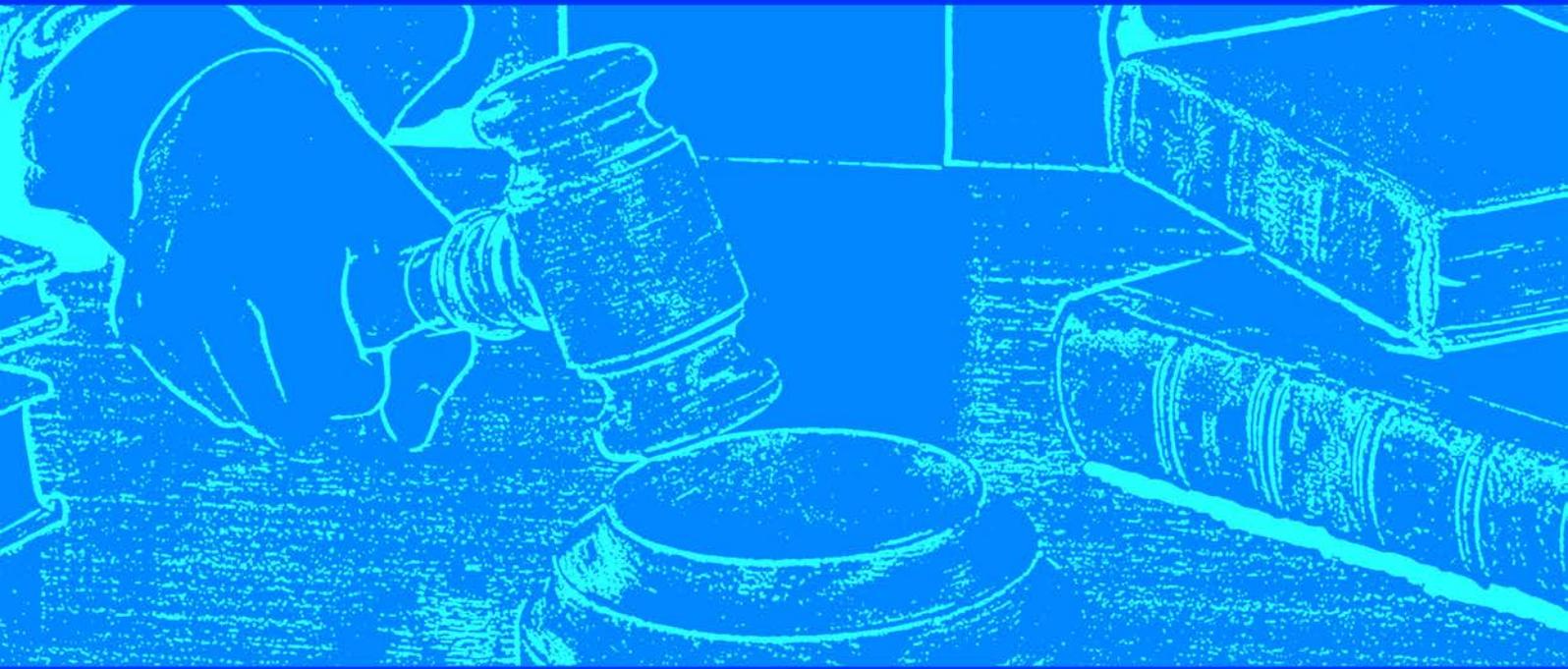


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Coalition for
an Independent and
Transparent Judiciary



THE JUDICIAL SYSTEM IN GEORGIA

REPORT
2012

Author: Sophio Verdzeuli, Lawyer, Young Lawyers Association of Georgia (GYLA)

Person responsible: Tamar Chugoshvili, Chairperson, Young Lawyers Association of Georgia (GYLA)

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I. Introduction

The Georgian judiciary is still in the process of significant transformation. A number of areas have been changed as a result of intensive reforms. Along with ongoing as well as completed reforms, it is important to analyze the existing situation in the judiciary to assess the scale of reforms and identify directions for future development.

The aim of the presented analysis is to assess the situation created after essential changes had been made to the judiciary. Just before the preparation of this analysis, significant amendments had been introduced to the legislation.¹ Those amendments resulted from a long-term and productive cooperation between the High Council of Justice and nongovernmental sector. The amendments affected a number of important issues such as enhancement of neutrality of the High Council of Justice, transfer of judges, publicity of disciplinary proceedings, etc.

However, those changes failed to encompass all the problems existing in the judiciary. Consequently, a number of the issues directly affecting the process of strengthening the independence of the judiciary still remain and this will require timely and proper regulation.

Among those issues, the most important ones are the enhancement of the role of self-governance of judges in the administration of the judiciary, strengthening of individual judges and Conference of Judges, and ensuring their appropriate empowerment.

The rule of manning the High Council of Justice and the Disciplinary Collegium remains the main problem. There is a clear need for amending the rule of manning and operation of the Disciplinary Collegium in order to create proper guarantees for ensuring independence of judges.

Transparency of the court system remains an especially acute problem. The existing rule of photographing, video and audio recording of court proceedings fall short of transparency requirements.

The procedure concerning the appointment, promotion and remuneration of judges needs to be improved in terms of its transparency and clearer regulation.

This report details all those issues which affect ongoing reforms which concern the independence and enhancement of the judiciary. This report also offers views on dealing with existing problems in order to carry on substantial debates on these topics.

II. Overview of judiciary

To evaluate the situation in the judiciary, it is important to analyze the level of internal institutional independence of the court system, self-governance functions of the courts and the role of separate judges in the process of operation of the system. This is analyzed apart from its interrelation with other branches of the government. Moreover, it is important to assess the degree of representation of judges in all those bodies which are responsible for the administration of the judiciary and are empowered to make relevant decisions. In relation to the degree of representation, the analysis of powers granted to concrete entities as well as the content of decisions taken by them must also be analyzed.

¹ Amendments to Organic Law of Georgia on Common Law Courts, Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Law Courts, Law of Georgia Concerning the Rule of Distribution of Powers and Cases between the Judges of General Courts, approved on 27 March 2012.

The system of courts is administered by several main bodies specified in the law. To assess the existing situation and balance of powers inside the system, it is important to review all the bodies which are involved in the process of court system administration.

The law distributed the administrative functions among the following bodies:

- Conference of Judges;
- Administrative Committee of the Conference;
- High Council of Justice;
- High School of Justice;
- Department of Common Courts;
- Disciplinary Collegium;
- Disciplinary Chamber;
- Plenum of the Supreme Court.

Four of these bodies are headed by the chairman of the Supreme Court.² As for the competences, each of these bodies has its sphere of administration specified under the law. For the purpose of a general assessment, it should be noted that the power is basically concentrated in the hands of one particular body – the High Council of Justice. Taking into consideration the fact that participation of an ordinary single judge is not demonstrated at a proper level, the administration seems to be vertical with a top-down approach in management. Below it is given the review of the power, rule of manning, degree of representation and the status of each of these bodies in the system of courts. Such a review makes it possible to assess interdependence of these institutions, the degree of separation of their functions and to assess their balance of powers.

The Conference of Judges is the widest-scale forum within the system of courts, which brings together all the judges of common law courts and is chaired by the Chairman of the Supreme Court. Consequently, the Conference of Judges has a status of the self-governing body.³ Given the scale and degree of representation of the Conference, it has a special role within the judiciary. The status of the Conference ensures the legitimacy of decisions taken by it and its influence on the administration of the judiciary. With this in mind, the role, influence and exclusive competence of the Conference of Judges in the administration of the judiciary are of great interest. These issues will be discussed later in this report. It is worth mentioning that under the law the Conference should be held at least once a year. Despite that, the law stipulates the extraordinary meeting of the conference.⁴

The Administrative Committee of the Conference is a structural unit of the Conference, set up to facilitate the implementation of functions of the Conference.⁵ The Administrative Committee is comprised of nine judges of the common law courts including the Chairman of the Supreme Court who sits on the Committee ex officio and chairs it. The remaining eight members of the Administrative Committee (who cannot be a court chairman, deputy chairman, chairman of collegium or chamber) are elected by the Conference of Judges for the term of three years.⁶ Given the scale of the Conference of Judges, it is necessary to have a separate body which would be more flexible in performing daily routines or intensive activities and in taking decisions. Indeed, it is the provision of support in the operation of the Conference that is defined as the aim of creating the Administrative Committee. However, the analysis of powers of the Administrative Committee reveals that its competence is not limited to technical and organizational support alone but include some of those functions as well which must exclusively belong to the Conference of Judges.⁷

2 Conference of Judges, Administrative Committee of the Conference, High Council of Justice, Plenum of the Supreme Court of Georgia

3 Paragraph 1, Article 63 of the Organic Law of Georgia on Common Law Courts.

4 Article 66 of the Organic Law of Georgia on Common Law Courts.

5 Paragraph 1, Article 64 of the Organic Law of Georgia on Common Law Courts.

6 Regulation of the Conference of Judges of Georgia.

7 Powers of the Administrative Committee are extensively discussed in other chapter of this report.

The High Council of Justice of Georgia is a constitutional body within the system of courts, created as the primary unit in the administration of the system. Functions of the Council are specified as follows: appointing and dismissing judges, organizing qualification exams for judges, and implementing measures necessary for the reforms under way in the system⁸. All three branches of government are involved in the process of manning the Council. Of the fifteen members of the Council, nine are judges. The Chairman of the Supreme Court sits on the Council ex officio and chairs it. An exclusive right to submit nominees to the Conference of Judges for the remaining eight members of the Council belongs to the Chairman of the Supreme Court. The Parliament is represented in the Council by four parliament members (MPs). Two members of the Council are appointed by the President. The rule of manning of the High Council of Justice, as the principal body of administration of judiciary, deserves special interest. Its formulation is important for ensuring healthy processes within the system of the court. In regards to views regarding the existing rule of manning and the Council will be discussed later in this report. But here, it is important to note yet another important factor concerning the Council, which concerns the accumulation of competencies in the hands of the Council. The analysis of powers of the Council and its influence on other bodies (which will be discussed in detail later in this report) points to the need of redistribution of competences and removal of certain functions from the Council.

Two bodies – legal entities of public law, High School of Justice and Department of Common Courts, are involved in the process of administration of judiciary with those important functions that are assigned to them.

The High School of Justice is one of main units in the implementation of judicial reforms. The School, on the one hand, has been created to train qualified personnel and justice students for the renewal of the corps of judges in the court system, and, on the other hand, to upgrade the professionalism of practicing judges and people working within the court system.

Management of the School is comprised by an independent board and administration. The independent board approves the School's curricula, internship and retraining programs. The board is also involved in the student assessment process. Therefore, the rule of composition and operation of the board is important. The independent board of the school comprises six members. The Chairman of the Supreme Court is an ex officio member and the chairman of the independent board. The remaining five members are also approved by the Chairman of the Supreme Court in agreement with the High Council of Justice. The Law on High School of Justice defines general criteria for the membership of the independent board. However, it does not specify which body, professional association or sphere, board members must represent. According to the law, one of five members of the independent board shall be a non-judge member of the High Council of Justice. The issue of selecting the remaining four members is defined by general criteria alone. As regards to the administration of the School, it consists of the director, deputy director and internship supervisor. Functions of the School administration are largely focused on organizational issues of the academic process. However, the powers of the School director also include the submission of curricula, internship and retraining programs to the independent board for the approval. A board of teachers, which is manned by teachers of the school, is involved in the development of those programs. The independent board appoints the director of the School.

The Department of Common Courts has been created to provide material and technical support to common law courts (with the exception of the Supreme Court). The functions of the Department include the provision of courts with necessary material and a technical base as well as the control over the spending of financial and material resources by courts. A project on financing the common law courts and Department is submitted to the state budget on the basis of proposals developed by the Department itself. The appointment of the head of the Department falls within the powers of the Secretary of High Council of Justice upon the consent of the Council.⁹

To conduct disciplinary proceedings, two units are created within the system – the Disciplinary Collegium and the Disciplinary Chamber, the latter being an appeal body. A corresponding legal regulation of the disciplinary

⁸ Paragraph 1, Article 47 of the Organic Law of Georgia on Common Law Courts.

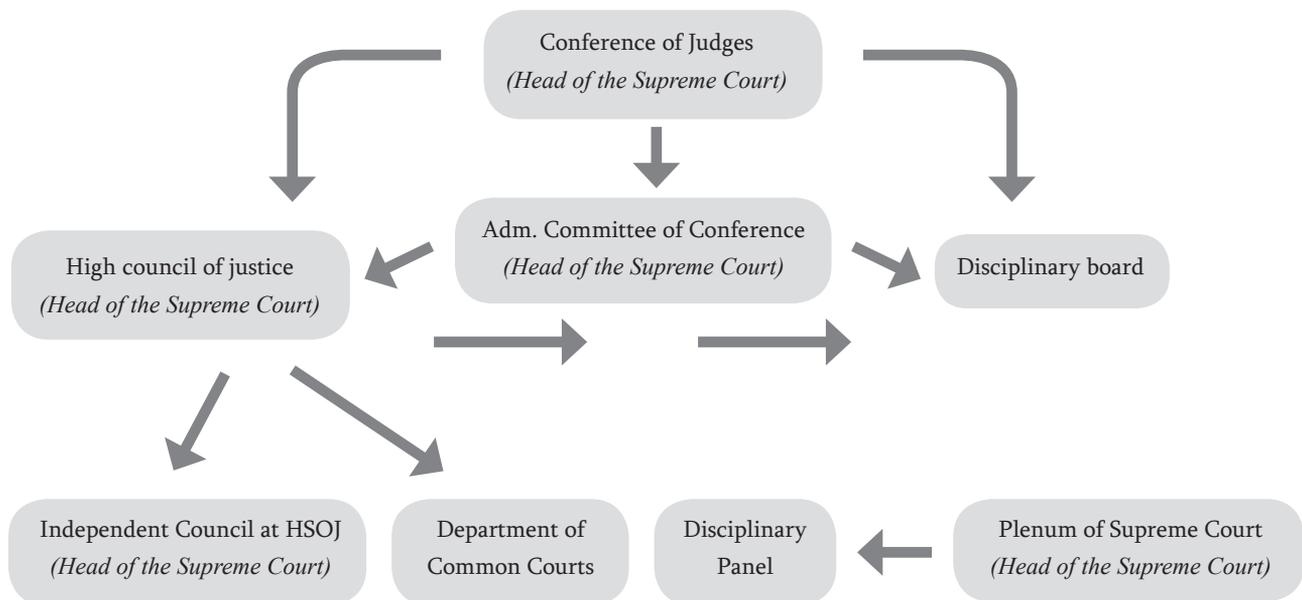
⁹ Paragraph 2, Article 54 of the Organic Law of Georgia on Common Law Courts.

proceedings and bodies conducting it is of significance for strengthening independence of judges. Additionally, the rule of manning these bodies is noteworthy.

The Disciplinary Collegium consists of five members.¹⁰ Of these members, three members are judge members of the High Council of Justice while the remaining two members are non-judges. Even though a decision on appointing three judges to the Disciplinary Collegium is taken by the Conference of Judges (while in between the sittings, the Administrative Committee), the designation of nominees is a sole competence of the Chairman of Supreme Court. As with regards to the two non-judge members of the Collegium, they are elected by the High Council of Justice from its own composition. Apart from curtailed powers of the Conference of Judges (members of the Conference are not entitled to nominate candidates), a point of interest in regards to the Disciplinary Collegium is the issue of conflict of interests which we will discuss later in this report.

The Disciplinary Chamber is an appeal body which considers complaints concerning decisions of the Disciplinary Collegium. The Chamber consists of three Supreme Court members. Like the Disciplinary Collegium, the designation of nominees to the Chamber is a sole competence of the Chairman of Supreme Court. The Chairman of the Supreme Court submits the nomination to the Plenum of the Supreme Court which takes the decision on the approval of nominees. As regards to this the Plenum of the Supreme Court is “awarded huge powers part of which is of technical nature whereas the remaining powers are of constitutional-legal nature and directly relate to the independence of court and due implementation of functions thereof.”¹¹ Bearing that in mind, most recent amendments to the Law on Common Law Courts concerning the removal of the Minister of Justice from the composition of the Plenum must be assessed as a positive step. As for the remaining members of the Plenum, according to the Law, it consists of the Chairman of Supreme Court, First Deputy and Deputies of the Chairman of Supreme Court, members of the Supreme Court and chairmen of appeal courts.

Chart 1 demonstrates all administrative bodies within the judiciary. Chart 2 demonstrates the persons involved in administration process, by indicating their positions.



10 By the amendment of 27 March 2012, the number of members of the Disciplinary Collegium decreased from six to five.

11 GYLA Report on Judiciary in Georgia, 2010, pg.14.

	HCOJ	Chair of the Court/ Collegium/Panel	Adm. Committee of Conference	Disciplinary Board	Disciplinary Panel	Ind. Board of HSOJ ¹²	Plenum of the Supreme Court	Board of the Judges Association of Georgia ¹³
Konstantine Kublashvili	√	√	√			√	√	
Zaza Meishvili¹⁴		√			√	√	√	√
Valeri Tsertsvadze	√	√					√	
Malkhaz Guruli	√	√					√	
Lasha Kalandadze	√	√		√				
Mamia Phkhakadze	√	√		√				
Giorgi Shavliashvili	√			√			√	
Mikheil Chinchaladze	√	√					√	
Vasil Roinishvili		√			√		√	
Paata Silagadze¹⁵			√				√	√
Maia sulkhanishvili						√	√	
Shota Getsadze	√	√						
Besarion Alavidze						√	√	
Irakli Shengelia		√				√		
Kakha Koberidze	√					√		
Levan Murusidze					√			
Leila Mamulashvili			√					
Tamar Zambakhidze			√					
Vazha Phukhashvili			√					
Besik Bugianishvili			√					

12 Letter of the HSoJ, 15.07.2011

13 The widest-scale professional union with a non-profit character within the judiciary, https://enreg.reestri.gov.ge/main.php?state=search_by_name&value=%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%E1%83%97%E1%83%90

14 Chair person of the Board of the Judges Association of Georgia

15 Executive Director of the Judges Association of Georgia

Ilona Todua			√					
Marina Kholoashvili			√					
Nana Daraselia			√					
Maia Vachadze							√	
Natia Tskepladze							√	
Maia Oshkhareli								
Teimuraz Todria								
Nunu kvantaliani							√	
Davit Sulakvelidze							√	
Nugzar Skhirtladze							√	
Nino Kadagidze							√	
Levan Murusidze							√	
Paata Katamadze							√	√

III. Self-governance of judges

The Conference of Judges, as a self-governing body of the common law courts, must be equipped with adequate powers to ensure its actual participation in the process of administration of the judiciary. Given that the Conference of Judges unites all the judges of common courts, it is natural that the efficiency of its activity is crippled by the lack of adequate powers which, for its part, urges for the redistribution of functions among various representative bodies.

Key powers of the Conference of Judges are demonstrated in the staffing of representative bodies. Although the Conference of Judges has other types of responsibilities, including the adoption of rules of ethics for judges (upon the submission of the High Council of Justice), approval of the charter and regulation of the Conference (upon the submission of the High Council of Justice), hearing of annual reports of the head of Conference and chairman of Department of Common Courts, and it participates in the functioning of the system mainly through its representatives. In this respect, the law authorizes the Conference to:

- Elect the Secretary of High Council of Justice and other members of the Council;
- Elect judge-members to the Disciplinary Collegium out from judge members of the High Council of Justice.

Administrative Committee of Conference

The Administrative Committee is an intermediate unit between the Conference of Judges and the High Council of Justice and it is entitled to perform functions entrusted to the Conference of Judges. Bearing in mind that the degree of representation of the Administrative Committee significantly differs from that of the Conference of Judges and that in certain cases the powers given to the Conference are delegated to the very Administrative Committee, it is important to analyze the rules of manning and operation of the Committee as well as the content of decisions taken by it.

The Administrative Committee is manned by the Conference of Judges with nine persons elected from its own composition. Of these nine members, one is ex officio the Chairman of the Supreme Court. The remaining eight members of the Administrative Committee cannot be a court chairman, deputy chairman, chairman of collegium or chamber which is according to the regulation of the Conference.

Such a wording, per se, is a positive factor conducive to the healthy processes within the judiciary and ensuring participation of court representatives of any level in the administration of the system. However, it would be probably beneficial to have such a provision in relation to a segment of judge members of the High Council of Justice.

Yet another positive side of staffing of the Administrative Committee is that the right to nominate a candidate for the Administrative Committee membership is given to each and every member of the Conference of Judges, which is not the case when it comes to the manning of the High Council of Justice.

Functions of the Administrative Committee

It is important to assess the powers that are granted to the Administrative Committee. According to the Organic Law of Georgia on the Common Law Court, the Administrative Committee is delegated the main function of the Conference of Judges, which implies the manning of representative bodies. In particular, the Administrative Committee is entitled to:

- Elect and dismiss the Secretary of High Council of Justice and other members of the Council, upon the submission of the Chairman of Supreme Court, *in the period between sittings of the Conference*;
- Elect judge-members to the Disciplinary Collegium out of High Council of Justice's member judges, upon the submission of the Chairman of Supreme Court, *in the period between sittings of the Conference*.

The delegation of the above listed powers to the Administrative Committee indicates that the Conference of Judges, as a body of self-governance of judges, does not enjoy exclusive power even in relation to such significant issues as the manning of the High Council of Justice and the Disciplinary Collegium. Although the Administrative Committee itself enjoys the degree of representation and legitimacy on the part of the Conference of Judges, it is unclear why so many functions are distributed between the Conference of Judges and the Administrative Committee.

The above information becomes more ambiguous taking into account that the creation of representative bodies is the main form to demonstrate the participation of the corps of judges in the administration of the judiciary. The delegation of this power to the Administrative Committee, which can by no means be regarded as analogous to the Conference of Judges, strips the Conference of main levels of participation.

Decision-making by the Conference of Judges

It is noteworthy that the existing rule of decision making at the Conference of Judges, which is related to the rule of staffing of the High Council of Justice or the Disciplinary Collegium, is not designed to ensure maximal representation of judges. Pursuant to the regulation of the Conference, a decision at the Conference is taken by an open ballot with the majority of votes of attendees. For its part, the Conference sitting is valid if it is attended by more than a half of common court judges. The regulation of the Conference does not contain any special wording about the rule of manning the High Council of Justice and the Disciplinary Collegium, which indicates that a decision on this issue, like other decisions, is taken by a simple majority of votes cast. Considering the above information, it would be better if the regulation of the Conference will specify various quorums for various decision types – for example, a qualified majority of votes cast for a decision on manning the High Council of Justice and the Disciplinary Collegium. Given that more guarantees exist that ensure the participation of self-governance of judges exist, it looks even more unacceptable to award the right of decision

on the manning of the Council and the Disciplinary Collegium to the Administrative Committee because the Committee is entitled to take that decision by a majority of votes cast by the attendees of a sitting, which, in theory, may comprise just three persons.

It should also be noted that the legislation overlooks a link between the involvement of the Administration Committee in a decision-making process and the inability to take a decision by the Conference of Judges, for example, due to inability to convene the Conference or to get a quorum, or any other cause. Once again, it is important to mention that the law stipulates the obligation the Conference meeting to be held at least once per year. Despite that, the law stipulates the extraordinary meeting of the Conference. It is therefore hard to understand why there is a need to delegate this function to the Administrative Committee when the Conference of Judges is able to convene and take a decision itself.

To ensure the degree of representation of judges and the legitimacy of taking decisions, it is important for the Conference of Judges to have exclusive powers which shall not be delegated to any other body even when that body is manned by the Conference of Judges itself. Such an exclusive power, first and foremost, is expressed in the very formation of representative bodies.

The analysis of decisions taken by the Administrative Committee in the past few years shows that quite principled issues have been decided without the involvement of the Conference of Judges, for example:

- Election of the Secretary of the High Council of Justice by the resolution #2 of the Administrative Committee, dated 6 October 2011;¹⁶
- Election of two members to the Disciplinary Collegium by the resolutions of the Administrative Committee, dated 5 February 2010 and 1 November 2010;
- Election of members to the High Council of Justice and the Disciplinary Collegium as well as the Secretary of the High Council of Justice by the resolutions of the Administrative Committee in 2010.

All in all, the analysis of resolutions of the Administrative Committee reveals that from 2007 till the conduct of the Conference of Judges in 2011, five out of eight representatives of the court in the Council were elected by the Administrative Committee. As with regards to the Disciplinary Collegium, in 2009 and 2010, three members of the Collegium were elected by the Administrative Committee. Two of these members were re-elected in the Collegium by the Conference of Judges in 2011. At present, the incumbent Secretary and one member of the Council were elected by the Administrative Committee.¹⁷

IV. Representative bodies in the judiciary

As noted above, the participation of the corps of judges in the administration of the court system is demonstrated in the creation of representative bodies. The highest representative body created by the self-governance of judges is the High Council of Justice which is a constitutional body and is the primary unit in the management of the judiciary. The High Council of Justice is authorized to appoint and dismiss judges, organize qualification exams for judges and coordinate reforms going on in the judiciary. One more administrative function related to disciplinary proceedings is delegated to the Disciplinary Collegium.

For the aims of the given analysis, it is interesting to identify the degree of participation of the corps of judges in the manning of two main units involved in the administration of judiciary. However, apart from the rule of manning, the attention is focused on such other aspects which may have a direct impact on the operation of these units.

16 <http://www.supremecourt.ge/files/upload-file/pdf/dadgenileba2011.pdf>

17 According to the Article 66 of the Organic Law of Georgia on Common Courts, the Conference meeting should have been held at least once per year.

The High Council of Justice

Amendments to the Organic Law of Georgia on Common law Court made in 2012 improved the rule of manning and operation of the High Council of Justice in several aspects. With these amendments, inter alia, the political neutrality of the Council has enhanced competence requirements for members of the Council and there is improvement in the decision making procedure regarding the appointment of a judge by the Council.

However, problems impeding the further strengthening of the representation and independence of the Council still remain and to solve them additional changes to the legislation are required. The overview of these issues are provided below, which takes into account amendments that have been made to the legislation.

- *The share of judiciary in appointing persons*

Unfortunately, no changes have been made to the issue of representation of the judiciary in the Council. Consequently, the procedure of electing judge-members to the Council remains a problem.

The judiciary is represented by nine members in the Council, including the Chairman of the Supreme Court as ex officio member. The remaining eight members are elected by the Conference of Judges upon the submission of the Chairman of the Supreme Court. Pursuant to the Organic Law on Common Law Courts, the right to nominate judge-members to the Council (including the Secretary of the Council) belongs exclusively to the Chairman of the Supreme Court¹⁸.

Even though judge-members of the Council are elected by the Conference of Judges, the power of the Conference is limited to either voting for or against nominees. Judges participating in the Conference do not have the right to put a vote candidates whom they favor. This significantly affects the effectiveness of the involvement of the Conference of Judges in the manning of the representative body.

A provision specified in relation to the Administrative Committee, which allows any judge of common courts to nominate a candidate to the Administrative Committee, serves the very aim of raising the degree of representation of judges. This issue is even more important in relation to the High Council of Justice whose decisions (considering the importance of these decisions) in the process of administration of the judiciary require a higher level of legitimacy.

Awarding an exclusive right to nominate candidates for the Council membership to a sole person adversely affects an adequate and full-fledged representation of the corps of judges in the High Council of Justice. Moreover, this regulation feeds unhealthy processes inside the judiciary. **The existing share of Judiciary in appointing persons does not create the best possibility of manning the Council. For the Council to enjoy a real power of representation of self-governance of judges, each judge of the Conference of Judges must be allowed to nominate a candidate to the Council membership.**

Moreover, given the importance of the issue, it would be better if the law specifies a different regime of voting, in particular, a secret ballot, by the Conference of Judges. Moreover, the legislation may establish a qualified majority of votes for the election of a Council member in order to ensure a higher consensus toward members of the Council on the part of judges of common law courts.

- *Political neutrality of the Council*

Legislative amendments enhanced the political neutrality of the Council. Restrictions on the political activity were imposed on those two members who are appointed by the president. Moreover, amendments specify that

¹⁸ Paragraph 4, Article 47 of the Organic Law of Georgia on Common Law Courts.

the Secretary of the High Council of Justice shall be a judge of the common law court which means that the restrictions on political activity extend to the secretary as well. These amendments represent a significant step towards the protection of the Council's activity from political influences.

However, in order to fully ensure the political neutrality of the Council, a similar restriction must also be imposed on persons appointed by the Parliament.

The legislature is represented in the Council by members of the parliament, namely, the head of parliamentary committee for legal issues, who is an ex officio member of the Council, and three MPs of which at least one must be from the parliamentary majority. This regulation allows the involvement of such people in the administration of the judiciary, who have concrete political goals, positions and responsibilities. For further strengthening of the Council's political neutrality, the restrictions on political activity must apply to all the members of the Council, including those appointed by the parliament.

According to an Opinion of the Consultative Council of European Judges (CCJE), *"If in any state any non judge members [of the Council] are elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support¹⁹."*

In order to protect the activity of the Council from political interests and influence of its members, the legislation must establish a different procedure for electing members to the Council from the parliament. A new regulation must contain an obligation of the parliament to elect its representatives from politically neutral people, outside the composition of the Parliament. Herewith, it is important for the law to include the criteria for these persons, including the adequate requirements in regard to their profession, competence and personal characteristics.

As with regards to the members of the Council appointed by the President, it should be noted that the legislative amendments defined the principle of restricting their political activities as well as criteria for appointment. However, the legislation does not provide for the restriction of the right of the President of early recall of the two members appointed by him. The absence of such a restriction may affect the degree of independence of those members of the Council who have been appointed by the President.

Disciplinary proceeding

In 2012, the legislation had been significantly amended in the area of regulation of disciplinary proceedings against judges. Most of the amendments targeted the issue of complete confidentiality of such proceeding, making them partially public. Amendments also affected fundamentals of the disciplinary proceeding. Accommodating provided recommendations, such wordings as "a gross violation of a law by a judge" and "breach of the internal statute" which have been deleted from the fundamentals of disciplinary proceeding, which is a positive move toward the strengthening of independence of judges. The rule of manning the Disciplinary Collegium has been amended as well. This amendment, however, did not eradicate the main problem concerning the conflict of interests of the members of the Disciplinary Collegium.

Taking into account amendments implemented in relation to the conduct of disciplinary proceeding, presented below are those issues which require additional changes to the law.

- The manning of the Disciplinary Collegium

With regard to the Disciplinary Collegium of the judges of common courts, it is necessary to review the place of the Disciplinary Collegium in the judiciary as well as the role of the Conference of Judges in staffing the Collegium.

¹⁹ CCJE Opinion #10, para.32, [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3)

Following the legislative amendments, the Disciplinary Collegium consists of five members with three of them being judges elected by the Conference of Judges from the composition of the High Council of Justice while the remaining two members are non-judges elected by the High Council of Justice from its own composition. At the same time, the High Council of Justice is the body commencing a disciplinary prosecution which means that a decision on commencing or terminating a disciplinary prosecution against a judge is taken by the High Council of Justice.²⁰ It is clear, that the consideration of a disciplinary case by the body responsible for commencing a disciplinary prosecution against a judge, falls short of objectivity and impartiality requirements to the conduct of a disciplinary proceeding. The rule of manning the Disciplinary Collegium, for its part, does not guarantee the avoidance of conflict of interests of members of the Council.

In order to ensure an impartial consideration of and the delivery of unbiased rulings on disciplinary cases, the manning of the Disciplinary Collegium shall be completely separated from the High Council of Justice; to this end, the Conference of Judges shall set up a body independent from the Council, with its members not being members of the High Council of Justice simultaneously.

In addition to the conflict of interests, there is a problem concerning the procedure of electing members to the Disciplinary Collegium. The members of the Disciplinary Collegium are elected by the Conference of Judges. However, even in that case, candidates are nominated solely by the Chairman of the Supreme Court. The Conference has the right to vote for or against the nominees alone. The participants of the Conference do not have the right to nominate alternative candidates, which naturally cripples the principal power of the Conference to influence the process of formation of representative bodies.

The Disciplinary Collegium is one of those principal bodies which are redistributed important administering functions of the judiciary. Moreover, the activity of the Collegium is especially important in terms of strengthening the independence of judges of common law courts. Therefore, it is natural that a high degree of involvement of judges in the activity of this body is necessary.

Consequently, the regulation of the process of manning the Disciplinary Collegium as well as voting needs to be amended in such a way as to ensure the increased role of the Conference of Judges in the formation of the Collegium. To this end, every judge of common law courts must be given a possibility to nominate a candidate to the Disciplinary Collegium. Additionally, it would be better to practice secret ballot and a qualified majority vote.

- *Dismissal of a judge*

Pursuant to the Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Law Courts, the dismissal of a judge as a measure of disciplinary responsibility, can be imposed over a judge of a common law court for committing the following disciplinary violations:

- Corruption or use of public office against justice and official interests;
- Incompatible activity;
- Inappropriate action for a judge;
- Failure to fulfill or improper fulfillment of duties of a judge;
- Breach of norms of judicial ethics.

With regard to the dismissal of a judge, the Venice Commission noted in its opinion: *“An early termination of the mandate of a judge should only be used as a last resort in exceptional cases, for instance if found guilty of a criminal offence, or for health reasons or if s/he is permanently prevented from performing his or her duties.”*²¹

²⁰ Paragraph 2, Article 15 of the Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Law Courts.

²¹ Opinion of the Venice Commission on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Law Courts of Georgia”, 2007, para.25

According to the law, in the case of dismissing a judge the Disciplinary Collegium takes into consideration the extent and severity of disciplinary infraction as well as any previous disciplinary violation. Moreover, *“If the primary penalty, which has been imposed for previous disciplinary violation, has not been annulled, as a rule [the] Disciplinary Collegium shall impose a more severe penalty upon a judge.”*

According to official statistics of the High Council of Justice, five disciplinary cases (against four judges) were considered in 2010 and only one judge was dismissed. In 2011, the Disciplinary Collegium considered 25 cases and dismissed only one judge as well²².

Article 43 of the Organic Law of Georgia on Common Law Courts specifies a number of grounds for the dismissal of judges or termination of their mandate, including: “committing a disciplinary violation” and “holding an office incompatible with the status of a judge or incompatible activity.” It is noteworthy that “holding an office incompatible with the status of a judge or incompatible activity” is one of the types of disciplinary violations and a disciplinary prosecution can be initiated against a judge on that ground and “a severe reprimand” or “release from office” applied as a sanction.²³ Moreover, according to paragraph C, Article 43 of the Organic Law, the High Council of Justice has the right to make a decision on the dismissal of a judge without the decision of the Disciplinary Collegium. However, dismissal of a judge on the ground of a disciplinary violation requires a decision of the Disciplinary Collegium. This, in turn, implies the conduct of a procedure established under the law for hearing a disciplinary case, which must ensure the equality of the accusing party and judge as well as other procedural guarantees to a judge who is being prosecuted, inter alia, the possibility to present their positions, documents and other evidences, raise motions to present additional documents, to summon additional persons, as well as the right to invite a lawyer and to appeal a decision of the Disciplinary Collegium to the Disciplinary Chamber. **These guarantees are provided to a judge only when his/her case is heard in accordance with the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Law Courts of Georgia. Consequently, a judge cannot enjoy such guarantees when a decision on his/her dismissal is taken by the High Council of Justice on the basis of paragraph C, Article 43 of the Organic Law of Georgia on Common Law Courts.**

Despite such significant differences in terms of procedure or rights, neither the Organic Law of Georgia on Common Law Courts nor the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Law Courts of Georgia spell out the difference between “holding an office incompatible with the status of a judge or incompatible activity” and “activity incompatible with the position of a judge or incompatibility of interests with the duties of a judge.” Herewith, as practice demonstrates, dismissal of the judge and strike off from the reserve based on this ground takes place with the sole decision of the High Council of Justice, without referring to the Disciplinary proceedings²⁴. The decision of High Council of Justice on “Dismissal of M. Mtsariashvili and striking her off from the list of reserve” was based on holding an incompatible position/activity. No disciplinary proceedings were held in the framework of disciplinary collegium on this particular case. In the light of such precedent, it is not clear-cut when an incompatible activity can be considered a disciplinary violation and accordingly require a decision of the Disciplinary Collegium and when a judge can be dismissed on the same ground without a decision of the Disciplinary Collegium.

It would be better if the legislation explicitly specifies that the consideration of issues of incompatibility falls within the competence of the Disciplinary Collegium and only after the Collegium has established the fact of such violation and then has taken a decision on the imposition of sanction, the Council is allowed to fire a judge on that ground.

22 <http://www.hcoj.gov.ge/?l=2&i=113>

23 Paragraph B, Article 54¹ of the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Law Courts of Georgia.

24 Decision of High Council of Justice # 1/250, December 21, 2010

- *Openness of disciplinary proceeding*

An absolute confidentiality of disciplinary proceedings was one of the most pressing issues that has been deregulated by legislative amendments. Before the amendments, the disciplinary hearing was completely closed not only for interested parties but for a complainant as well. Confidentiality of the process did not allow any control over the conduct of disciplinary proceeding and raised questions about the impartiality and substantiation of rulings. Recent amendments in the legislation have changed the situation in favor of more transparency.

Though, it should be mentioned here that, in the course of analyzing the disciplinary process in 2011, the following tendency was revealed: 940 complaints were sent to the High Council of Justice for examination. Out of that, disciplinary prosecution against judges was terminated in 422 cases, in 431 cases repeated applications were combined with other similar applications and sent according to jurisdiction and in 19 cases judges received private recommendation notes. In contrast to the cases which are under review by the Disciplinary Collegium and in contrast to the decisions which will be publicized according to the new standards, neither the above mentioned decisions taken by the HCoJ nor the circumstances of those cases are public and accessible.

Taking this into consideration, the results of amendments are of crucial importance. According to the amendments, Article 5 has been added to the second paragraph, allowing a possibility for a complainant to receive, upon his/her request, a corresponding notice about a decision of the High Council of Justice as well as a decision of the Disciplinary Collegium. An amendment was made to Article 81 as well, regulating the publicity of decisions by both the Disciplinary Collegium and the Disciplinary Chamber. According to the amendment, “Decisions of the Disciplinary Collegium and the Disciplinary Chamber are published, without disclosing personal data of a person, on the official web-page. The Disciplinary Collegium and the Disciplinary Chamber have the right to publish their decisions.”

Such amendments are important steps toward improving the transparency of the process. The move from total confidentiality toward openness helps satisfy existing interest to the process. The implementation of the new standard in practice will also reveal whether there is a need of additional changes and if yes, of what kind and in what areas.

V. Separation of competences between representative bodies

According to an Opinion of the Consultative Council of European Judges (CCJE) of the year 2003, in order to ensure a proper distribution of functions, the training of judges and the conduct of disciplinary proceeding must not be direct responsibilities of one and the same body. A similar stance was expressed with regard to the conflict of interests in the 2007 opinion of the CCEJ as well, according to which disciplinary cases should be dealt with by a disciplinary commission composed of a substantial representation of judges, different from the members of the Council of Justice.²⁵

Recommendation regarding the separation of competences is also provided in the Kyiv recommendations, which state that the key goal of separation is to avoid concentration of the power into the hands of a single body.

The most important functions in the administration of the court system, which should be redistributed among representative bodies elected by the Conference of Judges, can be classified in the following way:

25 Para. 64 [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2007\)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3)

- Appointment/dismissal of judges;
- Training of judges;
- Promotion of judges;
- Disciplinary prosecution.

Most of the above listed functions are entrusted to the High Council of Justice. Among them, the Council is responsible for conducting a competition for the admission of students to the High School of Justice as well as for the appointment, promotion, transfer, and dismissal of judges. Within the limits of the Disciplinary Collegium, members of the Council consider disciplinary cases against judges. Powers regarding the issues related to financial and material and technical provision of common law courts are delegated to the Department of Common Courts, thus weakening the Council's competence in this area. However, one should take into account the subordination existing between the Council and the Department. The head of the Department is appointed by the Secretary of the Council in agreement with the Council. For his/her part, the head of the Department is accountable to the Council.

Obviously, the High Council of Justice is assigned the leading role in the administration of the judiciary. Key functions are accumulated in the hands of the Council and it does not distribute them among representative bodies. This results in the concentration of significant powers within one body which is not counterbalanced by the powers of other bodies in the administration of the court system.

In order to avoid the amassing of excess powers within one body and to enhance the role of self-governance of judges in the administration process, certain functions may be taken away from the Council and be redistributed among such bodies that are totally independent from the Council.

First and foremost, the need for separation of competencies is important in the context of disciplinary proceeding against judges. In order to ensure impartial consideration of and ruling on disciplinary cases, the Disciplinary Collegium must be entirely separated from the High Council of Justice and to this end, a body independent from the Council must be created by the Conference of Judges.

Apart from disciplinary proceeding, the Conference of Judges must also create a committee for evaluation and promotion of judges as a body independent from the Council. That committee will be responsible for issues concerning promotion of judges.

- Election of chairmen of courts

The process of electing chairmen of courts also concerns the distribution of responsibilities. Under the existing regulation, the right to appoint chairmen of city and appeal courts falls within the competence of the High Council of Justice.

Bearing in mind that along with judiciary duties within concrete courts, court chairmen also have separate administrative functions, judges of these courts may have a legitimate interest to participate in the process of electing chairmen of courts. Allowing such a possibility inside the courts would be conducive to healthier relationships between judges and chairmen of courts.

Considering the above information, it would be better if the existing rule of appointing court chairmen be revised and the decision on the appointment of chairman, instead of the High Council of Justice, be taken by all judges of a corresponding court.

The model of distribution of responsibilities described above, will prevent the Council of Justice from concentrating excessive power in its hands, on the one hand, and on the other hand, will increase the involvement of judges in the decision-making process.

VI. Appointment of judges

The Georgian legislation provides for several ways of designating a person on a position of judge, including, initial assignment to a position, appointment without contest (Article 37 of the Organic Law of Georgia on Common Law Courts), putting responsibility on another judge (transfer) and promotion. In most cases, the legislation provides quite ambiguous and insufficient regulation of these procedures, which implies a rather big discretionary power of the High Council of Justice in decision making.

A positive change has been observed with regards to the rule of appointing judges, resulting from the legislative amendment concerning a decision making by the High Council of Justice. Under the previous rule, the election of a person to a position of a judge needed the vote of the majority of attending Council members but not less than one third of the total composition, including consent of at least one member of each of the three government branches. The amendment has abolished the possibility of vetoing a candidate and increased the number of votes needed for the appointment. At present, the Council appoints a judge if a candidate for judge has been supported by the majority of attending Council members but not less than half of the total composition.

In this regard, there are other problematic issues related to the appointment of judges, majority of them emerge from ambiguous regulation and procedures, thus urging for more clarity in the legislation.

The legislation specifies two rules of the appointing judge for the first time:

- a) For persons who are students of the High School of Justice²⁶;
- b) For persons who are relieved from attending the High School of Justice²⁷.

A person relieved from attending the High School of Justice is elected to the position of a judge through contest which involves a two-stage selection process including submission of documents at the first stage and interviewing shortlisted applicants (if the Council deems it necessary) at the second stage.

In decision making on the appointment of a justice student as a judge, the following factors are considered: numerical order of an applicant on the qualified list of justice students and the evaluation of an independent board of the High School of justice.

Given the existing two rules, it is interesting how they are applied in practice and how much they ensure equal opportunities to all subjects eligible under the law to take up the position of judges. It is noteworthy that different groups of subjects (students, on the one hand, and persons relieved from attending the School, on the other) require different circumstances in order to take up the position. Under the law, the creation of such circumstances is the responsibility of the High Council of Justice which must ensure equal start-up conditions for every subject eligible by the law.

It should be noted that the declared policy of the state is to give preference to graduates from the High School of Justice in manning the court system, having undertaken theoretical and practical training course at the High School of Justice. Even though such an approach may be justifiable by objective reasons, it still does not free

26 A person who having undertaken a corresponding contest is admitted to the High School of Justice by the decision of the High Council of Justice and receives a certificate of justice student.

27 Persons released from attending the High School of Justice are:

- persons nominated for the election to the position of a Supreme Court judge;
- former judges who have passed qualification exams and have at least 18 months of work experience in the capacity of judges;
- persons included in the list of justice students regardless of how long they have worked as judges or whether or not they have been appointed as judges;
- incumbent and former judges of the Constitutional Court.

relevant bodies from obligation to give an opportunity to persons relieved from attending the School to take up the position of a judge, as it is provided by the law.

- *Persons relieved from attending the High School of Justice*

The rule and terms of taking up the position of a judge is defined by the decision of the Council “On the Rule of Selecting Candidates for Judges” which concerns different regimes for different groups of subjects. According to that rule, in case of vacancies in city and appeal courts, the High Council of Justice announces a contest through an official print media outlet. This provision, however, does not explicitly indicate an obligation of the Council to announce a contest in case of any vacancy.

The issue is made even more ambiguous by paragraph 2, Article 7 of the Council’s decision, which states that **“After the expiry of the registration term (meaning the deadline for the submission of application when a contest is announced), the High Council of Justice considers accordingly applications specified in Article 2 (meaning applications of justice students) or conducts a contest.”** This provision and in particular, conjunction “or” can be interpreted as the right of the Council to conduct a contest and select a judge from those candidates who have been relieved from attending the School and who applied to the High Council of Justice for the contest.

In the event of such an interpretation of that provision, the Council is entitled not to announce a contest at all or even if a contest has been announced, it does not have to consider applications of those applicants who have been relieved from attending the High School of Justice, on the ground that justice students’ applications were given a priority and nominees for judges were selected from them. **Bearing in mind that the only way to be appointed as judges for those persons who have been relieved from attending the School is through contest announced by the Council, such an approach deprives them of any opportunity to get into the court system via any other way.**

Yet another provision in the rule approved by the Council worth noting is the one that awards the Council the right to call shortlisted applicants for interview at the second stage at its own discretion. For the process of selection of persons relieved from attending the School to be transparent and to provide the possibility of differentiating between applicants, it is necessary to make the interviewing of shortlisted applicants an obligatory stage of the contest.

- *Justice students*

The rule approved by the Council concerning justice students indicates that in taking a decision on the appointment of a judge, the Council takes into account an applicant’s numerical order on the qualified list of justice students and the evaluation of an independent board of the School. Moreover, upon the decision of the Council, a justice student can be invited to a sitting of the Council. According to these provisions, students are mainly evaluated at the High School of Justice and that evaluation is considered by the High Council of Justice. Bearing that in mind, especially noteworthy under this model is the very stage of admission of students to the School, or the rule and criteria of selection, as well as the procedure of evaluation.²⁸

The admission procedure to the High School of Justice - the form of contest, applicant registration, selection criteria and other contest-related issues are regulated by the charter of the High School of Justice.²⁹ The admission contest is conducted by the High Council of Justice taking into account terms and criteria specified in the charter.

28 According to the first wording of the Law on High School of Justice, before it had been amended in 2008, the Law had a provision regulating terms of the contest and ensured not only interviewing candidates but also video recording of these interviews and the publicity of information about voting. The current wording of the Law does not have such a provision.

29 An independent board of the High School of Justice is authorized to approve the charter.

According to the charter, the admission contest to the High School of Justice is conducted in two stages. At the first stage, applicants are selected on the basis of submitted documentation while applicants shortlisted for the second stage can be summoned for interviews by the Council. Criteria applied in selecting applicants are provided in Article 8 and include personal qualities, professional skills, analytical and logical thinking skills, etc.

Although the charter specifies the criteria for evaluating applicants, the process of selection still falls short of ensuring adequate transparency of the decision making process. The Council's right to invite shortlisted applicants for interviewing at its own discretion does not provide an opportunity to receive information and monitor the second stage of contest. Moreover, it does not help outline existing differences between applicants and evaluate the choice made by the Council from among applicants.

It is noteworthy that the legislation does not provide a possibility to challenge a decision of the Council. Given that the admission to the School is the only way of becoming a judge for a large group of subjects, it is of the utmost importance for the applicants to the School to have a possibility, in certain cases, to appeal decisions made by the Council. A complaints commission for an admission contest may be created, which would be responsible to consider complaints of applicants to the School. However, for a better transparency of the admission process and higher trust toward decisions of the Council, there is a need of ensuring possibilities for monitoring and evaluating the process. To this end, interested persons should be allowed to attend the selection process of applicants to the School.

- *Separation of functions between the Council and the School*

The legislation does not clearly separate powers and responsibilities of the High Council of Justice and the High School of Justice. That issue is especially important at the stage of final evaluation of students and submission of that evaluation to the High Council of Justice.

The existing regulation grants the Council with the right to man the corps of judges. Consequently, the Council is responsible for appointing qualified cadres to vacant positions. Given that and also bearing in mind that the main source of filling in vacancies of judges is the High School of Justice, it is the Council's absolutely legitimate interest to participate in the admission process to the School. Otherwise, it would be unjustifiable to charge the Council with the responsibility of appointing qualified cadres.

As regards the education and evaluation at the School, that is the competence of only the School administration and its independent board. Bearing that in mind, the legislation needs to clearly define what type of information the School should provide to the High Council of Justice about a student after he/she completes a ten-year training course. It would be reasonable for the independent board to establish such a form of evaluation of a justice student, which would include the results of exams and work at seminars as well as evaluation by teachers and leaders of internship and description of discipline of a student. That evaluation form would be sent to the High Council of Justice during a decision making about appointing a student to the position of a judge. For the aim of supplying additional information on a student, the law may provide for the right of the Council to request appraisals from various entities.

The law needs to draw a clear line between the competencies of the Council and the School at the same time, each competence assigned must be consistent with the functions and degree of responsibility of each body. It is also important to clearly spell out that a decision on appointing a person to the position of a judge is taken by the High Council of Justice, which implies the right of the Council to take a positive as well as a negative decision about the appointment on the basis of the student evaluation received from the School and additional information sought by the Council. Moreover, a procedure which is followed by the High Council of Justice in taking a decision concerning the appointment of justice students as judges must also be specified explicitly; in particular, whether or not students are summoned to the sitting of the Council for interviewing or the Council takes a decision on the basis of evaluation received from the School.

In conclusion, a brief outline of those main issues concerning the rule of appointment of judges, which require additional legislative amendments are provided below.

First, the legislation needs to ensure equal conditions to all subjects willing to take a position of a judge. To this end, an obligation must be specified, requiring the Council to announce a contest for every vacant position.

The process of evaluation of both justice students and persons relieved from attending the School must become clearer and transparent. To this end, the selection stages need to be specified explicitly and an obligation of interviewing applicants shortlisted for the second stage must be established.

The admission of students to the School also needs additional regulation. At this stage, a higher degree of transparency is needed and a mechanism of appealing Council decisions by School applicants must be installed.

VII. Transfer of judges

Imposing a judiciary authority on a judge in another court (transfer) does not represent a standard form of assignment to a position of a judge. It is an exception serving a concrete aim. Nevertheless, intensive application of that exception in practice has revealed the need for the issue to be regulated differently.

To this end, amendments were made to the Law of Georgia Concerning the Rule of Distribution of Powers and Cases between the Judges of Common Law Courts, which significantly improve the legislative regulation of that exception. In particular, a general rule of the transfer of judge has been established, which requires consent of the judge when the Council takes a decision on his/her transfer. The amendments, however, provide for exception with regard to the consent as well. Moreover, the length of transfer has been set at one year (with the possibility of extension for an additional year). These changes have underlined more vividly a special and exceptional nature of the transfer mechanism but have not fully eliminated problems related to it.

The grounds of the imposition of a judiciary power to another judge are:

- a) Absence of a judge in a concrete court;
- b) Sharp increase in the number of cases in a concrete court.

These grounds indicate that the transfer is a measure of a temporary nature, which becomes invalid upon the elimination of the cause of that measure. This may occur before the expiration of the term of transfer. Therefore, along with the identification of a maximum term of a transfer, it is important to tie the termination of the transfer with the occurrence of a concrete fact, for example, the decrease in the number of cases to a certain amount. In that case a judge, regardless of whether or not the term of his transfer has expired, must return to his place of assignment.

As with regards to the consent of a judge, according to the provision in the Law, the Council is given the right to transfer a judge to another court without his/her consent if it is in the interest of justice. Tying the application of this exception to such a broad base as the interest of justice may result in the replacement of the general rule with the rule of exception and using this mechanism toward judges on the basis of this exception. In theory, any issue arising in the court system can be linked to the interest of justice. Therefore, it will be important to analyze the application of this exception in practice by the Council, which can be conducted after judges have been transferred on the basis of amended legislation.

Among other issues, one question that requires clarification is whether after the expiry of a one-term secondment, a judge can be transferred again to another court. The existing norm fails to answer this question because it focuses on the extension of the term alone and does not specify whether after the expiry of a one-

term secondment in a concrete court, the judge can be transferred to another court. An additional regulation of this issue is urged for the following circumstances should be taken into account:

- √ *A court where a person is appointed experiences the shortage of judges;*
- √ *A judge has already been imposed the powers of another judge;*
- √ *A one year term has not expired since the imposition on a judge of a judicial power of another judge.*

Given the exceptional nature of the transfer mechanism, it is important that a decision of the Council be properly substantiated and meet the goals of the law.

VIII. The rule of appointing a judge to a position of a judge in another court without a contest

Article 37 of the Organic Law of Georgia on Common Law Courts concerns a possibility of appointing, in case of vacancy, an appointed judge, upon the consent of the latter, to a lower, similar or higher instance court without a contest. To this end, a vacancy of a judge in another court and the consent of the judge are sufficient. The rule of selection and evaluation of applicants for a position of judge does not apply in such cases.

Such a provision of the Law, allowing the High Council of Justice to appoint a judge without a contest to a court of any instance, does not conform with the principle of decision-making on professional career of judges, according to a uniform, consistent system. The law may envision a possibility of transferring a judge but that possibility must not allow an authorized subject to use the rule of transfer without any substantiation.

Bearing that in mind, the right of the High Council of Justice to appoint a judge without contest must be limited to exceptional cases alone. Moreover, it is necessary that:

- The High Council of Justice substantiate in writing the necessity of appointing a judge without a contest;
- This right in exceptional cases be used in case of appointing a judge only to a court of same instance without consent;
- Different competition requirements in various courts of one and the same instance be taken into consideration.

IX. Promotion of judges

Article 41 of the Organic Law of Georgia on Common Law Courts deals with the issue of promotion of judges, according to which the High Council of Justice is obliged to develop criteria for promotion and evaluate performance of judges by those criteria. On 27 December 2011, the High Council of Judges approved the “Rule of Evaluation of Performance of Common Law Court Judges.” This Rule, however, does not specify criteria and procedures of promotion. According to Article 15 of the Rule, based on performance evaluation, the Council is presented with recommendations about the promotion of separate judges, but the Rule does not specify the type of promotion implied. Based on the evaluation, the Rule also concerns a possibility of issuing an additional salary of a judge. The Rule does not say anything about the mechanism of promotion on the basis of performance evaluation.

Consequently, the Council still has an obligation to develop a normative basis for the promotion of judges and establish promotion criteria. In this process the following issues must be considered:

- The High Council of Justice must not be allowed to use its right of promoting a judge if the judge has not been exercising judiciary power in a city (district) court during a particular period specified by the law. In the process of determination this period, the amendments to the Constitution of Georgia

should be taken into account, according to which, before the life tenure, the judge might be appointed for specific period of time, no more than 3 years. Therefore, it would be logical, for the term for promotion to be determined by no less than 3 years.

- Promotion of a judge must not be allowed during that period when a disciplinary proceeding is under way against him/her.

X. Transparency of the court system

When reviewing the transparency of the court system, several components must be singled out, including, transparency of administration process in general and publicity of court hearings.

The practice of the High Council of Justice to post information about its sittings on the web-page must be assessed as a positive fact. Another positive step is the action plan for communicating with and gaining trust of the public, which has been adopted by the Council and contributed to the openness of the process.³⁰

As with regards to the publicity of court hearings, the Organic Law of Georgia on Common Law Courts establishes the principle of openness of court hearings but imposes various restrictive regimes for photographing, video recording, broadcasting as well as transcribing and audio-recording the hearings.

Problems with regard to every restrictive regime for publicity of hearings vary. Therefore, it is better to review them one by one.

- Photographing, video recording, filming, broadcasting

Paragraph 4, Article 13 of the Organic Law of Georgia on Common Law Courts prohibits the photographing, video recording, filming, broadcasting of court sittings except when that is performed by a court and a person authorized by a court. The wording – “a person authorized by a court” provides ample room for interpretation and may include any interested person who obtains such a right from the court. In practice, however, that phrase is limited to the judiciary alone. This line of reasoning is proved in a textbook prepared for journalists by the Supreme Court, which explains that only the court is authorized to take a photo and video of court sittings. **Even if the legislator gives any interested person, provided that he/she is authorized by a court, the right to cover the court hearing, the law does not provide a regulation for that right to be exercised whereas the practice proved incapable of realizing it.**

A problematic issue is also the availability of those court sitting materials which have been recorded by the court itself. The Law does not specify the presumption of openness of such material and does not oblige a court to issue such material in accordance with the general standard on the access to public information. Even more so, the law recognizes the discretion of a court to decide on the availability of such material, which runs counter to the general standard of openness established under the General Administrative Code of Georgia. Court sitting recordings fall within the notion of public information, which is defined in the General Administrative Code. Consequently, courts must be obliged to issue such material in accordance with the rule established in General Administrative Code.

To analyze the application of the above mentioned regulation in practice, public information was requested from common law courts. The content of absolute majority of responses received from 38 courts was identical and did not make clear how courts had conducted recording of court sittings in accordance with that Article of the Law. Nor did they allow to figure out whether recordings had been conducted at all. Analysis of received responses makes it clear that court hearings were recorded by CCTV cameras installed in the halls only in the

30 <http://hcoj.gov.ge/files/pdf%20files/sazogadoebasTan%20komunikacia.pdf>

Tbilisi City Court and the Tbilisi Appeal Court. However, it is not clear whether the sittings were recorded regularly or only upon the request of a party.

Courts do not register applications to courts, requesting the issuance of photo or video materials of the hearing. Nor is the filmed material archived, according to the information received from the Tbilisi City Court, which excludes the availability of material in case of interest towards it.

Given the situation, it is important to amend Article 13 of the Organic Law of Georgia on Common Law Courts. Instead of prohibiting, the Law must define a standard of openness and specify that photographing, video recording, filming and broadcasting of court sittings is **allowed** if it is performed by a court or a person authorized by a court. In addition to the above said, recording of court sittings made by a court must be subjected to the regulation of public information, explicitly obliging courts to issue materials featuring open court sittings.

For the aim of regulating photographing, video recording, filming and broadcasting of court sittings it is important to set forth a procedure which will give the right to any interested person to record a court sitting in any preferred form on the basis of relevant application provided that the application is submitted in a proper form and in due time.

To this end, a normative act must be drafted and approved by the decision of the High Council of Justice, which will put to right the validity of existing norm procedurally. The developed rule must allow any person to apply to a court and receive the right to record a court sitting in a preferred manner. To that end, the decision of the Council may also specify the terms of application to a court as well as of the response from the court.

It is important to explicitly set forth an obligation of a court to record court sitting upon an application of an interested person and if due to technical reasons a court is unable to do so, to give a person the right to record the sitting him/herself.

- *Transcribing and audio recording*

The Organic Law of Georgia on Common Law Courts does not establish a standard of openness with regard to transcribing and audio recording of a court sitting either. The legislation does not prohibit those actions but indicates that transcription and audio recording is allowed only in accordance with the rule established by a court, which can be evaluated as an unreasonable restriction of the principle of publicity. Bearing that in mind, it is important to change the existing regulation in favor of openness.

The implementation of the provision existing in the Law is impeded by the fact that courts have not established a corresponding rule of exercising the right. According to our information, for the time being, only the Tbilisi City Court established such a rule, but it is not available on the webpage of the Court and can only be obtained upon a corresponding application, which further impedes the access for it.

It is important to allow any interested person to transcribe and audio record a court sitting without any prior permission. However, a judge may have the right to inquire, before commencing a hearing, whether there are such persons among attendees, who want to audio record the sitting. Such persons must express their desire which will be recorded along with the ID number of person(s) in the minutes of the sitting.

- *Problems in processing data in documents maintained in common law courts system*

Current legislation does not lay down rules for issuing and processing (shading) information maintained in courts (case materials, decisions). Nor is the issuing and processing of information regulated by any other normative act or instruction that would ensure the establishment of a uniform standard. All this produces

myriad problems in practice. First of all, an inconsistent approach towards processing a certain set of data (concealing, shading) is observed in decisions that were requested. There is no guiding standard for persons responsible for the issuance of public court information or any other responsible persons, which, at the end of the day, deprives an interested person of the right to file a complaint against the incomplete information provided by a person responsible in a court for the issuance of such information.

In regulating this issue, characteristics of legal proceedings need to be taken into account, which must translate into the development of different approaches. A distinct line must be drawn between public and private interests and instances when restrictions can be imposed upon the issuance of information must be determined. Moreover, established standards must be in line with the Constitution of Georgia, Georgian legislation and principles of freedom of information.

A general document must be created, which will ensure any interested person with the access to information maintained in the common law courts system. Moreover, that document must establish rules of processing those data information, contained in documents drawn up in the common law courts system, which are not public information or are closed public information and shall not be disclosed to unauthorized persons. The regulation must concern different approaches to different types of legal proceedings, in particular, the degree of transparency should be different in civil, administrative and criminal cases in order to maintain a balance between private and public interests.

Establishment of common standards will ensure the development of uniform practice in the common courts system and at the same time, improve the degree of transparency of courts.

XI. Remuneration

The issue of labor remuneration of judges can be included in the list of those issues which are important to be clearly and explicitly defined by the law. Regulation of this issue with unambiguous and clear-cut norms will ensure a genuine independence of the judiciary.

A number of international acts deal with the issues of remuneration of judges. Among them is the UN's Basic Principles on the Independence of the Judiciary (UN Basic Principles)³¹, the Universal Declaration on the Independence of Justice or, the so-called Singhvi Declaration³², the Universal Charter of the Judge³³, European Charter on the Status for Judges (European Charter)³⁴, Recommendation of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (Recommendation)³⁵. The listed international acts note that the state must ensure judges with adequate remuneration and periodically revise this issue in accordance with the level of inflation. Moreover, the basic part of remuneration of judges must not depend on performed work, as that may endanger the independence of courts. Unfortunately, the mentioned international acts say nothing about the issuance of bonuses along with ex officio wage rates.

31 Adopted by the Seventh United Nations Congress held at Milan from 26 August to 6 September 1985; <http://www2.ohchr.org/english/law/indjudiciary.htm>

32 <http://www.cristidanilet.ro/docs/Shingvi%20Declaration.pdf>

33 Judges from around the world worked on the text of this Charter and was approved by the member associations of the International Association of Judges. The text of the Charter was unanimously approved at the meeting of the Central Council of the International Association of Judges in Taiwan on November 17, 1999; <http://www.hjpc.ba/dc/pdf/THE%20UNIVERSAL%20CHARTER%20OF%20THE%20JUDGE.pdf>

34 The Charter was adopted at the meeting in Strasbourg from 8 to 10 July. The idea to draft a European charter emerged in 1997, at a meeting in Strasbourg devoted to the Status of Judges in Europe. <http://www.judicialcouncil.gov.az/Law/echarte.pdf>

35 Adopted by the Committee of Ministers on 17 November 2010; [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec\(2010\)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec(2010)12&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)

Opinions of the Venice Commission concerning the remuneration of judges are of special interest. The 2008 recommendation of the Commission notes that remuneration of judges should be commensurate with their activity, which is a necessary prerequisite for ensuring their independence. The Commission indicates that the remuneration must be set in accordance with the social conditions in a country and the remuneration of judges must not be lower than that of public officials. When determining levels of remuneration, a country must rely on objective, predictable and clearly defined criteria and must not be based on individual performance of judges. Bonuses which include an element of discretion should be excluded. According to the 2008 recommendation of the Venice Commission, non-monetary benefits of judges should also be abolished, which in various countries may be expressed in providing apartments to judges and the distribution of which involves a discretionary element and may pose a threat to judicial independence.

The Venice Commission indicates that that judges' remuneration should be guaranteed by law bonuses and non-financial benefits which are enjoyed by judges in some countries given the social and economic situation in those countries, must be gradually phased out and replaced by an adequate level of financial remuneration³⁶.

- Labor remuneration of judges of courts of first and second instances and social security guarantees in Georgia

As with regards to a legislative regulation of the issue of labor remuneration of judges in Georgia, it is defined in the Organic Law of Georgia on Common Law Courts and the Law of Georgia on Remuneration of Judges of Common Law Courts.

Similar to public servants, the labor remuneration of judges consists of ex officio wage rate and additions to that wage.³⁷ The legislation and in particular, the Law of Georgia on Remuneration of Judges of Common Law Courts defines amounts of ex officio wage rates of judges of common law courts (first instance and appeal courts) by directly establishing levels of wages.³⁸ The legislations sets different wage rates for judges of each instance, which cannot be decreased during the entire tenure of judges.

As with regards to issuing additional wages, as in the case of a public servant, the legislation does not specify directly the amount of additions or regularity of issuance of additions in case of judges either. The legislation entitles the High Council of Justice of Georgia to issue additions to judges within the limits of allocations to common law courts approved under an annual budget law and taking into account certain criteria. In particular, a) taking into account the workload of a concrete judge and/or complexity of cases considered; b) taking into account the workload of a concrete district (city) and appeal court; c) in case of transfers to more than two courts on the basis of the Law of Georgia Concerning the Rule of Distribution of Powers and Cases between the Judges of Common Law Courts; d) in case of imposing powers of a chairman of a court in cases envisaged in the organic Law of Georgia on Common Law Courts; e) in case of performing the powers of a chairman of common court; f) in case of performing judicial duties far from a permanent place of residence; g) other special cases.

Given the above mentioned norm, it is clear that the High Council of Justice has a possibility to issue additional wages together with ex officio wages in accordance with a quite broad base. At the same time, the legislation does not set a minimal or maximum amount of these additions. Nor does the legislation provide an exhaustive

³⁶ European Commission For Democracy Through Law) Venice Commission) Report on the Independence of the Judicial system part I The Independence of Judges Adopted by the Venice Commission at its 82nd Plenary Session 12-13 march 2010

³⁷ Article 69 of the Organic Law of Georgia on Common Law Courts.

³⁸ See, the Law of Georgia on Remuneration of Judges of Common Law Courts. This law establishes the following ex officio rates: chairman of appeal court – GEL 4,200; deputy chairman of appeal court – GEL 3,300; chairman of appeal court chamber (collegium) – GEL 2,900; judge of appeal court – GEL 2,500; chairman of city (district) court – GEL 2,500; chairman of city (district) court chamber – GEL 2,400; judge, magistrate judge of city (district) court – GEL 2,300.

list of grounds for issuing additional wages and just grants the right to the High Council of Justice to issue additional wages in various cases, when it considers the case “special”. Moreover, the General Administrative Code of Georgia does not apply to the High Council of Justice and consequently, the obligation to substantiate a decision, which would require from the Council to corroborate its decisions on the issuance of additions.

Common law court judges belong to that category of public officials who **are required to fill annual financial declarations in accordance with the Law of Georgia on the Conflict of Interests and Corruption in Public Service**. From the financial declarations completed by the judges of common law courts in 2010, one can identify several categories of judges: a segment of judges of first instance courts (55 judges of 168) received from GEL 30,000 to GEL 38,000 for their activities in courts. In separate cases, judges received the remuneration from GEL 24,000 to 30,000. It should be noted that the remuneration received by judges working at the Tbilisi City Court differs from that of other courts of the first instance, ranging from GEL 42,000 to 47,000. As with regards to the chairmen of separate courts, their income ranges from GEL 55,000 to 57,000.

The Georgian legislation requires from any public official that while filling a declaration he/she indicates the amount of income received for performed works during an accounting period, which implies amount received as a wage and any additions. Given that the wage rates are defined by the Law, it is not difficult to calculate the amount of additions received by a judge during a year but it is impossible to break down additions by months and figure out the ground of issuance of addition.

The legislation does not set either a minimal or a maximal level of additions, which enables an authorized subject – the High Council of Justice, to take an unsubstantiated decision which, in turn, endangers the independence of judges.

Under the Georgian legislation, apart from the ex officio wage and additions, the High Council of Justice can, on the basis of its decision, provide an accommodation to or cover costs of accommodation of judges who do not have housing at the place of performing their judiciary duty. In contrast to amounts of additions, the High Council of Justice sets limits of compensation of housing costs for judges by self-governance units. For example, in the decision #1/56, dated 10 March 2011, the High Council of Justice set limits of amounts to be allocated for renting apartments³⁹. Moreover, by the decision taken in 2011, the High Council of Justice pays corresponding rents to 67 judges in 24 self-governance units. Of these 67 judges, 24 are transferred to relevant courts and therefore, need renting costs.

Given the above information, one can single out three types of income of judges: wage, additions to wages and in case of need, rent for an apartment.

Moreover, the Georgian legislation provides for compulsory health and life insurance of judges. Insurance costs of appeal and district (city) courts are covered from the budget of common law courts. Compulsory insurance of judges of appeal and district (city) courts is implemented by means of a contract concluded between the Department of Common Courts and a licensed insurance company in accordance with the rule established by the law or by means of a voucher⁴⁰.

Considering social conditions in Georgia, the situation in the judiciary and practice or experience in this sphere, separate recommendations can be developed for the improvement of the existing labor remuneration system of judges in Georgia, which, all in all, will increase the level of independence of judges.

39 Tbilisi – GEL 550; Batumi, Kutaisi, Khelvachauri – GEL 495; Rustavi – GEL 385; Gori, Zestaponi, Zugdidi, Signaghi and Poti – GEL 330 and in case of other self-governances – Gel 220.

40 Article 72 of the Organic Law of Georgia on Common Law Courts.

For the improvement of the situation in this direction, it would be better to:

- Provide an adequate salary to judges under the law;
- Abolish the possibility of issuance of additions;

XII. Conclusion

The above presented analysis which assesses both achievements and challenges has allowed to depict a picture existing within the judiciary.

Moreover, it outlines those impeding factors that may adversely affect the process of independence and strengthening of the judiciary. Of these factors, the fundamental problem singled out in the report is the inadequate involvement of the corps of judges in the processes which represent an obstacle in creating a balanced administration inside the system. The legislation does not ensure the separation of competencies between the entities. Powers of the High Council for Justice in the process of administration is largely unbalanced, enabling it to concentrate powers into the hands of one entity. The issue is aggravated by the reality that the High Council for Justice itself fails to ensure a proper degree of representation of self-governance of judges.

An established rule of decision making inside the system, which grants the Chairman of Supreme Court with the exclusive right to nominate candidates for membership of a number of entities, is of not avail to actual representation of judges in those bodies. Moreover, that rule grants unreasonably ample powers to separate persons to largely influence processes going on within the system.

For the strengthening of the court system it is, first and foremost, required to create conditions conducive to healthy processes within the system, to strengthening the actual self-governance of judges and degree of representation. This is impossible without separation of competencies, on the one hand, and the increase in the involvement of corps of judges in the manning of decision-making bodies.

The issues discussed in this report also indicate that along with the reforms implemented in the judiciary a number of problems still remain, which should be adequately dealt with. Among them an issue of transparency of court system is of utmost importance. Further improvement is required of the rule of manning the High Council of Justice and the Disciplinary Collegium, as well as of procedures regarding the appointment and promotion of judges.

Each and everyone of these issues is closely linked to the institutional strengthening of the judiciary as well as to the degree of independence of the judiciary and an increase of the level of trust toward it. The presented report is designed to support these very processes and is aimed at providing substantiated opinions on those issues which, despite achievements made in the judiciary, still remain unsolved.

Final Recommendations:

Recommendations for strengthening self-governance:

- Electing members of the High Council of Justice and the Disciplinary Board must become an exclusive competence of the judicial conference. To this end, corresponding authority of the Administrative Committee must be restricted;
- The decision-making rule for the judicial conference must be amended. In the process of electing members of the High Council of Justice and the Disciplinary Board; ballot secrecy must be ensured and a qualified majority as opposed to a simple majority must be determined;
- All members of the judicial conference as opposed to the chairperson of the Supreme Court must be delegated with the right to nominate candidates for judge members of the High Council of Justice;
- Evaluation and promotion of judges must be separated from the HCJ's competence. To this end, the judicial conference must set up an independent body responsible for issues pertinent to professional career of judges;
- HJC's competence with respect to appointment of court chairpersons must be limited and the power must be delegated to judges of individual courts;
- Prohibition of political activities must also apply to individuals appointed under the parliamentary quota. To this end, parliament's right to recruit candidates out of MPs must be restricted;
- President's power to prematurely withdraw two members of the HCJ appointed by him/her must be limited;
- The rule for recruiting members of the disciplinary board must be amended. The judicial conference must set up an agency independent from the HCJ which will include judges elected by the judicial conference, who are not serving as members of the HCJ at the same time;
- All members of the judicial conference as opposed to the chairperson of the Supreme Court must be delegated with the right to nominate a candidate for the disciplinary board membership;
- Judicial dismissals due to activities incompatible with the judicial status or conflict of interests with judicial obligations must remain within the competence of the disciplinary board;

Recommendations for judicial appointments:

- The law must envisage obligation of the High Council of Justice to announce a competition for a vacant position of a judge and allow individuals exempt from studying at the high school of justice to participate in the competition;
- Determine the obligation of the HJC to conduct interview with candidates, if a competition is announced;
- Determine an obligation of the HCJ to conduct interview with candidates in the process of selecting students in the high school of justice and afterwards, considering their candidacy for vacant positions;
- The legislation must envisage mechanisms for appealing results of a competition for admission to the high school of justice.

Recommendations for judicial transfers:

- Provide substantiation for the HCJ's decision on judicial transfer without consent of a judge concerned;
- Specify the number of times judicial transfer mechanism can be applied to one and the same judge even in various courts;

Recommendations for judicial appointments without a competition;

- Provide substantiation for the HCJ's decisions on judicial appointments without competition;
- The HCJ must use the authority in same instance courts;
- Different competition requirements that exist even in different courts of same instance must be taken into account.

Recommendations for judicial promotions:

- The rule and the criteria for judicial promotions must be determined;
- A logical connection between the rule for evaluation of efficiency of judge's work, as elaborated by the HCJ, and the process of judicial promotion must be introduced;
- Realization of judicial authority for at least 3 years must be determined as a precondition for promotion.

Recommendations for transparency:

- Amend Article 13 of the Law on Common Courts in favor of the standard of openness so as to allow photo and video recording of a trial, which must be regulated in terms of applicable procedures by a sub-legal normative act;
- An interested individual must be allowed to apply to court with a request to record a trial and be provided with an opportunity to, if technically possible.
- All interested individuals must be provided with an opportunity of audio recording, without prior permission by court;
- A unified standard for processing information kept by the judicial system must be elaborated, in view of individual characteristics of different types of litigations.

Recommendations for remuneration:

- Abolish salary supplements;
- Based on abolishment of supplements increase a salary defined by the law.