interview.

<sup>79</sup> GYLA and Transparency International – Georgia, the High Council of Justice Monitoring Report #4, para.5.2.4 (e.g. conflict of interest identified during a competition; during the competition, certain members of the Council expressed their opinions in advance and publicly with regard to the appointment as judge of the Secretary of the HCoJ participating in the competition, which violated the principle of neutrality; interviews with candidates were of formal nature and did not aim to assess compliance of the candidates with the established criteria; the Council failed to publish short biographies of candidates participating in the competition) and para. 5.2.5 (e.g. inconsistent approach towards candidates during interviews and contents of questions asked raised serious questions about impartiality of the Council members; during the reporting period individual members of the Council publicly acknowledged that they didn't follow the established criteria for making of decisions about judicial appointments).

<sup>80</sup> GYLA and Transparency International – Georgia, the High Council of Justice Monitoring Report, 2015, para. 5.2.5.

## **Recommendations:**

1. The organic law should provide for an obligation of the HCoJ to establish and publish the information about how candidates are evaluated against the set of criteria for selection of judges, sources and information that allows evaluation of candidates using a uniform approach;
2. The organic law should establish that not only professionalism but also integrity of judicial candidates must be evaluated using a points system;
3. Voting for appointment of judges envisaged by the organic law must be abolished; instead, the Council should make decisions about judicial appointments based on evaluation results and appoint candidates with the most favorable assessment;
4. The rule for appointment of judges for a probationary period must be abolished and high standard of professionalism for a judge must be secured by reforming the HSoJ to delegate it with adequate powers and create adequate safeguards for independence;
5. The judicial selection regulations should reflect different requirements of higher and lower level courts, in view of specific nature of their work;
6. Basic principles for interviewing judicial candidates and the weight of interviews in overall evaluation must be established under the organic law, while detailed interview procedures and the subject of interviews should be established and published by the HCoJ.

## **4.3. LIFETIME APPOINTMENT OF JUDGES**

### **Main Findings**

- The norms regulating the evaluation of a judge appointed for a probationary period, established by the Organic Law, do not include sufficient guarantees for evaluation through an objective and transparent process;
- The rule for making a decision on lifetime appointment of a judge appointed for a probationary period, established by the Organic Law, creates room for subjective and arbitrary decisions and fails to set adequate transparency standards;
- Since 2013, the High Council of Justice has been undertaking evaluation of judges appointed for a probationary period without having adopted a bylaw to regulate the process of evaluating a judge appointed for a probationary period in detail.

### **Norms regulating lifetime appointment of judges**

The 2010 amendments to the Constitution of Georgia introduced lifetime appointment of judges, which can be preceded by appointment of judges for a probationary period. Paragraph 2 of Article 86 of the Constitution of Georgia reads: "Judges shall be appointed for life unless they reach the age determined by law. Before the lifetime appointment of a judge, the appointment of a judge for a definite period but not more than three years may be envisaged by law."

The introduction of appointment of a judge for a probationary period has been criticized by international organizations<sup>81</sup> and local civil society institutions. Since November 2013, in courts of first and second instance, all judges are appointed for a probationary period. In order to appropriately ensure judicial independence, it is advisable to reform the rule of appointment of judges through a systemic approach. The training process of a person to be appointed as a judge should be refined, the High School of Justice should be reformed, and a transparent rule for the selection and appointment of judges should be established. This will ensure high professional standard of judges without posing serious jeopardy to judicial independence.

We support the abolishment of the rule for appointment of a judge for a probationary period; however, taking into account the fact that the Constitution and the legislation still provide a possibility for appointment of a judge for a probationary period, we consider it necessary to analyze the existing model of appointment for a probationary period, identify its shortcomings and elaborate recommendations to refine the existing model.

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<sup>81</sup> (1) Venice Commission, CDL-AD(2014)031, Paragraph 13, Section c. (2) Venice Commission, CDL-AD(2010)004, Paragraph 37. (3) OSCE Trial Monitoring Report, pg 21; (4) Coalition for Independent and Transparent Judiciary, Statement of November 8m 2014: Recommendations regarding Article 5 of the Constitution < [http://coalition.ge/index.php?article\\_id=90&clang=0](http://coalition.ge/index.php?article_id=90&clang=0) > [Last accessed on March 4, 2017].

## **Legislation regulating the evaluation of a judge appointed for a probationary period**

### *Voting procedure*

According to Paragraph 4<sup>1</sup> of Article 36 of the Organic Law of Georgia on Common Courts: “The judge of a district (city) court and court of appeals shall be appointed to office for a term of three years. Not earlier than two months before and not later than one month after this term expires, by analysing the monitoring results under paragraph 42 of this article, the High Council of Justice of Georgia shall discuss and make a decision on whether to appoint the judge to office for life until he/she reaches the statutory age limit.”

In order to evaluate the performance of a judge, after one year and two years of office, as well as 4 months prior to the expiration of the three-year term, the High Council of Justice of Georgia will vote, by lot, to select one judge member and one non-judge member of the High Council of Justice of Georgia to evaluate the activity of the judge for the given period within one month, independently from each other. The mentioned six evaluations shall be performed by different evaluators.

The High Council of Justice carries out the voting procedure in a closed session. According to the law, the data on the evaluation of a judge is confidential until the expiration of the three-year term of the judge. Neither the Council members, nor the structural unit personnel have the right to disclose the results of the evaluation.

According to the law, the voting procedure is not among confidential procedures.<sup>82</sup> However, the established practice of the Council is to carry out the voting procedure on a closed session, violating the requirements of the law.<sup>83</sup>

It should be considered whether the closure of the voting procedure serves any legitimate purpose. The evaluator is known to the judge. The evaluator is only unknown to the society. The purpose of classifying the mentioned information is unclear.

Observation of the voting procedure is only possible during Council sessions. Considering the nature of the voting process, even after the publication of evaluations, it will not be known whether the voting procedure has, in fact, taken place and whether the evaluators have been randomly selected. Therefore, the fact that voting takes place during a closed session makes it impossible to assess its legitimacy.

### ***Informing judges on the procedures and circumstances of evaluation***

According to the Organic Law of Georgia on Common Courts, as soon as the three-year term begins, the judge is informed about the procedures and circumstances that will be considered during his/her evaluation based on certain criteria and during decision-making regarding his/her appointment for life.<sup>84</sup>

The law does not specify the kind of information delivered or the form of deliverance of information to the judge regarding the above-mentioned procedure. According to a letter of the High Council of Justice,<sup>85</sup> during the past three years, the Council has not adopted any additional procedures. After appointment for a probationary period, judges only receive the information about their evaluation that is already given in the law, which renders the requirement of the law about informing judges about their evaluation process merely formal and meaningless.

The OSCE Trial Monitoring Report<sup>86</sup> includes important recommendations which directly advise the Council to establish additional procedures for the evaluation of judges appointed for a probationary period. The mentioned recommendation stems from the international standards for judicial independence set out by the Venice Commission:

- If the appointment for a probationary period is maintained, the High Council of Judges should elaborate additional regulations on the monitoring and evaluation of judges to the provisions included in the Organic Law on Common Courts and take into account international recommendations on evaluating the efficiency of performance in terms of international standards of judicial independence and accountability.

<sup>82</sup> Paragraph 11 of Article 36<sup>4</sup> of the Organic Law of Georgia on Common Courts prescribes a general rule that “The assessment data on a judge shall be confidential until his/her three-year term of office expires.” Neither does any other norm of the Organic Law prescribe confidential voting.

<sup>83</sup> High Council of Justice Monitoring Report, Georgian Young Lawyers’ Association and Transparency International Georgia, 2015, pg. 80.

<sup>84</sup> Paragraph 3 of Article 36<sup>1</sup> of the Organic Law of Georgia

<sup>85</sup> Letter N1701/2387-03-o of October 20, 2016, of the High Council of Justice.

<sup>86</sup> Pg. 21-22. Available on: <<http://www.osce.org/odihr/130676?download=true>> [Last accessed on March 4, 2017]

- The High Council of Justice should elaborate fundamental criteria for the selection and appointment of judges and standard procedures, regardless of whether the probationary period is maintained; this should include procedures for decision-making on lifetime appointment after the expiration of the probationary period. These procedures should require written evidence to be enclosed in all decisions.<sup>87</sup>

The general content of the law implies that the Council had to elaborate the mentioned rule. In addition, the analysis of the legislation has shown that the norms of the law are not sufficiently detailed and a range of procedural issues requires additional regulation (e.g. the rule for evaluating the decisions made by a judge appointed for a probationary period, the rule for obtaining information about the appointed judge, the reference to information sources and the evidence necessary for objective evaluation of a candidate according to the defined criteria, etc.). As noted above, similar recommendations have also been given by the OSCE.

Regardless of the above-mentioned, for the past three years, the evaluation of judges appointed for a probationary period has been conducted without the adoption of additional evaluation procedures by the Council. This renders the process non-transparent and creates room for arbitrary and non-objective decisions. Furthermore, judges are unable to foresee the information based on which the evaluation is carried out, which, in turn, violates the principles of judicial independence.

### ***Criteria for the evaluation of judges appointed for a probationary period***

According to the law, the performance of a judge is evaluated by two main criteria: **integrity** (personal honesty and professional integrity; independence, impartiality and fairness; personal and professional conduct; personal and professional reputation; financial obligations) and **competence** (knowledge of legal norms; ability and competence to provide legal arguments; writing skills; oral communication skills; professional qualities, including conduct in a courtroom; academic achievements and professional training; professional activities (Article 36<sup>2</sup>)).

Opinion 17 of the Consultative Council of European Judges clarifies the following: “The formal individual evaluation of judges must be based on objective criteria published by the competent judicial authority. Objective standards are required not merely in order to exclude political influence, but also for other reasons, such as to avoid the risk of a possible impression of favouritism, conservatism and cronyism, which exists if appointments/evaluations are made in an unstructured way or on the basis of personal recommendations.”

The Organic Law sets evaluation criteria and determines assessment characteristics for each criterion. Nevertheless, the law does not specify the information and sources the evaluator should rely on during the evaluation. For example, the characteristics of the integrity criterion are honesty, personal conduct, moral reputation, etc. However, the law does not specify how, based on what information or sources of information the evaluator should assess the honesty, personal conduct, moral reputation, or other qualities of a judge. This renders the evaluation process non-transparent, creates room for non-homogeneous, unequal approach and arbitrariness and violates the principle of judicial independence.

Paragraph 39 of Opinion 17 of the Consultative Council of European Judges notes that: “Sources of information used in the evaluation process must be reliable. This is especially so in respect of information on which an unfavourable evaluation is to be based. Also, it is essential that such an evaluation is based on sufficient evidence...”

### **Evaluation by the evaluator**

According to the Law, the evaluators carry out the evaluation of the performance of a judge concurrently and independently of each other, and are obligated not to disclose any information obtained during the evaluation or its results. During the one-month evaluation period, an evaluator can, at any time, take any necessary measures to evaluate the judge according to the criteria outlined by the law.<sup>88</sup>

The mentioned rule of evaluation includes several shortcomings and ambiguities. Specifically:

- The evaluators should, concurrently and independently of each other, examine one and the same at least five cases reviewed by the judge under evaluation in a relevant period. The law envisages that the mentioned cases to be examined shall be randomly selected. However, the law does not specify the procedure of random selection. Therefore, it is not specified how the random selection will be achieved in practice. The law sets out the following criteria for case selection: cases on which summary/final

<sup>87</sup> Ibid.

<sup>88</sup> Paragraphs 1 and 2 of Article 36<sup>1</sup> of the Organic Law of Georgia On Common Courts.

decisions have entered into force, including, at least, two cases on which the summary/final decisions have been overturned/modified (if any) by a higher instance court (if any). Even with such criteria, it is necessary to have a random selection mechanism that excludes the possibility of providing an arbitrarily selected list of cases to evaluators.

- According to the Organic Law, during the evaluation of decisions, it is assessed whether the judge is familiar with substantive and procedural legislation, human rights law, including case law of the European Court of Human Rights, the correctness of application of appropriate legal norms with respect to the decisions made by the judge, and the substantiation and cogency of court decisions. Opinion 11 of the Consultative Council of European Judges sets out the elements and evaluation methods for high-quality decisions, while Opinion 17, which generally defines the standards for individual evaluation of judges appointed for relevant terms, refers to Opinion 11. The standards set out in Opinion 11 should be used during the evaluation of the quality of decisions made by the judges appointed for a probationary period. The Organic Law does not provide specific criteria for the evaluation of decisions and the legislation does not provide evaluation methodology to be uniformly used by all evaluators. The mentioned issues need additional regulation, which has not been provided for by the Council.
- The Law envisages that the evaluator can attend court hearings chaired by the judge under evaluation. What the evaluator assesses or observes is unknown. It is similarly unknown whether the questionnaires and evaluation systems are identical for all judges appointed for a probationary period. In addition, it is unclear how the evaluator will select the hearings to attend. The fact that the selection procedure is not defined creates a possibility for subjective selection of hearings, both in favor of and against the candidate.
- The Law envisages that the evaluator has the authority to obtain necessary information as prescribed by the Law. It is unclear what the necessary information is, however, according to the content of the law, the norm should be interpreted in a way that the norm enables the evaluator to request only the information which, according to the same Law, is necessary to carry out the evaluation. The Law itself determines what information is necessary for the evaluator (for example, the right to obtain audio-video recordings of court hearings, the right to obtain the decisions made by the judge under evaluation, etc.). Specification of the Law in this regard is important to uphold the random selection principle.
- The Law gives the evaluator the right to consult the representatives of legal circles. This probably implies consultation needed to evaluate the knowledge of legislation by the candidate. However, the process of selecting a person to provide consultation, the procedures of communication between the evaluator and the person providing consultancy, as well as the options to prepare a relevant protocol and enclose it to the case, remain ambiguous. It is unclear whether the consultancy based on which the evaluator might make a conclusion on the candidate is competent and what constitutes a guarantee for competent consultancy. Such an ambiguous mechanism creates possibilities of using the consultancy mechanism in a subjective manner, both in favor of or against the candidate.
- The evaluator has the authority to meet with the judge under evaluation and other people in person and ask questions to obtain information on specific issues. The procedure of meeting the candidate is unclear. This is precisely the issue which requires additional regulation by the Council. Specifically, the purpose of such meetings, the specific issues to be discussed between the evaluator and the judge, the meeting procedures, the obligation to prepare meeting protocols and other details that are important to ensure the transparency of the process and avoid inappropriate influence need to be determined. In addition, it is unclear who can be implied under "other people," how the people to be asked questions will be selected, what questions can be asked specifically, (related to the judge, legal questions, or all possible issues), etc.

### **Refusal to review the issue of lifetime appointment of a judge**

According to the Law, if during the evaluation based on the integrity criterion, more than half of the evaluators considers that the judge does not fulfill this criterion, this constitutes a sufficient condition for refusing to admit the judge to the interview stage.

In addition, if the sum of the points gained by the judge based on competence criterion does not amount to 70% of the maximally available points, the Chairperson of the High Council of Justice of Georgia issues a legal act on the refusal by the High Council of Justice of Georgia to review the issue of lifetime appointment of a judge.

The mentioned regulation violates the principle of judicial independence, since the question of lifetime appointment of a judge appointed for a probationary period is not discussed if at least three evaluators assess the judge negatively based on the integrity criterion or if the judge fails to obtain a 70% score on the competence

criterion. It should be taken into account that this already represents the lifetime appointment process. Judges appointed for a probationary period are subject to legal guarantees of judicial independence. The fact that the issue is not discussed on a Council session directly jeopardizes judicial independence, especially as the act of refusal can be appealed in the Council only once and, if dismissed, is not subject to further appeal.<sup>89</sup>

Furthermore, the Law does not prescribe interviews with judges until the Council refuses to discuss his or her lifetime appointment. The Law does not guarantee that appropriate process will be carried out and the judge will be heard before the decision negatively impacting the judge is made (procedural justice<sup>90</sup>).

### **Shortcomings in the rule of appealing the act of the Chairperson on the refusal by the High Council of Justice of Georgia to discuss the issue of lifetime appointment**

According to Paragraph 13 of Article 36<sup>4</sup> of the Organic Law, the act of the Chairperson on the refusal by the High Council of Justice of Georgia to review the lifetime appointment of the judge to office may be appealed to the High Council of Justice of Georgia within one week after its submission to the judge. In case of an appeal, the Council, by at least two thirds of the full membership and by an open ballot, makes a decision regarding the cancellation of the legal act of the Chairperson and the conduct of an interview with the judge. According to Paragraph 16 of the same Article of the Law, if the Council does not make a decision to cancel the act and conduct the interview (i.e. if the act of the Chairperson on the refusal to review the lifetime appointment of the judge to office remains in force), the mentioned decision shall be final and it may not be appealed.

Therefore, the Law allows for the possibility that the candidate will not proceed to the second stage if three members of the Council (three evaluators) conclude that the candidate does not fulfill the integrity criterion or if the total points obtained on the competence criterion fail to amount to 70%, and this cannot, in effect, be appealed. Even if the candidate used the appeal mechanism and 2/3 of the members agrees to such evaluation (considering that the 2/3 of the members includes the 3,4,5, or possibly 6 evaluators whose positions have been stated in advance), the mentioned decision of the Council cannot be appealed to the Chamber of Qualification of the Supreme Court of the Supreme Court of Georgia. Certainly, the conclusion of the evaluator is later discussed by the Council, however, the discussion does not extend beyond the Council and no other independent institution can discuss the issue, therefore, this cannot be considered as an effective appeal mechanism.

According to the Venice Commission, the refusal of lifetime appointment of a judge appointed for a probationary period should include the same legislative guarantees that are envisaged in the standards for discharging a judge.<sup>91</sup> Among such standards is one that stipulates that disciplinary liability of a judge, which may lead to discharging, is reviewed by an independent institution and is subject to appeal. The fact that the negative assessment of the Council in the above-mentioned case is not subject to appeal to an independent institution, violates the mentioned principle, one of the most important guarantees of judicial independence. Opinion 17 of the Consultative Council of European Judges also recommends that effective appeal mechanisms are necessary.

### **Self-assessment of a judge and interview**

According to the law, if during the assessment on integrity criterion three or more than three evaluators consider that the judge fulfills or completely fulfills the integrity criterion, and if the total points obtained by the judge on the competence criterion amounts to at least 70% of the maximally available points, the High Council of Justice of Georgia shall interview the judge and hear his or her opinions about the results of the evaluation.

The judge may submit to the High Council of Justice of Georgia his/her opinion on the results of the assessment also in writing, as well as submit an oral and/or written self-assessment, which means that the judge shall submit to the High Council of Justice of Georgia the analysis of what he/she considers to be the most successful and most unsuccessful decision(s), as well as mistakes made when adopting decisions over the past three years of judicial activity.

According to the information obtained from the High Council of Justice, after the evaluation of judges appointed

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<sup>89</sup> CCJE, Challenges For Judicial Independence And Impartiality In The Member States Of The Council Of Europe, SG/Inf(2016)3rev, Paragraph 76 - The actual independence of a Council for the Judiciary is especially important as, according to the case law of the ECtHR, a Council for the Judiciary, if it takes the decision to dismiss a judge, must meet the same requirements of independence and impartiality as other tribunals according to Article 6. In *Volkov v Ukraine* and *Mitrinovski v. "the former Yugoslav Republic of Macedonia"*, the ECtHR held that if the dismissal of a judge by a Council for the Judiciary does not meet those standards, this can be challenged before the ECtHR.

<sup>90</sup> CCJE Opinion N17, Paragraph 41.

<sup>91</sup> Venice Commission, Judicial Appointments, CDL-AD(2007)028, Paragraph 40. Venice Commission CDL-AD(2010)004, Paragraph 37.

for a probationary period, out of 12 judges whose lifetime appointment had been reviewed in November 2016, none have addressed the Council regarding the content of the evaluation conclusions and none have submitted self-assessment; this could be indicating the merely formal nature of the process. It is interesting whether the candidates decided not to respond to or provide self-assessment to the Council only in the cases of negative evaluation, or whether these were not provided due to the positive evaluation of all candidates by the Council.

To obtain information on the issues related to the assessment, the High Council of Justice of Georgia hears the evaluators. The mentioned issue has been discussed by the Council on an open session. During the interview process, the Council listened to general statements of evaluations about the relevant judges. For example, the evaluators mentioned that they confirm the overall score given, that the judge has communication- or other skills, can lead the hearing effectively, etc. These statements were not related to the argumentation on any specific problematic issue or any concrete questions raised by Council members regarding the evaluation. Therefore, we consider that the listening of evaluations was merely a formality and the evaluators simply repeated the information already reflected in their assessments.

### **Decision-making by the Council**

According to the Law, the High Council of Justice of Georgia analyses the results of all assessments prepared during the whole three-year term of the judge. To sum up the assessment points gained by a judge with respect to the competence criteria, calculation is made of the total sum of the points gained by the judge in the six evaluations held during three periods of assessment based on the characteristics of the competence criteria, after which a calculation is made of the percentage of this sum in relation to the maximum available points determined for the competence criteria.

On the basis of analyzing the assessments and conducting interviews with the judge, the High Council of Justice holds a discussion under Article 36(4<sup>1</sup>) of the Organic Law and, by two thirds of the full membership and an open ballot, makes a decision about the appointment of the judge to office for life before he/she attains the age determined by law. A member of the High Council of Justice of Georgia who disagrees with this decision, may record his/her dissenting opinion in writing, which will be enclosed in the case file.

The process during which the Council analyses the results of all assessments and interviews to discuss the issue of lifetime appointment of a judge, is unclear. The form of this discussion, its purposes and the issues discussed, as well as the question whether the discussion is open or closed, remains ambiguous and needs regulation. A positive decision regarding lifetime appointment will fail to comply with the transparency standard if the issues that are or should be discussed by the Council members after analyzing the evaluation results remain ambiguous. It should also be taken into account that after the discussion, a Council member has the right to disagree with the decision of the Council and write a dissenting opinion. It is possible and permissible that this implies the case in which a judge rebuts the negative assessment through self-assessment or during the interview and the Council or any of its members shares his or her opinion. It is clear that the Law needs to be refined in this regard and the purpose and procedure of the discussion held by the Council should be specified.

According to the legislation of Georgia, the substantiation of the evaluation of a judge prepared by the evaluator and the substantiation of the decision of the High Council of Justice on lifetime appointment should be differentiated. The purpose of this differentiation is that not only the assessment prepared by the evaluator, but also the positive decision regarding lifetime appointment, made on the basis of this evaluation by the high Council of Justice, should be subject to substantiation.

### **Recommendations**

- The voting procedure should take place on an open session, as required by the law and the principle of transparency;
- The predefined rule for the evaluation of judges appointed for a probationary period – the Council should adopt a rule for the evaluation of judges appointed for a probationary period, which should clearly describe the content and procedures of the evaluation and be available in advance for the judge under evaluation and the general public;
- The Council should establish a rule for random selection of cases;
- The Council has to adopt a rule for evaluating decisions made by a judge, which should be compliant with the standards established by Opinion 11 of the Consultative Council of European Judges and should be used homogeneously by all evaluators;
- The Council has to adopt the rule for random selection of attendance to case hearings of the judge and

video recordings, as well as the rule for the evaluation of case hearings and questionnaires based on which the evaluators will assess the case hearings led by the judge through a homogeneous approach;

- The Council should establish a rule for consultation by the evaluator and the procedures for selecting the person with whom the evaluator may hold consultations. In addition, the rule should specify the issues on which consultation is permissible and the obligatory nature of drafting the consultation protocol, which should be included in the evaluation documentation;
- The Council should outline the purpose and rule for holding meetings with the judge under evaluation; the protocols of these meetings should be drawn with the help of the Council apparatus and should be included in the evaluation documentation;
- The procedure for refusing the review of lifetime appointment should be eliminated and the Organic Law should prescribe the obligatory nature of the decision about the refusal to be made by the Council, as well as effective appeal mechanisms for these decisions;
- The process of hearing of evaluators on Council sessions should serve specific purposes and should not have a formal nature;
- The Law should prescribe that the High Council of Justice is obligated to establish a detailed rule for the evaluation of judges appointed for a probationary period, satisfying the requirement of foreseeability and ensuring objective and transparent evaluation;
- The Law should prescribe the obligatory substantiation of positive decisions made by the High Council of Justice regarding lifetime appointment of judges;
- The Law should determine the purpose, issues and procedures of the discussion held by the Council after the analysis of the assessment and interviews; the potential outcomes of the discussion stage on the judge should be defined;
- The Council should be obligated to substantiate the decisions made through the discussion, distinctly from the obligation of separate evaluators of the Council to substantiate their assessments.

#### **4.4. DEFINING THE NECESSARY JUDICIAL RESOURCES**

##### **Main Findings:**

- The High Council of Justice does not have a methodology to research the caseload of a given judge and determine the necessary judicial resources (number of judges);
- The High Council of Justice makes a decision to determine the judicial resources, the number of listeners to be enrolled to the High School of Justice, and to announce competitions on vacant positions of judges and appoint judges, without having elaborated or approved the methodology of determining the necessary judicial resources;
- The High Council of Justice has not elaborated a list of statistical data necessary to evaluate the caseload of judges and the situation on delays in case processing, the rule for processing statistical data and the subjects responsible for the process. The mentioned requirements are similarly not fulfilled by the statistical data in the judicial system that are periodically published on the webpage of the Supreme Court of Georgia;
- During 2016, the issue of delays in case processing and the need to study its reasons has been discussed several times on the sessions of the High Council of Justice. A document on research methodology has also been prepared. However, the discussion on this issue has been postponed and the Council has not returned to the question since then. The mentioned could indicate the absence of the will of the majority within the Council to research the situation and underlying reasons behind the delays in case processing in courts;
- During the years of 2014, 2015 and 2016, the High Council of Justice has not taken effective measures to assess the caseload of judges and determine the necessary judicial resources.

##### **The importance of researching the caseload of judges**

The excessive caseload of judges in Georgia has been a known problem for years, as stressed by the Public Defender.<sup>92</sup> Regardless of the mentioned fact, there is no research on the specific statistical data and reasons behind the delays in case processing in the courts of Georgia.

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<sup>92</sup> Statement of the Public Defender 'Proposal to the High Council of Justice.' Available on: < <https://goo.gl/fSHCuv> > [Last accessed on March 26, 2017].

Delays in case processing violate the right to fair hearing within a reasonable period – the right to fair trial. Furthermore, a court overloaded with cases cannot ensure the substantiation of decisions with appropriate quality and standard, which also violates the right to fair trial.

Delays in case processing also point to an ineffective justice. The latter is defined as adoption of a decision within a reasonable period through fair hearing of the case. The judges are obligated to ensure effective management of their cases. State institutions responsible for the organization and functioning of the judicial system are, in turn, obligated to provide all necessary conditions to the judges. In this process, it is necessary to uphold the balance between efficiency and judicial independence.<sup>93</sup>

Excessive caseload in courts also creates risks of violating judicial independence. The possibility of errors on behalf of judges (e.g. the possibility of violating important procedural deadlines) or inadequate fulfillment of procedural measures is higher, which creates the risk that disciplinary liability will be applied towards these judges; this could include discharging from office or manipulation with the possibility of using such measures. These risks are especially higher when the system of criminal responsibility and disciplinary liability of judges in Georgia does not ensure a transparent, foreseeable process, compliant with international standards.<sup>94</sup>

Therefore, excessive caseload in courts has the aspects of both adequate realization of the right to fair trial and judiciary independence and impartiality. Hence, the assessment of the degree of caseload and research on the reasons behind excessive caseload, as well as elaboration of appropriate measures against excessive caseload are of primal importance in order to ensure the right to fair trial.

There are two, European and American, methods for researching the caseload of judges and consequent calculation of the necessary judicial resources. In both cases, the research on caseload of judges aims at: ensuring effective management of cases, avoiding delays in case processing, and providing high-quality judicial service to the public.

The methodology of research on the degree of caseload is based on the examination of the working time of judges considering the complexity of cases, since research on merely the size of the population and case count does not provide an adequate image on caseload of judges and, therefore, cannot sufficiently and realistically assess the degree of caseload.

### European standards for researching the caseload of judges

According to the Consultative Council of European Judges (CCJE)<sup>95</sup>, fair trial within reasonable time encompasses several aspects, including:

- **Ensuring access to justice through delivery of suitable information on the functioning of the judicial system** – this includes delivery of information on the possible duration of proceedings, simplified mechanisms of litigation, funding of the operation of the judicial system (the judicial system should not limit the access to justice by setting high fees); organization of the legal aid system (which includes legal consultations on the advisability of appealing in court); special provisions which envisage appropriate sanctions for unreasonable use of judicial procedures, etc.
- **The quality of the justice system determines the degree of effective operation of the judicial system.** Therefore, effective management of the judicial process (processes ongoing in the court) importantly conditions the degree of caseload on the court. The assessment of the quality of the judicial system differs from the assessment of individual judges. The quality and assessment of the judicial system includes, among others, the quality of infrastructure and ability of legal professionals. This criterion implies measuring the performance of the court according to how long it takes to deal with cases, how great the backlog is, how large the support staff is, the quantity and quality of infrastructures, etc. Quality assessment also includes publication of statistical data concerning pending and past cases in each court and forms of release of reserved information to researchers. Importantly, the CCJE considers that quality assessment should take context into account, highlighting the interrelations between the quality of justice and the existence of appropriate infrastructure and support of legal professionals.
- **Measures oriented at decreasing excessive overload** – this includes limiting the involvement of judges in non-judicial functions, on which numerous recommendations have been issues;<sup>96</sup> measures

<sup>93</sup> Council of Europe, Recommendation CM/Rec(2010)12, Chapter V.

<sup>94</sup> See Chapter 8 of the Report - System of Criminal Responsibility and Disciplinary Liability of Judges.

<sup>95</sup> CCJE Opinion #6(2004).

<sup>96</sup> Recommendations of the Council of Europe: R(81)7 on measures facilitating access to justice, R(84)5 on the principle of civil procedure designed to improve the functioning of justice; R(86)12 concerning measures to prevent and reduce the excessive workload in the courts;

directed at decreasing overload considering the aspects of criminal, civil, and administrative litigation.

The European Commission for the Efficiency of Justice (CEPEJ) defines the methodology of measuring the efficiency and quality of the judicial system, including the types of information to be used and the components to be assessed. According to CEPEJ, the adoption of the mechanisms to assess the efficiency of the judicial system serves the purpose of democratization of the judiciary, as well as elevation of the efficiency of justice and minimization of costs. Another principle that the caseload assessment system is based on, according to CEPEJ, is the balance between judicial independence and accountability. The assessment of the efficiency of the judicial system and the realization of the principle of accountability in this regard should not violate the independence of the judiciary or individual judges.

Article 2 of the Charter of CEPEJ establishes that CEPEJ studies different systems according to the obtained statistical data and assessment methods. The Guideline includes the following elements of assessing the efficiency and quality of the judicial system on the basis of obtained statistical data:

- Number of cases in the court and before the judge;
- The amount of time to review the given number of cases;
- Human and financial resources necessary for the review of the given number of cases;
- The quality of judicial services;

### ***Guidelines on judicial statistics***

The primary mechanism for assessing the situation of the judicial system is the production of relevant statistical data. CEPEJ conducts research on the situation of judicial systems in member countries, above all, through obtaining statistical data from the member countries. To this end, CEPEJ has created Guidelines on Judicial Statistics.<sup>97</sup>

CEPEJ pays particular attention to the transparency of processing statistical information in member countries and to the possibility of verification of data in order to achieve a fair and transparent system of processing statistical data.<sup>98</sup>

The Guideline establishes that statistical data should give decision-makers and practitioners the possibility to obtain information on the caseload of judges in courts, as well as on the time needed for case review in the conditions of existing caseload, the quality of the judicial process and the human and financial resources necessary to deal with the existing caseload. This represents information on the operation of the judicial system and the quality of justice. States should have a coherent methodology for statistical processing as necessary to evaluate the efficiency of resources allocated to the judicial system. Statistical information should include: detailed data on budget, on public servants employed in the court and their working time according to case types and length of proceedings, etc. For example, statistical information on the number of cases should include the following:

- Total number of pending cases during the relevant year;
- Number of cases flowing in the current year;
- Number of past cases and their results (on merits, cases ended with conciliation, terminated etc.)
- Total number of pending cases at the end of the reporting period;
- Information according to types of cases;
- Information about the length of proceedings, including information on the length of separate stages of proceedings, rather than the total length of proceedings;
- Information on the clearance rate;
- Duration of the waiting period during case review – a period during which no measures are taken, which should not be unreasonably long;

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R(87)18 concerning the simplification of criminal justice; R(95)5 concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases; R(95)12 on the management of criminal justice; R(2001)3 on the delivery of court and other legal services to the citizen through the use of new technologies.

<sup>97</sup> CEPEJ Guidelines, available on: <[http://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf)> [Last accessed on March 26, 2017].

<sup>98</sup> Ibid. 'When the competent authority distributes the resources between judicial bodies using benchmarks through statistics, a mechanism of monitoring of the proper application of the rules for collecting, processing and analysing data should be established to guarantee a fair and transparent system. Appropriate steps should be taken by the bodies responsible for collecting and processing judicial statistics in the member states to ensure dialogue with the organisations representing the legal and judicial professions, researchers and, as appropriate, other organisations with an interest in the matter so as to guarantee a broad consensus on the information collected and communicated'.

### ***Research on the length of proceedings***

To calculate the caseload of judges and the necessary judicial resources, CEPEJ uses the SATURN Guidelines for Judicial Time Management.<sup>99</sup>

The Guidelines for Judicial Time Management is based on the principle that the arrangement of time management issues should involve the users of the justice system and that statistical information on the length of proceedings for different types of cases should be available to general public. Data on the length of proceedings requires separate examination, according to types of cases and for specific periods of time. For example, when case review is done during a period of less than a month, within 1-3 months, 4-5 months, 7-12 months, 1-2 years, 2-3 years, 3-5 years and more than 5 years. Thus, the length of proceedings should be studied according to case stages (e.g. planning of average/mean duration of particular types of cases, or average/mean duration of process before certain types of courts, etc.). Chairpersons should ensure the collection and periodic analysis of all information related to the length of proceedings. Information on the length of proceedings should be available to relevant institutions, as well as parties and general public.<sup>100</sup>

In addition, one of the components of time management is periodic monitoring to ensure adherence to court deadlines. According to the CEPEJ Guideline, monitoring should be implemented by the institutions responsible for court administration. To this end, special standards - European Uniform Guidelines for Monitoring of Judicial Timeframes (EUGMONT) - have been set, including all necessary information and timeline templates to examine the length of proceedings.<sup>101</sup> During the monitoring process, the waiting time is also observed and if delays or risks of delays are identified, relevant intervention should take place to accelerate the proceedings.<sup>102</sup>

### ***Guidelines to assess the efficiency of justice***

CEPEJ Standards also set guidelines to determine the size and location of courts,<sup>103</sup> which is one of the components of accessible justice. The main factors to ensure access to justice are: population density; size of court, flows of proceedings and workload; geographical location, infrastructure and transportation. The document considers additional factors, such as: computerization and court; ADR/mediation; availability of legal advice; recruitment of judges and staff, etc.

### ***American model of researching the caseload of judges***

Florida Judicial Workload Assessment Final Report<sup>104</sup> defines two methods to determine the necessary judicial resources: the Unweighted Caseload Method of judicial resource allocation, based on population density, and the Weighted Caseload Method. The document clarifies that different types of cases require different length for proceeding. Considering the above-mentioned, in contrast with the method based on population density, the Weighted Caseload Method creates the possibility to consider the complexity of cases and accurately calculate the necessary judicial resources. Hence, the method based on population density is considered an inaccurate and outdated method. Nowadays, the necessary judicial resources are calculated with the consideration of the weighted caseload component.

The weight of caseload is calculated through workload assessment. To assess workload, two main methods are used: the DELPHI method and the Time Study Method. The DELPHI method is entirely based on expert opinions, whereas the Time Study Method is based on empirical data. The Time Study Method describes how judges and the court apparatus personnel distribute their time. During research, participants record their working time according to different types of work. Based on the mentioned information, researchers create an empirical profile of workload of judges. The method is useful in terms of calculating the time the participants need for case processing; however, the Time Study Method fails to assess the amount of time a judge should allot for a specific task. Considering the results of the Time Study Method, the experts then use the DELPHI method to calculate the necessary judicial resources in a relevant court.

The weighted caseload method calculates judicial need based on total judicial workload. The weighted caseload

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid. pg. 22. Collection of Information.

<sup>101</sup> Ibid. pg.21. Monitoring.

<sup>102</sup> Ibid. pg.22. Intervention.

<sup>103</sup> Ibid. pg.34. Judicial Maps.

<sup>104</sup> Florida Judicial Workload Assessment Final Report, May 2016. Available on: < <https://goo.gl/l3ejuH> > [Last accessed on March 26, 2017]

formula consists of three critical elements:<sup>105</sup>

- Case filings, or the number of new cases of each type opened each year;
- Case weights, which represent the average amount of judicial time required to handle cases of each type over the life of the case; and
- The judge year value, or the amount of time each judge has available for case-related work in one year.

The National Center for State Courts of the USA<sup>106</sup> calculates judicial resources by weighting different types of cases to account for variations in complexity and the need for judicial attention. Since cases differ in complexity, the mean required time for judicial review, i.e. the „weight of the case,” also varies. Calculating the weight of cases in relation to the number of cases that come before the court makes it possible to evaluate the weighted caseload in an accurate manner, considering the hours and minutes required for the specific case. Dividing workloads by the amount of time available per judge leads to an estimate of judicial resource requirements. This is the method used in the courts of most US states to calculate the necessary judicial resources.<sup>107</sup>

### Measures taken by the High Council of Justice to assess the workload of judges

In response to our question regarding the measures the High Council of Justice is taking to assess the workload of judges, we received the following in the form of public information:<sup>108</sup>

- On December 27, 2011, the High Council of Justice adopted the Decision N1/226 on “Rules for Assessing the Efficiency of Judges of the Courts of General Jurisdiction”.
- In March 2016, the High Council of Justice conducted quantitative research on the analysis of the necessary judicial resources in common courts. The letter notes that on March 28, the research results were presented on a Council session and the courts facing the direst need for either increase or decrease of their number of staff were identified. As a result, on April 28, 2016, the Council decision regarding the calculation of judicial resource was amended.<sup>109</sup> The letter from the Council also notes that the conducted research study considered the substantiated opinions of the chairs of courts regarding judicial resource and, according to CEPEJ standards, adequate judicial resource was determined based on statistical data on population size.
- After the competition held in 2016, 104 judges were appointed, out of which 66 were listeners of the High School of Justice and former judges.

According to the decision of the High Council of Justice on “Rules for Assessing the Efficiency of Judges of the Courts of General Jurisdiction,” the Council has to assess the workload of judges once in every six-month period. Considering the components of workload assessment, the rule prescribes the coefficients of complexity, adherence to the deadlines of judicial review and decision and stability of decisions. According to the rule, the assessment outcomes on the efficiency of judges’ judicial work can be the following: the work is completed on the highest level, overcoming expectations; the work is completed on a good level, meeting expectations; the work is completed on an acceptable level, partially meeting expectations; the work is completed on a satisfactory level; the work is completed on a partially satisfactory level; the work is completed with shortcomings, with room for improvement; the work is completed on an unsatisfactory level, failing to meet requirements. In addition, the rule provides that considering the assessment outcomes, the High Council of Justice of Georgia receives recommendations regarding incentives for specific judges (including, consideration of a bonus on the remuneration).

The purpose of the rule for assessing judges, established by the High Council of Justice, is not the determination of the necessary judicial resources, since:

- The Rule neither implies compilation of statistics on the cases reviewed by the judge (according to case types), which is necessary for the calculation of judicial resources, nor specifies the subject responsible for statistical data;

<sup>105</sup> Workload assessment: a Data-driven Management tool for the Judicial Branch By Matthew Kleiman, Cynthia G. Lee and Brian J. Ostrom. Available on: < <https://goo.gl/KIZ5Sw> > [Last accessed on March 26, 2017]

<sup>106</sup> NCSC National Center for State Courts, available on:<<http://www.ncsc.org/>> [Last accessed on March 26, 2017]

<sup>107</sup> Virginia Judicial Workload Assessment Report, 2013, available on:<[http://www.courts.state.va.us/courts/scv/virginia\\_judicial\\_workload\\_assessment\\_report.pdf](http://www.courts.state.va.us/courts/scv/virginia_judicial_workload_assessment_report.pdf)> Last accessed on March 26, 2017. Florida Judicial Workload Assessment Final Report, 2016 available on:<[http://www.floridasupremecourt.org/pub\\_info/documents/2016-NCSC-Florida-Workload-Study.pdf](http://www.floridasupremecourt.org/pub_info/documents/2016-NCSC-Florida-Workload-Study.pdf)> [Last accessed on March 26, 2017].

<sup>108</sup> Letter #1816/2459-03-o of November 18, 2016 of the High Council of Justice of Georgia.

<sup>109</sup> Decision #1/150-2007 of August 9, 2007 of the High Council of Justice of Georgia “on the creation of regional (city) courts and courts of appeals of Tbilisi and Kutaisi and definition of their scope and judicial resource.”

- The Rule fails to prescribe research on case processing time or the methodology of calculation of judicial resource based on these data;
- The research on the workload of judges does not lead to the estimation of judicial resources;
- The provision of any incentives, including monetary awards, to judges in relation to success in their work violates international standards and jeopardizes judicial independence.<sup>110</sup>

In response to freedom of information requests regarding any decisions of the High Council of Justice within the years of 2014, 2015, and 2016 on the assessment of the workload of judges, which, as the mentioned rule prescribes, should be prepared every six months, the Council responded that due to a technical difficulty on the Council server, such information was unavailable at that stage.<sup>111</sup>

As for the analysis conducted by the Council in March 2016 on the number of judges in common courts, as the document shows, the analysis has not been carried out according to the assessment components envisaged in the rule. The analysis does not specify the methodology applied; however, the general content of the document indicates that it is based on the data of population size in relevant districts, statistical information on the cases inflowing to relevant courts per year and data envisaged in CEPEJ standards, including those on the judicial resources necessary per units of population (e.g. in Europe, the mean number of judges per 100 000 inhabitants is 21).

The analysis is not based on the calculation of judicial resources through the Weighted Caseload Method. Importantly, however, calculation of the necessary judicial resources merely on the basis of population density and case inflows fails to produce correct data on the number of judges necessary for efficient judiciary work. This is also clear in the concluding part of the document, which notes that “in the common court system, the problem of strategic vision is of utmost importance. I believe that the High Council of Justice has to take immediate steps towards the creation of a strategic plan in terms of further development for the judiciary. Specifically, several issues require immediate planning and resolution: 1. The arrangement of the judicial system; 2. Judicial resources in the common court system; 3. Statistical analysis of the increase in case inflows; 4. The arrangement of court infrastructures with a long-term perspective.”<sup>112</sup> Regardless of such a conclusion, the High Council of Justice has not adopted a plan to calculate judicial resource.

It should also be considered that the above-mentioned research document has not been approved on the Council session. Therefore, it remains unclear whether the content of the document was endorsed by the Council. Council decision of April 28, 2016, which, according to the Council, was adopted based on the mentioned study, includes no references to the research or justification on the specific parts that were based on the research or the arguments for the increase of the existing judicial resources.

Monitoring of the activities of the High Council of Justice<sup>113</sup> shows that during the March 28, 2016 session, the Council discussed a draft Council decision prepared by Eva Gotsiridze, a non-judge member of the Council regarding the approval of the rules to present and discuss relevant materials on the reasons behind case processing delays. During the session, the Council discussed the draft, which included a list of statistical information that the Council had to obtain from the court in order to examine the data and reasons behind case processing delays. During the March 28 session, it was decided that the discussion on the mentioned issue would be postponed in order to obtain statistical data from relevant courts. The issue was once again discussed during the June 6, 2016 session of the Council, when Eva Gotsiridze, a non-judge member of the Council, presented a report on the delays in case processing. The presentation included statistical information on delays in case processing in several courts. It was highlighted that in the courts under question, the degree of delays exceeded 2, 3, or, in some cases, even 10 years. No information was given as to the reasons behind these delays. After discussing the issue, the Council requested the non-judge member to obtain statistical information from all other courts that had not been studied. The mentioned issue has not been discussed by the Council since.

The Supreme Court of Georgia periodically publishes statistical information about the number of inflowing cases and their review on its webpage. Statistical information is limited to the following: the total case count, the number of inflowing criminal, civil and administrative cases in different courts, and number of past cases

<sup>110</sup> Venice Commission, CDL-AD(2010)004. Paragraph 51.CEPEJ, European Judicial Systems, Edition 2012 (2010 data), Efficiency and Quality of Justice, pg. 274: „Only 5 states reported that additional financial bonus is granted on the basis of the achievement of specific quantitative targets: France, Georgia, Italy, Montenegro and Spain.”

<sup>111</sup> Letter #1932/2762-03-o of December 13, 2016 of the High Council of Justice of Georgia.

<sup>112</sup> Attachment to Letter #1932/2762-03-o of December 13, 2016 of the High Council of Justice of Georgia –a document analyzing judicial resource in common courts

<sup>113</sup> Results of the Monitoring on the High Council of Justice, carried out by the Georgian Young Lawyers' Association and Transparency International Georgia.

according to results. The statistics processed and published by the Supreme Court of Georgia do not include categorization according to case types and calculation of relevant case count, data on the time necessary for case review according to case complexity, or other statistical information necessary to calculate judicial resources and improve access to justice.

### **Estimating judicial resource in the judiciary**

Establishing a rule and methodology for the estimation of the adequate judicial resource is essential for decision-making in the judicial system. For example, the rule should be used to calculate judicial resource not only in courts of first instance and courts of appeal, but also in the Supreme Court. According to the existing legislation, the number of judges in the Supreme Court is not fixed and defined by the law. The number is determined by the plenum of the Supreme Court, and can be modified at any time, upon the decision of the plenum. There is no rule to prescribe the data based on which the plenum can make a decision regarding the number of judges. Furthermore, the definition of a minimal number of judges in the Supreme Court was envisaged within the scope of the third wave of reforms of the judicial system. The maximal number, in turn, has to be defined by the plenum of the Supreme Court. It is essential to adopt a rule that will obligate the plenum to make a decision about judicial resources on the basis of empirical evidence. This will further increase the guarantees of judicial independence and protection from internal or external interference.

Periodically, the High Council of Justice makes decisions regarding judicial resources in courts of first instance and courts of appeal. The mentioned decisions are not based on empirical data on the necessary judicial resource, rendering the process absolutely non-transparent. The decision regarding the number of listeners of the High School of Justice is also made on the basis of the proposals from the High Council of Justice. These decisions are also not based on any empirical data on the necessary judicial resource.

The High Council of Justice also makes decisions regarding the announcement of competitions to appoint judges. The competitions represent a complex process requiring significant human resources and time. Data on the estimation of judicial resource and situation on delays in case processing would give the Council the opportunity to plan the competition process more efficiently.

Periodically and according to the judicial demand, the High Council of Justice makes decisions regarding the relocation of judges from one court to another. Throughout years, the mentioned decisions of the court have been gravely criticized due to lack of substantiation. The failure to comply with the principle of immovability of the judiciary on behalf of the High Council of Justice has already been highlighted in the reports of numerous international organizations.<sup>114</sup> Elaboration of a methodology to estimate the necessary judicial resource and periodical research would produce empirical evidence, based on which the High Council of Justice would be able to justify the relocation of judges from one court to another without causing harm to justice in the relevant courts. The mentioned will also help the Council determine the needs accordingly and will exclude the possibility of arbitrary relocation, which has taken place on numerous occasions in the past.

### **Recommendations**

- The Organic Law should provide that the High Council of Justice has the obligation to establish a rule for estimating the necessary judicial resources and the main principles that the rule is based upon; the High Council of Justice should also be required by the Law to carry out periodical research to examine the situation on delays in case processing and estimate the appropriate judicial resources;
- The High Council of Justice of Georgia should ensure the adoption of the rule and methodology for estimating the necessary judicial resource in compliance with the relevant international standards;
- The Organic Law should require the High Council of Justice to periodically publish information regarding the situation of delays in case processing in the judicial system and take measures to eliminate the reasons behind these delays;
- The High Council of Justice should determine a list of statistical data necessary for examining the caseload of judges, the situation on delays in case processing and their reasons, as well as the rules for data processing that comply with international standards and the subjects responsible for data processing;
- The High Council of Justice should ensure that information regarding the caseload of judges and delays in case processing are accessible to the public;
- The High Council of Justice should periodically carry out research on the caseload of judges and delays in case processing and make the findings accessible to the public.

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<sup>114</sup> GRECO Fourth Evaluation Round, EVALUATION REPORT GEORGIA, Paragraph 97.

GUARANTEES  
OF JUDICIAL INDEPENDENCE

5

## 5.1. ALLOCATION OF CASES IN COMMON COURTS

### Main Findings:

- Allocation of cases according to the list number is flawed, since it fails to ensure effective protection of the process from manipulation or artificial interference, which grossly violates the guarantee of impartial judiciary. It becomes possible to select a judge to assign a specific case to in advance;
- In numerous cases, the list of courts is not defined in written form, which renders it impossible to assess whether the norms are used appropriately. There is no mechanism to control the adherence to the list in the process of case allocation;
- The law gives chairpersons of courts unreasonably wide discretion in the process of case allocation, which makes it possible to allocate a case to a specific judge in an arbitrary manner;
- The specific cases in which the chairperson can allocate a case as an exemption (e.g. notification of sickness absence, significant difference between the workload of a given judge as compared to that of another judge, etc.) are not defined. In cases of case allocation as an exemption, the legislation does not envisage the obligation of the chairperson to substantiate the order or decision. In addition, courts do not record cases in which this right is used;
- There is no clear regulation on how the further case allocation should take place (Article 9 of the Law “On the rule on distribution of cases at common courts and the transfer of responsibilities to a different judge”); specifically, if the chairperson singlehandedly decides the issue of allocating a case to a certain judge, the case returns to the united list. This creates an unrestricted authority for the chairperson.
- In principle, the new rule of electronic and random case distribution, introduced within the third wave of reforms, is an important addition; however, the law leaves open a range of critical issues, including exceptional cases, the regulation of which falls under the High Council of Justice.

### The importance of the reform on case allocation

Case allocation in courts is related to such serious aspects of justice as the independence and impartiality of the judiciary, organizational flexibility, and efficiency.<sup>115</sup> One of the components of the right to fair trial is case review by an independent and impartial tribunal, created on the basis of the law.

The current system of case allocation in common courts should be assessed precisely in light of these principles, more specifically: the degree to which the system upholds the principle of impartiality during case review; the degree to which the process is secured from external interference; and the degree to which the system is refined in order for justice to be administered in a timely and efficient manner.

The new system of case allocation (random and electronic distribution), which was adopted under the “third wave” of judicial reform, has not been fully enacted yet. Hence, the assessment of the old system of case allocation according to list number, which remains in force, is still relevant.

Considering the above-mentioned principle, case allocation according to list number is flawed, since it fails to ensure effective safeguarding against manipulation and artificial interference and creates possibilities to define which judge reviews a certain case in advance, thus violating the idea and guarantee of an impartial judiciary.

The research has shown that the flawed rule of case allocation is an important hindrance to the independence and impartiality of the judiciary, which becomes apparent not only in the analysis of legislative and institutional issues, but also during case hearings of specific cases.

The problem of manipulation in the process of case allocation became apparent on several occasions during hearings of prominent cases, resulting to criticism from the civil sector.<sup>116</sup> For example, the judges assigned to three criminal cases against one of the most important former officials were simultaneously relocated to the Tbilisi City Court a little earlier before the hearing.<sup>117</sup> The concurrence of factual circumstances related to the appointment of judges assigned to the case raised doubts regarding the objective nature of the case allocation

<sup>115</sup> Marco Fabri and Philip M. Langbroek, *Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries*, available on: <<http://www.ejls.eu/2/31UK.pdf>> [Last accessed on March 26, 2017].

<sup>116</sup> Transparency International Georgia, *The third trial monitoring report of high-profile criminal cases, 2015*. Available on: <<http://www.transparency.ge/node/5548>> [Last accessed on November 30, 2016]

<sup>117</sup> Transparency International Georgia, *The second trial monitoring report of high-profile criminal cases, 2014*. Available on: <<https://goo.gl/119xSR>> [Last accessed on November 30, 2016]

process.<sup>118</sup> Allegedly artificial interference during case allocation was also identified during case hearing of imposing pre-trial restrictions of Ivane Merabishvili in the Kutaisi Court of Appeals, when the case was assigned to the chairperson of the court.<sup>119</sup>

The system of case allocation which still remains in force fails to ensure the fundamental guarantee of the right to fair trial and review by an impartial court. In addition, it represents one of the crudest tools of interference in the activity of a judge, creating risks to the independence of individual judges.

### **The existing model of case allocation (according to list number)**

Until full enforcement of the amendments envisaged by the “third wave,” cases in district (city) and appellate courts are distributed according to list number. This rule implies that cases are distributed according to the list of inflowing cases and the list of judges. The list of judges is sorted according to the first letter of the last name of a judge, or, in case of identical last names, its consecutive letters.<sup>120</sup>

In order to define the list, the law does not require an order from the chairperson. However, research shows that in certain courts, the list of judges is determined by the order of the chairperson.<sup>121</sup> In cases of no such order or written document, it is hard to assess whether cases are allocated in full compliance with the requirements of the law.

Furthermore, it has to be noted that, in certain cases, the orders of chairpersons<sup>122</sup> do not define the list separately according to boards and chambers. Therefore, in the conditions of the list number principle, it is unclear how the criminal, civil, and administrative cases are distributed to judges with a relevant specification without violating the rule. The situation is different in the Tbilisi City Court<sup>123</sup>, where the list of judges is categorized according to chambers, and in the Kutaisi Court of Appeals, where the list is similarly categorized according to investigative boards and chambers.<sup>124</sup>

The current legislation envisages exemptions from the list rule, specifically: in courts of first and second instance, where there are more than two judges, if any of the judges faces an excessive number of cases or any other issue rendering case review impossible, the chairperson of the court or, upon his or her order, deputy chairperson and/or the chair of the relevant board or chamber distributes cases on the basis of caseload of judges.<sup>125</sup> The analysis of this rule indicates that the scope of cases in which the chairperson can distribute incoming cases according to own views is wide. The legislation does not specify the forms and procedures of case distribution or substantiation of the decision, etc. According to the European Networks of Councils for the Judiciary (RECJ), any exemptions from the existing rule of case allocation should be substantiated and recorded.<sup>126</sup> However, as a rule, courts do not record or statistically process data on cases distributed as exceptions<sup>127</sup>, which renders it impossible to assess the grounds and reasonability of case allocation. This, in turn, raises the risks of arbitrary application of this mechanism.<sup>128</sup>

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<sup>118</sup> Human Rights Education and Monitoring Center (EMC), A statement on the appointment of the judges to ongoing criminal cases of Bachana Akhalaia. Available on: <<https://emc.org.ge/2013/08/02/bacho-akhalaia/>> [Last accessed on December 6, 2016]

<sup>119</sup> The Order of May 20, 2013 of the Chair of the Kutaisi Court of Appeals determined a new list of judges in the Investigation Board, according to which the first judge in the list was Malkhaz Guruli, whereas formerly the first judge was Malkhaz Okropirashvili. After the adoption of the new order, on May 24, 2013, the Ivane Merabishvili case was assigned to Malkhaz Guruli, even though he was a judge of the Chamber of Criminal Cases and not of the Investigation Board.

<sup>120</sup> Articles 4 and 5 of the Law “On the rule on distribution of cases at common courts and the transfer of responsibilities to a different judge.”

<sup>121</sup> For example: Tbilisi City Court, Mtskheta Regional Court, Rustavi City Court, Kutaisi Court of Appeals.

<sup>122</sup> Orders presented in Letter N144 of September 19, 2016 of the Mtskheta Regional Court; Orders presented in Letter N406/g of September 15, 2016 of the Rustavi City Court.

<sup>123</sup> Letter N3-06137/1498136 of September 13, 2016 of Tbilisi City Court.

<sup>124</sup> Letter N625-2/10 of October 28, 2016, of the Kutaisi Court of Appeals.

<sup>125</sup> Article 9 of the Law “On the rule on distribution of cases at common courts and the transfer of responsibilities to a different judge.”

<sup>126</sup> ENCJ Report, Minimum Judicial Standards IV, Allocation of Cases, 2013-2014. Available on: <<https://goo.gl/Q11kaw>> [Last accessed on March 27, 2017].

<sup>127</sup> Letter N14832 g/f of October 31, 2016 of the Gori Regional Court; Letter N23539 of October 31, 2016 of the Kutaisi City Court; Letter N177 of October 31, 2016 of the Mtskheta Regional Court; Letter N477/g of October 31, 2016 of the Rustavi City Court.

<sup>128</sup> According to Letter N684 g/k of November 1, 2016 of the Batumi City Court, during 2013-2016, no cases were allocated based on this article. According to Letter N177 of October 31, 2016 of the Mtskheta Regional Court and Letter N477/g of October 31, 2016 of the Rustavi City Court, cases have been and still are allocated based on the mentioned article in cases of overload of judges, the incapability of the judge to carry out his or her duties and/or the termination of the term of a judge.

In the Supreme Court of Georgia, case allocation is regulated by the regulations of the Supreme Court apparatus. In this case, too, cases are allocated according to list number, which means that cases are distributed according to the list of inflowing cases and the list of judges. However, in contrast with the courts of first and second instance, in the Supreme Court, the case allocation process also involves the personnel of the apparatus and the relevant authority is fully granted to chamber secretariats. Specifically, timely review of appeals and applications and their transfer to relevant persons is ensured by the head of the secretariat, while recordings of inflowing cases and their timely transfer to relevant persons can also fall under the competence of chief specialists.

### **Risks associated with the existing model**

As mentioned in the beginning, the main shortcoming of the system of case allocation that is still enforced is the potential of manipulation. This, in turn, creates risks in terms of case review by independent and impartial judiciary, which is an essential component of the right to fair trial.

According to the Venice Commission, when the chairperson of a court is granted the authority to allocate cases, this includes an element of discretion which can be used as an instrument for influencing the judge through assignment of exceptionally many or least high-profile cases. It is also possible to allocate politically sensitive cases to certain judges, which can then become an effective tool for influencing the outcomes. In general, the Venice Commission recommends case allocation on the basis of maximally objective and transparent criteria, predefined by the law or a special regulation adopted based on the law, while exceptions should be motivated.<sup>129</sup>

The shortcomings of the current regulation can be grouped as follows:

- Case allocation according to list number creates the possibility to preselect a judge that a certain case will be assigned to;
- In most cases, the list of judges is not defined in a written document, making it impossible to assess whether the norms of the law are applied properly. There is no mechanism to control the adherence to the list during case allocation;
- The law grants court chairpersons unreasonable wide discretion in the case allocation process, which creates possibilities to assign cases to specific judges in an arbitrary manner;
- The cases in which cases are allocated by a chairperson as exceptions are not specified (e.g. notification of sickness absence, significant difference between the workload of a given judge as compared to that of another judge, etc.)
- During case allocation as an exception, the legislation does not prescribe the obligation of the chairperson to issue an order or substantiate the decision. Also, the courts do not record cases in which this right is applied;
- There is no clear regulation on further allocation of cases in Article 9 of the Law “On the rule on distribution of cases at common courts and the transfer of responsibilities to a different judge”; specifically, if the chairperson singlehandedly decides the issue of allocating a case to a certain judge, the case returns to the united list. This creates an unrestricted authority for the chairperson.

In this regard, the information received from the Tbilisi Court of Appeals is also interesting.<sup>130</sup> According to the Court, in the period from 2013 to October 24, 2015, on the basis of Article 9 of the Law “On the rule on distribution of cases at common courts and the transfer of responsibilities to a different judge,” judges addressed the chairperson with report cards in 27 cases. On each of these occasions, the cases were returned to the chancellor with a general resolution of the chairperson and the cases were distributed according to list number. However, it should be stressed once again that in the conditions of heterogeneous practices in different courts and the ineffectiveness of the monitoring mechanism, it is hard to conclude whether this model represents an exception or a general rule established in courts. In any case, the fact is that such procedure of further case allocation is not envisaged by the law.

According to the assessment of the Union of Judges, the shortcomings and problems of case allocation increase twofold in the Court of Appeals and the Supreme Court, which receive cases not directly from users, but from subordinate courts. In addition, incoming cases are not classified chronologically or according to any other criteria; thus, it is easy to distribute them so that a certain case gets assigned to a specific judge.<sup>131</sup>

<sup>129</sup> Venice Commission, CDL-AD (2010)004.

<sup>130</sup> Letter N160 of the October 25, 2016 of the Tbilisi Court of Appeals.

<sup>131</sup> Unity of Judges of Georgia, “Rule and Practice of Case Distribution in the Courts of Georgia,” 2015.

## Distribution of cases in electronic and random manner

The electronic case assignment system was developed in Common Courts of Georgia with initiative of the Chairman of the Supreme Court, within the frameworks of the “third wave” legislation reform, based on principle of randomly and equal distribution of cases, in order to improve flaws of the existing legislation. The advantage of this principle is confirmed with numerous international standards and recommendations.

In accordance with European Networks of Councils for the Judiciary (ENCJ), allocation of cases within a court should follow objective, pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.<sup>132</sup> Additionally, according to Kyiv recommendations, the cases should be allocated based on random selection principle or based on objective, pre-established criteria that should be established by the panel of judges. Interference in the rule of distribution of cases after adoption is prohibited.<sup>133</sup>

According to the amendments provided with reform “third wave”, similar principle of distribution of cases is being implemented in all three instance courts. Namely, the cases shall be distributed with automated, electronic system following the principle of random distribution of cases in District (City) court, Court of Appeal and in the Supreme Court that represents a clear step forward. High Council of Justice will approve the rule of automated, electronic distribution system.

The mentioned amendment also considers exception from the rule and states that in case of temporary failure of the electronic system, the cases shall be distributed without electronic system according to the order of cases that implies allocation of cases between the judges based on entry number and alphabetical order of the judges.

The initiative of distribution of cases in electronic manner was positively assessed by the Venice Commission during bill discussion phase.<sup>134</sup> However, the recommendation of the Venice Commission was to also provide detailed rules of functioning of electronic system and reviewing case allocation, as well as current principles used in case of temporary failure of the electronic system.<sup>135</sup> Unfortunately the mentioned issues were not specified in the final wording of the law. Moreover, number of significant issues were not discussed on legislative level that were emphasized by experts.

Expert of the German Agency for International Cooperation (GIZ) developed concept regarding implementing electronic software<sup>136</sup> that considered several principles:

- To implement algorithm of random distribution of cases in electronic system of proceedings, that will distribute of cases to judges based on their specialization and will provide for randomly and equal distribution of cases.
- Assessing the cases filled with the court and giving complexity ratio in order to distribute the cases on judges in maximum equal manner.
- For those seldom cases when the case should be distributed from one judge to another, or the judge needs to be relieved (as he/she is assigned to case of particular complexity, that cannot be recognized by the system) - to establish Council selected by the judges within the court that will be authorized to make decision in mentioned cases.

According to the experts working on the mentioned issue, the situation may arise in the process of electronic distribution of cases that shall require different regulation, e.g.:

- Distribution of urgent case, when the judge is not on place and the mentioned fact is not properly denoted in the daily attendance list;
- Re-distribution of case due to recusal of a judge;
- Re-distribution of case if the judge does not exercise the authority on relevant court;
- Re-distribution of case, when the judge is unavailable to consider the current number of cases in reasonable time due to particular circumstances;
- Other reasons. These types of cases should be very limited and measures of additional control and

<sup>132</sup> Report of the European Networks of Councils for the Judiciary (ENCJ), Independence and Accountability of Justice, 2013-2014.

<sup>133</sup> Kyiv recommendations regarding independence of courts in Eastern Europe, South Caucasus and Central Asia, § 12.

<sup>134</sup> Summary of Venice Commission concerned the initial version of the bill, according to which the cases were distributed automatically, through electronic system, according to order. Principle of random distribution was added to the bill later.

<sup>135</sup> CDL-AD(2014)031 Joint conclusion of Venice Commission and Council of Europe Directorate General Human Rights and Rule of Law (DGI) and Human Rights Directorate (DHR) on amendments draft to the organic law of Georgia on Common Courts.

<sup>136</sup> Opinion of Tornike Darjania, the expert of law of German Agency for International Cooperation (GIZ).

inspection measures should be implemented towards them.<sup>137</sup>

The experts' recommendations indicated the need for comprehensive regulation in order to minimize the risks of interference from outside during implementation of the new rule. That is why it was so significant for any exception and deviation from the rule, as well as detailed procedures to be provided for in law comprehensively, that unfortunately did not happen. Innovation introduced by the "third wave" represents significant step, however number of issues remained undiscussed, the regulation of which was delegated to the High Council of Justice by legislator.

Also, those changes based on which the cases are being allocated according to the order in case of temporary failure of the electronic system, should also be considered. The mentioned exceptional rule is general and requires more detalization and detailed regulation. The person responsible for allocation of cases in such cases according to the order should also be determined. It is vitally important for this issue not to be subject of personal decision of Chairman of court, as it is likely to arise risks that exist with current legislation. Also it is important to have proper mechanism that will inspect the correct usage of the exceptional rule.

One of the approaches in this regard is creation of the commission/council the members of which will be selected by ballot from judges of certain courts, based on their specialization (not less than three judges) and that will allocate the cases in case of failure of electronic system.<sup>138</sup>

The regulation provided by the "third wave" draft should also be noted here, which gave the working group established by the government the authority of creating the electronic case assignment system and which at the same time should coordinate implementation of system in court. Despite the scale and importance of this reform, it is debatable whether it is advisable to give this function to executive branch in the process of implementing reform, especially, when there are organs like High Council of Justice and Department of Common Courts in justice system. One more organizational ring – Department of management was added with "third wave" changes, the main function of which is to supervise the functioning of the software.

#### **Recommendations:**

- Implementation of random and electronic distribution of cases in the system of Common Courts in timely and improved manner in courts of all instances;
- Development of comprehensive and clear list of exceptional occasions in the law in order to operate the software unhindered;
- Objective and impartial principle of case weight that will create the possibility of equal distribution of cases;
- Detailed regulation of case distribution rule in case of failure of electronic software;
- Avoidance of participation of the Chairman of Court and instead, establishment of local councils/commissions, that provide for case distribution in case of software failure;
- Defining the rules for developing statistics regarding exceptional cases with purpose of further study of the issue.

## **5.2. SPECIALIZATION OF JUDGES**

### **Main findings**

- There is no unified and systematic regulation of specialization issue and the system gives different significance to specialization of judges;
- It is problematic for the Chairman to assign the cases of certain specialization to the judge with not relevant specialization without proper reasoning. Additionally, the law does not define clearly the terms of considering the case;
- It is unclear how the case will be assigned by the Chairman under the conditions of principle of case electronic and random distribution;
- Despite the fact that establishment of thematic/narrow specializations within the panels is defined by the council, the composition of judges based on narrow specialization is defined solely by the order of the Chairman of the court, that creates the risk of making willful and ungrounded decisions by her/him.

<sup>137</sup> Pavel Reberc, Razvan Craciunescu, strengthening independence and effectiveness of legislation system, assessment of project of rules for case distribution, 2015.

<sup>138</sup> Unity of Judges of Georgia, "Rule and practice of case distribution in Common Courts", 2015

- Formal procedures and stages of assigning judges to groups of narrow specialization is not regulated by law, accordingly it is difficult to manage the legality of this process;

### **The meaning of the specialization of judges**

Specialization of judges is an important element of qualitative legislation. Additionally this issue is tightly related to the principle of “court established by law” that is one of the legal components of fair court.

According to Consultative Council of European Judges thorough knowledge of proper field of law stipulates high quality judgments rendered by the judge. Proceedings are improved based on the experience gained through specialization in certain field of law that is extremely important considering the constantly increasing number of cases.<sup>139</sup>

According to survey the issue of specialization of judges is related to the factors, such as: methods and specifications of qualification examination and trainings of judges, issue of small number of courts; characteristics of case distribution etc. Based on survey, main challenge nowadays in regard to specialization is wide range of authority of Chairmen of court regarding defining narrow specialization of judges, it also is problematic for the Chairman to assign the cases of certain specialization to the judge with not relevant specialization without proper reasoning; the law that does not clearly state the terms of considering the case – has gaps. It also is unclear how this authority of the chairman shall be implemented under the conditions of enactment of principle of case electronic and random distribution.

Addressing the challenges related to specialization should be the part of systematic and long-term strategy, that overall provides for the right to fair court proceedings, improvement of proceedings and changing the attitude of the society towards the justice system.

Similar to case distribution, the issues related to specialization has become discussion topic when discussing the cases of public interest. Besides, this issue is also related to the independence of the judge, as the experience of the judicial system indicates that assigning the case to judge violating specialization resulted in inefficient administration of justice and further, imposing liability to him/her.<sup>140</sup>

### **Existing system of specialization of judge**

Analysis of whole system is important in order to identify the gaps and challenges related to specialization, including assessment of legal regulation of the mentioned issue on each stage of selection and appointment and activity stages.

Passing the qualification examination of the judge represents the first stage to hold the position of the judge. Qualification examination is held based on general and specific specialization and specialization is conducted in the fields of civil and administrative and criminal law.<sup>141</sup> This indicates that specialization of the judge by the system on the first stage is recognized.

The next stage is preparation of justice listeners in High School of Justice (HSOJ). The program of HSOJ covers the issues of each specialization,<sup>142</sup> however training length and volume of training program cannot provide for the field to be studied comprehensively, the listener has no previous experience and thorough knowledge of which.

Listener passes examination by the end of the study. Final examination gives the listener opportunity to choose the case category (civil, administrative and criminal) that once again confirms the recognition of the principle of gaining knowledge in the specific field of law.<sup>143</sup>

As regards the judge selection competition, current legislation does not provide for any limitations in regard to specialization and each candidate is authorized to apply to any vacant position, despite the specialization the judge passed the qualification examination with. The candidate for the position of judge is authorized to ap-

<sup>139</sup> CCJE Summary N15(2012), paragraphs 8 and 12.

<sup>140</sup> Analysis of judge liability, pg. 58. Available at: <[http://coalition.ge/files/analysis\\_of\\_the\\_judicial\\_liability\\_system\\_ge.pdf](http://coalition.ge/files/analysis_of_the_judicial_liability_system_ge.pdf)> [Last accessed March 26, 2017].

<sup>141</sup> Decision of the High Council of Justice of September 25, 2007 on “Rule of conducting judge qualification examinations and approval of qualification examination program”.

<sup>142</sup> Training program of Group XII of Justice listeners, 2015. Available at: < <https://goo.gl/Lm8TMh> > [Last accessed March 27, 2017].

<sup>143</sup> Legal Entity of Public Law – statute of High School of Justice, Article 19.

ply for one or more vacant positions and give the proper priority to each position.<sup>144</sup> The decision of the High Council of Justice on appointing a judge indicates the certain panel/chamber where the judge is appointed to and in case if the judge is appointed to the court where the panels are not established, the specialization of the judge is not indicated in the decision<sup>145</sup>.

Analysis of the mentioned stages indicates that there is no unified and systematic regulation of specialization issue and the system gives different significance to specialization of judges.

### **Narrow thematic and procedural compositions of judges**

Under current legislation, in a district (city) court composed of 2 judges, 1 judge shall examine criminal cases and the other judge shall examine civil and other categories of cases, except as determined in the procedural legislation of Georgia. Judges shall be specialized based on a decision of the High Council of Justice of Georgia.<sup>146</sup> The number of judges in the Panels and the composition of the Panels shall be determined by the High Council of Georgia.<sup>147</sup> Based on the information provided by the High Council of Justice, in courts without panels, the specialization of the judges is not defined.<sup>148</sup>

The issue of narrow specialization of judges deserves special attention in context of specialization. According to law, In a district (city) court of special caseload composed of more than 2 judges, a narrower specialization of judges may be conducted or specialized panels ('the Panels') may be created by decision of the High Council of Justice of Georgia.

Judicial panels are established in six courts of first instance<sup>149</sup> out of which Investigative and Preliminary Hearing Panels together with three main panels (Criminal, Administrative and Civil) are in Tbilisi city court.<sup>150</sup> Also, narrow thematic specializations are defined in Tbilisi City Court boards with decision of High Council of Justice<sup>151</sup>:

Despite the fact that developing narrow thematic/procedural specializations is established by the Council, the membership of the judges based on narrow specializations is defined solely by order of Chairman of the Court,<sup>152</sup> that creates the risk of making willful and ungrounded decisions by him/her. The mentioned issue is even more aggravated with fact that law provides no formal procedures and stages of assigning the judges in narrow groups, therefore it is difficult to control legitimacy of the processes, on the one hand and also the judge protection guarantees are also insufficient.

Allocation of judge to certain group should not be depended on the discretion of the Chairman and should fall under the competence of the High Council of Justice. Additionally, the formal procedure should be developed through which decisions of the Council will be reviewed, that will allow the Judges, if desired, consider cases of other category after certain period of time.

### **Assigning a case of different panel/chamber**

The most problematic is the issue of possibility to assign case of different specialization to judge and also wide range of power of the Chairman of the court in this process that is provided by current legislation.

According to law, "if necessary, to avoid delay in the administration of justice, the chairperson of the court may assign a judge to participate in a hearing in another chamber of the same court". The rule of assigning a case in the court of appeal is similar.

The procedure of assigning a case of other specialization is comparatively improved within the frameworks of the judiciary reform "third wave". Namely the law provides for the consent of the judge to use this mechanism that should be assessed positively.

<sup>144</sup> Article 6 of The rule for selection of candidates for judges approved by the decision of High Council of Justice of October 9, 2009 N1/308.

<sup>145</sup> See the decisions of the High Council of Justice regarding appointment of judges: available at: < <https://goo.gl/CVGmCM> >< <https://goo.gl/ISJh3P> > [Last accessed on March 26, 2017].

<sup>146</sup> Paragraph 1 of Article 30 of the organic law of Georgia on Common Courts.

<sup>147</sup> Paragraphs 2 and 3 of the Article 30 and paragraph 3 of the Article 23 of the organic law of Georgia on Common Courts.

<sup>148</sup> Letter N1852/2676-03-0 of the High Council of Justice of Georgia of November 29, 2016.

<sup>149</sup> City courts of Tbilisi, Batumi, Rustavi, Kutaisi and District courts of Mtskheta and Gori.

<sup>150</sup> Letter of High Council of Justice of Georgia of October 12, 2016.

<sup>151</sup> Letter N1767/2474-03-0 of High Council of Justice of Georgia November 4, 2016.

<sup>152</sup> N18-b §02 order of the Chairman of Tbilisi City Court of April 8, 2016. Available at < <https://goo.gl/1gnTJy> [Last accessed on December 25, 2016]

Discretion of Chairman of court was even wider before the amendments were made to the law and risks of using this mechanism against independence of the individual judge and the risk of selection and appointment of trial judge willfully were higher.

However, despite the changes made within the frameworks of the “third wave”, the problem of the law not providing for establishing the necessity of using this mechanism by the Chairman of court and the terms within which judge can be assigned to consider the case of other specialization still exists. It is unclear whether the assignment implies one specific case (and can be received after being registered in court) or it implies the certain period of time and any case that will be registered in court in this period. Additionally, it is unclear how the certain case will be assigned to a certain judge under the conditions of electronic and random distribution of cases, so that the main principles of case distribution are not violated. Obviously, this mechanism allows the Chairman of the court to assign the desired judge to a case, when in the case of distributing the cases according to the order the certain case could have been assigned to other judge. Accordingly, the mentioned regulation originates the threat of influence and manipulation that contradicts the principle of unbiased court.

Besides the mentioned, lack of effective mechanism of control of the mentioned mechanism still remains a problem. Obligation of informing the board cannot be considered as an effective way to solve the mentioned problem, as it is unclear what will the consequences be if it is revealed that the assignment was willful and was not serving the interests of justice. It is also unclear how the council can assess the rationality of using this mechanism by the Chairman in the absence of argumentation.

### **Review of practice of assignment**

Orders of judges regarding the assignments on hearings were studied within the frameworks of the survey. It is noteworthy that the orders were issued under the old version of the law, before the amendments provided by the “third wave” entered into force.

The purpose of assigning a case was limited to general formulation in orders of Chairmen of the courts regarding assigning a certain judge to hearings in other chamber: Avoid impediment of administration of justice – that is quite vague regulation and grants the Chairman with unlimited powers to assign a judge certain case at his/her own discretion. Assessment of the court situation and justification delegation of authority is provided for only in order N36 of March 23, 2016 of Rustavi City Court.

According to the information received from the courts, the case is assigned to the judge by the Chairman of the Court directly. Decision on distribution and hearing of a case is indivisible part of that particular case and this information is not processed and stored separately.<sup>153</sup> The Chairman of court makes individual decision regarding assigning each judge to a case hearing through brief instructions.<sup>154</sup> Accordingly, when using the mentioned mechanisms the Chairman issues general order regarding case hearing and no written document regarding case hearing by certain judge based on this order is issued that makes it impossible to inspect its validity and advisability.

It is noteworthy that while the orders of Chairmen of the first instance indicates the separate judge and the Board, where the judge is obliged to consider the case, in the Courts of Appeal only orders of general content are accepted: order N9 of January 5, 2010 of Kutaisi Court of Appeal provides for judges of criminal cases, administrative cases, civil cases and investigative board to participate in a hearing in another chamber of the same court or investigative chamber, in order to avoid delay in the administration of justice, in case of necessity. The similar regulation is provided with order N438 § 4 of December 9, 2009 of the Chairman of Tbilisi court of appeal. Accordingly separate cases of considering the cases in other chamber/investigative boards are not regulated by the order and does not include individual argumentation on using the mentioned mechanism. Based on the information from Kutaisi Court of Appeal, the information regarding the mentioned issue is not statistically processed, additionally, not any judge has expressed protest regarding assigning to other chamber and case considering.<sup>155</sup> Based on the information received from Tbilisi court of appeal, due to expiry of powers of judges and increased number of cases the membership of judges in the panels and also boards is constantly renewed, that is self-regulated process that is aimed to avoid delay in the administration of justice, accordingly, it is actually impossible for such cases to be statistically processed and/or obtain this type of information.<sup>156</sup>

<sup>153</sup> Letter N177 of Mtskheta District Court of October 31, 2016; Letter N477/□ of Rustavi City Court of October 31, 2016

<sup>154</sup> Letter N14832 of Gori District Court of October 31, 2016; Letter N23539 of Kutaisi City Court of October 31, 2016.

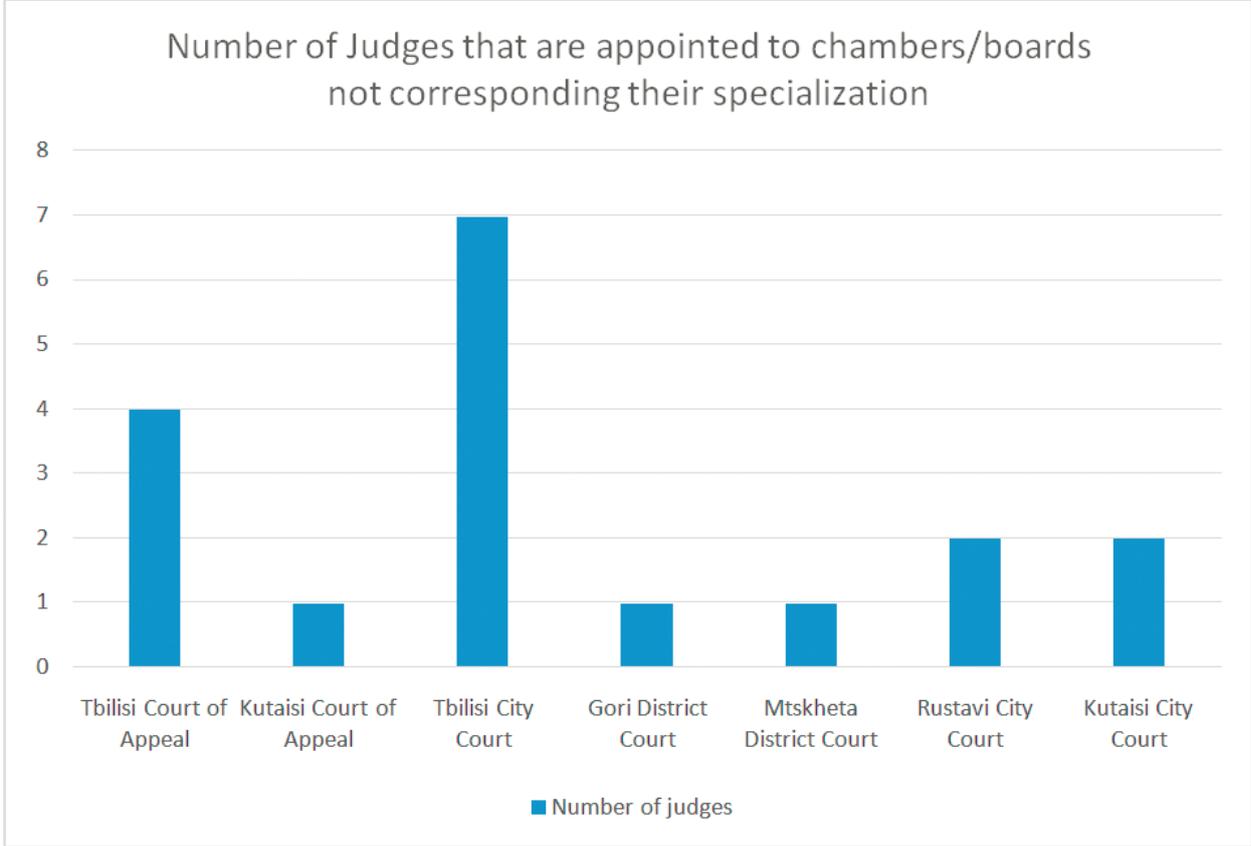
<sup>155</sup> Letter of Kutaisi Court of Appeal of September 16, 2016.

<sup>156</sup> Letter N01/280(□) of Tbilisi Court of Appeal of September 16, 2016.

It is noteworthy that in the decision N1/93 of February 22, 2016 on “dismissal of Mamuka Akhvlediani from the positions of the Chairman of the Tbilisi City Court and Head of the Criminal Panel of the same court” the court indicated that the purpose of the assignment to consider the case in another specialized composition (Panel) is inevitability/exceptional case –in order to avoid delay in the administration of justice, to provide support to judges of other board/specialization and does not imply considering the cases of different boards on a regular basis. Considering the fact that Chairman of the court is authorized to assign judges of different boards (specializations) to consider the cases of other boards (specializations) with own initiative (without necessity), in that case establishing certain boards and narrow specializations and defining the number of judges in relevant boards by the High Council of Justice does not make sense.<sup>157</sup> It is clear that the council itself recognized the problematic nature of the mentioned mechanism with abovementioned decision, however responded and examined the mentioned issue only based on one specific case (Tbilisi city court) and have not taken proper measures to redress the faulty practice.

**Appointment of a judge disregarding specialization**

As of October 1, 2016,<sup>158</sup> discrepancies were revealed between specialization of passed qualification examination and the panel/chamber, where the judge have been appointed with the decision of the council in the following courts:



Based on current legislation, holding a position of a judge disregarding specializations gives a candidate an opportunity to hold a position in board/chamber where there is a vacancy and after certain period of time, with the decision of the High Council of Justice<sup>159</sup> transfer to specialized composition.

Based on the information provided by the council<sup>160</sup>, 16 judges appointed through the competition from 2015 to October 1, 2016 were appointed to other panel/chamber, however in most cases, this appointment was re-

<sup>157</sup> Information available at: < <https://goo.gl/1gnTjy>> [Last accessed on March 26, 2017].

<sup>158</sup> Letter of N1688/2358-03-მ of High Council of Justice of Georgia of October 17, 2016

<sup>159</sup> Paragraph 3 of Article 30 of the Organic Law of Georgia on Common Courts.

<sup>160</sup> Letter of High Council of Justice of Georgia of October 16, 2016 N1688/2358-03-მ .

lated to creation of Investigative and Preliminary Hearing Panel of Tbilisi city court and concerned transfer of judges from Criminal Case Panel to the mentioned panel. Although there were cases of transferring to different specialization panels, namely:

- SergoMetopishvili (passed qualification examination of judges with specialization in criminal law) was appointed as a judge of the Criminal Chamber of Tbilisi city court from February 15, 2016 and from February 20 – as a judge of Investigative and Preliminary Hearing Panel, from March 5 he was appointed as a judge of civil chamber.
- David Mamiseishvili (passed qualification examination of judges with specialization in criminal law) was appointed as a judge of civil chamber of Batumi City Court, from September 19 he was appointed as a judge of criminal chamber. Herewith, with the decision of High Council of Justice he was assigned to exercise the authority of Chairman of Batumi city court and with order of August 11, as a Chairman of the court, he imposed on himself to exercise the powers of the judge of the criminal panel.<sup>161</sup>

### Practice of participating in hearings of cases of other specialization

Participation of judges in hearings of cases of other specializations is an established practice in Supreme Court. The basis of which are rulings of the plenum of the Supreme court of Georgia, based on which the judge is assigned the obligations of the member of other chamber in order to participate in hearings of cases under that chamber, if necessary. It is noteworthy that the changes regarding assigning to case hearing provided by the “third wave” does not concern the Supreme Court.

The names of those judges of Supreme Court that participated in hearings of cases of other specializations in 2013-2016<sup>162</sup> are given below:

	2013	2014	2015	2016
Administrative cases	Judge of Criminal Cases Chamber Paata Silagadze - 173 cases  Judges of Civil Cases Chamber Besarion Alavidze - 4 cases, Paata Katamadze - 5 cases	Judge of Criminal Cases Chamber Paata Silagadze - 145 cases  Judge of Civil Cases Chamber –Paata Katamadze- 4 cases.	Judge of Criminal Cases Chamber Paata Silagadze - 76 cases  Judges of Civil Cases Chamber Vasil Roinishvili - 100 cases, Paata Katamadze- 6 cases	Judge of Criminal Cases Chamber Paata Silagadze -11 cases

	2013	2014	2015	2016
Civil cases	Judge of Administrative Cases Chamber Levan Murusidze - 41 cases  Judge of Criminal Cases Chamber Paata Silagadze -79 cases	Judge of Administrative Cases Chamber Levan Murusidze -5 cases  Judge of Criminal Cases Chamber Paata Silagadze -8 cases	Judge of Administrative Cases Chamber Levan Murusidze-2 cases  Judge of Criminal Cases Chamber Paata Silagadze - 2 cases	

	2013	2014	2015	2016
Criminal cases	Judge of Administrative Cases Chamber Levan Murusidze - 4 cases  Judge of Civil Cases Chamber Besarion Alavidze - 14 cases Teimuraz Todria - 1 cases	Judge of Civil Cases Chamber Besarion Alavidze - 3 cases Vasil Roinishvili - 1 cases		Judge of Administrative Cases Chamber Vasil Roinishvili - 1 cases  Judge of Civil Cases Chamber Besarion Alavidze - 2 cases Ekaterine Gasitashvili - 1 cases

<sup>161</sup> Order N103 of Chairman of Batumi City Court of August 11, 2016.

<sup>162</sup> Letter of Supreme Court of Georgia of October 24 of 2016.

### **Recommendations:**

- Develop integrated view regarding the specialization of judges and accordingly develop similar approach on every stage of appointing a judge (examination, school, competition, appointment);
- The violations of specialization, which is tightly linked to paucity of judges and court caseload, should be considered and should become subject of gradual improvement, together with addressing the gaps of judiciary system.
- Narrow specialization based on thematic/procedural stages and membership of judges in separate categories should be established by decision of the High Council of Justice. The possibility to change narrow specialization of the judge with formalized procedure, in certain periods of time should also be considered.
- The mechanism of assigning the case to the judge in other specialized composition should be changed to have only exceptional nature, its usage should be well-grounded, should be carried out in compliance with principle of distribution of cases in random, electronic manner and should be subject proper supervision.
- Large-scale practice of assigning case in Supreme Court should be limited similar to courts of first and second instances and should be a subject of integrated legal regulation.

### **5.3. JUDGE ROTATION**

#### **Main findings:**

- The decisions of the court are ungrounded, that arises questions regarding its goals and motives;
- Regulation of judge rotation on legislative level is insufficient that creates wide discretion for the Council;
- Inspection of validity and advisability of decisions regarding judge rotation, appointment without competition and promotion cannot be inspected due to pattern decision made by the Council;
- Legislative regulation of appointment of a judge to other court without competition is vague and as a result, unhealthy practice of using this norm still exists;
- The judges are promoted in the absence clear and effective rule of assessing judicial activities, furthermore, with promotion criteria and rules hastily adopted by the Council;
- Mechanisms of promoting judges and rotation to higher instance without competition are identical in content that makes impossible to have clear and distinct boundary between them;
- Broad basis of judge rotation (“interest of justice”) requires concrete definition and is confirmed by the opinion of Venice Commission;

#### **Review of legal regime of judge official assignments**

Faulty practice of judge official assignments have been a subject of criticism and discussion of society. Before 2012 changes, the regulation of official assignment provided by law was quite flawed – its usage was the subject of wide discretion of High Council of Justice, was not a subject of any restriction and did not provide for consent of the judge.

Changes of 2012 improved the legislative regulation of official assignment. Consent of the judge became the mandatory precondition, one year was determined as maximum term and possibility of extension of this period for one year with consent of the judge was defined. The mentioned change was aimed to avoid official assignments of judges on the basis of willful decision of the Council. Official assignment without consent was also considered as an exception.<sup>163</sup>

Observation on practice after the mentioned legislative amendments revealed that separate gaps still remained that mostly were related to inspection of validity and advisability of necessity of official assignment.

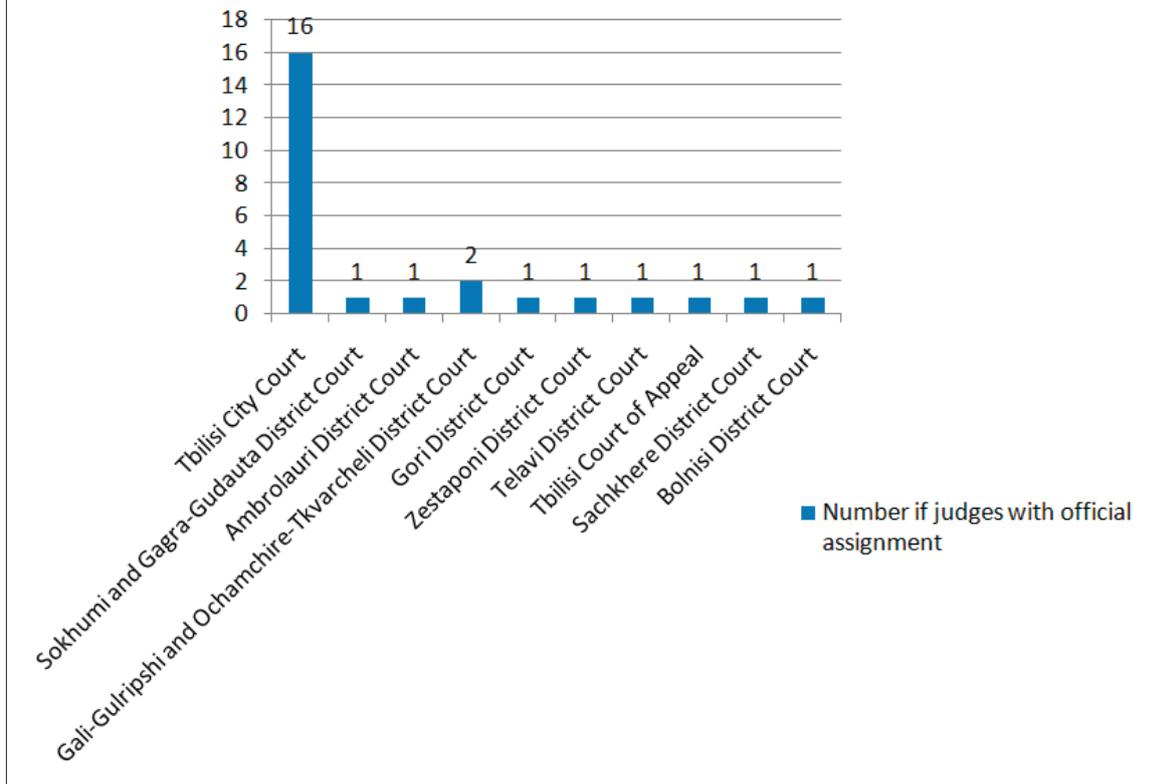
In accordance with information provided by the High Council of Justice,<sup>164</sup> 26 judges were assigned 2014-2015.

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<sup>163</sup> Paragraph 2<sup>1</sup> of Article 13 of the Law of Georgia on Rules of distribution of cases and assignment of authority to another judge in Common Courts.

<sup>164</sup> Letter N1498/2244-03-0 of High Council of Justice of Georgia of November 2, 2015.

## Number of judges with official assignment in 2014-2015



The decisions of the Council regarding the official assignment would not establish the grounds based on which each judge was sent with business mission to the relevant court, making it impossible to inspect the appropriateness of the official assignment. Additionally, only 6 decisions of the High Council of Justice provided for the term of business mission (one year). Based on the information provided by the Council, in 2014-2015 the Council had not made a decision, without consent of the judge, regarding assigning them to other court<sup>165</sup>.

The official assignment regulation was even more improved with changes made within the frameworks of the “third wave” of the judiciary reform that substantially decrease the threat of infringing the independence of a judge. Namely, based on the current regulation:

- In the absence of the judge or in case of sharp increase of the number of cases, the High Council of Justice shall refer to the judge/judges enrolled in the reserve, proposing to exercise judicial authority.
- In case of negative response from reserve judges, the High Council of Justice will refer to judges of the nearby courts of the same instance with the mentioned offer and, in case of written refusal, will refer to judges of other courts of the same instance.
- Assigning a judge to another court may be carried out based on well-grounded decision of the High Council of Justice, with consent of the judge, with up to a 1-year term.
- Assignment may be prolonged for not more than 1 year, which implies the consent of the judge.

In case if judge is selected through the mentioned rule, the draft law still includes the mechanism of assigning judges without their consent, albeit on important conditions.

Despite the guarantees envisaged as a result of the reform, the Venice Commission indicated that such assignment to another court shall only be possible based on strict criteria, clearly provided by the law, as is e.g. number of cases in receiver and sender courts, number of cases considered by the judge to be assigned. Such a vague criterion as “interest of justice” cannot be considered as a strict criterion. In order to avoid violation

<sup>165</sup> Letter of High Council of Justice of Georgia of November 2, 2015 N1498/2244-03-0.

of the principle of immovability of judges, detailed basis and objective regulations are necessary. Additionally, it is important to indicate the respect of the judge specializations when using assignment mechanisms clearly in the law.<sup>166</sup> Unfortunately, the mentioned detailization is not provided by current legislation. However, the amendments to the law significantly decrease the risks of misusing the mechanism. It is significant for the High Council of Justice to supervise the practice of using this mechanism in the future in order to analyze how the positive changes are reflected on assignment practice.

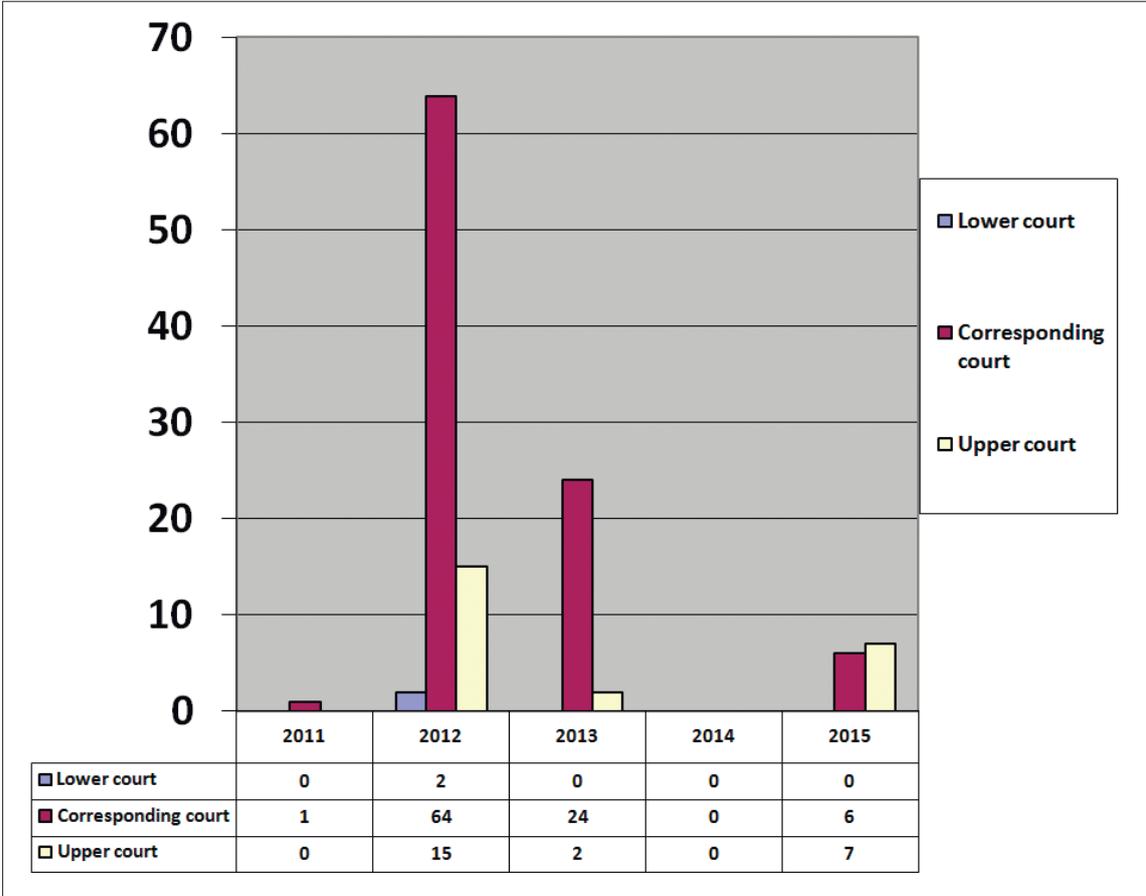
**Review of the procedure for appointing a judge as a judge of another court without a competition**

Article 37 of the Organic Law of Georgia on Common Courts provides for the opportunity for a judge to be appointed without competition as a judge of a corresponding or upper court if the judge so agrees and if a vacancy arises. It should be considered that before the “third wave” changes, judges of a lower court could be appointed. The current law additionally indicates that a judge shall meet criteria for promotion of judges in order to be appointed to upper court.

Besides this indication, the norm does not provide for additional explanations regarding the justification of the necessity of using the mentioned mechanism, and the rules and procedures of appointing judge without competition and of selecting and assessing the judge. Accordingly, such general and vague indication gives wide opportunity to the High Council of Justice to transfer the judges to other courts in its own discretion, with non-transparent procedures, which creates risks of misusing the mentioned legal mechanism. Subsequently, the society has no opportunity to assess the advisability and appropriateness of the transfer to other court.

The High Council of Justice established the rule of assigning a judge to another court without competition on June 10, 2015, in order to make amendments to Council regulations. However, the mentioned rule concerned only assigning the judge to relevant instance and did not regulate the issue of transferring to another instance. Before June 10, 2015, the rule of appointing a judge as a judge of another court without competition was not defined and accordingly, the judges were appointed based on the vague regulation of the law.

Below is the number of judges appointed to a lower, corresponding or upper court in 2011-2015.



<sup>166</sup> Venice Commission, CDL-AD(2014)031, paragraph 36

The data above reveals that the number of judges appointed to lower, corresponding or upper courts in 2012 significantly exceeds the number of appointments in other years (81 judges).<sup>167</sup>

Should be considered that at the end of 2012 the council had no legal acts that could ensure the process of appointing judges to upper instance to be conducted objectively, including the criteria of promotion and procedures. Conducting mass reappointment of judges under these conditions strengthens the feeling that the mechanism of reappointment of judges created grounds and opportunities of using it unreasonably, and that it could have been used by the High Council of Justice at different times. The possibility to appoint was especially risky when a judge could have been appointed to a lower court.

Appointing a judge to upper court without competition implies his/her promotion. Accordingly, the aim of mechanisms of identical content in law is unclear. According to Organic Law, promotion criteria are developed and the judge is assessed based on promotion criteria by the High Council of Justice. The mentioned criteria and promotion procedures were developed by amendments made to Council regulations on November 19, 2015<sup>168</sup>. It is noteworthy that the Council adopted the criteria and rules of promotion of judges hastily, after the applications of judges for vacant positions had already been submitted. Additionally, the Council has not worked on the adoption of mentioned criteria, which, of course, discredited the promotion process<sup>169</sup>.

A significant gap of the mentioned mechanism is also the fact that the Council makes pattern decisions when appointing the judge as a judge of another court<sup>170</sup>, accordingly, it is impossible to establish whether the Council was guided with criteria provided to in regulations in the promotion process.

### **Review of the mechanism of promotion of judges**

Based on the information provided by the High Council of Justice<sup>171</sup>, article 41 (promotion) of the Organic Law of Georgia on Common Courts was not used during 2011-2015. However, as noted above, appointing a judge to another instance without a competition under Article 27 is actually a mechanism analogous of promotion and implies promotion. Accordingly, the process of appointing a judge to upper court should be subject of Article 41 which is provided for in the changes envisaged with the "third wave". However, the decisions of the Council made in previous years regarding the appointment of a judge to upper instance indicates only Article 37 (appointing without competition)<sup>172</sup> as the basis of appointment.

It is clear that before the changes were made to Council regulations, namely in 2012-2013, the judges in Tbilisi Court of Appeals were promoted under the conditions of absence of promotion criteria and procedures. Despite the fact that Council regulation provides for promotion criteria and rule, there still are remarks regarding the promotion process that mostly concern the lack of the assessment system of judges and inconsistency of the Council's decisions.

According to the current legislation, a judge of a District (City) court can be appointed to the Court of Appeals, if he was exercising the judicial powers in a District (City) court for not less than 5 years. The exceptional norm regarding early promotion was annulled by the "third wave" reform.

According to the Consultative Council of European Judges, some decisions of the Justice Council, related to management and administration of the judiciary system, as well as the appointment, mobility, promotion, discipline and resignation of judges, should include the definition of grounds, should have restrictive powers and should be subject to an opportunity of court review. Independency of the Justice Council does not mean that it is outside the law and independent from judiciary supervision.<sup>173</sup> Besides, each interested person should be able to check whether the Council of Justice used rules and criteria towards appointments and promotions.<sup>174</sup>

Similar to above-mentioned, in accordance to European Networks of Councils for the Judiciary (ENCJ) all decisions of the Council of Justice regarding appointment, promotion, assessment, disciplinary persecution and any other decision related to the career of a judge should be well-grounded. Any interested party should be able to

<sup>167</sup> Information available at: <<https://emc.org.ge/2015/12/03/mosamartleta-gadaadgileba/>> [Last accessed on March 26, 2017].

<sup>168</sup> „On the Approval of the Bylaws of the High Council of Justice of Georgia“ High Council of Justice of Georgia, Decision N1/166 of October 19, 2015 on amendments to the Decision N1/208-2007 of September 25, 2007. Available at: < <https://goo.gl/PA8dvK> > [Last accessed on March 26, 2017].

<sup>169</sup> Information available at <<https://emc.org.ge/2015/10/19/arasamtavroboebis-gancxadeba/>> [Last accessed on March 26, 2017].

<sup>170</sup> For example, see Council Decision: <<https://goo.gl/0Rb4jd>> [Last accessed on March 26, 2017].

<sup>171</sup> Letter N1495/2242-03-0 of High Council of Justice of Georgia of November 2, 2015

<sup>172</sup> For example, see Council Decisions: < <https://goo.gl/fA49Hr> > < <https://goo.gl/GAuEVD> > [Last accessed on March 26, 2017].

<sup>173</sup> CCJE Opinion N10(2007), Paragraph 39.

<sup>174</sup> Ibid., Paragraph 93.

familiarize with the choice made and review whether the Council used appropriate rules and criteria regarding appointment and promotion.<sup>175</sup>

ENCJ developed guidance regarding promotion of judges, namely:

- The promotion process should be open to public discussion and fully documented;
- The promotion process should be conducted based on published criteria;
- The promotion should be conducted only based on merit;
- The promotion process should promote diversity of people inside the judicial authorities and should not tolerate discrimination;
- The promotion process should include the independent procedure of appeal.<sup>176</sup>

Additionally, according to the recommendation of the Consultative Council of European Judges, bodies of the member-states, responsible for appointment and promotion of judges, as well as for providing recommendations on these issues, are obliged to develop, publish and implement objective criteria, in order to ensure that selection of judges and their promotion is based on merit, considering qualification, fairness, possibilities/knowledge and effectiveness.<sup>177</sup>

Despite the changes made under the “third wave” of the judicial reform, defining procedures and criteria for appointing a judge without competition still remains under the competence of High Council of Justice, which is not rational. In order to redress the gaps, it is necessary for the principles and procedures of appointing and promoting a judge as a judge to another court without competition to be regulated in detail on the legislative level that shall not allow High Council of Justice to use the mentioned mechanism in an unjustified and arbitrary manner. Moreover, it is essential to implement an effective system periodic assessment of judges that ensures the promotion of judges based on merit.

#### **Recommendations:**

- It is important that any decisions regarding judge transfer are justified and an effective mechanism of appeal exists (appeal to court of qualification chamber).
- The criteria for promotion of judges should be defined on the legislative level and not by a legal act of the High Council of Justice.
- The main principles of appointing and promoting judges without competition should be developed with the Organic Law.
- The grounds for appointment should be detailed in the law as it is provided for in the recommendation of the Venice Commission.

## **5.4. THE SYSTEM OF PERIODIC EVALUATION OF JUDGES**

### **Key findings**

- The law only provides for evaluation of judges appointed for a three-year probationary period, however, it stipulates nothing about periodic evaluation of effectiveness of the judiciary performance.
- In 2011, the Council at its own discretion approved the periodic evaluation system, which largely fails to meet internationally accepted standards of judiciary evaluation and includes risks for infringement of the independence of individual judges;
- The goals of the current evaluation system are unclear. It is more focused on the whole judicial system rather than the evaluation of individual judges, which is not advisable;
- The current model is mainly based on the quantitative criteria, whereas according to international standards it should be based mostly on the qualitative criteria;
- The evaluation procedure includes such components which in some cases might be caused by factors independent from judges and beyond their control;
- One of the components of the evaluation - stability of decisions - can pose a threat to the independence of judiciary;
- The current evaluation rules do not include the evaluation of administrative functions performed by court chairpersons;

<sup>175</sup> ENCJ Report, Independence and Accountability of the Judiciary, 2013-2014.

<sup>176</sup> Ibid.

<sup>177</sup> CCJE OpinionN1(2001), Paragraph 25.

- The result of evaluation should be a recommendation on encouragement of individual judges, as well as determination of bonus award system to the remuneration, which is problematic in terms of the judiciary independence;

### Current system of judiciary evaluation

The evaluation of activities of individual judges is associated to such fundamental issues such as high-quality and efficient justice, competent judicial system, protection of interests of those seeking the justice provided through a judge's timely, high-quality and well-reasoned decisions. At the same time, it is essential that the judiciary evaluation should not endanger the independence of the judicial authority, which is the main prerequisite for the supremacy of the law.

It should be noted that evaluation is not the goal in itself and may not become just a ritual. Evaluation, first of all, is an opportunity to improve both at human and organizational level.<sup>178</sup>

The current Law of Georgia "On Common Courts" only provides for the evaluation of judges appointed to the office for the three-year probationary period in order to make a decision on appointment of a judge for life, but stipulates nothing about periodic evaluation of the effectiveness of the judiciary performance. Accordingly, such an evaluation lacks in a legal basis<sup>179</sup>, the law fails to provide the essence and the basic principles of the evaluation and the High Council of Justice of Georgia exercises a broad discretion and authority in this field.

The High Council of Justice of Georgia, pursuant to the Decision N1 /226 of December 27, 2011, approved the procedure for "The evaluation of effectiveness of performance of Common Courts Judiciary" (hereinafter - "Evaluation Procedure"), which in most parts does not meet internationally accepted standards of evaluation of judiciary performance and includes some risks of infringement of the independence of individual judges. The current legal framework is problematic in terms of the evaluation objectives, methods and components, as well as evaluation outcomes.

As mentioned above, the mechanism of the judicial evaluation has been designed under the decision of High Council of Justice of Georgia. In accordance with the rules approved by the Council, the evaluation of effectiveness of judiciary performance serves the following goals:

- To control the number of cases, caseload of judges, case administration and meeting decision-making procedural timeframes in the Common Courts;
- To promote the development of the uniform judicial practice;
- To provide encouragement for judiciary.

The purposes of performance evaluation systems found in different states worldwide can generally be divided into three main groups:

- Self-improvement, which aims at enhancement the performance and professional accountability of judges;
- To increase public confidence in court;
- To aid judicial institutions in deciding upon issues of career and promotion within the judiciary.

However, these purposes are not exclusive to each other and any model may serve more than one of the above purposes.<sup>180</sup> According to the Kyiv Recommendations, the evaluation of judges may be used to help judges identify aspects of their work on which they may wish to improve and for the purposes of possible promotion.

Sadly, the evaluation rules applied in Georgia usually do not entail the important goals such as improving the quality of performance of individual judges. In practice, this rule is applied to identify problems and challenges within the judicial system for calculation of the required number of judges, therefore, it is focused more on the entire judicial system rather than on individual judges.

Therefore, under the conditions of the current evaluation procedures, there is an overlap between the evaluation of the quality of judicial system and professional evaluation of judges. According to Consultative Council of European Judges, the two processes cannot be mixed since they serve different goals.<sup>181</sup>

<sup>178</sup> Richard Mohr, Francesco Contini, Judicial Evaluation Project, Judicial Independence and Legal Empowerment Project, 7 June 2012.

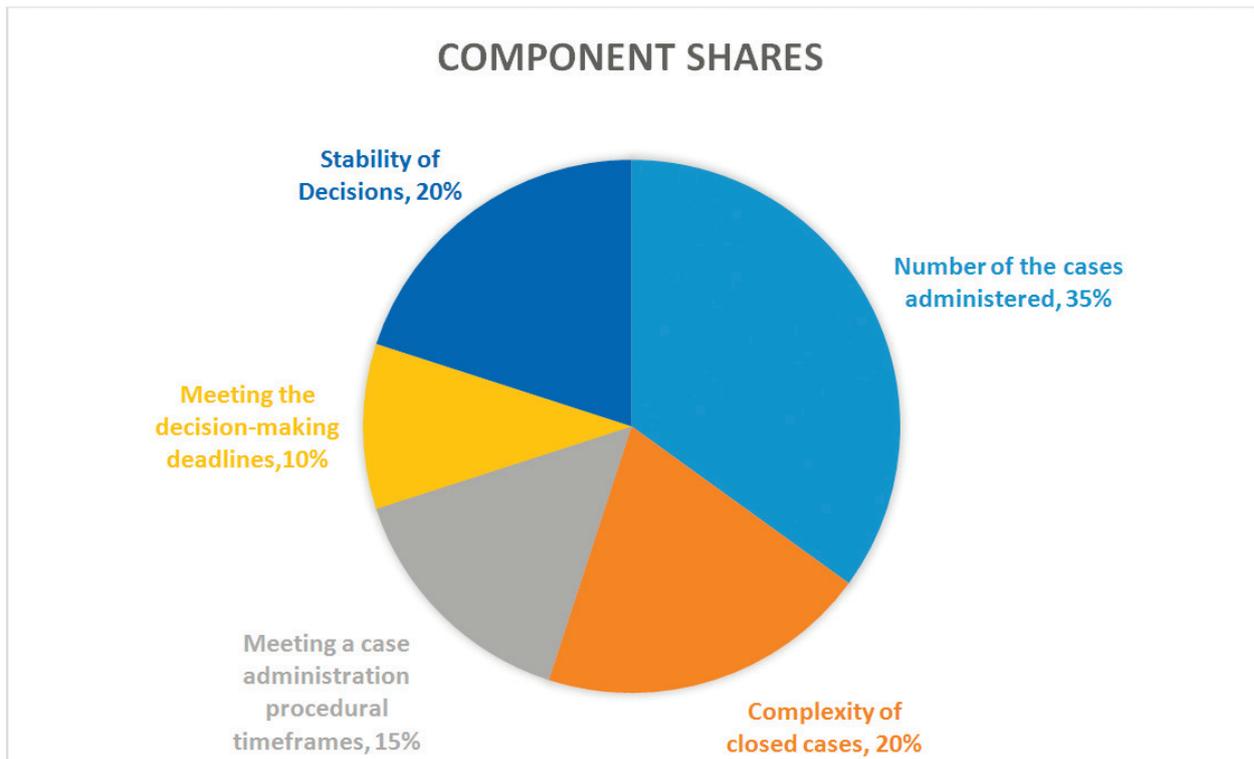
<sup>179</sup> According to the Kyiv Recommendations, the main criteria should be determined by the law. The detailed criteria applied for the periodic evaluation should be determined in a bylaw, which shall also define the evaluation terms and mechanisms.

<sup>180</sup> OSCE/ODIHR, Assessment of Performance Evaluation of Judges in Moldova, 27 June 2014

<sup>181</sup> CCJE Opinion N6 (2004), Paragraph 34.

Pursuant to the current procedure, the evaluation is carried out by High Council of Justice of Georgia once every 6 months though the generalization of statistical data obtained from the Common Courts and under the rule established by the law. The first instance and appellate judges are subject to evaluation. Accordingly, the evaluation is completely in the hands of the judicial authority, which should be rated positively as the institutional independence from other governmental branches is guaranteed.

The current evaluation system in Georgia is inherently formal. The main difference between the formal and informal evaluations is that in the case of most formal evaluations, the objectives of the evaluation, the criteria applied, the composition of the evaluating body, the procedure for evaluation and its possible consequences are clearly defined in advance of any evaluation exercise, and an informal evaluation does not use either formalized evaluation rating or criteria and it has no direct consequences for the evaluated judge.<sup>182</sup> According to the evaluation procedures, the general evaluation consists of the following components:



### Evaluation of the current evaluation procedure

As the High Council of Justice has decided, the evaluation components of decision-making efficiency of High Council of Justice are defective in several respects:

- The possibility of evaluation is not set out in the law. Moreover, the legislation does not provide for the principles, rules and procedures of the evaluation;
- The current model is mainly based on quantitative criteria. Venice Commission recommends giving preference to the qualitative criteria rather than the quantitative, as the qualitative criteria refer to knowledge and personal skills.<sup>183</sup> In addition, according to the Kyiv Recommendations, the evaluation of judges' performance should be primarily qualitative and focus upon their skills, including professional competence (knowledge of law, ability to conduct trials, capacity to write reasoned decisions), personal skills (ability to cope with workload, ability to decide, openness to new technologies), social skills (ability to mediate,

<sup>182</sup> CCJE Opinion N17(2014), Paragraphs 9-10.

<sup>183</sup> Venice Commission, CDL-AD(2014)007, Paragraphs 37-40, 42-43, 49-50 and 77-78. In addition, according to Venice Commission, the judge's individual activities should be evaluated with the objective criteria, such as the increase / decrease of the cases to be administered, availability of qualified assistants and proper equipment, etc. In general, the system based on the main quantitative indicators can lead to harmful consequences: for example, the statistics look much better when the judge handles a multiple number of cases by meeting the procedural terms and only a few cases with violated terms. To this end, the judge may delay a particularly complicated case for which the judge will not be able to ensure the protection of the procedural terms in order to meet the deadlines in the majority of the cases. As a result, those involved in most complex and serious cases are likely to find themselves in disadvantaged position. (CDL-AD(2015)042, opinion on the laws on disciplinary liability and evaluation of judges of the former Yugoslav Republic of Macedonia).

respect for other parties of any case), and – for the possible promotion to an administrative position – management and leadership skills. These same skills should be cultivated through judicial training programmes as well as on the job.<sup>184</sup>

- The evaluation typically includes the components which in some cases may be due to factors beyond the control of judges. For example, the workload may depend on the number of cases lodged and distributed, unforeseen events during the consideration of cases, etc. However, experts say that a measurement of workloads may become a useful tool for evaluation of effectiveness of the court (as an institution) and for assessment of a particular number of judges. Measuring an individual judge's caseload is often considered as a useful tool to observe and increase the judiciary efforts and ability to cope with the workload, but it also depends on factors that are beyond their control.<sup>185</sup> Accordingly, when the purpose of evaluation of workloads, a number of cases considered, compliance with the procedural timeframes is to improve the judicial system and determine a required number of judges, it is an acceptable way to achieve the above aim but when the efficiency of judges' performance is evaluated with the number of cases in production, the balance level and compliance with deadlines, it might become an improper criterion because in certain cases, such components are related to objective factors.<sup>186</sup>
- Another component of the evaluation – stability of judicial decisions/acts may endanger the judicial independence.<sup>187</sup> The issue related to the measuring of stability of judicial acts has also been noted by Venice Commission: Such mechanism should be avoided because it involves an interference with the independence of the judge. At the same time, when a case is overturned on appeal, it is impossible to say exactly that the court of first instance got a wrong decision and the appeal court got it right.<sup>188</sup> Moreover, according to the Kyiv Recommendations, judges shall not be evaluated under any circumstances for the content of their decisions or verdicts either directly or through the calculation of rates or reversal.<sup>189</sup>
- The current evaluation rule does not provide for the evaluation of performance of administration functions by judges. According to experts, chairpersons of the court, as reviewers of the court cases, should be evaluated under the criteria established by the applicable rules, but for them, as for the administrators, relevant criteria should be determined separately.<sup>190</sup>

According to the evaluation procedure, the outcome of the evaluation can be a recommendation for promotion of individual judges, as well as the possibility of determining a bonus award to their remuneration the amount of which shall be decided by the High Council of Justice of Georgia. Determination of a bonus award to the remuneration based on results of the evaluation can be an issue as it may jeopardize the independence of a judge. This approach is also provided in the Opinion of the Consultative Council of European Judges.<sup>191</sup> However, as the research process showed, and also according to the information obtained from High Council of Justice of Georgia, a promotion or a bonus award to the remuneration based on the evaluation results has not been carried out over the recent period. Therefore, there is no longer a danger of infringement of the independence in this regard though the above provision still is maintained in the evaluation rule.

Considering the fact that the current process of evaluation applied in the country is not focused on professional or personal skills of individual judges, the evaluation does not aim at further improvement of their professional performance, which can be regarded as a major drawback of the current system.

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<sup>184</sup> Kiev's recommendations for judicial independence in Eastern Europe, South Caucasus and Central Asia (2010).

<sup>185</sup> Richard Mohr, Francesco Contini, Judicial Evaluation Project, Judicial Independence and Legal Empowerment Project, 7 June 2012.

<sup>186</sup> According to experts, for ensuring the efficiency of this measure systemic activities shall be provided, for instance, case management rules, strategies and training, which will help judges timely close cases. With the influence of the factors in mind which are beyond the control of a judge (parties to a case, their lawyers and court assistant staff), the assessment mechanisms should allow judges and managers to identify the problematic areas in terms of observance of procedural periods. (Richard Mohr, Francesco Contini, Judicial Evaluation Project, Judicial Independence and Legal Empowerment Project, 7 June 2012.)

<sup>187</sup> According to experts, the success of the appeal at first glance seemingly measures the consistency of the judge's decisions (on the basis of interpretation of the higher courts), but it is not a legitimate means of measurement of legal characteristics or values. The judge does not have to be in a position to try to guess the opinion of the higher court which, in turn, may establish its appeal judgement on other issues that a judge of the first instance was not aware of or was not available. In addition, the measurement contains a threat of intimidation of judges and it can act against the independence of the judge. (Richard Mohr, Francesco Contini, Judicial Evaluation Project, Judicial Independence and Legal Empowerment Project, 7 June 2012.)

<sup>188</sup> Venice Commission, CDL-AD(2014)007.

<sup>189</sup> Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010).

<sup>190</sup> Richard Mohr, Francesco Contini, Judicial Evaluation Project, Judicial Independence and Legal Empowerment Project, 7 June 2012.

<sup>191</sup> According to CCJE Opinion N17, when an individual evaluation has consequences for a judge's promotion, salary and pension, or may even lead to judge's removal from office, there is a risk that the evaluated judge will not decide cases according to his or her objective interpretation of the law and facts, but consider the case in a way to please the evaluators. However, the risk to judicial independence is not completely avoided even if the evaluation is conducted by other judges.

As for the evaluation body/evaluators, there is a wide range of approaches to the matter. According to the CCJE, in order to protect judicial independence, evaluation shall be undertaken mainly by judges. This process may also involve the Council of Justice. However, other means of evaluation could be used, for example, by members of the judiciary appointed or elected for the specific purpose of evaluation by other judges.<sup>192</sup>

According to Kyiv Recommendations, a Judicial Council may be involved in the process of specifying the evaluation criteria and procedures, but professional evaluations should be conducted at the local level. Evaluations shall be conducted mainly by other judges. Court chairpersons should not have the exclusive competence to evaluate judges but their role should be complemented by a group of judges from the same or other courts. That group should take into account the opinions of outsiders who regularly deal with the particular judge (such as lawyers) and law professors when assessing the diligence to professional activities, respect for the parties and adherence to the rules of procedure by a judge. Evaluations should include review of the judge's written decisions and observations of how he or she conducts trials.<sup>193</sup>

Pursuant to the assessment provided by the Venice Commission, evaluation of judges conducted by their colleagues has the potential of causing some difficulties in particular, it can lead to bad personal relationships between colleagues and where judges receive favourable evaluations this could give rise to allegations of cronyism. There is a danger that the above system can lack credibility. In general, establishing a mixed team of evaluators, inviting legal professionals from outside the current judicial system may be the least dangerous option. It is essential to establish an evaluation team with a balanced composition.<sup>194</sup>

#### **Recommendations:**

- It is necessary to determine in the law the essence, goals and basic principles of the periodic evaluation of judges to avoid awarding unlimited powers to the High Council of Justice.
- The relevant components of the evaluation procedure need to be improved. It is advisable to give priority to qualitative indicators.
- It is important to include procedural guarantees in the periodic evaluation of judges' performance to ensure a high level of involvement and participation of judges in the evaluation process. In addition, the mechanism of reviewing the results of the evaluation should be provided.<sup>195</sup>
- The issue of conflict of interest<sup>196</sup> and undue communication during an evaluation process should be expressly and clearly regulated in order to ensure that the process is conducted impartially and without any external influences.
- The current provision on determination of a bonus award for a judge based on the results of evaluation should be removed.

## **5.5. COMMUNICATIONS WITH JUDGES**

### **Key findings**

- The legislation regulating communications with judges does not ensure the protection of judges against influences coming from within the system; final decisions on improper communications are made by chairpersons of the courts which cannot be appealed to the High Council of Justice;
- Judges are not provided with the opportunity to apply to the High Council of Justice in the cases of restricted communications. If the Council is participating in the process, it is solely represented by the Secretary of the High Council of Justice;
- The current definition of restricted ex-parte communications with judges is not sufficiently foreseeable;
- The law does not clearly identify grounds for a judge's liability in any breach of communication rules which weakens the accountability system of the judiciary and increases risks of its abuse.

<sup>192</sup> CCJE Opinion N17(2014), Paragraphs 36-37.

<sup>193</sup> Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), § 30-31.

<sup>194</sup> Venice Commission CDL-AD(2014)007, The Paragraphs 62, 67, 69-70 and 75.

<sup>195</sup> The right of hearing and revision of the judge's opinions is provided in the Kyiv Recommendations.

<sup>196</sup> The possibility for the change of the Evaluator is provided in the Consultative Council of European Judges Opinion N17(2014). In addition, Venice Commission provides on the mechanisms of disqualification of an evaluator who fails to recuse him or herself or to report a conflict of interest. Evaluators should also be under the obligation to report any form of communication that attempts to influence the evaluation process by improper means. (CDL-AD(2014)007, Joint Opinion on the draft law amending and supplementing the judicial code (evaluation system for judges) of Armenia.)

## International standards of ex-parte communication

For ensuring the right of a fair trial, judges should be independent and free from outside influence in the process of administration of justice. Public confidence in the judicial system may fade away when the decision-making process of judges is seen as an object of improper influence from the outside.

In order to protect the independence of the court from external effects, a range of various mechanisms are established in the international practice<sup>197</sup> such as criminal and administrative sanctions, right to access to justice councils and others. According to the recommendations of the Committee of Ministers of the Council of Europe, in the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. *The law should provide for sanctions against persons seeking to influence judges in such manner.*<sup>198</sup>

Pursuant to the Constitution of Georgia, any pressure on the judge or any interference in his/her activities with the view of influencing his/her decisions shall be prohibited and punishable by law.<sup>199</sup> One of the means of influencing a judge is an attempt to establish ex-parte communication outside the courtroom with the intention of influencing the outcome of a case. Such cases endanger the judiciary impartiality, independence, adversariality of the process, and at the same time undermine the public's confidence in the judicial system.

## Regulation of communications with judges in Georgia

The rule about communication between judges of the Common Courts of Georgia and the liability for a breach of the above regulation first was provided for in the law in July 2007, when the Law of Georgia "On the Procedure for Communication with Judges of Common Courts" was passed. The adoption of the above Law had been preceded by a sharp criticism on gross interference in the activities of judges by various persons, especially officials of the Prosecutor's Office. According to the US State Department's Report 2006, ex-parte communications with judges were frequent in Georgia and parties including prosecutors placed judges under pressure to decide cases in ways favourable to their own interests. The State Department report compared such situation to the Soviet-era "telephone justice".<sup>200</sup> In response to the international criticism, as well as for the purpose of implementation of the duties stipulated under the European Neighborhood Policy Action Plan 2006<sup>201</sup>, the Parliament of Georgia passed a law in 2007 "On the Procedure for Communication with Judges of Common Courts" which has no analogues in almost any country of the world and in a sense is a Georgian innovation.<sup>202</sup> The declared aim for the adoption of the law was strengthening the guarantees of independence and impartiality of judges and limiting the possibilities of influence on judges by public officials and private individuals during any court proceedings. The law prohibited ex-parte communications for the purpose of influencing a case with judges from any outsiders including public officials. In the event of any ex-parte communication a judge shall be obliged to notify the court chairperson who shall be able to penalize an infringer party with no more than 2,000 GEL and / or address the High Council of Justice of Georgia for transferring the case to other relevant bodies for imposing appropriate disciplinary measures.

In 2007, the adoption of the law "On the Procedure for Communication with Judges of Common Courts" was largely evaluated positively by local<sup>203</sup> as well as international organizations.<sup>204</sup> However, the minimum application of the law in practice soon proved its ineffectiveness. The monitoring conducted by "International Transparency - Georgia" on the implementation of the European Neighborhood Policy Action Plan in Practice showed

<sup>197</sup> Justice Scoreboard, The 2014 EU Justice Scoreboard, pg.32, available on the webpage <<https://goo.gl/vjYNYK>> [Last seen on 26 March 2017].

<sup>198</sup> The Recommendation №R (94) 12 of the Committee of Ministers to the member States on judges: independence, efficiency and responsibilities 1, 2(d)

<sup>199</sup> The Constitution of Georgia, the Article 84

<sup>200</sup> "Ex parte communications between lawyers and parties with judges were common, which facilitated Soviet-style "telephone justice." Lawyers, including prosecutors, and parties to litigation reportedly used this avenue to pressure judges to decide cases in ways favorable to their interests." - US Department of State, 2006 Country Reports on Human Rights Practices, available on the website: <<https://goo.gl/SyZ7zG>> [Last seen on 26 March 2017].

<sup>201</sup> For implementation of the EU European Neighborhood Policy Agreed Action Plan, the Government of Georgia in the strategy 2007 provided to conduct a study of the international practice in terms of restriction of ex-parte communication and develop relevant legislative proposals for the purpose of improvement of justice.

<sup>202</sup> GYLA, Justice in Georgia, 2010, <<http://bit.ly/2hj7Sen>> [Last seen on 26 March 2017].

<sup>203</sup> GYLA, Justice in Georgia, 2007.

<sup>204</sup> Implementation of the European Neighbourhood Policy in 2007, Progress Report Georgia can be accessed on the webpage: <<https://goo.gl/4Lx9YV>>; OECD Second round of Monitoring pg. 44, available on the webpage: <http://bit.ly/2hjmABY> [Last seen on 26 March 2017]; PACE, Honouring of obligations and commitments by Georgia, 2008.

that since the enactment of the law the actual situation has not changed and the influence from government authorities, especially the Prosecutor's Office on the court was again alarmingly high.<sup>205</sup>

In September 2009, the President of Georgia submitted to the Parliament a draft bill according to which the liability for the infringement of the law became more severe. In particular, the amount of the fine was increased from 2000 to 5000 GEL, in addition, a public servant and a state-political official were delineated and for the latter the amount of the fine was set at 10 000 GEL. The amendments were introduced to the Criminal Code as well (Article 364), according to which any gross interference in a judge's activities has become punishable and the sanctions for state-political officials have become more severe. The aim of the changes was to provide additional safeguards for avoiding interference of public servants and state-political officials in court proceedings by imposing strict liabilities.

It should be noted that for the moment of submitting of the above draft law in 2009, 4 persons had already been fined for the breach of ex-parte communication rules, 2 of whom were public officials.<sup>206</sup> The statistics shows that not the amount of the fine but its implementation was the legislation gap. Georgian Young Lawyers' Association (GYLA) in its report 2010 observed the main setback of the law in the fact that it does not provide a solution if an ex-parte communication restricted by the law is conducted with a judge by the court chairperson, i.e. by the person whom a judge shall notify upon a case of violation and request a penalty for violator. This gap in the law was considered even more urgent with the practices in the judicial system in mind when the system of the Common Courts actively applied the so-called "Phone Tapping" method which had been introduced with the view to establishing a uniform practice and during which court chairpersons reviewed the factual situation and possible outcomes of a particular case together with judges. The so-called "Phone Taping" was identified by judges themselves as the major means of improper influence<sup>207</sup> however, since the enactment of the law no violation of ex-parte communication rules by any judge appointed at any administrative position has been identified.<sup>208</sup>

According to the information obtained from the High Court of Justice,<sup>209</sup> since the enactment of the law until 2016 or during 9 year period, in total only 9 cases of violation of the ex-parte communication rules restricted by the law had been identified, and regarding all these cases the decision on imposing a fine had been made. It should be noted that no substantial amendments to the Law of Georgia "On the Procedure for Communication with Judges of Common Courts" have been introduced since 2010, nor even the "Third Wave" of the judicial reforms of the legislative system intend to introduce any amendments.

### **Gaps of the current ex-parte communication rule**

Since the adoption of the Law of Georgia "On the Procedure for Communication with Judges of Common Courts", the statistics of its application (total of 9 cases) indicates to the inefficiency of the current regulation. The analysis of the legislative base reveals that the law fails to protect judges particularly from influences arising from within the system. This is manifested mainly in excessively broad powers of court chairpersons and the Secretary of the High Council of Justice when making decisions on violations of ex-parte communication procedures, insufficient involvement of the High Council of Justice in the process, the current definition of the restricted communication that enables interpreting the law in a narrow sense and inefficiency of the appeal mechanisms. It is also problematic that the law does not expressly provide the grounds of a judge's liability for a breach of the communication rules thus weakening the system of judicial accountability and raising the risk of its further abuse.

### ***Definition of the restricted communication and the elements of misconduct***

In order to provide a real mechanism for prevention of the influence on implementation of justice, the law should explicitly and unambiguously define what may be deemed as an attempt to influence a judge, and the extent of a liability for doing so prescribed by the law.

The Law of Georgia "On the Procedure for Communication with Judges of Common Courts" prohibits any com-

<sup>205</sup> European Neighbourhood Policy: Monitoring of Georgia's Anti-Corruption Commitments, TI Georgia, 2010 can be accessed on the webpage: <<https://goo.gl/ne8jVB>> [Last seen on 26 March 2017].

<sup>206</sup> The Letter N111/2950-03-n of High Council of Justice dated as of 30 January 2017.

<sup>207</sup> GYLA, Justice in Georgia, 2010 <<http://bit.ly/2hj7Sen>> [Last seen on 26 March 2017].

<sup>208</sup> The Letter N111/2950-03-n of High Council of Justice dated as of 30 January 2017.

<sup>209</sup> The Letter N1810/2611-03-n of High Council of Justice dated as of 16 November 2016.

munication from the moment of submission of a case to court until entry of the court ruling on the case into force, also at the stage of a criminal case investigation participants to the proceedings, interested persons, public servants and state political officials shall be prohibited from establishing any communication with a judge that is related to consideration of a specific case or an issue, and / or to the presumable outcome of a case, and that violates the principles of independence and impartiality of a court / judge, and the principle of adversarial nature of proceedings.

The above definition specifies when the communication with a judge might be deemed improper, although the above explanation fails to clarify **whether the communication over a case is prohibited only with the judge considering a case or with other judges as well**, including Chairperson of the court. Given the fact that the number of judges in Georgia who frequently are in close relationships is not very large, the communication between even one of the judges and any interested person who has some interest to the case may seriously undermine public confidence in the judicial system. Therefore, the law should clearly provide for the inadmissibility of communication with any judge of the Common Courts of Georgia over a specific case in order to have improper influence on the case proceedings. However, in this regard essential should be the content and purpose of the communication rather than the real levers a judge may have to influence a case outcome.

In addition, communication with judges about civil or administrative cases should be prohibited not only about pending cases but also cases already in legal force. Judging from the fact that in some cases envisaged by the law it is permitted to renew proceedings over completed cases, such communications may violate the impartiality and independence of the court. Also, the communication with judges should be prohibited over the category of lawsuits which have not been filed to the court yet, however, there is a great likelihood that a case will be assigned for consideration to a particular judge (e.g. in small scale courts also in the courts which provide for the narrow specializations). Even in the above cases, essential should be the purpose and content of communications, and if a person aims to have influence a judge, this fact should be deemed as an improper communication.

The law should clearly define that **the law provides for the liability only for private ex-parte communication with a judge**. Stating public opinions regarding any specific case through mass media or other public medium should not be considered as a pressure on judges and infringement of the rules of communication.

Pursuant to the law, if the chairperson of a court or the High Council of Justice believes that an action may contain any signs of misconduct, they shall refer the case to appropriate investigative bodies. The Criminal Code of Georgia regards it punishable any gross interference with judicial activities in any manner in order to influence the legal proceedings (Criminal Code 364 (2)), also any threat to kill or to damage the health or destroy the property of a judge in connection with the court hearing of a case or material (Criminal Code of Georgia 365 (1)). In order to make the law more foreseeable, it is important to clearly define what may be considered as a gross interference in legal proceedings, or a threat to a judge, and what constitutes a violation of the communication rules. **The violation of the communication rules and the content of a criminal offence should be clearly delineated from each other** in order to avoid any unequal and subjective interpretation of the law. Moreover, the law should provide for the possibility of imposing a liability on a person for any violation of the ex-parte communication rules if the investigation does not start or comes to a halt after the referral of the case to the investigative bodies.

It should be also noted that in order to influence legal proceedings, communication may be held with staff of the court administration, including assistants to judges and secretaries of court hearings, which is not regulated by the Law of Georgia "On the Procedure of Communication with Judges of Common Courts". For instance, according to the statement released by Tbilisi City Court on June 5, 2013, one of the prosecutors of the Prosecutor's Office of Georgia held a telephone communication with the assistant of the judge handling the criminal case of the accused Bachana Akhalaia. The party of the prosecution was interested to learn about the position of the judge in particular, whether or not the judge had expressed his or her opinion on the case, and any weaknesses or insufficiency of the evidence submitted by the prosecution. The prosecutor was also interested in the prosecutor's competence speaking about the case, in particular, how well s/he could cope with the task.<sup>210</sup> Although such cases may not be considered as a violation of the communication rules with a judge, it obviously contains the signs of indirect interference in the court activities. Therefore, it is important that the **law should define the extent of the legal liability for any attempt to influence a court administration official**, as well as the responsibility of courts to provide in the internal documents the liabilities of court administration officials in the event of any violation of the communication rules.

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<sup>210</sup> *Tbilisi City Court statement on the telephone communication from the Prosecutor's Office*, the information is available on the webpage: <<http://netgazeti.ge/news/22546/>> [Last seen on 26 March 2017].

### ***A judge's liability for violation of communication rules***

According to the Bangalore Principles of Judicial Conduct, the principles of judge's professional conduct, in particular, objectivity and impartiality prohibit private communications between judges and any party or interested persons. Any attempt to influence the court should be limited only to the courtroom and derive from only the parties to a dispute and lawyers. The judge is obliged to prevent cases when someone from the outside in direct or indirect way is trying to influence the decision to be made by the judge for a particular case.<sup>211</sup> Therefore, a judge shall not consider requests for personal communication (prohibition of ex-parte communication), and if such communication is still established, the judge shall immediately declare about it.<sup>212</sup>

According to the Law of Georgia "On the Procedure for Communication with Judges of Common Courts", any violation of the requirements of the communication rules by a judge or the failure to notify about it shall result in disciplinary liabilities. However, the Law of Georgia "On Disciplinary Liability and Disciplinary Proceedings of Judges of the Common Courts of Georgia" does not regard violation of the communication rules as a separate misconduct of judges, which can give rise to application of any grounds for disciplinary offence. In accordance with the Article 54<sup>1</sup> of the Law of Georgia "On Disciplinary Liability and Disciplinary Proceedings of Judges of the Common Courts of Georgia," there is an appropriate penalty defined for committing any disciplinary misconduct. It is not clear which form of the liability must be applied for a violation of the Law of Georgia "On the Procedure for Communication with Judges of Common Courts".

It should be noted that according to the law any breach of ethical norms by a judge is deemed as misconduct. Pursuant to the rules of judicial ethics a judge shall be prohibited from communicating with the parties to legal proceedings and / or any persons interested in a case, both in and out of court from the moment of submitting the case to the court until the moment of rendering the final judgment on the case. In addition, a judge pursuant to the ethical norms is required to immediately notify the chairperson of a court in writing if the prosecutor, lawyer or other participants of the proceedings attempt to establish communication in a form restricted by law.<sup>213</sup> Accordingly, a judge's ex-parte communication or the failure to notify about it can be considered as the infringement of ethical norms and the judge can be held liable.

Apart from the fact that an infringement of judicial ethical norms is considered as a disciplinary misconduct which is inconsistent with international standards,<sup>214</sup> under the current situation the duties of a judge pursuant to the judicial ethics are defined in more narrow sense compared with the Law of Georgia "On the Procedure for Communication with Judges of Common Courts". In particular, pursuant to the code of ethics a judge shall notify the chairperson about the restricted form of communication only if the attempt to communicate is established by participants of legal proceedings. Also, the ethical norms do not provide for the obligations of the chairperson of a court in examining notices on a violation of the communication procedures;

A judge may be held liable for any breach of the communication standards with the general grounds of disciplinary misconduct such as inappropriate conduct or improper performance of the judge's duties. Therefore, it might not be clear for a judge what specific actions or in what form the judge could be held responsible. This may be considered as a serious inhibiting factor for submitting notifications on any restricted forms of communication by a judge, as well as for the provision of effective judiciary accountability mechanisms. Pursuant to the information submitted by the High Council of Justice, since the date of the law enactment, the rules of communication have not been violated by judges and therefore, no disciplinary proceedings launched with the above grounds against any judge.<sup>215</sup>

It is interesting that the survey initiated and carried out among judges by non-judicial members of the Disciplinary Committee of Judges of Common Courts of Georgia in 2015 showed that the failure to notify the Chairperson of a court upon any restricted form of ex-parte communication was considered as a disciplinary misconduct only by 34% of the judges, while 11% of the respondents declared that such fact was not a disciplinary offence or was insignificant offence for which no disciplinary liability should be imposed.<sup>216</sup>

Another serious gap of the law is that it does not provide for the obligation of a court to inform parties to the proceedings in connection to which communication was established about the restricted forms of communication

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<sup>211</sup> The Bangalore Principles of Judicial Conduct, 29; 1.1

<sup>212</sup> The Bangalore Principles of Judicial Conduct, 64

<sup>213</sup> Norms of Judicial Ethics of Georgia, Article 7

<sup>214</sup> See the Chapter 7 of this report- Judicial Disciplinary Proceedings and Disciplinary Liability System.

<sup>215</sup> The Letter N111/2950-03-n of High Council of Justice dated as of 30 January 2017.

<sup>216</sup> The survey results on the grounds of disciplinary liability of judges of Common Courts of Georgia 2015, available on the webpage: <<https://goo.gl/I8Op86>> [Last seen on 26 March 2017].

with a judge. Any communication with the judge regarding a case unless it occurs in the court room or in any form permitted by the law, is the ex-parte communication, which automatically includes the risks of violation of the principles of adversarial system and may also become the basis for the judge's disqualification. The judge shall get the opinions about a case material only from the parties and the parties shall have the opportunity to express their opinions and solicitations. Therefore, **the law should provide for the court's responsibility to inform the relevant authorities as well as parties upon any ex-parte communications.** Imposition of such obligation on judges is one of the most fundamental principles of international conventions.<sup>217</sup>

### ***Involvement of High Council of Justice in the process***

The main deficiency of the Law of Georgia "On the Procedure for Communication with Judges of Common Courts" is the provision of inefficient mechanisms of protection for judges. This is mainly manifested in unjustifiably broad powers of chairpersons of courts in making decisions on the violations of the communication standards and the minimal involvement of the High Council of Justice in the process.

As the CCJE explains the improper influence on the court can be derived from outside of the system and also from other judges.<sup>218</sup> The obligation to protect the judicial independence from improper influence both in and out of the system is vested in the High Council of Justice, as recognized through the major international instruments.<sup>219</sup> Pursuant to the recommendations of the Committee of Ministers, where judges who consider that their independence is threatened, they should be able to have a recourse to a Council for the judiciary or another independent authority or they should have effective means of remedy.<sup>220</sup>

According to the Law, in the event of any restricted form of communication, a judge shall be obliged to immediately notify in writing Chairperson of the court or any judge authorized by him or her who shall be empowered to take all legal measures against the violator. The judge may appeal onetime any decision of the Chairperson of the court to the president of the superior court instance or any judge authorized by thereof. The judgment made about the claim shall be final and may not be appealed.

The above regulation delegates the full authority on the Chairperson of a court to protect judges from pressure and nearly eliminates the involvement in the process of the High Council of Justice which is the independent and collegial body whose duty is to ensure the judicial independence. According to the law, the High Council of Justice shall consider a case on the violation of the communication rules only if the communication was established with the Chairman of a court or if the judge responsible for considering written notices upon the ex-parte communications fails to handle it within 14 days.

Therefore, the Law does not protect judges from the cases when the pressure is exerted by the Chairman of the court. Moreover, a judge is not allowed to appeal the Chairman's decision in the High Council of Justice. This provision awards unjustifiably broad authority to Chairpersons of the courts but fails to provide the protection for judges from the influences coming from inside of the system, especially by taking into account that the current rule of appointment of court chairpersons is defective and not based on objective criteria.<sup>221</sup>

As already mentioned, the involvement of the High Council of Justice of Georgia in cases of violation of the communication rules with judges is minimal. However, when the Council is participating in the process, it is unilaterally represented by the Secretary of the High Council of Justice. Namely, based on the appeal of the Chairperson of a Court, the Secretary may refer to relevant bodies and request imposing of disciplinary liability on the violator or forward the case materials to relevant subordinated investigative units. The Secretary is also entitled to challenge decisions of any relevant authority on the rejection of the request on imposing disciplinary liabilities. Accordingly, the law grants the Secretary of the High Council of Justice the exclusive authority to address any breach of the communication procedures and s/he does not require consent of the High Council of Justice to do so.

The elimination of the High Council of Justice from the important process of protection of judicial independence does not comply with the functional purpose and high legitimacy of the constitutional body. Thus, it is essential

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<sup>217</sup> Manual on Independence, Impartiality And Integrity Of Justice, American Bar Association, Model Code Of Judicial Conduct (2011 Edition), Rule 2.9; The Burgh House Principles On The Independence Of The International Judiciary, Par. 12.2.; Mt. Scopus Approved Revised International Standards Of Judicial Independence, Par. 7.11.

<sup>218</sup> CCJE Opinion No. R (94) 12, Principle I (2)(d)

<sup>219</sup> Venice Commission, CDL-AD(2007)003, Paragraph 61

<sup>220</sup> Judges: Independence, Efficiency and Responsibilities Recommendation CM/Rec(2010)12 and explanatory memorandum, 8.

<sup>221</sup> Although the original version of the law bill "Third Wave" of the judiciary reforms provided for the possibility of election of chairpersons of courts by judges, finally, the authority of appointment of chairpersons of the courts was again vested in the High Council of Justice. Unfortunately, the substantiated objections of the President, which aimed at the solution of the problem, were rejected.

to increase the involvement of the High Council of Justice in the process and in the event of establishing any forms of ex-parte communication restricted by the law **judges should be granted the right to appeal to the High Council of Justice** where the process shall be conducted in an open and transparent manner and decisions taken collectively. It must be the Council the final authority that will take decisions on notices of judges on infringement of the communication standards.

### *Process Transparency*

The Law of Georgia “On the Procedure for Communication with Judges of Common Courts” as amended in 2010 defined that information on any ex-parte communication restricted by the law shall be public, except for the information about the judge’s identity with whom the communication was established, and the information of the case upon which such communication was made. In addition, according to the law, the High Court of Justice of Georgia in order to ensure the availability of information shall in the manner prescribed by the law maintain the database of statistical information on the application of the law, which shall also include the information on persons penalized in the manner as prescribed by this law.

Although the Law on violation of the communication rules establishes the highest standards of transparency, initially, the High Council of Justice refused the authors of this research to provide the information on the application of the law under the pretext of the privacy and protection of personal data.<sup>222</sup> In this particular case, the High Council of Justice only informed us that since the enactment of the law there have been identified 7 cases of the restricted ex-parte communication and for all of them the decision was a penalty. Several months later, after sending an additional letter, the Council provided us with more detailed information. For that point, the Council informed that since the enactment of the Law 9 cases of the restricted communication were revealed, which contradicted the previously provided information. The Council also sent us the bar-coded copies of orders on the imposition of the fines with the violators’ details hidden. It should be noted that the direct instruction of the law is that the High Council of Justice shall ensure the disclosure of the information concerning the identity of persons fined, therefore, there were no grounds for keeping the information secret. Disclosing a fined person’s identity is especially important in cases where the penalized person is a public servant.

Pursuant to the information provided by the High Council of Justice, since the effect of the Law in total 9 judges informed in writing the Chairperson of courts upon the cases of violation of the communication rules and in all cases the fact of illegal communication was confirmed by the Chairperson of the Court. Only in one case the decision was challenged by the penalized person but the claim was dismissed. Of these, all of the ex-parte communications except for one were established with a judge of the first instance court and one with a judge of the Supreme Court.

Four out of nine persons fined for the ex-parte communication were public officials, four were interested parties and one a party to the proceedings. The restricted ex-parte communications were established in 2007, 2008 (3 cases), 2012, 2013 (2 cases), 2014 and 2016. The amount of the fines imposed ranged between 50 to 2500 GEL. Under the information provided by the High Council of Justice, the Secretary of the Council in three cases sent requests to the appropriate bodies for imposition of disciplinary sanctions on particular individuals. In none of the cases decisions over the rejection of the imposition of liabilities have been challenged by the Secretary of the High Council of Justice.<sup>223</sup>

Ensuring judges’ independence in the judicial system is of paramount importance and is vital for the country’s development. There is always a high public interest over the cases of restricted forms of communication with judges with the view to influencing them, hence such information shall be easily accessible to any interested parties. Consequently, it is important that **the High Council of Justice should ensure proactive publication of any information related to the application of the Law**. The information on both the identity of penalized persons and the amount of the fine as well as the information on whether any disciplinary sanctions have been applied against them should be open and available. Accessible must be also the details about the manner in which the communication rules were breached.

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<sup>222</sup> The Letter N1810/2611-03-n of High Council of Justice dated as of 16 November 2016

<sup>223</sup> The Letter N111/2950-03-n of the High Council of Justice of Georgia dated as of 30 January 2017.

## Recommendations

- In any case of restricted ex-parte communications judges should have the right to apply to the High Council of Justice, where the process should be conducted transparently and decisions made in collegial manner;
- To clearly define disciplinary liability measures against judges in the event of any violation of restricted communication rules;
- To provide in the Law that any form of ex-parte communication with the view to influencing a case shall be restricted not only with the judge considering the case but with other judges as well. Any improper communication with judges in civil and administrative proceedings shall be prohibited even for specific cases which have already become effective. Also, any ex-parte communication with a judge should be restricted for such category lawsuits that have not been filed to the court yet, though there is a great likelihood that a case will be assigned to a particular judge.
- Violation of the communication procedures by judges and commission of the criminal offence for interfering in a judge's activities shall be clearly separated from each other in order to avoid unequal and subjective interpretation of the law;
- For cases of any ex-parte communication the law should provide for a court's obligation to notify about this relevant authorities as well as parties to proceedings;
- To provide in the law the extent of the liability for even an attempt to influence court administration officials;
- The High Council of Justice should proactively publish any information about each individual case concerning the violation of the restricted communication rules by judges.



JUDICIAL ADMINISTRATION  
AND MANAGEMENT

6

## 6.1. CHAIRPERSON OF THE COURT

### Key findings

- The administrative functions in the court are assigned to several units, which is why roles are often duplicated.
- The changes implemented through “Third Wave” of the judiciary reforms aimed at strengthening of Court Managers and re-evaluation of chairperson’s functions are important and it is essential to implement them efficiently in practice;
- The “Third Wave” of the judiciary reforms have failed to resolve the issue of undemocratic rule of appointment of court chairpersons, which still awards unlimited powers to the High Council of Justice;
- So far has been problematic the absence of the mechanisms regulating the empowerment of chairpersons of the courts, which enables awarding the authority for an indefinite period and with uncertain grounds;
- Setting up the management department on the one hand led to overlapping of functions of other administrative units, and on the other hand, created an additional source to limit the autonomy of individual courts;

### Overview of judicial administration issues

Effective administration of the Common Courts is closely related to judicial independence and implementation of justice without delay and quality assurance. In parallel with the implementation of the judicial authority, court management and making decisions about administrative issues are significant elements of the judiciary performance. Accordingly, the effective and fair division of competences in this regard is essential, on the one hand, to enable judges maintain some sort of control over the environment in which they carry out judicial activities, and on the other, to strike a reasonable balance between judicial and administrative functions.

The administration of courts and the judiciary shall enhance independent and impartial adjudication in accordance with due process rights and the rule of law. Judicial administration must never be used to influence the content of judicial decision making. At the same time, the process of judicial administration must be transparent.<sup>224</sup>

Under the current legislation, the administrative functions inside the court are distributed to several units, but frequently the functions are duplicated. The court chairperson’s status and fair distribution of functions between him/her and managers still remains problematic. The changes implemented within the framework “Third Wave” of the judiciary reforms have created fruitful soil to relieve chairpersons’ workload and delegate administrative functions largely to a manager. However, the “Third Wave” failed to solve the problem of undemocratic rule of appointment of court chairpersons, which assigns unlimited powers to the High Council of Justice. Also, non-regulated mechanism of assigning the authority to court chairpersons still remains the issue which makes it possible to award authority for an indefinite period and on uncertain grounds. The changes within the “Third Wave” judiciary reforms have also given rise to additional uncertainties in the management process, in particular, the creation of the Management Department on the one hand resulted in the overlap of functions with other administrative units, and on the other hand, created an additional source for limiting the autonomy of individual courts, which must be evaluated negatively.

### Court Chairpersons

It is recognized that judicial independence depends not only on freedom from undue external influence, but also freedom from the impermissible and undue influence which might in some situations come from the attitude of other judges.<sup>225</sup> Therefore, the role, the appointment rule and competences of the court chairperson is vital.

Under the current legislation, the chairperson and deputy chairpersons of the city (district) courts and Court of appeals shall be appointed from among Chambers and Investigation Panel chairpersons for the term of five years and discharged by the High Council of Justice of Georgia.<sup>226</sup>

The unlimited authority of the High Council of Justice of Georgia in terms of appointment of chairpersons is problematic in the sense that it causes the accumulation of excessive power in the hands of the Council and

<sup>224</sup> Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), § 1.

<sup>225</sup> CCJE Opinion N1(2001), Paragraph 66.

<sup>226</sup> The Organic Law of Georgia “On Common Courts”, the Article 23, Paragraph 6.

also gives rise to the risk of influencing individual judges. The issue is particularly problematic given that the legislation does not provide for the selection criteria of court chairpersons, as well as clear procedures for their selection and the Council exercises wide discretion and unlimited authority in the process.

The original version of the draft law developed within the “Third Wave” of the judicial reforms provided for the selection of chairpersons of the first and appellate instance courts by the judges of the same courts by secret ballot for the term of 3 years of office. Such change would have significantly increased the degree of democracy of the chairpersons’ election process and would have been a step forward to the strengthening of the internal independence of the court.

It should be noted that the Venice Commission and the Directorate welcome the proposed system of election of court presidents by the judges of the same courts by secret ballot which is in line with the requirements of the principle of internal independence of the judiciary.<sup>227</sup>

During the second hearing of the draft law by Legal Issues Committee several important amendments were made to the draft law and the current rule of appointment of court chairpersons by the High Council of Justice was maintained<sup>228</sup>. However, the recently adopted law does not expressly provide for inadmissibility of appointment to the office for two consecutive terms and thus, the ambiguity in this regard still remains.

Therefore, the reforms implemented within the framework of “Third Wave” judiciary reforms still maintain the defective procedure of selection of court chairpersons which is contrary to the existing international recommendations. According to Kyiv Recommendations, the selection of court chairpersons should be transparent. Any vacancies for the post of court chairpersons should be published. All judges with the required seniority / experience should have the opportunity to apply. The body competent to select may conduct interviews with the candidates. A good option is to have the judges of the particular court elect the court chairpersons.<sup>229</sup>

CCJE thinks that the procedures for the appointment of presidents of courts should follow the same path as that for the selection and appointment of judges. The system for selection and appointment of chairpersons of courts should include a competitive selection process of candidates based on an open call for applications of candidates who meet the pre-determined conditions set out in the law. In addition, judges of the courts in question could be involved in the selection of chairpersons and their decisions can take the form of a binding or advisory vote. CCJE also notes that if presidents of courts are not selected and/or appointed but are elected by their peers- the judges of the court, objective criteria of merit and competence should prevail.<sup>230</sup> In addition, according to the CCJE, court presidents should have managerial skills and abilities. Also, the chairperson qualifications should be appropriate for the presidents’ tasks and responsibilities.<sup>231</sup>

**Improvement of the Institute of court chairpersons should start with the change of their election rule. The lever of appointment court presidents assigns the High Council of Justice unreasonably wide range of powers, and even further strengthens the status and unhealthy ambitions of the judge. Chairing of the court should be responsibility for judges and not the privilege. Thus, it is important to rule out the involvement of the Council in the appointment of chairpersons and the latter should be appointed by judges of the courts in question. The defective rule of selection of court presidents was one of the issues based on which the President of Georgia returned to the Parliament the draft law of “Third Wave” judicial reforms with his substantiated objections.<sup>232</sup> Sadly enough, the Parliament shared neither the opinions of the Venice Commission and the President nor the suggestions of local organizations regarding the improvement of the draft law in this part.**

### **Delegation of powers of the chairperson**

Under the current legislation, until the chairperson of the court of appeals, its chamber or Investigation Panel are appointed, his/her powers may be delegated to one of the judges of the same court under the decision of the High Council of Justice of Georgia.<sup>233</sup> The same rule applies to first instance courts. The High Council of Justice of Georgia is entitled to terminate the chairperson’s powers delegated to the judge.<sup>234</sup> The current legislation

<sup>227</sup> Venice Commission, CDL-AD(2014)031.

<sup>228</sup> Available on the webpage: <<http://info.parliament.ge/file/1/BillReviewContent/114536?>> [Last seen on 26 March 2017].

<sup>229</sup> Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), § 16.

<sup>230</sup> CCJE Opinion N19 (2016).

<sup>231</sup> The same above

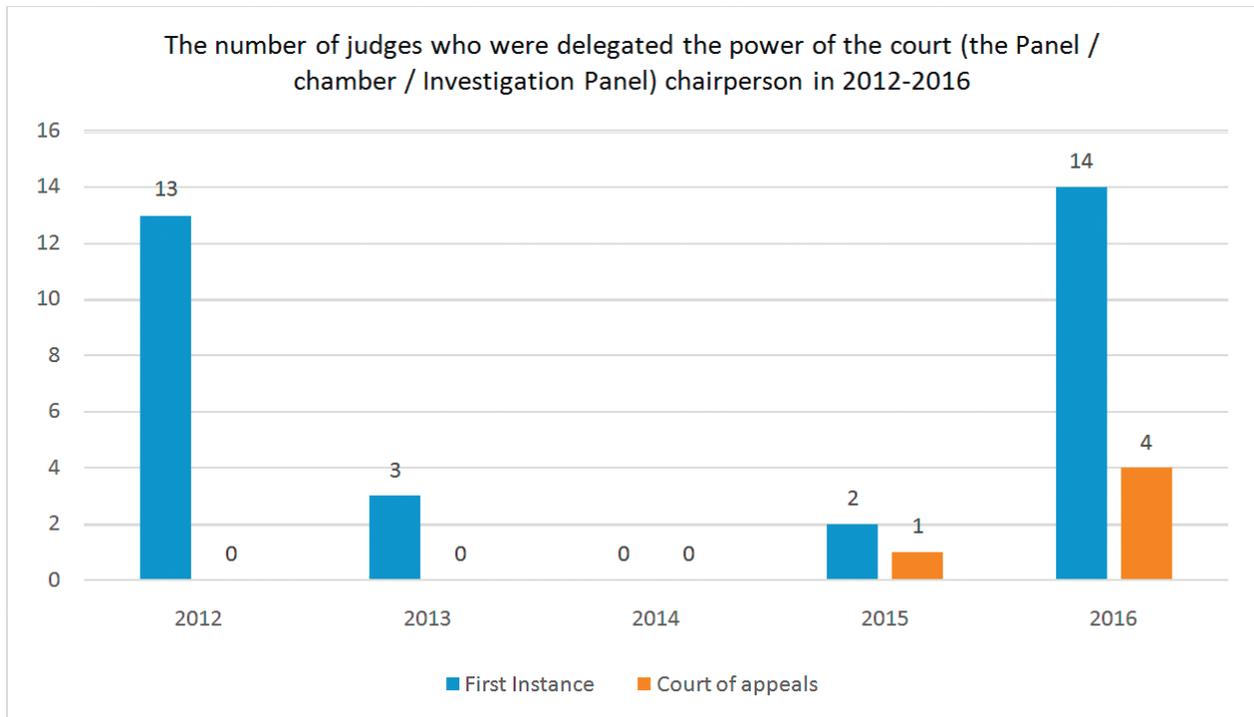
<sup>232</sup> Available on the webpage: <<https://goo.gl/GAuEVD>> [Last seen on 26 March 2017].

<sup>233</sup> The Organic Law of Georgia „On Common Courts“ the Article 23, the Paragraph 7.

<sup>234</sup> The Organic Law of Georgia „On Common Courts“ the Article 32, the Paragraph 3.

does not provide for a concrete grounds for the use of this mechanism, therefore, in individual cases it is unclear whether appropriate and justified the application of this mechanism might be.

In 2012-2016, the power of the chairperson of the Court of First Instance (the Panel) was delegated to 32 judges, and the powers of the chairperson of the Court of Appeals (Chamber / Investigation Panel) to 5 judges.<sup>235</sup>



However, the current legislation does not provide for the timeframe during which a judge may perform the powers of the chairperson of the court. Even the decisions made by the High Council of Justice of Georgia on delegating the powers of the chairperson do not specify the duration for the exercising of the above authority. Thus, the regulation of the matter is vested in the wide discretion of the Council. For example, the powers of the Chairperson of Kutaisi Court of Appeals were delegated to Dimitri Gvritishvili on 22 September 2015<sup>236</sup>, and after his reappointment as a judge the powers of the chairperson were re-delegated to him on August 1, 2016<sup>237</sup>. Hence, this judge was exercising the powers of the Chairperson of the court for more than a year. Due to the absence of adequate legal provisions, the Council may use this mechanism for an unlimited period, and may at its own discretion any time discharge a judge from implementing the delegated powers of the chairperson.

It should be noted that the above decisions on the appointment of the chairperson taken by the Council do not clearly provide whether the period within which the judge was delegated the chairperson's powers was included in the maximum 5-year term of office or the calculation of the term began at the moment of his appointment as the chairperson. Under the vague legal conditions, a judge might exercise the powers of the chairperson for more than five-year term of the office as set out in the Organic Law.

Accordingly, the current legislation gives the possibility of arbitrary and unreasonable use of the mechanism for delegating the chairperson's powers thus awarding the Council unlimited competence in the process. The society has no opportunity to evaluate whether there was a real requirement for the use of the mechanism based on which the judge in question was selected and whether the term of the office within which the person had been delegated the powers of the chairperson of the court was reasonable.

At the initial stage the draft law "Third Wave" of the judicial reforms provided for certain amendments in this direction, in particular, pursuant to the initial version:

- The above mechanism was applied in case of pre-term termination of the chairperson's powers;
- The powers of the chairperson were to be delegated to a judge for no more than 3 months.

<sup>235</sup> The Letter of High Council of Justice of Georgia dated as of 12 October 2016.

<sup>236</sup> The information is available on the webpage: < <https://goo.gl/QNzsrZ> > [Last seen on 26 March 2017].

<sup>237</sup> The information is available on the webpage: < <https://goo.gl/rxfjzl> > [Last seen on 26 March 2017].

This change could improve the current situation to some extent, and limit the broad competence of the Council however, the final version of the law adopted by the Parliament does not provide for such provision, therefore, the gaps in the above direction still remain a challenge.

### **Powers of court chairpersons**

According to the CCJE, the role and function of court chairpersons are as follows:

- to represent the court and fellow judges;
- to ensure the effective functioning of the Court;
- to perform jurisdictional functions.<sup>238</sup>

The Organic Law of Georgia “On Common Courts” defines the powers of the chairperson of the court. It should be noted that according to the Organic Law of Georgia the chairperson of a district (city) court and also the Court of Appeals shall personally examine cases.<sup>239</sup>

Noteworthy that over the years chairpersons have been often criticized saying that they were not handling cases. For instance, according to the policy document prepared by the “Unity of Judges of Georgia”, the statistics about the workload of judges in courts showed uneven caseload of some judges. This concerns first of all the judges who perform administrative duties - chairpersons of the court and / or chamber or the Panel.<sup>240</sup> It is unacceptable when carrying out of the administrative functions by a chairperson can significantly limit his/her main function - assuming the judiciary power. This may be seen as a privilege and create an unhealthy environment in the court and eliminate the equality between judges which obviously poses a threat to the independence of individual judges.

The analysis of the courts regulations<sup>241</sup> shows that the powers of court chairpersons include the administrative functions such as the issue related to employees’ leaves, issuing the orders for employee’s work-related matters, discharge of an employee in the manner prescribed by the Georgian legislation.

Accordingly, the functions assigned to the chairpersons of courts are a serious administrative burden which can significantly limit the ability of the chairman to carry out the judicial powers. According to the recommendations of the Council of Europe, in order to prevent and reduce excessive workload in the courts, it is advisable to develop measures consistent with judicial independence to assign non-judicial tasks to other suitably qualified persons<sup>242</sup> and in Georgian reality such persons are Court Managers.

The law adopted within the framework “Third Wave” of the judicial reforms aims to limit the administrative tasks of the chairpersons of district (city) courts and Court of Appeals. By these changes they will supervise the performance of court administrative office and court managers will perform direct organizational management of the court apparatus, which should be viewed positively.

According to Kyiv Recommendations, the role of court chairpersons should be strictly limited in the following sense: they may only assume judicial functions which are equivalent to those exercised by other members of the court. They may have representative and administrative functions, including the control over non-judicial staff.<sup>243</sup> The similar standard is supported by the Venice Commission, according to which the competence of the court chairperson should be purely administrative, and should not interfere with the judicial functions of judges.<sup>244</sup>

In some member states, the powers of the court presidents in managing the court staff can be very broad. They can deal with selection and appointment, determination of remuneration levels, transfers, discipline, performance evaluation and dismissal of personnel, while in other member states the powers of the presidents are

<sup>238</sup> CCJE Opinion N19 (2016).

<sup>239</sup> The Organic Law of Georgia “On Common Courts”, the Article 32, Paragraph 2, Subparagraph „a“.

<sup>240</sup> Association - Unity of Judges of Georgia „Distribution of Cases and practice in Common Courts of Georgia, “2015.

<sup>241</sup> The Work Procedure approved by the Chairperson of Rustavi City Court under the Order N17 on February 5, 2013. The Work Procedure of Tbilisi Court of Appeals approved by the Chairperson of Tbilisi Court of Appeals under the Order N184 §1 on December 17, 2007. The Work Procedure of Kutaisi Court of Appeals approved by the Chairperson of Kutaisi Court of Appeals under the Order N185 on September 30, 2011. The Work Procedure of Gori District Court approved by the Chairperson of Gori District Court under the Order N59 on September 10, 2012. The Work Procedure of Tbilisi City Court approved by the Chairperson of Tbilisi City Court under the Order N75-s §02 on September 28, 2010.

<sup>242</sup> Judges: Independence, Efficiency and Responsibility, Recommendation CM/Rec(2010)12, §36.

<sup>243</sup> Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), § 11.

<sup>244</sup> Venice Commission, CDL-AD(2014)031, §93

very limited and most of the managerial functions are fulfilled by an outside person or body. According to the CCJE, there is a clear advantage if this responsibility is shared with the “court manager” or “administrative director”, who shall be appointed by court presidents.<sup>245</sup>

In Georgian reality, it is recommended that managerial tasks and issues related to the court personnel management should mainly fall in the competence of court manager that will allow the Court chairperson to be more focused on implementation of judicial and representative powers.

### **Removal of court chairpersons**

**According to CCJE, a chairperson can only be removed from the office (for example, as a result of disciplinary proceedings) following the application- as a minimum- of those safeguards and procedures that would apply when consideration is being given to a removal from office of an ordinary judge. Serious organizational failures or incapacity to fulfill the functions of the court president can lead to a procedure for removal. Any pre-term removal should be subject to clearly established procedures and safeguards, with clear and objective criteria.<sup>246</sup>**

**Under the current legislation, chairpersons of the first instance and Courts of Appeals shall be removed by the High Council of Justice of Georgia<sup>247</sup>. Pursuant to the Organic Law of Georgia, the grounds for discharging of a Chairperson shall be:**

- a personal application;
- Termination of the office of the chairperson;
- Removal as a disciplinary measure;
- Expiration of the tenure.

**It should be noted that until the introduction of the amendments through the draft law “Third Wave” of the judicial reforms, the law had not provided for the similar list of the grounds for discharging a court chairperson. The only ground was stipulated in the Law of Georgia “On Disciplinary Liability of Judges of Common Courts of Georgia and Disciplinary Proceedings.” Discharge of a court chairperson from the office was one of the disciplinary measures. In such a case, the ground for the discharge of a court chairman was a disciplinary misconduct. However, in February 2016, the High Council of Justice dismissed the Chairman of Tbilisi City Court with no observance of the legal procedures of the disciplinary proceedings<sup>248</sup>, which is inconsistent with the requirements of the applicable law.**

### **Court Managers**

For the purpose of smooth administration of justice, study and generalization of judicial practice, analysis of judicial statistics, as well as support any other activities of the court, Georgian Common Courts employ court administrative offices. The organizational management of the court administrative office is performed by a court manager.<sup>249</sup> A court manager is appointed and dismissed in the district (city) courts and the Courts of Appeals by a relevant Chairperson of the court.<sup>250</sup>

The office of the court manager was introduced as an amendment to the Organic Law in July 2010, and was aimed at delegation of the administrative powers of the chairperson to the court manager. According to the explanatory note of the law, the implementation of timely and efficient administration in the judiciary system was due to various needs in different countries however certain factors were common to all states. These factors are as follows: the increase of the number of cases in the court and delay in their timely consideration; dissatisfaction of public to the judicial system; transformation of courts from a small scale body to much larger and more powerful organizations which along with the administration of justice have assumed the functions such as the provision of high quality services to clients, management of public finances, court documents, and information technology, media and public relations etc. Clearly, coping with such administrative workload was no longer achievable for only judges and “traditional” employees of courts and the courts needed professional

<sup>245</sup> CCJE Opinion N19 (2016).

<sup>246</sup> The same above.

<sup>247</sup> The Organic Law of Georgia “On Common Courts”, the Article 23, Paragraph 6; the Article 32, Paragraph 1.

<sup>248</sup> The information is available on the webpage: < <https://goo.gl/e1BDQT> > [Last seen on 26 March 2017].

<sup>249</sup> The Organic Law of Georgia “On Common Courts”, the Article 56.

<sup>250</sup> The Organic Law of Georgia “On Common Courts”, the Articles 25 and 32.

managers who would deal with organization and arrangement of non-judiciary matters under the supervision of judges.<sup>251</sup>

As it was observed during the research, the Court Manager – the Head of Human Resources and Organization Department – carries out its powers in all district (city) courts and the Courts of Appeals, except for the GaligulrifshiTkvarcheli and Ochamchira, Sukhumi, Gagra and Gudauta and Tsageri District Courts.<sup>252</sup>

A court manager shall manage the administrative office of the court according to the legislation of Georgia and if necessary within the scope of powers defined by the chairperson of the court<sup>253</sup>. Pursuant to the information obtained from courts,<sup>254</sup> no order of any chairperson of a court which could define the powers of the court manager has been issued so far. In some courts,<sup>255</sup> there is no specific description of the court manager's tasks which makes it impossible to study and evaluate their functions and competence.

Following the introduction of further amendments within the framework “Third Wave” of the judiciary reforms, the duties of the court manager now provide for appointment and discharge of employees of the administrative office of a court (except for heads of Bailiff's Office, court Bailiff's officers, assistants of judges and secretary of a court session), in the manner prescribed by the Georgian legislation, which should be viewed positively.

In the Supreme Court, the Court Manager (Head of Administrative Office of a Court) alongside with the traditional administrative functions, in the event of delegation of powers by chairperson of the court, represents the Supreme Court to various legislative and executive bodies, as well as at international level. Pursuant to the Order of the Chairperson of the Supreme Court of Georgia, the court manager also carries out comprehensive supervision of secret judicial proceedings<sup>256</sup>.

The strategy of the criminal justice reforms approved by the Criminal Justice Reform Inter-Agency Coordination Council in 2016 provides for further improvement of the institute of the Court Manager, namely:

- to clearly separate the functions of the court chairperson and court manager and relieve judges from administrative workload;
- To elaborate an effective court management manual for court managers;
- To establish a permanent forum for court managers (for example, conference of court managers) etc.

Relieving of court chairpersons from administrative functions to the maximum extent and real enactment of the institute of court managers will be a significant and sound step on the way to the improvement of inter-agency judicial system and achievement of equality among judges which will also slow down unhealthy influences which chairpersons of courts may exercise over the activities of some courts.

## Management Department

Pursuant to the law adopted within “Third Wave” of the judiciary reforms, a new organizational unit - Management Department shall be established in the judicial system. According to the amendments introduced, the Management Department shall be responsible for overseeing the operation of the electronic case management software and furnishing recommendations regarding its improvement to the High Council of Justice of Georgia. However, the law does not specify the scope of such competence, namely, whether the powers of the department are limited only to technical supervision of the case management software operation, or at the same time it will have controlling levers, including supervision of the alternative ways of case distribution if the electronic software breaks down.

<sup>251</sup> The Explanatory Notes on the Draft Law on Amendments to the Organic Law “On General Courts of Georgia”.

<sup>252</sup> The Letter N1737/2436-03-nof High Council of Justice of Georgia issued on 26 October 2016.

<sup>253</sup> The Organic Law of Georgia „On Common Courts of Georgia”, the Article 56, Paragraph 2.

<sup>254</sup> The letter N144 issued by Mtskheta District Court on September 19, 2016; The letter N c / u -12657 c/u issued by Gori District Court on September 19, 2016; The letter N19235 issued by Kutaisi City Court on September 19, 2016; The letter N3-06137 / 1498136 issued by Tbilisi City Court on September 13, 2016; The letter N01 / 280 (a) issued by Tbilisi Court of Appeals on 16 September 2016; The letter N560-2110 issued by Kutaisi Court of Appeal on 16 September 2016; The letter N591 c / j issued by Batumi City Court on September 15, 2016.

<sup>255</sup> According to the letter N771 c / j issued by Batumi City Court on 9 December 2016, the Manager of the Court shall manage the administrative office of a court in the manner prescribed by the Georgian legislation, and if necessary, within the scope of the powers defined by the chairperson of the Court. According to the letter N01 / 387(a) issued by Tbilisi Court of Appeals on 6 December 2016, the Court Manager's activities shall be regulated by the Organic Law of Georgia. According to the letter N711-2 / 10 issued by Kutaisi Court of Appeals on 6 December 2016, nowritten rules of work procedure for the court manager's office has been defined. According to the letter N c/u -16933 issued by Gori District Court on December 5, 2016, the Manager of the Court shall exercise its powers in accordance with the Organic Law of Georgia. According to the letter N3-06179 / 1626579 issued by Tbilisi City Court on December 5, 2016, the Court Manager's job description is not defined in an individual legal act, and his/her activities shall be regulated by the Organic Law of Georgia.

<sup>256</sup> The Rules of Procedure of the Supreme Court of Georgia, Article 3, Paragraph 1.

Apart from the case allocation program, the Management Department is assigned a number of vague and broad functions which may jeopardize the autonomy of separate courts, including analyzing information on workload of courts and case hearing index and citizen service quality.

Currently, there are several bodies in the judiciary system functioning for improvement of administrative and organizational management issues in the court. In addition to the Court Chairpersons and Court Managers, the judiciary system also includes the Department of Common Courts which provides the material and technical support for the system. However, the relation of Department of Common Courts and the Management Department to High Council of Justice of Georgia is the same. In particular, in both cases, heads of the body are appointed by the High Council of Justice of Georgia.

According to the legislation, the High Council of Justice of Georgia elects a chairperson of the court Management Department with the majority of votes of its members through the competition. The rules for selection and dismissal of a chairperson of the Court Management Department, recruitment of the department staff and their activities shall be determined by the rule of procedures of the High Council of Justice of Georgia.

Bearing the existing administrative units in mind, the appropriateness and the grounds for setting up a new unit is unclear, especially when overlapping between their roles is obvious.

Taking into consideration the wide powers of the Management Department and the scale of its possible influence over the autonomy of courts, it is recommended to clearly define in the law a rule of its recruitment and activities instead of attributing it to the broad powers of the High Council of Justice of Georgia. It is also important to define the powers of the Management Department in more detail and determine the safeguards of autonomy and independence of individual judges during the fulfillment of management powers.

### **Recommendations**

- Court chairpersons should be elected by judges of relevant courts, and appropriate and objective criteria be developed.
- Delegation of the chairperson's powers should be exercised only in exceptional cases as expressly stipulated in the law, also the law should determine the term of application of this mechanism.
- The managerial powers of a chairperson should be limited and powers of the chairman and court manager should be effectively separated.
- For further development of the court manager's institute, the court manager's functions and powers should be provided in detail in every court.
- The roles and tasks of the Management Department should be specified in the law, also the law should provide for the basic principles of creation and operations of the department;

## **6.2. THE PLACE OF THE SUPREME COURT IN THE JUDICIAL SYSTEM**

### **Key findings**

- In some cases the legislation does not distinguish between the powers of the Supreme Court of Georgia and the High Council of Justice of Georgia, which adversely affects the quality of administration of the judicial system and the independence of judges.
- The presence of chairpersons of Courts of Appeals in the composition of the Supreme Court Plenum is inconsistent with the place and role of the Plenum in the judiciary system;
- In some cases the legislation awards overly broad powers / obligations to the Plenum of the Supreme Court and chairpersons, which poses a threat for the independence of the judiciary.

### **Importance of designation of the place of the Supreme Court in the judicial system**

The Constitution of Georgia defines that the Supreme Court is the highest cassation court for implementation of justice in the country.<sup>257</sup> In addition, pursuant to the existing legislation, the Supreme Court shall carry out a number of functions which are related not to the administration of justice but to administration and supervision of the judicial system. This may result in an accumulation of unreasonably broad powers in the hands of the Supreme Court, as well as mixing of competences with the High Council of the Justice of Georgia which may ultimately have a negative impact on the quality of administration of the judicial system, and independence of judges.

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<sup>257</sup> The Constitution of Georgia, the Article 90(1)

Although the recent amendments to the Organic Law of Georgia “On Common Courts” have significantly limited unjustifiably broad powers of the Chairperson of the Supreme Court<sup>258</sup>, so far the place and role of the Supreme Court, chairman of the Supreme Court in the judiciary system has not been clearly defined yet. The main reason is the legislation gaps which result in the duplication of functions between the Supreme Court of Georgia and the High Court of Justice of Georgia, including the current version of the Constitution which does not distinctly separate the powers between these two constitutional bodies.

### **Functions of the Supreme Court and the High Council of Justice**

In order to clearly understand the place and the role of the Supreme Court of Georgia within the judicial system it is essential to define the functional authority and the scope of competences of the bodies exercising the judiciary powers.

The Supreme Court is a part of the system of the Common Courts of Georgia, which as prescribed by the law supervises the administration of justice in district (city) courts and the Courts of Appeals. This status places the Supreme Court at the top hierarchical level in the system of Common Courts, but it is important that such hierarchy shall be exercised only in administering of justice in individual cases.<sup>259</sup> Granting the Supreme Court judges the power to supervise the activities of the general courts in other forms<sup>260</sup> would seem to be contrary to the principle of the independence of such general courts<sup>261</sup>. Thus, it is important the legislation to clearly define that the primary duty of the Supreme Court is the administration of justice and the rights and obligations, such as administration of the judicial system, protection of court / judiciary independence and facilitation of effective functioning of the court, should be entrusted to an independent, collegial and representative body which will be free from the hierarchies of the common courts system.

Pursuant to the Constitution of Georgia, the High Council of Justice of Georgia is the above mentioned body whose composition comprises of more than half of the members elected by self-governing body of judges of general courts of Georgia. The High Council of Justice is not involved in the administration of justice, it is an independent and collegial body administering the judicial system which performs the most significant functions, including appointment / dismissal of judges of district (city) courts and Courts of Appeals, implementation of disciplinary proceedings to the extent prescribed by the law, elaboration of the organizational work procedure for Georgian Common Courts etc. A collegial body similar to the High Council of Justice of Georgia operates<sup>262</sup> in many European states where they are assigned<sup>263</sup> to perform the tasks such as protection of independence of both the judicial system and individual judges, administration of the judicial system and at the same time guarantee<sup>264</sup> the efficiency and quality of justice in order to reinforce public confidence in the justice system<sup>265</sup>.

### **Functions of the Supreme Court and the High Council of Justice of Georgia according to the Constitution**

The Constitution of Georgia contains only very general provisions about the Supreme Court of Georgia and the High Council of Justice of Georgia which further increases the likelihood of confusion of the competences of these bodies at the legislative level. Also, in some cases, it should be reviewed whether it is advisable the Supreme Court / the Chairperson to be conferred the powers which they actually have under the Constitution of Georgia.

The Constitution of Georgia with regard to the powers of the High Council of Justice of Georgia only provides that the Council shall appoint and dismiss judges from/to office and that it shall be entitled to appeal to the

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<sup>258</sup> e.g. if previously candidates for the position of a member judge of the High Council of Justice of Georgia, as well as a member judge of the Disciplinary Panel of Judges had been exclusively submitted by Chairperson of the Supreme Court of Georgia to the Judicial Conference of Georgia, under the amendments of the “First Wave” of the judicial reforms each member of the Judicial Conference of Georgia was entitled to nominate a candidate; In addition, through the legislative changes introduced under “Third Wave” of the judiciary reform the powers of the Chairperson of the Supreme Court of Georgia in terms of composing the chambers and in disciplinary proceedings were limited.

<sup>259</sup> Venice Commission, CDL-INF(2000)5.

<sup>260</sup> Venice Commission, CDL-INF(1997)6, Paragraph 6

<sup>261</sup> CCJE Opinion 1, Paragraph 68: “The hierarchical power conferred on superior courts in many legal systems might in practice undermine individual judicial independence. One solution would be the transfer of all relevant powers to a Higher Judicial Council, which would then protect independence inside and outside of the judiciary.”

<sup>262</sup> The Functions of Judicial Councils in different states, see: the 2016 EU Justice Scoreboard, p 39, available on the webpage <<https://googl/W0x62b>> [Last seen on 26 March 2017].

<sup>263</sup> CCJE Opinion #10 (2007), Paragraph 42

<sup>264</sup> Recommendation of the European Council CM/Rec(2010)12, explanatory memorandum, Chapter IV, Paragraphs 26,40.

<sup>265</sup> CCJE Opinion N10 (2007).

Constitutional Court on the compliance of the relevant normative acts.<sup>266</sup> According to the Constitution other tasks, powers and setting up procedures of the Supreme Council of Justice of Georgia shall be determined by an organic law. The fact that the Constitution of Georgia does not clearly set out in more detail the list of the powers and the rules of composition of the High Council of Justice of Georgia has been criticized several times by the Venice Commission.<sup>267</sup> Based on the importance of the functions and powers that the High Council of Justice of Georgia is conferred in administering of judiciary authority, what would be required is to clearly provide in the Constitution the tasks and scope of powers of the High Council of Justice.

The Constitution of Georgia also provides little information about the structure and powers of the Supreme Court. The Constitution defines that the Supreme Court shall be the cassation court. In addition, the Constitution contains the provisions on election of judges of the Supreme Court and their judicial immunity. The authority, organization of the Supreme Court and the procedure of activity and of the pre-term termination of the office of judges of the Supreme Court shall be determined by the Organic Law of Georgia "On Common Courts".

Pursuant to the Constitution, the Supreme Court of Georgia is the highest cassation court in the country, though the Constitution awards the Supreme Court of Georgia/ Chairperson such powers which are contrary to the place and role of the cassation court in the judicial authority. For instance, the Constitution stipulates that three members in the Constitutional Court of Georgia shall be appointed by the Supreme Court. The process of the composition of the Constitutional Court that consists of 9 members equally involves three branches of the authority.<sup>268</sup> In this case, the Supreme Court of Georgia performs the judicial powers. The wording of the provision is disputable as the Supreme Court cannot be considered as the representative of the judiciary power, especially considering the fact that its members are appointed by the Parliament based on the recommendations of the President. For the purpose of representing the entire system of the Common Courts by candidates submitted to the Constitutional Court, the provision of the Constitution should be changed in such a way that candidates could be selected by the Conference of Judges - the self-governing judicial body which consists of all judges of the Supreme Court, Courts of Appeals and district (city) courts. Decisions made by the Conference of Judges of Georgia are marked by high legitimacy since they fully reflect the will of judges.

Furthermore, pursuant to the Constitution, the right to remove immunity of judges of district (city) courts and Courts of Appeals in criminal cases is entrusted to the Chairperson of the Supreme Court of Georgia. Vesting such sole powers in the Chairman of the Supreme Court creates unnecessary hierarchy between various instance courts, which should be avoided. Therefore, it is recommended that decisions related to lifting the immunity of judges of the district (city) courts and Courts of Appeals in criminal cases should be made by the representative and institutionally independent body such as the High Council of Justice of Georgia.

### **The powers of the Supreme Court according to Organic Law**

The Georgian Law "On Common Courts" in certain cases awards unjustifiably wide range of powers to the Chairperson of the Supreme Court and the Plenum, which prevents a secure implementation of the judicial self-governance in the judiciary system and poses the risks to judicial independence.

The Law defines the structure and powers of the Supreme Court of Georgia, according to which the following are established within the Supreme Court:

- a) The Chamber of Civil Cases;
- b) The Chamber of Administrative Cases;
- c) The Chamber of Criminal Cases;
- d) The Grand Chamber;
- e) The Plenum;
- f) Chamber of Disciplinary Cases;
- g) Chamber of Qualification.

Among them, the courts of cassation instance are: the Chamber of Civil, Administrative and Criminal Cases, as well as the Grand Chamber of the Supreme Court. The Chamber of Disciplinary Cases in the manner prescribed by the law shall consider appeals on the decisions of the Disciplinary Panel of Judges of Common Courts, and the Chamber of Qualification of the Supreme Court shall review appeals of the decisions of the High Council

<sup>266</sup> The Constitution of Georgia, the Article 89

<sup>267</sup> Venice Commission, CDL-AD(2006)040, Paragraph 11; CDL-AD(2005)003, Paragraphs 102,105

<sup>268</sup> Although the President of Georgia no longer represents the executive power, at the moment of making this provision in the Constitution, he was administering the executive authority.

of Justice of Georgia related to refusal to appoint a judge to 3-year office or indefinitely.<sup>269</sup> The Supreme Court Chambers shall have chairpersons who shall be the Supreme Court deputy chairpersons at the same time.

The Plenum of the Supreme Court of Georgia shall be composed of the Chairperson of the Supreme Court, the First Deputy Chairperson and the Deputy Chairperson of the Supreme Court, the members of the Supreme Court and chairpersons of the courts of appeals. The Plenum together with the Chairperson of the Supreme Court shall be responsible for staffing of the Supreme Court Chambers and for dealing with other administrative issues.

It should be noted that according to the initial version of the draft law within “Third Wave” of the judicial reforms, the composition of the Plenum no longer included chairpersons of the courts of appeals, which was positively evaluated by the Venice Commission.<sup>270</sup> Nevertheless, the changes were not reflected in the legislation in the long run. The elimination of chairpersons of courts of appeals from the composition of the Plenum is justified since the Plenum performs the administrative powers in the Supreme Court and not in the entire judicial system. Accordingly, the presence of chairpersons of the courts of appeals in the Plenum is incompatible with the place and role of the Supreme Court of Georgia in the judicial system.

Pursuant to the existing legislation, the Plenum of the Supreme Court of Georgia shall make decisions on important issues related to the management and administration of the Supreme Court such as electing members for the Chambers and establishing the work procedure for the administrative office. Given that the Plenum of the Supreme Court is composed of all members of the Supreme Court, awarding broad powers to this body points at the high degree of self-governance in the Supreme Court and accordingly it is welcome, however, it is important to balance the rights and responsibilities of the Plenum so that it could not undermine the independence of the Supreme Court and the lower court judges.

### ***The Plenum’s power to appoint 3 members to the Constitutional Court of Georgia***

According to the Organic Law of Georgia “On the Constitutional Court of Georgia”, the candidates for the membership on the Constitutional Court shall be nominated by the President of the Supreme Court at the plenary session of the Supreme Court of Georgia. After the ballot, the three candidates who receive two-thirds of the votes of the members present at the plenary session shall be deemed appointed. Empowering the Plenum with such authority poses it as the representative body of the Common Courts system, which does not correspond to its functional purpose. Moreover, pursuant to the rule of appointment of the members for the Supreme Court, no decisions of the Plenum shall be deemed taken on behalf of the judicial authority. Thus, the appointment of judges to the constitutional court on behalf of the judicial authority shall be carried out by the Conference of Judges of Georgia, which is the representative body of judiciary.

### ***The Plenum’s right to appeal to the Constitutional Court***

Pursuant to the Organic Law, the Plenum shall be entitled to, in accordance with the Constitution of Georgia, the Article 89, paragraph one, the subparagraph “a”, submit an appeal to the Constitutional Court of Georgia in order to consider the constitutionality of normative acts to a particular case and generalization of the judicial practice. It should be noted that the Plenum shall not consider cases and may not administer the justice. The Justice in the Supreme Court is administered by Chambers of Criminal, Civil, Administrative Cases, as well as the Grand Chamber. The justice shall be also administered by the Chamber of Qualifications and Chamber of Disciplinary Cases in the manner as prescribed by the law. The judgments made by the Cassation Chambers shall be final and not subject to appeal within the country.

The Plenum should not be deemed as a body higher than the Cassation Chambers which has the capacity to evaluate the performance of judges in the process of case consideration or carry out the parallel justice. The Plenum, institutionally, shall not have any authority to administer justice or supervise the implementation or administration thereof, thus, the right to refer to the Constitutional Court with the appeal shall be vested solely in the judicial courts. Empowering the Plenum with such authority does not correspond to its role and functions in the Supreme Court.

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<sup>269</sup> Prior to the amendments under “Third Wave” of the judiciary reforms, the Chamber of Qualifications considered appeals on the decisions refusing to appoint judges for an indefinite period.

<sup>270</sup> Venice Commission, CDL-AD(2014)031 2. Composition of the Plenum of the Supreme Court.

### ***The Plenum's power to supervise the Cassation Chambers***

According to the law, the Plenum is entitled to hear and assess briefs from chairpersons of the Supreme Court chambers, reports from the heads of structural units of the Office of the Supreme Court and consider any proposals related to the improvement of their activities. This provision empowers the Plenum to supervise activities of the chambers which contradicts with the status of the cassation chamber as the independent and final instance implementing the justice. It is inadmissible the Plenum to exercise any form of lever of influence over the justice, since this creates the threat of implementation of collective justice, encroaches on the independence of individual judges and hinders the development of the judiciary practice.

### ***The Plenum's power to determine a monthly bonus to the remuneration of a member of the Supreme Court***

In accordance with the Organic Law of Georgia "On Common Courts", the plenum is entitled to determine a monthly bonus to the salary of a member of the Supreme Court within the funding allocated from the state budget of Georgia for the Supreme Court.

In order not to endanger the independence of individual judges, it is important to add to the law the plenum's obligation to determine the amount of the bonus under the pre-determined procedure and objective criteria. Otherwise, due to the fact that determination of a bonus for judges is risk inclusive in terms of the independence of judges, it is recommended to cancel the possibility of adding a bonus to the remuneration and all judges of the Supreme Court should enjoy only the compensation provided by law.

### ***The Plenum's power to draw up and publish an annual report on the condition of justice in Georgia***

The Plenum has the right to prepare and publish annual reports on the condition of justice in the country. The provision does not specify the type of information to be processed at the moment of drawing up reports and whether or not they shall include any evaluation / analytical elements. The provision allows the Plenum to request and process any information, also evaluate the data obtained about the lower instance courts which poses the Plenum as the supervisory body of the Common Courts and may jeopardize the judicial independence.

According the existing practice, annually the Supreme Court of Georgia publishes the main statistical data about the Common Courts. In this regard it should be noted that according to the Law one of the tasks of the High Council of Justice is to review the materials of the court/judiciary statistical analysis. Accordingly, the present situation gives rise to the functions overlap between the High Council of Justice and the Plenum. In addition, the law stipulates that it is the Council's task to ensure the quality and efficiency of the justice and to develop recommendations for judicial reforms, thus, it would be reasonable not the Plenum but the High Council of Justice of Georgia informed public about the condition of justice in the country.

### ***The Plenum's obligation to ensure the independence of the court / judiciary***

Pursuant to the Organic Law of Georgia, the Plenum shall protect and strengthen the institutional independence of the judiciary, of one and equal branches of the state authority and ensure the independence of judges.

Given the fact that the Supreme Court of Georgia is the court implementing cassation justice but not supervision of courts, the delegation of the task on the Plenum to ensure the independence of courts / judges is inconsistent with its powers and competences. Also, the Plenum is not provided with the sufficient levers to fulfill the above tasks.

The body responsible for protection of the independence of court / judges functionally should be High Council of Justice of Georgia. The High Council of Justice is responsible for the administration of the judicial system and performs appointment / dismissal of judges, disciplinary proceedings against judges and analyzes the condition of the justice in the country. The best protection for judicial independence, both internal and external can be assured by a High Judicial Council, which is in line with international practice.<sup>271</sup>

### ***Transparency of the Plenum's activities***

As of today, the performance of the Plenum does not meet the standards of transparency. In order to strengthen public confidence in the work of the Supreme Court, the plenary sessions should be open (except for the cases prescribed in the law) and the information about holding such sessions should be published in advance on the webpage. Moreover, the internal regulatory acts governing the Plenum activities including the procedure of sessions should be proactively accessible. It is also necessary that the decisions of the Plenum to be substantiated and publicly published.

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<sup>271</sup> Venice Commission, CDL-AD(2007)003, Paragraph 61: "the best protection for judicial independence, both internal and external can be assured by a High Judicial Council, as it is recognised by the main international documents on the subject of judicial independence".

It should be noted that under the amendments introduced through “Third Wave” of the judicial reforms there is a reservation according to which the Supreme Court plenary sessions shall be public. The above change is welcome but additionally the Plenum should ensure more transparency of its activities with internal regulations and best practices.

### ***Powers of the Chairman of the Supreme Court according to the Organic Law***

According to the Constitution of Georgia, Chairperson of the Supreme Court is also the Chairperson of High Council of Justice (an ex officio member). Pursuant to the Law, the Chairperson of the Supreme Court, on behalf of the judiciary administering the justice, interacts with other branches of the state authority, the media and the population in connection with general issues of the justice in Georgia. The Chairperson of the Supreme Court also signs a service card, an official document confirming the identity of a judge, decisions of the High Council of Georgia on appointment and dismissal of judges, applications and resolutions of the Conference of Judges of Georgia.

The high status of the Chairperson of the Supreme Court certainly poses him as the most important representative of the judiciary system and vests in him/ her important obligations. However, accumulation of excessive and broad powers in the hands of the Chairperson of the Supreme Court can be harmful for the judicial independence.

Pursuant to the legislative amendments within the framework “Third Wave” of the judicial reforms, unjustifiably broad powers of the Chairperson of the Supreme Court were significantly restricted, including the exclusive power to nominate candidates when staffing the composition of the Chambers, the right to discharge any member of the Disciplinary Chamber and initiate disciplinary proceedings against judges. The regulation applicable prior to the implementation the “Third Wave” of the judicial reforms had failed to create an independent and impartial system of judicial accountability and had become the subject of criticism from international organizations.<sup>272</sup> Accordingly, the legislative changes have been evaluated positively<sup>273</sup>. Nevertheless, certain powers assigned to the Chairperson of the Supreme Court pursuant to the Organic Law of Georgia “On Common Courts” are not still consistent with the principles of strengthening of self-governance of the judiciary and includes a threat to the judicial independence.

### ***The Sole Power of the Chairperson of the Supreme Court to submit to the Plenum the Composition of the Grand Chamber for selection***

Prior to the introduction of the amendments within “Third Wave” of the judicial reforms, the composition of the Grand Chamber of the Supreme Court, as well as the composition and chairpersons of other chambers (except for Chamber of Qualification) had been elected by the Plenum based on the recommendation of the Chairperson of the Supreme Court of Georgia. Such regulation had been contrary to the principles of self-governance of courts and awarded unjustifiably broad powers to the chairperson. According to the law bill of the “Third Wave” of the judicial reforms, the right to nominate candidates for the composition of Chambers has been granted equally to all members of the Plenum, which has to be assessed definitely as a positive change. However, the exclusive right to nominate judges for the composition of the Grand Chamber still remains in the hands of the Chairperson of the Supreme Court. In order to avoid the creation of unnecessary hierarchy among judges in the Supreme Court, the right to nominate candidates for the Grand Chamber should be given to the Plenum members. In addition, the rights and responsibilities of chairpersons of the Chambers need to be clearly defined provided that they should not have any leverage to exercise improper influence on the court’s activities.

### ***The Powers of the Chairperson of the Supreme Court to decide on living accommodations for judges***

The decisions on provision of judges of appellate and district (city) courts with living accommodations are made by the High Council of Justice of Georgia. The above decisions on provision of the living accommodation for members and chairpersons of the Supreme Court are taken unilaterally by the Chairperson of the Supreme Court. Awarding such powers to the Chairperson of the Supreme Court contains risks for the independence of judiciary, thus, it is reasonable to deal with the issues jointly by the Plenum.

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<sup>272</sup> Venice Commission, CDL-AD(2014)031 Paragraph 26. OECD, Fourth Round of Monitoring of the Istanbul Anti-Corruption Action Plan, Available on the webpage: <<https://goo.gl/10BhKL>> [Last seen on 26 March 2017]

<sup>273</sup> Venice Commission, CDL-AD(2014)032 Paragraphs 10, 20-24

## **Deputy Chairpersons of the Supreme Court**

Pursuant to the current legislation the Supreme Court shall have the first deputy and deputies. Chairpersons of the Chambers of the Supreme Court of Georgia (except for the chairperson of Disciplinary and Qualification Chambers) shall be also Deputy Chairpersons of the Supreme Court. The First Deputy Chairperson of the Supreme Court shall be elected among the chairpersons of the Supreme Court Chambers (except for chairpersons of the Disciplinary and Qualification Chambers) by the Plenum of the Supreme Court of Georgia.

According to the changes initiated within the “Third Wave” of the judicial reforms, the office of the Deputy had to be cancelled in both the Supreme Court and the lower instance courts. However, through the legislative hearings the law bill undergone some changes and the office of the Deputy Chairman is still preserved. It is unclear what caused the bill to change in this part because the functions of the deputy chairperson of courts in the current condition are unclear and actually s/he represents unnecessary administrative position which makes the system more hierarchical.

## **Recommendations**

### *Amendments to be introduced to the Constitution:*

- The Constitution should clearly delineate the powers of the Supreme Court and the High Council of Justice of Georgia and define that the Supreme Court shall administer the justice at the cassation level, and High Council of Justice shall be responsible for administration of the judicial system, and its independence and accountability.
- The Conference of Judges of the Common Courts of Georgia should be authorized to elect three members to the Constitutional Court, as the Conference and not the Supreme Court is deemed as the representative body of the judiciary system.
- The right of consent on initiating a criminal prosecution against judges of district (city) courts and courts of appeals should be granted to the High Council of Justice- the collegial and representative body- instead of the Chairperson of the Supreme Court of Georgia.

### *Amendments to be introduced to the Organic Law of Georgia:*

- Chairpersons of Courts of Appeals should be removed from the composition of the Plenum;
- The Plenum’s power to appeal to the Constitutional Court should be cancelled and this authority should be awarded to the court considering a case;
- The Plenum’s power to supervise activities of cassation Chambers should be cancelled;
- The obligation of the Plenum to be guided by pre-determined objective criteria in determination of a bonus amount to the monthly remuneration for members of the Supreme Court should be clearly defined;
- The Plenum’s power to prepare and publish annual reports on the condition of the justice administration in Georgia should be cancelled and granted to the High Council of Justice;
- The Plenum’s obligation to ensure independence of the court / judges should be removed and clearly stipulated that it is the function of the High Council of Justice;
- Increase the transparency of the Plenum activities;
- The exclusive authority of the Chairperson of the Supreme Court to submit to the Plenum for selection of the composition of the Grand Chamber should be cancelled and all members of the Plenum should be entitled to nominate candidates;
- The power of the Chairperson of the Supreme Court to make decisions on the living accommodations for judges shall be transferred to the Plenum;
- The office of the Deputy Chairpersons of the Supreme Court should be cancelled.

JUDICIAL  
ACCOUNTABILITY SYSTEM

7

## Key findings

- The current grounds for judicial disciplinary proceedings do not meet the foreseeability requirements and therefore pose tangible risks of influencing judges through their undue application. Particularly important issue is imposition of disciplinary liability on a judge based on decisions made in the process of justice administration.
- The law does not explicitly define the goals and objectives of disciplinary proceedings which gives rise to a threat of inappropriate application of the disciplinary procedures in practice.
- The legislation does not provide for proper safeguards for an independent inspector's activities.
- The procedures of disciplinary proceedings include legislative gaps;
- The issue related to application of disciplinary proceedings for infringement of judicial ethics is not provided in the legislation in a foreseeable form;
- The law does not provide for the standard of proof in disciplinary proceedings and also the rules for recognition of admissibility of evidence, thus there are no sufficient guarantees for implementation a fair process in this regard;
- The provisions of the Criminal Code of Georgia in terms of the judiciary responsibility are vague and only partially cover the basics of the disciplinary liability;
- The Supreme Court of Georgia is solely entitled to make decisions on lifting of criminal immunity of judges.

## Importance to improve the current system of disciplinary liability

The Coalition for an Independent and Transparent Justice frequently has emphasized the necessity to improve the current system of judicial disciplinary responsibility. There is no doubt that the system of disciplinary liability on the one hand serves the interests of the authority of judicial system and strengthening the confidence of public in the court, but on the other hand, it includes a potential threat that in case of inappropriate application it may become an effective tool for influencing individual judges. That is why, for establishment and strengthening of the judiciary independence it is of crucial importance to provide the legislation which will be foreseeable and consistent with best international practices in this field and which may provide a fair balance of interests and eliminate the use of such authority in bad faith.

The research carried out by the coalition member non-governmental organizations on the disciplinary liability system have identified the following major challenges:

- **To improve the grounds for disciplinary misconduct and determine the goals of disciplinary liability system;**
- **To define the procedures of disciplinary proceedings and legal safeguards;**
- **The issue of transparency of the disciplinary liability system;**
- **The vague grounds for criminal liability and lifting of immunity of judges;**<sup>274</sup>

The urgency of the above issues is indicated by the major policy documents in the country, including the relevant chapter of the Action Plan of the Government of Georgia on the Protection of Human Rights stipulates about the need for improvement and perfection of disciplinary mechanisms and as well as change of the Code of Ethics.<sup>275</sup> Similarly, the criminal justice reforms strategy and action plan provide for the improvement of the legal framework in terms of disciplinary proceedings.

## Grounds and objectives of disciplinary liability

The basics of disciplinary prosecution of judges have been strongly criticized multiple times by local and international organizations. In the report 2007<sup>276</sup> the Venice Commission noted out that the statutory grounds established by the law needed to be defined more precisely and be entirely foreseeable in order to avoid the risks of unfair imposition of disciplinary liabilities.

<sup>274</sup> „Analysis of the Judicial Liability System“, 2014, available on the webpage: <<https://goo.gl/8fS1z8>> [Last seen on 26 March].

<sup>275</sup> The Action Plan of the Government of Georgia on the Protection of Human Rights 2016-2017, Paragraphs 2.2.1.3 and 2.2.1.4.

<sup>276</sup> Venice Commission, CDL-AD(2007)009.

## Imposition of liability due to Incorrect Interpretation of the Law by a Judge

Even today imposition of disciplinary sanctions on judges for legal interpretations in the process of law enforcement still remains the main challenge. In 2007 the Law provided a gross violation as the basis of disciplinary proceedings. The Venice Commission assumed that the provision of the law was not compatible with the European and international standards as it excessively interfered into the independence of judges to interpret the legal rules based on internal faith. There is no doubt that the interpretation of legal provisions plays an important role in rendering a decision in a concrete case, and a judge should not be solely restricted in his/her adjudication by existing case law and current practice. The essence of a judge's function is to independently interpret legal rules and to apply them to the specific circumstances of a given case. There are no absolutely clear legal provisions that would never necessitate an interpretation. Moreover, during interpretation a judge may go beyond the wording of a provision, for instance if the provision has to be interpreted in compliance with the Constitution or with international law.<sup>277</sup>

Following the amendments to the law introduced in March 2012 the above mentioned provision was removed from the law and was specified that any incorrect interpretation of the legal provisions which is based on a judge's internal faith shall not be deemed a disciplinary misconduct and a judge shall not bear liability for such action. Nevertheless, this issue still remains problematic as the bodies involved in disciplinary proceedings qualify a judge's interpretation of the legal provisions in the process of adjudication in some cases as non-fulfillment or improper fulfillment of the judge's responsibilities, which is one of the grounds for disciplinary prosecution.

In this connection, the Coalition responded negatively to the decisions made by the Disciplinary Panel of Judges and the Disciplinary Chamber in May and July 2016 about the case of Judge George Sulakadze. The judge was imposed the disciplinary liability on the grounds of improper fulfillment of his duties as he failed to interpret the legislative provision. The substantiation provided in the decisions of the Disciplinary Panel and the Chamber is based solely on the fact that the judge, as the Disciplinary Panel of Judges and the Chamber evaluate, incorrectly interpreted the mandatory legal provision. The verdicts do not refer to any other circumstances which could prove that the judge when interpreting the provision acted in bad faith or for any improper purpose, the judge was biased to the case, or the judge sustained damage to a party due to improper action etc.<sup>278</sup>

The study of International standards has shown that the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability except in cases of malice and gross negligence.<sup>279</sup>

The correctness of the above attitude can be explained by purpose of disciplinary proceedings. The key objective of the imposition of disciplinary proceedings is to secure the authority of the courts and enhancement of public confidence in the court and not to secure the correct application of the law by judges, which is to be achieved with the appeals procedure.<sup>280</sup> The current legislation on disciplinary proceedings does not provide for an explicit definition of the objectives and scope of the disciplinary liability system. The problem largely creates the threats which are related to administration of parallel justice through disciplinary proceedings and thus possibilities of imposition of liability on judges for the use / interpretation of the legal provisions.

A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions<sup>281</sup> however disciplinary proceedings should not replace the appeal mechanism of judicial decision making process. Disciplinary proceedings should only apply to gross and inexcusable professional misconduct and not to different interpretations of law provisions and judicial errors.<sup>282</sup> The recommendations of the Venice Commission and the Council of Europe Committee of Ministers point out that the legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence.<sup>283</sup> While judges of lower instance courts should generally follow established case law by higher instance courts, they should not be barred from challenging it, if in their judg-

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<sup>277</sup> *The same above*. Paragraph 19

<sup>278</sup> Coalition for an Independent and Transparent Justice "The practice established with therecent decision of the Disciplinary Panel of Judges and the Disciplinary Chamber poses threats for the independence of the judiciary", Available on the website: <<https://goo.gl/FM91oE>> [Last seen on March 26, 2017].

<sup>279</sup> Council of Europe Committee of Ministers Recommendation CM / Rec (2010) 12 §66. See also Kiev recommendations, paragraph 25.

<sup>280</sup> Venice Commission, Paragraph 29.

<sup>281</sup> CCJE Opinion N10(2007) pg 63.

<sup>282</sup> Venice Commission, CDL-AD(2011)012, Paragraph 60.

<sup>283</sup> Venice Commission, CDL-AD(2014)006 Paragraph 22.

ment they consider right to do so.<sup>284</sup>

As mentioned above, the study of international standards shows that a judge may be imposed a disciplinary liability if along with the legal error there is an additional circumstance which points to the judge's actions of bad faith or gross negligence.

For instance, according to the system of judicial disciplinary proceedings of California, a judge may be imposed a liability if his/her actions are contrary to any explicitly established legal provision which is clearly interpreted and there is no vagueness or a difference of opinion, and if at the same time clearly and convincingly a judge's dishonesty, bias, lack of respect for human rights, or any other motive is established that is not related to administration of a judge's authority in good faith.<sup>285</sup>

The standard establishes higher safeguards for the independence of judges during the administration of justice and that is why we consider that the local practice should be developed in this direction. It should also be noted that application of the above grounds in practice is related to certain challenges, however, it is possible to establish some standards which may reduce the existing risks.<sup>286</sup> First of all, it is important not to initiate any disciplinary procedures against a judge unless the validity and legality of the decision is discussed by higher instances. There is no doubt that cancellation of a decision through the appeal procedures may not become the basis for initiation of any disciplinary proceedings against a judge of a court of the lower instance, however, there can be singled out rare occasions when a judge's decisions demonstrate the judge's apparent incompetence and negligence, which is prejudicial to the entire court authority and public confidence in the court.

One reason for the negative evaluation of the decisions made by the Disciplinary Panel of Judges and the Disciplinary Chamber in May and July 2016 about the case of Judge George Sulakadze is that the disciplinary proceedings were initiated on the pending case until the higher instances would review the legality and validity of the judge's decision. Therefore, the disciplinary bodies actually administered the parallel justice over the case which is unacceptable.

Notably that the in connection with the above issue the practice of the disciplinary bodies is non-homogeneous, for instance, the Disciplinary Committee of Judges in its decision of 12 April, 2013, explains that a judge's action which is based on inner faith may not become the basis for imposition of disciplinary liability, in particular, in case of a judge's erroneous action, though established that the judge was acting under the inner faith and honestly, with the belief s/he to have acted lawfully with no private interest, then initiation of the disciplinary prosecution on the above grounds is unacceptable as it directly poses a threat to the integrity of a judge and the court's independence as a whole, accordingly, the judge's action shall not be deemed as a disciplinary misconduct and disciplinary sanctions shall not be imposed. The above provision constitutes a legal gap. And, if it is established that at the moment of making the error, the judge abused his power and / or acted in bad faith, partially, with private interest or benefited whatsoever, then the judge's actions shall be qualified as the disciplinary offence.<sup>287</sup> There is nothing said about the delineation between legal misconduct and disciplinary misconduct in the decision made by the Disciplinary Panel of Judges on the case of Judge Sulakadze nor provides any clear reasoning why the judge's action was not a legal error.

It should also be noted that the degree of misconduct is of great importance in the disciplinary proceedings. If a judge allowed a minor error which resulted neither in a violation of rights and interests of parties to a case, nor any adverse effect, then there is little interest for imposition of disciplinary proceedings. Also, if the damage caused by a judge's action has been eliminated with the appeal procedures, this can be taken into account, but in some cases it may not rule out the need for disciplinary proceedings, as the primary objective of disciplinary proceedings is to protect the authority of the court but not the rights of parties to a specific case. Accordingly, if a judge's actions encroach on the reputation of the court and public confidence in the court, it may become the basis of disciplinary sanctions in a number of cases regardless of whether any party to a case has suffered any damage or whether the damage has been eliminated through the appeal procedures.

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<sup>284</sup> The same above.

<sup>285</sup> Oberholzer v. Commission on Judicial Performance (1999) 20 Cal.4th 371 Available on the webpage <<https://goo.gl/252Pas>> [Last seen on 26 March 2017].

<sup>286</sup> Cynthia Gray, 'The Line Between Legal Error And Judicial Misconduct: Balancing Judicial Independence And Accountability' Hofstra Law Review (2004), Available on the webpage: <<https://goo.gl/gC36HG>> [Last seen on 26 March].

<sup>287</sup> The Decision of The Disciplinary Panell of Judges of Common Courts of Georgia made on 12 April, 2013 regarding the Case #1/04-12.

## **Breach of judicial code of conduct as the basis for disciplinary liability**

Another basis for disciplinary proceedings can be a breach of judicial code of conduct, which in a number of cases has become the subject of severe criticism. Right from the beginning it should be noted that the Code of Conduct does not clearly define whether reference is made to the existing code of judicial ethics or it also provides for so-called unwritten rules. It is therefore not foreseeable which actions fall under this provision<sup>288</sup>. The Venice Commission in its reports has repeatedly pointed out that determination of general violations of ethical conduct as the basis for disciplinary proceedings is excessively broad and unforeseeable therefore, it is essential that the disciplinary grounds be laid out more precisely.<sup>289</sup>

In addition, the purpose of a code of ethics is to provide general rules, recommendations or standards of good behaviors that guide the activities of judges and enable judges to assess how to address specific issues which arise in conducting their day-to-day work, or during off-duty activities. In the majority of countries, codes of ethics have only unofficial status and the breach of the ethical principles does not constitute direct grounds for disciplinary actions.<sup>290</sup> The breach of ethical principles, as a rule, is related to more moral than disciplinary responsibilities.<sup>291</sup>

According to the above, the provision in the current legislation on violations of ethical standards as the general basis for imposition of disciplinary proceedings does not meet international standards and poses a threat of its malicious application in practice. Moreover, ethical standards are interpreted subjectively in many cases and may vary with the development of the society. However, it should also be noted that any gross violations of the code of ethics which compromise the reputation of the court and undermine public confidence in the court is the indication to a judge's misconduct or gross negligence, which obviously should be subject to disciplinary measures. However, it is important that such cases should be written specifically and foreseeably in the legislation with the principle of proportionality in mind.<sup>292</sup>

Another ground for disciplinary proceedings provided in the current legislation in addition to violations of code of ethics is any action inappropriate for a judge which disgraces the reputation of or damages the confidence in a court.<sup>293</sup> The above ground in its turn is linked to breach of ethical standards however the wording is so generalized that it fails to meet the criteria of foreseeability.

## **Procedure of disciplinary proceedings and legal guarantees**

The purpose of judiciary independence is to guarantee every person the fundamental right to have their case decided in a fair trial on legal grounds only and without any improper influence, so independence is not a privilege granted to judges, but the guarantee for protection of human rights and freedoms which gives individuals an opportunity to have faith in judicial system.<sup>294</sup> And the judicial accountability system should be there to protect and strengthen this trust. For the achievement of the goal it is of decisive importance to provide healthy and sound disciplinary procedures and relevant procedural rights.

Indeed the current legislation needs some improvements in this respect. Some positive changes implemented within the framework of the so-called Third Wave of the judicial reforms should be pointed out however it is true that the "Third Wave" does not fully meet the current challenges and the implementation of legislative activities still need to be pursued. It should be noted that the "Third wave" of the judicial reforms provided for the rule according to which disciplinary proceedings initiated before the amendments as well as proceedings related to disciplinary misconducts committed prior to the enactment of the amendments shall be considered according to the previously applicable rule. Such blanket restrictions limit individuals involved in disciplinary proceedings to benefit from the improved procedures within the framework of the so-called "Third Wave". Though it is unclear what legitimate interest justifies the period in disciplinary proceedings and placing persons in differentiated condition if we take into consideration the improved rule provided in the "Third Wave". In this regard, the judicial practice of the Constitutional Court of Georgia which requires reasonable justifications for differential treatment in similar cases should be taken into account.<sup>295</sup>

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<sup>288</sup> Venice Commission, CDL-AD(2007)009 Paragraph 14.

<sup>289</sup> Venice Commission, CDL-AD (2013)035.

<sup>290</sup> Venice Commission, CDL-AD(2014)018, Paragraph 26. Also CCJE Report N3, Paragraph #48.

<sup>291</sup> Venice Commission, CDL-AD (2013)035, Paragraph 36.

<sup>292</sup> The same above § 31.

<sup>293</sup> The Law of Georgia "On Disciplinary Liability of Judges of General Courts or Georgia and Disciplinary Proceedings", the Article 2, paragraph "d"

<sup>294</sup> European Council Recommendation CM/Rec(2010)12.

<sup>295</sup> See the decision of the Constitutional Court of Georgia on the case Citizens of Georgia –Valerian Gelbakhiani, Mamuka Nikolaishvili and Alexander Silagadzev. the Parliament of Georgia, November 13, 2014.

## **Right of initiation of disciplinary proceedings, timing for case hearing and necessary quorum for making decisions**

Pursuant to the legislation applicable prior to the introduction "Third Wave" of the judicial reforms, the right to initiate disciplinary proceedings against all judges had been vested in the Chairperson of the Supreme Court of Georgia together with the Council of Justice and in the Chairperson of the Court of Appeals against all judges of Court of Appeals, as well as any district (city) court judges acting within the jurisdiction of that Court of Appeals. After the "Third Wave" of the judiciary reforms, the above rule has been amended and the Chairperson of the Supreme Court and chairpersons of Courts of Appeal will no longer have such power, which is welcome.

Judicial independence is not only independence of the judiciary as a whole vis-a-vis the other powers of the State, but it also has an "internal" aspect. In judicial adjudication every judge should therefore be independent also vis-a-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts.<sup>296</sup> Keeping the above in mind, the power of chairpersons of the courts to initiate disciplinary proceedings may lead to weakening the independence of a judge in a case, for instance, if judge is conflicting with the president of the Court.<sup>297</sup>

Prior to adoption "Third Wave" of the judicial reforms, the Secretary of the High Council of Justice based on the preliminary examination of submitted complaints evaluated the validity of initiating disciplinary prosecution against a judge and made decision on the termination of disciplinary prosecution or requesting explanations from the judge. And if the Secretary of High Council of Justice decided to terminate disciplinary proceedings it had to be submitted to the High Council of Justice for consideration.<sup>298</sup>

The exclusive powers of the Secretary of the High Council of Justice at the initial stage of disciplinary proceedings may be evaluated as excessive and therefore negatively, thus the changes within the "Third Wave" are welcome through which the authority is no longer vested solely in the Secretary of High Council of Justice. Namely, the above changes have introduced the institute of the Independent Inspector who shall be appointed and dismissed for the 5-year term office by the High Council of Justice. The Independent Inspector based on a preliminary examination shall assess the validity of initiating disciplinary proceedings and then the High Court of Justice shall jointly take a decision to start disciplinary proceedings and take an explanation from a judge, or to terminate disciplinary prosecution. The examination and investigation of a disciplinary case shall be conducted by the Independent Inspector and after the completion of this stage the decision on disciplinary prosecution or termination of disciplinary proceedings against a judge shall be made by the High Council of Justice. Although the "Third Wave" has limited the exclusive powers of the Secretary of the High Council of Justice at the initial stage of disciplinary proceedings and the new institute in the form of Independent Inspector has been introduced, the legislation does not still explicitly provide for the safeguards to secure the independence of the Inspector. As noted above, the Inspector is appointed and removed by the High Council of Justice which makes the institute of the Inspector fully dependent on the Council even more that the law provides for the general grounds for the discharge of the Inspector and does not expressly set out opportunity and rules of appealing decisions made by the Council. At the legislative level, for enhancement of guarantees for the Inspector's independence, the participation of the Conference of Judges and judiciary might be included in the election and appointment of Inspectors and the rule for discharge and appeal of inspectors be improved.

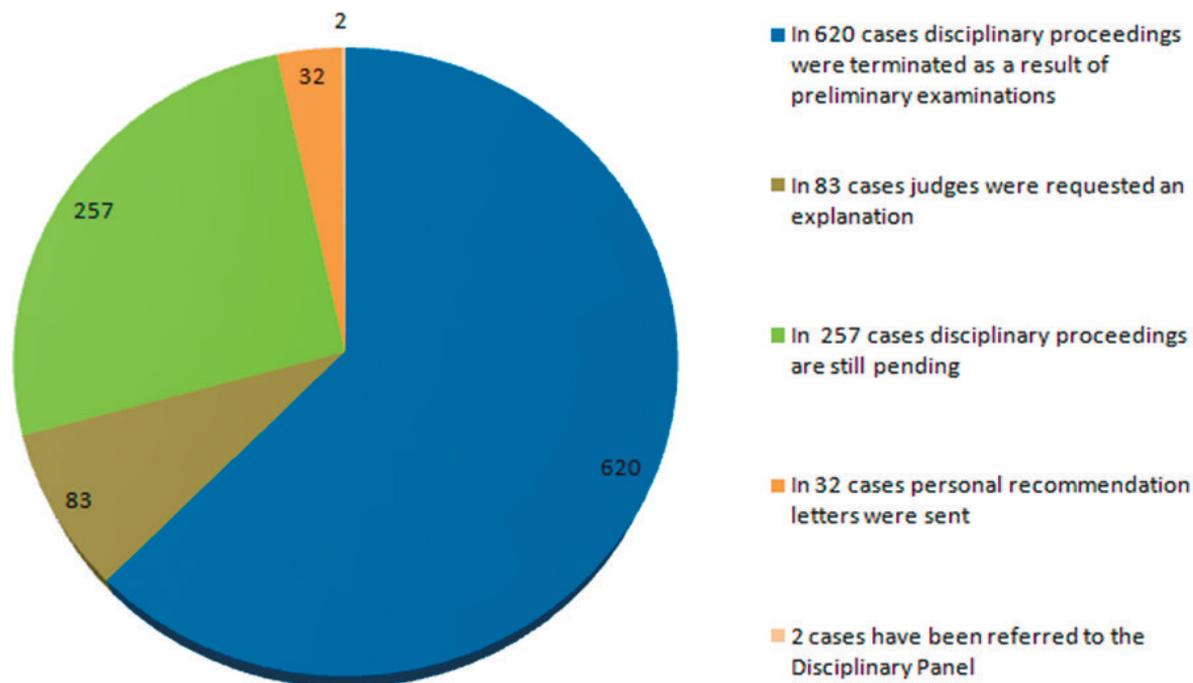
It is important to note that under the current legislation, decisions on imposition of disciplinary proceedings on a judge shall be made by two-thirds of the full list of the Council members. However, the requirement for such majority of votes is rather high which may prevent achievement of the legitimate goals of disciplinary proceedings. Such a qualified quorum for the initiation of disciplinary proceedings creates the serious risk that too many complaints would not be followed up at this early stage because of corporatist attitudes within the High Council of Justice. Therefore, under the recommendation of Venice Commission,  $\frac{2}{3}$  majority should be changed by a simple majority.<sup>299</sup> Today, the statistics on disciplinary cases in High Council of Justice shows that despite a great number of disciplinary complaints, the disciplinary mechanisms are applied in very rare cases. In 2013-2016, total of 1039 disciplinary complaints were submitted to the High Council of Justice thus the statistics of the decisions made by the Council on disciplinary cases are as follows:

<sup>296</sup> Report on the Independence of the Judicial System Part I, Adopted by the Venice Commission, 12-13 March 2010 Paragraph 71.

<sup>297</sup> CDL-AD(2014)032 Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of adopted by Venice Commission October 2014 Paragraph 24.

<sup>298</sup> The Law of Georgia "On Disciplinary Liability of Judges of General Courts or Georgia and Disciplinary Proceedings", the Article 9.

<sup>299</sup> CDL-AD(2014)032 Disciplinary Liability and Disciplinary Proceedings of Judges of General Courts of adopted by Venice Commission October 2014 §24.



Prior to the adoption “Third Wave” of the reforms, the legislation had not provided for the time frame to hold a meeting of the High Council of Justice on disciplinary proceedings at which the Council could take a decision on institution or termination of disciplinary proceedings against a judge. Accordingly, the deadline for making final decision on disciplinary prosecution against a particular judge was dependent on general maturity terms as defined in the law. In such a situation, the provisions of the law that regulated time frames for reviewing of applications and examination and investigation of disciplinary cases lost their importance. In fact, they could not be effective if the legislation did not define the time frame during which the High Council of Justice should consider disciplinary issues and make appropriate decisions. The lack of the regulation led to an undue delay of consideration of disciplinary cases.<sup>300</sup> Therefore, the changes under the “Third Wave” of the reforms are welcome which stipulate that within the general time frame for examination of a disciplinary case shall be taken a decision on the institution of disciplinary proceedings against a judge or the termination of such proceedings.

### Termination and suspension of disciplinary proceedings

The law provides for the grounds for termination of disciplinary proceedings. A substantiated decision to terminate disciplinary proceedings against a judge shall be made if as a result of the examination of a disciplinary case, the fact of committing a disciplinary misconduct under this law, or its culpable commission by a judge has not been proven. However, prior to the adoption the “Third Wave” of the judicial reforms, the High Council of Justice was not obliged to substantiate decisions and even a complainant was not explained upon the validity for the termination of a disciplinary prosecution. This hindered the provision of a uniform practice for disciplinary cases, and at the same time posed a threat of selective use of authority and made it hard to have public control on the Council. For the reasons given above, the changes under the Third Wave of the reforms are welcome through which the Council of Justice shall be obliged to make a reasoned decision on termination of proceedings.

Pursuant to the legislation applicable before the adoption “Third Wave” of the reforms, disciplinary proceedings had to be terminated if a criminal prosecution was initiated against a judge based on the case materials transferred. It should be noted that criminal and disciplinary liability are different in their nature and objectives and therefore require a different standard of proof. Therefore, a criminal prosecution shall not rule out the necessity for disciplinary proceedings.

In addition, a disciplinary sanction might be imposed against a judge after an acquittal before a criminal case

<sup>300</sup> „Analysis of the Judicial Liability System 2014” pg.44 Available on the webpage: <<https://goo.gl/8fS1z8>> [Last seen on 26 March 2017].

but such disciplinary actions and proceedings must not violate the presumption of innocence.<sup>301</sup> Disciplinary authorities shall be able to independently establish facts that they are facing to consider.<sup>302</sup> Due to different objectives between disciplinary and criminal liabilities, the Venice Commission believes that initiation of disciplinary proceedings for the same offence in parallel to criminal proceedings does not violate the principle of prohibition of *ne bis in dem* double trial and punishment for the same offence in two different criminal proceedings (*ne bis in idem*).<sup>303</sup> Accordingly, the change provided under “Third Wave” of the judicial reforms is welcome through which the above grounds for termination of disciplinary proceedings shall be removed, however, the provision will be maintained according to which if a case is referred by Council of Justice or the Disciplinary Panel to the criminal prosecution authorities, disciplinary proceedings shall be terminated. The legislative amendments specified that unless criminal prosecution is initiated and / or guilty verdict is established against a judge, disciplinary proceedings shall continue unless the period for instituting disciplinary proceedings or imposing disciplinary liability on a judge has expired. As mentioned above, disciplinary and criminal liabilities shall be delineated but this provision is problematic as the law does not define the time frame within which the prosecution bodies shall make decisions on initiation of prosecution against a judge, therefore, there is a threat that disciplinary proceedings might be suspended indefinitely.

### **Legal rights of a judge during disciplinary proceedings**

For ensuring fair disciplinary proceedings, it is important that a judge against whom the process is being held to be equipped with the necessary procedural guarantees. The current legislation contains many problematic provisions in this regard.

The judge subject to disciplinary proceedings should be informed at an early stage of the investigation and should have the right to have a counsel and this right should apply in all stages of the entire disciplinary proceedings.<sup>304</sup>

Prior to the adoption “Third Wave” of the judicial reforms, the system for notifying a judge upon the initiating of disciplinary proceedings had been regulated incompletely. Namely, the Secretary of the Council of Justice when conducting a preliminary examination of a case was not obliged to communicate with a judge. Under the recommendation of the Venice Commission, a judge should be informed about disciplinary proceedings at an early stage so that s/he could timely seek a proper counsel. At the same time a judge should retain this right not only at the stage of considering the case by the Disciplinary Panel but in all stages of the proceedings.

Also, the High Council of Justice was not obliged when considering the case on termination of disciplinary proceedings or initiating disciplinary proceedings against a judge to invite a judge that limited the judge to protect its own position before the High Council of Justice. In addition, the legislation provided for a private recommendation letter of the High Council of Justice to a judge as one of the disciplinary sanctions if during the preliminary examination of the grounds for initiating disciplinary proceedings or the investigation of a disciplinary case clearly established a disciplinary misconduct of a judge for which imposing disciplinary proceedings would be considered inappropriate. Therefore, any adverse proceedings against a judge could have been initiated so that a judge might not have been given an opportunity to state his/her own opinion and also such decisions could not have been appealed. Although according to the law a personal recommendation letter did not constitute a disciplinary sanction, still it is obvious it could unfavourably affect a judge’s career, thus, it is important to provide the procedural guarantees for a judge, in general, that are applied in disciplinary proceedings. The Venice Commission also noted that High Court of Justice when addressing the judge with a private recommendation letter was acting as both the investigative body, and the final decision making agency. And these functions in accordance with international standards must be separated<sup>305</sup>.

Based on the above, the amendments made within the framework “Third Wave” of the reforms are welcome under which the Council of Justice shall summon a judge to the hearing and the judge is entitled to turn up together with a counsel. Moreover, the Council of Justice shall no longer have the right to send a private letter of recommendation to a judge.

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<sup>301</sup> Venice Commission, CDL-AD(2014)006, Paragraph 28.

<sup>302</sup> European Court of Human Rights Decision on the Allen v. the United Kingdom, Paragraph 103, 104 and 124.

<sup>303</sup> Venice Commission, CDL-AD(2014)032 Paragraphs 56-58.

<sup>304</sup> The same above. §49

<sup>305</sup> European Council Recommendation CM/Rec(2010)12. See also CCJE Opinion N3(2002) and Kyiv Recommendations, the Article 5.

The “Third Wave” of the judicial reforms also amended the rule of dismissal of chairpersons of courts. Pursuant to the Organic Law of Georgia, the grounds for termination of a chairperson’s office shall be as follows:

- Personal application;
- Termination of a judge’s authority;
- Dismissal as a disciplinary measure;
- Expiration of the term of the office.

It should be noted that prior to the introduction of the amendments with the “Third Wave” draft law, the law did not provide for the similar list of grounds for dismissal of a chairperson. The only ground was defined in the Law of Georgia “On Disciplinary Liability of Judges of Common Courts of Georgia and Disciplinary Proceedings”. Dismissal of a chairperson of the Court was one of the disciplinary measures provided in the law and in this case the ground for the dismissal of a chairperson was a disciplinary misconduct. Nevertheless, in February 2016, the High Council of Justice of Georgia removed the Chairman of Tbilisi City Court without consideration of the legal procedures of disciplinary proceedings<sup>306</sup>. To fill this gap, the “Third Wave” stipulated that the Chairperson of the Court may be dismissed from the office only pursuant to the Law of Georgia “On Disciplinary Liability of Judges of Common Courts of Georgia and Disciplinary Proceedings “. However, the legislation does not provide for possibilities and the rule of application of other disciplinary sanctions in addition to the dismissal of the chairperson of a Court. The legislation should necessarily allow the application of proportionate disciplinary sanctions against a chairperson of the Court relevant for a specific case.

### **The standard of proof in disciplinary proceedings**

The current legislation regulates neither the question of the standard of proof nor the nature of evidence permitted in disciplinary proceedings. The law does not contain any provision referring to use by analogy of the standard of any respective codes. Therefore it is not clear the relevance, admissibility and sufficiency of evidence as well as a combination of evidence required for imposition of a disciplinary measure. For instance it is unclear whether evidence which is considered inadmissible by other legal (criminal, civil, administrative) processes is acceptable in disciplinary proceedings.

There is no doubt that the above issues should be regulated at the legal level in order to ensure fair disciplinary proceedings.

It is understandable that the Law on Disciplinary Liability cannot take into account all procedural issues that may arise within disciplinary proceedings. However, the lack of clear rules on procedural issues which may potentially affect the defence rights of the judge concerned may lead to serious doubts regarding the compliance of the disciplinary proceedings with the standard of fair trial guaranteed in Article 6 of European Court of Human Rights applicable to disciplinary proceedings either under its civil or criminal limb.<sup>307</sup>

The Coalition member organizations previously noted that the decisions of the Disciplinary Panel failed to provide clearly what forms of evidence had been examined by the Disciplinary Panel, the standard by which a disciplinary misconduct had been established or what evidence the Panel had based its decisions on. In general, the standard of proof applied by the Panel in decision making process still remains unclear.<sup>308</sup> This in mind, in terms of the standard of proof, the current legislation and practice fail to ensure the soundness of the process.

### **The quorum required to make decisions by the Disciplinary Panel/Board**

The Disciplinary Board considering disciplinary cases shall consist of 5 members three out of which are elected by the Conference of Judges and the other two members are appointed by the Parliament of Georgia. According to the Law, the Disciplinary Board shall be duly constituted if at least 3 Board members are present at its session.<sup>309</sup> In addition, a decision made by the Board shall be deemed valid if it is supported by a majority of the

<sup>306</sup> The information is available on the webpage: <<https://goo.gl/Q11kaw>> [Last seen on 26 March 2017].

<sup>307</sup> Venice Commission, CDL-AD(2014)032 Paragraph 33.

<sup>308</sup> „Analysis of the Judicial Liability System” 2014, pg.100 The information is available on the webpage::<<https://goo.gl/8fS1z8>> [Last seen on March 26, 2017].

<sup>309</sup> The Law of Georgia “On Disciplinary Liability of Judges of General Courts or Georgia and Disciplinary Proceedings”, the Article 30, Paragraph 2.

Board members present.<sup>310</sup> Based on the foregoing, theoretically 2 members of the Board may take decisions on a disciplinary proceeding, which is a too low quorum and cannot ensure a fair trial, therefore, it is recommended that decisions of the Disciplinary Board to be made by a majority of the full composition. Further, on a particular case the composition of the Panel shall follow the legislative procedure of its formation and be comprised of the judge and non-judiciary members. Under the current law, a decision on a specific disciplinary case may be taken by only 3 judges with no participation of non-judiciary members, which is contrary to the legal rationale of formation of this body.

### **Transparency of disciplinary proceedings**

Until 2012 in Georgia disciplinary proceedings against judges had been entirely confidential and completely eliminated any form of public control over proceedings. This had prevented the generalization of practice of the disciplinary bodies and establishment of uniform standards.

On March 27, 2012, significant amendments were introduced to the law on disclosure of disciplinary proceedings. Namely, a provision was added to the law according to which, if requested, an appellant had to be served with a relevant notification in writing providing the information of a decision made if the Common Court no longer considered the case in connection to which the disciplinary proceedings had been initiated.” In addition, it became mandatory to publish decisions made by the Disciplinary Board and the Disciplinary Chamber on the official website without disclosing a person’s personal details. This enabled public organizations and legal circles to control the validity of decisions taken by the above authorities.

Further changes provided within the “Third Wave” of the judicial reforms should be evaluated positively according to which a judge is entitled to request public disciplinary hearings. This is compatible with the Basic Principles of the Independence of the Judiciary which requires that the examination of the disciplinary matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.<sup>311</sup> Transparency shall be the general rule for disciplinary hearings of judges. The exceptions shall be such hearings when the judge who is accused requests that they be closed.<sup>312</sup>

In terms of transparency another step forward is the rule established as a result of the changes in the legislation according to which decisions made by the High Council of Justice about termination of disciplinary proceedings against a judge shall be published on the website of the High Council of Justice of Georgia.

### **Vague grounds for criminal liability and lifting a judicial immunity**

Majority of service-related criminal offences committed by judges are provided for in the Chapter of Official Misconducts of the Criminal Code of Georgia. The regulation grants unreasonably excessive discretion to the Prosecutor’s Office and is not sufficiently foreseeable<sup>313</sup>.

For the protection of the judiciary, it is important to improve the provisions of the Criminal Code of Georgia which are linked to judicial responsibilities in exercising official duties in order to clearly define in which case a judge’s actions go beyond the disciplinary boundaries. It is especially important to review the disposition of service-related negligence.

Subject to the problem of foreseeability, it is important to establish difference between the grounds for disciplinary proceedings, namely, non-performance, or improper performance of the judicial duties and criminal offence such as service –related negligence (Criminal Code, the Article 342). The negligence of official duties is non-performance, or improper performance of official duties due to the careless attitude to the duties. Criminal qualification will be applied to a case only if the action caused substantial violation of the rights of physical or legal persons, breach of public or state’s legal interests. Substantiality of violation of rights and interests should be resolved individually in each particular case. However, substantial damage is the major indication that takes the action beyond the disciplinary borders and leads to criminal liability. Since every decision of the judge makes special impact on public, as well as specific individuals, any type of misconduct committed by the judge, even insignificant offence, may lead to serious legal consequences.

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<sup>310</sup> *The same above*, the Article 47, paragraph 2.

<sup>311</sup> UN Basic Principles on the Independence of the Judiciary, Paragraph 17.

<sup>312</sup> Kyiv Recommendations, Article 26.

<sup>313</sup> See „Analysis of the Judicial Liability System” 2014, pg.53-63, The information is available on the webpage: <<https://goo.gl/8fS1z8>> [Last seen on 26 March 2017].

The following circumstances should be taken into consideration while making distinction between the disciplinary misconduct and legal error: excessive number of cases assigned to a judge, the complexity of cases, specialization of the judge and the category of cases to be considered. As well as all other factors that may exclude any cruel, dishonest or inexcusable action from the side of the judge. Evidently, when acting in good faith, the judge should be protected from the threat of any criminal liabilities.<sup>314</sup>

Another problematic issue is the rule about lifting of judiciary immunity in criminal proceedings. In particular, according to the Constitution of Georgia, the right for removing of immunity of judges of district (city) courts and Courts of Appeals in criminal proceedings is vested in the Chairperson of the Supreme Court of Georgia. Empowering the Chairman of the Supreme Court individually with such authority is unreasonably high and establishes a hierarchical system among judges. Accordingly, it is important that the issue on lifting of the immunity of judges of district (city) courts and Courts of Appeals in criminal cases shall be resolved by the High Council of Justice which pursuant to the law is the body to ensure the internal and external independence of the court.

## Recommendations

- It is necessary to revise the current basics of disciplinary proceedings of judges. The particularly important issue is imposition of disciplinary liability against a judge for decisions made in the process of administration of the justice. A judge should have freedom in interpreting and explaining the law and be protected from the threats of disciplinary proceedings unless the judge's actions point at his/her bad faith.
- The law should also precisely define the goals and objectives of disciplinary proceedings in order to avoid the threat of administering the parallel justice in disciplinary proceedings.
- Any general violations of ethical norms should not constitute the grounds for disciplinary proceedings. A judge's actions which affect and undermine the reputation of the court, and public confidence in the court should be expressly and foreseeably defined in the law.
- At the initial stage of disciplinary proceedings, the legal requirement for two-thirds of the full composition of the Council members should be replaced by a simple majority.
- It is necessary to increase the institutional guarantees of independence for the Independent Inspector
- Criminal prosecution against a judge and the transfer of case files to the Prosecutor's Office by the High Council of Justice and the Disciplinary Panel should not constitute the grounds for termination and suspension of disciplinary proceedings against a judge.
- The law should determine the standard of proof in disciplinary proceedings and also the rule for recognition of evidence admissibility.
- The Disciplinary Panel should make decisions by a majority of the entire composition and not by a majority of members present at the sessions.
- The provisions of the Criminal Code of Georgia which are related to judicial liability when exercising official duties need to be improved in order to clearly define in what circumstances a judge's action may go beyond the disciplinary boundaries.
- Decisions about lifting of the immunity of judges of district (city) courts and Courts of Appeals in criminal offences should be made by the High Council of Justice and not unilaterally by the Chairperson of the Supreme Court of Georgia.

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<sup>314</sup> *The same above*, pg.58

