



# MONITORING REPORT OF THE HIGH COUNCIL OF JUSTICE N6

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# TABLE OF CONTENTS

<b>I. Executive Summary</b>	6
<b>II. Methodology</b>	8
<b>1. Unbalanced Power of the Dominant Group of Judges in the New Composition of the Council</b>	9
1.1. Changes to the Composition of the Council	9
1.2. Suppression of Critical Opinion	12
1.3. Reduction of Civil Society Involvement	14
1.4. Necessity for Normative Regulation of the Council Activities	15
<b>2. Management and Transparency of the Council Activities</b>	17
2.1. Proactive Publication of Session Related Information	17
2.2. Management and Preparation of Sessions	19
2.3. Publication of Session Minutes and Decisions	21
2.4. Recording and Media Coverage of Sessions	22
2.5. Financial Transparency of the Personnel and Members of the Council	23
2.6. Publicly Inaccessible Information	24
<b>3. Substantiation of Council Decisions</b>	27
3.1. Selection and Appointment of judges	27
3.2. Admission to the High School of Justice	39
3.3. Problems of judicial specializations, transfers, reappointment of judges without competition	39

#### **4. Challenges related to Internal Independence of the**

<b>Judiciary and the Practice of Appointing Court Chairs</b>	43
4.1. Review of Legislation	43
4.2. Appointment and Dismissal of Court, Panel, Chamber Chairs and Acting chairs	45
4.3. Powers of Court Chairs as foreseen in the rule on electronic case allocation adopted by the Council	49
<b>5. Disciplinary Responsibility of Judges</b>	51
5.1. Legislation Regulating Disciplinary Proceedings and an Independent Inspector Mechanism	51
5.2. Evaluation of the Inspector's Selection and Appointment	52
5.3. Analysis of Statistical Data on Disciplinary Proceedings	54
5.4. Statistics after the Appointment of an Independent Inspector	55

# I. EXECUTIVE SUMMARY

Monitoring of the High Council of Justice over the past several years points to a crisis in the judiciary and the need for fundamental change in the Council's work. In 2017, the composition of the Council was almost entirely renewed (members elected by both the Conference of Judges and the Parliament), in addition to the launch of the Third Wave of Judicial Reform. While these circumstances could have been used to introduce real change to the Council and the judiciary, our 2017 monitoring revealed the ineffectiveness of legislative changes, indicating a lack of political will to carry out real reform of the judiciary, as well as persisting lack of accountability and transparency, and concentration of power in the new composition of the Council.

The new composition of the Council did not prioritize identification and elimination of challenges facing the judiciary, and instead chose to follow in the footsteps of the previous composition. The majority of non-judge members elected by the Parliament also failed to counteract this process. **As a result, no substantial changes were made to the work of the Council.**

In early 2017, legislative amendments of the so-called Third Wave of Judicial Reform went into effect. However, the process of **selection / appointment** of judges during the reporting period showed that the reforms did not bring real change, and that 141 judges were appointed (including 67 lifetime appointments) on the basis of unsubstantiated and non-transparent decisions. The High Council of Justice also failed to ensure timely and effective implementation of positive legislative amendments to the regulations on **judicial disciplinary proceedings**. As a result, selection of the Independent Inspector by the Council as well as hearings on disciplinary complaints were delayed significantly. A new regulation allowing Court Chairpersons to simultaneously serve as members of the Council is also a negative element of the Third Wave of reform. This change further contributed to the concentration of power in the hands of a specific group of judges.

Another major problem in relation to the activities of the High Council of Justice is a combination of a number of issues that were left outside the scope of the legislative reform: non-transparent and arbitrary practice of appointing / dismissing judges, lack of the obligation to substantiate decisions by the Council, insufficient legal guarantees for the proper functioning of the Independent Inspector and the necessity to introduce normative regulations to the work of the Council.

2017 saw the introduction of the positive practice of publication of video recordings of Council sessions on its website, which allowed stakeholders to access information about the Council's activities without having to send written requests for public information. However, a number of negative tendencies, in terms of **transparency of the Council's operation**, were also identified during the reporting period. An unprecedented number (a change from 4 in 2014-2016 to 45 in 2017) of judicial candidates (including judge members of the Council and their close relatives) chose to hold closed interviews. Competitions announced for the selection of the Independent Inspector and the Head of the Management Department were completely non-transparent. During the reporting period, the Council constantly violated the obligation to publish information about its sessions within legally defined deadlines. The **involvement of civil society** in the work of the Council also declined; the renewed composition of the Council did not support the involvement of NGOs in working groups tasked with the implementation of the 2017-2021 judicial strategy. The Council continues to either ignore statements by civil society organizations about existing problems or perceive them as 'attacks' on the judiciary.

Problems exist in the **management** of the High Council of Justice as well. Procedures for preparing Council sessions are not in place. The Council has repeatedly postponed decisions on items on the agenda based on the argument that Council members needed more time to study the issue. There were cases when discussions were postponed due to the fact that not all members were provided with relevant documents in time. The quality of management and administration of the High Council of Justice as well as the Common Courts was also damaged by the fact that the Council failed to select the Head of the Management Department and its other employees even 1 year after the introduction of the Third Wave of Judicial Reform.

Especially troubling was the continued effort of the High Council of Justice to **suppress dissenting opinion** and demonstrate the improper influence of the dominant group of judges. As a rule, judge members of the Council hold uniform positions on all issues and are able to gain the necessary number of votes from non-judge members in order to make decisions. Dissenting opinions were mostly expressed by two non-judge members, and, in some cases, the Council Chairperson. Our monitoring of Council sessions revealed that members have difficulty conducting ethical, constructive discussions. In 2017, Council sessions often included raised voices, unethical allegations of personal nature and aggressive statements, which often had nothing to do with an argumentative discussion about the judicial system. The fact that one non-judge member and the Council Chairperson openly accused their colleagues of pressure during the reporting period is alarming.

Overall, the 2017 monitoring of the High Council of Justice revealed that the Council often misuses the extensive powers granted to it, which continues to reduce public trust in the judiciary. For this reason, it is critical to introduce timely and real legislative amendments that will strip the dominant group of judges of its leverage to control the system and subject all aspects of the Council's work to transparent, substantiated and foreseeable procedures. We hope that the main findings and recommendations revealed by our monitoring will be of interest to the members of the High Council of Justice, and experts and organizations involved in the work and reform of the judiciary on the local and international level.

## II. METHODOLOGY

The Georgian Young Lawyers' Association (GYLA) and Transparency International Georgia have been monitoring the activities of the High Council of Justice of Georgia on an annual basis since March 2012 within the framework of the project Promoting Rule of Law in Georgia (PROLoG), which is financed by USAID and implemented by the East West Management Institute.<sup>1</sup>

This report covers the period between January 2017 and December 2017. Its aim is to identify positive or negative trends of the activities of the Council, which, we believe, will contribute to the efficiency of this body and the transparency and impartiality of the justice system as a whole. The report is prepared on the basis of information obtained as a result of direct attendance of the representatives of monitoring organizations at the Council's sessions and different public meetings; analysis of current legislation and data obtained from the Council website as well as through freedom of information requests. Documents and opinions of competent international organizations regarding matters related to the independence of courts have also been used in this report.

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1 Monitoring Report of the High Council of Justice, *Georgian Young Lawyers' Association, Transparency International Georgia*, 2013, <https://bit.ly/2IFgOHH>; Monitoring Report of the High Council of Justice #2, *Georgian Young Lawyers' Association, Transparency International Georgia*, 2014, <https://bit.ly/2rYX9ME>; Monitoring Report of the High Council of Justice #3, *Georgian Young Lawyers' Association, Transparency International Georgia*, 2015, <https://bit.ly/2x3iRUv>; Monitoring Report of the High Council of Justice #4, *Georgian Young Lawyers' Association, Transparency International Georgia*, 2016, <https://bit.ly/21Bu6sO>; Monitoring Report of the High Council of Justice #5, *Georgian Young Lawyers' Association, Transparency International Georgia*, 2017, <https://bit.ly/2IGGdAT>



# 1. UNBALANCED POWER OF THE DOMINANT GROUP OF JUDGES IN THE NEW COMPOSITION OF THE COUNCIL

## Key Findings:

- In 2017, the process of selecting new members of the High Council of Justice by the Parliament and the Conference of Judges was neither transparent nor based on professional merit. This renewal failed to bring any substantial change to the work of the Council. Instead, the Council chose to follow in the footsteps of the previous composition.
- Monitoring of the 2017 renewal of the Council composition revealed that positions of judge members were filled almost exclusively with members of the dominant group of judges, the majority of whom hold (currently or in the past) positions of Court Chairpersons. This concentration of power in the hands of specific judges was increased by a regulation introduced as part of the Third Wave of Judicial Reform, which allowed Court Chairpersons to simultaneously serve as members of the High Council of Justice.
- There was continued effort by the High Council of Justice to suppress dissenting opinion and demonstrate the improper influence of the dominant group of judges. The suppression of critical opinion was expressed in the form of unethical attitude towards colleagues and session attendees as well as unequal treatment of judges with dissenting opinions.
- Despite several positive cases of the Council inviting outside experts to present their research / reports during Council sessions, in general, the involvement of civil society in the work of the Council declined dramatically in 2017. The renewed composition of the Council did not support the involvement of NGOs in working groups tasked with the implementation of the 2017-2021 judicial strategy.
- The work of the High Council of Justice remains unregulated. The absence of such regulations allows the Council to make unsubstantiated decisions that are not subject to adequate judicial control. This reduces the Council's accountability and increases the possibilities of abuse of power. The need for regulation is further evidenced by inconsistent decisions and management problems of the High Council of Justice.

## 1.1. CHANGES TO THE COMPOSITION OF THE COUNCIL

The composition of the High Council of Justice was substantially renewed in 2017, with 11 of the 15 members being changed. The renewal process gathered considerable public interest due to wide criticism<sup>2</sup> of the work of the previous (2013-2017) composition of the Council.

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<sup>2</sup> In protest of the developments in the judicial system, NGOs refuse to present their report and demand creation of a parliamentary forum to discuss the developments and prompt reforms, Coalition for an Independent and Transparent Judiciary, May 2017, <https://bit.ly/2Ju8ezd>; The Coalition Negatively Assesses the Ongoing Processes in the Judiciary, Coalition for an Independent and Transparent Judiciary, May 2017, <https://bit.ly/2JnJnND>

### ***Selection of Non-Judge Members***

In 2017, the composition of non-judge members of the High Council of Justice selected through the Parliament quota was fully renewed. On March 23, the Parliament selected **Shota Kadagidze** to fill a member position in the Council, which had been vacant for the previous 4 years due to the fact that the legislation required 2/3 of MPs, i.e. agreement between majority and minority MPs, to elect a Council member. As a result of the Third Wave of Judicial Reform amendments, the new member was selected by a simple majority of the full composition of the Parliament instead of 2/3 of MPs.

Shota Kadagidze's candidacy was proposed to the Parliament by an organization called Young Barristers. The Parliament approved Kadadidze without a public discussion and without any MP questions to the candidate. According to the Organic Law on Common Courts, the Parliament may select as a member of the Council a person that has high reputation and is a recognized specialist in the field of law.<sup>3</sup> In this case, nothing was known to the public about Shota Kadagidze's professional experience. According to his biography, Kadagidze had worked as a private attorney for the previous 4 years,<sup>4</sup> even so, his name was not known for the general public during this time.

On June 21, 2017, the Parliament elected four more non-judge members of the Council. The new members replaced Eva Gotsiridze, Gocha Mamulashvili, Kakhaber Sopromadze and Vakhtang Tordia. The initiative of the Legal Issues Committee on giving each candidate the ability to make a 5 minute address could have been assessed positively, were it not for the formal nature of the process. Despite high public interest, neither members of the committee nor other attendees were given the opportunity to ask questions to the candidates.<sup>5</sup>

In the end, the Parliament elected **Nazi Janezashvili, Irma Gelashvili, Levan Gzirishvili and Zaza Kharebava** through a secret ballot. The position of the majority of these candidates on the implementation of ongoing and planned reforms in the judiciary was unknown to the public. The basis on which the majority of MPs supported these candidates was also unclear.

**Legislation regulating the selection of members of the High Council of Justice by the Parliament of Georgia does not ensure transparency and a professional merit based process.** The Georgian Young Lawyers' Association addressed the Parliament with a legislative proposal and submitted a draft amendment to the Parliamentary Rules of Procedure.<sup>6</sup> During committee discussions, MPs shared the position that procedures for selecting members of the Council were in need of improvement. However, the Parliament failed to make relevant procedural changes to its Rules of Procedure in time.

### ***Selection of Judge Members***

On April 8, 2017, the Conference of Judges replaced Paata Silagadze and Ilona Todua with **Giorgi Mikautadze and Revaz Nadaraia**. Before nominating the candidates, Levan Tevzadze, Chairperson of the Administrative Committee of the Conference of Judges and judge member of the High Council

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3 Organic Law of Georgia on Common Courts, Article 47 (6)

4 Biographical Information on Shota Kadagidze, High Council of Justice, <https://goo.gl/6hjuuU>

5 The Coalition for Independent and Transparent Judiciary addresses the renewed High Council of Justice, Coalition for an Independent and Transparent Judiciary, July 2017, <https://bit.ly/2suNvSh>

6 NGOs call on the Parliament to ensure a transparent and professional merit based process of electing new members of the High Council of Justice, June 2017, <https://goo.gl/kNA3tP>

of Justice, addressed his colleagues and explained that according to law, 4 judge members of the Council *must* hold administrative positions. This statement was misleading, since the law does not provide such a requirement and merely sets the maximum number of judge members of the Council that can simultaneously hold administrative positions. Two candidates were nominated at the April 8 Conference: Giorgi Mikautadze, Chairperson of Tbilisi City Court, and Revaz Nadaraia, Head of the Pre-trial and Investigation Panel of the same court. Prior to the vote, Levan Tevzadze asked the candidates whether they wanted to address the Conference, but they did not use this opportunity.

On June 24, 2017, judges attending the Conference of Judges elected **Irakli Shengelia, Irakli Bondarenko, Dimitri Gvritshvili and Vasil Mshvenieradze** as new members of the Council. On the same day, the Conference decided to replace Levan Murusidze with Giorgi Mikautadze on the position of Council Secretary. According to the agenda,<sup>7</sup> a separate vote was held for 2 of the 4 vacancies, for which the law allows Council members to simultaneously hold positions of a Court Chairperson, First Deputy or Deputy Chairperson, and Panel/College Chairperson. Candidates that did not hold any administrative positions were voted on for the remaining two vacancies. Although Irakli Bondarenko and Vasil Mshvenieradze did not hold managerial positions during the time of voting, they did serve as Chairpersons of Signaghi District Court in 2012-2017, and Mtskheta District Court in 2012-2016, respectively. Monitoring of the election of judge members of the Council over the last five years has shown that, as a rule, only members of the dominant group of judges, most of whom hold (or have in the past) the position of Chairperson, are being elected in the Council. It should be noted that prior to the amendments introduced as part of the Third Wave of Judicial Reform, a Court Chairperson could not be elected as a member of the Council, and a maximum of 3 Panel/College Chairpersons could be on the Council at any one time. The Third Wave amendments have allowed a maximum of 4 Court Chairpersons (or their First Deputies and Deputies) on the Council. According to the conclusion issued by the Venice Commission in 2013,<sup>8</sup> in order not to allow concentration of power in the hands of specific individuals, it is advisable that an elected Court Chairperson resign from this administrative position before assuming Council membership. Similar recommendations were made by local non-governmental organizations, which were not included in draft laws.<sup>9</sup>

The Coalition repeatedly called on the Conference of Judges to allow nominated candidates to present their views on the achievements and challenges of the judiciary as well as the possibility to pose questions to them.<sup>10</sup> Unfortunately, this appeal was not taken into account once again. The nominated candidates did not present their views and opinions, nor did they receive any questions from judges attending the Conference. Only Giorgi Mikautadze and Revaz Nadaraia, candidates for the position of Council Secretary, addressed the Conference with a short and general speech, which was positive nonetheless.

Following the Conference of Judges, statements<sup>11</sup> made by the newly elected judge members of the Council showed that they did not intend to prioritize identification and elimination of challenges facing the judiciary, but rather chose to follow in the footsteps of the previous composition and maintain its achievements.<sup>12</sup>

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7 Agenda for the XXI Extraordinary Conference of Judges, <https://goo.gl/EUprvd>

8 CDL-AD(2013)007-e, Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013) 11/03/2013

9 Coalition Calls on Parliament to Consider President's Objections in Relation to the "Third Wave" Judicial Reform Bill, Coalition for an Independent and Transparent Judiciary, January 2017, <https://bit.ly/2LiScW8>

10 The Coalition Addresses the Judicial Conference Held on Extraordinary Basis, Coalition for an Independent and Transparent Judiciary, April 2017, <https://bit.ly/2kNGfg8>

11 The High Council of Justice has 4 new members and a new Secretary, Rustavi 2, June 2017, <https://goo.gl/qtD4TJ>

12 The Coalition for Independent and Transparent Judiciary addresses the renewed High Council of Justice, Coalition for

## 1.2. SUPPRESSION OF CRITICAL OPINION

In 2017, the High Council of Justice continued to suppress dissenting opinion and demonstrate the improper influence of the dominant group of judges. Similar to previous reporting periods, as a rule, judge members of the Council held uniform positions on all issues and were able to gain the necessary number of votes from non-judge members in order to make decisions. Dissenting opinions were mostly expressed by two non-judge members (N. Janezashvili, V. Mchedlishvili), and, in some cases, the Council Chairperson.

As in previous years, suppression of critical opinion was expressed in the form of unethical attitude towards colleagues and session attendees, as well as unequal treatment of judges with dissenting opinions. In fact, the situation worsened in this regard in 2017, after the renewal of the composition of the Council.

Throughout 2017, during Council sessions<sup>13</sup> and public speeches<sup>14</sup>, members of the Council often referred to the Unity of Judges in a negative manner. The Unity of Judges was created in 2013 and was composed of about 50 acting judges. Initially, the Unity member judges did not shy away from criticizing the system and were considered to be an alternative to the dominant group of judges. The failure of Unity representatives to gather enough votes to become members of the Council in 2013 was the starting point for the gradual suppression of dissenting opinion in the system. Unity members were repeatedly refused re-appointments,<sup>15</sup> while some of them were subjected to disciplinary prosecution,<sup>16</sup> which played an important role in the gradual disappearance of dissenting opinion in the judiciary. In May 2017, after Unity criticized the process of appointment of judges,<sup>17</sup> 20 of its members left the union.<sup>18</sup> Nowadays, there are no acting judges in the Unity of Judges. Instead, the absolute majority of judges are currently members of the Association of Judges, which is chaired by Levan Murusidze, while its Board is composed of members of the High Council of Justice and other influential judges.<sup>19</sup>

The High Council of Justice tolerates criticism neither from judges nor from the media or civil society. The discussion launched during the previous reporting period by Eva Gotsiridze, non-judge member of the Council, regarding the freedom of expression in relation to the judiciary continued in 2017 as well. On April 26, the Council published a statement compiling statements made by media representatives (with references to authors, and times and places of publication) regarding judges and the judiciary. The Council stated that these statements went far beyond the scope of freedom of expression and

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an Independent and Transparent Judiciary, July 2017, <https://bit.ly/2suNvSh>

13 For example, session of December 5, 2017

14 *"The goals of this association were quite far-reaching and unhealthy [...] the association aimed to clear the system of so-called 'unworthy' judges [...] many of the judges that joined this association were misled."* - Statements made by Judge Member of the High Council of Justice Dimitri Gvritishvili on Imedi TV, Kronika, November 11, 2017, (from 20:25), <https://goo.gl/x5xBrG>

15 Amicus Curiae on the case of M. B. No. 3/4971-17, Public Defender of Georgia, <https://goo.gl/A2vZc3>

16 *The recent precedents set by the latest decisions of the Disciplinary Collegium and Chamber pose danger to judicial independence*, Coalition for an Independent and Transparent Judiciary, October 2016, <https://bit.ly/2Hp4lGU>

17 *20 Judges Leave the Unity of Judges*, Rustavi 2, June 2017, <https://goo.gl/N1YeJp>

18 In 2017, a total of 30 members left the Unity of Judges. One member applied for the termination of membership on February 16, 2017, 9 members did the same on June 1; and the remaining 20 members left the union after issuing a public statement on May 31.

19 Board Members of the Association of Judges of Georgia (ID 202953321) are: Levan Murusidze (Chairperson), Levan Tevzadze, Davit Mamiseishvili, Irakli Shengelia, Dimitri Gvritishvili, Temur Gogokhia, Vasil Roinishvili, Miranda Eremadze and Giorgi Mirotadze; Extract from the Registry of Entrepreneurial and Non-Entrepreneurial (Non-Commercial) Legal Entities.

“constituted an intolerable mockery of the judiciary as an institution and flagrant violation of the right to individual reputation”.<sup>20</sup> The Council appealed to the Charter of Journalistic Ethics, the National Communications Commission, the Public Defender and the public to issue a response to these statements. The Council also expressed its desire to organize a broader conference on the issue of determining the scope of freedom of expression,<sup>21</sup> but did not follow up on the idea due to a negative response from the public.

Our monitoring of Council sessions revealed that members have difficulty conducting ethical, constructive discussions. In 2017, Council sessions<sup>22</sup> often included raised voices, unethical allegations of personal nature and aggressive statements, which often had nothing to do with an argumentative discussion about the judicial system. On several occasions during the reporting period Council sessions became extremely strained, with Council members and judges exhibiting extremely inappropriate behavior. As a rule, the reasons for these confrontations were dissenting opinions expressed by two non-judge members Vakhtang Mchedlishvili and later Nazi Janezashvili. Monitoring also revealed a tense relationship between judge members and the Council Chairperson, which often found its expression through unethical addresses and non-collegial attitude.

Initiatives and criticisms voiced by non-judge members of the Council Vakhtang Mchedlishvili and Nazi Janezashvili during the reporting period often elicited accusations from judge members and some non-judge members that they did not care for the court, tried to discredit the Council and were engaged in self-promotion.<sup>23</sup> Judge members of the Council were also irritated by critical statements made through the media by non-judge members.<sup>24</sup>

On October 20, 2017, non-judge member of the Council, Nazi Janezashvili, made a special statement with the media and accused her colleagues of pressure and insult.<sup>25</sup> According to Janezashvili, judge members Sergo Metopishvili and Revaz Nadaria approached her before the session, addressed her unethically and demanded an explanation for her low evaluation of several judge candidates. According to her, the confidentiality of the assessment was likely not observed and evaluations issued by her became known to the other members of the Council.<sup>26</sup> This statement was confirmed by another non-judge member Vakhtang Mchedlishvili,<sup>27</sup> who stated that Council members had repeatedly exhibited unethical behavior towards Janezashvili in the past.<sup>28</sup> The session<sup>29</sup> of November 6 was especially

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20 Statement of the High Council of Justice, April 26, 2017, <https://goo.gl/TxMtNb>

21 Session of the High Council of Justice, April 26, 2017

22 Sessions of the High Council of Justice, January 13, March 31, July 24, 2017

23 Sessions of the High Council of Justice, March 31, December 11, 2017

24 For example, at the session of July 31, judge members demanded Vakhtang Mchedlishvili explain his public statement about possible falsification of a session video record. At the same session, Nazi Janezashvili also stated that she too had previously been asked, albeit privately, for an explanation for her public statements.

25 *Nazi Janezashvili accuses members of the High Council of Justice of unethical addresses*, Netgazeti, October 2017, <https://goo.gl/1yuTTS>

26 *Critical member of the High Council of Justice speaks of unequal treatment*, Netgazeti, March 2018, <https://goo.gl/iUACPn>

27 *“The HCoJ member: There had been several cases of displaying unethical attitude towards Janezashvili before”*, IMEDI NEWS, October, 2017, <https://goo.gl/VLKKvU>

28 On October 30, during a session held in Borjomi, the Council Chairperson addressed Nazi Janezashvili on behalf of the Council and stated that this would not happen again. At the following session, this statement became a reason for a confrontation between the Council Chairperson and its judge members.

29 During the session, judge members of the Council expressed their dissatisfaction that the Council Chairperson had not signed the October 20 decisions on the appointment of judges. This statement was followed by a sharp reaction from Nino Gvenetadze, who accused her colleagues of demonstrating force. Council members also demanded an explanation from Nino Gvenetadze about her October 30 apology to Nazi Janezashvili which had not been agreed with the Council. The

tense, when Chairperson Nino Gvenetadze accused the Council Secretary and members of violence and blackmail. The session involved several hours of raised voices and insulting statements.

Unfortunately, members of the Council exhibited unethical behavior towards invited session attendees as well. At the session of April 11, judge member Shota Getsadze unethically addressed a representative of a donor organization and demanded her to be silent. Similarly, at the session of July 10, judge member Sergo Metopishvili unethically addressed an invited representative of the Public Defender.

## 1.3. REDUCTION OF CIVIL SOCIETY INVOLVEMENT

Several positive cases were identified during the reporting period when the Council invited outside experts to present their research / reports during sessions.<sup>30</sup> However, in general, the involvement of civil society in the work of the Council declined dramatically in 2017.

The Council continues to either ignore statements by local civil society and international organizations about existing problems or perceive them as ‘attacks’ on the judiciary.<sup>31</sup> On May 30, 2017, the Georgian Young Lawyers’ Association and Transparency International Georgia refused to present their fifth report on the monitoring of the High Council of Justice in protest to repeatedly ignored recommendations and the general crisis in the Council and the judiciary. According to NGOs, their monitoring reports repeatedly demonstrate that the Council uses its powers against the interests of justice, instead of protecting them. Despite this, authorities are failing to take effective measures to address the crisis. A combination of troubling developments at the time (arbitrary decisions by the majority of the previous composition of the Council, a few days prior to the expiration of their terms, that were aimed at allowing a small group of judges to establish control over the judiciary, as well as the results of the competition to select candidates for the vacant position of the Georgia-nominated judge to the European Court of Human Rights) led the organizations to believe that the presentation of the monitoring report would have been pointless.<sup>32</sup>

In 2016, NGO representatives were actively involved in the development of the 2017-2021 judicial strategy and action plan. In 2017, after development was completed, during the previous composition of the Council, the dominant group of judges launched an organized<sup>33</sup> opposition to certain provisions of the Action Plan that were included based on NGO recommendations. More specifically, several weeks before the adoption of the documents, judge members of the Council stated that they would never agree to making Court Chairpersons an elected position and removing this authority from the High Council of Justice, which led to a change in the wording of the relevant provision.

The 5 year strategy of the court system and its 2 year action plan was approved by the previous

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decision on when to hold a session on the contest for the Independent Inspector also became a cause for confrontation.

30 For example, on February 3, Chairperson of the association Unity of Judges was invited to the Council session to present a research document prepared by the organization; On October 23, a representative of the Human Rights Education and Monitoring Center (EMC) presented a report titled The New System of Case Assignment in Georgia.

31 The Coalition Negatively Assesses the Ongoing Processes in the Judiciary, Coalition for an Independent and Transparent Judiciary. May 2017, <https://bit.ly/2JnJnND>; Compared to the previous year, Georgia lost 24 positions in terms of independence of judges in the World Economic Forum Global Competitiveness Index 2017-2018; <https://goo.gl/B4VkiU>

32 *In protest of the developments in the judicial system, NGOs refuse to present their report and demand creation of a parliamentary forum to discuss the developments and prompt reforms*, Coalition for an Independent and Transparent Judiciary, May 2017, <https://bit.ly/2Ju8ezd>

33 Session of the High Council of Justice, April 11, 2017; also, a meeting held in the Council on April 19, during which Levan Murusidze and Levan Tevzadze presented comments on behalf of the judiciary regarding some of the provisions of the Action Plan.

composition of the Council on May 29, 2017. The new composition, despite recommendations of donor organizations and the civil sector, did not support the involvement of non-governmental organizations in the working groups created for the implementation of the Action Plan. According to the decision of the Council, the agendas of working group meetings will be published in advance, however, civil society organizations cannot attend them.<sup>34</sup> The Council also refused a request of participation from the Coalition for an Independent and Transparent Judiciary.<sup>35</sup>

During the reporting period, the Council has also failed to determine the procedure allowing session attendees to voice their opinions. Practice in this regard has worsened dramatically in 2017. The Council has a negative attitude towards and outright refuses requests to hear comments from session attendees. At the session of November 27, judge members of the Council were irritated by the decision of the Chairperson to allow a representative of Transparency International Georgia to make comments about an item on the session agenda. Council members called upon the Chairperson not to allow attendee comments in the future.<sup>36</sup>

## 1.4. NECESSITY FOR NORMATIVE REGULATION OF THE COUNCIL ACTIVITIES

Under the existing legislation, the General Administrative Code does not apply to the High Council of Justice. The Council's activities are not regulated by any other legislative act. This absence of regulatory norms allows the Council to make unsubstantiated decisions without judicial control. Monitoring of the High Council of Justice has shown that the current situation diminishes the Council's accountability and increases the possibilities of abuse of power.

Inadequate regulation of the Council's authority allows it to arbitrarily adopt normative documents. The legislation does not regulate important issues, such as, procedures for case assignment, electing the Independent Inspector, conducting selection contests and qualification exams for judges, as well as procedures for adopting and amending the Rules of Procedure of the Council.

For years, the High Council of Justice has been planning to revise and improve its Rules of Procedure. The Council often uses this need for systemic revision as an argument against making smaller proposed changes. To this day, the Council has not developed even a draft of its new Rules of Procedure.<sup>37</sup>

This situation constantly creates problems in the work of the Council. For example, appointments of Court Chairpersons have become subjects of controversy on several occasions, due to the fact that neither the legislation nor the Rules of Procedure define the criteria and procedures for appointing Court / Panel / Chamber Chairpersons. Recently, the Council has introduced the practice of interviewing candidates for chairmanship, but not all of the Council members agree with this procedure.<sup>38</sup> Generally, Council members often launch discussions about the terms and procedures for announcing contests for vacant court chairperson positions, nomination of candidates and submission of candidate applications.

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34 Session of the High Council of Justice, October 16, 2017

35 Session of the High Council of Justice, December 5, 2017

36 Similarly, at the session of December 5, 2017, when the Council was considering recommendations for improving its transparency, the recommendations were presented by a Council employee, while the author organization's request to comment was voted down.

37 Session of the High Council of Justice, November 13, 2017

38 Session of the High Council of Justice, May 29, 2017, where a judge member Sergo Metopishvili stated that he does not see the need for interviewing chairmanship candidates

Therefore, norms regulating the activities of the High Council of Justice must be adopted in a timely manner. These norms must define procedures for preparing sessions, compiling and amending its agendas, procedures for consideration and decision making on specific issues, procedures for recusal and self-recusal (conflict of interest), obligation to substantiate decisions, and effective appeals mechanisms. In addition, the law must define the administrative functions of the Council and all cases when the Council is obligated to follow the requirements of the General Administrative Code.

## **Recommendations**

- **The procedure for electing non-judge members of the Council by the Parliament must be improved by making the participation of minority MPs necessary. This will increase chances that elected candidates will be more acceptable for general public. The Parliamentary Rules of Procedure must ensure that the process of electing non-judge members is more transparent and merit-based. The Conference of Judges must obligate HCoJ judge member candidates to present documents about their vision of the judiciary to their colleagues and answer their questions.**
- **Judge members of the Council must follow ethical norms when dealing with colleagues and civil society. The Council must introduce an effective mechanism for responding to violations of ethical norms.**
- **The Council must ensure civil society involvement in the implementation of the 2017-2018 Action Plan for the 5 year Judicial Strategy. Regulations must be introduced for granting Council session attendees a possibility to voice their opinions.**
- **The Parliament must adopt norms regulating the Council's activities in a timely manner. These norms must include the obligation to substantiate decisions and effective appeal mechanisms. In addition, the law must define the administrative functions of the Council and all cases when the Council is obligated to follow the requirements of the General Administrative Code.**



## 2. MANAGEMENT AND TRANSPARENCY OF THE COUNCIL ACTIVITIES

### Key Findings

- **Important information remains closed to the public. This includes closed interviews requested by an unprecedented numbers of judge candidates, and unavailability of information on the identities and biographies of candidates for the Independent Inspector and Head of the Management Department.**
- **The High Council of Justice does not publish information regarding its sessions within legal timeframes. During the reporting period, formulation of agenda items was not sufficiently informative. Agendas were frequently amended, and not always followed during Council sessions.**
- **Procedures for preparing Council sessions are not in place. The Council has repeatedly postponed decisions on items on the agenda based on the argument that Council members needed more time to study the issue. There were cases when discussions were postponed due to the fact that not all members were provided with relevant documents in time.**
- **The Council does not publish multiple use, consolidated versions (final edition) of decisions of normative nature and does not disclose them as public information.**
- **Even though the positive practice of publishing video recordings of Council sessions online was introduced during the reporting period, this was not always followed. Complete video recordings were not published for several sessions in 2017. Media recording of Council sessions also remains a problem. The media is only allowed to record the opening of sessions.**

### 2.1. PROACTIVE PUBLICATION OF SESSION RELATED INFORMATION

Proactive publication of information related to sessions of the High Council of Justice is important for the transparency and monitoring of its activities. This information includes session dates, agendas and draft decisions, which need to be published a reasonable period before the session.

In March 2017, legislative amendments of the Third Wave of Judicial Reform went into force, according to which, the Council is obligated to publish the date and agenda of a session no less than 7 days in advance. However, during the reporting period, the Council continuously violated this provision. In the first half of 2017, session dates were usually published 6-7 days prior, while agendas only 2-4 days before sessions. In the second half of the reporting period, both dates and agendas were being published 3-4 days prior to the sessions.

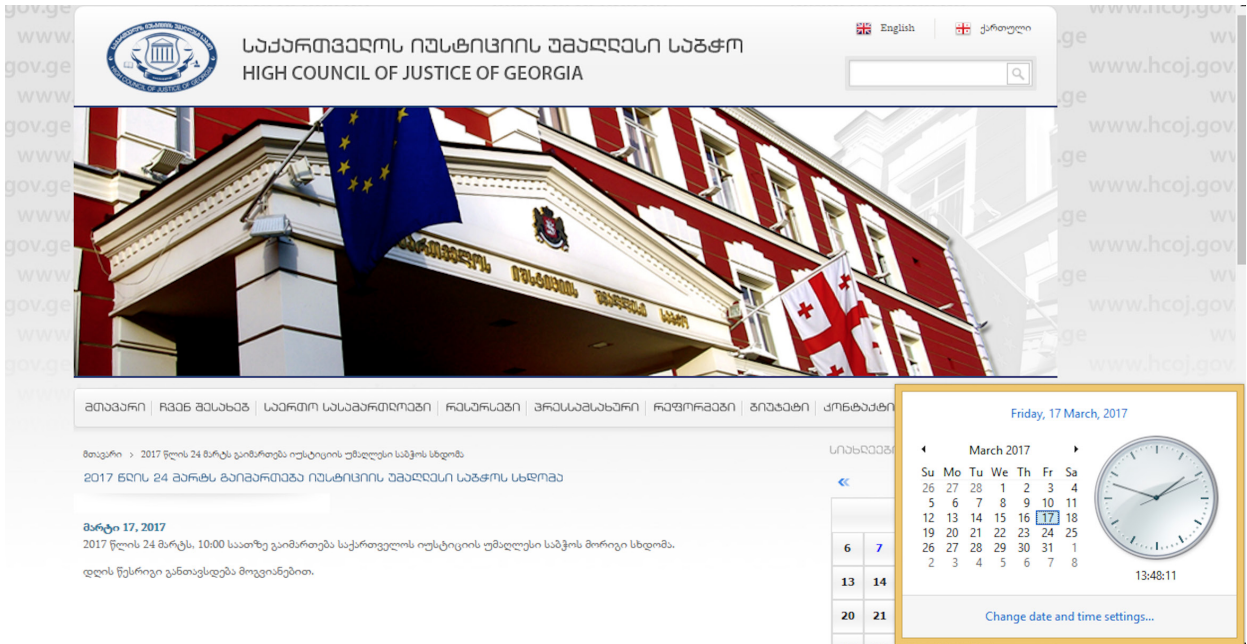


Figure 1: In the first half of 2017, session dates were usually published 6-7 days prior, while agendas only 2-4 days before sessions.

On one occasion during the reporting period, monitoring organizations were unable to attend a Council session, because its date was not published in advance.<sup>39</sup> On 5 occasions, dates were published shortly before the sessions. For example, the date for the session of June 19, where Court Chairpersons were appointed, was published on the same day, while the date for the session of June 20, where candidates for the Independent Inspector were voted for, was published the previous day.<sup>40</sup> As in previous reporting periods, there were cases in 2017 when the dates indicated on some Council decisions did not match any dates when sessions were held.<sup>41</sup> This strongly suggests that sessions were held in a way that information about them was published neither before nor after.

On several occasions in 2017, session agendas were published the day before.<sup>42</sup> There were also cases when sessions included discussions on topics not on the agenda.<sup>43</sup> This was the case during the July 24 session, when the Council made decisions to merge Panels in Tbilisi City Court, dismiss Chairpersons and appoint an acting Chairperson of the new Panel, none of which were on the agenda.

39 On March 27, the Council website published a video record of a previously unannounced session that had been held that day, and where the Council discussed and adopted amendments to the procedure of holding judicial vacancy contests.

40 Other examples are the sessions of October 20, May 11, and March 10, 2017

41 Decisions of the High Council of Justice, January 9, March 13, and August 2, 2017

42 For example, session agendas for January 13, February 3, February 17, March 10, April 21, May 11, June 20, July 10, October 20 and December 5.

43 For example, sessions of July 17, July 25, and October 16, 2017

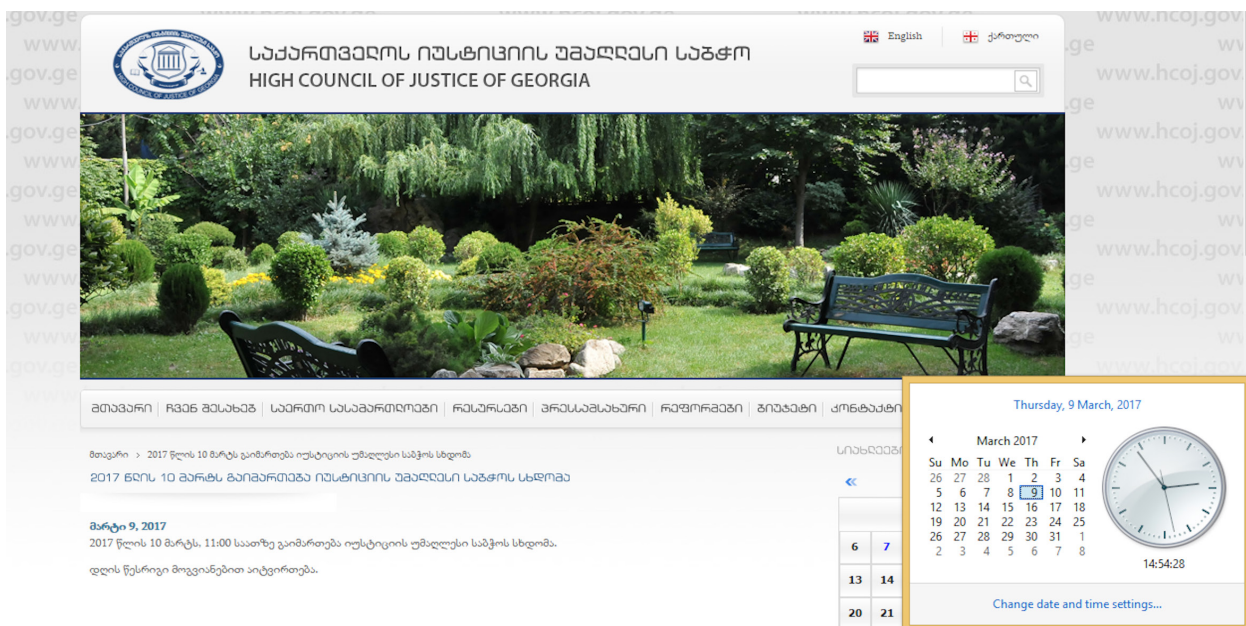


Figure 2: The date of the March 10 session was published a day before, while the agenda was published the previous evening.

A draft decision was published on a single occasion during the reporting period.<sup>44</sup> During the session of November 6 and November 13, non-judge member Nazi Janezashvili proposed the publication of draft decisions and inclusion of greater details in session agendas. Even though these initiatives are in line with long standing recommendations from monitoring organizations, the Council did not support the proposal.<sup>45</sup> The Council Secretary explained that one of the reasons for this decision was that the Council wanted to be able to ‘freely’ raise issues during sessions. According to Giorgi Mikautadze, there were cases when some items on a proactively published agenda caused strong reactions from the public. Such an approach towards the transparency of the Council’s activities indicates a lack of accountability before the public.

## 2.2. MANAGEMENT AND PREPARATION OF SESSIONS

Normative regulation of the preparation of Council sessions and management of its activities remained a problem during the reporting period. In 2017, the Council had repeatedly postponed decisions on items on the agenda based on the argument that Council members needed more time to study the issue. There were cases when discussions were postponed due to the fact that not all members were provided with relevant documents in time. Non-judge members of the Council Vakhtang Mchedlishvili and Nazi Janezashvili stated on several occasions that agendas for Monday sessions were uploaded in the internal system on Friday or the weekend, which gave them unreasonably short time to prepare.<sup>46</sup> There were also cases when non-judge members had no information about the candidates to be

<sup>44</sup> The draft judicial strategy for 2017-2021 was published on February 28 for comments and feedback.

<sup>45</sup> Worth noting is the positive practice of including brief descriptions of items on the agenda that was introduced by the Council in 2018.

<sup>46</sup> For example, at the Monday session of March 6, 2017, Vakhtang Mchedlishvili requested the discussion on one of the items on the agenda be postponed, since relevant documents had been uploaded over the weekend. The same happened for the sessions of March 24, and October 16.

appointed as Court Chairpersons by the Council and had not been informed about the substantiation on drafts being discussed during sessions.<sup>47</sup>

On several occasions during the reporting period, the Council made its decision despite the fact that not all of its members had sufficient information on the issue and were ready to make a decision. The session of July 24 was one example of this, when the Council dismissed the Chairperson of the Criminal Cases Panel at Tbilisi City Court, even though this item was not on the agenda. Vakhtang Mchedlishvili requested the discussion be postponed, since, according to him, they were not provided with relevant information in time, however, the request was denied by the Council.<sup>48</sup>

Procedures for preparation of sessions and drafting of agendas are not in place, which has given rise to conflicting practices. For example, on the session of July 3, involving the appointment of Vasil Mshvenieradze as Chairperson of Tbilisi City Court, non-judge member of the Council Nazi Janezashvili proposed appointing Mshvenieradze as the acting Chairperson instead. The Council Secretary turned this proposal down by saying that this item was not on the agenda.<sup>49</sup> However, the Council had made decisions on items that were not on the agenda on many occasions prior to that session, illustrating how conflicting practices can be used against critical members of the Council. There were also cases during the reporting period when items were added to the agenda several hours before the session.<sup>50</sup> Management problems in the Council were also illustrated by sessions that were started a few hours late.<sup>51</sup>

The Statute<sup>52</sup> of the Administration of the High Council of Justice states that the Council Secretary is responsible for preparing sessions and timely supply of Council members with session materials. The Statute also states that the Human Resources Department of the Council is responsible for organizing sessions. Regulations must be introduced in relation to the session preparation and timeframes. More specifically, a specific timeframe must be determined for when the Council Secretary must provide Council members with draft documents to be discussed at the nearest session. In addition, Council members must be provided with copies of all other documents submitted to and within the competence of the Council, so that they are able to request a discussion of this or that issue at the nearest session. Legislation regulating the activities of the Council must determine the procedures for compiling session agendas as well as the person responsible for it. Current regulation does not specify who is responsible for compiling session agendas, nor does it determine the right of a Council member to request amendments to the agenda (through a specific procedure, timeframe, or directly at the Council session).

The Third Wave of Judicial Reform introduced the **Judicial Management Department** to the High Council of Justice for the purpose of monitoring the administration and management of the Common Courts of Georgia. The law grants the following important functions to the Department: study of how the flow and volume of cases is managed in the Common Courts; improvement of managerial skills of Court Chairpersons; submitting conclusions and recommendations on important issues of court administration to the High Council of Justice; and so forth. Even though the Third Wave amendments

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47 Sessions of the High Council of Justice, July 3, July 10, and September 25, 2017

48 The same request was submitted at the October 20 session by Nino Gvenetadze and Nazi Janezashvili, who refused to vote for judicial candidates after the Council had denied their request. The session of November 6 was another such case, when the Council denied a postponement request submitted by the Chairperson.

49 Session of the High Council of Justice, July 3, 2017

50 Session agendas for March 31, and July 3, 2017

51 For example, sessions of March 6 and March 20, 2017 started 4 hours late.

52 Approved by the Decision of the High Council of Justice, N1/206-2007 of September 25, 2007

went into force in early 2017, the Council has yet to appoint the head of the Judicial Management Department.<sup>53</sup> According to information provided by the Council, only 2 of the 7 staff members of the Department have been hired (a senior consultant and a consultant). Other positions, including that of the department head, remain vacant (the Department does not have an acting head either). According to the Council, the existing staff of the Department is involved in the management of the electronic case assignment system, which includes registration of judges in specific Panels / Chambers / narrow specializations, and uploading information about vacations, work visits and sick leaves of judges in the electronic system.<sup>54</sup> In other words, the Management Department performs only a small portion of the functions it is given by law. Therefore, the Council must fill the remaining vacancies of the Department as soon as possible, which will facilitate the effectiveness of the Council's activities.

## 2.3. PUBLICATION OF SESSION MINUTES AND DECISIONS

Availability of session minutes and decisions is another component of the transparency of the High Council of Justice, allowing stakeholders to study and evaluate the Council's work. The Council keeps only video-audio records (minutes) of its sessions.

A positive practice of publishing video records online was introduced during the reporting period; however, not all video records were published.<sup>55</sup> On several occasions, the video recording was hindered, resulting in incomplete records. According to information received from the High Council of Justice, audio-video recording of sessions was hindered on 3 occasions in 2017 due to server related technical problems. More specifically, no record was made between 11:00 am and 13:00 pm on the session of May 29, and between 14:45 and 20:00 pm on the session of July 24; the record of the November 6 session is also defective due to its out-of-sync audio.<sup>56</sup> These hindrances are a serious problem, since the Council does not keep any paper based minutes and video records are the only means for documenting Council sessions.

On July 31, 2017, Vakhtang Mchedlishvili stated that the Council had destroyed the record of the July 24 session, because it documented violations of the law. According to Mchedlishvili, this was not the first occasion, and that he had noticed in previous years that only session records depicting gross violations went missing. In response, the Council published a statement on its website, explaining that the recording was hindered due to technical problems and that the record had not been destroyed.<sup>57</sup> Considering the above, the Council must ensure that recordings are not hindered due to technical problems, but must at the same time introduce paper based minutes to altogether mitigate the risk of losing video records.

The monitoring group believes that the Council must be obligated by law to publish session minutes/ recordings and decisions on its website within certain deadlines, since the public has the right to access these materials, and the Council failed to ensure this over the years. Council sessions should also be live streamed on the website. This will facilitate greater transparency of the Council with relatively little effort and resources.

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53 As of March 22, 2018

54 N 443/354-03 letter of the High Council of Justice, February 23, 2018

55 Session agendas of April 26, May 11, November 6, June 20, December 18, 2017

56 Letter of the High Council of Justice, N 576/412-03, March 13, 2018; The letter explains that the Council has introduced the same recording system that is used for court hearings, and that starting in 2018 Council sessions are being recorded using an audio system created for this purpose.

57 Statement of the High Council of Justice, July 31, 2017, <https://goo.gl/FKpg59>

Full and timely publication of Council decisions also remains a problem. As a rule, the Council publishes its decisions 10-14 days after they are made. Moreover, the Council does not always publish full decisions. For example, during the reporting period, the Council failed to upload on its website the 2017-2018 Judicial Strategy and its two-year Action Plan that were approved on May 29.<sup>58</sup> The search function of the Council website is also faulty, since it is difficult to find specific decisions or other documents using the search field.

Inaccessibility of consolidated (final) versions of Council decisions is a serious problem as well. Responding to our public information request about multiple use documents of normative nature, the Council stated that they do not have the final editions of the Rules of Procedure of the Council, procedures for conducting judicial vacancy contests or other similar multiple use documents. According to the Council, they are not obligated to systematize their decisions and 'bring them to a controlled state'.<sup>59</sup> **This answer confirms the low level of transparency of the Council and further reduces public trust towards this institution.** When issuing public information, the High Council of Justice provides only the original edition of requested documents with an attachment of all the amendments that were made to it. Such form of publication and issuance of public information does not meet the minimum standard of transparency, since stakeholders wishing to study the most recent version of a normative document have to spend an unreasonable amount of effort consolidating the original version with all of its subsequent amendments. Therefore, the Council must publish its decisions in a consolidated format. This is important not only for civil society representatives, but for the proper functioning of the Council itself.

## 2.4. RECORDING AND MEDIA COVERAGE OF SESSIONS

The monitoring group has been raising the problem of hindering media coverage (recording) of Council sessions for the past six years. The Council has yet to take any effective steps to resolve this. The law guarantees the publicity of sessions of collegial institutions and does not set any limitations on media coverage. Media representatives, as well as any other stakeholder, have the right to attend sessions and make audio/video recordings. Despite this, the Council issued a decision on February 17, 2014 that allowed photo, video and audio recording of only the opening of its sessions. During the reporting period, media organizations were not allowed to record the full duration of the sessions and could do so only during their opening.<sup>60</sup> The Rules of Procedure of the Council must ensure the possibility of uninterrupted and full recording of sessions, which will bring the Rules of Procedure in line with the General Administrative Code.

Even though the reception of the High Council of Justice is equipped with a monitor broadcasting ongoing sessions, such video transmission cannot be equivalent to the right of the media to make recordings of Council sessions. Furthermore, the recording made by the camera inside the session hall does not guarantee high enough audio and video quality to be used successfully for journalistic purposes and for persons outside the hall to fully grasp the processes happening inside the hall.

Members of the Council have stated on several occasions that the above restriction was necessary due to the limited size of the session hall and possible obstruction of the Council's work. However, these

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58 The documents have been uploaded to the Council website since 2018.

59 Letter of the High Council of Justice, N 514/395-03, March 6, 2018

60 For example, the High Council of Justice prohibited a journalist from bringing a camera inside the session hall at the session of March 24, 2017

concerns can be overcome by developing a regulation allowing a single camera to record the sessions, with the obligation that the recording will be distributed to all media organizations. This regulation is in place for court hearings, where it ensures that the recording does not obstruct the process.

Interest towards the activities of the Council is increasing not only within the judiciary but among the general public as well. Therefore, it is unjustifiable to restrict full media recording of sessions. The Council must bring the legislation regulating its activities in line with the General Administrative Code and ensure the right of the media to record its sessions.

## 2.5. FINANCIAL TRANSPARENCY OF THE PERSONNEL AND MEMBERS OF THE COUNCIL

Openness of information about the remuneration received by the employees and members of the High Council of Justice is a good indicator of its transparency and accountability. The Council website proactively publishes quarterly amounts of salaries, supplements and bonuses (cumulatively) received by public officials (cumulatively) of the Council and its other employees (cumulatively), however, this information does not specify amount of bonuses and supplements received by Council members and its personnel.

According to the Organic Law on Common Courts, the Council may issue bonuses to its judge members for effective implementation of their authority. Council members elected by the Parliament/ appointed by the President shall receive a salary equivalent to that of a judge of the Court of Appeal from the budget of the High Council of Justice.

According to public information received from the Council, in 2017, non-judge members received a monthly salary of GEL 5,000, and a quarterly bonus of GEL 5,000. Judge members of the Council received a monthly supplement of GEL 700, in addition to their remuneration for serving as judges.<sup>61</sup> It should be noted that judge members of the Council enjoy significant benefits during case assignment, as a result of which they receive far fewer cases compared to their colleagues not on the Council.<sup>62</sup>

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61 According to the January 15, 2018 Decision N1/62 of the High Council of Justice, the monthly salary supplement of a judge member of the Council increased by GEL 500, up to GEL 1,200.

62 *“The percentage of case assignment for judge members of the High Council of Justice is 20%; this changes to 10% if the member is also a Chairperson/Deputy Chairperson of a Court, or a Chairperson of a Panel/Chamber.”* – Decision N1/56 of May 1, 2017 (version of December 18, 2017) of the High Council of Justice ‘On the Approval of the Rule for Automatic Case Assignment through the Electronic System in the Common Courts of Georgia’

	Salary	Salary Supplement	Bonus
<b>Judge Members</b> (cumulatively)	—	75 190	—
<b>Non-judge Members</b> (cumulatively)	346 667	—	115 000
<b>Personnel</b> (cumulatively)	1 156 697	—	561 665
<b>Total Remuneration received by Council Members and Personnel</b>	2 255 219		

Figure 3: Remuneration (gross amount) received by members of the High Council of Justice and its Personnel in 2017.

The Council provided us with only cumulative remuneration received by the staff of the Council, stating that this was done in order to avoid the possibility of identifying specific persons. According to the Law on Conflict of Interest and Corruption in Public Service, only members of the High Council of Justice are considered “public officials”. This reduces the accountability and financial transparency of other high-ranking officials of the Council. Therefore, the list of public officials must be extended to include the heads of departments of the High Council of Justice, the Independent Inspector and Head of Management Department.

## 2.6. PUBLICLY INACCESSIBLE INFORMATION

The High Council of Justice has been long criticized for failing to meet adequate standards of transparency. Some important information remained unavailable during the reporting period:

- **In 2017, 45 judicial candidates requested closed interviews**

The right of a judicial candidate to request a closed interview is determined by the 2014 amendment to the October 9, 2009 Decision N308 of the High Council of Justice. Despite this rule, in previous years, the Council had been conducting open interviews with candidates. The Council had established a practice, whereby, prior to their interview, each candidate was asked whether they agreed to an open format; as a rule, most candidates gave their consent and interviews were held in an open format.



While only 4 candidates requested closed interviews in 2016, this number increased to 45 in 2017, which is a clear deterioration of transparency of the judicial selection/appointment process.

Considering the fact that the Council, as a collegial body, and its individual members do not have the obligation to provide substantiation for their decisions related to candidates, the openness of interviews remains the only opportunity for stakeholders to observe (albeit partially) the selection/appointment process, identify and disclose its positive and negative aspects and contribute to improving the system from the outside. By closing this process, it becomes completely impossible for outside stakeholders to assess the selection of judges.

The Council refused to provide the monitoring group with video recordings of any of the candidate interviews (including those with candidates that were ultimately appointed as judges for life) by referring to the regulation, whereby the session was closed for the public. The reason for this decision remains unclear, since there is no logical basis for not disclosing recordings of interviews with successful candidates.

- **The identities and biographical information of persons participating in the competition for the vacancies of the Independent Inspector and Head of the Management Department in 2017 are closed**

On November 20, 2017, the Council elected an Independent Inspector without the public having any information about the candidates taking part in the competition. The positions of the Independent Inspector and Head of the Management Department must be included in the list of “public officials” defined by the Law on Conflict of Interest and Corruption in Public Service, so that the identities and biographies of persons taking part in competitions for these positions are made public.

- **Closed sessions**

On one occasion during the reporting period, a Council session was closed for the public without prior notice or due substantiation. More specifically, the Council closed its session of April 11, which dealt with the communication strategy of the Council, without any substantiation or prior notice.<sup>63</sup> The monitoring group has stated in previous reports that the regulatory legislation of the Council does not define procedures for closing sessions, which constantly creates problems in practice. This also ties directly with the lack of regulation on session and agenda preparation. Therefore, these issues must be regulated by legislative or subordinate normative acts in a way that ensures a high standard of transparency and considers the interests of stakeholders attending Council sessions.

## **Recommendations**

- **The Council must ensure through correct management that information about its sessions is made public within legal deadlines. The Council must also publish more detailed agendas. More specifically, internal regulations must obligate the Council to publish decisions, concepts and other types of public documents to be discussed during its sessions.**
- **The Council must elaborate internal regulations related to the procedures and timeframes for preparing sessions, as well as cases when sessions can be organized and agendas**

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<sup>63</sup> The agenda contained the following wording: “Report on the Consulting Activities of Public Relations of the High Council of Justice, Future Plans and Prospects”.

amended based on urgent necessity. The procedure of compiling agendas and the person responsible for it must be determined.

- **The Council must hire the head of the Judicial Management Department and its other employees as soon as possible.**
- **The Council must be obligated by law to publish session minutes/recordings and decisions on its website. The decisions must be published in their consolidated (final edition) form.**
- **The Council's Rules of Procedure must be brought in line with the General Administrative Code; the media must be given unrestricted ability to record the full duration of Council sessions in a way that does not hinder proceedings.**
- **The law must ensure the publicity of information that is important for the public. Interviews with judicial candidates must be open, while recordings of interviews with appointed judges must be made available to any stakeholder. The list of "public officials" must be extended to include the heads of departments of the High Council of Justice, the Independent Inspector and Head of Management Department to ensure transparency of the selection process, as well as the finances of these individuals.**

## 3. SUBSTANTIATION OF COUNCIL DECISIONS

In the reporting period, like the previous one, the legislation still does not foresee an obligation of the High Council of Justice to substantiate its decisions. The concern that the Council decisions are unsubstantiated are well illustrated by its decisions on appointment of chairs of court and chambers/panels, admission to the High School of Justice, determination of judicial specializations and on other important issues.

Despite enactment of the so-called ‘third wave’ legislative changes, as well as the amendments related to judicial appointments in accordance with the decision of the Constitutional Court of February 15, 2017<sup>64</sup>, there are still concerns regarding unsubstantiated nature of the Council decisions on judicial appointments. In practice, judges are appointed through a non-transparent procedure and without provision of reasons. This points to the ineffectiveness of the reform in the direction of selection and appointment of judges.

### 3.1. SELECTION AND APPOINTMENT OF JUDGES

#### Core Findings:

- **The selection/appointment process of judges that took place after the enactment of the third wave legislative changes on judicial reform revealed that the reform undertaken has not produced results and judicial appointments are still based on biased and non-transparent decisions;**
- **The process of selection and appointment of judges was damaged by the legislative changes enacted after the reform legislation entered into legal force. Exceptional rule on lifetime appointments worsens the transparency standard and harms the possibility of effective appeal. Accordingly, improved rules on judicial appointments introduced by the reform concerned only a limited number of judges. Former and incumbent judges, among those, the ones, whose decisions raised significant questions in terms of their fairness, were appointed for an indefinite term through an exceptional procedure;**
- **Rules on selection/appointment of judges introduced by the third wave reform still contains a number of shortcomings. Namely, they do not foresee an obligation to substantiate; procedures for interviewing a candidate is not formalized – the ratio of the interview results in the overall assessment of a candidate is not established, that creates ample room for arbitrariness at the interview stage; information gathering about a candidate carries a formal nature;**
- **In the reporting period, the High Council of Justice has not announced a competition for admission to the High School of Justice; neither has the Council held a qualification examination. This has an adverse effect on selection/appointment of judges and limits the possibility of recruiting new judges with high professional qualities and integrity.**

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<sup>64</sup> <https://matsne.gov.ge/ka/document/view/3584518> - Decision of the Constitutional Court Grand Chamber of February 15, 2017 (N<sup>o</sup>3/1/659) Citizen of Georgia Omar Jorbenadze versus Georgian Parliament

- **The High Council of Justice still has not adopted rules on assessment of judges appointed for a probationary period.**
- **In the reporting period, there have been cases, when the Council, in a short period after the competition, changed the specialization of several judges appointed for another specialization prescribed by the competition. This indicates that the Council may be abusing the power to determine specializations with the purpose of appointing judges on certain positions following a prior agreement about it;**
- **Regulations for transferring judges without a competition procedure as established by the Council, does not satisfy requirements of a foreseeability standard.**

### **3.1.1. CHANGES TO LEGISLATION ON SELECTION/APPOINTMENT OF JUDGES**

In the previous reporting period, the law did not regulate criteria for selection/appointment of judges and did not foresee a procedure for reaching a decision. Accordingly, selection/appointment of judges took place through a non-transparent procedure and without reference to objective criteria.<sup>65</sup>

On March 8, 2017 third wave legislative changes of the judicial reform entered into legal force, which predominantly concerned amendments to rules precisely on selection and appointment of judges. Namely:

- a) For judicial appointments, two main criteria for selecting judicial candidates were determined (competence and integrity), scoring system was introduced for assessing the candidates in terms of the competence criterion;
- b) Rules on assessment of candidates were determined;
- c) Procedures for reaching a decision and appealing it were introduced.
- d) For an objective and comprehensive assessment of a candidate, rules on information gathering regarding their professional reputation and activities were determined by the law.

According to the changes, ballots are cast on appointment of those judicial candidates only, who majority of the Council members believe satisfy or fully satisfy the integrity criteria, and the sum score in the competence criteria is no less than 70 percent of the maximum scores received.<sup>66</sup>

The main shortcoming of the third wave changes is that assessment score system does not extend to assessment by integrity criterion. Following the assessment, a candidate takes a judicial position through voting by secret ballot, there is no requirement to substantiate a decision on judicial appointments, and neither is an effective appeal mechanism guaranteed. Furthermore, decisions on

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65 Monitoring Reports of the High Council of Justice activities of 2014, 2015 and 2016 produced by Goergian Young Lawyers' Association (GYLA) and Transparency International Georgia (TI Georgia), available at [www.gyla.ge](http://www.gyla.ge) and [www.transparency.ge](http://www.transparency.ge);

66 Before the third wave judicial reform, the above rules on assessment of judges extended only to judges who were already appointed for a three-year probationary period.

judicial appointments and the evaluation results are confidential.

This appointment rules introduced by the third wave judicial reform significantly differs from the appointment rules foreseen in relation to judges appointed for a probationary period and worsens the previous standard which was in force. Namely, the law in relation to lifetime appointment of judges currently undergoing a probationary period foresees an open ballot procedure, substantiation requirement for the refusal of appointment, publicity of the candidates' assessment documents. As a result, in Georgia different procedures exist for appointment of judges. A more transparent procedure is foreseen only for a limited group of judicial candidates (graduates of the High School of Justice). Majority of judges, namely those judges, who have years of judicial experience and whose judicial activities raise questions in the society, are appointed based on the legislation establishing a lesser standard.

On June 16, 2017, approximately three months after the third wave legislative changes entered into legal force, enacted amendments to the organic law on Common Courts of Georgia established different procedures for those judges who have no less than 3 years of judicial experience and those who were appointed for a probationary period before the law entered into legal force and have no less than 3 years of judicial experience.<sup>67</sup> According to the legislation establishing a lesser standard, majority of judges employed in the judicial system any more would not be assessed and appointed based on general rules of selection/appointment of judges. In particular, from 209 judges which were appointed for trial period till June, 2017 only 147 judges are subject of a new rule for a lifetime appointment in judicial system. In the reporting period, the High Council of Justice appointed 34 judges based on these new procedures. According to information available by May 2018, 78 judges were appointed for an indefinite term based on the exceptional rule.

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<sup>67</sup> The decision of the Constitutional Court in the case *Omar Jorbenadze v. Georgian Parliament*, led to changes to rules regulating selection-appointment of judges. Based on this decision starting from July 1, 2017 the normative content of paragraph 4<sup>1</sup> of article 36, which foresaw appointment of those persons, who are incumbent or former judges and have no less than 3-year's judicial experience, to appellate and district (city) courts for 3-year term, was revoked. The legislative changes intended to execute the judgment of the Constitutional Court, established that upon the request, evaluation procedure is terminated in relation to those judges, who were appointed before July 1, 2017 for a three-year term and have no less than three-years of judicial experience, and based on the decision of the High Council of Justice they are appointed for an indefinite term before they reach an age established by law (this decision of the High Council of Justice is rendered by secret ballot and requires no less than two-third majority vote of the Council members).

# SELECTING – APPOINTING JUDGES

## APPOINTMENT THROUGH COMPETITION



**Appointment for probationary period** – High School of Justice graduates, individuals with over 18 months and less than 3 years of experience as a judge

**Lifetime appointment** – current and former judges, with over 3 years of experience

## STAGES OF COMPETITION



- ✓ Announcement of competition
  - ✓ Formal selection of applications
  - ✓ Gathering information about candidates
  - ✓ Interview with candidates
  - ✓ Assessment of candidates with integrity and competence criteria
- 
- *Only those candidates who, based on the Council's decision, meet minimal standards of integrity and competence prescribed by law, are eligible for voting procedure.*
  - *The decision taken by the Council to exempt candidate from voting procedure can not be appealed.*
- 
- ✓ Secret ballot ( by  $\frac{2}{3}$  majority of members)
- 
- *Refusal can be appealed to the Qualification Chamber of the Supreme Court*

# LIFETIME APPOINTMENT



**High School of Justice graduates, appointed for probationary period; judges with over 18 months and less than 3 years of experience**

**Exceptional rule – judges appointed for 3 years probationary period before July 1, 2017, who have at least 3 years of experience as judges**

## ASSESSMENT PROCEDURE:

- ▶ **Selecting evaluators:** 6 evaluators (the Council members)
- ▶ **Evaluation with integrity and competence criteria:** Total of 6 evaluations throughout 3 years

■ *If 4 evaluators decide that the judge does not meet minimal standards of integrity and competence prescribed by law, the Chairperson of the Council issues an act on denying to review lifetime appointment, which can be appealed to the Council.*

- ▶ **Interview with candidates**
- ▶ **Open ballot** (by  $\frac{2}{3}$  majority of members)

■ *Refusal to lifetime appointment can be appealed to the Qualification Chamber*

## ASSESSMENT PROCEDURE:

- ▶ **Upon judge's application, three-year evaluation procedures are terminated**
- ▶ **Formal evaluation**
- ▶ **After gathering information about applicants, the same procedures in place for appointing through competition, are continued**

### 3.1.2. APPOINTMENT OF JUDGES THROUGH COMPETITION

Persons admitted to the High School of Justice, who are to be appointed to a judicial position for the first time and for a probationary period are subject to appointment through competition. Former or incumbent judges to be appointed for an indefinite term are also subject to competition.

In the reporting period, the High Council of Justice announced competition for selection/appointment of judges twice based on decisions of February 17 and October 16 of 2017.

#### Competition of February 17 of 2017

On February 17 of 2017, the High Council of Justice announced a competition for filling 84 vacant judicial positions<sup>68</sup>. Based on the decision of the Council applications had to be submitted between February 20 and March 5. Based on the decision of the Council the deadline for submitting applications was extended to March 19,<sup>69</sup> reasons for such extension was not provided either in the decision or in the statement published on the website.<sup>70</sup>

According to the rule on judicial appointments introduced by the third wave legislative changes, the High Council of Justice within 5 days considers applications and supporting documents of judicial candidates participating in the competition and immediately after such consideration, it publishes short biographical data about those judicial candidates, whose documents satisfy requirements established by law. The short-list of judicial candidates reaching the second stage of the competition was drawn up on March 24, however the list did not become accessible until March 29. Furthermore, short biographical data about the candidates was not published until March 31<sup>71</sup>. According to information published on the Council website, between April 18 and 22, judicial candidates were given the possibility to get acquainted with the information collected by the High Council of Justice about them<sup>72</sup>.

On April 21, the Council posted on its website that interviews would start from April 24. Information about interviews would appear on the website only one day before the interview, which damaged the quality of its publicity even more.<sup>73</sup>

The competition proceeded in the circumstances, in which the Council had not brought the internal sub-statutory acts regulating the competition process in compliance the requirements of the third wave legislative changes<sup>74</sup>. The member of the Council appointed by the president highlighted the

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68 <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/24-2017.pdf> – regarding the announcement of a competition for vacant positions in appellate and district (city) courts;

69 <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/25-2017.pdf> – The Council decision on changes brought to its decision #1/24 of February 17, 2017

70 <http://hcoj.gov.ge/ge/informatsia-mosamartleta-shesarchevi-konkursshi-registratsiis-taobaze/2844> – Information regarding registration of candidates for the selection competition.

71 <http://hcoj.gov.ge/ge/mosamartleobis-kandidatebis-avtobiografiebi/2861> – biographies of judicial candidates

72 <http://hcoj.gov.ge/ge/mosamartleobis-shesarchevi-konkursis-monatsileta-sakuradghebod/2876>

73 Interviews resumed on April 24, 25, 26 and 27 and May 1, 2, 3;

74 <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/33-2017.pdf> – The Council by the decision of March 27, 2017 #1/33 made changes to the decision on approval of the Rules on Selection of Judicial Candidates”, which reflected changes foreseen in the third wave judicial reform. At this point, competition for selection of judges had already been announced and the candidates were short-listed for the second stage.



rushed conduct of the competition and the accompanying shortcomings, which triggered aggression of other members of the Council.

From among 108 judicial candidates short-listed for the second stage of the competition<sup>75</sup> 11 were graduates of the High School of Justice, 9 former and incumbent Supreme and Constitutional Court justices and 88 former and incumbent district (city) and appellate court judges.

Questions arose with regard to participation of 9 former and incumbent Supreme Court and Constitutional Court justices, among those were the first deputy Chief Justice and one of the most influential persons in the court system Mikheil Chinchaladze and former constitutional court justice Otar Sichinava<sup>76</sup>.

By the end of 2016, draft of the third wave legislative changes was modified in a hasty manner, directly prior to the third reading, without any preceding public consultations. The legislative changes stipulated that requirement of a three - year probationary period for judicial appointments did not apply to former or incumbent Constitutional or the Supreme Court justices and that they would be appointed for an indefinite term without a probationary period. Up until that time, despite several recommendations issued by local and international organizations the government did not agree to revise the institution of probationary appointments, which strengthened doubts that these legislative changes were introduced for favoring the above-mentioned persons. Eventually, the High Council of Justice through a competition appointed the said persons to judicial positions for an indefinite term.

Furthermore, at this point, the Council was already aware that according to the decision of the Constitutional Court of February 15, 2017, starting from July 1, new rules on lifetime appointment of judges who had no less than 3 years of experience would enter into legal force.

The said decision of the Constitutional Court, which was rendered before the announcement of the competition, raised discussion among Council members about the term of office candidates were to be appointed for in the framework of the ongoing competition. Certain members of the Council favored lifetime appointments based on the Constitution directly, and the other members supported appointment for a probationary period in accordance with the regulation in force before July 1. In addition, it was unclear which appointment procedure had to be invoked in relation to former and incumbent Supreme Court and Constitutional Court justices. Accordingly, throughout the competition it remained unknown to the candidates, which appointment procedure would be applied in their case, which rendered the conditions of the competition unforeseeable.

Based on the study of documents, from among 108 persons short-listed for the next stage of the competition, 104 candidates appeared at the interview stage.

77 judicial candidates reached the voting stage of the competition for the positions of judges. 24

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<sup>75</sup> <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/28-2017.pdf> – regarding short-listing candidates for the second stage of the selection competition. In total 112 candidates participated in the competition. 105 candidates reached the second stage and three were given additional time for presenting relevant documents attesting to their higher education qualification from the National Center for Educational Quality Enhancement;

<sup>76</sup> <http://www.tabula.ge/ge/story/120047-otar-sichinava-saapelacio-sasamartlos-mosamartled-uvadod-dainishna> – Otar Sichinava obtained publicity in the wider public, when he, instead of considering cases of Gigi Ugulava and the so-called ‘Cable Case’, was walking his dog in Tbilisi.

candidates did not satisfy the requirements of integrity and competence criteria. On May 11, 2017, in the framework of the competition Council members voted for judicial appointments.

Following the voting, 64 out of 77 candidates were appointed as judges in district (city) and appellate courts, while 20 positions remained vacant. Competition was not held for appointment on judicial positions in 7 courts, while none of the candidates were appointed in 2 courts.

A member of the Council appointed by the president Vakhtang Mchedlishvili did not participate in the voting procedure. The non-judicial member of the Council believed that it would be inexpedient to participate and cast ballots in the competition for judicial appointments before relevant regulations were drawn up by the parliament.<sup>77</sup>

**Eventually, from among the appointed candidates: 6 are graduates of the High School of Justice, who were appointed for a three-year probationary period due to lack of their judicial experience; 4 former and incumbent Supreme Court Justices and 1 former Constitutional Court Justice were appointed for an indefinite term precisely based on changes made to the draft law of the third wave judicial reform at the stage of the third reading in parliament; 27 former and incumbent judges were appointed also for a probationary period, as the Council eventually agreed to discuss their lifetime appointments after the Parliament passed the relevant regulations.<sup>78</sup>**

### **Competition of October 16, 2017**

Based on the decision of October 16, 2017, competition for appointment on 52 vacant judicial positions was announced.<sup>79</sup> Period between October 23 and November 13 was determined for registration of candidates.<sup>80</sup> Based on the Council decision of November 20, 81 candidates were short-listed for the second stage.<sup>81</sup> The list of candidates reaching the second stage of the competition was drawn up on November 20, however short biographical data about candidates was not published, which constituted breach of law, based on which immediately after consideration of the applications and supporting documents of judicial candidates, the Council shall publish short biographical data about them on the website.

Interviews with the candidates were held on December 27, 28, 29 and 30. Information about the date of the interview was posted one day before it was going to take place, which reduced the quality of publicity even more. Council members interviewed more than 20 candidates in a day.

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77 <http://hcoj.gov.ge/ge/mosamartleobis-shesarchevi-konkursis-monatsileta-sakuradghebod/2876> – Statement of the Council member Vakhtang Mchedlishvili

78 <http://hcoj.gov.ge/ge/mosamartleobis-shesarchevi-konkursis-shedegebi/2913> – Results of the competition for selection of judges.

79 <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/259.pdf> – regarding announcement of a competition for vacant positions in appellate and district (city) courts;

80 <http://hcoj.gov.ge/ge/mosamartleta-shesarchev-konkursze-registratsia-2017-tslis-23-oqtombridan-itskeba/3073> – Registration of candidates for selection competition of judges will begin from October 23, 2017

81 <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/313.pdf> – regarding short-listing judicial candidates for the second stage of the competition. In total 84 candidates participated in the competition, out of which 82 reached the second stage and one was given additional time for presenting relevant documents attesting to their higher education qualification from the National Center for Educational Quality Enhancement;

On January 11, ballots were cast. In the end, out of 82 candidates participating in the competition at the interview stage 2, and before the voting procedure 3 candidates withdrew from the competition. One candidate did not appear. Accordingly, only 76 candidates moved to the evaluation stage.

Only those candidates moved to the voting stage, who satisfied requirements of integrity and competence criteria. Namely, out of those 76 candidates, who were interviewed, 19 candidates failed to reach the voting stage, while they are restricted by law to appeal those decisions before the qualification chamber. This circumstance creates a suspicion that the Council may have intentionally rejected unwanted candidates prior to the voting stage. This suspicion is strengthened by the incident, in which one of the candidates who could not reach the voting stage was asked by a judge member of the Council to explain a critical comment directed at the Council the candidate had posted on social media.<sup>82</sup> It was also unclear fulfillment of which criterion was to be established by the question asked to one of the candidates about a legal dispute initiated by his spouse against the Council.<sup>83</sup>

Out of 34 candidates appointed as judges: 15 were graduates of the High School of Justice, 1 was a former judge and 18 were incumbent judges. 18 positions remained vacant.

### **3.1.3. CONSIDERATION OF LIFETIME APPOINTMENTS OF JUDGES AFTER EXPIRATION OF A 3-YEAR PROBATIONARY PERIOD**

On April 11, 2017, on its website the Council published information about interviews with those judges whose 3-year probationary period had expired. These 9 judges were appointed for a 3-year probationary period on May 27, 2014.<sup>84</sup>

In the reporting period, in April after the expiration of a three-year probationary period, the Council based on reports drawn by an evaluator and the interviews appointed all these 9 judges for an indefinite term.<sup>85</sup>

From 2013 up to the present, the High Council of Justice has been carrying out evaluation of judges appointed for a probationary period without having adopted a sub-statutory act that would regulate in details the process of evaluation of judges appointed for a probationary period. This makes the process opaque and creates room for reaching arbitrary and biased decisions. The legislation does not stipulate and it is not foreseeable for a judge, what information their assessment is based on, which violates the principle of judicial independence.

Since November 2013, all judges in the first and second instance courts were appointed for a probationary period. At the point of preparation of this report, in the judicial system overall 30 judges are appointed for an indefinite term, who had fully completed the 3-year evaluation period.

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82 See interview of December 27, 2017;

83 See interview of December 29, 2017 – as it turned out during the interview, spouse of the candidate who participated in the competition for admission to the High School of Justice, was rejected admission to the School and had appealed the relevant decision of the Council.

84 <http://hcoj.gov.ge/ge/informatsia/2870> – Interviews with the judges appointed for a probationary period. These judges are: Shota Bichia, Nino Buachidze, Sopio Gignadze, Levan Darbaidze, Lasha Tavartkiladze, Nana Kalandadze, Tea Leonidze, Manana Meskhishvili, Manuchar Tsatua.

85 <https://goo.gl/wDXzee> – For more details see the report of GYLA of 2017 on assessment of judges appointed for a probationary period and their appointment.

The procedure for evaluation of judges appointed for a probationary period, which is defined by the Organic Law of Georgia on Common Courts, does not meet the requirements of foreseeability. Further, the analysis of the legislation has illustrated that the relevant provisions are not sufficiently detailed and a number of procedural issues require additional regulation. In particular: the rules on assessment of decisions issued and sessions conducted by the judges appointed for a probationary period are vague and require detailed regulation; no rules are set about how the information shall be collected about the judges in question; it is not determined which sources and evidence evaluation of a judge shall be based on; it is not established how the randomness principle is guaranteed during the evaluation process (selection of decisions issued and sessions conducted by a judge in question), etc.

### **3.1.4. TERMINATION OF A PROBATIONARY PERIOD AND LIFETIME APPOINTMENT OF JUDGES**

The transitional provisions of the organic law on Common Courts of Georgia, which were introduced after the third wave legislative changes entered into legal force, established the rules on lifetime appointments of those judges, who are appointed for a three-year probationary period and have no less than three years of judicial experience.

The Council made changes to the Rules of the Council based on the decision of the Constitutional Court of February 15, 2017. The changes provided for a procedure on lifetime appointments of judges who have no less than three years of judicial experience and who were appointed as judges for a three-year term before July 1, 2017. The basis for commencing this procedure is an application filed by a judge. The Council is authorized to determine priority of those applications considering the time the evaluation of judicial activities started. Also, for lifetime reappointments of judges the legislation and the Council decision established a system of information gathering, case studies and evaluation by points. These procedures have fixed terms; however, information about the progress of the process is not published on the Council website. Accordingly, interested parties are not informed about the time of lodging the applications and about the stages of information gathering and case evaluations. In such cases, only general information is available online, namely number of judges who applied to the Council and the dates when interviews will be held. In this case also, evaluation of judges takes place based on the competence and integrity criteria. However, based on the new regulations, the standard set for lifetime appointments are worsened, as in this case decisions on indefinite appointments are rendered by secret ballot, which rules out their substantiation and the possibility of an effective appeal.

In October 2017, the Council considered applications of 38 judges appointed for a probationary period, who requested termination of the evaluation process and lifetime reappointments according to article 79<sup>4</sup> in the transitional provisions of the law on Common Courts of Georgia. On October 9, 10 and 11, interviews were held. On October 20, Council members voted about lifetime appointment of judges.

The chair of the Council demanded that consideration of the issue was postponed, claiming that it would be vague which procedures were to be invoked in relation to those judges, who may be denied appointment for an indefinite term. Non-judicial members of the Council Vakhtang Mchedlishvili and Nazi Janezashvili, shared this position, however in the end this proposal of the chair was not supported by the majority. Accordingly, the chair of the Council and the two non-judge members did not participate in the voting. The Council by secret ballot and majority vote appointed 34 out of 38

judges for an indefinite term.<sup>86</sup>

During one of the sessions of the Council after judges were appointed for an indefinite term, its member Dimitri Gvritishvili stated the chair of the Council refused to sign an order about their lifetime appointments.<sup>87</sup> Discussion of the issue continued with mutual accusations. Nino Gvenetadze stated that she would inform the public about the reasons for refusing to sign the orders on lifetime appointments, however, later when the Council chair signed the decisions, she did not clarify the reasons for the delay.

### 3.1.5. ASSESSMENT OF THE INTERVIEWS HELD FOR SELECTION OF JUDGES

Since October 2017, monitoring of the interviews with judges revealed several problematic issues:

**During the interviews, judges were asked questions of unequal difficulty, there were signs of favoritism towards particular candidates.** The Council almost never asked professional questions to candidates who serve as court chairs, while everyone else mainly answered such questions. The court chairs were mostly asked about their managerial skills, even though the Council had to decide on their lifetime appointments as judges rather than chairs.

For instance, Vakhtang Mchedlishvili, the Council member appointed by the President, was the only one to ask a professional question to one of the candidates who himself is a Council member and a court chair. He asked the candidate to list the absolute rights from the European Convention of Human Rights. This question of Vakhtang Mchedlishvili clearly irritated majority of the Council members. Some of the Council members actively tried to give a hint to the candidate, who eventually gave a wrong answer to a simple professional question.<sup>88</sup>

Particular attention has to be drawn to the fact that the candidate who could not demonstrate basic knowledge of the European Convention is a member of the Council and when deciding on judicial appointments is accordingly obliged to assess the other judicial candidates' familiarity with the Convention of Human Rights and the case law of the European Court.

During these interviews **leading questions** were asked a number of times. This made it easy for the candidate to guess which answer the Council member expected. Furthermore, often Council members expressed **bias towards certain candidates**.

For instance, several Council members openly expressed their positive attitude towards a judge, who had won a defamation case against a private person in the first instance court several weeks before. Certain members of the Council welcomed this decision as important and of precedential value. Such an assessment of a decision by Council members is problematic because the decision is not final, and an expression of views on the ongoing dispute carries risks of influencing courts.

**Unethical behavior of certain Council members towards colleagues** - during interviews majority

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86 <http://hcoj.gov.ge/ge/34-mosamartle-tanamdebobaze-uvadod-gamtsesda/3075> 34 judges were appointed for an indefinite term.

87 Minutes of the session of November 6 2017

88 Minutes of the interview session on October, 2017;

of the Council members openly expressed their dissatisfaction with the questions asked by two non-judicial members of the Council (Vakhtang Mchedlishvili and Nazi Janezashvili) to the candidates. Their attitude to these members was often cynical and marked with aggressive comments. Despite the Council Chair giving each member an opportunity to ask questions in such cases, unprofessional and often unethical conduct of certain Council members damages the trust in this institution and impedes its effective operation.

**To sum up, monitoring of interviews demonstrated that the Council has not managed to make judicial appointments in a way that would eliminate doubts of partiality and would ensure impartial evaluation of candidates based on their integrity and qualification.**

**During the February 16<sup>th</sup> competition, interviews with the judges revealed the same shortcomings which existed in the previous years, namely:** Interviews were not structured. Very often candidates were asked questions of unequal significance. Some of the candidates were not asked questions to check their professional qualifications at all. The most common questions were about criticism expressed against the judiciary, about the constitutional court decision regarding revocation of a three-year probationary period.<sup>89</sup> On certain occasions, it remained unclear, assessment of which criterion listed in the Council decision on the Rules of Selection of Judges, did the questions asked by the Council members serve. Interviews with some of the candidates related to only particular controversial cases; whereas, other judges similarly involved in such controversial cases were not asked such questions at all. Such inconsistent approach towards candidates may be indicative of the Council's partiality in the process.

**During the competition of October 16,** monitoring of the interviews with the candidates held in an open session revealed that compared to previous competition processes, quality of questions improved. Mainly, candidates were asked questions of equal difficulty. Majority of questioned were intended for evaluation of the candidates' professional knowledge; however, the candidates simultaneously had opportunity to demonstrate their experience and values.

The interviews revealed that level of qualification of majority of candidates did not correspond to the high-ranking position of a judge. The interview stage showed concerns regarding both level of familiarity with the case-law of the European Court of Human Rights and its application by the former and incumbent judges. Similarly, on most occasions, knowledge of the graduates of the High School of Justice was not satisfactory either, which may be indicative that the School is not paying sufficient attention to teaching human rights and jurisprudence of the European Court of Human Rights. Unsatisfactory qualification of the majority of the school graduates indicate the necessity of reforming the High School of Justice.

Unquestionably, the fact that the candidates, in relation to which risks of nepotism existed, and who attracted broad public interest, requested closure of interviews has to be assessed negatively. Following closed interviews from among the candidates the following judge members of the Council were appointed: Levan Tevzadze, Sergo Metopishvili, Vasil Mshvenieraze, Revaz Nadaraia; Supreme Court Justice Mikheil Chinchaladze; Relative of a Council judge member Temur Gogokhia and member of the Council staff Tina Vashakhmadze. Wife of the Council Secretary Maia Kvirikashvili requested closure of the interview. Closure of the interview stage despite broad public interest must be criticized. Publicity of the process in relation to these candidates, could eliminate questions related to impartiality

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<sup>89</sup> See interviews of April 26, 2017;

of the competition and would contribute to increasing public trust in this process. Moreover, requests about closure of interviews by judges, who in their capacity as judges were obliged to observe publicity requirements, may raise doubts about the candidate's compatibility with the established criteria also.

## 3.2. ADMISSION TO THE HIGH SCHOOL OF JUSTICE

According to the Law of Georgia on the High School of Justice, competitions for admission of trainees to the School shall be conducted twice a year: in May and October. In the reporting period, the competition for the admission of trainees to the High School of Justice has not been conducted.

The impediments in the process of admission of trainees to the High School of Justice adversely affect the process of selection/appointment of judges. Namely, same candidates register for the competition, due to which fewer new candidates participate in the process of selection of judges. In none of the competitions held by the Council, could the vacant positions be completely filled. That there is a considerable number of vacant positions remaining after competitions are held is particularly problematic bearing in mind that the court is overloaded with cases and there is a problem of delays in court proceedings. **Following the competition announced for May and October of 2017, respectively 20 and 18 vacant positions remained. The competition for selection of judges could not be held in 7 courts because candidates had not applied.**

The precondition for admission to the High School of Justice is passing of a qualification examination. Neither in this nor in the previous reporting year, in 2016 and 2017, did the Council hold a qualification examination of judges. Currently, qualification examinations are announced and held by the High Council of Justice. The Council is responsible for admission of trainees to the High School of Justice. The criteria for admission to the High School of Justice do not satisfy the requirement of transparency and leaves room for arbitrary decisions. Furthermore, there are no criteria established for selection of qualification examination commission members. This gives the Council wide competencies to exert undue pressure on the admission process to the School. At the start of the reporting period, the Secretary of the Council Levan Murusidze initiated changes to the rule on conduct of qualification examinations of judges. Secretary of the Council discussed that conduct of qualification examination and inflow of new judicial candidates in the judiciary was necessary.<sup>90</sup>

In the coming sessions of the Council, this issue was discussed and a position was expressed, that the electronic system of examinations was outdated, its format could not respond to challenges, could not assess analytical reasoning. The process of drawing up tests was named as one of the most problematic issues, as those tests cannot be checked and a quite a number of complaints were satisfied after the previous exam. In this discussion Council members expressed readiness to work on these issues with donor organizations.<sup>91</sup> However, during the Council sessions in the reporting period this issue has not come up for consideration again.

## 3.3. PROBLEMS OF JUDICIAL SPECIALIZATIONS, TRANSFERS, REAPPOINTMENT OF JUDGES WITHOUT COMPETITION

In the reporting period, majority of incumbent judges participated in competitions announced for selection of judges. On certain occasions, they participated in the competitions, despite the fact that

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90 See the Council session of February, 2017;

91 See the Council session of March 24, 2017;

2 or 3 years were left before their terms of judicial office expired. According to their explanation, as they would have to go through a probationary period, they preferred to complete this term timely and know, whether they are appointed for an indefinite term. Several of them requested transfer to a different court – for instance, transfer from Batumi to Tbilisi court due to family circumstances.

A Judge of Tbilisi Appellate Court Amiran Dzabunidze, who had left 3 years before expiration of his term participated in the competition. He submitted applications for different specializations, among those for the position of a magistrate judge. A Non-judge member of the Council Nazi Janezashvili asked the said candidate about his motivation to participate in the competition, as his term of office expired after three years.<sup>92</sup> The judge answered that for him reappointment for an indefinite term was important and it did not matter whether he would be a judge in the first instance or an appellate court.

On January 11, following the voting session, he was appointed to investigative panel of Tbilisi Appellate Court. During the January 15<sup>th</sup> session, where the issue of filling vacant positions of Tbilisi Appellate Court chambers/panels was discussed, according to the Council decision Amiran Dzabunidze was again transferred to chamber of civil cases.<sup>93</sup>

Pursuant to the legislation, within the context of the competition for the selection of judges vacancies are announced according to specialisations in the specific panels and chambers. Interviews with candidates are conducted based on the vacancy selected by the candidates and the respective topic. However, at the same time, the law provides a general regulation with regard to the change of the specialisation of judges, which gives the Council a wide discretion to change, without any substantiation, the specialisation of a judge, to which he/she had been appointed as a result of the competition. The cases that were revealed in the reporting period, when the judge was appointed through the competition and soon after his specialisation was changed, contribute to losing the meaning of announcing a competition for the selection of judges for specific vacancies. Reappointment of incumbent judges before their term expires and the way this process developed, raise doubts that the incumbent judges may have participated in the competition following a prior agreement with the Council.

Throughout years rules and practice on transfer of judges to other courts and that judges were appointed without competition have been issues of concern for civil society. In the previous years, transfers/promotions were rather problematic and the rules and practice established by the Council raised a number of questions. Article 37<sup>1</sup> of the third wave legislative changes provided for the rules on granting authority to another judge/transferring judges to other courts. The rules determined in which circumstances judges are transferred, as well as the procedure, how the judge to be transferred is selected.

**In the reporting period, one reappointment of a judge without competition and four transfers of judges were considered in the High Council of Justice. It has to be described positively that decisions on transfers were substantiated. Namely, the rule that judges have to be transferred from the geographically nearest court is observed, the need for transfers, also its effect on the place where a judge is transferred, as well as the court, from which a judge is transferred, is explained. The decisions consider consent of judges.**

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92 See the Council session of December 29, 2017;

93 See the Council session of January 15, 2017;



In the reporting period, the rule on transfer of judges was invoked once. Namely, on July 17, the Secretary of the Council presented an issue for consideration, which concerned transfer of a Kutaisi City Court judge Temur Gogokhia to Tbilisi Court due to family circumstances. According to the law, the High Council of Justice defines criteria for promotion of judges. According to article 13<sup>1</sup> of the Council Regulations, in case an issue on appointment of judges without competition is initiated, information shall be published on the Council website. Presentation of the issue was followed by a discussion. In the end, majority of the Council members rendered a decision on initiating an issue on the judicial reappointment, to a vacant position in Tbilisi City Court without a competition and for the duration of his term of office.

Other judges willing to take the same position were given the opportunity to present applications between July 17 and 23.<sup>94</sup>

On the session of 24<sup>th</sup> July, the Council resumed consideration of the issue. Even though the competition had been announced, Temur Gogokhia did not have a competitor. Following the interview, Temur Gogokhia was transferred to a pre-trial and investigative panel in Tbilisi City Court.

Despite measures formally followed by the Council, the rules on transfer of judges still is not properly regulated, there are no foreseeable process and grounds for determining when a decision of the Council on transfer of judges to other courts is permissible.<sup>95</sup>

#### **Recommendations:**

- **The legislator should immediately start reforming the laws regulating selection and appointment of judges, so that appointment of judges is based on merit and objective and substantiated decisions. Namely, evaluation of judicial candidates by scoring system has to extend to assessment of integrity criterion, assessment by scoring system has to be supported with relevant reasons, interview and information gathering stages have to be formalized and the interviews need to be held in open sessions, the rule on appointment of judges by secret ballot has to be revoked, judicial positions have to be filled by candidates with the highest scores and an effective mechanism for appeals against the refusal of appointment has to be introduced;**
- **The legislator should carry out legislative reform of the High School of Justice, which will ensure independence of the School from the High Council of Justice, from both institutional and functional point of view;**
- **The legislator should ensure that the competence of holding a qualification examination is separated from the powers of the High Council of Justice, so that the Council does not exercise undue influence on the conduct of examinations;**
- **The legislation should determine rules and conditions of determining specializations of judges, which rules out improper manipulation with the authority of determining/changing specializations;**

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94 <http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-gantskhadeba/3026> – Statement of the High Council of Justice.

95 Decision of the High Council of Justice of July 24, 2017 (#1/231) regarding appointment of Temur Gogokhia as a judge of Tbilisi City Court investigative and pre-trial panel.

- **The High Council of Judges should adopt detailed rules on assessment of judicial work during the 3-year probationary period, which ensures objective and transparent evaluation process;**
- **The Council should reform the existing vague rules on reappointment of judges without competition; foreseeable grounds and procedures for transfer of judges and grounds and procedures for initiating promotion of judges must be established.**

# 4. CHALLENGES RELATED TO INTERNAL INDEPENDENCE OF THE JUDICIARY AND THE PRACTICE OF APPOINTING COURT CHAIRS

- **The law does not foresee criteria and procedures for appointment of court/chamber/panel chairs. Such criteria and procedures have not been established by the Council either;**
- **Non-transparent process of nominating candidates for court chairs is still problematic. As a rule, the Council considers only one candidate for one position of a court chair. The Council members do not explain reasons for nomination of a concrete judge candidate. The small number of judges willing to be appointed as court chairs raise questions;**
- **The legislation and practice of the Council does not ensure that selection of court chairs is competitive;**
- **The flawed practice of appointing court/panel/chamber chairs and acting chairs leaves the impression that the Council arbitrarily appoints judges to superior positions in the judiciary. This may be used for retaining influence of the Council over individual judges and the judicial system.**
- **Like the previous reporting period, during this one, the High Council of Justice dismissed a panel chair in disregard of disciplinary proceedings. This illustrates that it depends on the good will of the High Council of Justice whether a judge will take the position of a chair and maintain it until his term of office expires. Legislative guarantees of the court chairs' independence are not implemented in practice;**
- **As a rule, women are not appointed as court chairs.**

## 4.1. REVIEW OF LEGISLATION

According to relevant international standards, judge is only bound by law. Judge shall be free from external influence, also the one from court chairs.<sup>96</sup>

According to international standards, a court chair has to be selected by open ballot and the candidates, who satisfy the foreseen criteria, shall have the right to participate in the selection process.<sup>97</sup>

The significance of the court chairs' appointment in Georgia is increased by the wide competencies that they have in relation to individual judges. According to Georgian legislation, court chairs have rather wide and often discretionary powers, among those: heading and supervising the work of the staff; assigning cases to judges. The chair is authorized to instruct a judge to participate in consideration of a case in another panel, chamber or specialized unit of the same court. Wide competencies of court

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96 Conclusion N19 of Consultative Council of European Judges (2016), para 1 of Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010)

97 Conclusion N19 of Consultative Council of European Judges (2016) on the role of the court chairs, paras 45-45;

chairs and unfettered discretion of the High Council of Justice to select court chairs as they wish represents a risk to independence of individual judges, and places chairs under the informal influence of the High Council of Justice.

As for the chairs' competencies of allocating cases, despite positive legislative changes, which contain a significant restriction of the powers relating to assigning cases, in the reporting period those have not entered into force<sup>98</sup> and chairs in court still have unfettered powers to influence distribution of cases among judges.

Still in this reporting period, legislation has not addressed appointment and activities of court chairs. Neither through legislation nor through Council decision are the criteria for appointment of a court chair determined.

In the previous reporting period, for eliminating the flawed practice of dismissing court chairs,<sup>99</sup> the third wave legislative changes of the judicial reform specified the rule on dismissal of court chairs. The law determined that the ground for termination of the court/panel/chamber chairs' authorities is dismissal of the court/panel/chamber chair through a disciplinary action.<sup>100</sup> This provision rules out dismissal of a judge from the position of a court chair without set procedures, as it happened in the previous reporting period. Despite this positive change, in the reporting period the High Council of Justice dismissed chair of Tbilisi City Court Panel of Criminal Cases Giorgi Ebanoidze without resorting to the disciplinary procedures set by law and at the pretext of joining court panels. In this case also, dismissal of a panel chair in this form left the impression that the chair was dismissed circumventing the legislation on disciplinary violations.<sup>101</sup>

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98 In the reporting period pilot system of random case distribution operated only in Rustavi city court.

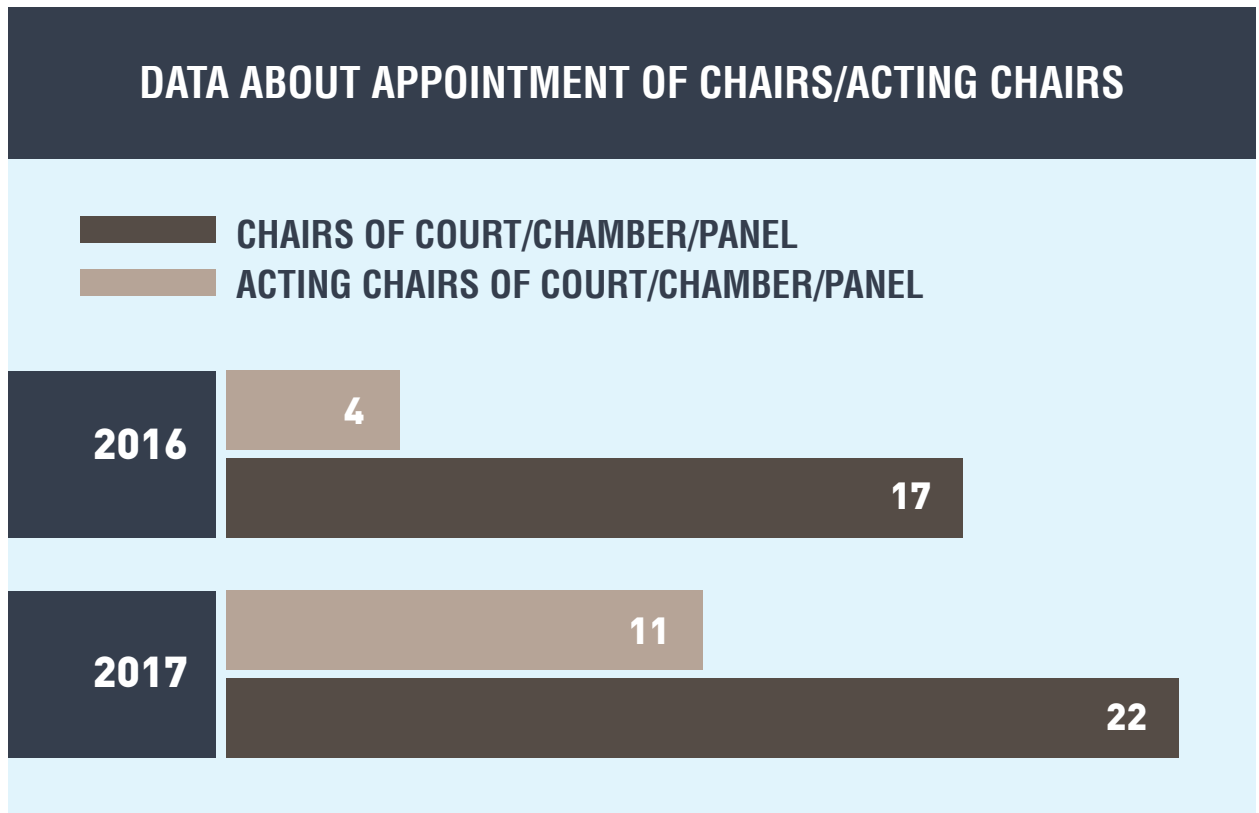
99 The Council dismissed the chair of Tbilisi City Court from his position as a chair in disregard of the legal requirements, so that disciplinary proceedings were not initiated against him. Monitoring report N5 of the High Council of Justice activities produced by GYLA and TI Georgia, chapter 5.4.3

[https://gyla.ge/files/news/2006/MONITORING%20REPORT%20OF%20THE%20HIGH%20COUNCIL%20OF%20JUSTICE%20%20N%205%20GEO%20\(3\).pdf](https://gyla.ge/files/news/2006/MONITORING%20REPORT%20OF%20THE%20HIGH%20COUNCIL%20OF%20JUSTICE%20%20N%205%20GEO%20(3).pdf)

100 subparagraph 'c' of paragraph 5 of article 32 of the Law on Common Courts of Georgia

101 [http://coalition.ge/index.php?article\\_id=162&clang=0](http://coalition.ge/index.php?article_id=162&clang=0) - The Coalition Strongly Criticizes Arbitrary Dismissal of Tbilisi City Court Criminal Collegium Chair

## 4.2. APPOINTMENT AND DISMISSAL OF COURT, PANEL, CHAMBER CHAIRS AND ACTING CHAIRS



In 2016, based on the decision of the High Council of Justice, 17 acting chairs of court/panel/chamber and 4 chairs of court/panel/chamber were appointed in the judiciary. In the reporting period, the Council appointed 22 judges as chairs of court/panel/chamber and 11 judges as acting chairs of court/panel/chamber. As observed, the Council continues the practice of appointing acting chairs. Decisions on appointment of acting chairs and the duration of their term was not substantiated by the Council, which creates doubts about improper use of powers in relation to appointment of acting chairs.

Observation of the appointment-dismissal of panel chairs and acting chairs once again brought to attention number of shortcomings related to this process. Due to the absence of set criteria and procedures, competitive environment and formal interviews, objective observer is not given the possibility to see how the Council evaluates a candidate. Lack of legislative regulation and inconsistency of the Council leaves room for arbitrariness, which represents a significant leverage for appointing judges favored by the Council to managerial positions. For years, the High Council of Justice does not observe even a basic standard of transparency when appointing chairs. Neither does the legislation determine criteria and procedures for appointment of chairs, which is fully in compliance with international standards. All the above poses a serious risk to internal independence of individual judges and the court.

This position is strengthened by the statement of Batumi City Court Irakli Shavadze aired on Adjara TV, who discussed in details the influence that Batumi City Court chair Davit Mamiseishvili has on the court and concrete judges. This unprecedented appearance of a judge about the problems existing within the system illustrated how significant the influence of chairs over consideration of cases is in

the court and once more confirms that the judiciary is ruled precisely through chairs.

In the reporting period, the Council more than devoted sessions to issues of appointment of court/panel/chamber chairs and acting chairs. With the renewed composition of the Council, discussion of the appointment and dismissal of chairs was marked by intense confrontations. The discussion revolved around the absence of relevant criteria and procedures.

During the discussion of these issues, judge members of the Council shared positions and interpreted the law as following: the legislation does not foresee a specific procedure and it is the discretion of the Council to decide on such appointments. Despite this, the Council demonstrates good will and holds interviews with the candidates.

It is true that the Council established the practice of interviewing candidates. During the interviews the candidates were mainly asked about their managerial qualities, statistics of the pending cases, approaches to identify and resolve problems. However, as no criteria are determined, it is vague and unforeseeable, which skills were assessed by questions asked and answers given. Furthermore, observation of the process showed that very often candidates were not aware of the challenges in the court, could not identify problematic issues, and their answers were general. Considering the above, it appears that interviews had a formal nature and the Council members had agreed on appointment of concrete candidates in advance.

***While discussing the appointments of chairs, a non-judge member of the Council Gocha Mamulashvili noted that throughout previous four years, never have been the non-judge members asked about such appointments, as chairs are not appointed by a two-thirds majority, judge members would agree between them and appoint accordingly.<sup>102</sup>***

Court chairs were selected in a noncompetitive environment. As a rule, judge members of the Council nominated one candidate, who was then appointed.

We will discuss example of Mikheil Chinchaladze's appointment as chair of Tbilisi Appellate Court as an illustration of this practice.

Mikheil Chinchaladze was nominated by the judge member of the Council Shota Getsadze. He did not have competitors. His nomination was preceded by unexpected resignation of Tbilisi Appellate Court chair<sup>103</sup>, which created the possibility for the Council to appoint one of the most influential persons in the court system to this position. The concerns were aggravated by the fact that appointment as Tbilisi Appellate Court Chair of Mikheil Chinchaladze was decided by the Council, while tenure of majority of its members was expiring, which confirmed doubts that the incumbent Council composition intended to appoint to this position a candidate they wished before expiration of their term.

During the interview, non-judge member of the Council Vakhtang Mchedlishvili appointed by the President advised Mikheil Chinchaladze to withdraw from the selection process, as his candidacy was discredited in the society and his appointment would not have a positive effect on the public trust

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102 Video recording of the Council session of May 29, 2017;

103 <http://medianews.ge/ge/iustitsiis-umaghlesma-sabchom-valeri-tsertsvadzis-gantskhadeba-tsnobad-miigho/27074> - According to Valeri Tsertsvadze, his decision to resign from his position as a chair of the appellate court was related to a legal dispute between two companies, one of which was associated with his family.

in the judiciary. Other non-judge members of the Council also had questions about the concerns in society related to his alleged interference in the activities of judges and influences over the judiciary. In response, the candidate noted, he did not agree with accusations against him and was open for cooperation. The Council with 12 votes appointed Mikheil Chinchaladze as the chair of Tbilisi Appellate Court.<sup>104</sup>

There were several occasions, when non-judge members of the Council nominated alternative candidates, however, these candidates have not even reached the voting stage. According to practice established by the Council, judges are appointed by secret ballot, accordingly, as the Council supported candidates nominated by judge members by majority vote, voting for alternative candidates became pointless.

When the renewed composition of the Council considered appointment of Tbilisi City Court chair again with only one nominated candidate, a non-judge member Nazi Janezashvili suggested appointing an acting chair for a certain term, establishing procedures and criteria for selection of chairs and only after that discussing appointment of Tbilisi City Court chair. Furthermore, she noted she did not have information whether other judges of Tbilisi City Court had the possibility to nominate themselves. Judge members of the Court stated that based on information they had, judges of Tbilisi City Court welcomed the nomination of Vasil Mshvenieradze. As a result, during the July 3<sup>rd</sup> session, following a formal interview procedure, Vasil Mshvenieradze, incumbent member of the Council, was appointed as chair of Tbilisi City Court and as chair of administrative panel of the same court.

The practice showed that absence of procedures and criteria raises question and causes ambiguity in the process of appointments and dismissals of panel/chamber chairs. According to the law, the High Council of Justice appoints chairs of panels/chambers for a 5-year term from among judges in the composition of panels/chambers.

Like previous reporting period, during this one also, the Council appointed a chair of the chamber not from among judges in the same chamber but changed the specialization of a judge in another chamber and then appointed that judge to the position of a chair. Namely: during the 19<sup>th</sup> June session, Secretary of the Council Levan Murusidze proposed an issue for consideration, which concerned transfer of Merab Gabinashvili, a judge of Tbilisi Appellate Court investigative panel and acting chair of the same panel, to a civil cases panel since already for a while the panel did not have a chair and faced challenges, then as the second issue the council considered appointment of Merab Gabinashvili as a chair of civil cases panel.

During the Council session non-judge members inquired about the need for transfer of Merab Gabinashvili, a judge of a criminal specialization, to a civil cases chamber and his later appointment as a chair of civil cases chamber. Gocha Mamulashvili stated that there were quite a few challenges in the investigative panel and the candidate's transfer to another specialization would not improve that situation. During the discussion, his personal traits such as integrity and professionalism were emphasized. In the end, the Council unanimously supported change of his specialization and appointment as a chair of civil cases chamber. However, none of the decisions regarding specialization and appointment as chair were substantiated.

Third wave legislative changes specified rules on dismissal of panel/chamber chairs, according to

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104 Non-judge member – Gocha Mamulashvili did not attend the session, Vakhtang Mchedlishvili voted against.

which dismissal of a chair is now considered as a disciplinary sanction. Despite this, one of the panel chairs was dismissed from his position in disregard of disciplinary procedures. The Council related the decision to joining of panels. When discussing the issue non-judge member Vakhtang Mchedlishvili noted, that it was unclear for him why the position of a chair of the joined panels was not taken by a chair, who was appointed by the Council for a 5-year term, and instead why the acting chair Badri Shonia filled that position. If the Council was concerned about the work of Giorgi Ebanoidze, then disciplinary proceedings had to be initiated. Doubts were also aggravated by the fact that the session during which joining of panels was considered was not recorded electronically, as it turned out when the non-judge member of the Council – Vakhtang Mchedlishvili requested minutes of the sessions. As the Council explained the recording was not available due to technical failure of the server.<sup>105</sup>

Throughout years appointment of acting panel/chamber chairs remained problematic. Neither the law nor the Council decisions regulate the cases when acting chairs shall be appointed. Neither in the established practice of the Council is the need for appointing acting chairs substantiated, it is unclear on what grounds the Council decides whether to appoint acting chairs or a chair who is appointed for a specific term. In the reporting period, 13 out of 17 appointed court chairs were acting chairs before the appointment. The term of office, for the duration of acting chairs are appointed, is also problematic.

During the 25<sup>th</sup> September Council session when appointment of the chair of Tbilisi City Court criminal investigative, pre-trial and trial panel was discussed, court chair stated that only Badri Shonia had submitted an application. Non-judge member Nazi Janezashvili stated, that it would be preferable if she was making a decision in a more competitive environment. She stated that lack of competition was related to absence of assessment criteria, which presumably left the impression of partiality among judges. Chair of the Council requested that the session was adjourned, however her position was not supported by the majority. After the session resumed, Vasil Mshvenieradze nominated Temur Gogokhia. During the interview, he could not specifically refer to needs and shortcomings in the work of the panel. He stated that as only a short period had passed since he was appointed to Tbilisi City Court, he did not have the possibility to get acquainted with specificities of the panel's work. Judge members of the Council underlined his experience. In the end, the Council did not vote for Badri Shonia and appointed Temur Gogokhia as acting chair, a judge transferred from Kutaisi without competition.<sup>106</sup> Non-judge member of the Council Nazi Janezashvili noted that it was unclear as eventually still an acting chair was appointed why the Council did not vote for Badri Shonia, who two weeks ago was appointed as a judge by majority vote. It was important to know what was that he failed at, however such reason was not presented.<sup>107</sup>

**In the absence of procedures and criteria, in the reporting period, the Council appointed 17 court chairs, 8 judges were granted authorities of a court chair, 5 judges were appointed as panel/chamber chairs, and authorities of panel/chamber chairs were granted to 3 judges.**

**In the reporting period, out of 25 appointed chairs and acting chairs, only 3 judges occupied these positions, and out of 8 appointed chairs and acting chairs of panels/chambers none are women.**

Absence of procedures and criteria for appointment of court/panel/chamber chairs leaves Council

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105 <http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-gantskhadeba/3031> – Statement of the High Council of Justice.

106 See minutes of HCOJ sessions of September 25 and October 2 of 2017;

107 See minutes of HCOJ session of September 25, 2017;



members with unfettered powers to appoint chairs based on their subjective preferences. These shortcomings are already for years conducive to continuation of improper influences in the judiciary and over individual judges, while those also create artificial barriers for women judges to occupy administrative positions. Consideration of gender equality principles while appointing court chairs will promote women judges to express their willingness to be appointed as chairs and will remove the artificial barrier, which in practice prevents women judges from occupying administrative positions. Observation of the appointment process revealed that selection of chairs by High Council of Justice is not competitive, and women judges as a rule do not even propose their candidacies.

On the session, during which appointment of Vasil Mshvenieradze as a court chair was considered, non-judge member of the Council Nazi Janezashvili urged Council members to nominate women judges, moreover considering that majority of judges in Tbilisi City Court were women. Discussion of the issue further illustrated that judge members of the Council do not have sufficient sensitivity on gender issue and view those as the least significant for the judiciary.<sup>108</sup>

### **4.3. POWERS OF COURT CHAIRS AS FORESEEN IN THE RULE ON ELECTRONIC CASE ALLOCATION ADOPTED BY THE COUNCIL**

Introduction of the electronic case allocation system has to be considered as one of the core achievements of the third wave judicial reform. Legislation obliged the High Council of Justice to draft and adopt the rule on automatic, electronic case allocation in Common Courts of Georgia. Pilot electronic case allocation system started to function in Rustavi City Court starting from July 1 2017, and in Common Courts of Georgia starting from December 31.

On May 1 of 2017, the Council adopted a rule on automatic, electronic case allocation system in the common courts of Georgia, which established that except cases foreseen in article 3 of the rule cases are distributed among relevant judges from panels/narrow specializations.

Despite legislative changes, based on which, besides exceptional circumstances cases are not allocated by a court chair, their wide discretion is still problematic. The court chair may, for avoiding impediments to administration of justice, instruct a judge to participate in a case consideration in another chamber, investigative panel, or in the specialized composition of the same court, as well as to carry out duties of a magistrate judge, while the court chair may also instruct a magistrate judge to consider cases in a district (city) court outside its geographic area.<sup>109</sup> Further, it has to be highlighted, that the court chair determines composition of judges in narrow specializations. This regulation creates serious risks of interference into case allocation system by court chairs, which is even more apparent considering that for years court/panel/chamber chairs have been perceived as a leverage in the hands of the High Council of Justice for controlling courts and individual judges and for influencing judicial decision-making process.

Article 6 of the rule adopted by the Council established that if the duration of a system's failure exceeds 2 days, the court chair is authorized to distribute cases in a sequential order. Similarly, in cases of administrative violations, which shall be considered within 24 or 48 hours, the court chair allocates

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108 See minutes of session of July 3, 2017;

109 Paragraph 5 of article 30 of the Organic Law on Common Courts of Georgia;

cases if the duration of the system's failure exceeds 3 hours.

According to changes that entered into legal force on December 27, 2017, in case of the system's failure, apart from a court chair a deputy court chair, also chairs of panels/chambers may allocate cases, however based on the current version in force, this rule has changed and in case of the failure of a case allocation system, appropriate authorized officer of the chancellery will have the competence to allocate cases in a sequential order. In relation to these changes, a judge member of the Council expressed hope that case allocation by an employee of the chancellery would eliminate questions about the court chairs' possible influences.<sup>110</sup> We believe, that the said reasoning is devoid of any legitimate basis, as according to law, the court chair also supervises staff of the court.

Another significant power of chairs is processing and generalization of information about managing the caseload (among those data about cases received and finalized, time limits for case consideration, reasons for adjournments and for impediments to proceedings). This duty, along with other important functions, was imposed also on the management department created in accordance with the third wave judicial reform.

Chair of the management department is elected by majority vote of members of the High Council of Justice. On May 8, 2018, the Council announced a competition for the position of a management department chair. Throughout the competition, information about candidates was not published on the Council website. Later, during the Council session, it was explained that an appropriate candidate could not be selected. In the coming months, the Council did not announce another competition for the position of the management department chair. The management department is currently staffed by two employees.<sup>111</sup> The management department has not proposed any initiatives or recommendations regarding management of caseload, reasons for delays in proceedings, supervision of the electronic case processing system or its reform. Considering that delays in court proceedings remain one of the core challenges in the judiciary, the Council's ineffectiveness in terms of implementing positive changes foreseen by the third wave reform legislation will become even more apparent.

#### **Recommendations:**

- **The legislation shall establish rules on selection of court/panel/chamber chairs, which will ensure independence of judges and will reduce risks of concentration of power in the High Council of Justice. The rule, among others, needs to consider the interests of a competitive and an open process of nominating candidates.**
- **The legislation and the decision of the High Council of Justice should establish criteria, procedures for appointment of acting chairs, their maximum term of office, and the requirement of substantiating the need for such appointments;**
- **The legislation should limit discretionary powers of chairs, to prevent concentration of powers and informal governance in the judiciary;**
- **The High Council of Justice should take measures, to promote appointment of women to position of a chair.**

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110 See minutes of session of January 8, 2018;

111 <https://goo.gl/xowi2v>

# 5. DISCIPLINARY RESPONSIBILITY OF JUDGES

## Core findings:

- **The Council did not ensure timely and effective implementation of positive legislation in the third wave judicial reform related to disciplinary proceedings against judges and to introduction of an independent inspector mechanism. This has delayed implementation of those positive changes in practice for almost 9 months and has prolonged consideration of disciplinary complaints;**
- **The value of positive changes in the third wave judicial reform legislation is reduced by the fact that improved procedures are not applicable in cases when disciplinary complaints are lodged and disciplinary violations are committed before the changes entered into force.**
- **The competition for an independent inspector was held based on a rule with shortcomings, which led to selection of the inspector through a non-transparent process and based on an ambiguous procedure;**
- **Consideration of disciplinary complaints are delayed, which poses serious risks to internal independence of the judiciary;**
- **The rate of termination of disciplinary proceedings is still high, which in the absence of sufficient transparency guarantees, raises doubts about impartiality of the decisions on termination of such cases;**
- **In the absence of sufficient statistical data, it is impossible to assess what the High Council of Justice deems as improper fulfillment of duties or illegitimate delays in court proceedings and whether it is at all justified to terminate disciplinary proceedings based on complaints related to the above grounds.**

## 5.1. LEGISLATION REGULATING DISCIPLINARY PROCEEDINGS AND AN INDEPENDENT INSPECTOR MECHANISM

In the present chapter, issues related to disciplinary proceedings against judges will be discussed in the period before the third wave judicial reform legislation entered into force and thereafter.

According to law, disciplinary proceedings against judges are confidential. This has always been problematic in terms of transparency of such proceedings. Before third wave legislative changes entered into force, with a particularly high termination rate of disciplinary proceedings, information about the reasons for such terminations was not published. Time limits for consideration of disciplinary cases were vague, which created possibility for delaying proceedings. For instance, the Council had 488 pending cases, out of which only 231 cases were considered in the same year, and in other 257 cases disciplinary proceedings continued in 2017.

The so-called third wave judicial reform contained positive legislative changes in relation to disciplinary proceedings; namely:

- a. The judge implicated in the pending disciplinary proceedings is given possibility to request the right to publish sessions of the Council (except deliberations and procedures of rendering a decision), of the disciplinary panel and chamber held for consideration of a disciplinary responsibility of a judge;
- b. Statutory limitations for initiating disciplinary proceedings and the general time limit for termination of proceedings were specified, which shall not exceed 2 months. In exceptional circumstances this term may be extended for two more weeks.
- c. Council obligation to issue a reasoned decision on termination of disciplinary proceedings was established;
- d. The obligation to publish Council decisions on termination of disciplinary proceedings was established;

The third wave judicial reform introduced an independent inspector mechanism, responsible for objective, impartial and comprehensive study, and prior assessment of an alleged disciplinary violation. Even though introduction of an independent inspector mechanism was positively assessed, the law did not foresee necessary guarantees of inspector's independence. Namely:

- a. High Council of Justice appoints and dismisses the independent inspector by majority vote of its members (alone votes of judge members are sufficient for appointment and dismissal of the inspector);
- b. One-third of the Conference of Judges may propose dismissal of the independent inspector to the High Council of Justice. Apart from that, the law foresees general grounds for dismissal of the inspector, e.g. improper fulfillment of duties; inappropriate conduct, which damages the reputation of an independent inspector mechanism; serious or systemic violation of the rights of judge etc. Such broad grounds for dismissal do not comply with the foreseeability principle and poses a threat to the inspector's independence.

The third wave judicial reform legislative changes established that the disciplinary proceedings initiated and related to violations committed before the new law entered into force will continue and be finalized based on the rules that were in force before the new law was enacted. In view of the certain positive changes foreseen by the legislation in terms of transparency, consideration of disciplinary complaints lodged before the law entered into force based on the old rules, is devoid of any legitimate grounds. Further, it has to be noted that the said provision of the law is challenged before the constitutional court by the Public Defender of Georgia in relation to article 14 of the Constitution<sup>112</sup> (right to equality).

## 5.2. EVALUATION OF THE INSPECTOR'S SELECTION AND APPOINTMENT

The High Council of Justice could not ensure timely implementation of the new rules on disciplinary proceedings against judges. This has delayed putting into practice the positive changes for 9 months

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<sup>112</sup> [12-01-2018 Constitutional complaint N-1291](#) The constitutional complaint has been filed, however, substantial consideration of the case in constitutional court has not commenced yet.

and prolonged consideration of disciplinary complaints lodged after the new law entered into force. At the point of the inspector's appointment, 138 complaints had already been submitted to the Council. It has to be taken into account that for the appointment of an independent inspector the High Council of Justice had one-month period from passing of the law before its entry into force, however, in this period, the Council has not announced competition for selection of the inspector. According to public information received from the Council, independent inspector is not a professional public officer as defined by the law on Public Service. Based on the law on Public Service, independent inspector is neither among those persons, which are not covered by the law on Public Service.<sup>113</sup> However, according to article 51<sup>1</sup> of the organic law on Common Courts of Georgia, independent inspector represents a civil servant. Therefore, for avoiding ambiguity related to the status of an independent inspector, a position of an independent inspector has to be added to the exceptional list determined by paragraph one of article 4 of the law on Public Service, which will clarify the position of an independent inspector in the system of the Public Service.

As for the rules on selection of an independent inspector, according to organic law on Common Courts of Georgia, the High Council of Justice determines the rules on conduct of a competition for selection of an independent inspector. For that purpose, On March 31, 2017 the High Council of Justice made changes to Rules of the Council, which established that the competition for selection of an independent inspector is announced according to the rules set by the Law on Public Service. The rules also established a two-stage procedure for selection of an inspector: formal review of documents submitted by candidates and selection of candidates short-listed for the second stage. At the second stage of the competition, interviews are held with candidates and decisions are made. According to the Rules, voting takes place after that.

Neither the law nor the selection procedure adopted by the High Council of Justice regulates the following significant issues: how the second stage of the competition is held (criteria for selection of an independent inspector; rules for assessment of these criteria, purpose of the interviews and relevant procedures, information to be obtained during the interview, rules for assessment of a candidate and relevant reasons), the core principles of the competition are not established (impartiality, publicity, prohibition of discrimination, elimination of conflicts of interest, etc.). These shortcomings give the Council possibility to render arbitrary decisions, which was also illustrated by the practice of the inspector's appointment.

The High Council of Justice announced competition for selection of an independent inspector on May 8, 2017.<sup>114</sup> Neither during the competition, nor after its completion, did the Council publish information about the candidates. Despite the absence of regulations on closure of interviews both in the law and the Rules of the Council, the interviews were held during a closed session of the Council. Following the first competition, independent inspector was not selected. No information was published on the Council website about the outcome of the competition. According to information requested from the Council,<sup>115</sup> during the May 8<sup>th</sup> competition for the position of an independent inspector, none of the candidates received enough votes and the position of an independent inspector remained vacant. The

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113 Correspondence of GYLA dated March 9, 2018 N04/43-18; Correspondence of the Council dated March 15, 2018 N587/628-03;

114 <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/58-2017.pdf> The Council decision regarding announcement of competition for the vacant position of an independent inspector. The applications were received between May 15 and 28.

115 GYLA correspondence of September 29, 2017 N04/296-17; Response of the Council dated October 10, 2017 N1167/2299-03;

Council announced another competition on October 23, 2017, approximately 4 months after the first competition was finalized.<sup>116</sup> It was noted during this session, that at the time of announcement of the second competition, the Council had received 78 disciplinary complaints and as the independent inspector was not appointed, those could not be considered.<sup>117</sup>

During these 4 months, the High Council of Justice did not work on the improvement of ambiguous rules on the competition for the position of an independent inspector.

Identification and biographical information about the candidates participating in the competition was again not published during the competition of October 23 of 2017. Interviews were closed. The organizations carrying out monitoring work did not have the possibility to observe the progress of the competition, interview stage and to get acquainted with biographical data about the candidates. In the end, based on the decision of the High Council of Justice of November 20, 2017, Ketevan Tsintsadze was appointed as an independent inspector.<sup>118</sup> Biographical data about Ketevan Tsintsadze and the non-transparent process of her appointment raised doubts about her actual independence, particularly in the circumstances, when the law does not grant the inspector any basic guarantees of independence.

### 5.3. ANALYSIS OF STATISTICAL DATA ON DISCIPLINARY PROCEEDINGS

**In the reporting period**, the Council received 170 disciplinary complaints satisfying requirements of form, and 317 in breach of them.

From January to March of 2017, the Council Department of Judicial Ethics received 134 cases, 257 were pending from 2016, totaling 391 disciplinary cases. Based on the legislative changes, disciplinary complaints submitted after this period were forwarded to the independent inspector. In the reporting period, independent inspector received 138 disciplinary complaints for consideration. Accordingly, inquiry into disciplinary complaints submitted to the Council is carried out based on two completely different regulations.

In the reporting period, the High Council of Justice held 13 disciplinary sessions. During these sessions, 365 disciplinary cases were considered, among those 257 and 108 cases from the years of 2016 and 2017 respectively. In the reporting period, disciplinary complaints after consideration by the independent inspector have not been forwarded to the High Council of Justice.

From among 365 disciplinary cases, proceedings were terminated in 345 cases. Despite such request, the correspondence sent by the Council did not refer to grounds for termination of disciplinary proceedings.<sup>119</sup> The decision of the Council Secretary about termination of disciplinary proceedings was not approved and adopted in 15 disciplinary cases. In 15 cases, judges were asked for an explanation.

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<sup>116</sup> [http://hcoj.gov.ge/files/news/dgis%20cesrigi/29-dgis%20cesrigi\\_23.10.2017.pdf](http://hcoj.gov.ge/files/news/dgis%20cesrigi/29-dgis%20cesrigi_23.10.2017.pdf) - Minutes of the session of October 23, 2017.

<sup>117</sup> See minutes of session of October 23, 2017.

<sup>118</sup> Since 2009 Ketevan Tsintsadze has worked in different capacities in the Supreme Court of Georgia. Her biography is available on the website of the High Council of Justice:

<http://hcoj.gov.ge/ge/about/organizational-charter/aparati/damoukidebeli-inspeqtoris-aparati/damoukidebeli-inspeqtori-qetevan-tsintsadze>

<sup>119</sup> Correspondence of GYLA of January 24, 2018 Nc-04/14-18; Correspondence of the Council of February 2, 2018 N195/202-03;

In 3 cases, judges' disciplinary responsibility was established (complaints related to undue delays in court proceedings and non-fulfillment or improper fulfillment of judicial duties). In 2 cases judges were addressed with individual recommendation notes.<sup>120</sup>

In 2018, the Council Department of Judicial Ethics received 41 disciplinary cases pending since 2017 for consideration.<sup>121</sup>

In the reporting period, from among disciplinary complaints received by the Council 3 concerned alleged disciplinary violations of the judge members. Complaints concerned alleged improper fulfillment of judicial duties. Disciplinary proceedings were terminated on these disciplinary complaints. The High Council of Justice did not provide information about the grounds for such terminations.<sup>122</sup>

**Such a high rate of terminations of disciplinary proceedings raises questions about impartiality of termination decisions. Similar problem was also identified in the previous reporting periods.**

As the statistical data of 2017 published by the Council reveals, disciplinary complaints submitted to the Council most frequently relate to two grounds: non-fulfillment or improper fulfillment of judicial duties and undue delays in court proceedings.<sup>123</sup> As the Council does not publish more detailed information about the alleged judicial conduct referred to as a disciplinary violation in the complaints, it is impossible to assess the legality of termination of disciplinary proceedings on the indicated grounds. Furthermore, breaches of the time limits for case consideration is an acknowledged problem in the judiciary. However, due to insufficient statistical data, it is impossible to assess whether when considering such complaints, the High Council of Justice studies the undue delays in court proceedings, what is deemed as undue delay and whether decisions on termination of disciplinary proceedings on such violations is justified.

According to so-called third wave judicial reform, submission of a complaint (application) in breach of the sample form adopted by the High Council of Justice may not become ground for refusal to admit (register) them. Despite this, the form of a disciplinary complaint adopted by the Council still contains a warning note that a complaint (application) submitted in non-compliance with the formal requirements shall be inadmissible, about which the complainant is notified accordingly.

## 5.4. STATISTICS AFTER THE APPOINTMENT OF AN INDEPENDENT INSPECTOR

Starting from November 21 of 2017, when the Council appointed an independent inspector, 138 disciplinary complaints, out of them 19 in breach of formal requirements and 119 in compliance with them, were forwarded to the independent inspector. As it turns out from the correspondence, disciplinary complaints mainly relate to undue delays in court proceedings.<sup>124</sup>

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120 <https://goo.gl/qfR4SD> – Statistical data of 2017 about the work of Council Department of Judicial Ethics

121 GYLA correspondence of January 24, 2018 Nc-04/14-18; Council correspondence of February 2, 2018 N 195/202-03;

122 GYLA correspondence of September 29, 2017 Nc-04/295-17; Council correspondence of October 10, 2017 N 1166/2301-03;

123 <https://goo.gl/79py2v> - Statistical data of 2017 about the work of Council Department of Judicial Ethics

124 GYLA correspondence of January 24, 2018 Nc-04/14-18; Council correspondence of February 2, 2018 N 195/202-03;

According to legislative changes, independent inspector commences disciplinary proceedings and undertakes a preliminary review and inquiry into the case, who presents conclusions and views to the Council. In the reporting period, the independent inspector has not presented its conclusions and views to the High Council of Justice which would hold commencing disciplinary proceedings against judges justified. Accordingly, certain procedural improvements which accompanied introduction of an independent inspector mechanism, were not put into practice during the reporting period.

#### **Recommendations:**

- **In any event, the High Council of Justice should ensure timely and effective implementation of the enacted positive legislative changes; The High Council of Justice has to ensure that an independent inspector is selected through a competition procedure;**
- **The High Council of Justice should ensure that delays during consideration of both pending and new disciplinary complaints is avoided and that time limits for their consideration are observed.**
- **The High Council of Justice should publish relevant statistical data about termination of disciplinary proceedings on complaints considered before the entry into force of the third wave legislative changes, which will specify what the disciplinary violation consisted in, evaluation of the complaints' basis, and reasons and grounds for termination of disciplinary proceedings;**
- **The rules of the competition for selection of an independent inspector should be clarified: selection criteria, procedures for the interview, assessment rules and the requirement of substantiation, principles of impartiality and publicity of the competition should be established.**
- **Parliament should ensure that the positive changes to the legislation on disciplinary proceedings against judges also extend to consideration of disciplinary complaints submitted before the said changes entered into force and to alleged disciplinary violations committed before the same time;**
- **Parliament should ensure that the legislation specifies the status of an independent inspector and the legislative acts regulating the issue are brought into compliance (Organic Law on Common Court of Georgia and the Law on Public Service).**





