MONITORING REPORT OF THE HIGH COUNCIL OF JUSTICE #4

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1. KEY FINDINGS

The monitoring of the activities of the High Council of Justice of Georgia during 2015 has revealed the following findings:

Key findings related to the legislation regulating the Council's activities during the reporting period

- Leaving the Council's activities without legal regulation in certain fields (the procedures and criteria for the selection of judges, non-existence of the accountability of the Council members, the Council's right to issue normative acts, non-existence of obligations to justify the Council's decisions, non-existence of mechanisms for appealing the Council's decisions, etc.) still remained a problem, which granted the Council unfettered discretion and a wide range of opportunities to act in accordance to its own will, many examples of which have been observed during the reporting period;
- Insufficiency of legal regulation of separate fields of the Council's activities and the obscurity of existing legislative norms still remain a problem, which gives the Council very wide discretion and an opportunity to abuse it, many examples of which have been observed during the reporting period;
- The Council failed to adopt unambiguous and clearly developed sub-statutory acts or to establish a good practice;
- Insufficient, deficient and obscure legislative and sub-legislative regulation of the Council's activities finds a negative reflection in the implementation of the fundamental functions of the Council which are the selection and appointment of judges, and the transfer and promotion of judges in a transparent, open and objective manner;
- When exercising its powers and during decision-making, the Council does not ensure the separation of administrative functions from constitutional powers, and during the implementation of administrative functions, and when the decisions are made, the Council does not refer to the General Administrative Code, which might have significantly limited unjustified decisions taken by the Council. The positions of the Council members and the practice of the Council with this regard remain unequal.

Key findings related to the Council's activities during the reporting period

- The aim of the law to ensure the representativeness and the existence of the difference of opinions in the Council has not been properly ensured. The Parliament of Georgia was not able to staff the Council with the participation of different political powers with qualified majority of votes of the Parliament;
- During the previous reporting period the condition of pluralism and representativeness achieved on the basis of the difference of opinions between judge and non-judge members of the Council has gradually changed for the given reporting period and the positions of particular non-judge members of the Council started to coincide with the positions of judge members of the Council;
- The positions of a new chairperson of the Council have not coincided with the positions of judge members (and sometimes of non-judge members) of the Council during the whole reporting year, however, the chairperson of the Council ceased to state her different positions so clearly and acutely, as she used to do in the beginning of the reporting year;
- The coincidence of the positions of the majority of members of the High Council of Justice during the reporting period raised doubts that the Council members had been taking decisions not individually, which is a principle for the operation of a collegial body, but by prior arrangement.

Problem of justification of decisions

- Law does not bind the Council to justify adopted decisions. The Council does not ensure the justification of adopted decisions in practice either. Nor the discussions held at the Council's session contain the justification of decisions. This discredits the Council's activity and raises doubts with regard to the objectivity and impartiality of the Council's decisions;
- Members of the High Council of Justice explained reasons for their decisions by making public statements, including the decisions taken with regard to the promotion of judges or the

appointment of judges through a competition. The fact that the Council or part of the Council members have attempted to reason their decisions through public statements, is positive in itself, although it would be fair if the Council tried to justify decisions made, rather than to explain them through public statements. Response through the public statements may serve the protection of the reputation of courts and not the justification of the Council's decisions.

Transparency of the Council's activities

- Information on holding of a session within the period determined by law was made public only in two cases.
- It is an established practice based on which information on holding of a session of the Council shall be made available three calendar days prior to the session, which fails to meet the appropriate standards of transparency and does not allow interested persons to carry out an effective control.
- Draft laws, action plans, conceptions and other documents to be reviewed/already reviewed during the Council's sessions are not published on the Council's web page. There were only two cases when interested persons were able to obtain such documents via web page.
- Interested persons do not have opportunity to get familiar with agendas of the Council's sessions via web page.
- The Council restricts the coverage of sessions via mass media in their full length. Although the openness of sessions of collegial bodies is not guaranteed by legislation, the Council establishes a different rule and allows video and audio recording of the ***opening*** of its sessions only.
- During the current reporting period the matter of the conflicts of interest had been raised for several times but the Council was not able to prevent the conflict of interest in either of the cases.
- The structure of matters included in the agendas of sessions often did not provide exhaustive information on the matters to be discussed during the sessions.

- Matters related to the drawing up of the agendas of the Council's sessions are also problematic. Neither the General Administrative Code of Georgia nor legislative and sub-statutory acts determining the Council's activities set out how and under what procedures to draw up the agendas of the Council's sessions.
- Procedures for closing the Council's sessions are not determined by legislation regulating the Council, which causes problems in practice.

Transfer of judges without a competition

- Procedures for transferring judges to another court without a competition, as provided for by Article 37 of the Organic Law of Georgia on Common Courts, are obscure, and this was used by the High Council of Justice during the reporting period without any justification and without studying the necessity of transferring judges to another court by way of exception, which points at the existence of insufficient legislative guarantees for the protection of the universally recognised principle of irremovability of judges.
- During the reporting period the High Council of Justice performed a transfer of judges, which implied the promotion of judges in its context. However, during the process of promotion, the Council relied only upon Article 37 of the Organic Law of Georgia on Common Courts, and did not use Article 41 of the same law. This points at the insufficiency of legal regulation of the processes of transfer and promotion of judges, which was used by the Council when it transferred judges without any justification.
- Decisions, during the reporting period, of the High Council of Justice with regard to the transfer/promotion of judges without a competition, have been made without any justification, by formally conducting the procedures established by the Council, which evidences that the Council fails to obey the order determined by it.

Selection/appointment of judges

- Existing legal regulation of the process of appointing judges fails to ensure the impartiality and transparency of the process - law does not define the criteria for the selection of judges and does not bind the Council to justify its decisions with regard to the appointment of judges; the General Administrative Code does not apply to the Council and law does not define those fundamental principles as well, by which the Council would be guided during the process of selecting/appointing judges, which leaves the Council unregulated a complete mess and makes the Council dependent on self-regulation;
- Insufficient legal regulation of the process of selecting/appointing judges, only fragmented reform of the post-soviet judicial system by the legislative and executive authorities of the country, without applying systemic approaches, remain a problem.

Council's response to the facts of insulting and pressure on judges

- The Council did not have a uniform approach with regard to response to the facts of pressure on judges through public statements only. Whereas the Council has decided to make a response to the facts of pressure on judges in an individual case by using this form, the Council has not made a response to other cases through public statements and has not discussed the issue during the Council's session either;
- There was a case when, for the purposes of responding to possible facts of pressure on judges, the chairperson of the Council decided to invite the respective judge to the Council's session. However other members of the Council thought that it would not be appropriate to invite the judge to the Council and make a response to the fact of possible pressure on the judge in this way. The mentioned fact proves that there is no consensus over the measures that are to be taken by the Council in order to protect the independence and reputation of judges. The Council has not discussed the issue of creating a system for response to possible facts of insulting and pressure on judges, and the Council's reaction against this issue still retains a fragmented character.

Non-transparency of the process of the assessment of judges appointed for a probation period

- During the reporting period the process of the evaluation of activities of judges appointed for a probation period has been completely non-transparent. The complete closing of the Council's sessions related to the assessment of judges appointed for a probation period and the non-disclosure of any information, including on the gaps revealed or other information related to the process of assessment, contravene the requirements of the law.

Inefficiency of the mechanism of accountability of judges

- The number of reviews of disciplinary complaints against judges filed with the High Council of Justice is critically low, which points at the inefficiency of the system of accountability of judges. Accordingly, there are reasonable grounds to believe that the independence of judges and the accountability of judges are not well balanced. The insufficient transparency of disciplinary proceedings against judges provided for by law and the existence of an inefficient system of accountability of judges leaves a wide opportunity for the High Council of Justice to use the mechanism of disciplinary proceedings against judges.

2. INTRODUCTION

Within the framework of the project 'Promoting the Rule of Law in Georgia' (PROLoG),which is financed by USAID and which is implemented by the East-West Management Institute, the Georgian Young Lawyers' Association (GYLA) and the International Transparency - Georgia have been implementing the monitoring of the activities of the High Council of Justice of Georgia since March 2012. In the beginning of 2013, the said organisations published joint report No 1, depicting the activities of the Council, in which the results of observations and the analysis of the Council's activities during the period from March through December 2012 were described; In the beginning of 2014, joint report No 2[1]was published, which reflected the results of monitoring from January 2013 to 10 December 2013. In the beginning of 2015, joint report No 3[2] was published, which described the period between January 2014 and December 2014. The given report also described the comparative analysis of events and trends ongoing in 2014 with regard to those events which took place in 2012 and in 2013 and which were reflected in reports No 1 and No 2. Besides, a summary report[3] on the activities of the Council in the first half of 2015 was published, which represents dynamically developed results of observations on the activities of the Council described in reports No1, No2 and No3.

In 2015 GYLA and the International Transparency - Georgia continued the monitoring of the activities of the Council, the results of which are provided in this report.

The following matters fell within the scope of monitoring of the Council's activities in 2015:

- Difference of opinions and pluralism within the Council;
- Justification of decisions taken by the Council: selection/appointment of judges, transfer/promotion of judges;
- Transparency of the Council's activities;
- Response of the Council to the facts insulting and pressure on judges;

[1] High Council of Justice Monitoring report No 2 https://gyla.ge/files/news/gamocemebi...

[2] High Council of Justice Monitoring report No 3:
https://gyla.ge/files/news/%E1%83%98%...

[3] High Council of Justice three-year summary report (2012-2014):
https://gyla.ge/files/news/%E1%83%98%...

- Assessment of the efficiency of the mechanism of accountability of judges.

This report No 4 also highlights the role of legislative and executive authorities in ensuring the efficiency of the Council's activities and contains the assessment of the reporting period in this regard.

During the monitoring which was conducted in 2015 it was made clear that there had been a number of gaps in the Council's activities, which was mainly caused by the obscurity of legislation and the insufficiency of legal regulation, and the incapacity of the Council to establish appropriate procedures and good practice. Notably, positive trends were revealed in the Council's activities during the previous reporting year, but improvements in particular fields have not been found to be continuing during the current reporting period. Besides, there have been aggravations in particular fields of the activities of the Council.

The purpose of the given report is to assist the Council in identifying gaps and positive trends in its activities, which, to our opinion, is a necessary pre-condition for the efficiency of the Council's future activities. We hope that the work that has been done by us will interest not only the Council members but also the local and international agencies, experts, and organisations involved in the judicial reform, and that it will be used to reform and improve the Council's activities.

Methodology

This report is prepared on the basis of information obtained as a result of the direct participation of the representatives of monitoring organisations in the Council's sessions and in different public meetings, and on the basis of the analysis of this information; also based on the study and analysis of current legal regulations and analysis of data obtained/received by way of requesting public information and of information uploaded to the web page of the Council. Documents and opinions of competent international organisations regarding the matters related to the independence of the judicial system have also been used in this report.

The reporting period covers the period from January 2015 through December 2015.

3. ACTIVITIES OF THE HIGH COUNCIL OF JUSTICE DURING THE REPORTING PERIOD

3.1. Representativeness in the High Council of Justice

- **The coincidence of positions of the majority of members of the High Council of Justice during the reporting period and closed consultations of the members of the High Council of Justice before making decisions raised doubts that the Council members had been making decisions not individually, which is a principle of decision-making by members of a collegial body, but by prior arrangement;**
- **The level of pluralism achieved as a result of difference of opinions between the judge and non-judge members of the High Council of Justice and the level of representativeness has gradually changed and the positions of particular non-judge members of the Council started to coincide with the positions of some judge members of the Council;**
- **It is true that the positions of a new chairperson of the Council have not coincided with the positions of judge members (and sometimes of non-judge members) of the Council during the whole reporting year, however, the chairperson of the Council ceased to state his/her different positions so clearly and acutely, as she used to do in the beginning of the reporting year;**
- **During the current reporting period a position of a non-judge member of the Council is still vacant, who should have been elected by a qualified majority with the participation of the governmental and non-governmental parliamentary political forces, which leaves the Council without a member being elected with the participation of the Members of the Parliament outside the majority.**

The composition of the High Council of Justice was updated almost completely in June 2013. The monitoring during the previous reporting period revealed that the changes made to the composition of the Council in 2013 positively reflected on the discussions held within the Council and on the quality of its work. A monitoring report on the activities of the High Council of Justice in 2014 says that there was a discussion in the Council initiated by non-judge members regarding some significant matters and in some cases it was supported by other

Council members. The report also says that the difference of opinions in the Council began to emerge as a result of active behaviour of non-judge members[4].

The said report also highlights that '...except for rare exclusions, the positions of non-judge members mainly coincided with each-other and contradicted those of judge members. As for judge members, their positions were almost equal, which almost coincided with the positions[5] of the chairperson of the Council'.

In view thereof, the situation during the reporting period has been gradually changing. Namely, the positions of judge and non-judge members started to coincide with each-other more frequently and the positions of both the judge and non-judge members were mainly equal. The chairperson of the Council more and more rarely expressed her different positions, which, as a rule, did not coincide with the positions of some non-judge and judge members of the Council. During the whole reporting period there were only two non-judge members of the Council who expressed their different opinions.

A new chairperson of the Council was especially active in the beginning of the reporting period. She raised issues[7] before the session for review that were most critical for the independence of the judicial system, and intensively demanded from the Council members that the collegial body complied with the principles of considering issues and that it introduced appropriate standards in the Council's activities, although legislation did not bind the Council to work under these significant principles, (e.g., legality, transparency, justice, legitimacy principles, the principles of making decisions individually by members of a collegial body, the principles of studying matters fully and objectively, and other principles), that the collegial body made decisions on the basis of the consideration of issues concerned at the Council's sessions only and not on the basis of the consideration of issues by the Council members beyond the Council's sessions, and that the Council ensured the increase of the efficiency of the Council's activities.[6]However, it should be noted that the provision of law regarding the publication of information on the Council's sessions at least one week before the

[4] GYLA and International Transparency - Georgia, High Council of Justice Monitoring Report No 3, 2015, p. 8, paragraph 3.1.

[5] The same.

[6] Sessions of the High Council of Justice of 7 April, 17 April, 24 April and 8 May.

session had not been complied with during the new chairperson either. It should be taken into account that it is the chairperson of the Council who is authorised to call sessions and when calling a session she should be guided by the above mentioned procedures[7].

Besides, there is an established practice within the Council when, after the discussions of particular issues at an open session, part of the session closes or the Council members leave the session for the purposes of taking consultations before a decision is made, which contravenes the principle of publicity of the Council's sessions and the principle of individual decision-making by the Council members.

At the very first session of the Council the Chairperson raised before the session for discussion the issue that was critically important for the independence of the Judiciary, namely the establishment of procedures for the electronic random distribution of cases in common courts and for the creation of an appropriate infrastructure. After this, the issue had been raised by her for several times before the sessions of the Council, a presentation of the existing electronic system was organised for the Council members and a draft procedure for the electronic random distribution of cases was prepared at the initiative of the Supreme Court, which was discussed at the Council's session, etc.

During the reporting period there have been several approaches expressed by the new Chairperson of the Council, which were being continuously brought into focus during the following sessions of the Council: The discussion of issues by the Council must end with concrete results and the discussion of particularly important issues must not be limited to considerations only. The Council's activities must become more operative and target oriented. There were cases when the Chairperson demanded to take decisions on those issues during the session, which had already been discussed by the Council, and there was no need to postpone them.

During the presidency of a new Chairperson, the involvement of interested persons attending the Council's sessions in the discussion of issues has grown. The Chairperson of the Council frequently requested representatives of non-governmental and international organisations attending the session to express their opinions regarding the issues under discussion. Following this, other Council members, mainly non-judge members, were more communicative with the audience in order to hear its opinion with regard to these issues.

[7] Article 47(15) of the Organic Law of Georgia on Common Courts, Article 11 of the Regulations of the Council, Article 34(1) of the General Administrative Code of Georgia.

The Chairperson of the Council raised the issue before the session which was held on 8 May regarding the inefficiency of a mechanism of disciplinary responsibility of judges and pointed out that the Council should assess the causes of disciplinary responsibility of judges and answer all questions that the public has with regard to this issue.

During the reporting period, at the initial stages of monitoring, it was obvious that the positions of the Chairperson of the Council have never coincided with the positions of the judge members, and in some cases, the non-judge members of the Council. By the end of the reporting period the picture has changed and though the positions of the Chairperson of the Council still did not coincide with the positions of the judge members, and in some cases, the non-judge members of the Council, the Chairperson of the Council quit expressing her different positions so clearly and acutely, as she used to do in the beginning of the reporting year.

Also, the non-judge members of the Councils were also observed to be active in raising different problematic issues.

At the session held on April 7, 2015 Kakha Sopromadze raised the issue related to the problem with regard to the termination of the term of office for judges whose term of office has been extended. The problem with this regard and the solutions thereof were supported by Eva Gotsiridze, a non-judge member.

At the initiative of Vakhtang Tordia, a non-judge member of the Council, the issue on making amendments to the Regulations of the Council was brought up for discussion, in order to determine the fields of curation and the efficient distribution of cases among judge and non-judge members of the Council taking their workload into consideration.

Also, in the first half of the reporting period, non-judge members of the Council frequently expressed their positions that were different from those of judge members with regard to certain issues, and opposed the positions of judge member. The expression of different positions by non-judge members at the Council's session, in its turn, ensured providing the public with correct information on certain matters to be

discussed at the Council's session, which facilitated the implementation of one of the fundamental objectives of the representativeness of the Council – if required so, the expression of a different opinion or the disclosure of correct of information. Such approaches undoubtedly reflected positively on the transparency of the Council's activities.

During the Council's session held on April 7, 2015, when there was a discussion regarding petrol limits for judges, the Secretary of the Council expressed the position which was misleading for the public. He presented the matter related to the Chairperson of the Bolnisi District Court in a positive context, when Sergo Metopishvili refused to allocate money for renting an appartment in Bolnisi and was happy with the petrol limit, and due to which he had to travel from Tbilisi to Bolnisi every day. As a response to this, Kakha Sopromadze, a non-judge member has mentioned the petrol limit during the Council's session which was established for Sergo Metopishvili (450 Liters) and he also mentioned an approximate rental price for an appartment in Bolnisi. It turned out that the petrol limit, which Sergo Metopishvili received every month, was at least twice more than the rental price for the appartment in Bolnisi. Consequently, the fact that this matter was mentioned by Levan Murusidze, the Secretary of the Council, in a positive context was incorrect and misleading.

However, it became clear at the Council's session on 26 October that the positions of judge and non-judge members of the Council were not as diverse as they had been during the period from the previous reporting period till present. The process[8] of selecting by the Council of two judge members of the newly established Prosecutorial Council, revealed problems of different types existing within the Council, which, in general, discredit the judicial system before the public. Ignoring the results of both rounds of voting for the selection of members of the Prosecutorial Council and putting to vote the candidates for the third time, who had failed to receive sufficient number of votes during the two rounds of voting but gained enough votes as a result of so called consultations held between the members of the Council for the third

[8] Pursuant to Article 8[1] of the Law of Georgia on the Prosecutor's Office two members of the Prosecutorial Council are elected by the HCOJ according to the procedure established by the HCOJ.

time, points at least at the violation of voting procedures[9]. The situation is even more aggravated by those unsound procedures, as a consequence of which the members of the Prosecutorial Council were not simply elected but they were rather elected on the basis of a deal, as described below.

The process of electing the members of the Prosecutorial Council has proved once again that the High Council of Justice fails to observe the rules and procedures established under its own decisions.

Levan Murusidze, the Secretary of the High Council of Justice, nominated Sergo Metopishvili, the Chairperson of the Bolnisi District Court, as a candidate for the membership with the Prosecutorial Council, and Nino Gvenetadze, the Chairperson of the Council, nominated Mzia Todua, a judge of the Supreme Court. Candidates for the membership with the Prosecutorial Council were also nominated by Gocha Mamulashvili. He nominated judges Lia Orkodashvili and Eka Gabrichidze; and Vasil Mshvenieradze was nominated by Vakhtang Tordia.

On the basis of the voting, the candidate nominated by Vakhtang Tordia, a non-judge member of the Council, received 10 votes for the first vacancy, and Mzia Todua received 3 votes. Mzia Todua and Sergo Metopishvili were transferred to the second round of voting or to the second vacancy. Vakhtang Mchedlishvli, a non-judge member of the Council, suggested consulting with other members of the Council, but the judge members (Levan Murusidze and Shota Getsadze) stated that they would not change their positions and would support the candidacy of Sergo Metopishvili. Levan Murusidze pointed out that Sergo Metopishvili's candidacy would be the best as he had been working in the Prosecutor's Office for a long time and he knew the system very well; therefore, he requested to put the issue to voting. In response, Vakhtang Mchedlishvili addressed the judge members of the Council and stated that if Sergo Metopishvili's candidacy was the best he should have been supported during the very first voting.

The second round of voting was held, as a result of which Sergo Metopishvili received 9 votes and Mzia Todua received 4 votes. The winner was not identified during the second voting either, and none of the candidates received two thirds of votes of the members. Later, Vakhtang Mchedlishvili stated that as long as the candidates were not able to receive necessary number

[9] On the basis of Decision #1/167 of the High Council of Justice of 19 October 2015: '...if neither candidate receives enough number of votes, the voting shall be held repeatedly between two candidates with the best results. If the candidates with better results after the first voting receive equal votes, all candidates shall participate in the voting repeatedly.'

of votes during the second voting either, these candidates, Mzia Todua and Sergo Metopishvili, shall not be put on voting any more. The judge members did not agree with this idea and a harsh dispute started in this regard. Kakha Sopromadze and Vakhtang Tordia, non-judge members of the Council, stated that all candidacies, including the candidacies of Mzia Todua and Sergo Metopishvili, should be put to vote again. Nino Gvenetadze, the Chairperson of the Council, and Vakhtang Mchedlishvili, a non-judge member, were against the idea. Vakhtang Mchedlishvili also marked out the fact that Sergo Metopishvili was not supported by Levan Murusidze during the first voting, but he supported the candidacy nominated by Vakhtang Tordia, and added that the candidate nominated by Vakhtang Tordia was the same as the candidate nominated by Levan Murusidze. After this, a break was announced. Levan Murusidze stated that first the judge members and then all the members would discuss the case together. All the members of the Council, except for the Chairperson of the Council, left the room. Later, Nino Gvenetadze and Gocha Mamulashvili were taken aside from the session room.

After the break, Vakhtang Mechedlishvili still requested not to include on the ballot those candidates, who had failed to receive necessary number of votes as a result of two voting rounds. The judge members still did not agree and demanded to include all the candidates on the ballot. Levan Murusidze repeated that he would not deviate from his position with regard to Sergo Metopishvili and asserted that Sergo Metopishvili had experience of working in the Prosecutor's Office. Nino Gvenetadze pointed out that such requirement for the membership with the Prosecutorial Council did not exist and that the work experience in the Prosecutor's Office should not be decisive. After this, Levan Murusidze stated: 'We agreed with electing a member of the Prosecutorial Council by a qualified majority of votes, now it is your turn to make a step toward us'. Vakhtang Mchedlishvili responded to this that the candidate from the judge members had already been elected in the Prosecutorial Council as a candidate nominated by Vakhtang Tordia, a non-judge member of the Council. Afterwards, voting was held and Sergo Metopishvili was elected as the second judge member of the Prosecutorial Council by 10 votes and Lia Orkodashvili received the remaining 3 votes (from Nino Gvenetadze, Vakhtang Mchedlishvili, and Gocha Mamulashvili). Following the results of voting, there was an argument in the Council and Gocha Mamulashvili addressed to the members in the following way: 'Tordia and Sopromadze are yours'. After this Vakhtang Tordia left the session room, while Kakha Sopromadze said: 'I belong to nobody, simply it would be a shame if the Council failed to make a decision on how electing these two persons would harm the Prosecutorial Council'.

The fact that one non-judge member is not represented in the Council is a serious violation of the principle of representativeness of the Council, who must be elected by a qualified majority of votes with

the participation of the majority of the Members of the Parliament of Georgia and by those outside the majority. In order to ensure that the principle of representativeness is observed, legislation defines that five non-judge members of the Council shall be elected by two thirds of votes of the Members of the Parliament of Georgia. If all vacancies are not filled in the first round of voting, the candidate elected in the following rounds shall be revealed by the majority of the full list of the Members of the Parliament of Georgia. Besides, the number of members elected by such quorum shall not exceed[10] four.

Four non-judge members of the Council have been selected by a simple majority of the Parliament of Georgia, while the remaining one member of the Council, for the election of whom a qualified majority of votes is not necessary, has not been elected within the period from 2013 till present. Consequently, the aim of law that the High Council of Justice shall be represented by members elected by the majority of the Parliament of Georgia, as well as by non-governmental opposition forces, has not been achieved at least to the minimum degree.

Under the conditions, when four non-judge members of the Council out of five are elected by the parliamentary majority, it is the parliamentary majority who is responsible for the disagreement with the non-governmental political forces with regard to one vacancy remaining in the Council and for the violation of the principle of representativeness of the Council.

3.2. **Council's response to facts of insulting and pressure on judges**

- The Council has not had a uniform approach with regard to response to the facts of pressure on judges through public statements only. When in an individual case the Council has decided to make a response to the facts pressure on judges by using this form, in other cases the Council has not made a response through public statements, and has not discussed the issue at the Council's session either;
- There was a case when, for the purpose of responding to a possible fact of pressure on a judge, the Chairperson of the Council

[10] The Organic Law of Georgia on Common Courts and the Rules of Procedure of the Parliament of Georgia

made a decision to invite the respective judge to the Council's meeting. However, the other members of the Council believed that it would inappropriate to invite the judge to the Council and to respond to the possible fact of pressure on the judge in this way. The mentioned case proves that there is no unified and shared opinion regarding the measures that are to be taken by the Council in order to protect the independence and reputation of judges. The Council has not discussed an issue of creating a system for response to the facts of pressure on and insulting of judges, and the Council's reaction against this issue still retains a fragmented character.

- Members of the High Council of Justice reasoned through public statements the decisions taken by them, including the decisions taken with regard to the promotion of judges or the appointment of judges through a competition. The fact that the Council or part of the Council members have attempted to explain the reasons for their decisions through public statements in individual cases, is positive in itself, although it would be appropriate if the Council had tried to justify its decisions rather than to elaborate them through public statements. The making of responses through public statements may serve the protection of the reputation of courts, but it does not mean that the Council's decisions have been duly justified.

Pursuant to the recommendation of the Consultative Council of European Judges (CCJE), a deliberative body of the Council of Europe, when 'dealing with the issue of judges or courts challenged or attacked by the media or by political or social figures through the media – considered that, while the judge or court involved should refrain from reacting through the same channels, the Council for the Judiciary or a judicial body should be able and ready to respond promptly and efficiently to such challenges or attacks in appropriate cases. The Council for the Judiciary should have the power not only to disclose its views publicly but should also take all necessary steps before the public, the political authorities and, where appropriate, the courts to defend the reputation of the judicial institution and/or its members'.[11]

During the reporting period the Council, as well as its individual members, made some statements with regard to certain issues. The pub-

[11] CCJE Recommendation No 10(2007), the Council for the Judiciary at the Service of Society, Paragraphs 82 and 83

lic statements made by the Council and by individual members of the Council referred to information about exerting of pressure on judges, as well as to events developed around the judicial system.

During the reporting period the High Council of Justice responded through public statements to different assessments[12] that were made with regard to the judge examining the dispute over the TV Company Rustavi 2. Through public statements, the Council called the parties, the public and the representatives of governmental and opposition political parties for the respect of the independence and image of the judicial system. In parallel with this, there were some cases during the reporting period, when high governmental officials expressed different positions with regard to decisions taken by this or that judge, to which the Council did not have respond in a similar way. For example, the Council did not respond to the statement made by the Prime Minister of Georgia in April, in which he demanded[13] an explanation of the decision taken by the judge examining the case of the Rustavi Metallurgic Plant. The Prime Minister noted: 'The person who has taken this decision shall present himself/herself before the public and explain why he/she has taken such decision.' The Prime Minister of Georgia has also requested the new Chairperson of the court to show his/her interest in this issue. Also, the Ambassador of Switzerland Guenther Baechler talked about the existence of corruption within the judicial system in his interview with the FINANCIAL[14] magazine. The Ambassador stated that foreign investors complained that in courts people lose cases using very strange circumstances and evidence. The statement made by the Ambassador was responded by the Chairperson[15]

[12] Public statement of the High Council of Justice of 2 October with regard to the dispute related to TV Company Rustavi 2. http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-gantskhadeba/2527 Public statement of the members of the High Council of Justice of 2 October with regard to the dispute related to the TV Company Rustavi 2 http://hcoj.gov.ge/ge/saqartvelos-iusticiis-umarlesi-sabwos-gancxadeba/2543

[13] Statement of the Prime Minister of Georgia regarding a decision of the judge reviewing the case of Rustavi Metallurgic Plant http://www.ipress.ge/new/4199-premieri-rustavis-metalurgiulis-saqmis-mosamartles-ganmartebis-gaketebas-stkhovs

[14] Statement of the Supreme Court of Georgia http://www.interpressnews.ge/ge/samartali/325233-uzenaesi-sasamarthlo-giunter-bekhleris-ganckhadebas-ekhmaureba.html?ar=A

[15] Statement of the Chairperson of the Supreme Court of Georgia http://www.supreme-court.ge/?q=%E1%83%A8%E1%83%95%E1%83%94%E1%83%98%E1%83%AA%E1%83%90%E1%83%A0%E1%83%98%E1%83%98%E1%83%A1+%E1%83%94%E1%83%9A%E1%83%A9&x=0&y=0

of the Supreme Court of Georgia. The High Council of Georgia has not expressed its position or published any information in this regard.

On 26 November, the members of the High Council of Justice made a public statement regarding the decision taken by the Council with regard to the promotion of seven judges to the Tbilisi Court of Appeals[16]. In this statement some members of the Council actually presented the justification of the decision taken by the Council regarding the promotion of the judges. We believe that issues, which are discussed at the Council's sessions and regarding which the Council makes decisions, shall be justified in the relevant document of the Council in accordance with the results of voting. In such case, there will be no necessity for individual members of the Council to give explanations with regard to the decisions made by the Council. In this statement the Council members also responded to the critical opinions expressed by non-governmental organisations regarding the gaps revealed during the process of the promotion of judges. Despite this, when discussing and making decisions on the promotion of judges, the Council members did not touch upon the issue of conflict of interest within the Council, which the non-governmental organisations kept actively mentioning both in their public statements and at the Council's sessions.

Despite the unanimous contradiction from different groups of the public, after a decision to appoint Levan Murusidze, the Secretary of the High Council of Justice, to the position of judge had been taken, the non-judge members of the Council made a public statement by which they attempted to explain the motives for this decision.[17]

The approach of the High Council of Justice to the critical opinion expressed by the public regarding judges is not uniform and it is not equally applied to all such cases, and there is no rule established by law or by a decision of the Council or an established uniform practice that would define the forms of response by the Council, and which may be a cause of the inefficiency of the Council in this regard.

[16] Statement of the members of the High Council of Justice of 26 November with regard to the promotion of judges http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-tsevrta-gantskhadeba/2553

[17] Statement of non-judge members of the High Council of Justice regarding the decision on the appointment of Levan Murusidze as a judge http://topnews.mediamall.ge/?id=152988

4. TRANSPARENCY OF THE COUNCIL'S ACTIVITIES

4.1. Publishing information on the Council's sessions

The publication of information on the Council's sessions on a timely basis allows interested persons to effectively carry out monitoring. While the conduct of monitoring is important to reveal gaps, to identify and evaluate important trends, to detect institutional weakness and to prepare necessary recommendations in order to increase the effectiveness of the Council's sessions. The High Council of Justice, as a collegial body, pursuant to the requirements of the General Administrative Code of Georgia[18], is obliged to publish information on its session, as well as the venue, time and agenda of the session, a week before the session is held.

During the reporting period, which included the year of 2015, out of 37 sessions[19] held only in 2 cases information on a session was published 7 days prior[20]. Unfortunately, during the last months of this reporting period, a practice was established in the Council, according to which, almost is all cases, information about sessions was published only three[21] calendar days prior[22]. There were cases when information on a session was published a day before the session. There were several cases when the time of sessions was changed, which became known just a day or two days prior to the session[23], and the reason of changing the time of the session is unknown.

During the previous reporting period there were cases when the decision had been made on holding a session, but information on the session was not published on the date specified in the decision. This gave sufficient grounds to believe that the session was held in a manner that the information on the session was published neither before nor after

[18] Article 34(2)(3) of the General Administrative Code of Georgia.

[19] This number does not include the interview sessions.

[20] Among them was a session for reviewing disciplinary cases http://hcoj.gov.ge/ge/2015-tslis13-ivliss-gaimarteba-iustitsiis-umaghlesi-sabchos-morigi-skhdoma/2473; Date of access: 09.02.2016

[21] Information about the session to be held on Monday was published on Friday evening.

[22] Within the same period the Council officer notified interested persons of the session via e-mail.

[23] http://hcoj.gov.ge/ge/press/news?year=2015&month=8&day=6
http://hcoj.gov.ge/ge/shetkobineba/2408
http://hcoj.gov.ge/ge/shetkobineba/2409; Date of access: 25.02.2016.

the session. The similar cases were also observed during the current reporting period[24]. The similar decisions in some cases[25] coincided with the date when interviews for selecting/appointing judges were held, and in other cases they coincided with the dates when closed-door sessions were held for the purposes of reviewing disciplinary cases against judges[26].

The existing data prove that there are gaps in the Council's activities with regard to the preliminary publication of information on sessions. The Council, actually in all cases, neglects the provision of the General Administrative Code of Georgia regarding the publication of information on sessions 7 days prior. The Council must strictly comply with the requirements of law and publish information regarding the Council's sessions within the established timeframes. The Council's established practice with regard to the publication of information on sessions three calendar days prior does not meet the appropriate standards of transparency and does not allow interested persons to carry out an effective control. According to the evaluation of the monitoring group, during the current reporting period, the Council has violated law in all those cases when within the timeframes established by law information on the sessions has not been published. Incompliance with the timeframes determined by law may be permitted only as exceptions in the cases of urgent necessity[27], and no urgent necessity has been observed in any of the cases.

4.2. **Agenda and additional projects/documents**

When we speak about the issue of publication of information on the Council's sessions, the issue regarding the agendas of the Council's sessions should be considered as well. Together with the publication of information on sessions, information on its agendas was also published; however, the formulation of items included in the agenda did not provide exhaustive information regarding the matters to be discussed during the session. For example, one of the items included in the agenda of the session on 19 October 2015 was: 'Information on the Kutaisi City Court and the Gali-Gulripshi and the Ochamchire-Tkvarcheli District

[24] Such sessions are: the sessions of 12, 27 and 1 May 2015.

[25] Such sessions are: the sessions of 7 and 15 December and of 11 and 21 May.

[26] Decision of 13 July 2015.

[27] Article 34(2)(3) of the General Administrative Code of Georgia.

Courts'. Besides, the agenda often included the discussion of letters from this or that person or from chairpersons of courts. Such general headings cannot actually tell interested persons the content of issues concerned or what the Council is going to discuss.

We should also point out the issue of preliminary accessibility of draft laws, action plans, conceptions and other documents related to issues to be discussed at the session. Only in two cases interested persons were able to obtain such documents to be discussed or that have been already discussed at the session via web page. In the first case, a draft law on amending the Procedure for the Selection of Judicial Candidates was published beforehand.[28] In the second case, when there was an issue related to the 2016 Action Plan for the Implementation of the Association Agenda[29], the Action Plan was published on the web page only after the session, regardless of the fact that the draft action plan had already been distributed among the members during the session.

Pursuant to Article 32 of the General Administrative Code, public institutions are obliged to hold its sessions openly and publicly. The principles of openness and publicity implies that interested persons have the right to know as exactly as possible what the issue concerns, and that the draft laws and conceptions and other public documents brought for discussion should be accessible for interested persons. For these purposes, in order to ensure the observance of the principles of openness and publicity, draft agendas of the Council's sessions should be as detailed as possible, and draft laws, action plans, and conceptions and other documents to be discussed should be also accessible. This will ensure the actual transparency of the Council's activities and will facilitate the realisation of the right of the public to have appropriate and complete information to carry out an efficient control.

The chapter of the General Administrative Code, which is dedicated to the freedom of information, fully applies to judicial bodies, including the activities of the High Council of Justice. The principles of openness and publicity of the activities of collegial bodies are integrated in this Chapter and as the Council has no direct obligation to publish all draft

[28] See http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-aramosamartle-tsevris-vakhtang-mchedlishvilis-mier-shemushavebuli-proeqti-/2572; Date of access: 09.02.2016.

[29] http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-mier-momzadda-asotsirebis-shesakheb-shetankhmebisa-da-asotsirebis-dghis-tsesrigis-gankhortsielebis-2016-tslis-samoqmedo-gegmis-proeqti/2519; Date of access: 09.02.2016.

documents beforehand, the Council shall, based on practice and the principle of publicity, ensure the implementation of the above mentioned activities. The Council may also define the obligation of publishing these documents by acts regulating its activities. It is also important that the Council develops a unified vision on whether or not the General Administrative Code fully applies to the Council's activities. The final resolution of the matter, except for other important issues which we will be discussing in the following chapters, is also important in the context of preparing the Council's sessions, because, if it is considered that the requirements of the General Administrative Code fully apply to this part of the Council's activities as well, then the direct obligation of the Council will be to ensure that all its draft normative administrative and legal acts are published beforehand.[30]

4.3. **Preparation of sessions**

Legislation regulating the Council's activities does not govern the issues related to the preparation of sessions. During the reporting period the Council has postponed many times the making of decisions on the issues included in the agenda on grounds that the issue needed to be better studied by the Council members and to be better prepared. There were also cases, when the session was postponed because the appropriate material had not been provided timely to all the members of the Council.

The current reporting year was also special for many sessions: the Council held sessions almost every week and the non-preparedness of issues to be discussed might have been caused by this fact. In these circumstances it is very important and essential to regulate the issues related to the preparation of sessions and the issues of respective timeframes. Namely, it shall be regulated, within what timeframes the Secretary of the Council shall provide all the members of the Council with those applications and project documents that are to be discussed at the upcoming session. It is also very important that the Council members are timely provided with not only those documents to be discussed at the upcoming session, but also with copies of any incoming documents addressed to the Council and falling within its competence, in order to enable the Council members to demand, at their own discretion, reviewing of certain issues at the Council's upcoming sessions.

[30] Article106[2](1) of the General Administrative Code

Matters related to the drawing up of the Council's agendas are also problematic. Neither the General Administrative Code of Georgia nor the statutory and sub-statutory acts regulating the Council's activities determine how and under what procedures the Council's agendas should be drawn up. Improper regulation of this issue undermines the transparency of the Council's activities and raises additional questions as to the openness of its activities. It would be expedient if the legislation regulating the Council's activities sets forth the procedures for drawing up agendas and identifies a person responsible therefor. This may be the cause of discussing and taking decisions in the course of the Council's session on those issues that are not included in the agenda, the examples of which we have had during the current reporting year. The Regulations of the Council does not determine a person who will be responsible for compiling a list of issues to be included in the agenda, also the rights of the Council members are not defined either, with regard to requesting, within appropriate timeframes and under appropriate procedures, or directly at the Council's session, to remove from or to add this or that issue to the agenda.

Similar problems were revealed in the monitoring of the Council's activities during the previous reporting period, about which the Council members were speaking aloud. Although there were no verbal references to similar problems by the Council members during the current reporting period, such problems emerged in practice, as a result of which we believe that in order to avoid any gaps in the future it is necessary that above mentioned issues are thoroughly regulated by the Regulations of the Council.

4.4. **Minutes of sessions and publishing of decisions**

Another component of the transparency of the activities of the High Council of Justice is the publicity and availability of the minutes of sessions and the decisions of the Council, which will allow interested persons understand and assess the Council's activities.

The Council maintains the minutes of sessions in the forms of video and audio recordings, and interested persons are not able to view them, as the minutes are not uploaded to the Council's web page. Despite the fact that the Council has provided the monitoring group with audio and video recordings in all cases, the Council is still required to

upload the minutes to the official web page. The matter is especially important in the circumstances, when the decisions of the Council are only limited to the indication of legal grounds, and are prepared according to an established template and contain no justification, whereas the minutes of the session is the only way for interested persons to view the justification of a particular decision.

It is also worth noting that the direct broadcasting of sessions is carried out through a special closed network (intranet) within the common courts system, which can be accessed by only judge and non-judge members of the Council. By the decision[31] made on 3 February 2014, the Council's sessions are not only broadcast live, but the audio and video recordings of the sessions are also uploaded within the same system in a manner that they can be downloaded to personal computers. This could be obviously evaluated as a positive change, but we consider that other interested persons should have the similar rights and at least the availability of recordings via web page should be guaranteed.

As far as the decisions are concerned, they have been published in a timelier manner during the current reporting period as compared with the previous years.

The monitoring group considers that the Council should be imposed an obligation by law to upload video and audio recordings, and the minutes of sessions and decisions to the web page of the Council within certain timeframes, because the public has the right to access this material, but the Council failed to ensure to regulate this issue in practice for many years. Before having it regulated by law, the High Council of Justice shall ensure the publication of audio and video recordings of sessions not only within its internal network, but also on its official web page. A live broadcasting via its own web page is also recommended. It is also very important that the Council ensures the availability of the minutes of sessions on the web page at least in the written form. Such approach will facilitate the economic efficiency of the Council's activities and the introduction of a transparent system by sparing less efforts and resources.

31 http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202014/1-13%20001.pdf; Date of access: 09.02.2016.

4.4.1. Information published proactively

There is a special space on the Council's web page as provided for by the Ordinance of the Government of Georgia on Requesting Public Information in Electronic Form and Publishing it Proactively, where information defined by the Ordinance should be uploaded. Main part of information has been already uploaded to the web page but there is certain information that cannot be found here. For example, on the 2013 Annual Report on the Council's Activities is published, while such reports should be published every year on the Council's web page. There are no strategies, conceptions and action plans published in the respective column on the Council's web page either, although, notably, the Council provided the monitoring group with above mentioned documents upon request.

4.5. **Closed sessions**

Pursuant to the General Administrative Code, an application for closing the session shall be published along with the agenda of the session 7 days prior. The monitoring group has pointed out in the previous reports as well that legislation regulating the Council's activities does not determine the procedures for closing sessions and this constantly created problems in practice. The issue is directly related to the non-existence of regulated procedures for drawing up agendas and preparing sessions. Hence, it is expedient that these matters are regulated by the statutory and sub-statutory acts determining the Council's activities, so that a high standard of publicity and transparency is achieved, which, from its part, ensures the protection of the interests of persons willing to attend the sessions.

During the current reporting period, there was only one case when information on the closed session was published 7 days prior as determined by law, and the issue to be discussed at the session related to disciplinary cases. In some cases the issue regarding the closing the session was raised directly at the Council's session.[32]

In all cases when the Council did not publish information regarding the closed sessions within the established timeframes, the requirements of legislation were violated. The Council is obliged to strictly comply with the requirements of law and to ensure a high standard of public-

[32] For example, the session of the Council of 30.11.2015.

ity and transparency. For this purpose, the Council shall be obliged to regulate how the Council's sessions should to be closed and what procedures should be followed. The Council shall ensure the protection of the interests of persons willing to attend the Council's sessions.

4.6. Making photo and video images of the Council's sessions and media coverage

The monitoring group has been pointing out the problem of media coverage of the Council's sessions for four years, but the Council has never had discussions regarding this issue. The publicity of sessions of collegial bodies, which is guaranteed by legislation, does not imply any restrictions for the representatives of mass media. They, equally as any interested person, have the right to attend the sessions and to make audio or video recordings of sessions. Nevertheless, the Council determined a different procedure by its decision[33] made on 17 February 2014, according to which mass media may take photos and make audio and video recordings of the ***opening*** of the sessions only. During the reporting period mass media took only photo and video images of the opening of the sessions, although in the beginning of the monitoring period they were allowed for several times to take photo and video images of the whole procedure of the session as well. Notwithstanding this, we believe that the matter needs to be regulated. It is essential that the Regulations of the Council provide for the possibility of unhindered and complete coverage of the sessions by mass media, by which the Regulations of the Council will be in conformity with the General Administrative Code.

The interest in the Council's activities grows every day not only inside the judicial authorities but also from the part of different groups of the public. Under these conditions, it is inappropriate to restrict the process of taking photo and video images of the entire sessions, especially when the minutes of the Council's sessions, which are in the form of audio or video recordings, are not uploaded to the Council's official web page. The Council is obliged to bring the legislation regulating the Council's activities into compliance with the General Administrative Code and to determine for mass media the right to unhindered coverage of sessions.

[33] http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202014/22-2014.pdf; Date of access: 09.02.2016.

4.7. Transparency of the process of selection/promotion/ reappointment

The monitoring group monitored the procedures for selecting/appointing judges and assessed the quality of transparency of the process together with other important issues.

The competitions for the selection of judges were announced twice during the current year. Besides, a voting on judicial candidates selected on the basis of the competition announced in the previous reporting year was held on 26 April 2015. As a result of the voting, 24 judges were selected.

The first competition was announced on 11 June 2015[34]. Information on the announced vacant positions was placed on the Council's web page, and later on several additional vacant positions were announced. Accordingly, the deadline for submitting documents necessary for the competition was extended[35]. In both cases (the competition announced for additional vacant positions is also meant) candidates were given less than two weeks to submit documents. A list of registered candidates, with references to the applications submitted by these candidates for the respective vacant positions, was available for interested persons via the Council's web page[36]. The curricula vitae of the candidates were also uploaded[37].

Interviews with judicial candidates for judges began on 20 July 2015 and lasted for several days. Information on one of the sessions was published on the Council's web page, where it was also specified that, after the discussion of the issue, interviews with judicial candidates would be held behind closed doors. Notably, later on information on interviews was published again, where there was no mentioning of closed sessions; however, the entire process was characterised with

[34] http://hcoj.gov.ge/ge/gamotskhadda-mosamartleobis-kandidatta-shesarchevi-konkursi/2463; Date of access: 09.02.2016.

[35] http://hcoj.gov.ge/ge/mosamartleobis-kandidatta-shesarchevi-konkursi/2466; Date of access: 09.02.2016.
http://hcoj.gov.ge/ge/mosamartleobis-kandidatta-shesarchevi-konkursi/2466; Date of access: 09.02.2016.

[36] http://hcoj.gov.ge/ge/mosamartleobis-kandidatta-sia/2482; Date of access: 09.02.2016.

[37] http://hcoj.gov.ge/ge/informatsia-mosamartleobis-shesarchevi-konkursit-dainteresebuli-pirebisatvis/2494; Date of access: 09.02.2016.

an especially low degree of transparency and openness, as information regarding the date of voting was uploaded for interested persons to the web page in late hours, on the day before the voting. This has deprived interested persons of an opportunity to attend the session and assess the process.

All of this was assessed by a Coalition for an Independent and Transparent Judiciary as a step backward in striving to achieve the transparency of the Council's activities and of the judicial system in general[38]. As a result of the competition held on 29 July 2015 10 judges were appointed.

The second competition was announced on 5 October 2015[39]. In this case judicial candidates were given more than two weeks to submit documents. Information on vacant positions was published on the Council's web page. Later, a list of registered candidates with references to the applications for the respective vacant positions became available on the web page[40] but the curricula vitae of the candidates were not published, which, in accordance with the Procedure for the Selection of Judicial Candidates, approved by the Council, represents open and public information.[41] On 3 December 2015, interviews with judicial candidates began. Periodically, but not systematically, the schedule of interviews was being uploaded. Notably, the schedules were usually uploaded on the day before the interviews. Interested persons did not have any problems to observe the process, but mass media still took photo and video images in a restricted regime because, in accordance with the Regulations of Council, mass media has the right to take photo and video images of the opening of the session only. As a result of the competition held on 25 December 2015 38 judges were appointed.

One should also mention the amendment that was made in 2014 to Decision No 308 of the High Council of Justice dated 9 October 2009, according to which interviews with judicial candidates should be conducted at closed sessions of the Council. Before this amendment, the practice of conducting open interviews was established in the Coun-

[38] http://www.transparency.ge/en/node/5429; Date of access: 09.02.2016.

[39] http://hcoj.gov.ge/ge/gamotskhadda-mosamartleobis-kandidatta-shesarchevi-konkursi/2528; Date of access: 09.02.2016.

[40] http://hcoj.gov.ge/ge/mosamartleobis-kandidatta-sia/2537; Date of access: 09.02.2016.

[41] Decision #1/308 of 9 October 2009 of the High Council of Justice on the Approval of Procedures for the Selection of Judicial Candidates, Article 12^1

cil. This very format and many years of observation on the process of interviewing allowed the civil society to see in dynamics those gaps that existed in the Council and to suggest the ways of eliminating these gaps.

Under the circumstances when neither the Council, as a collegial body, nor its individual members have an obligation to justify their positive and negative decisions with regard to candidates, the openness of the process of interviews with candidates is one of the opportunities for interested persons, not completely, but at least to observe the process of selection and appointment of judges, and to identify and disclose the positive and negative sides of the process and to assist the judicial system to make this process more sound. By closing this process, it becomes completely impossible for other parties to assess the procedure of the selection of judges.

Referring to the provision of the Regulations of the Council, pursuant to which interviews should be held at closed sessions, the Council has not provided the monitoring group with the video material and the minutes of the sessions depicting the interviews with candidates. The reason of this is unclear, when the sessions were open and they were attended by all interested persons and, practically in every announcement of interviews, the openness of the session for interested persons was specified. Besides, the Council has expressed its position at various times that, despite the clause in the Regulations of the Council, the openness of the process was established in practice; under these circumstances, the real grounds for the refusal to disclose information is even more ambiguous. After all the above said, closing of interviews lacks any substantiation. Similar decisions (refusals to disclose information) are clear examples of non-uniform approaches, and this significantly impedes the development of the Council as of a stable institution. One gets impression that the disclosure of information depends on decisions of particular persons. There is no systemic approach which could make it clear for interested persons what procedures and factors are taken into consideration by the Council when deciding whether or not to disclose information.

Except for the above mentioned two competitions, there were two cases when the High Council of Justice transferred judges without a competition. On 7 August 2015, six judges were transferred. The effective judges were given only two days to submit documents for transfer. In the second case, the Council made a decision on the promotion

of judges without a competition on 28 September 2015[42], when there was an agreement to transfer judges to 7 vacant positions in the Court of Appeals. The Council developed procedures and criteria for the promotion of judges after publishing an announcement about the appointment of judges without a competition. The draft was uploaded to the Council's web page before it was discussed at the session and, thus, it became available for interested persons.[43] Information on the identity of judges having applied for vacant positions was available as well[44].

The interviews were held in the open-door regime and the schedules of interviews were periodically published. Later, a list of promoted judges was uploaded to the web page as well[45]. Despite the fact that appointment without a competition was held without any considerable gaps in terms of transparency, the organisations implementing monitoring and the Coalition for an Independent and Transparent Judiciary responded to the process for several times and criticised the process with regard to its content, which will be discussed in other chapters of this report.

The above mentioned processes, namely, the procedures for the selection/appointment and promotion of judges without a competition were, in overall, held with certain gaps in terms of transparency. Despite the improvements in certain areas over the past years, the tendency of increasing of transparency was overshadowed by gaps which were observed during the first competition held in 2015. The Council's inconsistent practice with regard to the publicity of the processes of interviewing is also unacceptable. Interviews shall be conducted in an open-door regime and the minutes of sessions shall be available for all interested persons. This becomes especially important under circumstances when the Council has no obligation to justify decisions on the appointment/selection of judges and when for interested persons the observation on the process of interviews remains the only means

[42] http://hcoj.gov.ge/ge/saqartvelos-iusticiis-umarlesi-sabwos-reglamentis-damtkicebis-sesaxeb/2526
http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202015/156-2015%20001.pdf; Date of access: 09.02.2016.

[43] http://hcoj.gov.ge/ge/siakhle/2530; Date of access: 09.02.2016.

[44] http://hcoj.gov.ge/ge/informatsia-gasaubrebaze-dastsrebis-msurvel-pirtatvis/2536; Date of access: 09.02.2016.

[45] http://hcoj.gov.ge/ge/gamoqveknda-datsinaurebul-mosamartleta-vinaoba/2549; Date of access: 09.02.2016.

to assess the Council's decision. Refusal to provide recordings contradicts the policy of openness declared by the Council many times. It is also important that the candidates should be given reasonable time, not less than two weeks, to submit their documents. These issues need to be regulated so that the maximum transparency of the Council is ensured, which, in its turn, will reflect in the public's confidence in the institute.

4.8. **Conflicts of interest**

The issue of the conflicts of interest has been a problem in the Council for years. The Council was able to regulate this issue neither in practice nor by means of legislation regulating the Council's activities. There are practically no procedures in the Council to avoid the conflicts of interest among its members. The Council members pointed out the lack of regulation when they asserted that there were no mechanisms for avoiding conflicts of interest in the Council. When this issue was raised before the Council for discussion, the Council members did not take into consideration the Law of Georgia on the Conflicts of Interest in Public Service, which, pursuant to Article 2(1)(q) of the same law, applies to members of the High Council of Justice, and, in accordance with Article 11 of the same law, members of a collegial body are be obliged to refuse to participate in decision-making, in which they have property or other personal interest. Apart from the fact that this law does not permit the persons having conflicts of interest in a collegial body to make decisions, it also prohibits the persons having conflicts of interest to participate in a decision-making process.

The Council has faced the mentioned problem many times during the reporting period. Improper regulation of the issue seriously challenged the independence and impartiality of the Council's activities, especially both in the process of promotion of 7 judges to the Tbilisi Court of Appeals and in the on-going process of appointment of judges.

At the session held on 16 November 2015, when discussing the issue of the promotion of judges to vacant positions in the Tbilisi Court of Appeals without a competition, there was a difference of opinions among the Council members regarding the matter whether or not one of the Council members should participate in voting, who at the same time was in the list of candidates willing to be promoted. Based on the assessment of organisations carrying out monitoring, the participation of this candidate in voting would have been a classical example of the

conflict of interest. Opinions expressed during the discussions are also interesting. According to the statement of the judge concerned, despite the fact that he/she had not attended the interviews with candidates, he/she thought of recusing himself/herself during the voting on those vacant positions, which he/she had applied for, and would participate in voting on other vacant positions. Upon the request of non-governmental organisations and after the discussion held in the Council, the judge recused himself/herself and did not participate in the voting, although he/she participated in the discussions of issues in the Council related to promotion (including in the discussion of such issues related to the list of judges provided by the Public Defender to the Council)[46].

The problem of the conflicts of interest became more acute in the course of the competition for selecting judges. The Secretary of the Council, who was participating in the competition, after a long discussion recused himself during the voting on those vacant positions, which he had applied for. However, in the selection process, he had an opportunity to view the documents of other candidates and he periodically took part in interviews with other candidates. This put other candidates in unfair and unequal position. We believe that this case also represented an example of the conflict of interest.

When discussing the matter we should note the decision of the Council of 26 June 2015,[47] based on which the Council shall make decisions on the appointment of judges by secret ballot, without **the presence of the candidate**. The grounds for this amendment was the attendance of one of the candidates at the session during the voting related to the competition announced on 11 June 2015, who was making certain statements during the session, which was negatively assessed by the Council members. In order to prevent in the future changing of the attendance of candidates into facts of pressure, the Council made a decision[48] to restrict the attendance of candidates during voting. Despite the mentioned decision, the judicial candidate, who was concurrently a

[46] Prior to an interview with judicial candidates, the Public Defender presented to the High Council of Justice unified and summarised information on the activities of certain judges from 2005 till present. http://www.ombudsman.ge/ge/news/saqartvelos-saxalxo-damcveli-exmaureba-mosamartleta-sherchevadanishvnis-process.page

[47] http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202015/69.pdf; Date of access 09.02.2016.

[48] http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202015/69.pdf; Date of access: 09.02.2016.

member of the Council and the Secretary of the Council, attended both the voting procedure and the interviews with other candidates, and had an opportunity to view the documents of other candidates. Hence, the Council's non-uniform approach to certain issues becomes evident, when in one case the attendance of a judge could be interpreted as certain form of pressure from his/her side and the Council established certain procedures to prevent the above, but it is unclear what caused ignoring these procedures in other cases.

With regard to this issue it is worth noting that a non-judge member of the Council[49] had an attempt to have the issue of the conflict of interest regulated by the Regulations of the Council's. At the session held on 21 December 2015 he/she raised am issue with regard to the appropriateness of the participation in the competition for the selection of judicial candidates, who concurrently were registered as candidates for judges, and he also presented a draft law in this regard,[50] under which such members would not have the right to participate in voting. The mentioned issue was voted upon, but the majority of the Council members did not support it.[51] They stated that it was not up to the Council to decide this right and that the issue of recusing oneself in each particular case should be decided by the Council member himself/herself.

It is crystal clear that there is no uniform vision and approach among the Council members with regard to the conflicts of interest and the prevention of conflicts of interest. This issue needs to be regulated by law, because improper regulation of this issue allows the Council members to make decisions individually in each concrete case and adjust their decisions on participation to personal interests, which, in its turn, questions the Council's credibility and the impartiality of decisions made.

[49] Vakhtang Mchedlishvili.

[50] http://hcoj.gov.ge/ge/saqartvelos-iustitsiis-umaghlesi-sabchos-aramosamartle-tsevris-vakhtang-mchedlishvilis-mier-shemushavebuli-proeqti-/2572; Vakhtang Mchedlishvili, 09.02.2016.

[51] Supported by Vakhtang Mchedlishvili, Eva Gotsiridze, Kakha Sopromadze, Vakhtang Todria and Nino Gvenetadze. The session of 21 December 2015.

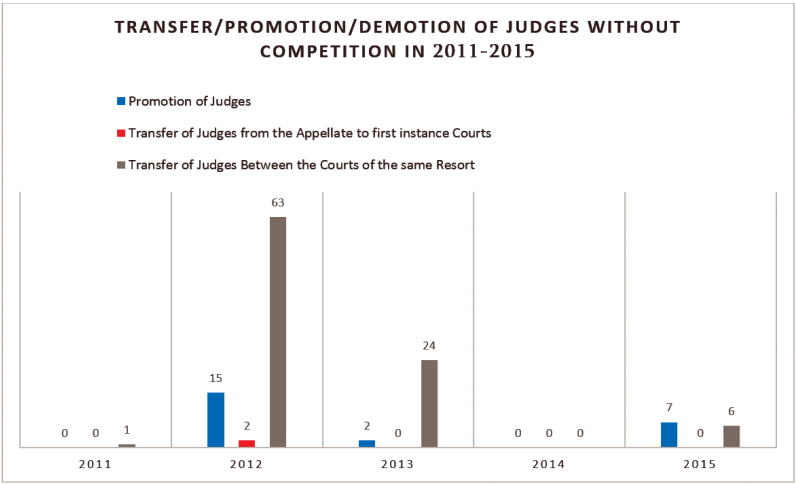
5. JUSTIFIABILITY OF DECISIONS MADE BY THE COUNCIL

During the reporting period, like in the previous reporting periods, the problem of the non-existence of an obligation of the High Council of Justice to justify its decisions has been existed again. This problem is very well demonstrated by the decisions made by the Council with regard to appointments, and transfers and promotions of judges without a competition. As a result of studying the minutes of the relevant sessions of the Council and the decisions of the Council it is determined that the decisions made with regard to the above mentioned important issues often lack any justification. The assessment of the justifiability of the Council's decisions is based on the study of the Council's decisions with regard to the above mentioned issues.

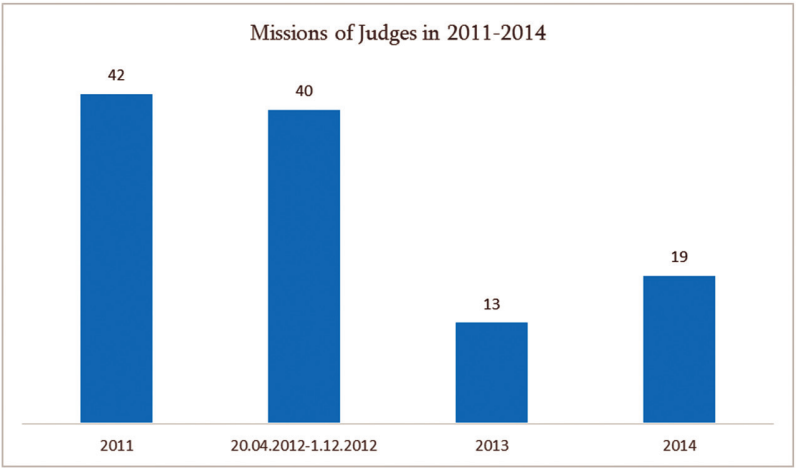
5.1. Transfer/promotion of judges without a competition

5.1.1. General assessment

According to 2011-2015 data, following the appointment of judges to office, the Council was actively applying the mechanisms of the transfer of judges from one court to another as provided for by law: transfer, promotion and sending judge on missions without a competition. By applying these mechanisms, almost half of judges of courts of first instance and the Court of Appeals (averagely 115 out of 230 judges) were transferred without a competition. To illustrate the scale of the use of the mechanism of transferring judges without a competition, the statistical data below will suffice:



In parallel with this, for the purpose of transferring judges from one court to another, the High Council of Justice was also actively applying the mechanisms of sending judges on missions. The data given below show the statistics of the use of the mechanism of sending judges on missions in 2011-2014. As from 1 January 2015, the sending of judges on missions became impossible by law[52].



Unjustified application of the mechanisms of transferring and sending judges on missions without a competition has always been the target of criticism from the public, and doubts were expressed with regard to the application of these mechanisms either for the punishment or rewarding of judges. The similar gaps were observed during the application by the High Council of Justice of the mechanism of transfer of judges during the reporting period.

The mechanisms of transferring or sending judges on missions without a competition were not properly regulated at a legislative level either, which gave unfettered discretion to the Council during the application of these mechanisms. As a result of the amendments that were made in March 2012, the unfettered discretion of the Council was limited to some extent, the duration of missions was limited to one year and the consent of a judge became required, except for exceptional cases. The issue relat-

[52] Article 13(3) of the Law of Georgia on Procedures for the Distribution of Cases and Assigning Powers to Other Judges in Common Courts.

ed to the obligation of the Council to justify decisions on sending judges on missions still remains open. The mechanism of transferring judges without a competition has not been regulated until now at a legislative level[53]*.*

This is aggravated by a malpractice of appointing and then reappointing of judges in different courts, which was established by the Council in 2012-2013. Namely, candidates were appointed as judges in general by two thirds of votes of the Council members and then reappointed as judges in certain courts by a simple majority of the votes of the Council members. However, there were cases, when judges were also sent on missions to other courts on the stage of appointment and reappointment of judges. [54]

Hence, the mechanism of transfer of judges to different courts without a competition in 2011-2015 was applied to 115 judges, which is a very big number, especially if we take into account that the mechanism of transfer should be used only as an exception mechanism. During the same period the mechanism of sending judges on missions was used in 114 cases and usually with regard to the same judges.

The above mentioned circumstances raise a serious doubt that, by evading existing vacancies, the effective judges might be distributed to different courts in a purposeful and so-called strategic manner, by ignoring the universally recognised principle of irremovability of judges, which directly affects the independence and impartiality of judges. This doubt is aggravated by the circumstance that none of the decisions of the Council with regard to the transfer or sending of judges on missions have been justified. It should be noted that such malpractice is facilitated by the non-existence of the obligation of the Council to justify its decisions, by the ambiguity and insufficient regulation, at a legislative level, of the mechanism of transfer and sending of judges on missions without a competition, and by uncontrolled and unfettered discretion granted to the Council by the legislature in this regard.

[53] Furthermore, at the session held on 25 May 2015, one of the non-judge members of the Council expressed his/her opinion regarding the defectiveness of Article 37 of the Organic Law and pointed out the following: 'Article 37 is an improper means of overcoming by the Council of its incapability (the appointment of judges through a competition is meant), which is not correct... I think this article has no prospect in the future.'

[54] More details on this issue: GYLA and International Transparency - Georgia, High Council of Justice Monitoring Report, 2014, p. 25.

5.1.2. Legislation regulating the transfer of judges without a competition

- **The procedure for the transfer of judges to other courts without a competition, as provided for by Article 37 of the Organic Law of Georgia on Common Courts, is ambiguous, which was used during the reporting period by the High Council of Justice without any justification and without studying the necessity of transferring judges to other courts by way of exception. This points at the fact that there are insufficient legislative guarantees in to comply with the universally recognised principle of irremovability of judges[55].**
- **During the reporting period the High Council of Justice promoted judges without applying Article 41 of the Organic Law of Georgia on Common Courts and with reference to Article 37 of the same law[56].**

Article 37 of the Organic Law of Georgia on Common Courts[57] defines

[55] The principle of irremovability of judges applies to the issue of transfer of judges to other courts: Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, paragraph 52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.
This content of the principle of irremovability of judges is recognised by the UN basic principles, Recommendation #R(92)12, Principle I(2)(a)(ii) and Principle VI(1) and (2). The principle of irremovability of judges is also observed by Opinion #1(2001) of the Consultative Council of European Judges (CCJE), a deliberative body of the Council of Europe, on Standards Concerning the Independence of the Judiciary and Irremovability of Judges, paragraph 57.

[56] UN basic principles, paragraph 13; Recommendation #R(94)12: 'All decisions concerning the professional carrier of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency'.
Opinion #1(2001) of the Consultative Council of European Judges (CCJE), a deliberative body of the Council of Europe, on Standards Concerning the Independence of the Judiciary and Irremovability of Judges, paragraph 57: '...the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are "based on merit, having regard to qualifications, integrity, ability and efficiency"'.

[57] 'If a vacancy arises, a judge who has been appointed to office may be appointed without

a general procedure for the appointment of judges though a competition. The given general regulation gives the Council unfettered and uncontrolled discretion as to in what cases, under what procedures and with regard to which judge the Council will use it.

In the Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges[58] it is stated that 'assignment of the judge to a different court or sending on mission should only be possible under strict criteria clearly identified in the law, for instance, the number of cases at the receiving court, the number of cases at the sending court, the number of cases dealt with by the judge who is being assigned. Vague criteria as 'in the interests of justice' may not be considered as 'strict criteria' as required by the above-mentioned standards. Also, the maximum duration of the assignment or the mission should be indicated in the law.'

Notably, neither during the reporting period nor during the periods before the monitoring, the High Council of Justice has discussed and justified the necessity of transfer of judges to other courts, or discussed each judge willing to be transferred to other court, or why it is expedient to transfer a particular judge and not any judge, or discussed how the situation would change in the court from where the judge is transferred. The respective decisions of the High Council Justice lack justification of the transfer of judges on the basis of objective circumstances[59]. Hence, the process of transferring judges to other courts is completely non-transparent, and incompatible with the universal principle of irremovability of judges and prejudices the independence of judges.

In parallel with Article 37 of the Organic Law of Georgia, Article 41 of the Organic Law of Georgia on Common Courts defines a minimum

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a competition as a judge of a lower, corresponding or upper court if the judge so agrees'. Article 37 of the Organic Law of Georgia on Common Courts.

[58] COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING COURTS AND JUDGES, CDL-PI(2015)001, p.45.

[59] Decisions #1/100, #1/101, #1/102, #1/103, #1/104, 1/105 of 7 August 2015 of the High Council of Justice on the Appointment of Judges in accordance with Article 37 of the Organic Law of Georgia on Common Courts; Decisions #1/176, #1/177, 1/178, 1/179, 1/180, 1/181, 1/182 of 16 November 2015 of the High Council of Justice on the Appointment of Judges in accordance with Article 37 of the Organic Law of Georgia on Common Courts.

procedure for the promotion of judges and establishes that the High Council of Justice shall develop criteria for the promotion of judges[60]. The High Council of Justice determined the criteria for the promotion of judges on 19 October 2015[61], although the decision made by the Council with regard to the promotion of 7 judges to the Tbilisi Court of Appeals does not contain any indication that this procedure has been applied.

The matter of applying these two articles during the reporting period caused the difference of opinions among the members of the High Council of Justice. For example, the issue with regard to difference between transfers of judges from low instance courts to higher instance courts under Article 37 of the Organic Law of Georgia on Common Courts and promotions provided for by Article 41 of the same law. Consequently, the Council has no uniform approach to this. For example, in 2012, on the basis of Article 37 of the Organic Law of Georgia on Common Courts, 15 judges were transferred from city/district courts to the Tbilisi and the Kutaisi Courts of Appeals; in 2013 2 judges were transferred and in 2015 7 judges were transferred from the court of first instance to the Tbilisi Court of Appeals. Despite the mentioned, on the basis of information provided by the High Council of Justice, 'in 2011-2015 the High Council of Justice did not apply Article 41 of the Organic Law of Georgia on Common Courts, which determines the procedure for promotion[62].' Hence, it is confirmed that even in those cases when the transfer of judges to other courts implies the promotion of judges in its content, the High Council of Justice does not apply the procedure for the promotion of judges determined by law and applies only Article 37 of the organic law.

It should be also noted that the Council of Justice made an amendment to the Regulations of the Council on 19 October 2015 with regard to the application of Article 37 of the Organic Law of Georgia on Common Courts. Article $13^1(3)$ of the Regulations defines that the application of Article 37 of the Organic Law of Georgia on Common Courts serves the

[60] Article 41(1) of the Organic Law of Georgia on Common Courts: 'The judge of a district (city) court may be appointed in a court of appeals if he/she has served as a judge in the district (city) court for at least two years. The High Council of Justice of Georgia shall formulate the criteria for promotion of judges'.

[61] Decision #1/166 of 19 October 2015 of the Council on Amending the Regulations of the High Council of Justice.

[62] Letter #1622/2504-03-ო of 30 November 2015 of the High Council of Justice.

interest of unobstructed, unhindered and effective implementation of justice. However, due to the fact that the decisions of the Council with regard to the transfer of judges on the basis of Article 37 of the Organic Law on Common Courts lack justification, it is impossible to assess, in concrete cases, what was implied by 'interest of unobstructed, unhindered and effective implementation of justice' and whether there was a consistency between the decisions made by the Council with regard to the transfer of judges and the procedures defined by the Council. It should be also pointed out that the procedure determined by the Council with regard to applying Article 37 of the organic law is ambiguous as well and it should regulate this issue more specifically.

At the session of the Council held on 25 May 2015, Vakhtang Mchedlishvili, a non-judge member of the Council appointed by the President of Georgia, raised an issue on the determination of the procedure for using the Council's discretionary power as provided for by Article 37 of the organic law. At the session Vakhtang Mchedlishvili and Eva Gotsiridze, non-judge members of the Council, expressed their opinions with regard to the fallaciousness of the mechanism of transfer of judges without a competition. Eva Gotsiridze pointed out the following: 'Article 37 is an improper means of overcoming by the Council of its own incapability (incapability of the Council to appoint judges through a competition), which is not correct. As long as we do not have any institute of mission, we should at least try to use it only temporarily and very correctly but, in general, I think that this article has no prospect in the future.' Zaza Meishvili, a judge member of the Council, stated that in conditions of non-existence of an institite of mission, the Council should have an opportunity to act operatively, although appropriate procedures should be prescribed for that. Shota Getsadze, a judge member of the Council, tried to explain the necessity of the transfer of judges to the Tbilisi City Court by the fact that in 2015, at various times, the term of mission of six judges and the term of office of one judge would expire. Consequently, he thinks that the judges sent on missions to the Tbilisi City Court shall stay there and shall be appointed to the positions where they had been sent to on missions, and, accordingly, a competition should be announced for vacant positions.

The issue of the transfer/promotion of judges through a competition was responded by the Georgian Young Lawyers' Association through a public statement, in which particular gaps of this process were described in details, including the serious accusation expressed by a non-judge member of the Council with regard to arrangements between

judge members of the Council on the issue of transfer of particular judges to the Tbilisi City Court[63] (see Annex 1).

5.1.3. Practice of the transfer of judges without a competition during the reporting period

- **The allocation of positions for the purpose of the transfer of judges during the reporting period took place without any justification of the need for transfer;**
- **The decisions of the High Council of Justice on the transfer/promotion of judges without a competition during the reporting period have been made without any justification, as a result of formally conducted procedures, which proves that the Council fails to follow the order established by itself. In such circumstances, it is more important that the law sets forth the minimum requirements for the transfer/promotion of judges and the principles, on which the decisions of the Council on the transfer/promotion of judges should be based: obligation to justify decisions, the principles of justice, legality, publicity, transparency, anti-discrimination, and prevention of conflicts of interest and other principles;**
- **During the reporting period the High Council of Justice proved to be completely incapable in terms of preventing conflicts of interest within the Council.**

During the reporting period the High Council of Justice transferred judges to other courts without a competition twice: on 7 August and on 16 November. A total of 11 judges have been transferred in the above manner.

At the session on 4 August 2015, the High Council of Justice discussed the issue of the transfer of judges without a competition. The admission of applications for the appointment of judges through the transfer procedure during the period from 4 August through 6 August has been announced, and the decision on the transfer of 6 judges to the Tbilisi City Court has been made on 7 August 2015. This decision of

[63] Statement of the Georgian Young Lawyers' Association with regard to the decision taken by the High Council of Justice https://gyla.ge/ge/post/saqartvelos-akhalgazrda-iuristta-asociaciis-ganckhadeba-iusticiis-umaghlesi-sabtchos-mier-mighebul-gadatsyvetilebastan-dakavshirebit-17

the Council proves that the Council practices the transfer of judges by way of exception, not when there is a need for and justification of the transfer of judges, but in the case of desire to allocate certain judges to concrete courts for uncertain reasons. The above is proved first of all by the fact that the judge members of the Council demanded adding 6 positions and the transfer of concrete 6 judges to the Tbilisi City Court, whose term of mission would expire and who would have to return to the respective courts. When the identity of judges, whose transfer was aimed by the judge members of the Council, became known in advance, it became clear that the procedure for the purpose of transfer has been implemented formally and did not aim at the actual selection of judges who applied for the transfer.[64]

Levan Murusidze, the Secretary of the Council, brought before the session of the Council on 4 August 2015 the issue of the addition of 2 positions in each of the panels of the Tbilisi City Court (a total of 6 positions) and of the appointment of 6 judges to these staffing positions. The issue concerned the six judges who were transferred on the basis of a mission to the Tbilisi City Court and whose term of mission was expiring. Notably, by that time the Council members were planning to concurrently announce a competition for the selection of judges.

The discussion that was held around this issue is of interest:

Levan Musuridze: 'We should apply Article 37, that is why two positions in each panel will be very normal... It was said that after the competition we would return to this issue.'

Nino Gvenetadze: 'It was said that in the case of necessity we would apply Article 37. We are going to announce a competition again in the nearest future. I do not believe that using the transfer procedure between competitions is correct.'

Shota Getsadze: 'I expect the promise to be fulfilled that when this competition was completed, we would apply Article 37. We should not forget about the promise. Otherwise, if we fail to apply Article 37, we will always stay in the competition mode.'

Nino Gvenetadze: 'Competition is a procedure for the appointment of judges, which is established by law. While the transfer of judges is an exception.'

[64] By the decision of the Council made on 7 August 2015, the following judges have been transferred to the Tbilisi City Court from different city/district courts: **Nino Buachidze**, a magistrate judge of the Zestaponi District Court, **Ekaterine Jinchvelashvili**, a judge of the Batumi City Court, **Ana Chogovadze**, a judge of the Zestaponi District Court, **Tariel Tabatadze**, a judge of the Gori District Court, **Vakhtang Mrelashvili**, a judge of the Gurjaani District Court, and **Gogita Tatosashvili**, a judge of the Telavi District Court.

The discussion around this issue lacked any reasoning. The judge members of the Council who were supported by several non-judge members of the Council, demanded without any justification the addition of 6 positions of judges in the Tbilisi City Court and the filling of these positions through the transfer procedure without any competition. For instance, Kakha Sopromadze, a non-judge member, stated that he was for the addition of positions and for the transfer of judges without any competition in order to 'restore the status quo which was in last summer.' Consequently, the necessity of the addition of positions for appointing judges by way of exception has not been justified. Notably, both the judge members and several non-judge members wished the above 5 positions to be added and to use the transfer procedure for appointing concrete 6 judges to these positions without any competition, whose terms of mission were expiring, as well as the fact that very short deadlines have been determined for the acceptance of applications of judges willing to be transferred proves that the Council used only formally the transfer procedure established by itself on 10 June 2015. It became clear in advance that the Council did not aim at the actual consideration of the submitted applications of judges willing to be transferred.

Nino Gvenetadze, the Chairperson of the Council, stood up against the process of the transfer of judges without any competition. She stated the following at the session on 7 August 2015: 'I would like to take my firm position on the appointments taking place today, which are performed in serious violation of law. None of the candidates have been studied. Their motivations have not been heard either. Now you will reply that you have their applications; however, that is not sufficient. It is important for me to express my position that none of the procedures have been complied with, and the second competition within the same month is expected. Competition is the foremost and compulsory legal reservation that constitutes the basis for the filling of vacant of positions... This process aims to appoint the judges who fell short of expectations upon returning from their missions...'

The High Council of Justice announced for the second time at the session on 28 September the initiation of the procedure of the transfer of judges to the Tbilisi Court of Appeals without any competition. The decision on the promotion of judges to 7 vacant positions in the Tbilisi Court of Appeals without a competition has been adopted at the session on 16 November. The above mentioned decisions of the Council also lacked any justification and raised serious doubts as to the actual goals of using the exception mechanism. The Public Defender of Georgia gave a negative assessment to this decision of the Council[65].

[65] Coalition for an Independent and Transparent Judiciary responds to the decision of the High Council of Justice https://gyla.ge/ge/post/koalicia-damoukidebeli-da-

The judge members of the Council raised the issue of using 10 vacant positions at the Tbilisi Court of Appeals out of 68 available vacant positions for the appointment of judges through a transfer procedure, and the issue of the announcement of a competition to fill the rest 58 vacant positions available in the different courts. The following gaps have been revealed in the process of appointing/promoting judges without a competition:

- The Council failed to justify why the existing vacant positions were artificially divided: it was proposed to separate 10 vacant positions for the appointment of judges without a competition, and to announce a competition for rest 58 vacant positions. The Council members have eventually agreed upon using seven, instead of ten, vacant positions, for the appointment of judges without a competition. Such artificial division of vacant positions lacks a legal framework as well;
- Several non-judge members avowed at the session that the judge members had already compiled the list of certain persons, whom they would appoint by applying Article 37;
- The procedure of the promotion of judges without a competition was initiated on 28 September, when the Council had not yet determined promotion criteria, as it is required under the organic law. Only at the session held on 19 October, after the Council had accepted the applications of judges willing to be promoted, the Council discussed and adopted the promotion criteria and procedure under forced conditions, after being requested many times by civil society[66]. Simultaneously, the Council extended the deadline for the submission of applications by judges willing to be promoted, though it is obvious that the Council initiated the promotion process before having an appropriate procedure adopted. This deepened the doubts

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[66] Non-governmental organisations impeach the credibility of the process of the promotion of judges on-going in the High Council of Justice: https://gyla.ge/ge/post/arasamtavrobo-organizaciebi-undoblobas-uckhadeben-iusticiis-umaghles-sabtchoshi-mimdinare-mosamartleta-datsinaurebis-process-18; GYLA's statement regarding the decision made by the High Council of Justice: https://gyla.ge/ge/post/saqartvelos-akhalgazrda-iuristta-asociaciis-ganckhadeba-iusticiis-umaghlesi-sabtchos-mier-mighebul-gadatsyvetilebastan-dakavshirebit-17

that the establishment of the criteria was just a formality and the Council did not intend to use this criteria, and the list of judges to be promoted had been really agreed with the Council in advance;

- When deciding to fill 7 vacant positions at the Tbilisi Court of Appeals without a competition, the supporters of the decision failed to consolidate their position through having studied the situation in certain courts and their needs, or by giving reference to any empiric materials or objective data;
- Questions emerged after several non-judge members of the Council supported the appointment of judges without a competition, while at the same session, just a few minutes earlier, they had supported the filling of these vacant positions through a competition (however, the decision to announce a competition was not made due to an insufficient number of votes);
- The arguments advanced by judge members of the Council remained unclear, according to which the Court of Appeals should be urgently staffed with judges transferred (promoted) from city courts due to increased workload and a large number of cases at the Court of Appeals. According to the clarification given by them, the announcement of a competition for the mentioned vacant positions requires specific time, and this will not help promptly solve the issues existing at the Court of Appeals. Furthermore, not long ago the Council appointed new judges through a competition both in the courts of first instance and in the court of appeals, which aimed to solve the problem caused by a shortage of judges within the judicial system. Consequently, it remained ambiguous how the problem of the shortage of judges in common courts could be solved by the promotion of judges from the courts of one instance to the courts of another instance, and why solving this problem was priority for the Tbilisi Court of Appeals;
- An issue of the conflict of interest appeared on the agenda again. Shota Getsadze, a judge member of the High Council of Justice of Georgia, concurrently was a candidate for promotion. After the repeated requests of non-governmental organisations and discussions held at the Council, the above mentioned member of the Council sought recusal and did not par-

ticipate in voting on promotions held at the Council. He did not participate in interviews with candidates either, though he participated in discussions held at the Council regarding the issue of the promotion of judges, when the issue of the consideration by the Public Defender of the information submitted to the Council on the judges participating in interviews was being discussed. Notably, Shota Getsadze recused himself in the decision-making process and explained this as his good faith, whereas the Council demonstrated itself as being completely incapable in preventing this conflict of interest.

The standpoint of the Chairperson of the High Council of Justice of Georgia is a critical indicator in the assessment of the process of the promotion of judges. She opposed the promotion of judges to the Tbilisi Court of Appeals right from the beginning. At the session, the Chairperson of the Council talked about the interviews conducted: 'The interviews we are conducting are assessments. I do not understand why we promote people. None of the candidates motivated why the court of appeals. None of the candidates named any of the significant cases from their practice. All this is of formal nature. I was for competitions from the very beginning and my viewpoint remains the same.' The response of Levan Murusidze, the Secretary of the High Council of Justice, to such assessment of the Chairperson of the High Council of Justice was as follows: 'Believe me, it will be more difficult to identify through competitions why they want to be judges and then we should not appoint anyone.' As a result, the Chairperson of the Council refused to participate in the voting for this issue. He did not participate in the process of interviewing candidates either. He was only attending and listening to the interviews.

The interviews with 29 candidates willing to be promoted were conducted by the Council with considerable violations. According to the amendments made to the Regulations of the Council on 10 June 2015, 'The High Council of Justice shall review applications and invites judges to an interview if necessary'. During the reporting period, the High Council of Justice conducted interviews with candidates for promotion. Notably, the conducted interviews did not make it possible to identify the advantages of candidates. A question why the candidate wanted to be promoted was answered identically by almost all the candidates. Candidates answered that they were having very overloaded work schedule or that they had acquired sufficient experience and they believed they had deserved to be promoted. In individual cases

candidates have been asked professional questions. Most frequently candidates were requested to recall complicated and significant cases, which did not make it possible either to mark out any of them.

The public statement of the Public Defender made on 30 November 2015 regarding the promotion of judges says: 'It seems that the majority of the Council members is not interested in the maximum identification and assessment of the judicial skills and abilities of candidates.[67]' In addition to this statement, the Public Defender made another statement[68] on 13 November 2015, in which he encouraged the High Council of Justice to take into consideration, when making decisions on the promotion of judges, the results of the monitoring conducted by the Public Defender, which reflect, according to the Public Defender, his recommendations on the initiation of disciplinary proceedings against certain judges in different years, as well as information contained in the parliamentary reports regarding the gross violations by certain judges of rights to fair trials.

At the session of the High Council of Justice on 16 November 2015, both the Public Defender of Georgia and attending non-governmental and international organisations encouraged the Council to take into consideration the above mentioned results of the monitoring of the Public Defender when making decisions on the promotion of judges to the Tbilisi City Court. Despite repeated requests, at the session held on 16 November 2015 the High Council of Justice made a decision on the promotion of 7 judges to the Tbilisi City Court, without having considered the information provided by the Public Defender of Georgia. It was planned to consider the letter of the Public Defender at the session on 16 November 2015 as the second item on the agenda. The first item of the agenda was 'Voting on the judges willing to be appointed without a competition to the vacant positions of judge in the Tbilisi Court of Appeals'.

Another important fact proving the formal nature of interviews con-

[67] Statement of the Public Defender of Georgia made on 30 January 2015 regarding the promotion of judges http://ombudsman.ge/ge/news/saqartvelos-saxalxo-damcveli-iusticiis-umagles-sabchoshi-mimdinare-mosamartleta-dawinaurebis-process-exmaureba.page

[68] Statement of the Public Defender of Georgia made on 13 November 2015 regarding the appointment/promotion of judges http://ombudsman.ge/ge/news/saqartvelos-saxalxo-damcveli-iusticiis-umagles-sabchoshi-mimdinare-mosamartleta-dawinaurebis-process-exmaureba.page

ducted by the Council was the voting process, through which the promoted judges were identified. Regardless of the fact that high quorum is required for making a decision on the promotion, 7 out of 29 candidates received two thirds of votes of the members of the High Council of Justice, so that no second voting was necessary in any of the cases. Given that during the previous reporting period, for the appointment of judges, enough votes were polled in the very first round only in exceptional cases and taking into account that interviews with candidates had a formal nature, as mentioned above, such unanimity of the Council members directly points at the presence of preliminary agreement with regard to the candidates.

By the decisions made by the Council on 16 November 2015, the above described procedures have been used to transfer 7 judges from different courts to the Tbilisi Court of Appeals, including one judge member of the Council Shota Getsadze.[69]

5.2. **Appointment of judges**

'All decisions by the Council for the Judiciary
on appointment, promotion, evaluation, discipline
and any other decisions
regarding judges' careers must be reasoned...
Any interested party should be able to look into the
choices made and check that the Council for the Judiciary
applied the rules and criteria based on merits
in relation to appointments and promotions.'
Consultative Council of European Judges (CCJE)
Opinion No 10(2007), §92, 93
'The Council for the Judiciary at the service of society'

A special collegial body, such as the High Council of Justice of Georgia, is set up to perform the functions of the appointment of judges. The

[69] By the decisions made by the Council on 16 November 2015, the following judges have been transferred to the Tbilisi Court of Appeals: **Shota Getsadze**, a judge of the Tbilisi City Court and a member of the High Council of Justice, **Amiran Dzabunidze**, a judge of the Khelvachauri District Court, **Giorgi Tkavadze**, a judge of the Mtskheta District Court and the Chairperson of the Disciplinary Board of Judges of Common Courts, **Ana Gogishvili**, a judge of the Tbilisi City Court, **Gela Kiria**, a judge of the Zestaponi District Court, **Natia Barbakadze**, a judge of the Kutaisi City Court, and **Giorgi Mirotadze**, a judge of the Sighnaghi District Court.

Council relies on the principle of participation of professional representatives and members of the public. This, of course, means that the process of the appointment of judges in the country must be non-political and merit-based. The recommendations of competent international organisations indicate the same. These recommendations emphasise the fact that the appointment of judges and career solutions should be merit-based, and be based on the objective criteria; judges should be appointed in compliance with law; decisions should be made by an independent body[70] or there should be guarantees that such decisions will be made only on the basis of particular criteria[71].

Many years' observation on the activities of the High Council of Justice of Georgia demonstrated that one of the most important functions of the High Council of Justice - the appointment of judges - is characterised by a fundamental problem, which is caused both by legislative gaps and the gaps revealed by the Council during the regulation of the above stated problem, and by a malpractice established by the Council and by the neglect of its part of obligations by the current government. Below are the gaps existing in the process of the appointment of judges:

- **The procedure for the appointment of judges determined by the High Council of Justice insufficiently regulates this process, which fails to ensure the objectiveness and transparency of the process of appointment of judges;**
- **Gross and systematic violations by the High Council of Justice of its own procedure for the appointment of judges results in the appointment of judges through a non-transparent procedure, on the basis of biased decisions;**
- **The legislative and executive authorities fail to ensure the**

[70] Opinion No 10(2007) of the Consultative Council of European Judges (CCJE) 'On the Council for the Judiciary at the Service of Society' was prepared for the cases of the appointment of judges by an independent body. The Opinion establishes the standard of the justification of decisions made by such body on the appointment of judges, as well as the necessity of transparency of the activities of an independent body and its accountability to the public.

[71] COMPILATION OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING COURTS AND JUDGES, CDL-PI(2015)001, 5 March 2015, §2.2.1.;
Consultative Council of European Judges (CCJE), Opinion No. 1(2001), Recommendation No. R(94)12, on the Independence of the Judiciary and the Irremovability of Judges, paragraph 37.

actual reformation of the post-soviet judicial system by using systematic approaches to the solution of problems in order to form an independent and impartial, human rights oriented judicial system;

- **Insufficient legal regulation of the process of appointment of judges and the fact that the appointment of judges is regulated only by the Council fail to ensure the objectiveness and transparency of the process: the law does not set forth the criteria for the selection of judges and the obligation of the Council to justify its decisions on the appointment of judges; the General Administrative Code does not apply to the Council; and the law does not determine the basic principles that must be followed by the Council in the process of selection/appointment of judges. The above stated circumstances make the activities of the Council completely unregulated and dependent on self-regulation;**

5.2.1. Legislation regulating the appointment of judges and functions of higher state bodies

The Organic Law of Georgia on Common Courts establishes only minimum and general requirements for judicial candidates, and a general procedure for holding a position of judge.

As far as the conditions for the conduct of competitions and the criteria for the selection of judges are concerned, the Organic Law of Georgia on Common Courts does not regulate them and delegates the function of establishment of the conditions for the conduct of competitions and of the criteria for the selection of judges to the High Council of Judges of Georgia. Below we will discuss whether or not it is correct to delegate to the High Council of Justice so broad rule-making powers[72] and what mechanisms there are against the abuse by the Council of its unfettered discretion.

Under the Constitution of Georgia, an organic law shall provide for the

[72] Issue related to the correctness of the delegation of rule-making functions by a legislative body to other administrative bodies, as per the legislation of the USA: LEGISLATION AND REGULATION, Cases and Materials, John F. Manning, Matthew C. Stephenson.

procedures for the appointment and dismissal of judges. For its part, the organic law established only general and key requirements, rather than the main principles of decision-making on the appointment of judges and the criteria and the procedure for the selection of judges. Under the organic law, the Parliament completely delegated the above stated functions to the High Council of Justice of Georgia. Judging by the nature of the High Council of Justice (the Council is a collegial body which is based on professional and public representation and which is entrusted with a function to appoint judges) and by the content of the Law of Georgia on Common Courts (this law provides for the establishment of the criteria and procedure for the appointment of judges), it is obvious that the legislature do not aim to give unfettered discretion to the Council or to empower the Council to make political decisions.

However, the organic law thoroughly regulates the procedure for the assessment of judges during probation periods and the criteria for their appointment for an indefinite period of time. The legislation approached these two equally important issues in radically different ways. If the regulation of the procedure for the selection and appointment of judicial candidates must be an exclusive and absolute power, then it is unclear why the legislature did not apply the same approach to the procedure and criteria for the appointment for an indefinite period of time of judges appointed for a probation period. This fact proves once again that the judicial reform is being implemented partially[73].

When considering the issue of appropriateness of giving by the Parliament of Georgia of unfettered discretion to the Council in the establishment of a procedure for the appointment of judges, the following two circumstances should be taken into account: a) based on Article 3(2) (e) of the General Administrative Code of Georgia, the General Administrative Code of Georgia does not apply to the activities of the High Council of Justice; b) the Law of Georgia on Normative Acts does not apply to procedures or decisions of a normative nature adopted by the High Council of Justice.

With this background, the organic law delegates the rule-making powers of the Parliament of Georgia to the High Council of Georgia, so that the organic law does not establish for the Council at least minimum

[73] The draft laws of the Third Wave of Judicial Reform, which are being discussed by the Parliament of Georgia, provide for the introduction of criteria for the selection/appointment of judges, as well as for the right of judges to appeal the refusal of appointment by the Council.

standards and principles to use, to which any procedure should be subject in a democratic and rule-of-law state: the principle of justice, the principle of legality, the principle of legitimacy, non-discrimination, justification of decisions, a right to appeal, etc.

Hence, the High Council of Justice, unlike other state bodies, is not subject to the legal order existing in the country, which would set for the Council the norms of operation in a rule-of-law state. At the same time, there are no mechanisms for appealing the Council's decisions, and the Council's activities are not subject to state control. Opinion No 10(2007) of the Consultative Council of European Judges says that 'the independence of the Council for the Judiciary does not mean that it is outside the law and exempt from judicial supervision.[74]'

The High Council of Justice monitoring reports for the previous years (2012-2014) focus on the gaps in the above-stated legislative regulation and in the regulation established by the Council, as well as in the processes of the appointment of judges performed by the Council within unfettered discretion given to the Council. We observe the same gaps during the current reporting period as well:

- Decision No 1/308 of the High Council of Justice of 9 October 2009 on the criteria for the selection of judicial candidates and the procedure for the conduct of competitions lays down the norms of partially non-binding nature (for example, the participation of a psychologist). Some issues have not been regulated completely again, which make the wide discretion of the Council more unfettered and obscure.
- During the process of appointment of judges, the Council made at various times decisions introducing a malpractice regarding certain issues (two-stage voting, two-stage appointment, fallacious practice of conducting interviews, making of decisions regarding candidates by prior arrangement, rather than by members individually, etc.).
- During the current reporting period there was a case when the Council attempted to regulate certain issues by procedures right in the course of the competition, rather than ensured the appointment of judges according to pre-determined rules. *Within the context of the competition of judges*

[74] Opinion No 10(2007) of the Consultative Council of European Judges, Council for the Judiciary at the Service of Society, paragraph 39.

held on 5 October 2015, right after the Council completed the process of interviewing the candidates and before the Council started voting on the candidates, the member of the Council, who has been appointed by the President of Georgia, tabled a draft regulatory norm related to the prevention of conflicts of interest within the Council, which was discussed at the session of the Council but failed to gain the support of the majority of its members. This case may be given several assessments: The council attempted to settle with delay, rather than preliminarily, the issue related to the process of appointment within the frame of an on-going procedure, which points at the existence of an incomplete procedure and to the Council's inability to regulate and conduct a judicial appointment procedure; the Council wilfully defied the universally recognised principle of prevention of conflicts of interest, neglected the provisions of the Law of Georgia on Conflict of Interest and Corruption in Public Service, which provides for the prevention of conflicts of interest in collegial bodies.

- It has been for many years that the Council fails to introduce a good practice with regard to the issues that have not been regulated by law and by the procedures established by itself. In the contrary to the above stated, the Council frequently modifies its approaches to certain issues and does not try to introduce a uniform practice with regard to certain issues.

The grounds for the delegation by the Parliament of Georgia of rule-making powers to another body emerges when the issue is of technical nature and requires special knowledge, or the issue is complex, due to which it should not be regulated by the Parliament of Georgia. In other cases, the appropriateness of the delegation of the rule-making powers of the Parliament of Georgia may be thrown into doubt that the issue is left without regulation purposefully. One should also take into account, that, unlike the executive authorities, which are not fully isolated from the legislative authorities and are subject to the control of the latter, the High Council of Justice is not subject to the control of the legislative or the executive authorities and is not accountable to any branch of government. In such circumstances, it is more unjustified if the legislative authorities (the approver of the reform at a legislative level) and the executive authorities (the author of the reform) give the High Council of Justice so wide discretion, as a result of which it remains outside the legal order.

Accordingly, in the matter related to the objective and transparent conduct of a judicial appointment process, the branches of state authorities (legislative and executive) and an independent body - the High Council of Justice - are responsible within the limits of their competence. Notwithstanding that the Third Wave of Judicial Reform is being implemented from 2012, no stage of the reform concerned the regulation of the criteria and of the procedure for the appointment of judges and the determination of the principles of operation of the Council.

5.2.2. Issues related to the review of draft laws of the Third Wave of Judicial Reform

In July 2015 the Government of Georgia initiated a set of draft laws prepared by the Ministry of Justice of Georgia, which is known as the Third Wave of Judicial Reform. The draft laws related to the Third Wave of Judicial Reform include a number of positive changes. It is critically necessary to adopt these changes on the way towards ensuring the independence of courts (random distribution of cases, regulation of the issues related to conflicts of interest within the High Council of Justice, appealing of the Council's decisions refusing the appointment of judges, etc.). The set of draft laws was reviewed at the first hearing on 7 October 2015 by the Human Rights and Civil Integration Committee and the Legal Issues Committee of the Parliament of Georgia. However, the hearing of the draft laws at the Parliament of Georgia was suspended without naming the obvious and clear reasons of the above.[75]

The Georgian Young Lawyers' Association requested information from the Parliament of Georgia and the Ministry of Justice of Georgia about the delay in the review of the draft laws of the Third Wave of Judicial Reform. The Parliament of Georgia informed us that the first hearing of the draft laws has been conducted by the Legal Issues Committee and their further review is scheduled immediately after the summer sessions of the Parliament of Georgia start[76]. The information published on the web page of the Parliament of Georgia confirms that the first hearing of the draft laws by the Committee was held on 7 October 2015[77]. However, the Parliament of Georgia failed to provide us with in-

[75] The review of the draft laws of the so-called 'Third Wave' of Judicial Reform resumed at the Parliament of Georgia in 2016, in a significantly revised form, which is not covered by this reporting period and, correspondingly, has not been assessed under this report.

[76] Letter #506/2-4 of the Parliament of Georgia of 22 January 2016.

[77] file:///C:/Users/etsimakuridze/Desktop/PROLoG%202016/HCoJ%20Monitoring%

formation regarding why the draft laws have not been reviewed within the deadlines determined by the Rules of Procedure of the Parliament of Georgia and what were the grounds for postponing the review of the draft laws.

We have requested information on the review of the draft laws of the Third Wave of Judicial Reform from the Ministry of Justice of Georgia as well. However, the Ministry failed to provide us with public information regarding at what stage the work on the Judicial Reform is and what hinders the adoption of the draft laws of the Third Wave of Judicial Reform and what activities are being implemented in this direction, etc.[78]

Hence, the information regarding why the adoption of the draft laws of the Third Wave of Judicial Reform had been delayed was not available to the monitoring group; however, taking into account further developments, we may assume the reason of the above mentioned. Prior to the review of the draft laws of the Third Wave by the Parliament of Georgia, the Ministry of Justice of Georgia, being an author of the the draft laws, submitted the draft laws to the judicature. The meeting was held on May 18, 2015 in the building of the High School of Justice.[79] At the meeting, some judges gave a negative evaluation to the part of the draft laws, which concerned the early termination of the powers of chairpersons of courts and the introduction of a new procedure for the selection of chairpersons, and the creation of an institute of inspector and of a Management Department. Levan Murusidze, the Secretary of the High Council of Justice, and other judges, actively kept expressing their positions with regard to these issues. Aleksandre Baramidze, the representative of the Ministry of Justice (the agency that has drafted and submitted the draft laws) and the First Deputy Minister of Justice, did not agree to this evaluation of the judges.

20Report/%E1%83%9B%E1%83%94%E1%83%A1%E1%83%90%E1%83%9B%E1%83%94%20%E1%83%A2%E1%83%90%E1%83%9A%E1%83%A6%E1%83%90/file-06072015.pdf

[78] The Georgian Young Lawyers' Association requested public information from the Ministry of Justice of Georgia on January 11, 2016, with the letter #ẟ-04/02-16. The Ministry failed to issue the requested information, which was appealed in a court by GYLA and the litigation is still being conducted.

[79] Article named "Reform of the Judiciary – Judges Oppose the Upcoming Amendments" http://www.tabula.ge/ge/story/96310-martlmsajulebis-reforma-mosamartlee-bi-dagegmil-cvlilebebs-etsinaaghmdegebian

After this meeting with the judges and after the draft laws of the Third Wave of Judicial Reform prepared by the Ministry of Justice had been brought before the Parliament of Georgia by the Government of Georgia exactly in the above mentioned form, on 19 October 2015 Tea Tsulukiani, the Ministry of Justice of Georgia met with 160 judges[80], including judge Levan Murusidze, the Secretary of the High Council of Justice of Georgia. Nino Gvenetadze, the Chairperson of the Supreme Court of Georgia, did not attend the meeting. After the meeting, the Ministry of Justice listed the issues that were provided for by the draft laws of the Third Wave of Judicial Reform. However, after the meeting with judges, it was agreed that these issues would be otherwise regulated[81]. The most critical change, which has been provided for by the draft laws of the Third Wave and regarding the postponement of enactment of which the Minister of Justice and the judges have agreed upon, is the principle of random distribution of cases in common courts. The reason of the above, as it was named, is that the judicial system is not prepared yet to introduce this important amendment. Further, a number of issues that have been included, according to the Minster of Justice, in the draft laws of the Third Wave at the initiative of the Chairperson of the Supreme Court of Georgia (an institute of inspector, Management Department, number of votes required for making decisions on the imposition of disciplinary responsibility, an institute of deputy chairperson of a court, probation periods for current judges, etc.) should be revised because the judicature does not agree to the introduction of the above mentioned changes.

As early as before the meeting on May 18, 2015 the Ministry of Justice was aware of the position of the judicature with regard to the draft laws of the Third Wave. However, the draft laws were put forward in a manner that the author of the draft laws had not taken into account the position of judges. Nevertheless, after the above meeting held on 19 October 2015, the Minister of Justice decided, in the course of the

[80] http://kvira.ge/%E1%83%97%E1%83%94%E1%83%90-%E1%83%AC%E1%83%A3%E1%83%9A%E1%83%A3%E1%83%99%E1%83%98%E1%83%90%E1%83%9C%E1%83%98-%E1%83%9B%E1%83%9D%E1%83%A1%E1%83%90%E1%83%9B%E1%83%90%E1%83%A0%E1%83%97%E1%83%9A%E1%83%94/

[81] Article about the meeting between the Minister of Justice of Georgia and judges held on October 19, 2015 on the draft laws of the Third Wave of the reforms of the judiciary named "Tea Tsulukiani agreed to part of the comments of judges." http://www.interpressnews.ge/ge/samartali/350360-thea-tsulukianma-mosamarthletha-shenishvnebis-natsili-gaiziara.html?ar=A

meeting, on the revision of some issues in the draft laws and stated that she would consult with the Chairperson of the Supreme Court about the other issues. As a result, the review of the draft laws of the Third Wave by the Parliament of Georgia was suspended.

On 7 July 2015, a meeting with Irakli Garibashvili, the Prime Minister of Georgia, took place at the initiative of the Secretary of the High Council of Justice. Reportedly, the Secretary of the High Council of Justice briefed the Prime Minister of Georgia on his position and the position of some judges with regard to the draft laws of the Third Wave (an institute of independent inspector). After the meeting the Prime Minister of Georgia told media that it is essential to continue consultations in the Parliament: 'Mr. Levan Murusidze has his own suggestions and he will certainly put them forward in the Parliament of Georgia in future, and let's see how things will develop. The Government shared the views that had been presented by the Ministry of Justice, as well as by the Chairperson of the Court, and they have been forwarded to the Parliament. Now it is essential that consultations and discussions continue at the Parliament of Georgia.'[82] This is another proof of the fact that, at the time when the draft laws of the Third Wave were brought before the Parliament, the Government of Georgia and the Ministry of Justice respectively were aware of the critical look of part of the judicature at the draft laws of the Third Wave. Yet, the Government of Georgia initiated the draft laws and only after the meeting held on 19 October the content of the draft laws of the Third Wave substantially changed.

The high officials of state authorities met at various times with the Secretary of the High Council of Justice of Georgia: two former prime ministers, Bidzina Ivanishvili and Irakli Garibashvili, and the Minister of Finance and the Minister of Justice. According to official information, the meetings were held in connection with different issues: increase of the salaries of judges, views of the Secretary of the High Council of Justice and some judges with regard to the reforms initiated by the Government.

According to the Law of Georgia on Common Courts, sessions of the High Council of Justice are called by the chairperson of the Council. The Secretary of the Council may call a session of the Council only under the instruction of the chairperson, or in exceptional cases provided for by law. The sessions of the Council must be chaired by the chairperson

[82] News item of the TV company Maestro: Prime Minister meets Levan Murusidze http://www.myvideo.ge/v/2599675

of the Council, rather than the Secretary. The decisions of the Council must be signed by the chairperson of the Council. According to Article 51(3) the Organic Law of Georgia on Common Courts, the Secretary of the High Council of Justice shall: provide organisational and technical support for the High Council of Justice of Georgia; administer the Office of the High Council of Justice; appoint and dismiss officials and other personnel of the Office of the High Council of Justice; arrange sessions of the High Council of Justice; sign official documents within the scope of his/her powers; and exercise other powers provided for by the legislation of Georgia.

Correspondingly, the chairperson of the Council, rather than the Secretary, is both a chairperson and a representative of the High Council of Justice. In this view, the meetings of the high officials of state authorities with the Secretary of the Council in connection with a number of issues may be in conflict with the principle of allocation of functions within the judicial authorities and this raises questions with regard to actual reasons of these meetings.

5.2.3. Practice of filling by the High Council of Justice of vacant positions of judges within the judicial system

According to the organic law, judges may be appointed to office in two ways:

- a graduate from the High School of Justice is appointed to a position of judge without a competition after he/she files an appropriate application with the High Council of Justice;
- a person, who is exempt from studying at the High School of Justice, occupies a position of judge through a competition.

During the reporting period, the High Council of Justice conducted competition for the selection of judges twice. Besides, when filling the vacant positions of judges, the Council applied an exception rule in August and in November 2015.

Despite the fact that the Council always becomes aware of the expiry of the term of office of judges in advance, the above mentioned process always catches the Council off its guard, and the Council applies exception rules, along with competitions, for filling the vacant positions of judges. This causes serious grounds to believe that the Council uses its powers (to appoint judges and transfer current judges from one court

to another) based on its subjective views, rather than in an impartial and fair manner and in consideration of the interests of justice.

As far as a shortage of judges is concerned, due to which, according to the Council, the exception mechanism during the transfer of judges has to be used, was caused by two circumstances: a) the expiration of the term of office of judges, of which the Council becomes aware in advance; b) the termination by the Council itself of the prolonged term of office of judges before the commenced cases complete[83]. Both of these circumstances are the cases subject to the control of the Council and it is unclear why they serve as grounds for staffing courts through applying the exception mechanism.

The Council announced competitions twice to fill the vacant positions of judges available during the reporting period. However, in two cases the Council used the procedure for the transfer of judges without a competition, in order to fill the vacant positions of judges. In particular, on 7 August 2015 the Council filled 7 vacant positions of judges in the Tbilisi Court of Appeals through the procedure for the transfer of judges without a competition. The process of transfer of judges is evaluated in details in Chapter 5.1 of this report; therefore, we will not address at this point the issue of groundlessness of the above decision of the Council. For the purposes of this chapter, it is essential to note that the Council did not have a comprehensive approach to and vision regarding the issue of filling vacant positions within the judicial system and, hence, the appointment of judges through a competition and the use of exception rules were not performed in a justified and effective manner and by using complex approaches. In its turn, this caused serious grounds to believe that the Council used the exception mechanism to effect the so-called 'strategic allocation' of current judges to the courts and judicial panels or chambers desired by the Council, rather than met urgent needs of justice in conditions of special necessity.

[83] According to Article 36(5) of the Organic Law of Georgia on Common Courts, 'if the judge reaches the age defined in Article 43(1)(g) of this Law or his/her tenure expires before a trial commenced with the participation of the judge completes, the judge's powers, under decision of the High Council of Justice of Georgia, may be prolonged until the judge or the judicial panel or the chamber, of which the judge is a member, makes the final decision on the case.'

5.2.4. Gaps revealed in appointments of judges through competitions

During the reporting period, the Council announced competitions for the selection of judges twice: in June and October. Within the frame of the competition announced in June, the Council appointed 10 judges, whereas 38 judges were appointed as a result of the competition announced in October.

In 2015 the Council conducted competitions by using an updated procedure for the selection of judicial candidates. The monitoring group has generally given a positive assessment to the amendments introduced into the procedure in February, March and September 2014, as the procedure specifies and provides for a number of essential provisions, such as: finding by the Council of a candidate's characteristics or other information for studying the candidate; revised criteria for the assessment of candidates and the principles of criteria evaluation have been established; the obligations of members of the High Council of Justice in the process of competitions have been determined; following the amendments introduced into the procedure for the selection of judicial candidates in September 2014, a new clause has been included in the procedure, according to which the Council members are obliged to observe the principles of objectiveness, justice and impartiality in decision-making. The aforementioned amendment has been positively assessed by the monitoring group; however, it has been noted that the importance of the amendment wanes due to the fact that there is no mechanism that can make it possible to monitor the implementation of these principles in practice[84]. The correctness of this assessment has been proved by the competitions for the selection of judicial candidates conducted during the reporting period.

The competitions for the selection of judicial candidates conducted by the High Council of Justice in 2015 showed that, regardless of the existence of the procedure and of positive amendments introduced to this procedure in 2014, the Council frequently violated the established procedures. The following serious procedural violations have been revealed in the course of competitions for the selection of judges conducted during the reporting period:

[84] Georgian Young Lawyers' Association, Transparency International - Georgia, High Council of Justice Monitoring Report No 3, 2015, p. 22. https://gyla.ge/files/news/%E1%83%98%...

- Failure to publish curricula vitae of judicial candidates;
- The entire process of the competition was conducted in conditions of conflict of interest;
- During the period of the competition, certain members of the Council were expressing their opinions in advance and publicly with regard to the appointment as judge of the Secretary of the High Council of Justice participating in the competition, by which they were violating the principle of neutrality;
- Interviews with candidates were of formal nature and did not aim to assess the compliance of the candidates with the established criteria.

5.2.5. **Interviews conducted with judicial candidates**

As a result of both competitions conducted during the reporting period it has been proved that the competitions were of formal nature and did not aim to assess the compliance of candidates with the established criteria. Pursuant to Article $12^7(1)$ of the Procedure for the Selection of Judicial Candidates, an interview stage of the competition is actually dedicated to the assessment of the compliance of candidates with the established criteria and the following facts point at the aforesaid:

- the Council members asked questions of absolutely different complexity and those related to different topics. In contrast to the previous reporting period, when the candidates were mainly asked easy law-related questions, which did not require deep analytical thinking from the candidates, during this reporting period the Council members put the candidates in unequal positions by asking part of candidates only easy law-related questions, whereas another part of them had to answer difficult questions.
- In the case of a number of candidates, their compliance with the established criteria was not assessed even formally. One of the examples is an interview with candidate Levan Murusidze, during which almost all the members of the Council gave an opportunity to the Secretary of the Council to use the interview for publicly clarifying the decisions he had made in the past regarding the rumoured cases; thus, the Council did not ask Levan Murusidze any critical and/or follow-up questions.

In the case of one of the candidates, the interview time was entirely allocated to the discussion of the criminal act committed against him/her in the past and not even a single question was asked to check the compliance of the candidate with the established criteria.

- Almost none of the candidates were asked questions about important issues related to human rights. Eva Gotsiridze, a member of the Council, was an exception, who asked questions about human rights to individual candidates. As far as the issues related to the rights of minorities, women and vulnerable groups or the tolerance of the candidates towards such individuals are concerned, the Council did not ask any questions related to those issues. Transition from a state that only declaratively recognises human rights to a state that is actually oriented to human rights requires appointing judges with relevant education and abilities.

- At the session of the High Council of Justice, quorum during interviews with candidates was a problem issue. The Council continues its malpractice, when decisions on the appointment of judges are made by the Council members who are not attending the process of interviews and, correspondingly, have not assessed a candidate. Under Article 50(1) of the Organic Law of Georgia on Common Courts, the High Council of Justice of Georgia may review a matter and make a decision if more than half of the full membership of the Council is present at its session. One should take into account that the Council makes decisions on the appointment of judges by two thirds of the full membership of the Council; therefore, proceeding from this provision of the law, a session of the Council must be attended by at least ten members of the Council. In the appointment of judges, interviews play an important role because the Council members directly form their ideas about candidates. During interviews the Council members not only listen to candidates but ask question that are of interest to them. The effect of interviews lies in two-sided communication. Nevertheless, the aforementioned malpractice has been long established at the Council, and is supported by individual members of the Council with several arguments: after an interview is completed, the Council members review the records made during a session (except when quorum is required, this argument is also unacceptable because the Council members should both

listen to an interview and participate in the process of interviewing); another argument presented by certain members of the Council is the fact that they usually know (are acquainted with) candidates and they do not need to have an interview with them to make a decision. This reason frequently affected the content of interviews, when the Council members would tell the former or current judges during interviews that they know them well and do not see the need to have an interview with them. Failure to attend an interview or to conduct an interview to a full extent due to the above mentioned reason might indicate that the Council members make a decision based on their pre-shaped opinions, rather than in each individual case, as a result of the assessment of candidates. Furthermore, if we take into consideration the fact that just former or current judges mostly participate in competitions, it is obvious that the Council members, as a rule, know the candidates well and, correspondingly, conducting interviews for the sake of formality only contradicts the purposes of interviews.

During the reporting period certain members of the Council acknowledged that they did not use the established criteria when making decisions on the appointment of judges. For example, in the case of appointment as a judge of Levan Murusidze, the Secretary of the High Council of Justice, Merab Gabinashvili, a member of the Council, said that he took into account Levan Murisidze's authority over the judicature[85]. In addition, the public statement of the non-judge members of the Council (see Annex 2) made regarding this matter says the following: 'We, non-judge members of the Council, supported the appointment of Mr. Murusidze as a judge for a probation period of three years. It was a tough and compromise decision, made after thinking for a long time, judgement and hesitation. It is impossible to deny that Mr. Murusidze has unenviable reputation in the society and it was not hard to foresee that his re-appointment would entail acute and negative assessments in our society. From the perspective of the confidence of the public in courts, his appointment would be unjustifiable indeed. However, in this situation, we were obliged to take into account many other factors and circumstances.'[86] Regardless of the fact that in 2014

[85] TV debates on the appointment of judges between the GYLA's chairwoman Ana Natsvlishvili and the judge member of the HCOJ Merab Gabinashvili http://rustavi2.com/ka/news/35261.

[86] Statement of the non-judge members of the High Council of Justice. 25 December

the criteria and assessment clarifications were improved, the Council still made decisions on the appointment of judges without relying on these criteria.

5.2.6. **Participation of a psychologist**

Regardless of the fact that the article defining the participation of psychologists in the process of interviews is not of imperative nature, this excludes any wilfulness from the Council's side. The Council must justify why it deems that the participation of a psychologist in each individual case is necessary, and in other cases the Council conducts interviews without participation of a psychologist. During the previous reporting period, a psychologist was attending interviews with candidates; however, a psychologist did not attend any of the interviews conducted during this reporting period. According to verbal clarification of the Office of the Council, the unavailability (pressure of work) of a psychologist was named as the reason for the above mentioned, which lacks persuasion and gives rise to suspicion that the Council wilfully decides the issue of participation of a psychologist.

The participation of a psychologist in one case and the absence of a psychologist in another case, without any clarification, undermine the stated goal of introduction of an institute of psychologist and raise questions regarding for what purposes this institute is used in practice: for the facilitation of the assessment of the compliance of candidates with the established criteria or, quite the opposite, for identifying features incompatible with the existence of independent courts. Hence, the fact that the procedure does not provide for the compulsory participation of a psychologist in the process of interviews, does not release the Council from the obligation to discuss at its sessions and decide on the issue of participation of a psychologist in each concrete competition, and, at the same time, to justify its decision. The regulation of the participation of a psychologist is very general and of non-binding nature. The issue of the participation of a psychologist should be regulated uniformly in the case of each competition for the selection of judges. Furthermore, a psychologist should have a standard list of certain points which the psychologist will be checking and about which he/she will be providing information to the Council. These points should

2015. http://hcoj.gov.ge/ge/justitsiis-umaghlesi-sabchos-aramosamartle-tsevrebis-gantskhadeba/2577

be an assessment of skills and characteristics of judges covered by the criteria for the selection of judges. Mechanisms for the prevention of abuse by the Council of participation of psychologists in interviews should be introduced (for example, communication with psychologists should be only in written form, as it is in the case of judges, etc.).

5.2.7. Failure to publish the curricula vitae of judicial candidates

Within the frame of the competition announced in October 2015 the High Council of Justice failed to comply with the imperative requirement of the Decision of the High Council of Justice on the Approval of the Procedure for the Selection of Judicial Candidates and to publish the curricula vitae of the judicial candidates on its web page. Publishing such information aims at obtaining by the Council of information about judicial candidates from third persons.

The High Council of Justice also failed to make the curricula vitae of candidates available to the public after the written request of the monitoring group[87].

Notably, the High Council of Justice published the curricula vitae of judicial candidates during the previous reporting period. It is unclear why the Council has failed to publish this information within the frame of the competition held in October. Failure to comply with the requirement for publishing the curricula vitae of judicial candidates might point at the inefficient conduct of the stage of finding information about candidates. This might mean that during competitions the Council only relies on the information on candidates it finds itself.

[87] Freedom of information request of the GYLA to the HCOJ from November 25, 2015 #ბ-04/583.15 to disclose short biographies of the candidates participating in the competition announced on October 5, 2015.

6. APPOINTMENT OF JUDGES FOR PROBATION PERIODS

- **The complete closure, by decision of the Council, of the process of assessment of the activities of judges appointed for probation periods and failure to disclose any information related to that process, including information about the process itself, contravene the provisions of the law and make the process absolutely non-transparent**

The issue of the appointment of judges for a probation period and of the assessment of judges during their probation period is connected to the issue of the appointment of judges. It is true that the process of the appointment of judges for a probation period is confidential, which makes it impossible to monitor the process. However, there are several issues that should be specified with regard to the transparency of this process.

On 17 November 2013, the constitutional amendment came into force, pursuant to which a judge may be appointed for a probation period for not more than three years. Accordingly, amendments have been made to the Organic Law of Georgia on Common Courts, which determine the principles, and criteria and procedure for the assessment of the activities of judges appointed for probation periods.

After these amendments came into force, from 2013 through the reporting period including, the High Council of Justice appointed a total of 94 judges for a probation period of three years. The Council should start considering the issue of the appointment of the above judges to office for an indefinite period from November 2016 (when the first 12 judges were appointed for a probation period of three years). The information on the assessment of judges during three years of the probation period should be confidential before a decision on their appointment to office for an indefinite period of time is made.

It is obvious that the confidentiality of information on the assessment of judges appointed for a probation period does not allow us to monitor the Council's activities as to the issues of the appointment of judges for a probation period. However, we should also mention the established practice of the Council, which makes completely closed the issue of the assessment of judges appointed for a probation period.

The Organic Law clearly defines a set of data that are deemed confidential. These data are as follows: assessment data on a judge appointed for a probation period, until his/her probation period expires; assessment data on a judge appointed for a probation period, who has

been refused the appointment to office for an indefinite period (except when this judge himself/herself requests the publicity of his/her assessment results). Besides, Article 36[4](21) sets out that 'if a judge is indefinitely appointed to office, the judicial assessment reports shall be made public and any person may request them under Chapter III of the General Administrative Code of Georgia.'

There was a case during the reporting period when questions about the assessment of judges appointed for a probation period were raised at the session of the High Council of Justice. In particular, the following item was included in the agenda of the session of the Council held on 6 February: 'Proposals and problems arisen in the course of monitoring of judges appointed for a period of three years.' Eva Gotsiridze, a non-judge member of the Council, noted that this issue had been included in the agenda at her initiative. Eva Gotsiridze brought about the issue of discussing at the session of the Council information about difficulties and impediments identified in the assessment of judges appointed for a probation period, about the views of evaluators, and about the efficiency of an assessment process.

After the above mentioned statement of the non-judge member of the Council, some of the members of the Council believed that the issue, which Eva Gotsiridze was focusing on, represented confidential information and in order to discuss this issue the session had to be closed. Notably, the agenda of the session of the Council did not specify that the Council would discuss this issue at a closed session.

Other sessions held during the reporting period have proved that the Council members interpret very widely the confidentiality of the assessment of the activities of judges appointed for a probation period and apply the confidentiality requirements not only to the information that is deemed classified under the organic law but also to any other information related to that issue.

According to the organic law, the Council members shall assess the activities of judges appointed for a probation period concurrently and independently from each other. Evaluators are obliged not to disclose to each other information gained during assessment and the assessment results.[88] Hence, the issue of assessment of certain judges could not become the subject of discussion by the Council members. However, the Council members could discuss the system or types of assessment

[88] Article 36[4](1) of the Organic Law of Georgia on Common Courts

of the activities of judges appointed for a probation period, or existing challenges and other similar issues, which is not associated with the assessment of activities of certain judges. The Organic Law provides exactly for such limits of confidentiality, when the assessment of the activities and the assessment results of a particular judge are confidential.

Since the session has been closed in order to discuss the above mentioned issue, it became impossible to listen to and assess the information about difficulties in the process of the assessment of judges appointed for a probation period or information on the course of that process in general. We believe that, neither under law nor based on the purposes of the assessment of judges appointed for a proration period, may the Council decide to close the procedure of the assessment of judges appointed for a probation period or organisational issues associated with that procedure, or information on existing challenges. Furthermore, if the Council interprets so widely the requirement for the confidentiality of information gained during the assessment of the activities of judges appointed for a probation period and for the confidentiality of assessment results, the aforementioned issues should not have been discussed at the session of the Council, because the Council members are aware, as compared to the public, of the identity of judges they are assessing.

Also, the identity of the Council members who assess judges appointed for a probation period is not deemed as confidential information under the law. Hence, the complete closure the process of the assessment of the activities of judges appointed for a probation period, and classifying any information, without distinction, related to this issue contravenes the requirements of legislation, and is exaggerated and fails to ensure an appropriate balance between the confidentiality and the interest of publicity of information.

Notably, an issue of discussing the proposals and problems arisen during the monitoring of judges appointed for a probation period was again brought up at the session of the Council on 8 May. This time, the Council discussed certain issues related to this process at an open session. The following issues were touched: collecting statistical data on the activities of judges, making judges to be assessed familiar with an assessment procedure in a manner established by the organic law, and other issues. Gocha Mamulashvili, a non-judge member of the Council, expressed his opinion that these issues should not be discussed at an open session. Nevertheless, the session was not closed in this case. Af-

ter this case, issues related to the assessment of judges appointed for a probation period have not been discussed again at an open sessions of the Council.

7. DISCIPLINARY RESPONSIBILITY OF JUDGES

- **The critically low number of reviews of disciplinary complaints submitted to the High Council of Justice point at the inefficiency of a system of accountability of judges. Hence, there are sufficient grounds to believe that the independence of judges and the accountability of judges have not been appropriately balanced. The non-transparency of disciplinary proceedings against judges and the existence of an inefficient system of accountability of judges, in their turn, give the High Council of Justice a wide opportunity to abuse the mechanism of disciplinary proceedings against judges.**

Before 2012 the disciplinary proceedings against judges were fully confidential, which excluded the monitoring of disciplinary proceedings conducted by the Council. In March 2012, significant changes have been made to the legislation in this regard, which aimed at partial publicising of disciplinary proceedings. These changes provided for an obligation to publish the decisions of the Disciplinary Board by concealing personal data; however, disciplinary proceedings themselves remained closed. Notably, the amendments drafted within the framework of the Third Wave of Judicial Reform entitle judges to request the publicising of the sessions of the Disciplinary Board and of the Disciplinary Chamber of the Supreme Court, as well as of the High Council of Justice, except for its deliberation and decision-making procedures[89].

The process of disciplinary proceedings against judges is of interest in two aspects: statistical information on the cases reviewed by the High Council of Justice, which makes it possible to draw certain conclusions; and decisions made by relevant bodies on the issues of disciplinary proceedings against judges and the established practice.

Since the sessions related to the issue of disciplinary proceedings against judges are closed, it was impossible to conduct the monitor-

[89] Draft law of Georgia on Amending the Law of Georgia on Disciplinary Responsibility of Judges of Common Courts of Georgia and Disciplinary Proceedings, first hearing version, http://parliament.ge/ge/law/9716/28962

ing of this process during the reporting period. Hence, in this report we will only touch on the statistical information on the disciplinary responsibility of judges. The statistical data below is based on the official data published by the Council and the Disciplinary Board, and the public information retrieved from the Council by the monitoring team.[90] As the statistical data proves it, during the years from 2011 through 2015 only 7 judges were held disciplinary responsible by the Council's decision.

The statistical data of disciplinary responsibility of judges is the following:

2015 – Overall number of disciplinary complaints received by the Council was 875. Out of those 875 disciplinary complaints the Council found 347 disciplinary complaints submitted in accordance to the formal requirements. After the merge of the complaints the overall number of Complaints admitted by the Council was 305. 70 disciplinary complaints came from the previous year 2014. Consequently, overall number of disciplinary complaints pending in the Council in 2015 was 375. Based on those 375 disciplinary complaints 1 judge was held responsible for a disciplinary violation. Disciplinary proceedings were terminated in 93 cases. Disciplinary proceedings were still pending in 277 cases.

2014 - Overall number of disciplinary complaints received by the Council was 710. Out of those 710 disciplinary complaints the Council found 212 disciplinary complaints submitted in accordance to the formal requirements. After the merge of the complaints the overall number of Complaints admitted by the Council was 204. 179 disciplinary complaints came from the previous year 2013. Consequently, overall number of disciplinary complaints pending in the Council in 2014 was 383. Based on those 383 disciplinary complaints none of the judges was held responsible for a disciplinary violation. Disciplinary proceedings were terminated in 286 cases. Disciplinary proceedings were still pending in 70 cases.

2013 - Overall number of disciplinary complaints received by the Council was 620. Out of those 620 disciplinary complaints the Council

[90] The statistical data is collected from the official data published on the web-page of the Council, official data published on the web-page of the Disciplinary Board and pubic information retrieved from the Council by the monitoring team: letters of the Council from February 1, 2016 #233/121-03-ო, #234/119-03-ო and the letter of the Council from March 28, 2016 #541/610-03-ო.

found 239 disciplinary complaints submitted in accordance to the formal requirements. After the merge of the complaints the overall number of Complaints admitted by the Council was 218. 54 disciplinary complaints came from the previous year 2012. Consequently, overall number of disciplinary complaints pending in the Council in 2013 was 272. Based on those 272 disciplinary complaints none of the judges was held responsible for a disciplinary violation. Disciplinary proceedings were terminated in 52 cases. Disciplinary proceedings were still pending in 213 cases.

2012 - Overall number of disciplinary complaints (letters, written statements) received by the Council was 844. 61 disciplinary complaints came from the previous year 2011. Consequently, overall number of disciplinary complaints pending in the Council in 2012 was 905. Based on those 905 disciplinary complaints 4 judges were held responsible for disciplinary violation. Disciplinary proceedings were terminated in 201 cases. Disciplinary proceedings were still pending in 58 cases. Applicants received written responses on 620 disciplinary complaints (letters, written statements).

2011 - Overall number of disciplinary complaints (letters, written statements) received by the Council was 880. 60 disciplinary complaints came from the previous year 2010. Consequently, overall number of disciplinary complaints pending in the Council in 2011 was 940. Based on those 940 disciplinary complaints (letters, written statements) a judges was held responsible for disciplinary violation in 2 cases. Disciplinary proceedings were terminated in 422 cases. Disciplinary proceedings were still pending in 61 cases. Applicants received written responses on 430 disciplinary complaints (letters, written statements).

According to the information provided by the High Council of Justice, during 2015 at various times 11 disciplinary complaints were brought against 6 judge members of the Council, whereas during 2015 at various times 9 disciplinary complaints were brought against 3 judge members of the Council. Disciplinary proceedings have been terminated in the case of 4 complaints filed in 2015, whereas decisions have not been made by the Council on 7 cases. Also, disciplinary proceedings have been terminated in the case of all 9 disciplinary complaints filed in 2014.

RECOMMENDATIONS

Recommendations related to the gaps revealed in the Council's activities during the reporting period

- Excessive discretion given to the Council and the Council's powers should be balanced through appropriate standards of transparency and accountability;
- The transparency of the Council's activities and accountability should be guaranteed by law and in practice;
- The following basic legal principles of the Council's activities and the procedure for the implementation of these principles in practice should be determined by law: legality, justice, legitimacy, non-discrimination, impartiality, prevention of conflicts of interest, justification of decisions, etc.;
- The mechanism of verification of the legality of the Council's decisions should be created, and the limits, the procedure, and the rule and the timeframes for appealing the Council's decisions in a court should be established;
- The nature of administrative functions of the Council should be determined and the Council should be guided by the General Administrative Code of Georgia in performing these functions;
- For the functions of the Council, to which the General Administrative Code of Georgia does not apply, the law should set out at least minimum standards of the performance of such functions in a rule-of-law state, which will ensure the transparency, justification and objectiveness of the Council's activities;

Transparency of the Council's activities

- The Council should strictly comply with the requirements of the General Administrative Code of Georgia and publish information on holding a session 7 days prior to the respective session.
- In order to ensure the compliance with the principles of openness and publicity, the agendas of the Council's sessions should be as detailed as possible, whereas the draft laws, action plans, and conceptions or other documents to be discussed should be available to the public. This will ensure the

actual transparency of the Council's activities and will facilitate the realisation of the right of the public to have appropriate and complete information in order to carry out an effective control.

- In order to solve problems existing in practice, it is important and essential to regulate the issue of preparation of sessions and the issue of respective timeframes. In particular, it is important to determine timeframes for the provision by the Secretary of the Council to all the members of the Council of the documents of those applications and projects, the discussion of which is planned at an upcoming session. Also, it is important for the Council members to be timely provided not only with documents related to the issues planned for discussion at an upcoming session, but also with copies of any incoming documents addressed to the Council and falling within its competence, in order to enable the Council members to demand, at their own discretion, reviewing of certain issues.
- It would be expedient that legislation provides for the procedures for drawing up agendas of the Council's sessions and also determines a person responsible for drawing up agendas.
- The Council should be imposed an obligation under legislation to publish video and audio recordings and the minutes of its sessions and decisions on the Council's web page within certain timeframes, because the public has the right to access these materials, but the Council has failed to ensure the regulation of this issue in practice for many years.
- The Council is obliged to strictly comply with the requirement of the law and to ensure high degree of publicity and transparency. For this purpose, it is also essential that the Council regulates in advance the procedures, relevant grounds and rule for closing sessions. The Council should ensure the protection of the interests of persons interested in attending the Council's sessions and notify interested persons of closed sessions within the established timeframes.
- The Council is obliged to define by its regulations the possibility of unhindered and complete coverage of the Council's sessions by mass media, by which the Regulations of the Council will be in conformity with the General Administrative Code of Georgia, because the publicity of the sessions of collegial bod-

ies, which is guaranteed under legislation, does not imply any restrictions for the representatives of mass media. The representatives of mass media, equally as other interested persons, have the right to attend sessions and make audio and video recordings of sessions.

- Legislation should provide for the publicity of interviews conducted for the selection of judges.
- The issue of conflicts of interest should be regulated at a legislative level. No uniform vision or approach exists with regard to the conflicts of interest and the prevention of conflicts of interest among the Council members. Improper regulation of this issue allows the Council members to make decisions individually in each concrete case and adjust their decisions on participation to personal interests, which, in its turn, questions the Council's credibility and the impartiality of decisions made.

Selection/appointment of judges and transfer/promotion of judges

- Legislation on the selection/appointment of judges should be improved: clear criteria and procedures for the selection of judges should be determined by law, which will ensure the appointment of competent and highly-reputable judges in a transparent, fair and objective manner;
- Legislation should provide for an obligation of the Council to justify its decisions on the appointment of judges;
- Legislation should provide for grounds for the transfer of judges and for the minimum procedure that will be based on the making of decisions on the transfer of judges in a fair, transparent and objective manner and in compliance with a particular need of justice and the principle of the independence of judges;
- Legislation should provide the definition of judicial promotion and basic criteria for promotion, and the minimum procedure, which will be based on the making of decisions on the promotion of judges in a fair, transparent and objective manner and in compliance with a particular need of justice and with

the principle of the independence of judges, and which will determine the difference between the procedures of transfer and promotion;

- The procedure for the selection of judicial candidates, which has been established by the decision of the Council, should be improved; more unambiguous and clearly developed procedures should be established; and the revealed gaps should be eliminated.

Council's response to the facts of pressure on and insulting of judges:

- The Council should ensure a uniform approach to facts of pressure on and insulting of judges in a manner that the Council's response to these issues should be uniform and efficient in order to ensure the independence of courts.

Ensuring the representativeness of the Council

- The Parliament of Georgia should ensure complete staffing of the Council in order to be represented by all 15 members and to ensure the involvement of non-governmental of political forces in the process of election of the Council members;
- The Council members should make decisions individually, based on their personal positions with regard to the issue to be decided, rather than based on preliminary agreement with other members of the Council.