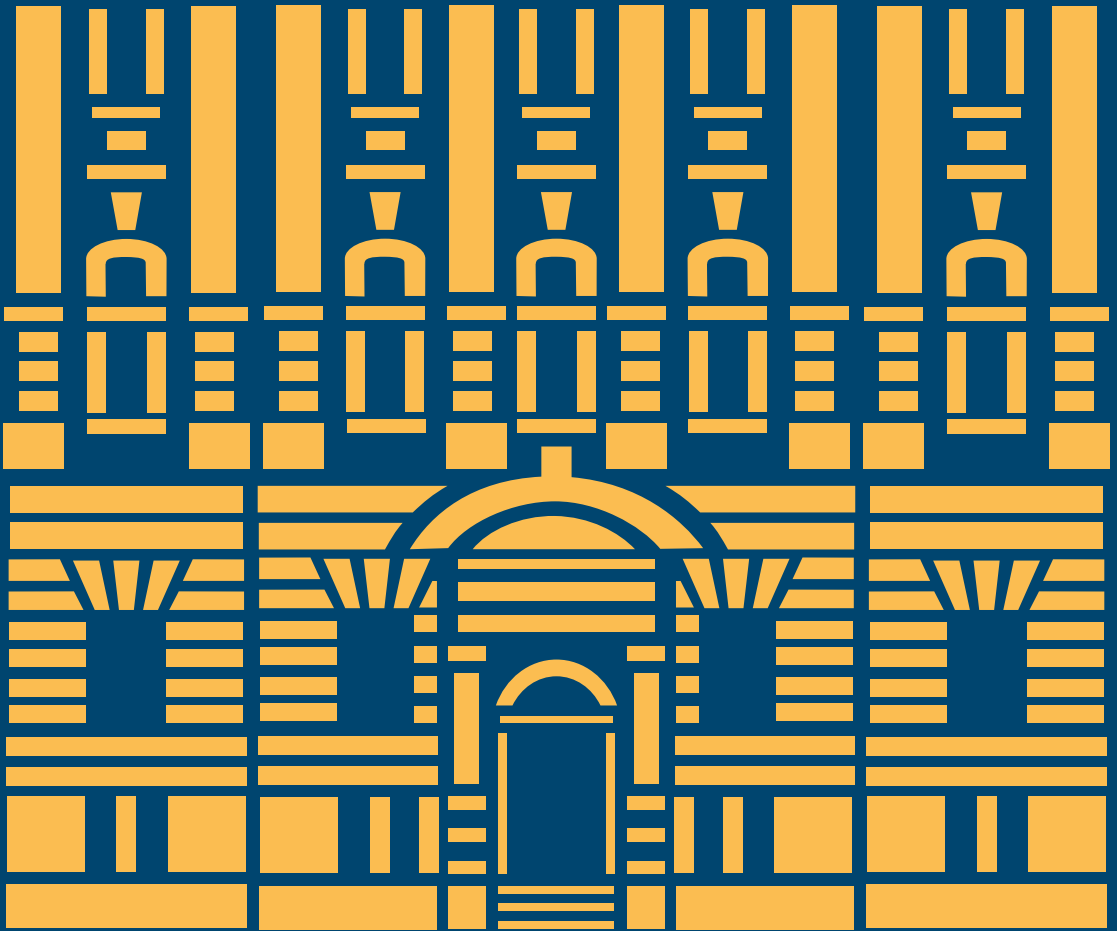




THE SUPREME COURT OF GEORGIA

Analysis of Institutional and Legal Framework



2020

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CONTENTS

1. INTRODUCTION

The Supreme Court of Georgia is the only Court of Cassation in the country. Given the significant role and function of the cassation court in the rule of law, strengthening its independence and effectiveness becomes of particular importance. The Supreme Court, as the highest and final instance of the administration of justice, sets precedence and promotes the development of law. Therefore, improving its institutional set-up and related legislative framework is essential for strengthening the rule of law.

As part of the constitutional reform of 2017¹, the procedure for the election of judges/chairpersons of the Supreme Court has significantly changed and the authority to nominate the candidacy to the Parliament has been granted to the High Council of Justice instead of the President of Georgia. In addition, as a result of the constitutional amendment, safeguards for the protection of judges of the Supreme Court have been strengthened and their dismissal, similarly to the dismissal of the Chairperson, is now only possible by the way of impeachment.

Some positive amendments were enforced in the legislative framework regulating the Supreme Court matters as a result of the so-called 'Third Wave' of the judicial reform. More specifically, broad authorities of the Chairperson of the Supreme Court were restricted and each member of the Plenum was granted the right to nominate the candidate for the composition of chambers (except for the Grand Chamber). In addition, the Chairperson was deprived of the authority to initiate disciplinary proceeding against a judge. The transparency of activities of the Supreme Court Plenum was increased to some extent and the Organic Law made the plenary sessions public.

The present study examines the institutional and legislative framework created as a result of amendments within the scope of the so-called 'third wave' and the constitutional reform. The study analyzes key issues, such as the role and the place of the Supreme Court in the judicial system, selection and appointment of the Supreme Court justices, powers of the Chairperson, liability of judges/chairperson, competence of the Supreme Court Plenum, work of the chambers and distribution of cases.

¹ The Constitutional amendment became effective on December 16, 2018.

The present study highlights those important legislative gaps that are essential to be addressed in a timely manner for ensuring independence and efficiency of the judiciary. In this regard, it should be underlined that the existing rule for selection of the Supreme Court judges is not fully consistent with international standards. Taking into consideration the degree of mistrust towards the High Council of Justice, the existing rule hardly ensures selection of the Supreme Court judges based on merit principle. Moreover, some broad powers of the Chairperson and vagueness of functions of the deputy Chairpersons are problematic. Furthermore, composition and powers of the Supreme Court Plenum remain as an important challenge. The practice of exercising judicial power in another Chamber by a judge of a particular Chamber is flawed. Moreover, the rule of case allocation is problematic as it creates the risk of arbitrary selection of panel members beyond legal regulation. This study aims to identify challenges and gaps related to the institutional and legal framework of the Supreme Court and to support further reforms of the Supreme Court by offering recommendations based on international standards.

2. METHODOLOGY

In the process of working on the present study, the project team used the following methodology:



ANALYSIS OF LEGAL ACTS

Important part of the research is dedicated to the analysis of legal framework related to the Supreme Court. Authors of the study researched legal acts that regulate the place and the role of the Supreme Court in the judicial system, its authorities and functions, selection of judges/Chairperson, their liability and removal from office, powers of the Plenum and the Chairperson, specialization of judges and distribution of cases. With this aim, the project team examined the Constitution of Georgia, Organic Law of Georgia on Common Courts, secondary legal acts adopted by the High Council of Justice of Georgia and the decisions of the Plenum of the Supreme Court. Analysis of legal acts has made it possible to identify existing challenges and gaps. Within the project, critical assessment/analysis of the Constitution has not been conducted. Therefore, present study does not include recommendations on the amendment of the supreme law of the country.



ANALYSIS OF INTERNATIONAL STANDARDS

In addition to domestic legal framework, the authors of the study examined international standards and assessed the compliance of national legislation with relevant recommendations and conclusions. The focus was placed on opinions and recommendations by Consultative Council of European Judges (CCJE), the Council of Europe, European Networks of Councils for the Judiciary (ENCJ), the Venice Commission, and the Office for Democratic Institutions and Human Rights (OSCE/ODIHR).



INDIVIDUAL INTERVIEWS

To further identify existing challenges, as well as to analyze opinions and attitudes, the project team used pre-structured questionnaire to interview judges/former judges, academics, attorneys, and the representative of Public Defender’s Office. For the purposes of the study, the project team interviewed 10 respondents in total.² Interviews were conducted in June and July 2019. Reflecting the results of individual interviews in the present study serves the purpose of illustrating opinions of the respondents and does not aim to generalize viewpoints of respective professional groups.



RETRIEVAL AND ANALYSIS OF PUBLIC INFORMATION

In the process of the research, the project team analyzed public information received from the Supreme Court of Georgia, the High Council of Justice, the Office of Independent Inspector and the Disciplinary Collegium. In addition, information published on official websites of the Supreme Court and the High Council of Justice served as an important source.



ANALYSIS OF SECONDARY SOURCES

Additional sources used for the purposes of the study included assessments, studies and reports of Public Defender’s Office and local non-governmental organizations.

² 3 judges of the Supreme Court, 3 former judges (2 of which are acting professors), 2 attorneys, 1 academic, representative of Public Defender’s Office.

3. KEY FINDINGS

Analysis of international standards and existing legal framework of Georgia, results of interviews of professional groups, and the observation of existing practices revealed the following key findings and challenges:

- In the selection process of the Supreme Court judges the legislation in force does not provide relevant guarantees to ensure judicial appointment based on the merit principle;
- Three-stage secret ballot used in the selection process of the Supreme Court judges contradicts with international standards, as it excludes the possibility of taking reasoned decision (regarding the compliance of a candidate with the high status of a Supreme Court judge);
- The first stage of secret ballot does not enable the members of the High Council of Justice to make informed decisions, as on this stage, the members of the Council are only aware of the fact that judicial candidates comply with formal requirements for the vacancy and they make decisions based only on information provided in the applications of the candidates;
- Significant problematic issues were identified in the process of competition for the selection of the Supreme Court judges, such as the participation of members of the Council in the selection process, despite the existence of a conflict of interest, as well as the distribution of votes with the same scheme during the first secret ballot. This once again highlighted the gaps in the legislative framework and raised question marks in the society;
- The Rules of Procedure of the Parliament does not precisely define functional purpose of the working group and does not envisage external experts' obligatory engagement in it. It does not define quota for the experts, Members of the Parliament and members of parliamentary opposition either;
- Work performed by the working group has revealed that it did not serve substantive assessment of the candidates and was limited to performing a technical function;

- Procedure for the selection of the Chairperson of the Supreme Court is flawed as, in case two-third of votes is not reached on the first stage, the decision is made by the majority of the full composition of the Council. Therefore, on the second stage of voting, non-judicial members of the Council have no influence on the selection process and this does not allow for decision-making on the basis of consensus;
- The Chairperson has certain broad powers, and there is also an evidence of the duplication of functions with the High Council of Justice;
- Functions of the deputy chairpersons of the Supreme Court are vaguely defined in the legislation. The need for this position, that actually creates a hierarchy in the Supreme Court, is unclear;
- A significant flaw of the legislation is the presence of the chairpersons of the courts of appeal in the Supreme Court Plenum. This does not comply with the role and the place of the Supreme Court in the Judicial System;
- The legislation grants excessive powers to the Supreme Court Plenum, including the right to file constitutional submission, and the right to determine the amount of a monthly supplement to the official salary of a member of the Supreme Court; Moreover, competencies are duplicated between the Plenum and the High Council of Justice;
- Decisions of Plenum are not proactively published on the Supreme Court website and this represents a significant transparency challenge;
- The practice of the Supreme Court shows that under the decree of the Supreme Court's Plenum, a judge of a particular Chamber exercises judicial power in another Chamber. As a result, the judges are authorized to consider cases falling within the jurisdiction of all three Chambers. Decrees adopted by the Supreme Court's plenum in this regard are identical;
- According to the rule adopted by the High Council of Justice, the case is assigned to the Chairperson of the hearing (reporting judge). The rule does not envisage the procedure for selecting the other two members of the panel, which creates the risk of their arbitrary selection.

4. THE ROLE AND THE PLACE OF THE SUPREME COURT IN THE JUDICIAL SYSTEM

The main function of the Supreme Court, as the highest instance court for the administration of justice, is to ensure judicial clarity and uniformity of practices, as well as to promote the development of law. The provision of the Constitution of Georgia on the function of the Supreme Court emphasizes its cassation role.³ According to the Organic Law, the Supreme Court oversees the administration of justice in common courts in an established procedural form.⁴ This provision is compliant with the main role and the place of the Supreme Court in the judicial system, as the purpose of the highest instance court is to ensure the consistency of judicial practices by taking decisions on individual cases.⁵

The majority of interviewed respondents attribute the main role and the function of the Supreme Court to ensuring the consistency of practices and to the development of law.

In recent decades, concentration of powers within the hands of the Chairperson of the Supreme Court and overlap of competences of the Supreme Court with the ones of the High Council of Justice caused uncertainty regarding management of the judiciary in Georgia. The broad powers that were previously held by the Supreme Court resulted in expansion of its activities well beyond that of a court of cassation. As a result of reforms,⁶ certain excessive authorities of the Chairperson of the Supreme Court have been limited and distributed, which was an important step forward.

³ Article 61 (1) of the Constitution of Georgia.

⁴ Article 14 (2) of the Organic Law on Common Courts.

⁵ Venice Commission, CDL-INF (2000)5. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)005-e) (last viewed on 30 July, 2019)

⁶ e.g. if previously candidates for the position of a judge member of the High Council of Justice of Georgia as well as a judge member of the Disciplinary Board were exclusively submitted by the Chairperson of the Supreme Court to the Judicial Conference, under the amendments of the “First Wave” of the judicial reform each member of the Judicial Conference was entitled to nominate a candidate; Moreover, within the scope of the “First Wave” of reform, the High School of Justice was distanced from the Chairperson of the Supreme Court. Furthermore, through the legislative amendments introduced under the “Third Wave” of the judicial reform the powers of the Chairperson of the Supreme Court in terms of composing the chambers and in disciplinary proceedings were limited.

Although the Constitution emphasizes the cassation role of the Supreme Court, the Supreme Court, under the existing legislation, still possesses certain authorities not related to the administration of justice. Such regulation leads to mixture of competencies with those of the High Council of Justice.⁷ For instance,⁸ one of the functions of the Supreme Court Plenum is to safeguard and strengthen institutional independence of the judiciary and ensure the independence of judges,⁹ that is, at the same time, a constitutional obligation of the Council.¹⁰ In addition, the Supreme Court processes and publishes basic statistical data of common courts,¹¹ which should clearly fall under the competence of the Council, as of the main body responsible for the quality and efficiency of justice¹². Under the existing legislation, the Chairperson of the Supreme Court, on behalf of the judiciary in charge of the administration of justice, liaises with other branches of the government, the media, and the society,¹³ which, considering the role of the High Council of Justice, should actually represent the function of the Chairperson of the Council.

Under the constitutional reform, constitutional authorities of the Council were expanded and ensuring the independence and efficiency of common courts was added to the existing list.¹⁴ As a result, the supreme law of the country has more clearly defined the main functional role of the Council. In addition, an important step forward in the separation of competencies between the Council and the Supreme Court was to transfer the authority of the waiver of the immunity for the first and second instance judges from the Chairperson of the Supreme Court to the Council.¹⁵

Notwithstanding the afore-mentioned positive changes, the elimination of certain gaps¹⁶ is still essential for the effective separation of competencies between the High Council of Justice and the Supreme Court.

⁷ Coalition for an Independent and Transparent Judiciary, *The Judicial System: Past Reforms and Future Perspectives*, 2017. p. 91.

Available at: http://coalition.ge/files/the_judicial_system.pdf (last viewed on 31 July 2019).

⁸ Chapters 7 and 9 discuss these issues in more detail.

⁹ Article 18 (3) (a) of the Organic Law of Georgia on Common Courts.

¹⁰ Article 64 (1), The Constitution of Georgia.

¹¹ <http://www.supremecourt.ge/statistics/> (last viewed on 21st August 2019).

¹² Article 47 (1) of the Organic Law of Georgia on Common Courts.

¹³ Article 21 (1) (d) of the Organic Law of Georgia on Common Courts.

¹⁴ Article 64 (1), The Constitution of Georgia.

¹⁵ Article 63 (2), The Constitution of Georgia.

¹⁶ Chapters 7 and 9 discuss these gaps in detail.

5. SELECTION AND APPOINTMENT OF THE SUPREME COURT JUSTICES

The independence of the judiciary, among other factors, is determined by the procedure for the appointment of judges, by the term of office and by safeguards against external influences.¹⁷ This chapter evaluates current legislative framework and the process of selection and appointment of the Supreme Court Justices.

It is advisable that the legislation provides sufficient guarantees enabling individuals who do not have any judicial experience to hold the position of the judge of the highest instance court. Strictly limiting access to the Supreme Court to candidates from lower courts could lead to the isolation of the judiciary, as opposed to being open to new thoughts and concepts, which could be brought in by legal professionals from different backgrounds.¹⁸

It has been widely recognized by international standards that appointment of the judges should be based on the merit principle.¹⁹ In addition, existing standards emphasize the significance of transparency and openness of the process. According to the Consultative Council of European Judges (CCJE), there must be total transparency in the conditions for the selection of candidates, so that judges and society itself are able to ascertain that an appointment is made exclusively on a candidate's merit and based on his/her qualifications, abilities, integrity, sense of independence, impartiality and efficiency.²⁰

In addition, according to the guidelines of the European Network of Councils for the Judiciary (ENCJ), the appointment process should be open to public scrutiny and fully and properly documented.²¹

¹⁷ E.g. Campbell and Fell v. the United Kingdom, § 78.

¹⁸ Venice Commission, CDL-AD(2018)003, 19.03.2018, § 31. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)003-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)003-e) (Last viewed on 30 July 2019).

¹⁹ Recommendation R (94) 12 of the Committee of Ministers of the Council of Europe, First Principle; CCJE Opinion No. 1 (2001), § 17.

²⁰ CCJE Opinion N10 (2007), § 50.

²¹ ENCJ, Independence and Accountability of the Judiciary, page 22. Available at: https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf (last viewed on 16 September 2019).

As part of the constitutional reform of 2017,²² the procedure for the selection of the Supreme Court judges has substantially been changed and the authority to nominate their candidacies has been granted to the High Council of Justice of Georgia.²³ Prior to the constitutional amendment, the candidacy of the Supreme Court judge was nominated to the Parliament of Georgia by the President.

²⁴ The involvement of the High Council of Justice in the selection of Supreme Court judges was the recommendation of the Venice Commission.²⁵

The constitutional amendment²⁶ also established minimum number of the Supreme Court judges and it was determined as 28 by the Organic Law.²⁷ Establishment of minimum number of judges was not founded on any study, therefore, it is obscure based on which factors and data this number was determined.

An important novelty is appointing the members of the Supreme Court for life²⁸ until they reach the age established by the organic law.²⁹ Prior to this constitutional amendment, the Supreme Court judges were appointed for a term of 10 years.³⁰

As a result of changes enforced by the constitutional reform, thorough regulation of the procedure of nominating the candidacy of a Supreme Court judge by the High Council of Justice, as well as the clear regulation of electing Supreme Court judges by the Parliament was put on the agenda. The existence of suitable legislative guarantees in the process of selection of judges is essential in order to ensure that the justice is administered by those individuals who, by their professional experience and personal characteristics, comply with the high status of a Supreme Court judge.

²² Constitutional amendment became effective on 16 December 2018.

²³ Article 61(2), The Constitution of Georgia.

²⁴ Article 90 (2) of the edition of the Constitution of Georgia, in force before 16 December 2018.

²⁵ Venice Commission, CDL-AD(2017)023, 09.10.2017, § 45. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)023-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)023-e) (Last viewed on 30 July 2019)

²⁶ Article 61 (2), Constitution of Georgia. The Venice Commission also supported the establishment of a minimum number of the Supreme Court justices by the Constitution, as an additional guarantee for the independence of the highest instance court. Venice Commission, CDL-AD (2017) 013, 19.06.2017, § 78. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)013-e)

²⁷ Article 14 (3) of the Organic Law of Georgia on Common Courts.

²⁸ Appointment for life was recommended by the Venice Commission, CDL-AD(2010)028 § 86. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)028-e) (Last viewed on 30 July 2019), See also CM/Rec (2010)12, § 49-50. Available at: <https://rm.coe.int/16807096c1> (Last viewed on 13 September 2019).

²⁹ Article 61 (2), The Constitution of Georgia.

³⁰ Article 90 (2) of the edition of the Constitution of Georgia, in force before 16 December 2018.

On 24 December 2018, the Council, without any procedure, nominated candidates, majority of which were associated with unlawful and unfair administration of justice. The Council submitted to the Parliament the list that was drawn up by several judges behind the closed doors. On 26 December 2018, following protests by different public groups, the Chairman of the Parliament postponed the process until the spring session. Subsequently, all judicial candidates withdrew their candidacy.³¹

As a result of the legislative amendment of 1 May 2019,³² the nomination and selection process of the Supreme Court judges started to be regulated by the organic law, which does not fully reflect recommendations of authoritative international organizations.³³ At the same time, it is worthwhile to mention the lack of trust towards the High Council of Justice, highlighted by the Venice Commission,³⁴ jeopardizing impartial and fair administration of the selection process of the Supreme Court judges.

³¹ Available at: http://www.coalition.ge/index.php?article_id=197&clang=1 (Last viewed on 30 July 2019)
https://idfi.ge/en/letter_to_venice_commission_and_osce_odhir_on_draft_law_on_selection_of_supreme_court_justices (Last viewed on 30 July 2019).

³² Organic Law of Georgia on the Amendment to the Organic Law of Georgia on Common Courts, 01.05.2019. Available at: <https://matsne.gov.ge/ka/document/view/4550937?publication=0>

³³ Venice Commission, CDL-PI(2019)002, 16.04.2019. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2019\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2019)002-e) (Last viewed on 30 July 2019).

OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019. Available at: <https://www.osce.org/odihr/417599?download=true> (Last viewed on 30 July 2019).

³⁴ Venice Commission, CDL-PI(2019)002, 16.04.2019. § 14; 63.

It should be highlighted that some of the respondents assess overall legislative regulation positively, however mistrust toward the High Council of Justice is identified as a main problem by them.

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Representative of Public Defender's Office: *“The issue that concerns the High Council of Justice itself should be taken into consideration. There is no trust towards this institution in Georgian reality, the trust that would, in the end, determine that the perception of the law is equally as good as the law itself.”*

Associated Professor: *“The Venice Commission, during its second onsite visit, became fully aware of gravity of the situation and realized very clearly that the High Council of Justice has no public trust or legitimacy whatsoever... Clearly, the mechanism of the Council cannot act as a proper filter due to the fact that the system of the Council is abusive - the members of the Council appointed by the Parliament who should be carrying out the function of public oversight and accountability, do not perform their obligations and are, simply, emissaries of the Parliamentary majority.”*

Judge of the Supreme Court: *“Our law is not bad, but it all depends on the individual integrity. How specific individuals apply this law, fully depends on them. All the question marks that have been raised are fair. You know, why I do not have confidence in the existing process? We are talking about the members who sent out a list written on a scrap of paper in December. As a judge and as a citizen, I have no reason to trust the Council who once submitted a ten-member list, in a rush.”*

”

5.1. SELECTION AND NOMINATION OF CANDIDATES BY THE HIGH COUNCIL OF JUSTICE



Requirements and Selection Criteria of the Supreme Court Justice

The Constitution of Georgia establishes basic requirements for the judge: A judge of a common court may be a Georgian citizen, from the age of 30, if he/she has relevant higher legal education and at least 5 years of working experience in the specialty.³⁵ According to the existing legislation, a person to be elected as a Supreme Court justice is exempt from the obligation to pass judicial qualification examination³⁶ and study in the High School of Justice.³⁷

Positive assessment should be given to the fact that existing legislation does not set an examination as an additional barrier for the candidates with no judicial experience. Examination cannot be considered as the only mean of assessing the competence. Candidates should be assessed based on clean professional record and demonstrated competence through a properly regulated and transparent selection procedures.

The Venice Commission,³⁸ as well as the Office for Democratic Institutions and Human Rights (OSCE/ODIHR),³⁹ have recommended to increase the number of years of previous professional experience in the legal field, however, the Parliament disregarded this recommendation. Given the high status of a Supreme Court Justice, the legislation should impose higher qualification requirements on him/her compared to lower instance judges. The legislation in force sets out at least five years of working experience in the specialty for the judges of all three instances, and this represents a significant gap.

In the process of selection of Supreme Court Justices, the High Council of Justice is guided by the same criteria that are used in the selection of first and second instance judges, the criteria of integrity and competence.⁴⁰ Existing legislation also defines characteristics for each of these criteria.⁴¹

³⁵ Article 63 (6), The Constitution of Georgia.

³⁶ Exempting candidates for the Supreme Court Judgeship from the obligation to pass judicial qualification examination was recommended by the Venice Commission. Venice Commission, CDL-PI(2019)002, 16.04.2019, § 22; 30.

³⁷ Article 34(1) and 34(2) of the Organic Law of Georgia on Common Courts.

³⁸ Venice Commission, CDL-PI(2019)002, 16.04.2019, § 31.

³⁹ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 15; 32.

⁴⁰ Article 34¹ (6) of the Organic Law of Georgia on Common Courts.

⁴¹ Article 35¹ (3-4) of the Organic Law of Georgia on Common Courts.

B Announcement of Competition by the High Council of Justice

According to the existing legislation, the High Council of Justice proceeds with the selection of the candidacy of a Supreme Court Justice for the nomination to the Parliament, no later than 3 months before the origination of the vacancy for a Supreme Court Justice, or no later than 1 month from the premature termination of the authority for a Supreme Court Justice.⁴² The Council announces the commencement of the selection process through the official print media body of Georgia, as well as through its official website and provides the relevant information to the Public Broadcaster and at least 2 national broadcasters.⁴³

According to the organic law, the Council establishes the application form for candidates to be filled out for the participation in the selection process.⁴⁴ The applications for the vacancy of a Supreme Court Justice can be submitted within three weeks from the commencement of the selection process.⁴⁵

By the decision of 6 May 2019,⁴⁶ the High Council of Justice approved the application form to be filled out for the participation in the selection process by the candidate that is to be nominated to the Parliament on the position of the Supreme Court Justice. The Council also approved the standard recommendation form and a special questionnaire to be used for seeking information on the candidate, and the evaluation form of the judicial candidate.

Within several days after the enforcement of the amendment to the organic law,⁴⁷ by the decision of 10 May 2019 of the High Council of Justice, the procedure commenced for the selection of candidates for the position of the Supreme Court Justice to be nominated to the Parliament.⁴⁸ This was the first case of the selection of the Supreme Court Justices by the way of competition by the High Council of Justice.

⁴² Article 34¹ (1) of the Organic Law of Georgia on Common Courts.

⁴³ Ibid.

⁴⁴ Article 34¹ (2) of the Organic Law of Georgia on Common Courts.

⁴⁵ Article 34¹ (3) of the Organic Law of Georgia on Common Courts.

⁴⁶ Available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/41-2019.pdf> (last viewed on 30 July 2019).

⁴⁷ Organic Law of Georgia on the Amendments of the Organic Law of Georgia on Common Courts, 01.05.2019.

⁴⁸ Available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/2019%20-%20gadawyvetilebebi/43-2019.pdf> (Last Viewed on 30 July 2019).



Stages of the Competition and Final Decision by the High Council of Justice

According to the organic law, the High Council of Justice decides to register a candidacy if a person meets the qualification criteria for a judge and has fully submitted the application and supporting documents.⁴⁹

The existing legislation sets out three-stage secret ballot by the Council.



THE FIRST STAGE

On the first stage, each member of the Council, secretly circles the number of candidates that shall not exceed the number of announced vacancies.⁵⁰ If the selection process is announced for 1 or 2 vacancies of the Supreme Court Justice, 3 times more candidates with the best results advance to the next stage of selection.⁵¹ If the selection process is announced for at least 3 vacancies, 2,5 times more candidates with the best results advance to the next stage. In case candidates receive equal number of votes, preference will be given to a candidate with longer work experience in the specialty.⁵²

Existing regulation of the first stage of voting jeopardizes the selection of candidates based on merit, as on this stage, the members of the Council are only aware of the fact that the candidate complies with formal requirements for the vacancy.⁵³ At this stage of the competition, members of the Council do not assess the candidate, candidates are not interviewed and the Council does not substantiate that the candidate complies with the high status of a Supreme Court judge. As a result of such procedure, the basis for moving or failing to advance to the next stage are unknown to the candidates as well as to the society. This directly contradicts with international standards that emphasize the importance of the selection of candidates based on merit⁵⁴ and full and proper documentation of the selection process.⁵⁵

⁴⁹ Article 34¹ (4) of the Organic Law of Georgia on Common Courts.

⁵⁰ Article 34¹ (7) of the Organic Law of Georgia on Common Courts.

⁵¹ Ibid.

⁵² Ibid.

⁵³ http://www.coalition.ge/index.php?article_id=204&clang=1 (Last Viewed on 30 July 2019).

⁵⁴ Recommendation of the Committee of Ministers of Council of Europe R(94)12, First Principle; CCJE Opinion N1(2001), § 17.

⁵⁵ ENCJ, Independence and Accountability of the Judiciary, page 22.

Two former judges that were interviewed also criticized the first stage of voting. According to one, such regulation sets lower standards in comparison to lower instance courts, as in the selection of first and second instance court judges, all candidates, regardless of their number, go through the same procedure. According to the second respondent, initial removal of candidates is unclear, as the contestant is only aware of the result – of how many individuals voted or did not vote for him. Setting a 2.5 coefficient limit, deriving from the quantity of candidates, and the lack of substantiation for the first removal casts a shadow over the process.



THE SECOND STAGE

According to the organic law, candidates that advance to the next stage, go through the public hearing.⁵⁶ According to the Office for Democratic Institutions and Human Rights (OSCE/ODIHR), in order to avoid bias and discrimination and to ensure fair treatment of all candidates, structured approach and the existence of standardized interview format is recommended. This will reduce the level of subjectivity during the interview and ranking processes.⁵⁷

Before the commencement of hearing, each member of the Council is provided with the information on the candidates.⁵⁸ After the completion of hearings candidates are assessed with scores.⁵⁹

After the completion of all hearings and at the earliest session, the council secretly votes for the candidates to be nominated to the Parliament for the election on the position of the Supreme Court justice, by reducing the quantity of candidates to the number of announced vacancies.⁶⁰ Candidates with best results are shortlisted for the next stage. Number of shortlisted candidates and number of vacant places is the same⁶¹ In case candidates receive equal number of votes, the preference is given to a candidate with longer work experience in the specialty.⁶²

⁵⁶ Article 34¹ (4) and (10) of the Organic Law of Georgia on Common Courts.

⁵⁷ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 62.

⁵⁸ Article 34¹ (9) of the Organic Law of Georgia on Common Courts.

⁵⁹ Article 34¹ (11) of the Organic Law of Georgia on Common Courts.

⁶⁰ Article 34¹ (12) of the Organic Law of Georgia on Common Courts.

⁶¹ Ibid.

⁶² Ibid.



THE THIRD STAGE

After publishing the list of candidates, the members of the Council vote for the nomination of candidates to the Parliament.⁶³ The candidate shall be deemed as nominated, in case, at the open session of the Council, his/her candidacy is supported by at least two-third of the full board of the Council.⁶⁴

Existing legislation does not ensure proper involvement of non-judge members in the decision-making on the nomination of candidates. In order for the Council to present the candidate to the Parliament, approval of at least two-third of the full board is required. This, considering the quantity of judge members, requires approval from only 2 non-judge members and, therefore, does not properly ensure their involvement in the decision-making.⁶⁵ It is recommended to make decision based on the opinion of 2/3 of judge members and 2/3 of non-judge members.⁶⁶

As for the secret ballot and mandatory substantiation, this study does not focus on a specific view in this regard. There are two approaches in this respect: according to the first one, after the Council substantiates the compliance of a candidate to the high status of a Supreme Court judge, open ballot and justification of a decision is not necessary. This view is focused on the consensus. According to another view, open ballot and substantiation is necessary. This viewpoint is based upon the preference to criteria-based appointment procedure. As discussed below, international standards are in favor of the latter approach.

Secret ballot contradicts with international standards in this respect, as it excludes the possibility of substantiation of decisions.⁶⁷ According to the opinion of the Venice Commission, final decision shall be made based on how each candidate has scored on the different evaluation criteria applied and not on the results of secret ballot. This seems necessary in order to convince the candidates, as well as the public, that the decision was based on the candidate's merit.⁶⁸

⁶³ Article 34¹ (13) of the Organic Law of Georgia on Common Courts.

⁶⁴ Article 34¹ (13) of the Organic Law of Georgia on Common Courts.

⁶⁵ http://www.coalition.ge/index.php?article_id=207&clang=1 (Last viewed on 31 July 2019).

⁶⁶ https://idfi.ge/ge/letter_to_venice_commission_and_osce_odhir_on_draft_law_on_selection_of_supreme_court_justices (Last viewed on 31 July 2019). This approach was supported by non-governmental organizations, the U.S. Embassy in Georgia, Delegation of the European Union, and the Council of Europe Office.

⁶⁷ Venice Commission, CDL-PI(2019)002, 16.04.2019, § 33.

⁶⁸ Venice Commission, CDL-PI(2019)002, 16.04.2019, § 52.

In addition, according to the opinion of the Office for Democratic Institutions and Human Rights (OSCE/ODIHR), clearly defined criteria should be provided at every stage of the selection process, so that, ultimately, the best candidates are appointed. The mentioned opinion emphasizes that the secret ballot undermines the merit-based selection system and the members of the Council should, instead, adopt a summary of majority justification based on the clearly defined criteria.⁶⁹ According to the same opinion, taking arbitrary decisions, based on vague criteria may ultimately result in the violation of Article 6 of the European Convention (right to a fair trial).⁷⁰ The need for the reasoned decision is also emphasized in the recommendation of the European Network of Councils for the Judiciary (ENCJ), which focuses on informing unsuccessful candidates of the reasons for the lack of their success.⁷¹

Several interviewed respondents strongly disapproved the secret ballot and assessed it as a substantial flaw in the existing legislative framework.



Representative of Public Defender's Office: *"The main problem with current organic law is that the voting is conducted anonymously, and this in many ways disrupts the process, does not make it consistent or transparent, as it may seem at a first glance."*

Former Judge, Professor: *"It does not make sense that I am obliged to take decision based on the criteria and have to vote through the secret ballot at the same time. I do understand that secrecy is kind of a protection mechanism for the members of the Council... but priding ourselves with the good criteria and having secret ballot at the same time... how does this balance out?"*

Attorney: *"I do not think secret ballots are right. Had the voting process been open, it would have been more trustworthy and we would have more confidence"*



⁶⁹ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 12; 57. Available at: <https://www.osce.org/odihr/417599?download=true> (Last viewed on 30 July 2019).

⁷⁰ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 61.

⁷¹ https://www.encj.eu/images/stories/pdf/workinggroups/encj_report_distillation_approved.pdf (Last viewed on 30 July 2019).

The abovementioned arguments are noteworthy, however, it should also be mentioned that they evaluate the existing model and not the author's proposal according to which the Council should make decision based on the opinion of 2/3 of judge members and 2/3 of non-judge members. The authors of this study do not offer unified recommendation in this regard and consider that the legislator should make a decision based on one of the conceptual viewpoints.

First secret ballot for the selection of candidates for the position of Supreme Court Judge was conducted on 20 June 2019 and 50 out of 137 candidates advanced to the next stage.⁷² According to Public Defender's assessment, first secret ballot of the Council once again emphasized the weakness of the legislative framework and revealed challenges existing in the practice.⁷³ Observation of the process of counting ballots and votes revealed that 10 out of 13 ballots were marked using the same scheme and with very high level of coincidences. This raised question marks.⁷⁴

First secret ballot was also criticized by local non-governmental organisations, according to which, if each member of the Council had voted for desired 20 candidates completely independently and without prior communication (agreement), such a precise coincidence of selected candidates would have been impossible.⁷⁵ Therefore, significant gaps in the existing legislation became evident during the first competition conducted by the Council.

D Conflict of Interest

According to the existing legislation, if a candidate for the judgeship of the Supreme Court is a member of the High Council of Justice of Georgia, he/she shall not enjoy the right to assess candidates and to vote at any stage of the process. He/she may not ask questions to the candidates either, during the hearing of the candidates by the Council.⁷⁶ In this section, the initiators of the draft law, considered the recommendation of the Venice Commission.

According to the opinion of the Venice Commission, the member of the Council, who is also a candidate for the Supreme Court Judgeship, should not be able to participate in the selection and nomination process. This approach is shared by the Office for Democratic Institutions and Human Rights (OSCE/ODIHR,); however, the later also offers an alternative to introduce legal provisions

⁷² <http://hcoj.gov.ge/kenchiskris-shedegebi/3454> (Last viewed on 5 July 2019).

⁷³ <http://ombudsman.ge/eng/akhali-ambebi/sakhalkho-damtsveli-ekhmianeba-uzenaesi-sasamartlos-mosamartleeb-is-sherchevis-mimdinare-protsess> (Last viewed on 5 July 2019).

⁷⁴ Ibid.

⁷⁵ http://www.coalition.ge/index.php?article_id=213&clang=1 (Last viewed on 29 July 2019).

⁷⁶ Article 34¹ (16) of the Organic Law of Georgia on Common Courts.

that require the said HCJ member to resign from her/his position as HCJ member before applying for judicial office.⁷⁷

Afore-mentioned opinions also address other conflict of interest situations. For instance, when a candidate is a close relative of the member of the Council,⁷⁸ or when a judge member of the Council is currently working with an applicant.⁷⁹ In both of these cases the member of the Council should be excluded from the nomination process.

In the course of the competition for the selection of the Supreme Court Judges, obvious cases of the conflict of interest were revealed. Relatives of judge members of the High Council of Justice participated in the selection process: Brother of Tamar Oniani's spouse – Zurab Aznaurashvili and brother of Irakli Shengelia's spouse – Levan Tevzadze. Despite such a clear conflict of interest, mentioned members of the Council were not excluded from the selection process⁸⁰ and this posed significant risks to objective and impartial administration of the process.

According to the Law of Georgia on the Conflict of Interest and Corruption in the Public Service, an official whose duty within a collegial body is to make decisions, with respect to which he/she has property or other interests, shall inform other members of this body or his/her immediate supervisor of this fact and shall refuse to participate in the decision-making.⁸¹ In addition, a public servant shall pay attention to any existing or possible conflict of interest and take measures to prevent any conflict of interest.⁸² This law also applies to the members of the High Council of Justice.⁸³ Therefore, the self-recusal obligation of the judges directly derived from this law.

⁷⁷ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 63.

⁷⁸ Venice Commission, CDL-PI(2019)002, 16.04.2019, § 51.

⁷⁹ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 64.

⁸⁰ http://www.coalition.ge/index.php?article_id=213&clang=1 (Last viewed on 29 July 2019).

⁸¹ Article 11(1), Law of Georgia on Conflict of Interest and Corruption in Public Service.

⁸² *Ibid*, article 13⁴ (2).






⁸³ *Ibid*, subparagraph Q of Article 2 and article 2¹ (1).

E Transparency of the Selection Process

Transparency of the selection process is of significant importance in ensuring the fair process of appointment and public trust in the judicial system. Existing legislation allows for access to some information during the course of the competition.

The Council holds individual public hearings of candidates⁸⁴ and this should be positively assessed as, publicity can promote legitimacy and credibility of the selection process.⁸⁵

According to the organic law, the following data is published on the website of the High Council of Justice:

-  the list of the applicants, their autobiographies and information on their registration as candidates;⁸⁶
-  the list of candidates who advance to the next stage;⁸⁷
-  certificate on the drug test of the candidate;⁸⁸
-  number of points gained by the candidate;⁸⁹
-  the decision of the High Council of Justice of Georgia on the candidates nominated to the Parliament of Georgia for election to the position of a judge of the Supreme Court;⁹⁰

The High Council of Justice submits to the Parliament the list of nominated candidates for the judgeship of the Supreme Court for election.⁹¹ Along with the submission, an application of the candidate and the enclosed documents, as well as the data retrieved on the basis of the information acquired by the High Council of Justice on the aforementioned candidate shall be sent to the Parliament.⁹² The data acquired as a result of background check that are related to the human health, are confidential and may not be disclosed in any form whatsoever. The aforementioned submission must include information regarding the selection process of a candidate and general information on a candidate.⁹³

⁸⁴ Article 34¹ (8) and (10) of the Organic Law of Georgia on Common Courts.

⁸⁵ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 55.

⁸⁶ Article 34¹ (4) of the Organic Law of Georgia on Common Courts.

⁸⁷ Article 34¹ (7) and (12) of the Organic Law of Georgia on Common Courts.

⁸⁸ Article 34¹ (7) of the Organic Law of Georgia on Common Courts.

⁸⁹ Article 34¹ (11) of the Organic Law of Georgia on Common Courts.

⁹⁰ Article 34¹ (13) of the Organic Law of Georgia on Common Courts.

⁹¹ Article 34² (4) of the Organic Law of Georgia on Common Courts.

⁹² Ibid.

⁹³ Ibid.

Problematic issue with regard to transparency was identified during the selection process of the Supreme Court Justices. The day after the first secret vote, several civil society organizations requested information on candidates from the Council. However, the Council first refused to disclose information about candidates, citing the obligation to protect their personal data. The refusal was based on an incorrect interpretation of the law, according to which the applicant's consent only referred to handing over his/her information (including personal data) to the Parliament of Georgia, rather than making this information public.

Following the statements made by representatives of the Public Defender's and State Inspector's offices, who emphasized the importance of publishing information on candidates for the selection process, the Council decided to issue the data on candidates shortlisted for the next stage of the competition, the interviews. The decision was made 5 days prior to the commencement of interviews, leaving insufficient time for civil society organizations for processing data on 50 candidates and eventually diminishing the importance of making this information public.⁹⁴

F Complaint Mechanism

Existing legislation allows for limited possibility for filing complaints on decisions taken by the High Council of Justice. The right to appeal is provided only to those applicants who are recognized by the Council as not eligible. In particular, a person participating in the selection process may appeal against the decision of the High Council of Justice on the registration of the candidacy to the Chamber of Qualification of the Supreme Court within two working days after the decision is published. The Chamber of Qualification shall make a decision within two working days.⁹⁵ Current legislation does not entitle the candidate to appeal his/her rejection to get nominated.

⁹⁴ http://www.coalition.ge/index.php?article_id=215&clang=1 (last viewed on 11 October 2019).

⁹⁵ Article 341 (5) of the Organic Law of Georgia on Common Courts.

In June 2019, in the course of the competition for the selection of the Supreme Court Judges, two individuals⁹⁶ filed a complaint against exclusion of candidacies on the basis of incompliance with qualification and formal requirements.⁹⁷ The Chamber of Qualification rejected these complaints.⁹⁸

International standards emphasize the importance of complaint mechanism. According to the guidelines adopted by the European Network of Councils for the Judiciary, the process for appointing judges should include independent complaint mechanism.⁹⁹ Recommendation of the Committee of Ministers of the Council of Europe also focuses on the right to appeal to an independent authority.¹⁰⁰ As noted in the opinion of the Office for Democratic Institutions and Human Rights (OSCE/ODIHR), unsuccessful candidates should have the possibility to challenge the decision of the Council, which should be subject to judicial review, at least on procedural grounds.¹⁰¹

⁹⁶ First complaint concerned the refusal of registration of a candidacy on the ground of the measure of disciplinary liability to dismiss the applicant from the position for improper performance of his duties. According to the Organic Law, a person who was dismissed from the position of judge on the grounds of disciplinary misconduct cannot be appointed as a judge. According to the Chamber of Qualification, the Organic Law does not allow for the possibility to expunge removal as a measure of disciplinary penalty, therefore, there was no ground for the annulment of the decision of the Council of the refusal of registration of the candidacy. Decision of 13 June 2019 of the Chamber of Qualification of the Supreme Court of Georgia on case Nბბჰ-02-19.

Second Claim concerned the refusal of registration of a candidacy on the ground of failing to submit documents verifying 5 years of work experience in the specialty. According to the Chamber of Qualification, documents submitted by the applicant did not comply with requirements of the law, and did not include the authorized signature, therefore the Council had rightly refused the registration of the candidacy. Decision of 12 June 2019 of the Chamber of Qualification of the Supreme Court of Georgia on case Nბბჰ-01-19.

⁹⁷ Letter of the Supreme Court of Georgia of 11 July 2019 Nმბ-401-19 and of 19 July 2019 N6ბ/85-19.



⁹⁸ Ibid.

⁹⁹ ENCJ, Independence and Accountability of the Judiciary, page 22.

¹⁰⁰ Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges, adopted by the Committee of Ministers of the Council of Europe on 13 October 1994.

¹⁰¹ OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, § 12; 37.

Unlike existing international standards, the legislation in force fails to ensure the provision of effective complaint mechanism, and this jeopardizes objective administration of the process as well as the possibility to make decisions based on the merit. In addition to the grounds foreseen by the current legislation, it is important to guarantee the possibility of appealing the decision taken by the Council as a result of the competition on the following grounds:

-  The Competition was conducted in violation of the procedure established by the legislation;
-  The information on the grounds of which the Council took its decision, is substantially false and the candidate presented relevant evidence to verify the above.

5.2. ELECTION OF SUPREME COURT JUDGES BY THE PARLIAMENT

Election of Supreme Court Judges falls under the competence of the Committee of Legal affairs of the Parliament.¹⁰² The Committee is authorized to seek/verify necessary information about the candidate of the relevant position, including the biography, work experience and professional knowledge of the candidate.¹⁰³ The Committee of Legal Affairs creates a working group in order to determine the compliance of the candidate for the Supreme Court Judge with requirements of the Constitution of Georgia and/or other legal acts.¹⁰⁴

Significant gap in existing legislation is that it does not define the composition and authorities of the working group. Namely, the Rules of Procedure of the Parliament does not precisely define functional purpose of the working group and does not envisage external experts' obligatory engagement in it. It does not define quota for the experts, Members of the Parliament and members of parliamentary opposition either.

¹⁰² Article 205 (1), The Rules of Procedure of the Parliament of Georgia.

¹⁰³ Article 205 (2), The Rules of Procedure of the Parliament of Georgia.

¹⁰⁴ Ibid.

In order to diminish the risk of biased conduct of the competition by the High Council of Justice, impartiality of the parliamentary working group is of the utmost importance. It is recommended that the Working Group is composed of independent individuals of high reputation, who will examine the completeness and accuracy of the candidate information, will request additional information from all possible sources, if necessary, and will prepare the report on each candidate and present the report to the Committee of Legal Affairs.¹⁰⁵

In September 2019 the Legal Issues Committee created a working group.¹⁰⁶ Civil society organizations were not represented in the working group, which should be negatively assessed. Moreover, the political quotas in the working group were inflated, and academic institutions were not involved in selecting their representatives.¹⁰⁷

Work performed by the working group has revealed that it did not serve substantive assessment of the candidates and was limited to performing a technical function. According to the information provided by the Parliament,¹⁰⁸ based on the reference of the working group, the Legal Issues Committee made a decision to request the following additional information/documentation about the candidates:

- a) Copies of identity documents of the judicial candidates;
- b) Information about health condition of the candidates;
- c) Information about diplomas of higher education of 18 candidates, taking into account the requirements of the law.

¹⁰⁵ https://idfi.ge/ge/letter_to_venice_commission_and_osce_odhir_on_draft_law_on_selection_of_supreme_court_justices (Last viewed on 29 July 2019).

¹⁰⁶ <http://parliament.ge/en/saparlamento-saqmianoba/komitetebi/iuridiul-sakitxta-komiteti-146/axali-ambebi-iuridiuli/iuridiul-sakitxta-komitetma-parlamentistvis-asarchevad-wardgenili-saqartvelos-uzenaesi-sasamartlos-mosamartleobis-kandidatebis-saqartvelos-kanonmdeblobis-motxovnebtan-shesabamisobis-dadgenis-xelshewyobis-miznit-komitetis-samushao-djgufi-sheqmna.page> (Last viewed on 23 October 2019).

¹⁰⁷ http://www.coalition.ge/index.php?article_id=218&clang=1 (Last viewed on 23 October 2019).

¹⁰⁸ Letter N11358/2-7/19 of 11 October 2019 of the Parliament of Georgia.

In the light of above, practical application of the provision of the Rules of Procedure and character of the work performed by the working group confirmed the necessity of clearly regulating the composition and functional purpose of the working group by legislation.

Existing legislation ensures open administration of the process by the Parliament. The Committee of Legal Affairs listens to each of the candidates on the public hearing. Candidates are heard and questioned separately.¹⁰⁹ After hearing the candidate on the committee sitting, the committee shall draw up a conclusion, including the recommendation on the candidacy for the official position.¹¹⁰ The candidate for the Supreme Court judgeship is not heard on the Plenary Sitting.¹¹¹ Voting for individual candidates is conducted separately.¹¹²

Nominating the same candidate for the Supreme Court judgeship during the term of office of the same convocation of the Parliament is allowed only twice.¹¹³

The hearing of the candidates in the Committee of Legal Affairs was transparent. The questions were related to legal issues and values, work experience and cases considered by the judge candidates in past. Certain candidates could not even answer basic legal questions. For the most part, legal argumentation skills of candidates were weak and their answers unsubstantiated. Certain candidates refused to answer the questions raised by particular persons. Some of them avoided answering the questions due to groundless reasons. Such attitude represents disrespect not only towards the Parliament, as an institution, but in general towards the process itself, and should be negatively assessed. Majority of the candidates inadequately perceive existing challenges in the judiciary, do not recognize the problems existing in the past and at present, or are not willing to talk about them. The nomination and the hearing process of the candidates once again highlighted existing problems in the judicial system.¹¹⁴

¹⁰⁹ Article 205 (3¹), The Rules of Procedure of the Parliament of Georgia.

¹¹⁰ Article 205 (4), The Rules of Procedure of the Parliament of Georgia.

¹¹¹ Article 205 (5), The Rules of Procedure of the Parliament of Georgia.

¹¹² Article 205 (6), The Rules of Procedure of the Parliament of Georgia.

¹¹³ Article 204 (6), The Rules of Procedure of the Parliament of Georgia.

¹¹⁴ http://www.coalition.ge/index.php?article_id=234&clang=1 (last viewed on 23 December 2019).

6. CHAMBERS OF THE SUPREME COURT

Since 2005 the Supreme Court of Georgia has been established as a court of cassation. The panel for criminal cases, which considered particularly grave crimes by the rule of the first instance, has been abolished. These amendments have highlighted the role of the Supreme Court as a doctrinal court, whose primary function is to interpret legal norms and establish a uniform court practice.¹¹⁵

The role of the court of cassation is to contribute to uniform interpretation of the law and establishment of unified practice. The Chambers of the Supreme Court review the cassation appeals of the decisions of Courts of Appeals and other cases falling within its jurisdiction¹¹⁶ on the basis of equality of arms and the adversarial process.¹¹⁷

Within the court of cassation, the following Chambers are formed with the aim of considering cases: Chamber of Civil Cases, Chamber of Administrative Cases, Chamber of Criminal Cases, and the Grand Chamber.¹¹⁸ Moreover, Chamber of Qualification and Chamber of Disciplinary Cases are also formed within the Supreme Court.¹¹⁹ Chambers of the Supreme Court (other than the Grand Chamber) review a case by panels composed of three judges.¹²⁰

Currently,¹²¹ there is a shortage of judges in the Supreme Court, there is only one judge in the Chamber of Criminal Cases and three judges in the Chamber of Administrative Cases.¹²² Two of these judges have extended their terms of office by a decision of the Council,¹²³ however, cases are not assigned to them, which obstructs administration of justice.

¹¹⁵ Available at: <http://www.supremecourt.ge/court-system/about-system/> (last viewed on November 11, 2019).

¹¹⁶ Organic Law of Georgia on Common Courts, Article 16, paragraph 2.

¹¹⁷ Constitution of Georgia, Article 62, paragraph 5.

¹¹⁸ Organic Law of Georgia on Common Courts, Article 15, paragraph 2.

¹¹⁹ Ibid.

¹²⁰ Ibid, Article 16.

¹²¹ As of September 2019.

¹²² Letter of the Supreme Court of Georgia Nns/73-19, dated June 26, 2019.

¹²³ Decisions N1/161 and N1/162 of the High Council of Justice of Georgia, dated July 9, 2019.

The Grand Chamber reviews a case by a Panel composed of 9 judges.¹²⁴ The Panel is composed of judges having originally reviewed the case regardless of whether they are concurrently the members of the Grand Chamber.¹²⁵ The case may be referred to the Grand Chamber for examination only when it constitutes a rare legal problem,¹²⁶ the Grand Chamber does not concur with the earlier legal assessment (interpretation of a norm) of cassation Chamber¹²⁷ or the Grand Chamber.¹²⁸

6.1. BINDING CHARACTER OF THE DECISIONS OF THE GRAND CHAMBER

In a number of civil law countries, case law has traditionally not been recognized as a binding source of law. Consequently, there has traditionally been important divergence between the common and civil law systems. The major question is the following: whether only a court of the same or a higher level can overrule a precedent, or whether every, i.e. also a lower, court can depart from the case law provided that such departure is not arbitrary.¹²⁹ In Common Law countries, decisions of higher courts serve as binding precedents. Thus, precedents are in principle binding de jure.¹³⁰ Although Georgia does not belong to Common Law system, according to the amendments of 2010¹³¹, legal interpretations (interpretation of a norm) by the Grand Chamber of the Supreme Court are binding upon the common courts of all instances.¹³²

¹²⁴ Organic Law of Georgia on Common Courts, Article 17.

¹²⁵ Ibid.

¹²⁶ Organic Law of Georgia on Common Courts, Article 16, paragraph 3, sub-paragraph “a”.

¹²⁷ Ibid, paragraph “b”.

¹²⁸ Civil Procedure Code of Georgia, Article 3911, paragraph 1, sub-paragraph “c”.

¹²⁹ CCJE opinion N20 (2017) on the role of courts with respect to the uniform application of the law, § 11.

Available at: <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3> (last viewed on July 12, 2019).

¹³⁰ CCJE opinion N20 (2017) on the role of courts with respect to the uniform application of the law, § 11.

¹³¹ Organic Law of Georgia of December 10, 2010 on amending the Organic Law of Georgia on Common Courts.

¹³² Organic Law of Georgia on Common Courts, Article 17, paragraph 5.

Regardless of whether precedents are considered to be a source of law or not, or whether they are binding or not, referring to previous decisions is a powerful instrument for judges both in common law as well as in civil law countries.¹³³ This contributes to building up the public confidence in the courts, makes the possible outcome of the case foreseeable for the citizens,¹³⁴ but such emphasis on binding character is not in compliance with the legal system of Georgia as a civil law country, and should be amended: Decisions of the Grand Chamber should not be binding upon lower instances.

According to information requested from the Supreme Court, no case has been referred to the Grand Chamber since 2016.¹³⁵ This may be due to the lack of judges. The last case which was considered by the Grand Chamber was the case of TV company “Rustavi 2”.

6.2. ADMISSIBILITY CRITERIA

There used to be three major admissibility criteria in the court of cassation according to which the cassation appeal was admissible if the case was important for the development of the law and for uniform practice, the judgment of the Court of Appeals differed from previous decisions of the Supreme Court with regard to the cases of that category or the Court of Appeals had considered the case with serious legal or procedural violations that could have affected the outcome of the case. Within the “third wave” of the judicial reform, grounds for admissibility of cassation appeals in criminal as well as civil and administrative proceedings were broadened through legislative amendments. As indicated in the explanatory note, the aim of the draft law was to strengthen the guarantees of human rights protection and increase the quality of justice.

In their conclusions on amending the admissibility criteria in procedure codes, the Venice Commission and the Directorate welcomed the efforts made by the Georgian authorities to improve the system of cassation appeals by broadening and refining the admissibility criteria¹³⁶ They consider that, if applied in an equal and a well-reasoned manner, the admissibility criteria for cassation appeals in abstracto meet the requirements of proportionality and non-discrimination.¹³⁷

¹³³ CCJE opinion N20 (2017) on the role of courts with respect to the uniform application of the law, § 10.

¹³⁴ Ibid, § 5.

¹³⁵ Letter of the Supreme Court of Georgia, Nns/73-19, dated June 24, 2019.

¹³⁶ CDL-AD(2014)030. Joint opinion on draft laws on amending the administrative, civil and criminal procedure codes of Georgia. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)030-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)030-e) (last viewed on September 12, 2019).

¹³⁷ Ibid.

Nowadays, the cassation appeal may be admitted, if it meets the following criteria:¹³⁸

- a) the case in question is a legal problem, solving of which shall promote development of the law and the establishment of uniform judicial practice;
- b) the Supreme Court of Georgia has never delivered before its decision on analogous case;
- c) It is likely, that the Supreme Court of Georgia may deliver a decision which will differ from the decision(s) delivered in the case(s) containing analogous facts;
- d) the decision of the court of appeals differs from previous decisions of the Supreme Court of Georgia with regard to the cases of this category;
- e) the court of appeals has reviewed the case with serious substantive and/or procedural violations that could have affected the outcome of the hearing;
- f) the decision of the appeal court contradicts the European Convention on Human Rights and the precedent decision(s) of the European Court of Human Rights;
- g) a second default decision of the court of appeals or a judgement of the court of appeals on confirming the default decision is being appealed;
- h) the appellant is convicted juvenile.¹³⁹

One of the primary functions of the Supreme Court is to establish the uniform judicial practice. This requires establishment of adequate and clear selection criteria for admitting cases, whereas the significance of the Supreme Court's decision goes beyond the frames of an individual case. Existence of criteria ensures adjudication of those cases which have a value of a precedent.

The recommendation of the Committee of Ministers of the Council of Europe specifies that appeals to a third instance court should be used in particular in cases which merit a third judicial review, for example, cases which may develop the law or which may contribute to the uniform interpretation of the law. They might also be limited to appeals in cases which concern a point of law of general public importance.

¹³⁸ Civil Procedure Code of Georgia, Article 391.

¹³⁹ Criminal Procedure Code of Georgia, Article 303, paragraph 1, sub-paragraph "g".

According to Georgian legislation, the admissibility of an appeal is checked by the Panel. The Panel may decide this matter without an oral hearing.¹⁴⁰ Any decision by which the court finds the cassation appeal inadmissible shall be reasoned, which shall contain explanations why the appellant's arguments in favour of admissibility have been rejected.¹⁴¹

With regard to the admissibility criteria, during the interview an acting judge of the Supreme Court said: "Based on existing criteria almost every case is admissible, and the ones which are inadmissible are substantiated to that extent that in fact a final judgment is made, which requires a lot of resources. Moreover, the number of judges decrease and the Court of Cassation has become one of the general courts, and it should be noted, that it is difficult to write decisions that are important for the development of law."

The European Court of Human Rights (ECtHR) has repeatedly held that, the introduction and application of the admissibility criteria in respect of complaints of legal issue, submitted to a court serves the legitimate aim of proper administration of justice.¹⁴² The ECtHR has noted that the Supreme Court of Georgia, unlike the courts of lower instances, does not fully examine the case, does not assess the facts and evidence; reviewing the cases by the Supreme Court is limited to certain legal issues. In such circumstances, the decision of the court of cassation with regard to the inadmissibility of the cassation appeal does not violate the requirements of the Convention. Moreover, with regard to the reasoning of the Supreme Court's decision, the ECtHR declared, that when the Court of Cassation rejects hearing of the case on the ground that there is no legal basis for hearing, the requirements of Article 6 of the Convention can be satisfied with little justification.¹⁴³ While the Georgian legislature may set higher standards than the ECHR and the case-law of the ECtHR with regard to the reasoning of the Supreme Court decisions on admissibility, this should not result into an excessive increase in the work-load of the judges and in the length of proceedings at the admissibility stage.¹⁴⁴

The filtering stage is to be regulated in such a way that it does not affect the right to a fair procedure without undue delays, by causing an excessive length of the proceedings.¹⁴⁵

¹⁴⁰ Civil Procedure Code of Georgia, Article 401, paragraph 1.

¹⁴¹ Ibid, paragraph 2.

¹⁴² As for example, Egić v. Croatia, Appl. no. 32806/09; Guérin v. France, Appl. no. 25201/94; Dobrić v. Serbia, Appl. nos. 2611/07, 15276/07.

¹⁴³ Kuparadze v. Georgia, (no. N30743/09) decision of European Court of Human Rights, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-177074%22%5D%7D> (last viewed on September 3, 2019).

¹⁴⁴ Venice Commission, CDL-AD(2014)030, § 51.

¹⁴⁵ E.g. Kudła v. Poland judgment of 26 October 2000; Frydlender v. France [GC], 27 June 2000; Zimmermann and Steiner v. Switzerland, 13 July 1983; Baraona v. Portugal, 8 July 1987.

6.3. PARTICIPATION OF JUDGES OF THE SUPREME COURT IN HEARINGS IN ANOTHER CHAMBER

The practice of the Supreme Court shows that the exercise of powers by a judge of a particular chamber in another chamber is actively used in judicial practice.

According to the practice established in the Supreme Court, under a decree of the Plenum of the Supreme Court, a judge specializing in one sphere of law is temporarily tasked to perform his/her duties in another chamber.¹⁴⁶ For example, under the decree of the Supreme Court's Plenum, certain judges were elected as members of the Supreme Court's Chamber of Civil Cases. The same decree states that the same judge shall, "if needed, temporarily tasked with the duties of a member of the Chamber of Administrative Cases, also, of a member of the Chamber of Criminal Cases, in order to participate in the consideration of cases falling under these chambers".¹⁴⁷ As a result, these judges became entitled to consider cases of all three chambers. The resolutions adopted by the Plenum of the Supreme Court are identical. They do not indicate a reason or substantiate the need for assigning a judge to another chamber. Also, they do not set a specific time frame for the judges to review the cases of other branches.

When assigning a judge to another Chamber of the same court, the Plenum of the Supreme Court should in its resolution make reference to a specific case and justify the necessity for the exercise of powers by a particular judge in another Chamber. Moreover, it is important to use this mechanism with the consent a judge.

The Supreme Court judges have similar attitude towards this issue:

“

Judge of the Supreme Court: *"I do not support it anyway. If there is a shortage of judges, the Supreme Court may request addition of a judge. Temporary imposition does not ensure quality of justice."*

Judge of the Supreme Court: *"If there is a sufficient number of judges available in the particular Chamber, the use of this institution should not be based on one's wish. This is just an exceptional case"*.

”

¹⁴⁶ Letter Np-447-19, dated April 15, 2019, Supreme Court of Georgia.

¹⁴⁷ Supreme Court of Georgia, Decree N6/pl, dated 29.10.2014.

6.4. CHAMBER OF DISCIPLINARY CASES

The Chamber of Disciplinary Cases of the Supreme Court, composed of 3 members, is elected by the Plenum of the Supreme Court for a three-year term.¹⁴⁸ Candidates for membership, including a candidate for the Chairperson, shall be nominated to the Plenum from among the Supreme Court members by a member of the Plenum.¹⁴⁹ If the Plenum fails to elect, twice in a row, a candidate, the Chairperson of the Supreme Court may appoint an acting member of the Chamber of Disciplinary Cases for not more than a six-month term until electing the member.¹⁵⁰

The Chairperson of the Supreme Court can recuse a member of the Chamber from case consideration, for the period of consideration of a particular complaint in the Chamber of Disciplinary Cases, when there are grounds for recusal.¹⁵¹ In such case, the Chairperson of the Supreme Court appoints an acting member of the Chamber of Disciplinary Cases from among Supreme Court members.¹⁵²

In order to avoid unilateral decisions by the Chairperson of the Court, in both above-mentioned cases, it is advisable to select the acting member by casting lots.

A member of the Chamber of Disciplinary Cases exercises the powers of a judge of the Supreme Court to the full extent. A member of the Chamber of Disciplinary Cases shall not be elected as a member of the High Council of Justice of Georgia.¹⁵³ This should be assessed positively, as the members of the High Council of Justice decide on bringing disciplinary proceedings against a judge, while the Chamber of Disciplinary Cases is the last instance to impose liability on a judge.

The Chamber of Disciplinary Cases considers an appeal on a decision of the Disciplinary Panel of Judges under the pre-determined procedure,¹⁵⁴ and also on a decision of the Ethics Commission of the Georgian Bar Association.¹⁵⁵ The decision of the Chamber of Disciplinary Cases is final.¹⁵⁶

¹⁴⁸ Organic Law of Georgia on General Courts, Article 19.

¹⁴⁹ Ibid, Article 19, paragraph 1.

¹⁵⁰ Ibid, Article 19, paragraph 2.

¹⁵¹ Ibid, paragraph 4.

¹⁵² Letter of the Supreme Court of Georgia, Nns/73019, dated June 24, 2019. In 2017, Nugzar Skhirtladze, a member of the Chamber of Disciplinary Cases, recused himself three times (recusal has not been declared against him). In 2018 there was no fact of self-recusal or recusal, while in 2019, Giorgi Shavliashvili recused himself once, the members, Zurab Dzierishvili and Nugzar Skhirtladze – twice (recusal has not been declared against them).

¹⁵³ Organic Law of Georgia on General Courts, Article 47, paragraph 4.

¹⁵⁴ Ibid, Article 19, paragraph 6.

¹⁵⁵ Ibid.

¹⁵⁶ Organic Law of Georgia on General Courts, Article 75⁶², paragraph 4.

In 2014-2019, the Chamber of Disciplinary Cases reviewed 27 complaints. Out of them, 3 in 2014, 4 in 2015, 5 in 2016, 6 in 2017, 2 in 2018 and 7 in 2019.¹⁵⁷

The Chamber of Disciplinary Cases dismissed all 3 complaints filed in 2014. In 2015 the Chamber did not grant appeal in 2 cases, granted appeal in 1 case and dismissed 1 complaint. In 2016 the Chamber partially satisfied 3 complaints and did not grant appeal in 2 cases. In 2017 the Chamber did not grant appeal in 1 case, partially satisfied 3 complaints and granted appeal in 2 cases. In 2018 the Chamber partially satisfied 1 complaint and did not grant appeal in 1 case. In 2019 the Chamber partially satisfied 4 complaints, did not grant appeal in 2 cases and dismissed 1 case.

6.5. CHAMBER OF QUALIFICATION

As a result of the amendments made in 2014, the Chamber of Qualification was added to the structure of the Supreme Court.¹⁵⁸ The Chamber of Qualification shall review appeals of the decisions of the High Council of Justice on refusing to appoint a judge to office for a three-year or indefinite term.¹⁵⁹

The Chamber of Qualification composed of three members shall be elected by the Plenum of the Supreme Court for a three-year term.¹⁶⁰ A member of the Chamber of Qualification may not be a judge of the Supreme Court who, at the same time, is a member of the High Council of Justice.¹⁶¹ This should be assessed positively, as the Council appoints judges, while in this process the Chamber of Qualification reviews appeals against the Council's decisions, as a result, the presence of a Council member in the Chamber of Qualification would be unjustified.

Any member of the Plenum of the Supreme Court may present to the Plenum candidates for membership in the Chamber of Qualification (including a candidate for Chairperson of the Chamber of Qualification) which are to be elected from among the Supreme Court members.¹⁶² If the Plenum of the Supreme Court fails to elect the nominated candidates twice, the Chairperson of the Supreme Court may appoint one of the members of the Supreme Court as an acting member of the Chamber

¹⁵⁷ <http://www.supremecourt.ge/court-decisions/disciplinary-cases/> (last viewed on September 20, 2019).

¹⁵⁸ Amendments made to Organic Law of Georgia on General Courts, N2645, dated: 01.08.2014.

¹⁵⁹ Organic Law of Georgia on Common Courts, Articles 35⁴, 36⁵ and 36⁶.

¹⁶⁰ Ibid, Article 19¹; paragraph 2.

¹⁶¹ Ibid.

¹⁶² Ibid, paragraph 3.

of Qualification, for not more than six months, until a member of the Chamber of Qualification is elected.¹⁶³ However, according to requested information, the Chairperson of the Supreme Court has not used its authority and has not made decision of appointing acting member of the Chamber of Qualification.¹⁶⁴

A member of the Chamber of Qualification shall be obliged to withdraw from a case hearing for the period required to review a specific appeal, if there is a ground for recusal.¹⁶⁵ In this case, the Chairperson of the Supreme Court shall appoint an acting member of the Chamber of Qualification for the period required to review the appeal.¹⁶⁶

In order to avoid unilateral decisions, in both above-mentioned cases, it is advisable to select the members of Chamber of Qualification by casting lots.

According to the organic Law, a member of the Chamber of Qualification shall be discharged by the Chairperson of the Supreme Court, with the consent of the Plenum.¹⁶⁷ The procedure of discharging the judge as a member of the Chamber of Qualification is not prescribed by the law. Therefore, necessity of a special provision for discharging the member of the Chamber of Qualification is not clear. Taking into consideration the principle of independence of judges,¹⁶⁸ he/she should be dismissed only in cases prescribed by the law.

¹⁶³ Ibid.

¹⁶⁴ Letter of the Supreme Court of Georgia, Np-447-19, dated April 15, 2019.

¹⁶⁵ Organic Law of Georgia on Common Courts, Article 19¹, paragraph 5.

¹⁶⁶ Ibid.

¹⁶⁷ Organic Law of Georgia on Common Courts, Article 191, paragraph 4.

¹⁶⁸ CCJE opinion N1(2001) on standards concerning the independence of the judiciary and the irremovability of judges. Available at: <https://rm.coe.int/1680747830> (last viewed on October 4, 2019).

To the question, whether the provision of appointing the member of Chamber by the Plenum, and the acting members by the Chairperson, is acceptable, the acting and former judges answered that there is nothing to worry in this respect.



Judge of the Supreme Court: *“Timeframes are limited, for example, in case of recusal – in the context of replacing. This is due to force-majeure circumstance”.*

Judge of the Supreme Court: *“It is used only in cases, when a permanent member is not present, for example, when being on a business trip. Waiting for the member means violation of timeframes, meaning that they have to appoint other judge instead of him/her, just for a specific case”.*



The Chamber of Qualification did not review any case in 2014-2016. It reviewed 2-2 cases in 2017-2018.¹⁶⁹ By 15th of March, 2019 the Chamber of Qualification has not reviewed any case.¹⁷⁰ One of the cases reviewed in 2017 was sent to the Tbilisi City Court within its jurisdiction, while in another case the Chamber refused to admit the case for hearing. In 2018, in one case, the Chamber of Qualification refused to admit the case for hearing and in the second case, rejected the complaint of appellant. As of November 2019, the Chamber of Qualification considered 5 complaints, out of which 3 complaints were rejected, and in 2 cases the Chamber refused to admit the case.¹⁷¹

¹⁶⁹ Letter of the Supreme Court of Georgia, Np – 447 – 19, dated April 15, 2019.

¹⁷⁰ Ibid.

¹⁷¹ Decisions of the Chamber of Qualification, available at: <http://www.supremecourt.ge/court-decisions/board-of-experts/>. (last viewed on November 25, 2019).

7. CHAIRPERSON OF THE SUPREME COURT AND CHAIRPERSONS OF CHAMBERS

7.1. PROCEDURE FOR APPOINTING THE CHAIRPERSON OF THE SUPREME COURT

International standards emphasize that the process of election/selection of presidents of the Supreme Courts should provide safeguards in order to maintain independence and impartiality of judges, and should completely rule out any possibility of political influence.¹⁷²

In 2018, after the Constitutional amendment entered into force,¹⁷³ the rule for the election of the Chairperson of the Supreme Court changed. The High Council of Justice, instead of the President of Georgia, nominates the candidacy of the Chairperson of the Supreme Court from among Supreme Court judges to the Parliament for approval. The same person may not be elected twice.¹⁷⁴

Several months after the Constitutional amendments entered into force, the amendment to the Organic Law of Georgia on the Common Courts started to regulate the procedure for the selection/election of the Chairperson and judges of the Supreme Court.¹⁷⁵ Before being elected to the office, the Chairperson of the Supreme Court shall hold the position of the Supreme Court Judge,¹⁷⁶ meaning that he/she must have gone through all the procedures associated with the new rule of the election of the Supreme Court Judge or, alternatively, must have held the position of acting judge of the Supreme Court before the enforcement of the Constitutional Amendment. The Chairperson of the Supreme Court is elected to the office for a term of 10 year, but not for more than his/her term of authority as a Supreme Court judge.¹⁷⁷

Candidate of the Chairperson of Supreme Court may be nominated by 1/5 of the total number of members of the High Council of Justice, which equals at least 3 of its members.¹⁷⁸ All candidates

¹⁷² CCJE Opinion N19 (2016) § 53.

¹⁷³ Constitutional Law of Georgia on the amendments to the Constitution of Georgia, 13.10.2017, became effective on 16 December 2018.

¹⁷⁴ Article 61, the Constitution of Georgia; article 36 (1) of the Organic Law of Georgia on Common Courts.

¹⁷⁵ On 1 May 2019.

¹⁷⁶ The Chairperson is elected from among acting judges.

¹⁷⁷ article 36 (1) of the Organic Law of Georgia on Common Courts.

¹⁷⁸ The High Council of Justice consists of 15 members ; article 64 (2) of the Constitution of Georgia.

are voted for together. Votes of at least 2/3 (no less than 10) of the total number of members of the High Council of Justice is required for the selection of the candidate.¹⁷⁹ If the afore-mentioned number of votes is not reached, the candidate with the best results shall be voted for. If candidates receive equal number of votes, preference shall be given to a candidate with more years of work experience in the specialty. A Candidate shall be considered as nominated, in case he/she receives the majority of votes of the total number of the members of High Council of Justice (this equals 8 members).¹⁸⁰ Selection of the Chairperson of the Supreme Court by the majority of the members of the Council deserves criticism, as, during the second stage of voting, non-judge members have no influence over the process and, thus, the possibility of taking consensus-based decision is excluded.

According to the Organic Law, in case, after the afore-mentioned procedures, the High Council of Justice fails to nominate the candidate of the Chairperson of Supreme Court, the nomination process shall commence all over no earlier than two weeks after the last voting.¹⁸¹

The Parliament elects the Chairperson of the Supreme Court, nominated by the High Council of Justice, by the majority of its full composition. A candidate, nominated by the Council on the basis of voting, who has failed to receive the number of votes of the Members of the Parliament of Georgia required, may be nominated to the Parliament of Georgia for election to the position of the Chairperson of the Supreme Court only twice within the authorities of one and the same convocation of the Parliament.¹⁸²

¹⁷⁹ Article 36 (1) of the Organic Law of Georgia on Common Courts.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² Article 36 (1) of the Organic Law of Georgia on Common Courts.

7.2. AUTHORITIES OF THE CHAIRPERSON OF THE SUPREME COURT

Existing legislation grants broad powers to the Chairperson of the Supreme Court. In recent years, functions and obligations of the Chair have been modified and excessive powers have been somewhat restricted, which is a step forward in ensuring the independence of judges.

As a result of amendments introduced under the ‘third wave’ of the judicial reform, the Chairperson of the Supreme Court has been deprived of the authority to nominate the composition of chambers¹⁸³ of the Supreme Court as well as their chairpersons to the Plenum for the election. Excessive authorities in the process of disciplinary proceeding have also been restricted and this should be perceived positively. Prior to the amendment, the Chairperson or the Acting Chairperson could initiate disciplinary proceeding against judges of the Supreme Court, Court of Appeals, and District (City) Courts.¹⁸⁴

Under the Constitutional reform, the Chairperson has been deprived of the authority to remove immunity of judges of district (city) courts and Courts of Appeal in criminal cases.¹⁸⁵ In addition, as a result of the constitutional amendment, the Chairperson of the Supreme Court is no longer automatically a Chair of the High Council of Justice, but remains as its ex officio member.¹⁸⁶

The key role of the Chairperson of the Court is to represent the court. Chairs contribute to the development of the whole judicial system, as well as to ensuring the maintenance and delivery of high-quality justice by their individual courts.¹⁸⁷ The high status of the Chairperson makes him an important representative of the judiciary, however, granting excessive authorities to the Chair, may actually undermine the judicial independence.¹⁸⁸

¹⁸³ Prior to the amendment enforced under the ‘third wave’, the Chairperson of the Supreme Court used to nominate candidates of the members and chairs of chambers (except the Chamber of Qualification) to the Plenum for the nomination.

¹⁸⁴ Amendments of the ‘third wave’ of judicial reform are dated as 8 February 2017; Organic Law of Georgia on the Amendments to the Organic Law of Georgia on the Common Courts N 255-III.

¹⁸⁵ Law N3262-6ლ of 21 July 2018.

¹⁸⁶ Law N3262 of 21 July 2018.

¹⁸⁷ CCJE Opinion N19 (2016) § 7.

¹⁸⁸ The Place of the Supreme Court in the Judicial System, Coalition of an Independent and Transparent Judiciary 2017. page 117. Available at: http://www.coalition.ge/files/_____.pdf (Last viewed on 30 July 2019).

The Consultative Council of European Judges (CCJE) differentiates between the representative (to represent the court and fellow judges), managerial (to ensure effective functioning of the court) and judicial functions.¹⁸⁹ Authorities and obligations of the Chairperson of the Supreme Court, as defined by the Georgian Legislation, comprise of all three directions.

Authorities of the Chairperson of the Supreme Court are assessed slightly differently by the respondents, however, the majority of them agrees that the Chair should be less burdened functionally, beyond his/her judicial activities.



Associated professor: *“The Chairperson retains functions necessary for the work of the Supreme Court. I think that is sufficient in this part.”*

Judge of the Supreme Court: *“It is good that the Chairperson of the Supreme Court is automatically no longer a Chair for the Council. This is nice and democratic. With regards to the current authorities of the Chair, I do not think that anything needs to be added to the list.”*

Attorney: *“The less the authority granted to the Chairperson of the Supreme Court and the more collegial the management, the better for individual independence of judges.”*

The Representative of Public Defender’s Office: *“Currently, the Council is the body that can speak on behalf of judicial corps... The Chairperson of the Supreme Court is the number one official of the highest instance court, the first among the equals, but this status should not be defined by additional matters. The Chair should be responsible for purely judicial matters and nothing beyond those. For anything else we have the secretary of the High Council of Justice and will also have its Chair, who will need to be elected separately.”*



Representative Authorities of the Chairperson

As mentioned previously, after the enforcement of constitutional amendments, the Chairperson of the Supreme Court is no longer a Chair of the High Council of Justice but remains as ex officio member of the Council.¹⁹⁰ Theoretically, it is still possible for the Chairperson of the Supreme Court to become the Chair of the High Council of Justice, as the Chair of the Council is being elected by the members of the Council.¹⁹¹

¹⁸⁹ CCJE Opinion N19 (2016) § 6.

¹⁹⁰ Article 64, The Constitution of Georgia.

¹⁹¹ Article 64 (2), The Constitution of Georgia.

Representing the court and fellow judges is an important function of the Chairperson of the Supreme Court. Under the existing legislation, the Chairperson, in connection with general issues of justice in Georgia, interacts, on behalf of the judiciary in the administration of justice, with other branches of state authority, the media and the population;¹⁹² The Supreme Court is the highest instance cassation court in the system of common courts. The Chairperson of the Supreme Court only leads the cassation instance and, therefore, the will of the legislator, to entrust him with the authority to interact with different bodies on behalf of the judiciary, is vague. Considering the role of the High Council of Justice in the legal system, this competence should be fulfilled by the Chair of the Council, while the Chairperson of the Supreme Court remains as a representative of the highest instance court only.

B Overall Management

The Chairperson of the Supreme Court provides overall management of the activities of the Court.¹⁹³ It is important to define what exactly is meant under the management of the Court of Cassation. Although the function of the Supreme Court is indeed to review cassation claims, ‘management’ does not imply control of judicial activities of the judges. The Chairperson should not undermine the independence of individual judges and should not supervise their activities. Judges should be free from directives or pressure from the Chairperson of the court when adjudicating cases.¹⁹⁴ Therefore, the role of the Chairperson should be limited in a sense that they do not interfere with adjudication by other judges.¹⁹⁵

Overall management should mostly imply activities derived from administrative functions of the Chair. In the Supreme Court, administrative functions between the Chairperson and the Manager of the Court are divided, although the Chairperson of the Supreme Court is the highest official of the Supreme Court. All administrative decisions in the Supreme Court are made by either the Chairperson or the individual designated by the Chair. Therefore, overall management is mainly the decision making on administrative matters of the court or the supervision of such decision-making processes.

¹⁹² Article 21 (1), subparagraph ‘d’ of the Organic Law of Georgia on Common Courts.

¹⁹³ Article 21 (1), subparagraph ‘a’ of the Organic Law of Georgia on Common Courts.

¹⁹⁴ CCJE opinion N19 (2016) § 13.

¹⁹⁵ Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia 2010, Para 11.

The Chairperson of the Supreme Court carries out general administration and monitoring of the Bailiff's Office.¹⁹⁶ The head of the Bailiff's Office is appointed and dismissed by the Chairperson of a court or the Secretary of the High Council of Justice, respectively.¹⁹⁷ Therefore, it is unclear how the supervision of the head of Bailiff's office, appointed by the Chair of other court, is carried out by the Chairperson of the Supreme Court. This issue was also considered problematic by the representative of Public Defender's Office during the interview process.

Judicial Role of the Chairperson

Chairpersons of the court are judges and, therefore, part of the judiciary.¹⁹⁸ The CCJE considers it very important that court presidents, after appointment, continue to perform as judges. A continuing practice allows chairs to ensure their continuing professionalism and also to best fulfil their organizational role through direct awareness of issues arising in daily practice. The caseload of court presidents may be reduced having regard to their managerial tasks.¹⁹⁹

The Chairperson of the Supreme Court may serve as the chairperson of one of the chambers (Chambers of Civil, Criminal or Administrative Affairs); He/she also presides over the sessions of the Plenum and the Grand Chamber of the Supreme Court and, if necessary, the sessions of the chambers of the Supreme Court;²⁰⁰

¹⁹⁶ Article 59 (2), of the Organic Law of Georgia on Common Courts.

¹⁹⁷ Ibid. article 60 (1).

¹⁹⁸ CCJE Opinion N19 (2016) § 8.

¹⁹⁹ CCJE Opinion N19 (2016) § 15.

²⁰⁰ Article 21 (1), subparagraph 'b' of the Organic Law of Georgia on Common Courts.

D The Right to Nominate Candidates for the Composition of the Grand Chamber

After the enforcement of amendments under the ‘third wave’ of judicial reform, the Chairperson of the Supreme Court has been deprived of the authority to nominate the composition and chairs of the chambers (except for the Chamber of Qualification) to the Plenum for the election. However, the Chair has retained the authority to define and nominate the composition of the Grand Chamber to the Plenum for the election.²⁰¹ It should be noted that the rule for the composition of the Grand Chamber of the Supreme Court, established by the organic law, creates excessive hierarchy between the judges of the Supreme Court and, to some extent, undermines their independence. In order to avoid the afore-mentioned risk, it is important to grant equal rights to nominate candidates for the membership of the Grand Chamber to each member of the Plenum.²⁰²

E Right to Nominate Candidates for the Election to the Constitutional Court

The Constitutional Court of Georgia is the judicial body of constitutional control and consists of nine judges appointed for a term of 10 years, out of which three judges are appointed by the President of Georgia, three judges are elected by the Parliament by a majority of at least three fifths of the total number of its members, and three judges are appointed by the Supreme Court.²⁰³

Judges to be elected at the Constitutional Court by the Supreme Court are selected by the Supreme Court Plenum, however, candidates are named exclusively by the Chairperson.²⁰⁴ Three candidates who receive two thirds of the votes of the members attending the Plenum, are considered nominated.²⁰⁵ Considering the fact that the final decision is made by the Plenum, it is unclear why the mentioned authority is granted exclusively to the Chairperson. In order to improve processes and balance unjustified excessive authorities granted to the Chairperson, it is important to grant equal rights to nominate the candidates to each member of the Plenum. Similar approach is shared by one of the interviewed former judges.

²⁰¹ Article 18 (2), subparagraph ‘a’ of the Organic Law of Georgia on Common Courts.

²⁰² Coalition for an Independent and Transparent Judiciary, *Judicial System, Past Reforms and Future Perspectives*, 2017. The Place of the Supreme Court in Judicial System, page 95.

²⁰³ Article 60 (2), the Constitution of Georgia.

²⁰⁴ Article 73 (2) of the Organic Law on Constitutional Courts of Georgia.

²⁰⁵ *Ibid.*

F**Right to Decide on the Provision of Housing to the Chairperson and Members of the Supreme Court**

Georgian legislation guarantees legal and social protection of judges. To ensure the independence of judges, the State is obliged to create dignified living and working conditions for them.²⁰⁶ The provision of the necessary living space for the judge is defined by the law and represents a social protection guarantee of judges.²⁰⁷

Granting such non-financial benefit to judges as is the provision of housing (characteristic for post-social countries, mainly) is critically assessed in the report of the Venice Commission. As noted in the report, in order to avoid broad discretion that may even undermine the independence of judges, such benefits should be replaced by an adequate level of financial remuneration.²⁰⁸

According to Georgian legislation, the provision of housing is differently regulated for the judges of the Supreme Court in comparison to those of lower instance courts. More specifically, the matter of the provision of housing for the judges of the city (district) courts and courts of appeal is decided by the High Council of Justice, while the same decision for the judges of the Supreme Court is solely made by the Chairperson of the Supreme Court. Granting such an authority to the Chairperson of Supreme Court undermines the independence of judges; transferring the mentioned authority to the collegial body (e.g. Plenum), until its full abolishment, will improve the process.²⁰⁹

For the purposes of the Study, the project team has requested information from the Supreme Court of Georgia on the number of cases of the provision of housing for judges from 2014 until now. According to the provided data, the Chairperson of Supreme Court has not taken any decision on the mentioned matter for the given time frame.²¹⁰

²⁰⁶ Article 64 of the Organic Law of Georgia on Common Courts.

²⁰⁷ Ibid.

²⁰⁸ Venice Commission CDL-AD(2010)004, 16/03/2010, §50-51, Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e) (Last viewed on 30 July 2019).

²⁰⁹ Coalition for an Independent and Transparent Judiciary, *Judicial System, Past Reforms and Future Perspectives*, 2017. The Place of the Supreme Court in Judicial System, page 95.

²¹⁰ Letter N3-447-19 of 15 March 2019 of the Supreme Court of Georgia.



Administering the Work of the Office of the Supreme Court and Making Decisions on the Matters Related to the Personnel

In the scope of the overall management, the Chairperson of Supreme Court possesses leverages of supervision over non-judicial staff. The Chairperson manages the operation of the Office of the Supreme Court²¹¹ and makes decisions on the appointment to the post (recruitment) and discharging from the post (dismissal from office) of public servants of the Office of the Supreme Court.²¹²

Administrative offices of courts are created in order to administer justice without delay, study and generalise judicial practice, analyse judicial statistics, and support any other activity of courts.²¹³

In the first instance courts and Courts of Appeal, the court managers shall, within the scope of authorities defined by the Chairperson, appoint and discharge employees of the office of court²¹⁴ (except for the head of the Bailiffs Office, a court bailiff, assistant to the judge and a secretary of the court session²¹⁵). The goal of the legislator to regulate this matter differently for the Supreme Court is vague and unclear, considering that the Chairperson of Supreme Court is more burdened with additional functions, in comparison to the chairs of other instance courts.²¹⁶ For the purposes of regulating matters related to the personnel, the Chairperson of the Supreme Court has only delegated the following authorities to the Manager of the Supreme Court: Suspend and/or renew official power and sign orders on business trips for professional public servants and individuals employed under the employment contract.²¹⁷

²¹¹ Article 21 (1), subparagraph 'e' of the Organic Law of Georgia on Common Courts.

²¹² Article 21 (1), subparagraph 'f' of the Organic Law of Georgia on Common Courts.

²¹³ Article 56 (1) of the Organic Law of Georgia on Common Courts.

²¹⁴ Article 56 (2) of the Organic Law of Georgia on Common Courts.

²¹⁵ Mentioned persons are appointed and dismissed by the Chairpersons of the first and second instances of the judiciary.

²¹⁶ As an example, the Chairperson of the Supreme Court exercises overall management and control of the activities of Bailiff's Services of the courts. Article 59 (2) of the Organic Law of Georgia on Common Courts.

²¹⁷ Order N1-b. Of 23 January 2018 of the Chairperson of the Supreme Court.

H The Right to Assign Supervisory Judge

The Chairperson of the Supreme Court designates a judge with relevant powers to issue orders for conducting operational-technical measures under the Law of Georgia on Counter-Intelligence Activities.²¹⁸ The supervisory judge also issues orders on the execution of measures of electronic surveillance²¹⁹ and individual and strategic monitoring.²²⁰

In addition to the afore-mentioned, the supervisory judge is obliged to control by electronic system and special electronic system of control, the execution of secret investigative action on the criminal case carried out via stationary technical capabilities.²²¹

7.3. SEPARATION OF POWERS BETWEEN THE CHAIRPERSON AND MANAGER OF THE SUPREME COURT

The Chairperson of the Supreme Court is the leader of the Supreme Court and administers the work of the office of the Court, while the Manager of the Court is in charge of organizational management of the court under the procedure established by the Georgian legislation. In addition to the established authorities, the Court Manager may also execute duties delegated by the Chairperson of Supreme Court.²²² According to the information requested from the Supreme Court, the Court Manager (head of office) has been delegated the authority to suspend and/or renew official powers (during the leave, temporary disability, pregnancy, childbirth or childcare leave) and sign orders on business trips for professional public servants and individuals employed under the employment contract.²²³

The position of the Court Manager was introduced to the Organic Law in July 2010. According to the explanatory note to the draft law, the introduction of effective and timely administration in the judicial system was caused by an increase in the flow of judicial cases and the delay in review of cases; by public dissatisfaction with the judicial system; by the transformation of courts from small-scale bodies into larger and stronger organizations that, in addition to the administration of justice, were

²¹⁸ Article 21 (1), subparagraph 'g' of the Organic Law of Georgia on Common Courts.

²¹⁹ Article 2, subparagraph 't' of the Law of Georgia on Counter-intelligence Activities.

²²⁰ Article 16 of the Law of Georgia on LEPL Operative-Technical Agency.

²²¹ Article 143⁴, part 3 of the Criminal Procedure Code of Georgia.

²²² Article 56 (2) of the Organic Law of Georgia on Common Courts.

²²³ Order N20-ბ, of July 13 2017, order N40-ბ of 2 October 2017 and Order N1-ბ of 23 January 2018 of the Chairperson of the Supreme Court.

entrusted with providing high quality service to the society; by the management of public finances, court documents and information technology; by communication with the media and the society and more.²²⁴ Such a workload could not be handled by judges and ‘traditional’ employees of court only and the position of Court Manager, who would, under the supervision of judges, organize and handle non-judicial matters, became necessary.²²⁵ Activities of the Court Manager and structure of the Supreme Court is defined by the Rules of Procedure of the Supreme Court Office. The Rules of Procedure is approved by Supreme Court Plenum.²²⁶

The Court Manager is appointed to the position by the Chairperson of the Supreme Court.²²⁷ The Court manager is the member of the managerial board of the Supreme Court. The work of the Court Manager is mainly related to the proper functioning of the office, as the Manager coordinates the activities of structural units of the Office, and ensures that internal regulations are being followed. The Court Manager also assumes all responsibilities related to the proper functioning of the Supreme Court.²²⁸

For the purposes of lightening administrative burdens, the majority of respondents support the delegation of authorities from the Chairperson to the Manager.



Associated Professor: *“It is indeed good to lighten administrative burdens of the Chairs, so that this is no longer the ground for not exercising their judicial functions properly.”*

Former Judge, Professor: *“Managers should have very broad authorities, technical job should be kept apart from the Court, they (the Chairs) should only focus on cases.”*

Judge of the Supreme Court: *“I see a problem today. They have to agree everything with the Chairperson and this is obscure to me. It is problematic that managers are not fully capable of making decisions.”*



Clear separation of powers between the Chairperson and the Manager is essential for lightening administrative burden and for internal institutional improvement of the Supreme Court, in general.

²²⁴ Coalition for an Independent and Transparent Judiciary, *Judicial System, Past reforms and Future Perspectives*, 2017, pages 88-89.

²²⁵ Ibid.

²²⁶ The Rules of Procedure of the Office of the Supreme Court are approved by Resolution N336-2018 of 18 January 2018 of the Supreme Court Plenum.

²²⁷ Article 1 (3) of the Rules of Procedure of the Office of the Supreme Court.


²²⁸ Right and Obligations of the Manager of the Supreme Court, Article 4 (1) of the Rules of Procedure of the Office of the Supreme Court.


7.4. APPOINTMENT OF CHAIRS OF CHAMBERS AND THEIR POWERS

Chamber of Civil, Criminal and Administrative Affairs as well as the Grand Chamber of the Supreme Court, represent courts of cassation and, under the procedure established by the Procedural Law of Georgia, review cassation claims on the decisions of the court of appeals, as well as other cases that fall under their jurisdiction, where provided and as defined by the law.²²⁹

Any Chamber of the Supreme Court (other than the Grand Chamber) considers a case by panels composed of three judges.²³⁰ The Supreme Court chambers have chairpersons, who are elected by the Supreme Court Plenum from among members of the chamber for a five-year term.²³¹ By decision of the Plenum of the Supreme Court, powers of the chairperson of a chamber may be exercised by the Chairperson of the Supreme Court.²³²

According to the information provided by the Supreme Court,²³³ from 2014 until today, the Plenum has taken two decisions with regards to the election of chairpersons of chambers:

 Mzia Todua was elected as the Chairperson of the Chamber of Civil Affairs starting from 15 June 2015.²³⁴

 Vasil Roinishvili was elected as the Chairperson of the Chamber of Administrative Affairs starting from 28 June 2017.²³⁵

With regards to the Composition of the Grand Chamber, the members of the Chambers are elected by the Plenum on the nomination from the Chairperson of the Supreme Court.²³⁶ The Grand Chamber consists of the Chairperson of the Supreme Court, chairs of other chambers and no less than 12 judges, elected by the term of 2 years.²³⁷

Chairpersons of the Supreme Court Chambers are, at the same time, deputies of the Chairperson of the Supreme Court. The First Deputy Chairperson of the Supreme Court is elected by the Plenum of the Supreme Court from among the chairpersons of the Supreme Court chambers.²³⁸ During the

²²⁹ Article 16 (1) of the Organic Law of Georgia on Common Courts.

²³⁰ Ibid. Article 16 (2).

²³¹ Ibid. Article 20 (1).

²³² Ibid.

²³³ Letter N3-447-19 of 15 March 2019 of the Supreme Court of Georgia.

²³⁴ Resolution N9/პლ, 15.06.2015 of the Supreme Court Plenum.

²³⁵ Resolution N7/პლ, 28.06.2017 of the Supreme Court Plenum.

²³⁶ Ibid. Article 18 (2), subparagraph 'a'.

²³⁷ Ibid. Article 17 (2).

²³⁸ Article 20 (3) of the Organic Law of Georgia on Common Courts.

temporary absence of the Chairperson of Supreme Court, his/her powers are exercised by the First Deputy Chairperson. If the Chairperson and the First Deputy Chairperson of the Supreme Court are absent, the powers of the Chairperson are exercised by one of the Deputy Chairpersons by the Chairperson's order.²³⁹

The legislation vaguely sets out functions of the deputy Chairpersons of the Supreme Court, other than the execution of authorities during the absence of the Chairperson of the Supreme Court. Therefore, the need for the position of the Deputy Chairperson, that creates hierarchy in the Supreme Court, is unclear.²⁴⁰

The majority of interviewed respondents assessed the position of the Deputy Chairperson as a non-essential additional title.



Former Judge, Professor: *"It is not a big necessity to have a deputy. Being a deputy means to substitute the Chairperson in his absence. However, this can be differently regulated by a special order delegating authorities of the Chairperson, in his absence, to the chairperson of one of the chambers."*

Associate professor: *"I think the position of the Deputy is not essential. It is just one of the titles without the content, separate authorities are not even defined."*

Attorney: *"It (the position of a Deputy) needs to be abolished. Historical experience reveals that this position is an extra cost and a means to exercise undesirable influence over judges."*



According to the initial draft law prepared within the scope of the "Third Wave" of the judicial reform, the position of the Deputy had to be abolished in both the Supreme Court and the lower instance courts. However, later this provision was removed from the draft law and the office of the Deputy Chairperson is still maintained.²⁴¹

In order to reduce hierarchy in the Supreme Court, it is recommended to abolish the position of the Deputy Chairperson, as vague and unnecessary. In case of a temporary absence of the Chairperson, his/her authority can be exercised by the chairperson of one of the chambers.

²³⁹ Article 21 (2) of the Organic Law of Georgia on Common Courts.

²⁴⁰ Coalition for an Independent and Transparent Judiciary, *Judicial System, Past Reforms and Future Perspectives*, 2017. The Place of the Supreme Court in the Judicial System, page 96.

²⁴¹ Ibid.

8. LIABILITY OF THE CHAIRPERSON AND JUDGES OF THE SUPREME COURT

A judge shall be independent in his/her activity. A judge shall make decisions according to the legislation and by his/her inner conviction. No one has the right to request a report from the judge, or instruct him/her as to which decision to make on a particular case.²⁴²

While most of the judges honor their profession, quite frequently, the risk arises of inappropriate and dishonest conduct in the name of independence.²⁴³ The system of liability of judges (including Chairpersons) serves the purpose of preventing dishonest conduct and ensuring proper response in case of improper and criminal conduct and failure to perform duties.²⁴⁴

An effective and foreseeable system of liability of judges, that would provide solid guarantees for the protection of independence of individual judges, is essential for ensuring accountability of the judiciary. The disciplinary liability system, on the one hand, serves the interests of protecting the authority of the judiciary system and the societal trust towards the judiciary, but on the other hand, it, in case of its misuse, also includes potential threats to become an effective tool for pressuring individual judges.²⁴⁵

8.1. IMPEACHMENT

Under the constitutional reform of 2017²⁴⁶ safeguards for the protection of Supreme Court judges were significantly strengthened. More specifically, similarly to the Chairperson of the Supreme Court, judges of the Supreme Court may only be dismissed from the position by the way of impeachment and, unlike judges of lower instance courts, their dismissal on the basis of disciplinary liability is inadmissible.²⁴⁷

²⁴² Article 7 (1) of the Organic Law of Georgia on Common Courts.

²⁴³ Robert H. Tembeckjian, *Judicial Disciplinary Hearings Should be Open*, *The Justice System Journal*, vol. 28, November, 2007. pp 419.

²⁴⁴ Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, para 69.

²⁴⁵ Coalition for an Independent and Transparent Judiciary, *Judicial System, Past reforms and Future Perspectives*, 2017, page 98.

²⁴⁶ The constitutional amendment came into force on 16 December 2018.

²⁴⁷ The amendment of 21 July 2018 to the Organic Law of Georgia on Common Courts which created the protection guarantees for the judges of the Supreme Court similar to those of the Chairperson. Article 42 (1) of the Organic Law of Georgia on Common Courts.

No less than one third of the total number of the Members of the Parliament have the right to raise the question of impeachment of the Chairperson and judges of the Supreme Court if his/her action violates the Constitution or contains signs of a crime.²⁴⁸ Only after the adoption of the relevant conclusion of the Constitutional Court of Georgia and by the majority of its full composition, is the Parliament of Georgia authorised to dismiss the Chairperson and judges of the Supreme Court.

Application of the rule of impeachment to the Supreme Court judges was positively assessed by the majority of interviewed respondents; however, one of the judges sees potential risks along with positive aspects:



Judge of the Supreme Court: *“Of course, the fact that the Council is not authorized to dismiss is a solid guarantee, but this can also undermine the reputation of the judge and portray him negatively in the eyes of the public. If you, as a judge, have 20 to 30 claims, being filed against you consistently, after much misconduct, an issue of the failure of exercising judicial authority arises.”*

Associate Professor: *“This is, of course, the guarantee for independence... Taken current context into consideration, it is clearly better that the Council is not authorized to dismiss on the grounds of disciplinary liability.”*

Former Judge, Professor: *“I consider it natural that this (impeachment) has developed in such a way. It is the same in many other countries. This determines the stability and the independence of the Supreme Court to some extent.”*

Attorney: *“The advantage is that the level of independence increases.”*



Unlike the approach of the majority of interviewed respondents, one of the lawyers sees this change negatively, as he deems it necessary for the Judge to fear disciplinary liability.

In general, such provision represents an important guarantee for the independence of the Supreme Court judges and the authors of this study assess it positively.

²⁴⁸ Article 48, the Constitution of Georgia.

8.2. DISCIPLINARY LIABILITY

It is inadmissible to dismiss the Chairperson and judges of the Supreme Court on the grounds of disciplinary liability; however, this does not exclude the possibility of imposing other kind of disciplinary measures on them. Disciplinary liability of the judges of the common court is regulated by the Organic Law of Georgia on Common Courts.²⁴⁹

Types of disciplinary misconduct, established by the Organic Law²⁵⁰ are of a very general nature, allow for a broad interpretation and create risks for influencing individual judges. More specifically, the meaning of ‘improper performance of duties’ is vague. Moreover, the violation of ethical norms as a form of disciplinary misconduct also deserves criticism because of the general punitive measure.²⁵¹

Types of disciplinary misconduct have, several times, become subject of criticism of local and international organizations. The Opinion of 2014 of the Venice Commission reiterates the recommendation on reconsidering the grounds of disciplinary liability, first included in the opinion of 2007. As noted in the conclusion, provisions should be defined in a much more precise way so that to exclude their usage for the purposes other than the real objectives of disciplinary proceedings.²⁵²

Vague and general nature of the types of disciplinary proceedings was assessed critically by the members of the professional group.



Former Judge: *“Clarity matters. It is important for a judge to know what he/she can be punished for. The goal of the authors of a disciplinary claim is to help the decision. Some file the claim beforehand to warn the judge that a sword of Damocles is hanging over his/her head. Legality is a separate issue. Most complaints concern the delay in the review process. These are important, but judge’s responsibility for such cases is low. Ambiguity raises even more questions.”*

Former Judge, Professor: *“We have to somehow formulate and say what ‘improper performance’ stands for – this needs to be known for everyone, what is its scope. Words, on their own, are too vague. Specific case should determine that this or that act is indeed an improper performance.”*



²⁴⁹ Chapter XIII¹ of the Organic Law of Georgia on Common Courts.

²⁵⁰ Article 75¹ of the Organic Law of Georgia on Common Courts.

²⁵¹ The mentioned fact was critically assessed by the Venice commission as early as in 2007.

²⁵² Venice Commission, CDL-AD(2014)032, § 27.



Attorney: *“Improper performance’ is a dangerous phrase and can be used as a means to punish judges.”*

Representative of Public Defender’s Office: *“Lack of definition is the problem. For instance, improper performance of duties... The new inspector has a nice attempt of introducing additional tests and components, such as the damage test, improper performance, what it caused, where the right was violated, public interest and more. In any case, some space for unequal approach might still be left for the Council. Speaking about how the Council can influence individual judges, one of the problematic issues is that vague grounds for disciplinary proceeding and the lack of uniform practice may cause fear in judges.”*



The draft law²⁵³ prepared within the scope of the “Fourth Wave” of judicial reform provides a concrete and exhaustive list of types of disciplinary misconduct. It does not include improper performance of duties as a type of disciplinary offence, and does not make a further reference to judicial ethics. Such amendment should be assessed positively as it is a step forward in terms of strengthening individual independence of judges. Moreover, specification of those corruption offenses that may become the basis for disciplinary liability should also be positively assessed. As of today,²⁵⁴ the draft law has not been adopted by the Parliament.

According to the Information received from the office of Independent Inspector, the Inspector has received 51 claims on potential disciplinary misconduct of Supreme Court judges since the creation of Inspector’s office until today.²⁵⁵ The Council has made decision only on 18 cases.²⁵⁶ As a result of preliminary investigation, disciplinary proceedings were terminated in 15 cases, with the motive of the lack of evidence of disciplinary misconduct, while disciplinary persecution was initiated and explanation requested from the judges in 3 cases.²⁵⁷ The latter concerned 1 case of unreasonable delay in considering a case and 2 cases of improper performance of duties by the judge. Disciplinary charge was brought against the judge in 2 of these cases, while one is still under review.²⁵⁸

According to the information provided by the Disciplinary Collegium of Common Courts of Georgia, the collegium has not heard any disciplinary case against judges of the Supreme Court of Georgia since 2014 until today.²⁵⁹

²⁵³ <https://info.parliament.ge/#law-drafting/18385> (last viewed on 15 October 2019).

²⁵⁴ October 2019.

²⁵⁵ As of 31 May 2019.

²⁵⁶ Letter N119/19/03-o of 31 May 2019 of the Independent Inspector’s Office.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Letter N15/03 of 23 May 2019 of the Disciplinary Collegium of the Judges of Common Courts of Georgia.

9. PLENUM OF THE SUPREME COURT

9.1. THE COMPOSITION OF THE PLENUM

The Plenum of the Supreme Court is composed of the Chairperson of the Supreme Court, the First Deputy Chairperson and the Deputy Chairpersons of the Supreme Court, the members of the Supreme Court and the Chairpersons of Courts of Appeals.²⁶⁰

The presence of every member of the Supreme Court in the composition of the Plenum is welcomed as this ensures high level of self-governance in the Supreme Court.²⁶¹ However, considering the fact that the plenum exercises administrative authorities in the highest instance only and not in the whole judicial system, the presence of Chairpersons of Courts of Appeal does not comply with the place and role of the Supreme Court in the judicial system.²⁶²

The majority of interviewed respondents criticized the presence of Chairpersons of Courts of Appeals in the Plenum of the Supreme Court. According to them, the Plenum is the unity of judges of the Supreme Court, which has internal competencies only and makes decisions on matters related to the Supreme Court and not to the entire judicial system. Therefore, the role of Chairpersons of Courts of Appeals in the Plenum is totally unclear.



Representative of Public Defender's Office: *"We have a separate body since the creation of the Council. The Plenum, of course, has internal competencies only and the role of the participation of Chairpersons of Courts of Appeals in relation to these competencies is unclear."*



Unlike the approach of the majority of respondents, one of the judges of the Supreme Court thinks that such regulation promotes transparency and the presence of the Chairpersons of Courts of Appeals in the composition of the Plenum does not bring any harm.

²⁶⁰ Article 18 (1) the Organic Law of Georgia on Common Courts.

²⁶¹ Coalition for an Independent and Transparent Judiciary, 'The Judicial System: Past Reforms and Future Perspectives' (2017), page 93.

²⁶² Coalition for an Independent and Transparent Judiciary, 'The Judicial System: Past Reforms and Future Perspectives' (2017), page 93.

Minutes of sessions provided by the Supreme Court²⁶³ reveals that 5 out of 14 public sessions of the plenum, conducted since 8 February 2017 until today, were attended by the Chairperson of Kutaisi Court of appeals and none was attended by the Chairperson of Tbilisi Court of Appeals.

It is worth noting that in the first draft of the 'third wave' of judicial reform, Chairpersons of Courts of Appeal were not included in the composition of the Plenum and such provisions were positively assessed by the Venice Commission²⁶⁴ but were not reflected in the draft law in the end.

Presence of Chairpersons of Courts of Appeals in the composition of Supreme Court Plenum is also problematic in a sense that the Chairs are being appointed by the High Council of Justice through a vague and non-transparent procedure,²⁶⁵ and this promotes the perception of the Chairperson as a controller. The legislation does not define criteria and clear process for the selection of the Chairperson. In addition, it has been years already that administrative positions in the courts are held by the same judges. Unlimited authority of the Council in the process of appointing Chairs is also problematic in a sense that it creates excessive power of the Council as well as risks for influencing individual judges. It has been recognized that potential threats to the independence of the judges may arise from within the hierarchy of the judicial system, as judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence which might in some situations come from the attitude of other judges.²⁶⁶

Excessive powers of Chairpersons of courts of Georgia have become subject of criticism number of times.²⁶⁷ Against this background, the presence of Chairpersons of Courts of Appeals in the Plenum of the Supreme Court increases their power and influences in the judicial system even more.

²⁶³ Letter N06-401-19 of 11 July 2019 of the Supreme Court of Georgia.

²⁶⁴ Venice Commission, CDL-AD(2014)031, 14.10.2014.

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)031-e) (Last viewed on 30 July 2019)

²⁶⁵ It is noteworthy that the initial version of the draft law drafted under the 'Third wave' of the judicial reform provided for the election of the Chairpersons of the First instance court and Court of Appeals on the basis of secret ballot by the judges of same courts, and this was assessed positively by the Venice Commission. Venice Commission, CDL-AD(2014)031, 14.10.2014, § 84.

²⁶⁶ CCJE Opinion N1(2001), § 66.

²⁶⁷ Available at: <https://www.oecd.org/corruption/acn/OECD-ACN-Georgia-Progress-Update-2018-ENG.pdf> (Last viewed on 30 July 2019)

9.2. RIGHTS AND OBLIGATIONS OF THE PLENUM

Under the existing legislation, the Supreme Court Plenum makes decisions on important matters of the management and administration of the Supreme Court, such as electing members of the Chambers, approving Rules of Procedure of the Supreme Court, etc. Its rights and obligations are regulated by Organic Law²⁶⁸ in detail.

Several interviewed respondents emphasize the significance of Plenum, as the collegial body, in balancing authorities of the Chairperson of the Court.

“

Judge of the Supreme Court: *“Authorities of the Chairperson are limited by authorities of the Plenum. The existence of the institution of Plenum is good and optimal. The Plenum and not the Chairperson solely, takes decisions on key issues concerning its work.”*

Former judge, Professor: *“The function of the Plenum, as of the collegial body, is to assist the Chairperson in managerial functions.”*

Judge of the Supreme Court: *“It is an important body. It is, in fact, self-administration of the Supreme Court. It balances the Chairperson, to some extent, and this is important.”*

”

Plenum is an important self-governing body which should ensure that every judge of the Supreme Court has the power to influence the process of running the Supreme Court and be involved in decision-making process. Despite an important role of the Plenum, as of the collegial body, existing legislation entrusts it with competencies that are non-compliant with its main functional role. It is necessary to define scope of authority of the Plenum in a way that is in compliance with the role of a self-governing body.

²⁶⁸ Article 18 of the Organic Law of Georgia on Common Courts.

A

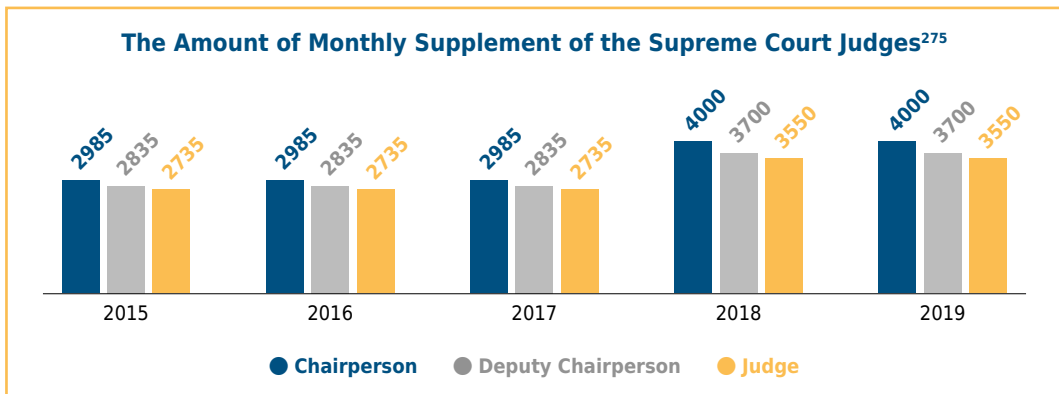
Determining the Amount of a Monthly Supplement to the Official Salary of the Member of the Supreme Court

According to the existing legislation,²⁶⁹ the Plenum may within funds allocated for the Supreme Court from the State Budget of Georgia, determine the amount of a monthly supplement to the official salary of a member of the Supreme Court;

It is noteworthy that, according to 2017-2021 Judicial Strategy,²⁷⁰ salaries of judges (including supplement) should be fixed by the law. The amount of the official salary of judges of common courts is defined by the Organic Law²⁷¹ and this should be assessed positively, however, determining a monthly supplement to the official salary of the Supreme Court judges by the Plenum, involves discretionary elements.

According to the recommendations formulated after the assessment of the fourth stage of anticorruption reforms,²⁷² any discretionary payments should be excluded from judicial remuneration and this is essential for ensuring the independence of the judiciary. Similarly, the Venice Commission deems it necessary to gradually abolish the benefits that contain discretionary elements.²⁷³

The amount of monthly supplement of the Supreme Court judges for the years of 2015 – 2019²⁷⁴ is reflected on the below chart:



²⁶⁹ Article 18 (2), subparagraph j, of the Organic Law of Georgia on Common Courts.

²⁷⁰ § 1.1.6 and 2.3.2; Available at: <http://hcoj.gov.ge/ge/162-2017> (Last viewed on 30 July 2019).

²⁷¹ Article 69 (2) of the Organic Law of Georgia on Common Courts.

²⁷² Recommendation 12.7. Available at: <https://www.oecd.org/corruption/acn/OECD-ACN-Georgia-Round-4-Monitoring-Report-ENG.pdf> (Last viewed on 30 July 2019).

²⁷³ Venice Commission, CDL-AD(2010)004, § 51.

²⁷⁴ Letter N3-447-19 of 15 March 2019 of the Supreme Court of Georgia.

²⁷⁵ The supplement of the First deputy Chairperson of the Supreme Court as of 2019 amounts to GEL 3800.

Despite the fact that the amount of monthly supplement for 2015-2019 is homogenous for the relevant positions of judges (the Chairperson, Deputy Chairperson, judge), such an authority of the plenum still contains risks of undermining judicial independence. Furthermore, as the Plenum's freedom in making such decisions is not restricted by the law and the judges determine their own monthly supplement, this constitutes a broad discretion which poses the risk of corruptive practices. It is important to deprive the Plenum of the authority to determine the amount of monthly supplement and to regulate the remuneration of judges (including the supplement to the official salary) at the legislative level only.

B The Right to File Constitutional Submission

If during the hearing of a particular case the court infers that there is a sufficient basis to believe that a law or any other normative act to be applied by the court in deciding the case may be deemed incompatible, in full or in part, with the Constitution of Georgia, it shall suspend the hearing and apply to the Constitutional Court of Georgia. The hearing shall be resumed after the Constitutional Court of Georgia has made a decision on the matter.²⁷⁶

In addition to individual judges, the existing legislation grants to the Plenum the authority to file constitutional submission. With regard to a particular case and generalization of precedents the Plenum may file a submission to the Constitutional Court of Georgia on the compatibility of a normative act with the Constitution of Georgia.²⁷⁷

Considering that the Plenum does not administer justice and consider cases, the right to file constitutional submission does not comply with its role and functions. Such authority should be granted only to the courts. According to the information provided by the Supreme Court, since 2014 until today, the plenum has not filed a submission to the Constitutional Court on the compatibility of normative acts with the Constitution of Georgia.²⁷⁸ According to the Judge of the Supreme Court, such submission in real practice is exercised by the Chamber. This happens during the proceeding and granting this authority to the Plenum is not right. Such regulation represents a gap of the legislation and this function of the plenum has never been used.

Therefore, it is recommended to eliminate the mentioned gap and deprive the Plenum of this authority.

²⁷⁶ Article 7 (3) of the Organic Law of Georgia on Common Courts. Article 19 (2) of the Organic Law on Constitutional Court of Georgia.

²⁷⁷ Article 18 (2), subparagraph 'd' of the Organic Law of Georgia on Common Courts.

²⁷⁸ Letter N3-447-19 of 15 March 2019 of the Supreme Court of Georgia.



Publishing Annual Report on the State of the Judiciary

The Supreme Court Plenum is authorized to prepare and publish annual report on the state of the judiciary in Georgia.²⁷⁹ However, existing legislation does not specify what information should be included in the mentioned report.

2018 report of the Supreme Court of Georgia on the state of the Judiciary was published in 2019.²⁸⁰ The main part of the report analyses the uniform practice of the Supreme Court considering the state of Georgian judiciary. It includes information on the usage of legislative norms, interpretation and observance of procedural rules in lower instance courts and important decisions made by the chambers of civil, administrative and criminal affairs of the Supreme Courts taken in 2017-2018.

Information provided in the mentioned report complies with the main role and function of the Supreme Court. However, it is noteworthy that annually the Supreme Court also publishes main statistical data of common courts. At the same time, reviewing analysis of judicial statistics is one of the functions of the High Council of Justice.²⁸¹ Considering that ensuring the quality and efficiency of justice is the obligation of the Council,²⁸² functions of the Council and the Supreme Court are duplicated in this respect.²⁸³ Taking its functional role into consideration, the Council should be the body that processes the statistical data of common courts and inform the public on the state of the system.

²⁷⁹ Article 18 (2) subparagraph 'l' of the Organic Law of Georgia on Common Courts.

²⁸⁰ <http://www.supremecourt.ge/news/id/1936> (Last viewed on 30 July 2019).

²⁸¹ Article 49 (1) subparagraph 'f' of the Organic Law of Georgia on Common Courts.

²⁸² Article 47 (1) of the Organic Law of Georgia on Common Courts.

²⁸³ Coalition for an Independent and Transparent Judiciary, 'The Judicial System: Past Reforms and Future Perspectives' (2017), page 116.

D**Protecting and Strengthening Institutional Independence of the Judiciary and Ensuring Independence of Judges**

Under the existing legislation, the plenum shall protect and strengthen institutional independence of the judiciary as one of the equal branches of state authority, and ensure the independence of judges.²⁸⁴ Such provision of the organic Law reflects duplication of competencies between the Plenum and the High Council of Justice as ensuring the independence of common courts is also one of the basic functions of the Council.²⁸⁵ The Plenum is a self-governing body composed of all the judges of the Supreme Court; therefore, its power should not go beyond the Supreme Court.

In the interview process, the former judge/professor noted that this is an excessive function for the Plenum, as the Council is more important in this respect. However, one of the judges of the Supreme Court thinks that, in this case, functions are not duplicated, as the Council ensures the independence of lower instances. According to him, the functions are the same but with respect to different bodies.

The Supreme Court is the highest and the last instance court of cassation for the administration of Justice throughout the whole territory of Georgia, which, under the established procedure supervises the administration of justice in the common courts.²⁸⁶ Therefore, taking the functional role of the Supreme Court into consideration, ensuring the institutional independence of the judiciary and independence of judges should not fall under the competence of the Plenum, as, according to the Constitution of Georgia, this is the obligation of the High Council of Justice,²⁸⁷ which is justified by the international standards in this respect. According to the Consultative Council of European Judges, the Council for the Judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges - structural requirement of a state governed by the rule of law.²⁸⁸

²⁸⁴ Article 18 (3) subparagraph 'a' of the Organic Law of Georgia on Common Courts.

²⁸⁵ Article 64 (1) of the Constitution of Georgia.

Article 47 (1) of the Organic Law of Georgia on Common Courts.

²⁸⁶ Article 14 (1) and 14 (2) of the Organic Law of Georgia on Common Courts.

²⁸⁷ Article 64 (1) of the Constitution of Georgia.

²⁸⁸ CCJE Opinion N10 (2007), § 8.

9.3. TRANSPARENCY OF THE ACTIVITIES OF PLENUM

The Plenum is convened as necessary, but at least once a year. The plenary session is called by the Chairperson of the Supreme Court on his/her initiative or by request of at least one fifth of Plenum members.²⁸⁹

Under the amendments enforced as a result of ‘third wave’ of the judicial reform,²⁹⁰ the transparency of the activities of Plenum has increased and sessions of the Plenum, as a rule, have become public, as defined by the law. 15 Plenum sessions have been held after the enforcement of the mentioned amendment.²⁹¹

Existing legislation does not obligate the plenum to publish its decisions, which represents a significant gap. This problem is being emphasized by several interviewed respondents. However, one of the acting judges thinks that publishing requires additional human resource and does not consider extra expenditure right for this purpose.

Despite the fact that the decisions²⁹² and minutes²⁹³ of Plenum are, as public information, accessible upon request, in order to increase the transparency of Plenum activities it is recommended to proactively publish the decisions on the website of the Supreme Court.

²⁸⁹ Article 18 (5) of the Organic Law of Georgia on Common Courts.

²⁹⁰ The amendment of 8 February 2018 to the Organic Law of Georgia on Common Courts.

Available at: <https://matsne.gov.ge/ka/document/view/3536739?publication=0#DOCUMENT:1> (Last viewed on 11 May 2019).

²⁹¹ Letter №6-401-19 of 11 July 2019 of the Supreme Court of Georgia.

²⁹² Letter №3-447-19 of 15 March 2019 of the Supreme Court of Georgia.

²⁹³ Letter №6-401-19 of 11 July 2019 of the Supreme Court of Georgia.

10. ELECTRONIC SYSTEM OF CASE DISTRIBUTION IN SUPREME COURT

An open procedure for distributing cases among judges is one of the main factors for determining the transparency and independence of the court. This ensures more or less balanced and equal workload of judges, as well as eliminates the corruption risks and ensures maintaining confidence in the judicial system.

Taking into consideration this principle, also to reduce the role of the Chairperson in distribution of cases, within the scope of the “Third Wave” judicial reform, distribution of cases via the electronic system was introduced. The Venice Commission positively assessed the initiative of electronic case distribution; however, the Commission recommended that the rules on the functioning of the electronic system as well as principles to be used during temporary disruption of the system should be determined by the law. In case of an electronic case distribution system, the rules under which the system operates must be clear and their proper use should be verifiable.²⁹⁴

Legislative amendments within the frames of the “Third Wave” judicial reform determined that cases shall be distributed between judges of a district (city) court, a court of appeals and the Supreme Court automatically, with an electronic system, by adhering to the principle of random distribution.²⁹⁵ The Law also determined that, in case of temporary disruption of the electronic system for automatic distribution of cases, they may be distributed between judges, based on the numerical order of cases received and the alphabetical order of judges,²⁹⁶ if electronic system failure exceeds 2 days, except for administrative cases which must be heard immediately, also those cases which must be considered in 24, 48 or 72 hours.²⁹⁷

The current edition of the Organic Law does not include the fair and objective principle of case weight as a criterion for equal distribution of cases and distributes the cases based only on a quantitative indicator, which is a significant shortcoming.

²⁹⁴ CDL-AD(2014)031, 14.10.2014. available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdf_file=CDL-AD\(2014\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdf_file=CDL-AD(2014)031-e) (last viewed on: June 6, 2019).

²⁹⁵ Organic Law of Georgia on Common Courts, Article 58¹.

²⁹⁶ Ibid.

²⁹⁷ Rule for distributing cases between the judges of Common Courts automatically using the electronic system adopted by the High Council of Justice, Article 6, paragraph 3. available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/konsolidirebuli%20gadackvetilebebi/1-56.pdf> (last viewed on July 11, 2019).

By the decision of May 1, 2017, the High Council of Justice of Georgia approved the procedure for automatic electronic distribution of cases in Common Courts of Georgia, according to which, the cases between judges are distributed according to the principle of random distribution, on the basis of the algorithm for generating numbers.²⁹⁸ The principle of random distribution implies the transfer of the cases to an automatically selected panel/chamber/narrow specialization judge.²⁹⁹

According to amendments made on July 24 2017, the cases in Court of Cassation were distributed to the Chairperson of the hearing/reporting judge and to the corresponding Chamber.³⁰⁰ According to the current regulation, the case is distributed to the Chairperson of the hearing/reporting judge.³⁰¹ The Act does not additionally provide procedure for selection of the other two members of the Chamber. Under these circumstances, there is a high risk of composing panel arbitrary, beyond legal regulation. Moreover, as a result of individual interviews with judges of the Supreme Court, it has been revealed that the predetermined panel does not exist at the Supreme Court.

As a result of interviews with the acting judges of the Supreme Court, different views were revealed regarding selection of the other two judges of the Panel:



Judge of the Supreme Court: *"I am not for the pre-determined panels, and I see risks in it. It is most likely to be in lower instances, but in Supreme Court maximum three panels shall exist in each Chamber. This is not necessary to be the defined panel. Nowadays, the reporting judge makes decision on composition of its panel... From my perspective, if anyone will compose panel for me, I may be always in minority and in such circumstances, it is very difficult to fulfil your tasks. It would be better to be determined by the program."*

Judge of the Supreme Court: *"Yes, it is distributed, it will be distributed to one of us, and the rest is composed by me. I see the risks in electing other judges by electronic means."*



²⁹⁸ Ibid, Article 2, paragraph 1.

²⁹⁹ Ibid, paragraph 2.

³⁰⁰ Decision N1/243 of the High Council of Justice of Georgia, available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/243-2017.pdf>; (last viewed on July 11, 2019).

³⁰¹ Ibid.



Judge of the Supreme Court: *“It does not matter whether the computer distributes the cases or the person, when the panel is composed of three judges. The sum does not change by replacing addends. The benefit in this case is zero. In case of bigger number, there will be difference. I do not see anything opposite to it. One thing is that we are human beings... For example, 6 judges are sitting and there is your cousin and I am the reporting judge, as a rule, the three of us make decision. There is no legal basis for recusal, as it does not directly fit in the criteria of relatives in ascending-descending line. Therefore, you should recuse yourself, and then another judge should be selected. This affects the time for the review. Therefore, the only negative thing is that, you avoid such formalities.”*



Distributing a case solely to the reporting judge when reviewing the case by Panel, raises the risk of artificial interference in the process, especially considering that a Panel of judges makes decision by a majority of votes. Therefore, the distribution of cases only to the reporting judges, contradicts the aim of random distribution of cases.

As for the hearing of cases by the Grand Chamber of the Supreme Court, in this case the electronic system, in addition to the judges initially hearing the case and the Chairperson of the hearing/reporting judge, additionally selects the proper number of judges from the Grand Chamber.³⁰²

The role of the Chairpersons in the process of case distribution is still problematic in the current rule. The Chairperson of the Court, the Deputy Chairperson or the Chairperson of the Panel/ Chamber are entitled to monitor the number of cases distributed to judges through the electronic system.³⁰³ The Chairperson of the Court is also entitled to increase or decrease the percentage of the workload of judges.³⁰⁴

Previous version of the rule provided that in the event of a temporary disruption of the electronic system, the Chairperson could distribute cases in sequential order, which means the distribution of cases among the judges according to the order of entry of cases and the alphabetical order of the surnames of judges.³⁰⁵ Later this power was granted to the person authorized by the chancellery

³⁰² Rule for distributing cases between the judges of Common Courts automatically using the electronic system adopted by the High Council of Justice, Article 4.

³⁰³ Ibid, Article 6, paragraph 1.

³⁰⁴ Ibid, Article 5, paragraph 8.

³⁰⁵ Rule for distributing cases between the judges of Common Courts automatically using the electronic system adopted by the High Council of Justice on May 1, 2017, Article 6, paragraph 2. Available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/56-2017.pdf> (last viewed on October 4, 2019).

of the Court,³⁰⁶ which should be assessed positively to some extent. However, in the light of the abovementioned regulation, the rule does not properly ensure elimination of the risk of artificial manipulation in the process of case distribution. According to information received from the Council, there was no disruption of the electronic system at the Supreme Court and consequently none of the cases were distributed without electronic registration.³⁰⁷

During individual interviews, one of the attorneys paid attention to improper regulation of the recusal system and to some extent unsubstantiated recusals, which increase the risk of artificial intervention in the electronic system. According to the procedural law, in case of recusal or self-recusal the judge refers the case to the Chairperson of the court, who will assign it another judge for consideration. Procedure and time frame for re-assigning the case is obscure as the rule established by the Council refers to the general article of case allocation in case of recusal/self-recusal.

According to information received from the Council, from January 1, 2018 to September 04, 2019, 8002 cases were distributed in the Supreme Court through the electronic system, out of which 7140 cases were allocated randomly,³⁰⁸ 3 - by direct distribution³⁰⁹ and 859 by default.³¹⁰

According to the rule adopted by the Council, as a rule,³¹¹ the cases are not distributed to judge during the last 2 months before the expiry of the term of office. This rule shall not apply if there are fewer than three judges in the relevant Chamber of the Supreme Court.³¹² Also, the rule provides certain privileges for those who hold administrative positions. For example, in exceptional circumstances, the cases may be distributed on the Chairperson and the Deputy Chairperson of the Supreme Court of Georgia, usually not more than 5%, except the cases directly under the specific jurisdiction.³¹³ However, according to the information received and due to the lack of judges, the workload of each judge of the Supreme Court is quite high.³¹⁴

³⁰⁶ Decision N1/1 of the High Council of Justice, 8 January 2018, available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/1-2018.pdf>; (last viewed on October 4, 2019).

³⁰⁷ Letter N1005/3175-03-o of the High Council of Justice of Georgia, dated: 12.09.2019.

³⁰⁸ Ibid.

³⁰⁹ Which implies the circumstances set forth in paragraphs 2-9 of Article 3 of the rule for distributing cases between the judges of Common Courts automatically using the electronic system.

³¹⁰ Which implies the circumstances set forth in paragraph 1 of Article 3 of the rule for distributing cases between the judges of Common Courts automatically using the electronic system.

³¹¹ Except for the civil, administrative and criminal cases consideration of which does not exceed 72 hours.

³¹² Rule for distributing cases between the judges of Common Courts automatically using the electronic system adopted by the High Council of Justice, Article 4, paragraph 14¹.

³¹³ Ibid, Article 5, paragraph 7.

³¹⁴ Letter N1005/3175-03-o of the High Council of Justice of Georgia, dated: 12.09.2019.

RECOMMENDATIONS

- It is important to abolish secret ballot in the selection process of the Supreme Court judges, and for the High Council of Justice to take reasoned decision regarding the compliance of a candidate with the high status of a Supreme Court judge;
- It is recommended to define the composition of the working group of Legal Affairs Committee by the legislation, to ensure the involvement of external independent experts and to clearly formulate the rights and obligations of the working group in the process of assessing candidates for the judgeship of the Supreme Court;
- Provision of the Organic Law, authorizing the High Council of Justice to nominate the candidacy of the Chairperson of the Supreme Court by the majority of its full composition during the second vote, should be abolished. In case the decision is not made by 2/3 majority during the second vote, the High Council of Justice should restart the nomination process;
- The exclusive right of the Chairperson of the Supreme Court to nominate the composition of the Grand Chamber to the Plenum, as well as the candidacy of judgeship of Constitutional Court should be abolished and each member of the Plenum should be given right to nominate the mentioned candidates;
- The provision of the Organic Law authorizing the Chairperson of the Supreme Court to interact with other bodies on behalf of the judiciary should be abolished and the competence of the Chairperson should be limited to the representation of cassation instance;
- The sole authority of the Chairperson of the Supreme Court to decide on the provision of housing to the judges of the Supreme Court should be abolished and transferred to the Plenum;
- In order to lighten administrative burden of the Chairperson of the Supreme Court, it is recommended to effectively separate administrative functions of the Chairperson and the Manager;
- In order to reduce hierarchy of the Supreme Court, it is recommended to abolish the vague and unnecessary administrative position of Deputy Chairpersons. In case of a temporary absence of the Chairperson, his/her authority should be exercised by the chairperson of one of the chambers;

- Legislation should obligate the Supreme Court's Plenum to indicate a concrete case in its decree when assigning a judge to another Chamber of the same court, and to substantiate the necessity of exercising power by a particular judge in another Chamber. Moreover, it is important to use this mechanism with the consent of a judge;
- Taking internal competencies of the Supreme Court Plenum into consideration, it is important to remove Chairpersons of Courts of Appeals from its membership;
- The authority of the Plenum to determine monthly supplement to the official salary of the member of the Supreme Court should be abolished and the mentioned matter should be regulated at a legislative level;
- The authority of the Plenum to file a submission to the Constitutional Court on the compatibility of normative acts with the Constitution of Georgia should be abolished, as the plenum does not consider cases and does not administer justice;
- The obligation to publish main statistical data of common courts should be entrusted to the High Council of Justice, as to the body responsible for ensuring the quality and efficiency of justice;
- The obligation of the Plenum to protect and strengthen institutional independence of the judiciary and ensure independence of judges should be abolished, as the mentioned obligations already represent the constitutional function of the High Council of Justice;
- In order to improve the transparency of the activities of the Plenum, it is recommended to proactively publish decisions of the Plenum on the website of the Supreme Court;
- The rule adopted by the High Council of Justice should be amended and the procedure for selecting all three judges by electronic system, in accordance with random allocation rule should be established in the Supreme Court.

