TRANSPARENCY INTERNATIONAL GEORGIA

HIGH COUNCIL OF JUSTICE MONITORING REPORT

№2

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The Judicial Independence and Legal Empowerment Project (JILEP)

THE HIGH COUNCIL OF JUSTICE OF GEORGIA MONITORING REPORT

№2

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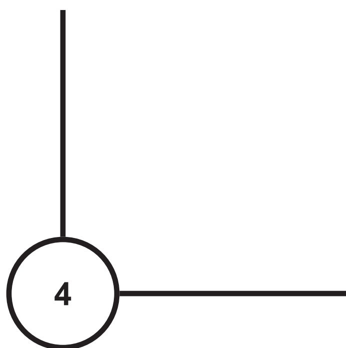

KEY FINDINGS AND RECOMMENDATIONS

Monitoring of the High Council of Justice of Georgia over last year has resulted in the following significant findings:

Transparency of the Council

During the monitoring period, several positive trends were identified:

- In contrast to the previous year overall transparency of the Council's activities have increased;
- In this reporting period, authors of this report have encountered fewer problems in terms of receiving requested information;
- After the election of the four new members of the council by the parliament of Georgia, the discussions of different topics between the members of the council have significantly increased. Compared to previous years the level of participation in the discussion of almost all members of the Council has significantly increased;
- During the monitoring period a majority of the Council's sessions were public and any interested person could have attended them. In some instances the attending guests were permitted to speak and provide their opinions during the session.

Despite the aforementioned the monitoring has revealed some very considerable gaps that still remain, in particular:

- Transparency of the Council's sessions was especially problematic in the aftermath of the 2012 parliamentary elections, prior to staffing the Council with new members;
- In majority of cases information on holding the Council's sessions and their agendas is not published within the legislative timeframes. This information is also absent from the official webpage.
- In individual cases, information on the Council's sessions is not posted on the Council's web page either prior to or after the end of the sessions. Adopted decisions are not publicized on the Council's official web page on a systematic basis;
- In individual cases the monitoring group was unable to obtain the minutes of the Council's sessions despite duly requesting them from the Council;
- The General Administrative Code stipulates that the Code does not apply to the Council's activities, but nevertheless, throughout the decision-making process the Council applies procedural norms set by this Code in a varied and vague manner;
- Despite absence of legislative constraints, a possibility of audio-video recording of the Council's sessions by mass media representatives is illegally restricted; further, the procedures for holding closed sessions is not regulated in practice;
- Neither the law nor the Council's practice determines procedures for drawing up an agenda of the Council's sessions;

A problem of adopting justified decisions by the Council

The High Council of Justice of Georgia is a central body of judicial authorities that discharges constitutional powers and makes crucial decisions in this process.

- Unfortunately, effective legislation does not provide for the Council's obligation to justify adopted decisions (time of discharging of administrative functions is an exception), and neither has the Council established any practice thereto. Accordingly, the majority of its decisions is not justified and probing into the basis of any one decision is impossible when judging the legality of such decisions; further, legislation does not directly regulate the possibility of appealing these decisions and exercising judicial control over them;
- Along with the standard of justification for decisions, legislation does not regulate (discharge of administrative functions is an exception) an array of procedural issues (summoning an interested party, timeframes of decision-making, examination of factual circumstances, etc.), which would have secured transparent decision-making under the procedure set in advance.

Appointment of judges

- It is a positive sign, compared to previous years, that the transfer of judges during this monitoring period is significantly reduced;
- Procedures for appointment of judges are problematic and disorderly. Existing vague, flawed and ambiguous legislative regulations undermine the possibility of discharging the process of appointment of judges in a transparent manner and making impartial decisions. This casts a doubt on the justification of decisions made on these issues and provides an opportunity to make biased decisions on this crucial issue;
- Flawed nature of legislation regulating the appointment of judges was once again confirmed by numerous postponed Council sessions in the recent period; in addition, number of votes distributed among the candidates during the appointment of judges on 12 November 2013 has proven the existence of two confronting approaches towards the candidates within the Council, made possible by gaps in the legislation that enable the Council members to make clearly biased assessments.

To improve the activities of the Council, it would be expedient to take into account the following recommendations:

- The Council should adhere to a high degree of transparency in its activities;
- Legislative regulations on procedures required for decision-making by the Council should be developed;
- Justification of decisions to be made by the Council should be made mandatory;
- Possibility of challenging the Council's decisions should be allowed by legislation;
- A brand new procedure for the appointment of judges should be developed, which will ensure an impartial assessment of candidate judges and justified decision-making.

INTRODUCTION

As part of the Judicial Independence and Legal Empowerment Project (JILEP) funded by USAID and implemented by the East-West Management Institute, Transparency International – Georgia (TI Georgia) and the Georgian Young Lawyers' Association (GYLA) have been monitoring the High Council of Justice of Georgia (the Council) since March 2012. At the outset of 2013 the organizations have published the joint report #1 on the Council's activities,[1] which has included the results of observations and examination of the Council's activities in March-December 2012.

In 2013, GYLA and TI Georgia have continued monitoring the Council, results of which are provided in the present report.

Similar to the previous period, monitoring aimed to assess the activities of the key constitutional body of administration in the judicial authorities – the High Council of Justice – against the background of pending reforms in the judicial system, as well as to assess the implementation of legislative amendments initiated by the new authorities of Georgia in practice and to reflect its results in the aftermath of the 2012 parliamentary elections. At that, it should be emphasized once again that monitoring provides a possibility to document the situation within the judicial system, thus allowing later to observe the ongoing processes and reforms in dynamics.

At the first stage monitoring has focused on the following areas:

- Procedure for appointment of judges;
- Practice of transfers (missions) of judges;
- Disciplinary proceedings;
- Transparency of the High Council of Justice.

Monitoring of the Council in 2013 has covered the following important areas:

- Transparency of activities of the High Council of Justice;
- Justification of decisions made by the High Council of Justice;
- Issues related to the appointment of judges;
- Observing the process of staffing the Council by the new procedure following the 2013 amendments to the Organic Law on the "Common Courts".

Monitoring proved to be extremely interesting and important as it coincided with a new wave of reforms within the judicial authorities against the background of key changes occurring in the two branches of power. At the same time, the reporting period has witnessed an abundance of issues discussed by the Council and the dynamics of the Council's activities in various areas, which has made the monitoring process even more engaging.

This period has revealed new problems in the Council's activities, identified better as a result of discharge of powers by the upgraded members of the Council. Notably, the results of both previous and current monitoring have once again underlined the vagueness of legislation regulating the Council's activities and prevalence of acute problems in the Council's everyday activities, triggered by gaps in the norms regulating the Council.

Monitoring of the Council's activities was carried out mainly through the period of January 2013 through 10 December 2013 inclusive. Yet, examination of several individual issues covers the period from October 2012 until 10 December 2013 as well.

METHODOLOGY

The study of activities of the High Council of Justice is based on the research of effective legislative regulations and the analysis of data received/obtained by requesting public information, along with information available on the Council's web page. Further, assessments are built on information obtained from the

[1] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf Date of access 10.12.2013

personal attendance of representatives of monitoring organizations at the Council's sessions and various public meetings.

1. Transparency of the High Council of Justice

This chapter discusses the openness and transparency of activities of the High Council of Justice. The Council's 2012 monitoring report[2] noted that insufficient transparency of the Council's activities has hindered the monitoring of each study component. The monitoring group experienced difficulties in obtaining individual types and categories of information, as this information was not posted on the Council's official web page. Further, there were difficulties in obtaining certain types of information (individual minutes of the session) requested from the Council.

It was already indicated back in the 2012 report[3] that pursuant to Paragraph 2 of Article 3 of the General Administrative Code of Georgia (hereinafter the "GACG"), legislative regulations on issuing of public information are fully applied towards the activities of the High Council of Justice.[4] In light of this standard, the transparency of the Council's activities was improved at this stage of monitoring compared to previous periods, yet problematic issues still remain.

For the transparency assessment purposes, within the framework of the present study focus was once again made on several components in this area, including:

- *Publicity of the Council's sessions, availability of the session agendas and minutes;*
- *Decision-making process, including decision-making only at the Council's public sessions and availability of decisions;*
- *Participation of interested persons in the Council's open sessions and possibility of expressing an opinion by the attendees.*

In respect of these issues, the present monitoring of the Council's activities covers the period from 1 December 2012 until 10 December 2013. According to the information posted on the Council's web page, 28 sessions were held over this period. Information on these sessions is available on the Council's web page. However, it should be noted that from December 2012 to 10 December 2013 the Council has most probably held other sessions as well, information on which is not available on the Council's web page. Further, monitoring has revealed that most of the cases when the Council did not post information on the sessions held on the Council's web page have coincided with the period following the 2012 parliamentary elections - from October 2012 to December 2012. Dozens of significant decisions (total of 245) were adopted during this period, including the personnel decisions and it is unfortunate that the Council has drastically reduced the degree of transparency prior to October 2012.

1.1. Publication by the Council of information on sessions

Information on a session would be usually made public several days earlier, through the Council's web page. In individual cases, session agendas were also available along with information. Out of the sessions observed from December 2012 to 10 December 2013 - total of 28 - information on the session was published 7 days in advance in only 4 cases,[5] while in other cases the Council has not observed the 7-day term of publication. Additionally, in 19 cases the information on the sessions was posted in advance on the Council's web page, but the agendas had not been posted on the same day. In 3 cases out of these, agendas are not available to-date.[6]

The first monitoring report has already noted, regarding the publicity of the Council's sessions that "the

[2] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf Date of Access 04.02.2013

[3] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf Date of Access 04.02.2013

[4] General Administrative Code, Article 3, Paragraph 2.

[5] Information is available on the Council's web page: http://www.hcoj.gov.ge/

[6] Sessions of the Council, agendas of which are not published: 16 January, 26 April and 2 June 2013. Information is available on the Council's web page: http://www.hcoj.gov.ge/

Council, as a collective public institution, is obligated to publicize information on the future session, its location, time and agenda a week ahead".[7] Under the legislation, an urgent necessity is the only exception from this rule.[8] According to the monitoring group, during this monitoring period as well legislative requirement was not met in all cases when the Council did not publicly announce information on the sessions.

Current data attest to the fact that gaps in the Council's activities still exist in this respect. However, it should be noted that the Council's activities with respect to the publication of information on sessions beforehand have improved compared to the data of the previous reporting period.[9]

In view of the aforesaid, to remedy the gaps it would be expedient:

- For the Council to consistently observe the requirements of the GACG and publish the information on the Council's sessions 7 days in advance of a session;
- Or, by making legislative amendments, to introduce different timeframes from the GACG for publishing the information on sessions in advance; further, to determine cases of urgent necessity, when the information on the session cannot be published by observing the term set in advance.

When discussing the need to publish the Council's session agenda pursuant to the GACG in advance, one cannot avoid a problematic issue related to drawing up the Council's agenda. Neither the GACG, nor the statutory and sub-statutory acts regulating the Council's activities sets forth the procedures for drawing up the Council's agenda. Improper regulation of this issue undermines the transparency of the Council's activities and raises additional questions as to the openness of its activities. Over the monitoring period this issue was raised a number of times by the non-judge members of the Council, who were interested in the procedure for drawing up an agenda. However, a relevant reasonable response or explanation on these procedures or rules has not been provided at any of the sessions. At the 6 December 2013 session,[10] non-judge members have requested the Chairman of the Council to hold a discussion at the Council session over issues raised in their letter to him, but the Chairman has refused stating this was not on the agenda. Yet, there was no response given to a question on how this should have been included on the agenda and under which procedure. This once again confirms an existing problem associated with drawing up the session agendas. To a certain extent, this problem relates also to the procedure for closing down the sessions, which is also a real problem discussed later on.

It would be reasonable for the legislation to set procedures for drawing up the agenda of the Council's session and identify a responsible person thereto. In view of the fact that the Secretary of the Council prepares the sessions of the High Council of Justice,[11] but the Chairman of the Council calls the Council's sessions, it is possible for the Council Regulations to obligate any one of the officials to draw up an agenda in advance of the Council's sessions. This should be made after mandatory consultations with other members of the Council, which will be immediately published and approved by a simple majority of the Council itself, upon the start of the session. Further, it would be expedient to draw up a draft agenda of the Council's session in maximum details in order to secure real transparency of the Council's activities and fully inform the public on the sessions.

As noted in the previous report,[12] the Council's new web page provides a possibility for posting information on the Council's sessions in a systematized form, including the agenda and minutes of the meeting. There is a special place for this on the web page. However, this function is not actively used so far. Accordingly, the publication of minutes of the Council's sessions is still problematic. Provided below is a respective window from the Council's web page, which includes information for 4 sessions only.

[7] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf, pg. 25.

[8] General Administrative Code, Article 34, Paragraphs 2 and 3.

[9] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf

[10] Representatives of the monitoring group have attended the session.

[11] Organic Law on the Common Courts, Article 51, Paragraph 3, Sub-Paragraph 'c'.

[12] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf, pg. 25. Date of access 03.02.2014

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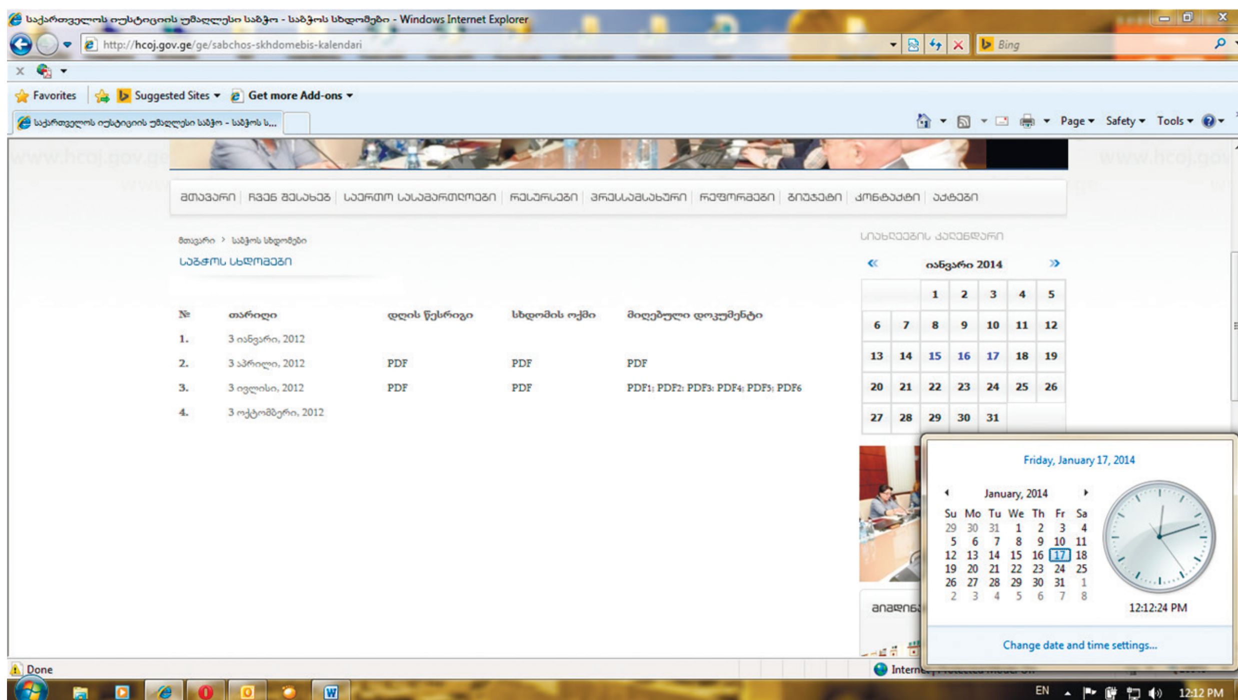

Furthermore, the monitoring group has once again encountered a problem with requesting the minutes of the Council's sessions. Regardless of our request,[13] minutes of individual sessions were not provided, thus complicating and hindering the study.

This is not a technical problem. It must be taken into account that the Council's decisions are limited to referring to legal grounds only and they do not provide any reasoning. In view of this, minutes of the Council's sessions still remain as the only means for probing into the lawfulness, expediency or relevance of the Council's decisions.

It would be reasonable to assign the Council, at legislative level, to publish on its official web page written minutes of the session, and in case of audio-minutes, audio files an decisions made in no later than 5 days from holding the session, which would secure maximum publicity of its activities.

1.2. Decision-making process

Publicity of a decision-making process is another key component of publicity. In particular, the Council makes decisions by voting,[14] which should take place at an open and public session,[15] save for exceptions stipulated by law. The first stage of monitoring has revealed violations of this rule. Namely, the Council had adopted important decisions so that information on the sessions did not become public either prior to or after the sessions.[16] The current period has identified that publication in advance of information on the sessions by the Council is still problematic. Further, the problem of failure to publish the information on sessions at all still prevails.

Monitoring has revealed that information on individual sessions (according to our information - 14 sessions) was not published at all; one can assume that sessions were held only pursuant to the dates of

[13] On 13 August and 4 December 2013 Transparency International - Georgia has requested the copies of minutes of the Council's sessions for January, February, July, August, September, October and November 2013. On 12 December 2013 GYLA has requested the minutes of October, November and December 2012 sessions. Unfortunately, requested minutes had not been provided to monitoring organizations by the time of completing the monitoring (10 December 2013).

[14] Article 50 of the Organic Law on "Common Courts" and Article 14 of the "Regulations of the High Council of Justice of Georgia" approved under the decision N1/208-2007 of the High Council of Justice of Georgia.

[15] General Administrative Code, Article 34.

[16] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf Date of access 05.02.2014

decisions posted on the Council's web page. At such sessions the Council has made dozens of significant decisions without publicizing information on holding the sessions either prior to their launch or after their completion. Such decisions are adopted on 12, 19, 20, 26 and 28 December 2012. Further, on 25 and 31 January 2013; 20 February 2013; 19 March 2013; 8 and 24 April 2013; 14 June 2013; and 25 and 30 September 2013. Pursuant to information posted on the official web page of the High Council of Justice, on these dates the Council has made important personnel decisions.[17] For instance, in December 2012, just like on 19 March, 24 April and 14 June of 2013 the High Council of Justice has made up to 55 important personnel decisions on the transfer of judges to different courts or assignment of powers, while the sessions held for the purpose of making these decisions were not publicly announced. In addition, information on holding the closed-door sessions on the listed dates was not published either. In this respect, of interest is the 25 September 2013 session of the High Council of Justice, at which the Council has presumably adopted one decision, by which all judges of the common courts of Georgia were given in September one month salary bonus on top of the monthly bonus. In view of the fact that the Council must adopt such decisions at the Council's sessions, it would be logical to infer that the Council has presumably held sessions on the above-listed dates, however, without publishing information on them, owing to which interested persons were unable to attend the Council's sessions. This further diminishes the degree of transparency of the Council's activities and makes the activities of this public institution extremely vague.

Moreover, pursuant to Paragraph 4 of Article 34 of the GACG, holding a session of a collective public institution by violation of procedure established by law shall result in invalidation of decisions adopted at this session by the court. Hence, not only the vagueness of the Council's activities, but the legality of its decisions may also become a subject of discussion.

The authority of the Council to make decisions without holding the sessions is of equal interest. As already noted, the Council must make decisions at the sessions as a result of voting. Current statutory or sub-statutory normative acts regulating the Council's activities do not list the issues that may not mandatorily require holding a session or some sort of decision-making, or deciding on which would fall under the competence of the Council's Chairman/Secretary. Accordingly, any type of decision-making should be preceded by the Council's session to be held by observance of a relevant procedure.

Apart from the above-described cases, when the Council was adopting individual decisions without holding the sessions, monitoring has identified several cases, when the Council's Chairman or Secretary have made decisions on issues within the Council's competence so that the Council had not examined these issues and had not made respective decisions at the session. Examination of Lali Lazarashvili's application is a good example. The application of the former Supreme Court judge Lali Lazarashvili was examined at the 12 November 2013 session of the Council. The attendees learned at the session that the Council's Secretary had already responded to the applicant's written request prior to the session, whereas the interested person was addressing the Council and thus requesting it to examine her issue.[18]

Obviously, in light of the importance of individual issues and the necessity of making an instant response, the Council may discuss and delegate decision-making on individual issues to the Council's Chairman/ Secretary, and/or the legislation may define part of issues that the Council members can decide on in the format different from holding the sessions. Yet, this issue definitely requires relevant regulation and legislative framework, otherwise the lawfulness of all these types of decisions can be questioned.

As for the availability of made decisions, just like during the previous monitoring period, the publication of the Council's decisions was problematic this time also. The Council started posting the decisions of 2013 on the web page only from the second half of June. Until that period none of the Council's 2013 decisions were available on the web page. By the end of monitoring, out of decisions posted on the Council's web page the latest is dated 15 October 2013,[19] illustrated by the respective window of the Council's web page.

[17] Information is available on the Council's web page: http://hcoj.gov.ge/ge/2013-tseli

[18] Representatives of organizations conducting monitoring have attended the session.

[19] Web page of the Council - http://hcoj.gov.ge/ge/2013-tseli - as of 10 December 2013.

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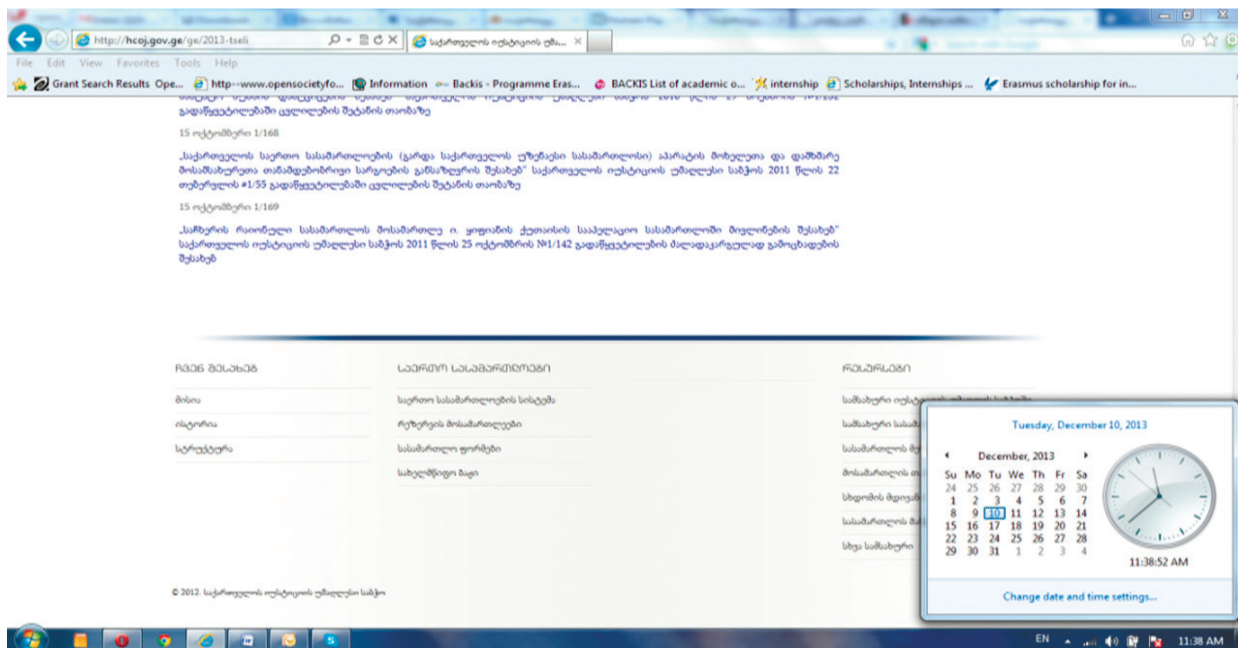

1.3. Attendance/participation of interested persons in the sessions

A possibility of attendance or participation of interested persons in the Council's sessions is another essential component of the Council's transparency. This monitoring period was remarkable in this respect, because an interest towards the Council's sessions has grown considerably during this period. During the monitoring period, those interested in attending the Council's sessions were local NGOs and international organizations, as well as judges themselves (non-judge members of the Council). Judges became particularly active since 22 June 2013, when the new composition of the Council started functioning. Members of the judges' association "Unity" were frequently attending the sessions during this period. At the sessions judges often wanted to express their opinions on a number of issues directly concerning the discharge of judicial powers by the judges, which can be assessed only positively. However, in individual cases they were deprived of this opportunity based on totally unclear arguments. Remarkably, a possibility of expressing the opinions in the course of a session by attending non-judge members or even other attending interested persons is not regulated anywhere, and the session's Chairman enjoys full discretion in providing them with such a possibility.

Coverage of the Council's sessions

Member organizations of the monitoring group believe that issues related to the coverage of the Council's sessions and the availability of audio and video recordings and minutes of the sessions are quite problematic. Publicity of sessions of the collective bodies, which is warranted by legislation, does not impose any restrictions for mass media representatives. As with any other interested person, they can also attend the sessions and make audio/video recordings of the sessions and issues of interest to them. Interest of media outlets in the Council's activities is not usually high. Yet, problems have arisen on several occasions when media representatives have attended the sessions. In all such cases the Public Relations Office of the Council would allow the journalists to make only video images of the sessions. All media outlets would make video images simultaneously, for a short period of time. Remarkably, at this point the Council members would usually halt discussions and wait for the mass media representatives to leave the hall. It is totally unclear how the Council decides to impose such restrictions on the journalists, when this has not been a subject of discussion or vote at the Council's sessions.

Of interest in this respect is the 12 June 2013 session, attended by a representative of the "Liberal" magazine, who was deprived of a possibility to make a video recording of the session. The Chairman of the Council had personally requested the journalist to refrain from video recording. The June 12 session of the Council was open and the reason of resistance to recording of the session remains unclear. The ses-

sion was not closed down and neither has the issue of closure been voted for. The journalist's right to make a recording was restricted by verbal instructions of the Chairman and the Council's Secretary, which by itself contradicts the requirements of openness and publicity of the sessions. Additional explanations on the need of such restriction were not given at the Council's session.

Attendance of public representatives and judges at the Council's sessions and closure of sessions

It could be concluded overall that interest towards the Council's activities has increased further during this monitoring period. This once again confirms that the Council must respect and observe the requirement of publicity. In view of existing legislative standards, the sessions in general are public. Yet, by observing high standards of publicity and transparency, the introduction of additional regulations would protect the interests of persons interested in attending the sessions to a great extent. At that, this right should not be restricted by individual decisions of the Council Chairman and/or Secretary. Decisions on holding a session behind the closed doors must be made by voting, in view of clear procedures set beforehand.

Sessions were closed down several times during the monitoring process. For instance, at the 4 October 2013 session of the Council where the judge candidates were interviewed, following which the Chairman requested the attendees to leave the session because the information on the candidates was to be discussed. The Council had not voted for nor discussed this issue. In another case on 6 December 2013, the advancement of applicants to the High School of Justice to the second stage of competition was to be examined. Unlike the previous example, the Chairman has suggested to vote for closing down the session. Legislative requirements were breached in both examples. In the first example the Chairman had made an individual decision and closed down the session by violating the procedures. In the second example, requirement of the GACG was breached by putting the issue up for vote, pursuant to which an announcement on closing down a session must be made in advance, 7 days earlier, together with an agenda. In this case there was no urgent necessity, which would have justified the breach of terms set by law. This issue is somewhat related to the problem of drawing up the agenda of the sessions, because it remains vague on how a session can be closed down in advance and under which procedures. Thus, it is reasonable that statutory or sub-statutory normative acts, regulating the Council's activities, regulate this issue as well.

Notably in terms of publicity is the written appeal of the judges' association "Unity" towards the Council, in which they were requesting live broadcast of the Council's sessions via a special closed network (Intranet) functioning within the common courts system, which is available to judges and non-judge members of the Council. According to information mentioned at the Council's session, the request was satisfied only after several months. It is worth mentioning also that according to the statements of members of the judges' association "Unity" made at the Council's session, this Intranet does not operate properly and interested judges are unable to watch the Council's sessions without disruptions.

Monitoring organizations note that the High Council of Justice is a collective public institution, where its sessions are held publicly and the decisions made at these sessions must also be made public and available. In this case publicity does not imply any restrictions, apart from individual exceptions related to closed-door sessions.

In light of an increased interest towards proactive[20] publication of public information at an international level, public institutions should play a special role by publishing the information proactively through its own online resources. Considerable legislative amendments were made in this respect in Georgia too.[21] Several years ago an application submitted in the relevant institution was the only way for obtaining public information ***(reactive publication)***, whereas today chief focus is made on public information released by public institutions themselves ***(proactive publication).***[22] Proactive publication of information is regarded as a constituent part of the fundamental right to access to public information. The European Court of Human Rights notes that information "is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".[23]

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[20] Meaning the publication of public information by public institutions at their own initiative.

[21] http://gyla.ge/uploads/sajaro.pdf, pg. 6-7. Date of access 04.02.2014

[22] Ibid. pg. 32.

[23] Ibid. pg. 32.

With this in mind, the restriction by the High Council of Justice of access of mass media representatives to the sessions and subsequent broadcasting of sessions via the Intranet only and in a limited manner does not duly secure the Council's transparency and publicity. Importantly, interest towards the Council's sessions does not emerge exclusively within the judicial authorities. Enormous public interest must also be taken into account.

It is crucial that the Council not only allows journalists to make recordings of the sessions, in case of interest, along with making live broadcasting via the Intranet, but that it also provides live broadcasting of sessions on the Council's web page, archives these recordings and makes them available. This will significantly increase the degree of transparency and publicity of the Council's activities, thus creating mostly relevant opportunities for obtaining the information, which otherwise required submission of applications requesting the information. This by itself will not only facilitate the efficiency of the Council's activities, but will make it possible to introduce a transparent system with comparatively less efforts and resources.

2. **Justification of Decisions Made by the High Council of Justice**

A trend was identified when drafting the first monitoring report of the Council,[24] according to which - regardless of the topic, the Council's decisions were standard and clichéd, without any justification or reasoning. For this very reason, in order to clarify the content of decisions, in the process of drafting, the first report monitoring group had to request minutes of the sessions from the Council, without which understanding the motivation behind the Council's decisions would be impossible.

The practice of adopting unjustified decisions has continued during the second monitoring period also. As part of this monitoring period we have studied decisions on various issues made from 1 October 2012 until 1 December 2013.[25] It turned out that the decisions of this period have a similar form and content to the decisions examined as part of the first report. Analyzing the argumentation, reasoning and expediency of decisions is still impossible without the minutes of the sessions.

Pursuant to Article 3 of the GACG, the High Council of Justice is on the list of those few state agencies, to which the GACG does not apply, apart from the norms regulating the freedom of information and discharge of administrative functions.[26] Legislative norms of other states also recognize such legislative reservation. For instance, the German administrative legislation has the same approach.[27] Remarkably, legislation regulating the Council's activities makes it possible to apply only the norms regulating public information and administration to the Council. The meaning of 'public information' is not vague, but the issue of administration is unclear. What does the discharge of administrative functions by the Council in this case mean? The powers of the Council set under the Organic Law on the "Common Courts" that relate to discharge of constitutional functions of the Council must not be comprehended as discharge of administrative functions. An administrative function implies the unity of so-called extra functions of an administrative agency, which, for instance, may relate to the adoption of individual decisions in respect of employees of the Council's administrative office and/or management of the administrative office, and may not relate to making decisions on the appointment/dismissal of judges, which is a constitutional power of the Council. Although this issue is not clarified at legislative level, it is essential to logically delimit administrative and other types of functions. Otherwise, restriction of the GACG's application to individual agencies is devoid of any sense. Despite the importance of the issue, Georgian legal and scientific literature, as well as the court practice is silent on the interpretation of this norm. At the same time, the Council itself applies a varied approach towards this restriction, thus creating difficulties in its activities on a day to day basis.

Requirements of the GACG (rules for carrying out the proceedings, justification of acts, timeframes, mandatory participation of an interested person, etc.) cannot be referred to when assessing the justification of adopted decisions and observance of procedural norms by the Council during the discharge of consti-

[24] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf, pg. 5-17.

[25] See the Council's web page: http://hcoj.gov.ge/ge/2013-tseli (visited on 10 December 2013).

[26] General Administrative Code, Article 3, Paragraph 2.

[27] See Administrative Procedure Act of Germany, Article 2. http://www.bmi.bund.de/SharedDocs/Downloads/EN/Gesetzestexte/VwVfg_en.pdf?__blob=publicationFile

tutional functions. Yet, this does not mean that the decisions of the High Council of Justice are not subject to judicial control, because the restriction of the GACG's application does not automatically exclude the application of the Administrative Procedure Code towards the Council's activities. In this respect, of interest is the 14 February 2001 Supreme Court ruling N3c/ad-19-c, in which the Court, despite restriction set under Article 3 of the GACG, found it possible by the court to probe into the legality of decisions made by agencies listed in this Article. Therefore, it is also possible that the Council's decisions are subject to judicial control. Hence, the Council's decisions must also meet a relevant standard of justification and must be adopted through observance of fixed procedures, allowing the exercise of judicial control over these decisions. Protection of interests by interested parties would otherwise prove to be impossible.

It was already noted above that the Council itself practices a varied approach towards the legislative restriction set under the GACG. For example, on 12 November 2013, part of the Council's members refused to examine the recusal of the Council's members requested by an interested person, alleging that the GACG does not apply to the Council, whereas in earlier decisions of the Council it has used the norms of the GACG as a legal ground.[28]

Throughout decision-making process the Council acts on the basis of the Organic Law of Georgia on the "Common Courts" and other sub-statutory acts regulating the Council's activities. Lawfulness of the Council's decisions must be probed in compliance with requirements of these very acts. Legislative acts mentioned do not regulate procedural issues defined under administrative legislation (formal requirements for the acts, necessity of justification/reasoning, various procedural norms in case of specific proceedings, including interested persons in the proceedings, referring to a possibility of challenging the act, etc.). Nevertheless, an essence of a legal state implies that a possibility must exist to probe into the reasoning and justification of acts adopted by any state institution - and especially such an important agency discharging constitutional powers, as the High Council of Justice. Possibility of challenging such acts must also exist. Effective legislation is silent on the right of persons to challenge the Council's decisions. By itself, this does not prohibit any interested person from challenging the Council's decision, as this is one of the central rights warranted by the Constitution of Georgia.[29] Accordingly, an interested person should always have a possibility to assess the correctness of its positions and establish if the decisions are duly justified and the procedural requirements observed. Yet, under the current legislation this is in fact impossible. Despite theoretic possibility of challenging the Council's decisions, this is not an effectively realized right due to the absence of a standard of justification for the Council's decisions set by law.

Owing to the legislation, the Council enjoys rather wide discretionary powers in case of individual issues. For instance, transfer of a judge, appointment/transfer of judges to another court without competition. Taking into consideration the importance of these issues, it is absolutely crucial that the Council's freedom of action is limited by the obligation of the Council itself to justify decisions adopted within the scope of its powers. Otherwise, the need to apply powers legally and with due reasoning, as well as the public and/or judicial control over the Council's activities is undermined.

The Council's decisions on various topics clearly attest to the above-described problematic issues. The present chapter will examine individual decisions made by the Council within the scope of its powers. Assessment of these decisions once again proves the urgency of problems caused in practice by restriction of the GACG's application towards the Council's activities and the flawed legislation regulating its activities. This stresses the need of amending the legislation in this regard and introducing clear and unambiguous regulations.

Most important of the personnel decisions – appointment of judges through a competition – will be discussed in the report separately in light of the significance and specifics of the issue.

[28] See the decision of the Council dated 19 March 2013: http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202013/52-2013%20001.jpg

[29] Constitution of Georgia, Article 42.

2.1. Mission/Transfer

Pursuant to the information obtained from the High Council of Justice of Georgia,[30] based on Article 13 of the Law of Georgia on the "Procedure for Distribution of Cases and Assignment of Powers to Another Judge in the Common Courts", 42 judges were so-called transferred in 2011,[31] 40 – from 1 April 2012 to 1 December 2012, but by the end of 2012 only 7 out of these 40 transfers were in force. As for the period from 1 January until 10 December 2013, according to the information provided by the Council, a total of 13 judges were transferred during this period.[32] The number of transfers is reduced considerably compared to the previous years. This may be related to vast public criticism towards this mechanism and doubts that it was applied as a measure of punishment against judges,[33] as well as the stricter legislation regulating this issue. Yet, on the other hand, the dismissal of judges from one court and their appointment in another court for their remaining term based on Article 37 of the Organic Law of Georgia on the "Common Courts" has increased significantly, which by itself means an appointment of the judge without competition. In 2011, 27 judges were transferred based on this Article, and 71 – in 2012.[34] Interestingly, only in October-December 2012 the Council has made 66 such decisions[35] (see the diagram). Pursuant to the data of 11 months of 2013, 26 judges were appointed (transferred) to another court without competition.[36] The Chairman of the High Council of Justice has stated at the 19 March 2013 session that it was expedient to reduce the number of judge's missions to a maximum. Further, he noted it was reasonable to discuss the issue of transfer of judges to other courts. According to him, missions were requested by the judges themselves due to the health, family or other reasons. The Chairman claimed that earlier they had given consent to their missions. At the 19 March session, the Council invalidated the missions of 11 judges transferred previously to various courts based on this argumentation only, and transferred[37] judges to their mission courts.

Legislation was amended in March 2012 and the duration of a mission has been limited up to 1 year and save for exceptions, obtaining a judge's consent became mandatory. The amendment has to be certainly hailed, because transferring a judge without his/her consent became impossible, and this was an additional guarantee for the judges' independence and protection during that period. However, the Council's obligation to justify the application of every single transfer is still an open issue. Accordingly, we were unable to judge the expediency of these decisions.

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[30] Information obtained from the High Council of Justice by the 18 December 2012 letter "1181/1072-03-ო". Available upon request.

[31] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf Date of access 11.12.2013

[32] Transfer of judges to other courts by the Council based on Article 13 of the Law of Georgia on the "Procedure for Distribution of Cases and Assignment of Powers to Another Judge in the Common Courts" was an extreme malpractice pursued for years, proved by relevant statistics. Further, this issue has deserved public criticism on number of occasions. For instance, see: http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf, pg. 13-18; See. http://gyla.ge/uploads/publications/2010/martlmsajuleba_sakartveloshi_2010.pdf, pg. 18; Date of access 10.12.2013
http://www.coalition.org.ge/ge/article119/კოალიციის_ანგარიში, pg. 28 – 30. Date of access 04.02.2014

[33] http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf, pg. 13-18; http://gyla.ge/uploads/publications/2010/martlmsajuleba_sakartveloshi_2010.pdf, pg. 18. Date of access 20.01.2014

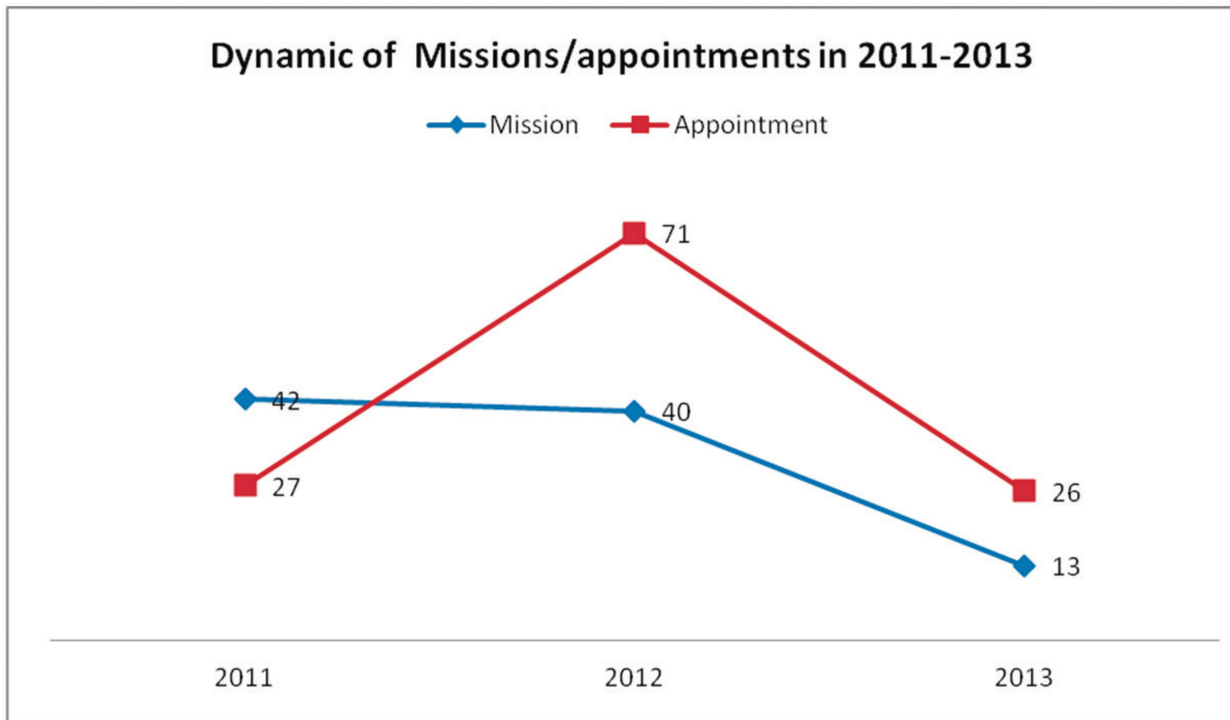
[34] Public information provided by the Council to GYLA, letter №ბ-04/254-13; 25.12.13; Available upon request.

[35] Official web page of the Council www.hcoj.gov.ge

[36] Public information provided by the Council to GYLA, letter №ბ-04/254-13; 25.12.13; Available upon request.

[37] Organic Law of Georgia on the "Common Courts", Article 37.

Diagram



- Pursuant to the information obtained from the Council's official web page, on 19 March 2013 the Council decided to transfer Magistrate judge I. Abshilava in the Chkhorotsku Municipality of the Zugdidi District Court to the Gali-Gulripshi and Ochamchire-Tkvarcheli District Court. The decision includes only legal grounds of transfer and does not provide any reasoning for transferring this judge from one court to another. We have requested the minutes of relevant sessions to learn about the motivation behind the decision. The minutes of the session are totally silent on the transfer of I. Abshilava.[38] Accordingly, even with the minutes of the session it is impossible to clarify the reason behind this decision, why it was necessary to add a judge to the court of mission, and whether the interests of justice were jeopardized in the Zugdidi District Court itself. In addition, the absence of Abshilava's transfer in the minutes casts a doubt on the legality of this decision. The Council's decisions must be made at a session only, the course of which must be recorded in the minutes. This transfer was invalidated in about a month from the decision.[39] The decision on invalidation of the transfer states that Abshilava's mission to the Ochamchire-Tkvarcheli District Court was necessary due to the illness of Judge Kekenadze of this Court, and that after Kekenadze's recuperation Abshilava's mission was no longer necessary.

This example illustrates once again that the Council's decisions on the transfers are still problematic and raise numerous questions as to the Council's activities.

In 2012 the Council was making the second type of decisions on the transfer of judges more frequently.[40] The above statistics give raise to a substantial doubt that malpractice of transfer of judges may have been replaced with the appointment of judges to various courts without competition, which is indeed alarming and which leaves numerous unanswered questions as to the Council's activities.

A decision of the Council based on this norm is not temporary and the judge is transferred from one court to another for his/her entire term. Accordingly, the monitoring group believes that this decision equates to an appointment of the judge, which is not a temporary mission and requires strong justification. This issue is of special importance in cases of transferring a judge from a lower instance court to a higher instance. By essence this is a promotion and therefore requires justification as would a transfer of the judge from a higher instance court to a lower one, which is a demotion. The monitoring group thinks that only

[38] Minutes of the 19 March 2013 session of the High Council of Justice of Georgia. Available upon request.

[39] Minutes of the 29 May 2013 session of the High Council of Justice of Georgia. Available upon request.

[40] Organic Law of Georgia on the "Common Courts", Article 37.

the vacancy and the judge's consent should not be sufficient for such a decision. In this case the decisions do not make it clear on how the judge to be transferred is selected, damage inflicted on justice by the transfer of this judge from the concrete court is not assessed, and the relevance of the concrete judge's professional experience to the needs of the court having a vacancy is not evaluated.

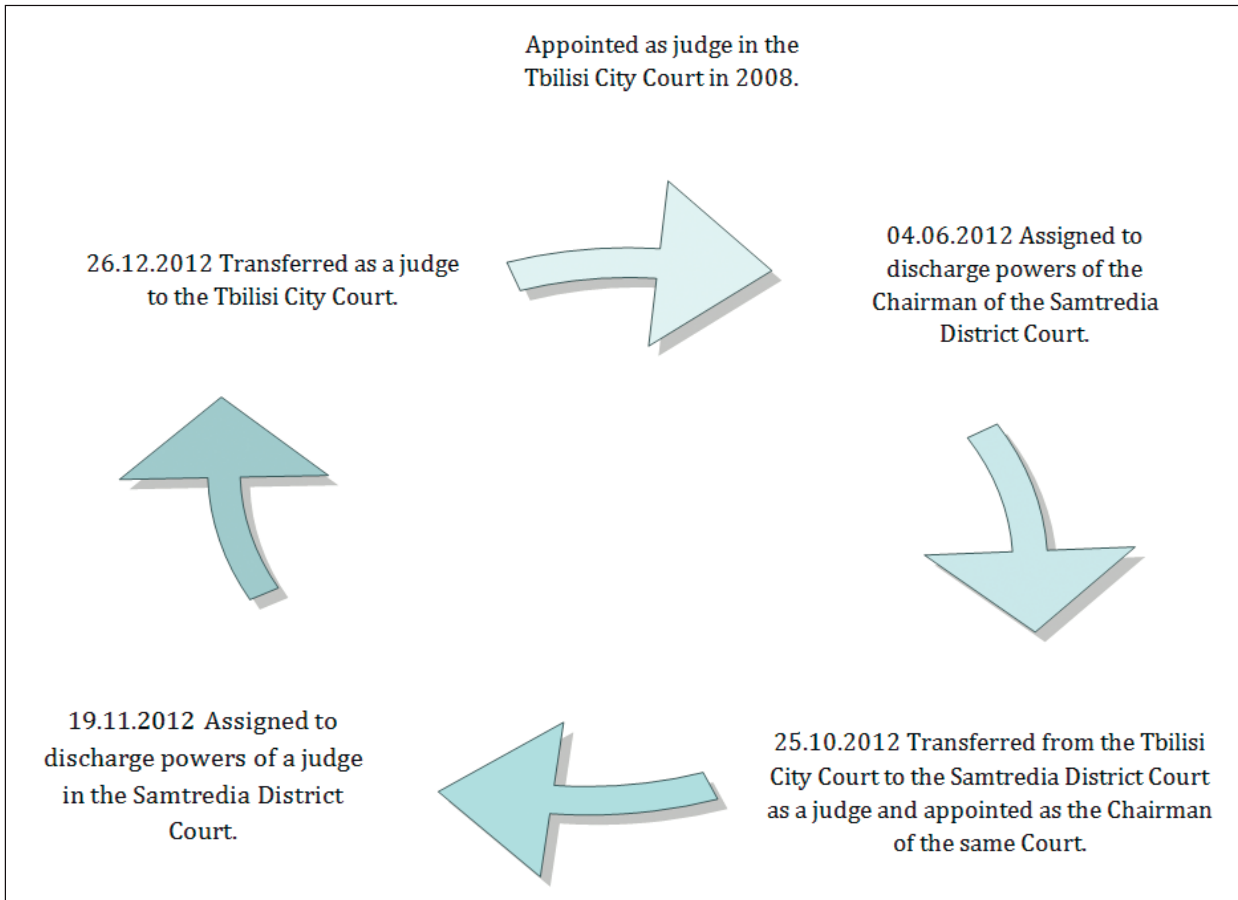
Only from October to December 2012 the Council has made 66 decisions on such appointments, while a total of 92 decisions during the current monitoring period (October 2012 – 10 December 2013) were made. Out of 66 decisions made in 2012, judges were transferred from district courts to a higher instance court in 15 cases, while in one case the judge was transferred from the appellate court to the district court. At the 19 March 2013 session 11 judges were transferred all at once to other courts. Prior to that, all of these judges had been on missions to the respective courts.

An examination of minutes of the sessions along with decisions of the Council demonstrates once again that the Council's decisions are unjustified and the grounds of concrete decisions are vague. Text of the decision refers to a specific norm only that served as the basis for the decision, but the respective reasoning and need to make the decision is not justified. Moreover, it is impossible to probe into the reasoning of decisions even with the minutes of the sessions obtained as part of monitoring. In individual cases the minutes of the Council's sessions indicate that judges themselves agree to transfer to other courts due to personal interests, but the minutes of respective sessions of the Council are silent on the interests of justice and other issues. Several such decisions are provided below for illustration:

- Out of 66 decisions on transfers made in October-December 2012, 13 decisions have transferred judges from various district courts to the Tbilisi City Court. Yet, none of the respective decisions includes justification as to the necessity/need of transfers.[41]
- On 16 October 2012 the judge of the Sokhumi and Gagra-Gudauta District Court L. Chkhikvadze was transferred to the Rustavi City Court, while on 6 February 2013 the same judge was transferred from the Rustavi City Court to the Tbilisi City Court. On the same day (6 February 2013) the judge of the Tbilisi City Court M. Gvelesiani was transferred to the Rustavi City Court. None of the decisions justify the necessity and expediency of such personnel changes between the courts.[42]
- On 25 October 2012 the judge of the Tbilisi City Court B. Bugianishvili was transferred from the Tbilisi City Court to the Tetritskaro District Court, while on October 30 Judge O. Jorbenadze was transferred from the Tetritskaro District Court to the Tbilisi Appellate Court. This transfer was not justified either, and especially in case of Judge Jorbenadze the judge was transferred to a higher instance court, which equals a promotion and requires even stronger justification.
- Judge G. Arevadze was appointed in the Tbilisi City Court in 2008. On 4 June 2012 he was assigned to discharge the powers of the Chairman of the Samtredia District Court; the 25 October 2012 decision #1/223 has invalidated the decision on assigning Arevadze to discharge the powers of the Chairman of the Samtredia District Court and by the decision #1/220 of the same day he was dismissed from the Tbilisi City Court and transferred as the judge of the Samtredia District Court. Further, by the Council's decision #1/222 of the same day he was appointed as the Chairman of the Samtredia District Court. On 19 November 2012, i.e. in only 25 days, under the Council's decision #1/289 Arevadze was dismissed from the occupied decision due to the liquidation of the Samtredia District Court and was assigned to discharge the powers of a judge in the same court created under the same title based on Article 44 of the Organic Law of Georgia on the "Common Courts". In approximately a month, on 26 December 2012 Judge Arevadze was transferred from Samtredia to the Tbilisi City Court based on Article 37 of the Organic Law of Georgia on the "Common Courts". These decisions indeed give raise to plentiful of questions concerning the reason behind such career movement of one particular judge and the compliance of similar decisions with the stability principle of discharging judicial powers. Arevadze's career is even more illustrious on the below diagram:

[41] In case of these decisions the minutes of the session were not examined because the Council has failed to timely provide the minutes.

[42] The minutes could not be obtained in this case as well.



- On 16 October 2012 Judge L. Liparteliani was dismissed from the Sighnaghi District Court and was appointed in the Rustavi City Court based on Article 37 of the Organic Law of Georgia on the “Common Courts”, while on 19 March 2013 was transferred from the Rustavi City Court to the Tbilisi City Court.
- On 25 February 2013 Judge E. Gabrichidze was sent on the mission to the Tbilisi City Court based on Article 13 of the Law on the Distribution of Cases and Assignment of Powers. In 3 weeks time, on March 19 the judge was dismissed from the Bolnisi Court and was transferred to the Tbilisi City Court based on Article 37 of the Organic Law of Georgia on the “Common Courts”.

Examples brought clearly attest to the vast importance of introducing respective legislative requirements in respect of the Council’s decisions to secure more transparency of its activities. This will ensure these decisions are justified and make it possible to assess the expediency of such decisions. Further, it is necessary that interested persons have a real opportunity to challenge such decisions.

2.2. Appointment of Judges

Legislation of Georgia prescribes two possible ways of appointing a person as a judge through a competition:[43]

1. Appointment of students of the High School of Justice;

2. Appointment of persons released from studies in the High School of Justice.

The previous report has identified an array of gaps in the process of appointment of judges, namely: low degree of transparency of the process; short period of time provided for competition to enroll in the School; unavailability of evaluations of students by members of the High Council of Justice and failure to justify respective decisions.

[43] Organic Law of Georgia on the “Common Courts”, Articles 36 and 37.

The present report illustrates the enduring nature of these gaps during the appointment of judges by the Council and identifies other considerable gaps as well.

a) Appointment of students of the High School of Justice as judges

Over the monitoring period, the Council made only one decision on 19 November 2013 on the appointment of graduates of the High School of Justice and persons released from studies in the School as judges.

Pursuant to Paragraph 1 of Article 11 of the 9 October 2009 decision N1/308 of the High Council of Justice of Georgia on the "Approval of Procedure for Selection of Candidate Judges", a position on the qualification list of the School's students and the evaluation of an Independent Council of the High School of Justice is taken into account when selecting the School's student as a candidate judge. According to Paragraph 4 of the same Article, a candidate judge is invited to a session based on the decision of the High Council of Justice. Hence, legislation does not provide for public announcement of competition by the Council and the appointment of this category of persons as judges through observance of relevant procedures, which by itself makes this process less transparent. In this case, information on available vacancies in the court system and number of applicants to these vacancies, as well as information on the candidates themselves is not publicly published in advance, as opposed to other types of competitions.

The appointment of 2013 graduates as judges was initially discussed at the 5 July 2013 session of the High Council of Justice. Upon the request of non-judge members, it was decided at this session to invite the graduates to the 15 July 2013 session, while the decision on their appointment would have been made at the July 22 session.

Our previous monitoring report on the High Council of Justice has reflected the results of admission competition of Groups 9 and 10 in the High School of Justice.[44] All students of Group 9 and several students of Group 10 were invited to the 15 July 2013 session.

All invited ten candidates were interviewed in a peaceful environment. According to the Chairman of the session, all members of the Council had data on each candidate, but the attending audience was not publicly informed about which group a candidate was from, what was his/her desired appointment, what was their evaluation at the School, etc. Interview with each candidate lasted from 15 to 30 minutes. Both general (candidates were asked to assess positive and negative aspects of studying in the School, reasons for selecting the profession of a judge, etc.) and professional questions (legal assessment of various issues) were asked. Notably, non-judge members of the Council were more active during the interviews. Judge members of the Council would justify their passiveness by their previous interviews with these candidates during their admission to the School. However, these students were enrolled in the School by the previous composition of the Council and their interviews were not loaded with professional questions.

Decision on the candidates was not made after the completion of interviews. To decide on the issue the Council gathered on 22 July 2013, yet in vain. In the opinion of non-judge members of the Council, in view of available vacancies in the judicial system (up to 40 vacancies) it would have been reasonable to announce competition also for persons released from studies in the School, and to evaluate these and other candidates together and thus to decide on their appointment as judges. They threatened not to participate in voting. Pursuant to Paragraph 4 of Article 50 of the Organic Law of Georgia on the "Common Courts", the High Council of Justice of Georgia shall appoint a person as a judge if his/her candidacy receives at least 2/3 of the full composition of the Council in a secret ballot. Therefore, in this case adopting the appointment decisions by the judge members of the Council only was excluded. Overall the Council has decided to announce the competition for vacant positions of judges and to decide on the appointment of the School's students as judges in September 2013 along with the results of the new competition.

After the competition for persons released from an obligation to graduate from the School was carried out in September 2013, the Council has also invited the listeners (students) of Group 10 of the High School of Justice, who at the time had completed a training course, to the interviews At the 4 October 2013 session the Council has interviewed this second group of the School's students as well. Similar to the

[44] GYLA and Transparency International - Georgia have observed in 2012 the competition for staffing Groups 9 and 10 of the School of Justice. See: http://gyla.ge/uploads/publications/2013/sakartvelos_umaglesi_sabchos_monitoringis_angarishi_2013.pdf, pg. 5.

15 July 2013 session, non-judge members were quite active during the interviews. After the interviews the Council's members have stated that a joint vote on these candidates would take place on 15 October 2013 in Kutaisi. However, judges were not appointed on October 15 either. This time non-judge members were referring to the fact that presidential election was scheduled on 27 October 2013 in the country, following which constitutional amendments would enter into force and the procedure for appointing judges would change. Accordingly, they have once again refused to vote. The next session with the same purpose was held on 1 November 2013, but judges were not appointed this time either, because the amendments would enter into force only after the inauguration of the newly elected president.

The final vote, during which the School's students were appointed, was held on 19 November 2013. At this stage 18 nominees from the School's students were submitted to occupy vacant judicial positions. Only 3 persons out of these were appointed as judges. Neither positive nor negative decisions made through a secret ballot were justified. Accordingly, there is no practical means to challenge these decisions.

Current legislative regulations and their realization in practice reconfirm how vague, flawed and problematic the process of the students' appointment can be. Problems of the same urgency were also identified during the second type of decision-making for candidates.

b) Competition for selection of judges

Occupying a position through a competition is a second method for appointing a person as a judge. During this monitoring period, the High Council of Justice has announced the competition for persons released from studies in the High School of Justice twice.

The first competition was announced on 15 April 2013.[45] Registration of candidates went underway from 15 to 22 April 2013 (except weekends). The Council announced the second competition on 25 July 2013 and the period for submitting documents was set from 26 July to 8 August 2013.

In both cases it was noted that interested persons should have also filed an online application through the web page of the High Council of Justice of Georgia, which would have then informed them about the competition stages and decisions made. However, legislation does not provide at all for online registration during the competition of judges. In both cases the Council has published information on the number of registered candidates,[46] pursuant to the procedure established by law.[47] In the case of a competition announced in April 2013, total of 7 candidates out of 45 advanced to the second stage at the April 24 Council's session. Remarkably, information on this session was not officially published. Further, pursuant to the minutes of the session, none of the members appointed under the Parliament's quota have attended the session.

In the case of a competition announced in September, candidates for interviews at the first stage were identified at the 10 September 2013 session held behind closed doors. 41 out of 76 candidates advanced to the next stage. The Council released this information on its web page on 17 September 2013. Nevertheless, information on the date of interviews with these candidates was not made public this time either. Organizations learned about the interviews from the candidates themselves on September 18 and thus managed to attend the session.

The majority of questions during interviews with the judicial candidates concerned the experience gained from working as a judge in the past. Unlike interviews with the School's students, professional questions were not asked. Non-judge members of the Council were especially interested in candidates who had resigned in the past based on their personal applications, asking them about reasons for their dismissal from court.

As a result of a competition held in April 2013, the Council appointed judges at the 17 June 2013 session, while in respect of participants in the September 2013 competition, together with the School's students,

[45] http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabcho-atskhadebs-mosamartleta-shesarchev-konkurss/2065 Date of access 17.07.2013

[46] 45 candidates were registered in the first competition, and 76 in the second. Information is available on the Council's web page http://www.hcoj.gov.ge/.

[47] 9 October 2009 decision #1/308 of the High Council Justice of Georgia on the "Procedure for Selecting the Judge Candidates", Article 7.

the decision was made at the 19 November 2013 session. 9 persons were appointed as judges out of 41 candidates.

In the case of these two competitions, the decisions made were not justified and there is no practical way for interested persons to challenge respective decisions. Apart from this fact, the appointment process itself is rather vague and non-transparent. Such process raises many questions.

c) Single or two-stage process of appointment of judges

Another problem has emerged on 29 November 2013 in relation to the appointment of judges, which once again proves the flawed nature of existing procedures for the appointment of judges and stresses the need to amend these procedures immediately. At this session of the Council judges appointed on 12 November 2013 were so-called ‘assigned’ (sent by appointment) to different courts. 12 judges had submitted applications for vacant positions announced in various courts. Part of them was requesting the appointment in one court only, while another part of candidates had given consent to be appointed in one of several courts. The Organic Law of Georgia on the “Common Courts” explicitly and directly prescribes the appointment of judges by 2/3 of votes of the Council’s members and does not provide for a two-stage decision on the appointment of judges, and in particular - the appointment as a judge in general followed by the appointment as a judge in the concrete court. Regardless of this, simple majority of the Council’s members has examined on 29 November 2013 the appointment of judges in various courts totally illegally, without participation of non-judge members of the Council, as the second stage of appointment - ‘assignment’, and has decided on these issues by a simple majority of votes. Further, decisions on the appointment of these judges in various courts were made absolutely vaguely and unclearly. For instance, some of them were appointed in one court and at the same time were sent on a mission to another court (e.g. from Mtskheta to the Tbilisi City Court, from Sighnaghi to the Tbilisi Appellate Court), alleging that interests of justice demanded additional personnel in these courts. Yet, it is unclear why the Council has failed to discuss the increase in number of judges in these courts. Moreover, worth of special notice is the appointment of a judge in the first instance court and the transfer of this judge on a mission to the appellate court on the same day. The monitoring group believes this type of a decision is even more alarming and unjustified, jeopardizing the due exercise of justice. This illegal process has neither taken into consideration the experience of each appointed judge, which obviously contradicts the interests of justice.[48]

Furthermore, the Council’s decision dated November 19 differs from the 17 June 2013 decision, by which the Council has appointed 6 judges and has indicated the concrete courts of appointment of these judges in the same decision and minutes, hence without the so-called ‘assignment’/second stage.

Monitoring the appointment of both types of candidate judges during the previous and current years has once again demonstrated that procedures for the appointment of judges are vague, flawed and fail to create a fair system for making fully impartial decisions based on the objective criteria and assessment of education background, professional experience and personal traits of each individual. Further, existing legislation equally fails to secure timely and rapid development of the process. Numerous postponed sessions of the Council in 2013 have proved the difficulty of securing the participation of required 2/3 of members in voting. There is no legal model or mechanism that would insure similar crises throughout the Council’s work. Neither is there any mechanism that would grant interested persons a real opportunity to appeal the Council’s decisions, because there is no standard of justification of decisions made by a secret ballot, thus undermining the exercise of judicial control over these decisions as well.

In view of the above, the monitoring group believes **it is crucial to amend the legislation in order to secure a fair and transparent competition, and most importantly, an impartial and justified decision-making process for the appointment of judges.**

[48] Association of judges “Unity” has also released a statement on the Council’s decision adopted on 29 November 2013, available at: http://news.ge/ge/news/story/72327-saqartvelos-mosamartleta-ertoba-mosamartleta-gamtsesebaze-gantskhadebas-avrtselebs Date of access 28.01.2014

3. **Staffing of the High Council of Justice by the New Procedure**

Monitoring organizations have actively monitored the implementation of ongoing changes within the judicial authorities triggered by the amendments made to the legislation of Georgia in 2013.

The reform was carried out in the following areas:

- Procedure for staffing the High Council of Justice has changed;
- Procedure for staffing the disciplinary panel of the common courts has changed;
- Conference of judges was granted the power to elect the Chair of the Administrative Committee;
- Conference of judges was granted the power to elect the Chair of the Independent Council of the High School of Justice.

The formation of the High Council of Justice was a topic of utmost concern during the monitoring period. Amendments made to the Organic Law of Georgia on the "Common Courts" have considerably changed the previous procedure for staffing the Council, in respect of the conference of judges, as well as in terms of the election of members by the Parliament of Georgia. Under the amendments, 8 out of 15 members of the Council are elected by the conference of judges by a secret ballot, while 6 non-judge members are elected by the Parliament of Georgia through a relevant competition. In light of this, the monitoring group has paid special attention to the process of electing new members of the Council, unfolding in May-July 2013.

3.1. **Election of judge members**

Pursuant to amendments to the legislation, the conference of judges was given 1 month for upgrading the members of the Council.[49] Further, certain restrictions were introduced under the amendments with respect to the Council members. In particular, pursuant to the Law, a member elected by the conference cannot be a member of the Supreme Court's Disciplinary Chamber or the Chairman of any court. A member cannot be the First Deputy or Deputy of the Chairman of a court at the same time, except when he/she occupies this position due to the chairmanship of a panel or a chamber. More than 3 members elected by the conference of judges cannot be the Chairman of a panel or a chamber. The procedure for naming the member nominees at the conference has also changed. Before, only the Chairman of the Supreme Court was authorized to name the candidates, however, following the amendments each judge participating in the conference was granted this opportunity. A new voting regime was introduced – where quorum was increased and it was determined to elect members of the Council by 2/3 of attending votes. A second round takes place in case candidates fail to receive sufficient votes, in which a candidate with more votes (however, not less than 1/4 of the full composition of the conference) wins.

To implement the amendments made to the Organic Law on the "Common Courts", amendments were developed also to the Regulations of the conference of judges, approved by the Administrative Committee of the conference.

Several sessions of the Administrative Committee were held prior to the conference, at which number of organizational issues required for holding the conference were discussed along with amendments to be made to the Regulations. Interested persons were informed in advance about the sessions of the Administrative Committee. Members of the monitoring group have attended the sessions. Draft amendments to the Regulations of the conference of judges were also submitted to the Administrative Committee. Following the examination by the Committee, the draft was posted on the web page of the Supreme Court and interested persons were given an opportunity to submit their opinions.[50]

In parallel to this process, a group of judges have developed an alternative draft of amendments to the Regulations, submitted both to the Administrative Committee and later to the Council. Overall, the Council and the Administrative Committee have taken into account a part of the comments submitted by the judges and have submitted them for approval to the conference of judges.

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[49] Pursuant to Paragraph 3 of Article 2 of the Law on the "Amendments to the Organic Law of Georgia on the Common Courts", at the time of enacting the Law the powers of effective members of the High Council of Justice have terminated except for one member - Giorgi Shavliashvili, who was elected by the conference of judges at the VIII conference of judges on 30 July 2011.

[50] http://www.supremecourt.ge/news/id/379 Date of access 03.02.2014

Following the entry into force of legislative amendments, there was a vast public interest towards the conference of judges. Accordingly, in view of the number of persons interested in attending the conference, it was relevant at the preparatory stage to decide on the place of holding the conference. It was initially decided at the sessions of the Administrative Committee to hold the conference in one of the courtrooms of Tbilisi City Court. Civil society representatives have occasionally noted at this stage that to secure transparency of the process it was crucial to allow both observers and media to observe without any impediments. Organizations assumed a courtroom would not be large enough. The Coalition for Independent and Transparent Justice has also released a statement on this subject.[51]

Having taken comments into account, the Administrative Committee later selected a larger hall for holding the conference. It was possible to fit all interested parties and mass media representatives in one hall, which would have been otherwise impossible. No problems were identified in this respect during the process of holding the conference. The Administrative Committee had set 9 June 2013 as the conference date. Due to the multiple issues on the agenda, the conference itself decided to continue the session on June 16.

On the first day of the conference 9 June 2013, the conference elected new members of the Council pursuant to the new legislative procedure. Conference participants nominated Shota Getsadze, Merab Gabinashvili and Zaza Meishvili for 3 members who can combine the chairmanship of a panel/chamber. 20 candidates were nominated for the remaining positions. Only one candidate received enough votes in the first round - Zaza Meishvili became the Council member with 158 votes.

Part of 20 nominated candidates has refused to participate in the second round of voting. Total of 12 candidates have participated and 6 of them have become the judge members of the Council: Merab Gabinashvili, Shota Getsadze, Tamar Alania, Ilona Todua, Paata Silagadze and Levan Murusidze.

At the conference on 16 June 2013 judges have elected Levan Murusidze as the Council's Secretary by 205 votes given in a secret ballot. Prior to voting, four nominees for the Secretary of the High Council of Justice - judges Ilona Todua, Paata Silagadze, Giorgi Shavliashvili and Tamar Alania - have withdrawn in favor of L. Murusidze.

Judges as well as the civil society and politicians have shown enormous interest in the (10th) extraordinary conference of judges held on 9 and 16 June 2013.

Georgian MPs and the Minister of Justice of Georgia emphasized in public statements the importance of the conference and election of judge members of the Council throughout the reform and in light of amended legislation.[52] Various groups of judges have also echoed the significance of the conference in several statements.[53]

The Georgian Young Lawyers' Association has also released the statement,[54] in which it has once again underlined the importance of pending reform and highlighted the huge significance of the election of the Council members by judges through a free will expressed in the free and democratic elections at the conference of judges. Prior to the conference, the Coalition for Independent and Transparent Justice released a statement, in which it urged the high officials of the executive and judicial authorities not to interfere in the pending processes and not to create unjustified risks to unimpeded choice of judges. It has also called for politicians to refrain from actions in respect of the court that would have adverse effects on the expression of free will granted to judges.[55]

Following the first day of the conference, several NGOs jointly gave an overall positive evaluation for the results of the conference and elections.[56] Monitoring organizations have not observed any procedural violations on both working days of the conference, and concluded that the conference was organized in a transparent manner. Yet, the majority of participants has narrowly interpreted the power of the conference as a supreme self-government authority and has not supported the amendment, pursuant to which the conference of judges should have been granted the authority to approve the agenda of an extraor-

[51] http://www.coalition.org.ge/article_files/166/მიმართვა%20კონსტანტინე%20კუბლაშვილს.pdf Date of access 01.02.2014

[52] http://topnews.mediamall.ge/?id=37283 Date of access 01.02.2014

[53] http://www.netgazeti.ge/GE/105/News/20446/; http://www.ttimes.ge/archives/2374# Date of access 28.01.2014

[54] http://gyla.ge/geo/news?info=1596 Date of access 04.02.2014

[55] http://www.coalition.org.ge/article_files/168/Statement%20of%20Coalition.pdf Date of access 01.02.2014

[56] http://gyla.ge/uploads/ConferenciaFINALwithLOGOS.pdf Date of access 20.01.2014

dinary conference. Further, by the decision of the attending majority, the conference refused to use the power of asking questions to the nominees for membership of the High Council of Justice. Consequently, judges who wanted to ask questions to the nominees for membership of the High Council of Justice were deprived of this right. The conference could make such a decision from a formal-legal standpoint. However, in general, the right of a voter to receive information on a candidate's visions or plans is inferred from the essence of election. Therefore, it would be reasonable for the conference to make a different decision and give each judge an opportunity to ask questions to candidates.[57]

3.2. Election of non-judge members

Under the legislative amendments of 2013, the Parliament of Georgia elects 6 members of the High Council of Justice through an open competition. Similar to the conference of judges, the Parliament of Georgia was also granted 1 month for selecting the candidates. According to the competition announced by the Chairman of the Parliament of Georgia, eligible subjects could nominate candidates until 31 May 2013. All three monitoring organizations have submitted their candidates to the Parliament.[58] Pursuant to the official web page of the Parliament of Georgia, 45 candidates were nominated for 6 vacant positions of the High Council of Justice, while 5 candidates were submitted to membership of the Disciplinary Panel. Following the examination carried out by the Parliamentary Legal Committee pursuant to Article 219 of the Regulations of the Parliament of Georgia, candidates were submitted to the Bureau of the Parliament, which on its hand has submitted the candidates to the factions. Later on 35 candidates to membership of the High Council of Justice were submitted for examination at the plenary session.[59]

The competition announced by the Parliament of Georgia for selecting the Council members did not unfold in a transparent manner. Various interested organizations have approached the Parliament to hold public interviews with candidates nominated in the Parliament, in order to learn about their visions. Despite this request, interviews with candidates were held behind closed doors and the general public was unable to observe this process.

At the plenary session on 14 June 2013 the Parliament elected four members of the Council. None of the candidates received enough votes during the first round of voting. In the second round, Eva Gotsiridze, Vakhtang Tordia, Gocha Mamulashvili and Kakhaber Sopromadze were elected as the Council members by a majority of votes. The Parliament should have elected 6 members of the Council, but because the election of two members requires 2/3 of votes and the parliamentary minority did not participate in voting, the Parliament could not elect two members of the Council.[60]

Another competition was organized in the Parliament of Georgia several months later, but none of the candidates have received the required number of votes at the secret ballot held on 4 October 2013.[61]

A constitutional norm has entered into force following the 2013 presidential election, pursuant to which the President of Georgia shall appoint one member of the Council.[62]

[57] Joint statement by NGOs: http://gyla.ge/uploads/ConferenciaFINALwithLOGOS.pdf Date of access 04.02.2014

[58] Information on candidates submitted by GYLA: Nino Bakakuri, Kakha Tsikarishvili, Zura Dzlierishvili, Merab Chikovani; http://gyla.ge/geo/news?info=1575

[59] http://www.parliament.ge/index.php?option=com_easyblog&view=entry&id=59&lang=ge Date of access 24.01.2014

[60] http://www.parliament.ge/index.php?option=com_content&view=article&id=3788%3A2013-06-14-22-49-43&catid=2%3Anews&Itemid=433&lang=ge#sthash.gcLRH9HV.dpuf Date of access 03.02.2014

[61] http://www.parliament.ge/index.php?option=com_content&view=article&id=4702%3A2013-10-04-20-14-25&catid=2%3Anews&Itemid=433&lang=ge Date of access 26.01.2014

[62] Upon completion of work on the report on 3 January 2014, the President of Georgia has announced the competition and the respective member of the Council was appointed.

RECOMMENDATIONS

Throughout the present report, the monitoring group has identified significant legislative and practical problems in the activities of the High Council of Justice.

Despite an improvement of the Council's activities in individual areas, a number of key topics prevails requiring appropriate reaction as in practice, as well as in terms of implementation of legislative amendments.

To improve the Council's activities, it would be expedient to take into account the following recommendations:

Transparency of the Council:

- The Council should consistently observe the norms of the GACG on the advance publication of full information of the Council's sessions;
- The Council should define by its own Regulations, the standards of advance publication of information on the sessions;
- Procedures for drawing up an agenda should be established;
- Rules and procedures for attendance of interested persons at sessions and the expression of their opinions should be defined;
- The Council should be assigned to upload made decisions and minutes of the sessions on its web page in no later than 5 days from making respective decisions;
- Live broadcasting of the sessions should be available through the Council's web page.

Justification of the Council's decisions:

- Any decision of the Council must be justified and grounded;
- Legislative amendments should introduce decision-making procedures by the Council and should cover issues defined under the GACG that are not applicable to the Council's activities;
- Legislation should provide a possibility to appeal the Council's decisions;
- A brand new procedure for the appointment of judges should be developed, thus ensuring an impartial evaluation of candidate judges and justified decision-making.