

Georgian Young Lawyers' Association

The Evaluation and Lifetime Appointment of Judges on Probation

Assessment of the
Legislation and Practice



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Georgian Young Lawyers' Association

THE EVALUATION AND LIFETIME APPOINTMENT OF JUDGES ON PROBATION

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Main Findings

Findings related to the legislation governing probationary appointment of judges

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

Findings related to the practice of evaluation of judges appointed for a probation period:

- Regulatory norms of the evaluation of judges appointed for a probation period and the procedure for making decision on the appointment of judges for an indefinite period of time do not contain guarantees sufficient for the objective and transparent evaluation of judges, and give an opportunity to make arbitrary and subjective decisions.
- From 2013 up to present, the High Council of Justice has been carrying out the evaluation of judges appointed for a probation period without having adopted a sub-statutory act that would regulate in detail the process of evaluation of judges appointed for a probation period.
- The blanks approved by the High Council of Justice were completed by some of the evaluators in a manner that, due to absence of concrete substantiation in a number of evaluation components, the evaluation could be attributed to any judge, rather than a particular judge. Therefore, it may be said that the evaluation reports in a number of components are formulaic. A formulaic nature is mostly characteristic of the 'honesty' component.
- Conclusions in the reports are made in a manner that they fail to show what the evaluators relied on when making the conclusions. More-

over, in a number of cases, the reports were not preceded by information on the documents or materials that the evaluator could rely on.

- When assessing judges based on an ‘**honesty**’ criterion, the evaluators observe that they relied on information requested from various institutions, information obtained through interviewing individuals, the results of examining the audio and video recordings of court sessions and others. However, when reading the conclusions, it is difficult to establish exactly what information led the evaluator to making a positive conclusion.
- The evaluation of judges according to a ‘competency’ criteria is mostly based on the study of cases reviewed by the judge, which should be selected randomly; however, it is difficult to figure out from the reports what methodology was used when randomly selecting the cases. In addition, it is uncertain what methodology was used to assess the decisions made by judges and whether the evaluators have uniform approaches to assessing the decisions.
- It has not been pre-determined based on which information a judge should be assessed in each specific criteria. The above mentioned showed in practice that information that was used for the evaluation of different criteria may be insufficient and irrelevant.

Executive Summary

The 2010 amendments to the Constitution of Georgia introduced the rule about lifetime appointment of judges, which may be preceded by appointment of judges for a probationary period. Amendments made to the organic law of Georgia on General Courts in November 2013 established that first-instance and appellate court judges will be appointed for a probationary period of three years and their lifetime appointment will be contingent upon successful completion of the probationary period.

Although the Venice Commission criticized the proposal to establish the probationary periods under the Constitution¹ the new government put into effect the possibility of probationary appointments established by the Constitution, starting from November 2013. The same month 12 judges were appointed for a probationary period and the HCoJ members started the process of evaluation. As of December 2016, out of 267 current judges

¹ Including CDL-AD(2014)031

in the system of general courts 156 were appointed for a probationary period. At the time of preparing this report, out of these 156 judges 21 were appointed for lifetime after successfully completing the probation period.

Here we must also note the recent changes made in the legal framework for probationary periods and the applicable decision of the Constitutional Court. Under the new regulations adopted as part of the so-called Third Wave of the judicial reform on February 8, 2017, former and current judges of the Supreme Court and the Constitutional Court were exempted from the probationary period. The Decision of the Constitutional Court of Georgia adopted on February 15, 2017, necessitated additional changes in the probationary period regulations.² According to the decision, a judge with an experience of working in any level of the court system or in the Constitutional Court should not be subject to a probationary appointment and the decision about his/her appointment should be made in consideration of his/her past judicial performance. GYLA plans to offer evaluation of pending and adopted changes in the probationary appointments at a later time; in the interim we would like to note the practical flaws that the above changes have already caused. In particular, on the basis of the new regulations adopted within the Third Wave of judicial reform, and by ignoring the above decision of the Constitutional Court and before implementation of corresponding legislative changes, the HCOJ is trying to appoint for life tenure certain judges who are on a probationary period, without any evaluation.³

We must note that GYLA supports complete abolishment of probationary appointments. Purpose of the present report is to analyze legislation and practice of probationary appointment to help identify flaws and promote making of effective decisions for ensuring independence and impartiality of the judicial system.

The monitoring group analyzed the legal framework for evaluation of judges on a probationary period, as well as evaluation reports of the HCOJ evaluating members for 12 judges that were appointed for life tenure on October 28, 2016.

² February 15, 2017 decision of the Constitutional Court of Georgia #3/1/659

³ Statement of the Georgian Young Lawyers' Association: "The High Council of Justice is trying to appoint two judges for life tenure based on the norm that has been found unconstitutional", 5 May 2017, available at: <https://gyla.ge/ge/post/iusticiis-umaghlesi-sabtcho-cdilobs-ori-mosamartlis-uvadod-gamtsebas-kanonis-arakonstituciurad-cnobili-normis-safudzvelze>

Analysis of amendments made to the organic law of Georgia on General Courts has revealed that rules for evaluating judges appointed for a definite term are ambiguous to the extent that they can potentially undermine independence and objectivity of a judge on a probationary period and appointment of a judge for life tenure on the basis of an objective decision. It has also revealed that for already four years the HCoJ has been evaluating judges on a probationary period without adopting and publishing detailed rules of evaluation for ensuring uniform evaluation. The rule prescribed by the law for making decisions about lifetime appointment following evaluation is also problematic because it leaves room for bias.

The flawed legislation affects the practice of evaluation of judges appointed for a probationary period. After examining evaluation reports of 12 judges we found that evaluation is performed for the sake of formality only and lacks justification.

Parliament's adoption of an ambiguous rule for evaluation of judges on a probationary period, the HCoJ's failure to adopt a detailed procedure for evaluation and gaps in evaluation of judges on a probationary period suggest that actions of the authorities and the HCoJ are in agreement and equally ineffective in addressing challenges in the area of judicial independence.

1. THE RULES REGULATING EVALUATION OF THE JUDGES APPOINTED FOR A PROBATIONARY PERIOD

Key findings

- The provisions regulating the assessment process of judges appointed for a probation period as prescribed by the Organic Law contain no sufficient safeguards for assessing a judge through an objective and transparent procedure;
- The procedure for making a decision on lifetime appointment of the judge designated for a probationary period, which is defined by the Organic Law, provides the possibility to make subjective and arbitrary decisions and fails to provide sufficient standards of transparency;
- Since 2013 up to present, the High Council of Justice of Georgia has conducted the evaluation of the judges appointed for a probationary period without the approval of any subordinate acts which would regulate in details the evaluation process of judges appointed for a probationary period.

The procedure for evaluation of judges designated for a probationary period, which is defined by the Organic Law of Georgia on Common Courts, does not meet the requirement of foreseeability of the law, as well as the analysis of the legislation has revealed that the provisions of the law are not sufficiently detailed and a number of procedural issues requires additional regulation. In particular:

- The rule for assessment of the decisions made and sessions conducted by the judges appointed for a probationary period are vague and require detailed regulation;
- There are no rules provided about how information shall be obtained about a judge to be assessed;
- There is not specified what sources or evidence shall the judiciary evaluation be based on;
- It is not established how the principle of randomness can be achieved during the assessment process (selection of decisions made and sessions conducted by a judge in question).

According to the Organic Law of Georgia on Common Courts, upon the launch of the three-year tenure a judge shall be notified on the assessment procedures and the circumstances which shall be taken into consid-

eration when evaluating the judge through individual criteria and when making a decision on the appointment of the judge indefinitely.⁴

The Law does not include any provisions on what information about the above procedure and in what manner shall be communicated to a judge. According to the letter of the High Council of Justice,⁵ no additional procedures have been developed by the Council for the last three years; Only after the appointment of judges for a probationary period, they shall be informed about the assessment procedure which is already envisaged by the law and which even more formalizes and underestimates the requirement of the law to inform judges about their evaluation process.

In practice, the evaluation process of the judges designated for a probation period is carried out, even though the Council has not developed any additional assessment procedures for over three years. It compromises the transparency of the process and provides the possibility of making arbitrary and biased decisions and it is not foreseeable for a judge what information her/his assessment is based on, which violates the principle of judicial independence.

1.1. ***Voting procedure***

According to Paragraph 4¹ of Article 36 of the Organic Law of Georgia on Common Courts: “The judge of a district (city) court and court of appeals shall be appointed to office for a term of three years. Not earlier than two months before and not later than one month after this term expires, by analysing the monitoring results under paragraph 42 of this article, the High Council of Justice of Georgia shall discuss and make a decision on whether to appoint the judge to office for life until he/she reaches the statutory age limit.”

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

⁴ The Article 36¹, paragraph 3

⁵ The letter N1701/2387-03-n of High Council of Justice dated as 20 October 2016.

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

According to the law, the voting procedure is not among confidential procedures.⁶ However, the established practice of the Council is to carry out the voting procedure on a closed session, violating the requirements of the law.⁷

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

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

1.2. *Informing judges on the procedures and circumstances of evaluation*

According to the Organic Law of Georgia on Common Courts, as soon as the three-year term begins, the judge is informed about the procedures and circumstances that will be considered during his/her evaluation based on certain criteria and during decision-making regarding his/her appointment for life.⁸

The law does not specify the kind of information delivered or the form of deliverance of information to the judge regarding the above-mentioned

⁶ Paragraph 11 of Article 36⁴ of the Organic Law of Georgia on Common Courts prescribes a general rule that “The assessment data on a judge shall be confidential until his/her three-year term of office expires.” Neither does any other norm of the Organic Law prescribe confidential voting.

⁷ High Council of Justice Monitoring Report, Georgian Young Lawyers’ Association and Transparency International Georgia, 2015, pg. 80.

⁸ Paragraph 3 of Article 36¹ of the Organic Law of Georgia

procedure. According to a letter of the High Council of Justice,⁹ during the past three years, the Council has not adopted any additional procedures. After appointment for a probationary period, judges only receive the information about their evaluation that is already given in the law, which renders the requirement of the law about informing judges about their evaluation process merely formal and meaningless.

The OSCE Trial Monitoring Report¹⁰ includes important recommendations which directly advise the Council to establish additional procedures for the evaluation of judges appointed for a probationary period. The mentioned recommendation stems from the international standards for judicial independence set out by the Venice Commission:

- If the appointment for a probationary period is maintained, the High Council of Judges should elaborate additional regulations on the monitoring and evaluation of judges to the provisions included in the Organic Law on Common Courts and take into account international recommendations on evaluating the efficiency of performance in terms of international standards of judicial independence and accountability.
- The High Council of Justice should elaborate fundamental criteria for the selection and appointment of judges and standard procedures, regardless of whether the probationary period is maintained; this should include procedures for decision-making on lifetime appointment after the expiration of the probationary period. These procedures should require written evidence to be enclosed in all decisions.¹¹

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

⁹ Letter N1701/2387-03-o of October 20, 2016, of the High Council of Justice.

¹⁰ Pg. 21-22. Available on: < <http://www.osce.org/odihr/130676?download=true> > [Last accessed on March 4, 2017]

¹¹ Ibid.

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

1.3. *Criteria for the evaluation of judges appointed for a probationary period*

According to the law, the performance of a judge is evaluated by two main criteria: **integrity** (personal honesty and professional integrity; independence, impartiality and fairness; personal and professional conduct; personal and professional reputation; financial obligations) and **competence** (knowledge of legal norms; ability and competence to provide legal arguments; writing skills; oral communication skills; professional qualities, including conduct in a courtroom; academic achievements and professional training; professional activities (Article 36²).

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

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

Paragraph 39 of Opinion 17 of the Consultative Council of European Judges

es notes that: “Sources of information used in the evaluation process must be reliable. This is especially so in respect of information on which an unfavourable evaluation is to be based. Also, it is essential that such an evaluation is based on sufficient evidence...”

1.4. *Evaluation by the evaluator*

According to the Law, the evaluators carry out the evaluation of the performance of a judge concurrently and independently of each other, and are obligated not to disclose any information obtained during the evaluation or its results. During the one-month evaluation period, an evaluator can, at any time, take any necessary measures to evaluate the judge according to the criteria outlined by the law.¹²

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

- The evaluators should, concurrently and independently of each other, examine one and the same at least five cases reviewed by the judge under evaluation in a relevant period. The law envisages that the mentioned cases to be examined shall be randomly selected. However, the law does not specify the procedure of random selection. Therefore, it is not specified how the random selection will be achieved in practice. The law sets out the following criteria for case selection: cases on which summary/final decisions have entered into force, including, at least, two cases on which the summary/final decisions have been overturned/modified (if any) by a higher instance court (if any). Even with such criteria, it is necessary to have a random selection mechanism that excludes the possibility of providing an arbitrarily selected list of cases to evaluators.
- According to the Organic Law, during the evaluation of decisions, it is assessed whether the judge is familiar with substantive and procedural legislation, human rights law, including case law of the European Court of Human Rights, the correctness of application of appropriate legal norms with respect to the decisions made by the judge, and the substantiation and cogency of court decisions. Opinion 11 of the Consultative Council of European Judges sets out the elements and evaluation methods for high-quality decisions, while Opinion 17, which

¹² Paragraphs 1 and 2 of Article 36¹ of the Organic Law of Georgia On Common Courts.

generally defines the standards for individual evaluation of judges appointed for relevant terms, refers to Opinion 11. The standards set out in Opinion 11 should be used during the evaluation of the quality of decisions made by the judges appointed for a probationary period. The Organic Law does not provide specific criteria for the evaluation of decisions and the legislation does not provide evaluation methodology to be uniformly used by all evaluators. The mentioned issues need additional regulation, which has not been provided for by the Council.

- The Law envisages that the evaluator can attend court hearings chaired by the judge under evaluation. What the evaluator assesses or observes is unknown. It is similarly unknown whether the questionnaires and evaluation systems are identical for all judges appointed for a probationary period. In addition, it is unclear how the evaluator will select the hearings to attend. The fact that the selection procedure is not defined creates a possibility for subjective selection of hearings, both in favor of and against the candidate.
- The Law envisages that the evaluator has the authority to obtain necessary information as prescribed by the Law. It is unclear what the necessary information is, however, according to the content of the law, the norm should be interpreted in a way that the norm enables the evaluator to request only the information which, according to the same Law, is necessary to carry out the evaluation. The Law itself determines what information is necessary for the evaluator (for example, the right to obtain audio-video recordings of court hearings, the right to obtain the decisions made by the judge under evaluation, etc.). Specification of the Law in this regard is important to uphold the random selection principle.
- The Law gives the evaluator the right to consult the representatives of legal circles. This probably implies consultation needed to evaluate the knowledge of legislation by the candidate. However, the process of selecting a person to provide consultation, the procedures of communication between the evaluator and the person providing consultancy, as well as the options to prepare a relevant protocol and enclose it to the case, remain ambiguous. It is unclear whether the consultancy based on which the evaluator might make a conclusion on the candidate is competent and what constitutes a guarantee for competent consultancy. Such an ambiguous mechanism creates pos-

sibilities of using the consultancy mechanism in a subjective manner, both in favor of or against the candidate.

- The evaluator has the authority to meet with the judge under evaluation and other people in person and ask questions to obtain information on specific issues. The procedure of meeting the candidate is unclear. This is precisely the issue which requires additional regulation by the Council. Specifically, the purpose of such meetings, the specific issues to be discussed between the evaluator and the judge, the meeting procedures, the obligation to prepare meeting protocols and other details that are important to ensure the transparency of the process and avoid inappropriate influence need to be determined. In addition, it is unclear who can be implied under “other people,” how the people to be asked questions will be selected, what questions can be asked specifically, (related to the judge, legal questions, or all possible issues), etc.

1.5. *Refusal to review the issue of lifetime appointment of a judge*

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

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

The mentioned regulation violates the principle of judicial independence, since the question of lifetime appointment of a judge appointed for a probationary period is not discussed if at least three evaluators assess the judge negatively based on the integrity criterion or if the judge fails to obtain a 70% score on the competence criterion. It should be taken into account that this already represents the lifetime appointment process. Judges appointed for a probationary period are subject to legal guarantees of judicial independence. The fact that the issue is not discussed on a Council session directly jeopardizes judicial independence, especially as the act of refusal can be appealed in the Council only once and, if dismissed, is not

subject to further appeal.¹³

Furthermore, the Law does not prescribe interviews with judges until the Council refuses to discuss his or her lifetime appointment. The Law does not guarantee that appropriate process will be carried out and the judge will be heard before the decision negatively impacting the judge is made (procedural justice¹⁴).

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

According to Paragraph 13 of Article 36⁴ of the Organic Law, the act of the Chairperson on the refusal by the High Council of Justice of Georgia to review the lifetime appointment of the judge to office may be appealed to the High Council of Justice of Georgia within one week after its submission to the judge. In case of an appeal, the Council, by at least two thirds of the full membership and by an open ballot, makes a decision regarding the cancellation of the legal act of the Chairperson and the conduct of an interview with the judge. According to Paragraph 16 of the same Article of the Law, if the Council does not make a decision to cancel the act and conduct the interview (i.e. if the act of the Chairperson on the refusal to review the lifetime appointment of the judge to office remains in force), the mentioned decision shall be final and it may not be appealed.

Therefore, the Law allows for the possibility that the candidate will not proceed to the second stage if three members of the Council (three evaluators) conclude that the candidate does not fulfill the integrity criterion or if the total points obtained on the competence criterion fail to amount to 70%, and this cannot, in effect, be appealed. Even if the candidate used the appeal mechanism and 2/3 of the members agrees to such evaluation

¹³ CCJE, Challenges For Judicial Independence And Impartiality In The Member States Of The Council Of Europe, SG/Inf(2016)3rev, Paragraph 76 - The actual independence of a Council for the Judiciary is especially important as, according to the case law of the ECtHR, a Council for the Judiciary, if it takes the decision to dismiss a judge, must meet the same requirements of independence and impartiality as other tribunals according to Article 6. In *Volkov v Ukraine* and *Mitrinovski v. "the former Yugoslav Republic of Macedonia"*, the ECtHR held that if the dismissal of a judge by a Council for the Judiciary does not meet those standards, this can be challenged before the ECtHR.

¹⁴ CCJE Opinion N17, Paragraph 41.

(considering that the 2/3 of the members includes the 3,4,5, or possibly 6 evaluators whose positions have been stated in advance), the mentioned decision of the Council cannot be appealed to the Chamber of Qualification of the Supreme Court of the Supreme Court of Georgia. Certainly, the conclusion of the evaluator is later discussed by the Council, however, the discussion does not extend beyond the Council and no other independent institution can discuss the issue, therefore, this cannot be considered as an effective appeal mechanism.

According to the Venice Commission, the refusal of lifetime appointment of a judge appointed for a probationary period should include the same legislative guarantees that are envisaged in the standards for discharging a judge.¹⁵ Among such standards is one that stipulates that disciplinary liability of a judge, which may lead to discharging, is reviewed by an independent institution and is subject to appeal. The fact that the negative assessment of the Council in the above-mentioned case is not subject to appeal to an independent institution, violates the mentioned principle, one of the most important guarantees of judicial independence. Opinion 17 of the Consultative Council of European Judges also recommends that effective appeal mechanisms are necessary.

1.7. *Self-assessment of a judge and interview*

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

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

¹⁵ Venice Commission, Judicial Appointments, CDL-AD (2007)028, Paragraph 40. Venice Commission CDL-AD(2010)004, Paragraph 37.

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

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

1.8. *Decision-making by the Council*

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

On the basis of analyzing the assessments and conducting interviews with the judge, the High Council of Justice holds a discussion under Article 36(4¹) of the Organic Law and, by two thirds of the full membership and an open ballot, makes a decision about the appointment of the judge to office for life before he/she attains the age determined by law. A member

of the High Council of Justice of Georgia who disagrees with this decision, may record his/her dissenting opinion in writing, which will be enclosed in the case file.

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

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

2. THE PRACTICE OF EVALUATION OF THE JUDGES APPOINTED FOR A PROBATIONARY PERIOD

Key findings:

- The forms approved by the High Council of Justice of Georgia are completed by some evaluators in a manner that due to the absence of specific evaluation in a number of the components the assessments may apply to any judge and are not tailored for a particular judge. Therefore, we can say that assessment reports in a number of components are formulaic. The cliché style is more characteristic to the component of honesty.
- The assessment reports do not clearly and expressly provide what the evaluator relied upon when making conclusions. In addition, in some cases assessment reports are not preceded by the information on the documentations or other material which the evaluator based his/her decisions on.
- When assessing the judges through the criteria of judicial **honesty**, the evaluators point out that their decisions are supported by the information requested from different agencies, the information obtained through individual interviews, the results of examining audio-video recordings of court sessions, and so forth. However, when it comes to reading the conclusions, it is hard to determine which information led the evaluator to provide a positive assessment report.
- The assessment of the judiciary based on the criterion of **competence** is mainly based on the examination of the cases which the judges reviewed, but such cases should be selected randomly, however, the reports do not expressly demonstrate what methodology was applied for the random selection of cases. Also, it is unclear what methods have been used to assess the decisions made by the judges and whether the evaluators had uniform approach when assessing the decisions.
- It is not established in advance on the basis of which information a judge shall be evaluated through each specific criterion. This practice has shown that the information used for the evaluation of individual criteria is insufficient or irrelevant.

2.1. *Public information obtained from the Council*

GYLA requested the High Council of Justice of Georgia to provide the assessment reports prepared between 2013 and 2016 for 12 judges appointed for a probationary period.

In accordance with the Article 36³ the paragraph 21 of the Organic Law of Georgia on Common Courts: “If a judge is appointed to the office indefinitely, the judge’s evaluation report shall be public information and any person shall have the right to request the same in accordance with the rules prescribed by the Chapter III of the General Administrative Code of Georgia.”

In accordance with the Article 36⁴ the paragraph 10 of the Organic Law of Georgia on Common Courts, a judicial assessment report shall include:

- a) a conclusion that provides an appropriate description of and grounds for the results obtained on the basis of each characteristic of both assessment criteria;
- b) a form completed according to a sample approved by the High Council of Justice of Georgia that incorporates the conclusions drawn, according to the seventh paragraph of this article, from the assessment of a judge based on the honesty criteria, and the number of the points gained by a judge for each characteristic of the competence criteria;
- c) all written documents and other materials which were used for the assessment of a judge’s activity for the given period.

The High Council of Justice did not provide GYLA with the documents and materials based on which the judges’ assessment conclusion reports had been prepared. GYLA reapplied to the High Council of Justice of Georgia with the request of issuance of the above documentations. In the letter of February 13 sent to GYLA the High Council of Justice noted that the information requested by GYLA is of a volume and its systematization and encoding of personal data requires definite time. Thus, the High Council of Justice violated the 10-day timeframe established by the legislation for the issuance of public information and made a promise to send the information on a “later” date.

2.2. Analysis of the assessment reports prepared by evaluators on judges’ activities

The evaluation reports of a judge’s activities when assessing the judicial honesty and competence criteria, as a rule, are usually based on the following sources:

- ✓ A judge’s biography and personal file.

- ✓ The testimonials-assessments provided by the staff of the Office of court administrations and the judges having official relationship with a judge in question.
- ✓ Declaration of property of a judge
- ✓ The data obtained from JSC “Creditinfo Georgia” on the current and overdue indebtedness of a judge to be evaluated.
- ✓ The data obtained from the LEPL Revenue Service of the Ministry of Finance of Georgia on the income sources, assets and tax liabilities of a judge to be evaluated.
- ✓ The information from the Information-Analytical Department of the Ministry of Internal Affairs of Georgia on a judge to be evaluated.
- ✓ The data obtained from the Department of Judicial Ethics of the High Council of Justice of Georgia on any disciplinary proceedings against a judge to be evaluated.
- ✓ The data obtained from the Department of Human Resources Management of the High Council of Justice of Georgia on professional trainings and professional activities of the judge to be evaluated.
- ✓ The statistical information obtained from a court and elaborated by the Department of International Cooperation and Quality Management of the High Council of Justice of Georgia on meeting the procedural timeframes in his/her activities by a judge during the assessment period and the stability of decisions.
- ✓ Audio recordings of court sessions included in cases.
- ✓ Video recordings of the court sessions retrieved from the Department of Organizational Support of the High Council of Justice on various cases.
- ✓ The documents verifying the judiciary qualification exams passed by a judge.
- ✓ Information published in the media about a judge.

In the assessment reports, some evaluators from the very start note the use of the above-mentioned data, and then according to the criteria indicate what conclusions have been made on the basis of the obtained information. For instance: The assessment report prepared about the activities of Khatuna Khomeriki, a Judge of the Kutaisi Court of Appeals, Kakhaber Sopromadze, the evaluator first of all lists down the data obtained and examined for the assessment, and then indicates at the sources when discussing the specific components, namely the evaluator when assessing

the “personal honesty and professional integrity” appears to have relied on the documents on the property status of and came to a conclusion that the judge “performs financial and other civil commitments in good faith and clear conscience”. In addition, the evaluator notes that according to the information requested from the MIA, there were no administrative penalties imposed on Judge Khatuna Khomeriki during the assessment period. The question remains unanswered whether it is relevant to assess the judge’s “personal honesty and professional integrity” only on the basis of the above information, though the reference to the source should be assessed positively.

Making irrelevant conclusions is quite frequent when an evaluator refers to the source. In a number of cases it is hard to make a conclusion on the compliance with a specific criteria only on the basis of the data provided (for instance to establish “independence, impartiality and fairness” based on the following description provided by colleagues: “a competent, principled and fair person with rich practical experience”),¹⁶ however, the reference to the source itself can be assessed as a positive factor since the evaluator’s conclusions appear more reasoned and understandable. When an evaluator does not refer to the source at all, it is impossible to argue about the relevance of the evaluation. **For example**, in the assessment of Judge Murtaz Meshveliani, the evaluator Levan Murusidze regarding the judge’s personal and professional conduct points out that “he adheres to the rules of the judicial ethics in and out of the courtroom; he is reserved, well-conducted and capable of managing his own emotions.” However, it is still unclear based on what information the conclusion was made.

When assessing both the honesty and professional integrity, the assessment report prepared by an evaluator shall be substantiated. In accordance with the Article 36⁴, paragraph “a” of the Organic Law of Georgia on Common Courts, the evaluator shall provide in the reports “accurately described and substantiated results obtained through each aspect of each criterion.”

The provision of the law obliges evaluators to prepare the conclusion reports based on the sources obtained that will enable unbiased readers to understand what the evaluators base their assessment on and why they evaluate a specific component positively or negatively.

¹⁶ The evaluation conclusion report prepared about Khatuna Khomeriki, the Judge of the Kutaisi Court of Appeals. The period of assessment 29.11.2014 – 29.11.2015, the evaluator Kakhaber Sopromadze.

From 2013 to 2016, the assessment conclusion reports prepared about 12 judges appointed for a probation period are not properly substantiated when assessing the honesty and professional integrity criteria. While reading the assessment reports it is unclear whether the judges were assessed fairly and whether such assessments were supported by the information obtained.

2.3. *Personal honesty and professional integrity*

The Article 35¹, Paragraph 5 of the Organic Law on Common Courts defines the component of personal honesty and professional integrity and therefore provides for the aspects which the evaluator should take into consideration during the assessment of a judge by this specific component: „when assessing a judge based on personal honesty and professional integrity the following qualities of a person, as a judge and a citizen, shall be taken into consideration: integrity, honesty, appropriate awareness of one’s duties and responsibilities, love of truth, transparency, civility and accuracy when performing official and other duties and fulfilling financial and other obligations (e.g. when completing a declaration of property, paying bank or other loans, utility bills or other charges, or a traffic fine), etc.“

In the assessment reports prepared by the evaluators when assessing personal honesty and professional integrity, the list of the components above provided by the law is not envisaged. The evaluators, as a rule, with the similar terminology point out that the interviews with the judge’s colleagues and the court administration staff’ revealed that a judge is humble, honest, industrious, and etc. However, how these features have been particularly demonstrated and how they are reflected in the judge’s activities is usually vague.

In addition to the interviews with the persons related with a judge in question, for the evaluation of the judges appointed for a probationary period the component also envisages the information received from the Ministry of Internal Affairs about administrative offenses, the information from the Revenue Service in connection with payment of taxes, and the information about a judge’s declared property in Civil Service Bureau. As is clear from the assessment reports, the above information enabled the evaluators to provide positive conclusions for all judges. As the assessment reports are not properly substantiated it is virtually impossible to identify from the conclusion reports whether such results were really based on judges’ ac-

tions in good faith or the assessment sources were insufficient and not properly investigated.

2.4. Independence, impartiality and fairness

The Article 35¹, the paragraph 6 of the Organic Law of Georgia on Common Courts defines independence, impartiality and fairness as the component of honesty in the following way: "when assessing a judge based on independence, impartiality and fairness, account shall be taken of his/her adherence to principles, ability to independently make a decision, and resistance to influence, personal steadfastness and firmness, political or other type of impartiality, fairness, etc".

In this component, the evaluators assess the judges in a cliché manner. They do not review specifically what actions or decisions revealed the judge's ability to stay independent and impartial. While reading the conclusion reports it is difficult to understand why the evaluator considers the judge impartial and fair. As a rule, the assessments are provided as follows:

- The monitoring of the court sessions and also the examination of the cases reviewed by Judge Tsitsino Kikvadze allowed me to assess the judges' independence, impartiality and fairness. It should be noted that the judge is capable of making decisions independently based on the circumstances of a case and the internal faith, treat people equally and worthily showing the respect to their rights and interests with no prejudices.¹⁷
- Judge Khomeriki is characterized by her colleagues as a competent, steadfast and fair person with great practical experience. In the course of the assessment, no facts of ex-parte restricted communications with the judge or interferences in the judge's activities were revealed.¹⁸

Such ambiguousness and catchall assessments raise questions about the substantiation and credibility of the assessment conclusions. In addition,

¹⁷ The evaluation report prepared by Ilona Todua, the member of the High Council of Justice of Georgia on the assessment of the activity of Tsitsino Kikvadze, the Judge of Kutaisi City Court. The period of assessment: 29.11.2013 - 29.11.2014.

¹⁸ The evaluation report prepared by Kakhaber Sopromadze, the member of the High Council of Justice of Georgia on the assessment of the activities of Khatuna Khomeriki, the Judge of Kutaisi Court of Appeals. The period of assessment: 29.11.2014 – 29.11.2015.

an impression is created that the judge's impartiality, fairness and independence was not examined thoroughly and the conclusions fail to "describe and substantiate the obtained results based on each component of both criteria" which is required by the Organic Law of Georgia on Common Courts.

2.5. *Personal and professional conduct*

In accordance with the Article 35 paragraph 7 of the Organic Law of Georgia on Common Courts: "When assessing a judge based on personal and professional conduct, account shall be taken of his/her adherence to judicial ethics, civility with regard to colleagues and other persons, conduct and image appropriate for a judge's high rank, restraint, the ability to manage one's emotions, appropriate conduct during disciplinary proceedings against him/her, in litigation to which the judge is a party, existence of criminal charges against the judge etc."

The content and obligation of the provision of the Organic Law for producing a substantiated assessment of a judge's personal and professional conduct should deprive evaluators of the ability of making arbitrary conclusions and obliges them to describe a personal and professional conduct of a judge as it is required by the Law. Besides, assessment conclusion reports should not reiterate the legal provision of "personal and professional conduct" as stipulated in the law, but each component should be grounded, for instance, how the ability of self-control or managing one's emotions has been demonstrated and what are the grounds for the positive assessment of these characteristics.

Usually personal and professional conduct in the conclusions is provided as follows:

- "The monitoring of the court sessions conducted by Judge Nino Sharadze allows to evaluate her with regard to professional conduct (as well as the materials of the cases reviewed by her) and the information received from the interviews with her colleagues.

Her colleagues emphasize her communication and organization skills. According to their assessment, Nino Sharadze is well able to plan and organize cases considering their number and complexity, and she has the ability to cooperate effectively oriented on quality.

As a result of the monitoring of court hearings, the judge has demonstrated the ability to properly manage her emotions, tactfulness, pla-

city and consistence. She appears convincing and reliable during the process, gives competent explanations and conducts sessions effectively, and has never been involved in any controversial relationship.¹⁹

The above characterization due to its cliché nature could be easily matched to any judge appointed for a probationary period if the name and surname of the judge were changed. It is impossible to identify the specific reasons why the evaluator came to the above conclusion. Noteworthy that almost all the judges have been assessed in the same manner above.

2.6. Personal and professional reputation

In accordance with the Article 35 paragraph 8 of the Organic Law of Georgia on Common Courts: “When assessing a judge based on personal and professional reputation, account shall be taken of his / her business and moral reputation and authority in legal circles and society, the nature and quality of relations with legal circles etc.”

When assessing personal and professional reputation, the evaluators have used the characterizations provided by the colleagues and court staff personnel of the judges in question. Typically, the evaluators point out as follows:

- ✓ “Based on the available information, I am convinced that the judge has the reputation of a conscientious and qualified lawyer among the colleagues and in private circle. S/he has never demonstrated any personal weaknesses and faults with the colleagues and participants to proceedings.”²⁰
- ✓ “I can conclude that the Judge enjoys the reputation of a likable person and competent lawyer among the colleagues and in his/her private circle, and is distinguished with diligence. S/he is straightforward and sincere in expressing his/her opinions, is sociable with colleagues and in personal relationships. S/he has the ability to ease the tense

¹⁹ The evaluation report prepared by Sergo Metopishvili, the member of the High Council of Justice of Georgia on the assessment of the activities of Nino Sharadze, the Judge of Gori District Court. The period of assessment: 29.11.2015 – 29.11.2016.

²⁰ The evaluation report prepared by a member (the name and surname are not indicated in the report, only the illegible signature is attached) of the High Council of Justice of Georgia on the assessment of the activities of Germane Dadashkeliani, the Judge of Gori District Court. The period of assessment: 29.11.2015 – 29.07.2016.

situations. S/he has never demonstrated any personal weaknesses and faults with colleagues and participants to proceedings however one of the colleagues notes the excessive self-criticism of the judge as the only fault.²¹

- ✓ “Judge Giorgi Mirotadze has long experience of working in the judiciary system and enjoys good reputation within the judiciary, the legal circles and society.”²²

In order to ensure the compliance of the assessment of personal and professional reputation with the Law, it needs to be tailored to individual judges and describe the authority and status of a particular judge in the society. The assessment conclusion reports provided for all twelve judges are drawn up in catchall/general manner, namely, the biographies of some judges are copied, note that a judge has a good reputation based on the interviews, most evaluators do not even provide biographical data and simply state that a judge has a good reputation because the interviewees declared so.

2.7. Financial liability

Information about the financial status of the judge is included in other components of the judiciary evaluation report. In particular, when assessing “personal honesty and professional integrity”, one of the factors that should be taken into consideration during the evaluation is fulfillment of financial obligations, but the Organic Law of Georgia on Common Courts also requires individual assessment of a judge in terms of financial liabilities. “Financial liability” as an independent component is much broader and contains the detailed information about the property of a judge. The Law defines the meaning of “financial liability” as follows: “when assessing a judge based on financial obligations, account shall be taken of the information on his / her source of income, assets, property owned and / or used, and on debts and liabilities related to this property and income. Examination of financial obligations is intended to establish whether there

²¹ The evaluation report prepared by Vakhtang Tordia, the member of the High Council of Justice of Georgia on the assessment of the activities of Nana Chichilashvili, the Judge of Tbilisi City Court. The period of assessment: 29.11.2013 – 29.11.2014.

²² The evaluation report prepared by Merab Gabinashvili, the member of the High Council of Justice of Georgia on the assessment of the activities of Giorgi Mirotadze, the Judge of Tbilisi Court of Appeals. The period of assessment: 29.11.2013 – 29.11.2014.

are grounds for a conflict of interest between a judge's material interests and the interests of justice, which may potentially compromise a judge's impartiality."

The assessment conclusion reports prepared for all 12 judges appointed for a probationary period in terms of their financial liabilities are based on the judges' property declarations which include the information about the judges' owned real estate property, as well as the cash on their bank accounts. In addition to that, the evaluators have used the data obtained from JSC "Creditinfo Georgia" about the judges' personal credit information and tax receipts from the Revenue Service.

Noteworthy that the evaluation reports provided for all 12 judges in terms of their financial liabilities are all positive. This component is also characterized by generality and the evaluators only point out that there are no grounds for suspicion of conflict between the judges' property interests and the interests of justice.

2.8. *Criterion of Competence*

Unlike the criterion of honesty, the criterion of competence is relatively well-substantiated. As the assessment conclusion reports show the evaluators examine the results of the exams taken by the judges, as well as the statistical information requested from the courts. In addition, the evaluators randomly select and examine five cases reviewed by a judge, on which final decisions have already entered into force, and according to the cases evaluate the judge's knowledge and skills through different criteria.

In addition to the above information, in order to make conclusions the evaluators use audio-video recordings of the sessions conducted by judges, the information on the participation in seminars and trainings and the biographies of judges. Based on such information and in accordance with the Organic Law on Common Courts, the evaluators provide the assessment within the criterion of competence through the various components, namely: "knowledge of legal norms", "ability to provide legal arguments, and competence", "writing skills", "oral communication skills," "professional qualities, including conduct in a courtroom," "academic achievements and professional training", "professional activity."

2.9. *Knowledge of legal norms*

The level of the judges' knowledge of the legal norms is assessed by the evaluators according to the decisions reviewed. It is noteworthy that compared to the criteria of honesty, the degree of substantiation of this component is slightly higher, but still with many issues. The evaluators do not specify what knowledge of legal norms and to what extent the judges has demonstrated, also, whether the decision of the European Court referred to in a particular case by a judge is relevant and if the judge makes the reference correctly. The reference to the decision itself may not be a basis for a positive assessment.

In accordance with the Organic Law of Georgia on Common Courts: "When assessing a judge based on knowledge of legal norms, account shall be taken of the level of knowledge of substantive and procedural legislation, human rights law, including case law of the European Court of Human Rights. In order to assess a judge based on this characteristic, the evaluator shall consider the correctness of the application of legal norms, including the case law of the European Court of Human Rights with respect to decisions made by the judge on the cases reviewed. To assess a judge based on the above characteristic, the evaluator shall also request and obtain the results of the judicial qualification exams taken by the judge and the assessment of the Independent Council of the High School of Justice."

The law unambiguously requires the establishment of the level of knowledge of a judge and not only the reference to the laws or decisions. The evaluators should have included in the assessment reports whether the judges had or did not have the knowledge of the legal norms and procedural legislation.

2.10. *Ability to provide legal arguments, and competence*

When assessing a judge based on competence and the ability to provide legal arguments, account shall be taken of the substantiation and cogency of the decisions made by the judge with respect to cases reviewed, the judge's ability to think analytically and professional experience.²³

In this component, the assessment conclusion reports provided should be evaluated positively since the evaluators reviewed the judges' deci-

²³ The Organic Law of Georgia "On Common Courts", Article 36³ (9).

sions and analyzed the degree of substantiation of the decisions, which, of course, is in line with the requirements of the law. However, as a judge's decisions shall be randomly selected, it is unclear from the reports what methodology has been used for random selection of the cases. There is also no information on what methodology has been applied to assess the decisions of the judges, and whether the evaluators had uniform approaches when evaluating the decisions.

2.11. „*Writing skill*” and “*Oral Communication Skill*”

The assessment reports on writing skills are characterized by generality like honesty criteria, for instance, when assessing Judge Levan Mikaberidze's work in Batumi City Court, the report prepared by Kakhaber Sopromadze, the member of the High Council of Justice, can be read as follows:

“As a result of the examination of the decisions made by Judge Levan Mikaberidze, I can conclude that:

The procedural documents prepared by Judge Levan Mikaberidze are in clear language and easily readable. The rules of spelling and punctuation are mostly adhered.”

The above general evaluation may not be a reliable source in the eyes of an objective observer who needs to obtain information on written skills of the judge.

As for the oral communication skills, the evaluators demonstrate the same approach to this component. The similar records provided by the evaluators about different judges show the attitude of the evaluators to the assessment process. For example, the assessments provided by Kakhaber Sopromadze, the member of the High Council of Justice, are worded in the following way:

“As a result of the examination of the audio and video recordings of court sessions, it has been established that Judge Gocha Putkaradze speaks fluently. While speaking he maintains academic register, refrains from using offensive or derogatory words and expressions, discriminatory terminology, jargons and slangs.”²⁴

²⁴ The evaluation report prepared by Kakhaber Sopromadze, the member of the High Council of Justice of Georgia on the assessment of the activities of Gocha Putkaradze, the Judge of Batumi City Court. The period of assessment: 29.11.2014. – 29.11.2015.

The similar record is provided in the assessment report of another judge. For example, the evaluator when assessing Judge Murtaz Meshveliani notes out: “As a result of the examination of audio recordings of court sessions and by attending court hearings, I can conclude that Judge Murtaz Meshveliani speaks fluently. He maintains academic register, refrains from using the offensive or derogatory words and expressions, discriminatory terms.”²⁵ In accordance with the Article 36³(11) of the Law of Georgia “On Common Courts:”When assessing a judge based on oral communication skills, account shall be taken of his/her ability to speak fluently, the ability to listen to other people’s opinions with patience, his/her openness, and the ability to tolerate different viewpoints, etc.” The assessment reports should clearly state whether the judge’s oral communication skills are consistent with the legal requirements, and why the evaluator thinks so.

2.12. Professional qualities, including conduct in a courtroom

The judges’ assessment in this component can be evaluated positively as the members of the High Council of Justice of Georgia have provided much more detailed, in-depth and objective assessment rather than when examining the criteria of “writing skills” or honesty.

As required by the law, the evaluators, as a rule, review the judge’s qualities which are listed in the law for assessment of professional qualities, such as: “Punctuality, preparation of a case with due care and responsibility, conduct in a courtroom and the ability to preside over a court sitting in an appropriate manner, conduct in the relationship with the parties, diligence and industriousness, the ability to make a decision without assistance, and to think independently, the ability to work under stress, purposefulness, efficiency and speed, adherence to procedural time frames, managerial skills and etc.”²⁶ The evaluators when assessing these characteristics declare that they have used the audio materials of cases, video recordings of court hearings, a judiciary evaluation questionnaire, statistical data on the activity of a judge etc. The evaluators have based their assessments on the statistical information on violation of the procedural timeframes by the judges and so forth. Therefore, such evaluations are

²⁵ The evaluation report prepared by Kakhaber Sopromadze, the member of the High Council of Justice of Georgia on the assessment of the activities of Murtaz Meshveliani, the Judge of Kutaisi Court of Appeals. The period of assessment: 29.11.2013. – 29.11.2014.

²⁶ The Organic Law of Georgia “On Common Courts”, Article 36³ (12).

more convincing, and we can say that the judges' assessments in this component are relatively well substantiated.

2.13. „*Academic Achievements and professional trainings*“ and „*Professional Activity*“

Academic achievements and professional training as well as professional activity are the components that should have been easily assessed because if a judge has achieved anything it can be easily tracked. However, these components have also revealed challenges, in particular, if a judge has no academic achievements or has not participated in professional activities (trainings, discussions, etc.), the evaluators still assess the judge in general and cliché format. Subsequently, when assessing with points, instead of zero or lower scores, they are awarded high points based on this general assessments. For instance:

“Judge Khatuna Khomeriki speaks Russian (fluent), English (intermediate) languages. She follows the rules of the office culture, in particular, she is punctual and organized and can use computer office programs.”²⁷ The assessment cannot be considered as an adequate tool to determine the “academic achievements and professional training”. However, on the basis of this assessment, the judge received 4 points from 5.

Recommendations

GYLA supports full abolishment of the rule about probationary appointments, because it poses a significant threat to independence and impartiality of a judge. In addition, following an in-depth evaluation of the issue we found that evaluation of judges is performed for the sake of formality only. However, we would like to also underline the flaws that need to be addressed for improving the process of probationary appointments and reducing threats to judicial independence before the decision about complete abolishment of probationary appointments is made.

²⁷ The evaluation report prepared by Kakhaber Sopromadze, the member of the High Council of Justice of Georgia on the assessment of the activities of Khatuna Khomeriki, the Judge of Kutaisi Court of Appeals. The period of assessment: 29.11.2014. – 29.11.2015

Recommendations related to the legislation governing probationary appointment of judges

- The voting procedure should take place on an open session, as required by the law and the principle of transparency;
- The predefined rule for the evaluation of judges appointed for a probationary period – the Council should adopt a rule for the evaluation of judges appointed for a probationary period, which should clearly describe the content and procedures of the evaluation and be available in advance for the judge under evaluation and the general public;
- The Council should establish a rule for random selection of cases;
- The Council has to adopt a rule for evaluating decisions made by a judge, which should be compliant with the standards established by Opinion 11 of the Consultative Council of European Judges and should be used homogeneously by all evaluators;
- The Council has to adopt the rule for random selection of attendance to case hearings of the judge and video recordings, as well as the rule for the evaluation of case hearings and questionnaires based on which the evaluators will assess the case hearings led by the judge through a homogeneous approach;
- The Council should establish a rule for consultation by the evaluator and the procedures for selecting the person with whom the evaluator may hold consultations. In addition, the rule should specify the issues on which consultation is permissible and the obligatory nature of drafting the consultation protocol, which should be included in the evaluation documentation;
- The Council should outline the purpose and rule for holding meetings with the judge under evaluation; the protocols of these meetings should be drawn with the help of the Council apparatus and should be included in the evaluation documentation;
- The procedure for refusing the review of lifetime appointment should be eliminated and the Organic Law should prescribe the obligatory nature of the decision about the refusal to be made by the Council, as well as effective appeal mechanisms for these decisions;
- The process of hearing of evaluators on Council sessions should serve specific purposes and should not have a formal nature;
- The Law should prescribe that the High Council of Justice is obligated to establish a detailed rule for the evaluation of judges appointed for a probationary period, satisfying the requirement of foreseeability and ensuring objective and transparent evaluation;

- The Law should prescribe the obligatory substantiation of positive decisions made by the High Council of Justice regarding lifetime appointment of judges;
- The Law should determine the purpose, issues and procedures of the discussion held by the Council after the analysis of the assessment and interviews; the potential outcomes of the discussion stage on the judge should be defined;
- The Council should be obligated to substantiate the decisions made through the discussion, distinctly from the obligation of separate evaluators of the Council to substantiate their assessments.

Recommendations related to the practice of evaluation of probationary judges

- The High Council of Justice should establish a procedure for the evaluation of judges appointed for a probation period, which will ensure the observance of the principles of foreseeability, objectivity, and independence of judges. This procedure should be made available to judges and the public in advance, and it should ensure a uniform approach of evaluators to the process of evaluation, and substantiation.
- In order to prevent arbitrary decisions, and to achieve better objectiveness in the evaluation of judges, the evaluators should substantiate the evaluation conclusions appropriately and the conclusions should not be formulaic.
- When an evaluator makes a certain conclusion, he/she should refer to information that became a basis for a positive or negative evaluation. Conclusions should be read in such a manner as to provide an objective reader with an exhaustive information about the honesty and competency of the judge.
- The evaluation conclusions should specify what methodology was used to select five cases reviewed by a judge and what methodology was used to evaluate these decisions.
- If information obtained by the evaluator in the course of evaluation of a judge is insufficient, the evaluator should make a respective note in his/her conclusion and should avoid writing a general evaluation of the judge.
- The points awarded by the evaluator should be in conformity with the substantiation stated in the evaluation conclusion.