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The Mid-Term Review

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Judiciary, Law Enforcement and Investigation of Ill-treatment Cases

ადამიანის უფლებების სწავლებისა და მონიტორინგის ცენტრი

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1. Introduction

In the given document, the Human Rights Education and Monitoring Center (EMC) assesses the quality of implementation of the recommendations accepted by Government of Georgia, in the framework of the UPR, with regard to the institutional independence and impartiality of the judiciary and law enforcement, as well as to the independent investigation of ill-treatment cases.

2. The Implementation of the Recommendations under the UPR with regard to the Judiciary

It has to be noted that in the recent years institutional reforms carried out in the judiciary to some extent improves the legislative framework, however cannot achieve the main goal – that the justice is administered by independent and impartial judges, whose integrity and competence does not raise doubts. Up until now, the so-called 'three waves' of judicial reforms have not reached the goal of refreshing the system. The core reasons for it is the flawed, belated and often times legislative changes that are suited to the interests of the most powerful group of judges.[i] The analysis of the fulfillment of the recommendations on the institutional setup of the judiciary issued in the framework of the second cycle of UN UPR process reveals that the political will in terms of carrying out systemic and consistent judicial reform is still weak and insufficient.

Today the biggest challenge of the system is the powerful group of judges within the judiciary, majority of which are represented in the High Council of Justice or act as Chairpersons of courts. Another challenge is the non-transparent and unsubstantiated process of lifetime appointments and this is precisely how almost half of the judges were reappointed for life terms. The excessive powers of court chairpersons and flawed legislation and practice on disciplinary responsibility remain a significant problem. Acquittals in the court may be assessed positively; however, closer look on the system might reveal the problem of selective justice and emergence of inconsistent standards on high profile, politically sensitive and regular cases.

Ensuring the independence and impartiality of the judiciary's, prevention of political interventions (Recommendations 117.75, 117.76, 118.19)

<u>Not Implemented</u>

The independence and impartiality of the judiciary consists of a number of components. Unfortunately, country's mid-term report on the fulfillment of UPR recommendations revealed that the state does not approach the issue of the courts' independence in a comprehensive and complex manner and the accent is placed on fragmented changes, among others: Introduction of an independent inspector, devising strategy and action plan of the judicial system, passing of constitutional changes.

The civil society has positively assessed the independent inspector mechanism introduced by so-called 'third wave' reform,[ii] however, it also has to be noted that there are not sufficient and firm legislative guarantees, which questions the effectiveness of this mechanism. For instance, inspector is appointed and dismissed by the High Council of Justice through a simple majority vote. Furthermore, grounds for the inspector's dismissal is rather broad and vague. The independent inspector started consideration of complaints/applications falling under its competence only 11 months after the 'third wave' legislative changes had entered into legal force. This was due to disrupting the first election procedure of an independent inspector [iii] and announcement of the second competition late.[iv] The High Council of Justice elected inspector in November 2017, however, before recruitment of staff, she was unable to carry out its functions. It has to be noted also that the inspector considers only those disciplinary violations, which were identified after the institution started to function.

Adoption of a five-year strategy of the judiciary and a two-year action plan was seen as a positive step by the civil sector.[v] 'Coalition for Independent and Transparent Judiciary' actively participated in the process of drafting the documents. The activities foreseen by the strategy and the action plan mostly reflect the challenges in the judiciary.

However, implementation and monitoring of the implementation process remains problematic, namely based on the decision of the High Council of Justice, non-governmental organizations will not participate in the working groups on the implementation of the action plan. Including up until May, based on decisions rendered through a ballot, almost all meetings of working groups were closed for representatives of civil society. The minutes of working group meetings fully, also the six-month reports prepared by the working groups have not become accessible to the public up until now.

As for the Constitutional changes, EMC believes that despite several important and positive constitutional changes in the chapter on the judiciary, the constitutional reform on the judiciary required further preparation and analysis, amongst others analysis of those reforms and its outcomes, that were implemented in the recent years in the court system. In addition, the reform had to aim at overcoming the crisis created by unbalanced powers concentrated in the High Council of Justice, informal procedures and flawed practice of decision-making[vi]. Instead, the constitution reform even increased the role of the High Council of Justice and granted it the power to nominate Supreme Court Justices. While the law regulating the activities of the Council, also the Council activities are subject to harsh criticism, clearly increasing its powers lead to further challenges.

Apart from assessing these issues, it needs to be noted also that a particular threat to the independence of the judiciary are the failure to investigate cases in which judges reported exertion of pressure on them. In one of the most controversial cases of the recent years regarding the TV Company 'Rustavi 2', two Justices of the Supreme Court talked about pressures on them. Unfortunately, information about the progress of the investigation and its results are not still accessible. In addition, it is unknown how the investigation is proceeding in other cases relating to the issues in the judiciary, amongst those in the case of the alleged disclosure of qualification exam tests. Certainly, unfinished investigations affect the independence of those judges, who may be implicated in them.

Review of procedures on selection/appointment of judges and their transfer to other courts (Recommendations 117.77, 118.24)

Technically implemented (No perceived Progress)

Currently, Organic law on Common Courts of Georgia envisages three different procedures for the appointment of judges:

- Procedures on appointment for the first time for a probationary period;
- Procedures on the lifetime reappointment of those judges appointed for a probationary period;
- The transitional rules on the lifetime appointment of those judges, who have at least three-years of judicial experience.

All these three regimes for selection and appointment of judges contain a number of shortcomings, which in practice revealed that despite the reform, the selection and appointment of judges still do not satisfy the requirements of objectivity, reasoned decision-making, principles of merit based selection and transparency, it allows members of the High Council of Justice to render subjective decisions. In this direction, the state is responsible for maintaining the legal framework that allows the High Council of Justice to appoint a judge through a non-transparent and unsubstantiated procedure, among others:

- A Decision on a judicial appointment is rendered through a ballot (in certain circumstances by a secret ballot), which rules out reasoned decision-making;
- Interview sessions with the judges can be closed, a procedure candidates are inclined to invoke more often;

The monitoring of all stages of selection/appointment of judges leaves the impression that the judicial appointments are based on loyalty towards the Council members and even nepotism.[vii] There is reasonable doubt, that the Council uses its powers and the shortcomings in the law for ousting those judges from the system, who may have different views and for strengthening its own positions.[viii]

It may well be said, that the belated legislative reforms gave the former composition of the High Council the possibility to render a number of decisions on judicial appointments in a non-transparent manner, without reasoning and in questionable circumstances. Sadly, the new composition of the Council continues the flawed practice of judicial appointments. Past activities of judges appointed for life term do not attest to their principled commitment to justice, rule of law and independent judiciary.

Strengthening transparency and accountability of the judiciary through reforming the legislation on High Council of Justice and the system of case allocation (Recommendations 118.20, 118.21)

Reform of the legislation on High Council of Justice - Not implemented
System of Case Allocation – Perceived Progress

The civil sector has urged the government to regulate the issues relating to High Council of Justice for years. It is problematic that the Council activities are unregulated in a number of spheres, which gives it unfettered discretion and creates room for arbitrariness.

Analysis of the legal acts governing the work of the High Council of Justice and monitoring of its activities reveal a number of shortcomings in its activities, in terms of principles of transparency and accountability:

- The law does not foresee the scope, rules and procedure for appealing decisions of the Council in court, which effectively rules out review of their legality and reasoning;
- The law does not require that the decisions of the Council are reasoned. This problem is well illustrated by the decisions on admission to the High School of Justice, promotion and transfer of judges, chairmen of courts, chambers and panels;
- Information about the sessions of the Council and the agenda are not published in observance of time limits and drafts/materials on issues to be considered during the session are not accessible either before or during the session. Video recording of the session is only permissible during the opening of the session. Time limits for publishing decisions rendered by the Council are problematic. It has to be noted that decision of the Council are not codified in a consolidated form:
- The procedure for expressing views by persons attending the session of the High Council of Justice are not regulated;
- The procedure for closing the sessions of the High Council of Justice is not regulated.
- Minutes documenting the sessions of the Council are not taken. In the recent period, only an audio-video recording of the sessions is taken. In practice, a number of technical shortcomings were identified, when the recordings was not available for interested parties.

Despite the fact, that non-governmental organization and one of the non-judicial members of the High Council of Justice, raise initiatives regarding accountability and transparency of the Council in various formats, until now no changes have been carried out either on legislative level or through adoption of a bylaw.

As for the case allocation system in common courts, the introduction of the electronic case assignment system represents one of the most significant reforms and a positive step in the recent years. However, the power maintained by the chairpersons of courts to decide unilaterally on allocation of judges across narrow specializations created within the court is still problematic. This authority of the chairperson has a substantial adverse effect on principle of random case allocation.

Since December 31, 2017 electronic system of case allocation started to function in all courts, without an exception, however, due to shortage of judges, random case allocation system is not applied in 1 district and 13 magistrate courts. Starting from January 2018, in total 43.227 cases were distributed through this electronic

program, however, out of this number 27.549 (64%) cases were distributed in compliance with random allocation principle.

The analysis of the acts approved by the Council concerning random and equal distribution of cases, also monitoring of the system in a pilot regime and its subsequent introduction on the national level revealed the following challenges that prevent proper implementation of the random allocation principle:[ix]

- Shortage of judges, especially in regions, which prevents random allocation of cases in all courts;
- The procedure of duty shifts of judges, which permits allocation of a case to a particular judge without giving due account to their specialization and a randomness principle;
- The deficient practice of case allocation in sequential order by the staff of the chancellery;
- Non-systemic and fragmented amendments to the rule on the functioning of the electronic program and increase of exceptional circumstances;
- Particularly problematic is the retained function of the Chairperson to allocate judges in narrow specializations as he/she wishes;
- Establishment of important rules to be invoked in cases of program disruption at secondary legislative level (bylaws);
- Although the excessive workload of the judges is one of the major challenges in the judicial system, the new rule on case allocation currently in force does not contain the principle of fair and objective distribution of cases based on its difficulty and volume in order to ensure equal distribution of cases.

3. The Implementation of the Recommendations under the UPR with regard to the Law Enforcement and Investigation of Ill-treatment Cases

The institutional arrangement of the law enforcement system, its independence and political neutrality, accountability and systematic measures against impunity, have been one of the country's most challenging issues for the last few years. Among the reforms of the recent years, it was essential, for the purposes of increasing the independence of the Prosecutor's Office, to make amendments to the Constitution of Georgia, as well as, to implement institutional reforms within the Ministry of Internal Affairs, including the creation of Human Rights Department. However, despite the steps taken by the State, the mechanisms of accountability, democratic control and oversight of the law enforcement system are still weak.

One of the main challenges in the law enforcement system today, is the excessive authority of the State Security Agency and the low level of accountability. The State Security Service (which became an independent agency from the Ministry of Internal Affairs in 2015) has a number of functions that are incompatible with its nature and competence (for example, the investigation of the crime investigation). Excessive power is not balanced by proper judicial and parliamentary control mechanisms.

The timely and effective investigation of the offenses allegedly committed by the representatives of the law enforcement agencies, remains a challenge. Yet, no systemic measures have been taken to tackle the problem of impunity. Independent investigative mechanism has not been created. Efficiency and independence of the General Inspection of the Ministry of Internal Affairs are another major concern. Another issue, which became increasingly problematic in recent years, concerns the cases of police officers allegedly planting drugs as evidence. In 2017, courts passed a number of acquittal sentences on the grounds that the authenticity of drugs was not sufficiently proven.

Establishing an independent investigative body for the purpose of objective investigation of torture, ill-treatment and other acts committed by the law enforcement (Recommendations 117.81, 118.22, 118.27, 118.28, 118.29, 118.30, 118.31)

Not Implemented

According to the Public Defender's reports[x], the number of facts of ill-treatment in the police system has increased in recent years. In these conditions, the facts of investigation of these cases are extremely rare. As a rule, the Prosecutor's Office opens up an investigation, but the process of granting the victim's status in time, as well as, giving correct qualification to crimes and the timely completion of the investigation, is problematic.

In response to this challenge, the long-term demand of local NGOs and the Public Defender has been the creation of an institutionally independent investigative mechanism. In 2018, the Government initiated a draft law, which envisages the creation of an independent investigative body, which is an important step forward. However, the initiated version of the bill has some significant drawbacks. Unfortunately, the government did not take into the consideration number of significant recommendations[xi] when working on the draft law, including:

- Refused to grant a criminal prosecution authority to a new institution (similar recommendations have also been issued by other States (118.31). Thus, according to the draft law, the Prosecutor's Office will continue to supervise the investigation carried out by an independent mechanism. Considering the specifics of the investigative system in Georgia[xii], the Prosecutor's Office has the ability to actually determine the course of investigation, which significantly weakens the investigative functions of the new agency[xiii];
- The mandate of a new mechanism is also problematic, which provides for the investigation of specific types of crimes by this institution and excludes, for example, the cases of planting drugs by the police. Also, the jurisdiction of the new institution does not apply to crimes committed by the Minister of Internal Affairs or the Head of State Security Service. It is illogical to limit the inspector's mandate with regards to the officials, who have the most power.
- The main problem of the draft project is that the function of investigating offenses, committed by the law enforcement agencies, will be transferred to the Personal Data Protection Inspector, who, at the same time, controls personal data protection and secret investigative activities within the law enforcement and investigative bodies. Therefore, it is questionable, whether or not, it's sufficient to grant two completely different functions to one body.[xiv]

External and internal control mechanisms of the police system are weak and obscure. The General Inspection of the Ministry of Interior, the mechanism of internal control over the police, is not sufficiently independent of the leadership of the Ministry. The official examination of the police system is not based on clear, concrete and consistent procedures. The legislation does not specify the deadlines for the inspection and all the necessary stages. The existing regulations do not include the rules of obtaining evidence and evaluation. The legislation does not guarantee the applicant's involvement in disciplinary proceedings. In case, facts of disciplinary misconduct are not confirmed, the decision is not properly grounded. And the relevant act does not clarify the decision-making procedures. There are no effective mechanisms in the country for appealing the results of workplace inspection in the court.[xv]

Depoliticizing the law enforcement system, impartiality, and independence (Recommendations 118.22, 118.24)

Not implemented

The State, in its interim report, considers the component to be fulfilled, however, the justification of the implementation excludes the second part of the recommendation, which concerns the police system supervision and is only limited to the activities implemented for judicial independence.

The existing organizational arrangement of the law enforcement system cannot provide sufficient guarantees to depoliticize the respective bodies. The Ministry of Internal Affairs is subject to the principles of strict hierarchy, where the Minister, as a political figure, has a virtually unrestricted mandate with regard to the activities of each agency. Minister also has a function of service supervision, which implies the right to supervise all the decisions and activities within the Ministry. All the branches of the Ministry, including the sub-agency, are accountable to the Minister directly. It is low and there is virtually no separation between the political and professional leadership of the police, which reduces the police functional independence. There is a danger of politicizing the existing human resource policy in the Ministry system. The decision about appointing any level official is made by the Minister directly. In this regard, the changes in the Ministry's system have not yet been implemented and the situation remains the same as it had been for years[xvi]. The Minister appoints and dismisses the officers of the Criminal and Patrol Police Department, General Inspection, who, in their turn, are accountable to the Minister directly. With this institutional arrangement, the State fails to provide protection for the police from possible political influence. Although, it is noteworthy that, the Minister in his report before the parliament, has announced fundamental changes of the recruitment policy in the law enforcement system.

Ensuring the Independence of the Prosecutor's Office (Recommendation 118.23)
Technically implemented (No perceived Progress)

In the Government's interim report, instead of the activities carried out during the reporting period, the State focuses on the reforms implemented in 2015. The issue of independence of the Prosecutor's Office, as amended by the law in 2015, is still considered a challenge. With the above-mentioned amendment, in order to ensure the independence and effectiveness of the Prosecutor's Office, the Prosecutorial Council was created. However, the legislation did not ensure independent functioning of the council itself.[xvii] In reality, it is part of the system of the Ministry of Justice, which is directly chaired by the Minister. The Council is not independent in the appointment of the Chief Prosecutor, since only the Minister of Justice has the right to nominate a candidate. She also has a decisive vote as head of the council[xviii]. In this regard, the constitutional amendments of 2017 have been an important step, as they essentially changed the status, arrangement, and procedure of the Prosecutor's Office.[xix]

However, the protection of these safeguards should be ensured by the Organic law on Prosecutor's office and other acts. The process of harmonization with constitutional amendments is now underway. Hence, at this point, it is impossible to say whether the actual independence of the prosecutor's office and parliamentary accountability, will be ensured or not.

4. References

[i] The Coalition is Starting "Make Courts Trustworthy" Campaign, available at: http://coalition.ge/index.php?article_id=177&clang=1, last visited: 24.05.2018

[ii] The coalition's opinion about the third wave of Judicial reform, page 5, available at: http://coalition.ge/files/coalitions_opinion_about_the_third_wave_of_judicial_reform__14_july_2015-1.pdf; last visited 24.05.2018

[iii] High Council of Justice's decision №1/58; available at: http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/58-2017.pdf; last visited: 24.05.2018

[iv] High Council of Justice's decision №1/312; available at: http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/312.pdf; last visited: 24.05.2018

[v] The Coalition for Independent and Transparent Judiciary addresses the renewed High Council of Justice; available at: http://coalition.ge/index.php?article_id=161&clang=1; last visited: 23.05.2018

[vi] EMC assesses the work of the constitutional commission and the project of constitutional changes, available at: https://emc.org.ge/en/products/emc-assesses-the-work-of-the-constitutional-commission-and-the-project-of-constitutional-changes-5; last visited: 23.05.2018

[vii] The Coalition is Starting "Make Courts Trustworthy" Campaign, available at: http://coalition.ge/index.php?article_id=177&clang=1, last visited: 24.05.2018

[viii] The Coalition is Appealing the Decision on the Case of a Former Judge, available at: http://coalition.ge/index.php?article_id=179&clang=1; last visited: 24.05.2018

[ix] The new system of case distribution in common courts, available at: https://emc.org.ge/en/products/sakmis-ganatsilebis-akhali-sistema-sasamartloshi; last visited: 25.05.2018

[x]The situation in Human Rights and Freedoms in Georgia, Annual Report of the Public defender of Georgia, 2017, available at: http://www.ombudsman.ge/uploads/other/5/5139.pdf, last visited: 25.05.2018

[xi]The Coalition opinions on the establishment of Independent state inspector service, available at: https://emc.org.ge/ka/products/koalitsiis-mosazrebebi-sakhelmtsifo-inspektoris-samsakhuris-shekmnastan-dakavshirebit; last visited: 25.05.2018

[xii] Under current regulation, the prosecutor's role in the investigation process is almost unlimited. The Prosecutor has the right of direct supervision of an investigation, based on the Procedure Code. In most cases, the prosecutor directly determines the investigative strategy, has the authority to give the investigator the order to carry out the task, and is authorized to cancel the investigator's decision. In addition, the prosecutor, in any case, has the right to use the status of an investigator and to investigate directly. (See also Analysis of Investigative System, "Human Rights Education and Monitoring Center (EMC)" 2018, Available at: https://emc.org.ge/en/products/sagamodziebo-sistemis-analizi. The legislative package initiated by the government includes the changes to be made in the Code of Criminal Procedure. However, the proposed draft does not envisage the restriction of the prosecutor's authority on the cases, which fall under the inspector's jurisdiction. On the contrary, the bill specifically indicates that a special department will be created in the Prosecutor's Office to implement procedural supervision over investigating cases of the State Inspector's Office, which will carry out the procedural administration of the investigation in accordance with the law. As for an investigator operating within the inspector service, the procedural obligations as determined by the Criminal Procedure Code, including the obligation to carry out the directions issues by a prosecutor (see: https://matsne.gov.ge/ka/document/download/90034/64/en/pdf) remains intact. Considering the existing legislative system of the country, the existence of State Inspection Service as a separate body serves no purpose, without a proper revision of the legislation and subsequent significant changes.

[xiii] The Coalition and the Public Defender React to the Government's Initiative to Create an Independent Investigative Mechanism, available at: https://emc.org.ge/ka/products/koalitsia-da-sakhalkho-damtsveli-ekhmianebian-damoukidebeli-sagamodziebo-mekanizmis-shekmnis-taobaze-khelisuflebis-intsiativas; last visited: 25.05.2018

[xiv] Law of Georgia on Personal Data Protection, available: https://matsne.gov.ge/en/document/download/1561437/5/en/pdf last visited: 25.05.2018

[xv]Disciplinary Liability System In Law Enforcement Agencies, available at: https://emc.org.ge/en/products/distsiplinuri-pasukhismgeblobis-sistema-samartaldamtsav-organoebshi, last visited:25.05.2018

[xvi]Policy of Invisible power (Analysis of the law Enforcement System in Georgia), available at: https://emc.org.ge/uploads/products/pdf/Policy_of_Invisible_Power.pdf, last visited: 25.05.2018

[xvii]Coalition's Another assessment of Amendments in the law on the prosecution of Georgia, available at: https://emc.org.ge/ka/products/koalitsiis-kidev-erti-shefaseba-prokuraturis-kanonshi-tsvlilebebis-mighebastan dakavshirebit, last visited: 25.05.2018

[xviii] Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015) available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)039-e, last visited: 25.05.2018

[xix] Georgia - Constitutional amendments as adopted at the second and third hearings in December 2017, adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018) available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)005-e, last visited: 25.05.2018