

# ASSESSMENT OF THE JUDICIAL REFORM

Electronic System of Case Distribution  
System for Disciplinary Liability of Judges



# **Assessment of the Judicial Reform**

Electronic System of Case Distribution  
System for Disciplinary Liability of Judges



The European Union  
for Georgia  
EU4Justice

ადამიანის უფლებების მწავლებელი და მონიტორინგის ცენტრი  
**EMC**  
Human Rights Education and Monitoring Center

**IDFI**  
Institute for Development  
of Freedom of Information

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## Introduction

This publication was prepared in frames of the project “Facilitating Implementation of Reforms in the Judiciary (FAIR)” which Human Rights Education and Monitoring Center (EMC) is implementing with support from the European Union and in cooperation with Institute for Development of Freedom of Information (IDFI) and the Caucasus Research Resource Center (CRRC Georgia). The purpose of the publication is to assess the two novelties introduced in the so-called “third wave” of the judiciary reform: the electronic system of case distribution and the system for disciplinary liability of judges as the office of Independent Inspector has been put into action.

It should be pointed it out from the very beginning that the “third wave” draft law was revised multiple times before it was eventually approved at the third hearing. This substantially altered the original and final contents of the draft legislation; however, the final version of the document retained several progressive provisions while at the same time a number of improvements were removed from the document.

Introduction of the electronic system for case distribution in Common Courts is one of the most important novelties of the “third wave” reform. It is designed to tackle a range of challenges in terms of the independence and impartiality of Courts. The new system is based on the principle of random distribution of cases between the judges.

Improving the system for disciplinary liability of judges constitutes another significant achievement of the “third wave” reform. The new legislation introduces a number of important modifications in this direction according to which the office of Independent Inspector has been set up within the High Council of Justice; judges are now authorized to request public access to disciplinary sessions; deadlines for preliminary examination and investigation of disciplinary cases have been established; the High Council of Justice is now required to make justified decisions on terminating disciplinary proceedings, to publish the decisions on their website, etc.

This monitoring report aims to review the legislative framework developed to address the modifications described above, decisions made by the High Council of Justice and the flaws in their practical implementation. Based on the findings, the report also provides suggestions and recommendations in response to the existing challenges.

## Methodology

The report covers the period starting from the date when the “third wave” amendments were enacted through to December 31, 2018. The monitoring team employed a number of research methods and sources to obtain information and data:

**Analysis of the legislation and the decisions of the High Council of Justice** – analyzing the legal framework produced during the “third wave” of reform and assessing the decisions made by the High Council of Justice regarding the issues mandated to them was some of the most important research tools for monitoring purposes;

**Analysis of international standards and recommendations** - in addition to the national legislation framework, the project team examined the relevant international experience and assessed the extent of compliance of Georgian legislation with corresponding international standards and recommendations;

**Monitoring of the High Council of Justice sessions** – as the High Council of Justice has been legally authorized to handle a number of issues, regular attendance at the Council sessions was one of the most important means for collecting information;

**Face-to-face interviews with judicial authorities** – based on the questionnaire developed in advance, the project team individually interviewed the justice system professionals regarding the disciplinary liability proceedings and the electronic system for case distribution. Namely, face-to-face interviews were conducted with judges and chancellery staff of Rustavi City Court; chancellery staff of Tbilisi City Court and Court of Appeals; Head of the Information Technology Department; chancellery staff of Tbilisi Supreme Court; staff of the Management Department and the administrative unit of the Independent Inspector’s office and finally, the Independent Inspector;<sup>1</sup>

**Collecting and processing the statistical data** – for the purpose of monitoring the electronic system of case distribution the project team requested and obtained public information in several stages from the High Council of Justice; Supreme Court of Georgia; Office of Independent Inspector and each Court;

**Analysis of secondary data** – reports, research and evaluations published by a range of local and international organizations and the Public Defender of Georgia constituted another important source of information for monitoring;

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<sup>1</sup> Originally, the project team was planning to interview the judges of Tbilisi City Court, Court of Appeals and the Supreme Court but pointing to the tight schedules of the judges, the courts refused to arrange the meetings.

**Analysis of potential gaps in practice** – the project team also observed the actual application of the new system for distributing cases that were filed by the project implementing partners.

## Main Findings

Monitoring of the new system for case distribution and the proceedings for disciplinary liability of judges and analysis of national legislation, international recommendations and standards, the decisions of the High Council of Justice and face-to-face interviews with the justice system professionals exposed the following main findings and challenges in the system:

### New electronic system for case distribution

- While the new system for distributing cases between the judges is a very important step forward, a number of issues remain unresolved in the legislation which commissions the High Council of Justice to address them;
- Lack of judges, particularly in the regions, excludes the opportunities for random distribution of cases in every court;
- Since the approval of the new rules and the system by the High Council of Justice and particularly after the new system became operational across the country, there have been fragmented and intermittent changes in the rules; the list of exemptions from random distribution has also increased;
- The regulations on duty judge schedules allow for transferring a case to a particular judge regardless of specialty and overlooking the principle of random distribution;
- The important rules applicable during delays in the system are regulated by the normative act of the High Council of Justice and not the law. During the system failure the process of distributing cases by the chancellery staff between the judges based on the sequential rule is also flawed;
- Authority of Chairpersons of courts to assign judges to narrow specialties also raises concerns;
- Chairpersons of the court, deputy Chairpersons and chairs of the chamber/panel have access to the electronic system to see the number of cases assigned to each judge. Court Chairperson is also authorized to increase or reduce the workload of each judge;
- For panel review of cases the electronic system randomly appoints only one speaker judge. The process of selecting two other judges in order to form the panel is unclear;
- Procedures and deadlines for secondary distribution of cases in the event of recusal/self-recusal of judges are unclear. Participation of the Court Chairperson in secondary

distribution of cases provided for by the criminal code and civil procedure codes is also troublesome;

- The current version of the system does not take into account the principle of objectivity and volume of the case in order to ensure their equal distribution;
- Professionals of the Common Courts system are not fully informed about the modifications to the rules of case distribution.

## **The system for disciplinary liability of judges and the performance of the Independent Inspector**

- The Independent Inspector's Office was established within the High Council of Justice, that limited excessive exclusive powers of the Secretary of the High Council of Justice at the initial stage of disciplinary proceedings;
- Transparency of the process of disciplinary proceedings has been increased. In particular, the High Council of Justice is obliged to make a substantiated decision on termination of disciplinary proceedings and to publish it on its website. Also, the judge has got the possibility to make the sessions of disciplinary proceedings publicly available (sessions regarding imposing disciplinary liability and sessions of the Disciplinary Committee and Disciplinary Chamber, except for meetings and decision-making procedures);
- Timeframe for the preliminary inspection and examination of the disciplinary case has been defined. If the Council fails to make a decision in this timeframe, disciplinary proceedings should be terminated;
- The legal guarantees of judges have been increased in the course of disciplinary proceedings. In particular, a judge has a right to defender. The judge has the same right during the proceedings at the Disciplinary Committee;
- The standard of proof has been specified at the stage of imposition of disciplinary liability and it was established that Disciplinary Committee makes a decision on the basis of mutually compatible and convincing evidence;
- Disciplinary Committee is entitled to send a reprimand letter as a disciplinary measure to a judge instead of the High Council of Justice;
- The objectives of disciplinary liability of judges are not still determined in the Organic Law that creates a threat of the misuse of disciplinary regulations. Also, the types of disciplinary misconduct of a judge as specified by the Organic Law are still general, that makes possibility of broad interpretation and do not meet the criteria of foreseeability and clarity and leads to risks of the diminishing independence of individual judges;

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- The organic law does not specify either the issue of the relevance and admissibility of the evidence, or the standard for proceedings of the case at the initial stage of disciplinary proceedings;
  - Theoretically, two members of the Disciplinary Committee can still impose guilty charges to the judges and set disciplinary liability and penalty;
  - Organic law does not adequately ensure institutional independence guarantees for the inspector. The grounds for the dismissal of the inspector are also too general; Furthermore, real influence of non-judicial members of the Council on the decision-making process is not guaranteed during the process of appointment and dismissal of the Inspector;
  - The difference between the number of reports submitted to the Independent Inspector on the alleged misconduct of the judges and the number of initiated prosecutions and disciplinary proceedings against judges is still noticeable. In addition, the number of suspended disciplinary proceedings is increasing. Out of 699 facts of alleged disciplinary misconduct, disciplinary proceedings were initiated in 33 cases and only in 4 cases a judge was charged with disciplinary liability;
  - Despite determining the timeframe for the preliminary inspection and examination of the disciplinary case, disciplinary proceedings are being conducted in missing the deadlines due to delayed appointment of the Inspector;
  - Conclusions of the Independent Inspector on disciplinary cases are not available, information about the content of Inspector's conclusions, except for the rare cases, also could not be found in the decisions of the Council on termination of disciplinary proceedings. The contents of the Inspector's conclusion are also unclear in decisions of the Disciplinary Committee;
  - After the amendments within the "Third Wave" judicial reforms, however, HCoJ does publish decisions on termination of disciplinary proceedings on its own website, but decisions are not uniform, some decisions lacks of substantiation, and number decisions are completely unsubstantiated;
  - To date none of the judges have exercised their right to public disciplinary hearing;
  - To date none of the members of the High Council of Justice have stated dissenting opinion on the termination of disciplinary proceedings by the Council, despite the fact that in several decisions, the positions of the Council members differed significantly.

# **The New System of Case Distribution**

## Legal Framework

As a result of the legislative amendments introduced by the “third wave” of the judicial reform, the organic law of Georgia on Common Courts now includes one more provision which establishes the electronic system for distributing cases between the judges in district (city), appeal and supreme courts automatically, based on the principle of random distribution.

Notably, as early as in May 2014 before the launch of parliamentary hearings, the Georgian Minister of Justice addressed European Commission for Democracy through Law (referred to as Venice Commission hereinafter) and requested their opinion on Georgia’s revised organic law on Common Courts.<sup>2</sup>

In its opinion, the Venice Commission referred to the recommendation of the Committee of Ministers according to which: “the allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge.”<sup>3</sup> The Commission also notes that the powers of court Chairpersons to distribute cases between the judges involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases.<sup>4</sup> Drawing on this principle, the Venice Commission welcomed the new rules for case distribution introduced in the organic law of Georgia on Common Courts;<sup>5</sup> however, it described the provision establishing the electronic system of case distribution as insufficient and stressed that the rules for operating the electronic system must be clear and it should be possible to verify their correct application. The Venice Commission also recommended that for instances when the electronic system of case distribution is out of order, the technical indications on how to allocate cases should also be laid down in the draft law.<sup>6</sup>

Sadly none of these recommendations were taken into consideration during any stage of the parliamentary hearings of the draft law. The eventual version of the law provides only a few guiding principles:<sup>7</sup>

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2 European commission for democracy through law (Venice commission), joint opinion on the draft law on amendments to the organic law on general courts, pg. 3 [available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)031-e), accessed on: 03.10.2018]

3 *Ibid*, ¶78.

4 *Ibid*, ¶79-80.

5 *Ibid*, ¶ 78.

6 *Ibid*, ¶80.

7 Law of Georgia on Common Courts, Article 58<sup>1</sup>.

- (1) Cases must be allocated in courts of all three instances electronically, based on the principle of random distribution;
- (2) If the electronic system breaks down, cases must be allocated through the sequential rule which means that the cases will be distributed between the judges based on the sequence of their submission and the alphabetical order of judges;
- (3) The High Council of Justice has been mandated to approve the rules for automatic electronic distribution of cases between the judges.

## Regulations Adopted by the High Council of Justice

On May 1, 2017 the High Council of Justice adopted the regulations for distributing cases between the judges of Common Courts automatically using the electronic system.<sup>8</sup> Importantly, the original version of the regulation has been modified multiple times, particularly since the system became operational across the country.<sup>9</sup>

It should also be noted that the regulations approved by the High Council of Justice regarding the case distribution system contains a number of ambiguous and problematic provisions.

## Exemptions

Both the original version of the regulation on the electronic system of case distribution and the updated/modified text provides a wide-ranging list of circumstances where random distribution of cases is not applicable. Particularly, exemptions from the random distribution requirement are provided in the following cases:<sup>10</sup>

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8 May 1, 2017 decision of the High Council of Justice №1/56, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/konsolidirebuli%20gadackvetilebebi/56-2017.pdf>, accessed on: 05.10.2018]

9 The rules were modified during every session of the High Council of Justice held in January and February: January 8, 2018 decision №1/1/, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/1-2018.pdf>, accessed on 06.11.2018]; January 15, 2018 decision №1/64, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/64-2018.pdf>, accessed on: 06.11.2018] January 22, 2018 decision №1/79 [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/79-2018.pdf>, accessed on: 06.11.2018] January 29, 2018 №1/85, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/85-2018.pdf>, accessed on: 06.11.2018] February 12, 2018 decision №1/92, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/92.pdf>, accessed on: 06.11.2018] February 22, 2018 decision №1/144, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/144-2018.pdf>, accessed on: 06.11.2018]

10 May 1, 2017 decision of the High Council of Justice №1/56, Article 3.

- When there is only one judge with the magistrate judiciary authority in the respective municipality;
- When there is only one judge of the relevant specialty in the district (city) court;
- When there is only one duty judge of the relevant specialty in the district (city) court.

*Due to the absence of a sufficient number of judges, cases are not randomly distributed in one District and 13 Magistrate Courts.*

Based on these exemptions, cases are not randomly distributed in Gali-Gulripshi and Ochamchire-Tkvareli district court. According to the information of the High Council of Justice,<sup>11</sup> there is only one judge of the relevant specialty in the mentioned court. In addition, cases are not distributed randomly in 13 other municipalities<sup>12</sup>. According to the Council, only one judge has the magistrate judiciary authority in the respective municipalities.<sup>13</sup>

As stated in the data received from the High Council of Justice, from December 31, 2017 to December 31, 2018 in total 22 727 cases were allocated without the rule only on the basis of the aforementioned exemptions<sup>14</sup>

As for the exceptions for cases of a certain specialty, in up to 21 circumstances civil, administrative and criminal cases are assigned to the judge who issued the decision/judgment:<sup>15</sup>

- When the claim is filed again due to the refusal to admit the case or failure to review/hear the claim or due to termination of legal proceedings;
- When after the admission of the claim, the same parties file the complaint again on the same grounds about the same subject matter;
- When filing a complaint regarding the decision to secure the claim;
- When submitting the application again regarding the decision to secure the claim;
- When submitting a complaint after the decision is made to secure the claim or evidence before the claim is filed with the court;
- When submitting a claim after the temporary judgement is made to issue an administrative-legal act or to carry out an action before the claim is filed with the court;
- When submitting an application about the changes in the areas of support after recognizing the person as a support recipient;

11 High Council of Justice correspondence №1905/2562-03-თ.

12 Qobuleti, Baghdati, Tkibuli, Tskaltubo, Dusheti, Tianeti, Kazbeti, Akhgori, Qareli, Lagodekhi, Kvareli, Ninotsminda and Qeda.

13 High Council of Justice correspondence №382/308-03-თ.

14 High Council of Justice correspondence №56/3724-03-თ.

15 May 1, 2017 decision of the High Council of Justice №1/56, Article 3.

- When filing a claim about the property of the debtor after the application regarding the insolvency has been admitted;
- When submitting an application requesting to correct the inaccuracies in the judgement or evident mathematical mistakes;
- When submitting an application requesting additional judgement;
- When submitting an application requesting explanations of the court ruling;
- When the court of upper instance annuls the ruling and returns the case to the previous court except if stated otherwise in the decision of the court of upper instance;
- When submitting an application to resume the legal proceedings due to the newly discovered circumstances;
- Solicitations requiring deprivation of liberty of a number of individuals accused of the same crime or requiring to carry out a number of investigatory and procedural activities for the same crime are assigned to the same judge;
- The issue of canceling, modifying or retaining the custodial sentence when the accused is in hiding and in case of his arrest is handled by the same judge who issued the custodial sentence;
- Solicitations made during the introductory hearing to issue a judgement without hearing the case on its merits against the accused are assigned to the judge who led the first introductory session;
- If the cassation court cancels the court of appeals decision to recognize the solicitation for the ruling due to newly discovered circumstances as inadmissible, the case is assigned to the judge who issued the appealed ruling except if stated otherwise in the cassation court decision, etc.

In addition, the regulation also covers a category of cases where the judges are assigned as provided for by the civil and criminal procedure codes. For example:

- Breach of order during the court session is handled by the court/hearing Chairperson;<sup>16</sup>
- When appealing the decision made in absentia, the issue of admitting the appeal is handled by the judge who made the decision in absentia;<sup>17</sup>
- Based on the solicitation of either party, places of residence of victims and witnesses of the case or other reasons which are related to incurring less court expenses, the Chairperson of the upper instance court is authorized to transfer the case to another court;<sup>18</sup>
- Disputes about the jurisdictions are handled by the Chairperson of the upper instance court, etc.

During face-to-face interviews the judges of Rustavi City Court noted that the exemptions provided in the regulation adopted by the High Council of Justice are derived from the procedures codes and are compatible with the current court practice.

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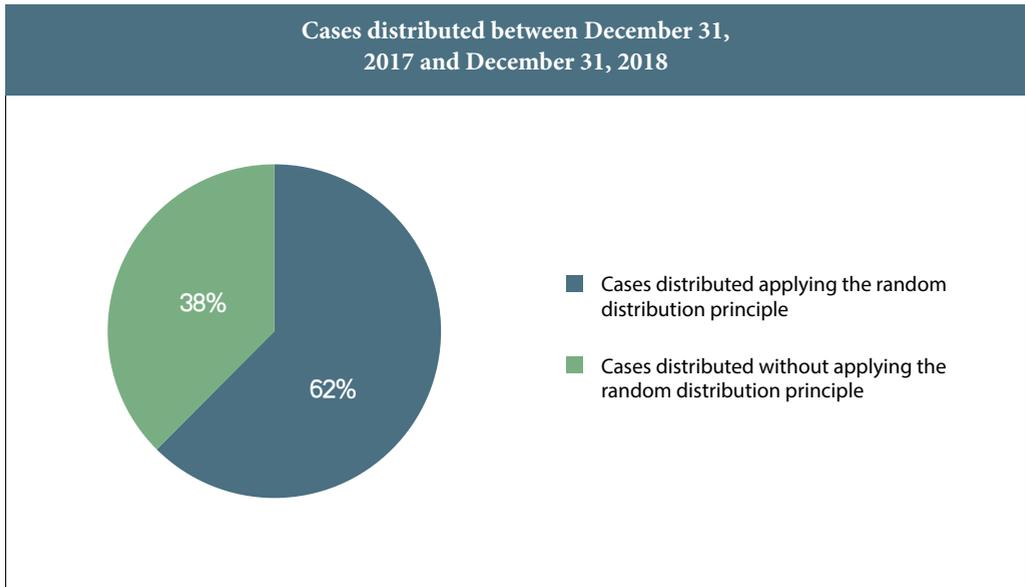
<sup>16</sup> Civil Procedure Code of Georgia, Article 212 and Criminal Procedure Code of Georgia, Article 85;

<sup>17</sup> Civil Procedure Code of Georgia, Article 239.

<sup>18</sup> Criminal Procedure Code of Georgia, Article 21.

**Rustavi City Court judge:** *I positively assess the exemption where in case of refusing to admit the claim, the secondary submission of the claim goes to the same judge.*

According to the information of the High Council of Justice, from December 31, 2017, to December 31, 2018, a total of 254 852 cases were distributed through the electronic system out of which 159 213 cases were allocated with using the random distribution principle.<sup>19</sup>

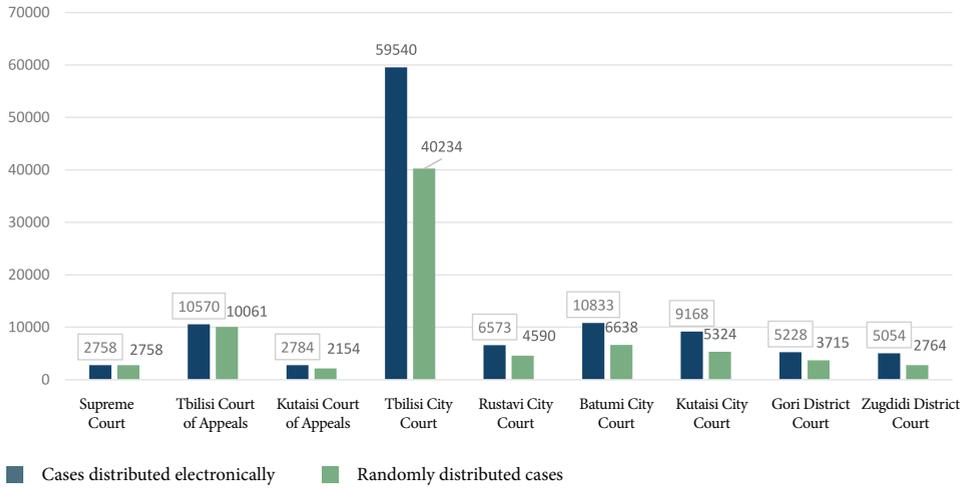


Based on the statistics provided by the High Council of Justice<sup>20</sup> the table below shows the share of randomly distributed cases out of all the cases which were allocated through the electronic system. For accurate analysis of the statistical information it should be elaborated that in the magistrate courts where there is only one judge, the cases are normally assigned directly, without random distribution. However, when the magistrate judge is on vacation or absent for some other reason, the judge who will fulfill his/her duty is selected randomly. Consequently, the cases assigned to the acting judge in the absence of the magistrate judge are categorized under the randomly distributed cases.

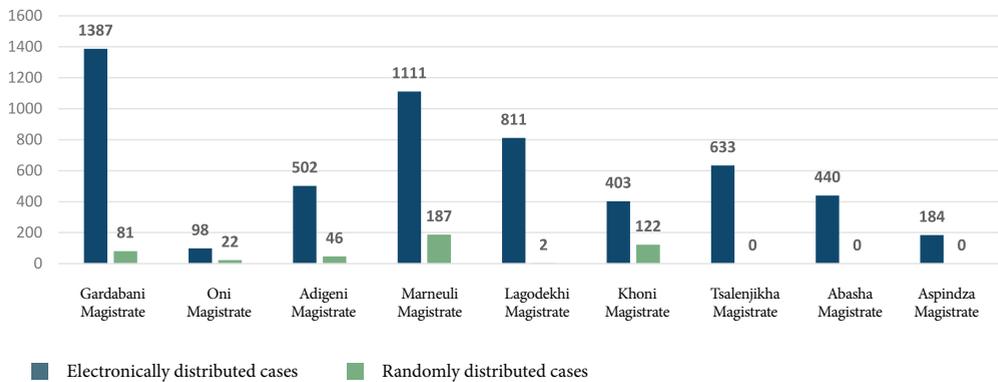
<sup>19</sup> High Council of Justice correspondence №56/3724-03-09.

<sup>20</sup> High Council of Justice correspondence №1905/2562-03-09; It Should be noted that in December 2018, the project team once again applied to the High Council of Justice for the updated statistical data, however the information presented by the Council includes data counted according to the three Instances of the Courts, not by each Court.

Cases distributed in several large Courts between December 31, 2017 and July 31, 2018



Cases distributed in several Magistrate Courts between December 31, 2017 and July 31, 2018



## Hearing of Cases by Judicial Panel

The rules for case distribution provide different procedures for allocating cases, which are to be reviewed by the judicial panel as pursuant to the current legislation.

For panel review of cases in the first instance courts, the Chairperson of the Court determines the composition of the judicial panel. Although the rule provides that the judge, who during the original hearing of the case unilaterally established the necessity for the case to be heard by the judicial panel, must be mandatorily involved in the panel, the issue of forming judicial panels by the court Chairperson raises concerns.<sup>21</sup> This provision is one of the outcomes of the modifications introduced in the rules on July 24, 2017. The original text of the rule provided that the electronic system would select judges for panels to hear cases in district (city) courts.<sup>22</sup> According to the High Council of Justice, the modification was based on the provisions of the civil procedure code pursuant to which the justified judgement to hand over the case for judicial panel hearing is submitted to the court Chairperson who then determines the composition of the panel with mandatory engagement of the initial judge in the panel.<sup>23</sup> As one of the main purposes of the new case distribution system is to electronically allocate cases randomly, it is reasonable to revise the existing legislation in compliance with the principles of the new system in order to ensure greater efficiency of the positive developments introduced by the new program.

The regulations on distributing cases in the appeals and cassation courts have also been altered multiple times. Originally, the case to be heard by a judicial panel was assigned to the presiding/speaking judge and the electronic system had to additionally select the needed number of judges to form the panel.<sup>24</sup> With July 24, 2017 modifications, in the cassation and appeals courts the cases to be heard by the panel were allocated to the presiding/speaking judge and the respective panel.<sup>25</sup> On December 18 the regulation was modified once again and as of today, in the court of appeals and cassation, cases to be heard by a judicial panel are assigned only to the presiding/speaking judge.<sup>26</sup> Given the fact that there are no references to the rules for selecting other members of the panel, it is unclear whether the presiding/speaking judge reviews the assigned case with a pre-established panel or it is allowed to form a new judicial panel with participation of the presiding/speaking judge.

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21 High Council of Justice decision №1/243, Article 1.

22 High Council of Justice decision №1/56, Article 4.

23 Civil Procedure Code of Georgia, Article 26.

24 High Council of Justice decision №1/56, Article 4.

25 High Council of Justice decision №1/243, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/243-2017.pdf>, accessed on: 14.10.2018]

26 High Council of Justice decision №1/326 [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/326..pdf>, accessed on: 01.10.2018]

During face-to-face interviews, the chancellery staff of Tbilisi Court of Appeals spoke about the so-called steady composition of judicial panels, pointing out that in practice the panels had long been formed and that the membership of each panel rarely changed.

To clarify this issue the project team requested public information from Tbilisi and Kutaisi courts of appeal and Supreme Court of Georgia: (1) based on the information provided by Tbilisi Court of Appeals, in order to fulfill the requirements set forth in Georgia's procedure codes and to ensure prompt and effective justice, judges with narrow specialties in criminal, civil and administrative cases agree to establish panels taking into account their own schedules and the lengthy timeframes of planned/upcoming trials. The composition of these panels is normally quite stable;<sup>27</sup> (2) the information provided by Kutaisi Court of Appeals also points to the absence of any legal acts about forming judicial panels to hear cases in the court of appeals;<sup>28</sup> (3) finally, according to the Supreme Court there is no legal act that would establish the civil, administrative or criminal judicial panels.<sup>29</sup>

Based on the information collected from the courts, it can be argued that there are no pre-defined and fixed compositions of judicial panels in the courts of appeals and the Supreme Court. Thus, the issue of selecting two judges for a panel consisting of a total of three judges is left beyond the legislation. This situation creates the risk of forming judicial panels artificially.

As for the hearing of cases by the Grand Chamber of the Supreme Court of Georgia, the electronic system selects the necessary number of judges for the panel, taking into account the number of judges who originally heard the case and the presiding/speaking judge.<sup>30</sup>

## Equal Distribution of Cases

The so-called "third wave" reform failed to introduce in the legislation the principle of equal distribution of cases between the judges; however, according to the rules adopted by the High Council of Justice, the electronic system should ensure equal distribution of cases to the greatest extent, considering only the quantity of cases. The electronic system identifies the average number of allocated cases, the number of cases assigned to each judge, it also

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27 Tbilisi Court of Appeals correspondence, №01/284(ღ).

28 Kutaisi Court of Appeals correspondence №375-2/10.

29 Supreme Court of Georgia correspondence №3-527-18.

30 May 1, 2017 decision of the High Council of Justice №1/56, Article 4.

identifies the number generated randomly and accumulates this information in the program. The difference between the number of cases assigned by the electronic system to the judges with relevant specialty must not exceed three.<sup>31</sup> If the difference equals three, the judge with most cases allocated to them will be withdrawn from the electronic distribution process until the difference between the cases diminishes.<sup>32</sup>

Speaking about the equal distribution of cases, the Rustavi City Court judges stressed the sharp increase in the number of cases submitted to the court, however, they noted that the increase was not necessarily connected to the new case distribution program. According to the civil cases judge, a modification that would permit acting judges to transfer the remainder of their cases to new judges would be a positive development. The judges also talked about their impression as though the program was “picking on” the same judge, however, they also pointed out that as far as they were concerned the cases were being allocated equally.

**Rustavi City Court judge:** “We noticed that the software tends to stick to one person. It may assign several cases to you but in terms of numbers the cases are distributed equally”.

**Rustavi City Court judge:** “It is not the purpose of the software to be mathematically precise in allocating the cases; however, you can’t really say that one judge is particularly burdened or another one is privileged”

The head of the technical team at the Supreme Court explained to the project team that in order to ensure equal distribution of cases between the judges, the software instantly processes the existing information and allocates cases accordingly. It may be true that several cases may be assigned to the same judge in a row, however, during distribution the program does not violate the principle established by the High Council of Justice: the difference between the allocated cases never exceeds three.

The interviewed judges have pointed out that along with increasing the trust in the judiciary, the electronic case distribution system serves the purpose of equal distribution of cases between the judges; however, the judges also note that the new system has not introduced any changes in their judicial activities at all which, according to them, may be linked to their busy schedules and the recent sharp rise in the number of cases.

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<sup>31</sup> High Council of Justice decision №1/56, Article 5.

<sup>32</sup> *Ibid.*

**Rustavi City Court judge:** “One of the purposes of the electronic system for case distribution is to increase public trust.”

**Rustavi City Court judge:** “One of the goals of the system is to make sure that the cases are distributed objectively and the judges are equally busy”.

The equal distribution rules adopted by the High Council of Justice in order to ensure equal workload of judges is based only on the quantitative indicator. It is a problem that the rules neglect the fair and objective principles for establishing the volume of the case.<sup>33</sup>

The modifications approved on December 18, 2017 are also connected to the issue of the workload of judges: specifically the changes which reduced the percentage level of effort spent on cases by the judge members of the High Council of Justice, Chairperson of the court, the deputy Chairperson, Chair of the panel/chamber (where the number of judges does not exceed 7), Chairpersons of the Supreme Court, Court of Appeals and Tbilisi City Court, also the Secretary of the High Council of Justice.<sup>34</sup> During February 12, 2018 session of the Council the former chairperson of the Supreme Court elaborated that regardless of the reduced workload ensured by the new rule, the Supreme Court judges (including the Chairperson) heard cases with 50% and 100% level of effort. The rule was modified again on February 26 and the concessionary rates for the deputy chairperson of the Court of Appeals was removed from the list. As the excessive workload of judges and the increase in the number of filed claims constitutes one of the main challenges of the justice system, it is unclear what prompted the High Council of Justice to decrease the level of effort for certain groups to spend on cases.

The current version of the regulation establishes the following workload exemption rates:

- (1) Member of the High Council of Justice – 20%; when the member is at the same time the Chairperson of the court, deputy Chairperson or Chairperson of a panel/chamber – 10%;<sup>35</sup>

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33 The methodology used by the National Center for State Courts in the United States to calculate the required number of judges entails calculating the average number of hours needed per the types of cases. As cases differ in terms of their complexity, the average amount of time needed to hear the case, also called the case volume, similarly differ.

34 Please See the Council decision: [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/326..pdf>, accessed on: 10.10.2018]

35 May 1, 2017 decision of the High Council of Justice №1/56, Article 5.

- (2) Chairperson or deputy Chairperson of the court or Chairperson of a panel/chamber where the number of judges does not exceed seven – 50%; Chairperson or deputy Chairperson of the court or Chairperson of a panel/chamber where the number of judges does not exceed seven – 20%;<sup>36</sup>
- (3) Chairperson of the Supreme Court of Georgia, Chairperson and deputy Chairperson of the Court of Appeals, Chairperson of Tbilisi City Court except for cases directly indicated in the legislation, also the Chairperson and Secretary of the High Council of Justice in exceptional cases may be involved in hearing cases with no more than 5% level of effort.<sup>37</sup>

These exemptions enable those judges who also hold administrative positions to escape the same amount of workload that other judges have. The table below illustrates the workload rates of the judge members of the Council, Chairpersons of a number of courts and panels/chambers.<sup>38</sup> It should be noted, that the High Council of Justice provided information<sup>39</sup> regarding the workload rates of Chairpersons of Tbilisi and Kutaisi courts of appeals after numerous requests posted by the project team.<sup>40</sup>

Name, surname	Administrative position	Workload rate
<b>Mzia Todua</b>	Acting Chairperson of the Supreme Court of Georgia	50%
<b>Mikheil Chinchaladze</b>	Chairperson of the Tbilisi Appellate Court	0%
<b>Levan Tevzadze</b>	Chairperson of the Criminal Cases Chamber of Tbilisi Court of Appeals	20%
<b>Tamar Oniani</b>	Member of the High Council of Justice	20%
<b>Revaz Nadaraia</b>	Member of the High Council of Justice	20%
<b>Merab Gabinashvili</b>	Acting Chairperson of the Civil Cases Chamber of Tbilisi Court of Appeals	20%
<b>Irakli Bondarenko</b>	Member of the High Council of Justice	20%

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> High Council of Justice correspondence №1905/2562-03-თ.

<sup>39</sup> High Council of Justice correspondence №52/3723-03-თ.

<sup>40</sup> High Council of Justice correspondence: №1905/2562-03-თ, №2165/2980-03-თ, №2166/2979-03-თ do not provide information about the workload rates of Mikheil Chinchaladze and Dimitri Gvritishvili.

<b>Irakli Shengelia</b>	Deputy chairman of Tbilisi Court of Appeals; Chairman of Administrative Cases Chamber of Tbilisi Court of Appeals; member of the High Council of Justice	100%
<b>Dimitri Gvritishvili</b>	Chairperson of the Kutaisi Appellate Court, member of the High council of Justice	5%
<b>Vasil Mshvenieradze</b>	Chairperson of Tbilisi City Court; member of the High Council of Justice	0%
<b>Giorgi Miqautadze</b>	Secretary of the High Council of Justice	0%
<b>Sergo Metopishvili</b>	Chairperson of Civil Cases Panel of Tbilisi City Court; member of the High Council of Justice	10%
<b>Davit Mamiseishvili</b>	Chairperson of Batumi City Court	20%
<b>Leri Tedoradze</b>	Chairperson of Kutaisi City Court	100%
<b>Levan Meshveliani</b>	Chairperson of Samtredia District Court	50%
<b>Shota Nikuradze</b>	Chairperson of Zestafoni District Court	100%
<b>Gia Beraia</b>	Acting chairperson of Akhaltsikhe District Court	50%
<b>Davit Narimanishvili</b>	Acting chairperson of Gurjaani District Court	100%
<b>Ararat Esoyani</b>	Chairperson of Akhalqalaqi District Court	75%

According to the rule, in case of assigning the judge to a position (including sending the judge on a mission to another court; the return of the judge from the mission or a maternity leave) the average number of cases being processed within the relevant panel/chamber/narrow specialty (except for the investigative panel) is identified,<sup>41</sup> taking into account the number of judges and in order to reach the total number of cases to be allocated to each judge, the quantity of cases may increase with 300%, based on the October 8, 2018 modification. Thus, it is clear that the new judge appointed with the purpose of ensuring equal distribution of cases, ends up with cases three times more than other judges.

The High Council of Justice explored the opportunities for modifying this provision multiple times. Before the introduction of the electronic system, the judge members of the Council proposed to assign new judges to existing cases. During the February 19, 2018 session, the

<sup>41</sup> Meaning the average number of cases out of the electronically distributed cases which are under review.

Council members also reviewed the Tbilisi City Court suggestion according to which the Chairperson of the court (or a person with similar authority) would be granted the power to increase the workload of new judges with 50% margin, based on the number of existing cases. On October 8, 2018 Mr. Sergo Metofishvili called for the secondary review of the offer. He proposed to develop a regulation according to which the electronic system would identify the cases remaining to be heard by the acting judges, where their consideration on merits have not yet taken place and randomly allocate them to the new judges. Majority of the members of the Council did not endorse the initiative.

### **Instances of Terminating the Case Allocation to a Judge/Temporarily Transferring the Case to Another Judge**

The provision addressing the instances of terminating the case allocation to a judge has also been modified several times. According to the initial text, cases were not to be allocated to judges during temporary suspension of their duties (vacation, mission, temporary inaptitude, pregnancy, maternity leave) except for cases when the mission or temporary inaptitude did not exceed 3 days and the period for hearing the case exceeded 72 hours. Later, a significantly ambiguous modification was introduced in the provision according to which cases are not allocated to judges when particularly objective circumstances are in place and when the period to hear the case does not exceed 72 hours.<sup>42</sup> The provision does not specify the meaning of particularly objective circumstances. It was modified again on February 26, 2018 when 3 days were extended to 5 days.

Reference to special objective circumstance was added to one more provision, according to which in case such a circumstance exists for a specific case under proceedings, the case is temporarily assigned to a different judge for implementing procedural action (in case the deadline determined by the procedural legislation is about to be missed) or for reviewing the motion (if legitimate rights and interests of the party are violated in case the motion is not reviewed).<sup>43</sup> As determined by the High Council of Justice, another judge to hear the case is randomly selected by the electronic case distribution program; however, the provision does not specify as to who is authorized to establish the existence of particularly objective circumstances and other prerequisites described in the provision.

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42 High Council of Justice decision, №1/1: [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/1-2018.pdf>, accessed on: 10.10.2018]

43 High Council of Justice decision №1/64, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/64-2018.pdf>, accessed on: 02.10.2018]

Based on the information received from the Rustavi City Court,<sup>44</sup> in such instances the standards provided in paragraph 18, Article 3 of the Criminal Procedure Code of Georgia and paragraph 3, Article 215 of the Civil Procedure Code are adhered. The judge who is hearing the case is responsible to assess and establish the presence of these standards. As for the procedural issues, according to the Rustavi City Court if the judge is on vacation, on a mission, temporarily incapable or faced with particularly objective circumstances and the timeframe established by law to carry out the proceedings on the case under his/her responsibility or the failure to hear the plea may potentially infringe on the lawful rights and interests of the party, the judge in question or the staff person assigned to him/her for the case requests in a written form that the chancellery of the court transfer the case to another judge. When the proceedings of the case continue after the completion of a certain stage of procedural actions and the grounds for temporarily transferring the case to another judge are no longer applicable, the case returns to the initial judge. Other courts describe the same procedures for similar occasions.

**Chancellery of Rustavi City Court:** *If while looking through the correspondence of the judge on vacation I discovered that the party of the case was requesting, let's say, public publication, I would definitely contact the party and ask if they would be interested in transferring the case to another judge. If yes, I demanded from them to submit evidence that would prove the potential damage to the party if the case was not heard immediately.*

## Redistribution of Cases in the Events of Recusal/Self-Recusal

The rules and procedures for re-distributing cases electronically in the events of recusal/self-recusal of judges are ambiguous. According to the legislation, in the event of recusal/self-recusal or the impossibility of hearing the case due to objective reasons, the case is transferred without the involvement of the judge in question; however, the rule adopted by the High Council of Justice does not elaborate as to who is responsible to return the case to the chancellery and who is responsible to make a decision and in what timeframe regarding the re-allocation of the case. The rules in question only refer to the article providing general descriptions of relevant procedures.<sup>45</sup>

As for the procedure codes, Articles 62-65 of the Criminal Procedure Code of Georgia outlines the actions for transferring the case to another judge or determining a new composition of judges to hear the case, in the event of recusal and self-recusal of the judge. The following

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<sup>44</sup> July 10, 2018 correspondence of Rustavi District Court, №396/8.

<sup>45</sup> May 1, 2017 decision of the High Council of Justice №1/56, Article 4.

aspects of this provision are particularly noteworthy and concerning: (1) the judge must declare about self-recusal to the Chairperson of the court;<sup>46</sup> (2) if the court hearing is recused, the case is transferred to the court Chairperson who then transfers the case for review to another composition of the same court.<sup>47</sup>

The Civil Procedure Code of Georgia also provides for the participation of the court Chairperson in the process of transferring the case to another judge/composition in the event of recusals and self-recusals. Specifically: (1) in the event of recusal or self-recusal, the judge transfers the case to the court Chairperson who then hands the case to another judge. If there are no more judge in the district (city) court to hear the civil case, then the court Chairperson transfers the case to the Chairperson of the Court of Appeals to hand it to another district (city) court;<sup>48</sup> (2) if recusal is declared against the entire composition or the majority of the panel, the case is handed over to the presiding judge who then transfers the case to another composition;<sup>49</sup> (3) if the entire chamber of the Supreme Court of Georgia or the Court of Appeals is recused, the case is submitted to the presiding judge of the court concerned who then refers the case to another panel for review according to the procedures prescribed by law.<sup>50</sup>

Given the practice that during the panel review of the case in the court of appeals the electronic program allocates cases only to the speaker judge and does not select the other two judges, in the event of recusal or self-recusal of the speaker judge arises the need to re-allocate the case. In this regard, some noteworthy circumstances occurred in the case litigated by EMC: when another judge was also recused along with the speaker judge of the composition, the program failed to acknowledge the recusal of the additional judge apart from the speaker judge. Thus, it allocated the case to the same judge, which has already been recused from the case.

As explained by the staff of Tbilisi Court of Appeals chancellery, in any event the recused case is referred to the court Chairperson, however, they question role of the Chairperson in this process, arguing that their involvement is only a formality – the Chairperson hands the case over to the chancellery and from there the electronic program re-allocates the case again.

***Chancellery of the Tbilisi Court of Appeals:*** “At this point the assistant to the judge takes the case to the Chairperson; the case is then handed over to the chancellery and it is re-allocated again through the same process as before, using the electronic program.

46 Criminal Procedure Code of Georgia, Article 62.

47 *Ibid.*, Article 65.

48 Civil Procedure Code of Georgia, Article 34.

49 *Ibid.*

50 *Ibid.*

As pointed out previously, neither the regulations adopted by the High Council of Justice, nor the procedures codes establish the specific deadlines for re-allocating the case after recusal/self-recusal. After the recusal of one of the judges in a case litigated by EMC, it took 29 days after the declaration of recusal before another judge was assigned to the case, as also confirmed in the copy of the case distribution file.

## Authorities of the Court Chairperson

Pursuant to the provisions approved by the High Council of Justice, the court Chairperson, deputy Chairperson or the Chair of a panel/chamber has access to the information about the number of cases assigned to judges.<sup>51</sup> Before the Council approved another modification on January 8, 2018, the court Chairperson or the panel/chamber Chairperson distributed the cases based on the sequential rule while the electronic system was out of order.<sup>52</sup>

During the January 8, 2018 session of the Council, in response to the criticism from the civil society sector, one of the members of the Council offered to authorize a chancellery staff person to distribute cases through the sequential rule in the event electronic system failure. While it may be a positive step from the part of the High Council of Justice to attempt restricting the powers of court Chairpersons during case distribution, it should be emphasized that the sequential rule is also flawed as it does not ensure effective protection from manipulation and intervention. Thus, it significantly breaches the impartiality of the court. Routinely replacing the court Chairperson with a chancellery staff person does not only fail to safeguard from but may also potentially increase the risks of manipulation and external intervention in the process of case distribution.

Despite the modifications introduced on January 8, the court Chairpersons continue to have ambiguous and concerning powers:

- The right to view the number of cases allocated to judges;<sup>53</sup>
- The right to increase or reduce the workload of judges;<sup>54</sup>
- The permissibility to relocate judges of narrow specialties without providing justification;<sup>55</sup>
- The right to determine the schedule of judges.<sup>56</sup>

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51 High Council of Justice decision №1/56, Article 6.

52 High Council of Justice decision, №1/1, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/1-2018.pdf>, accessed on: 24.10.2018]

53 High Council of Justice decision №1/56, Article 6. [available at <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/konsolidirebuli%20gadackvetilebebi/56.pdf>, accessed on: 09.10.2018]

54 *Ibid.* Article 5.

55 High Council of Justice decision №1/175, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/konsolidirebuli%20gadackvetilebebi/175-2018.pdf>, accessed on: 10.10.2018]

56 *Ibid.* Article 4.

Importantly, in order to avoid delays in justice, the court Chairperson is authorized to increase the workload of a member of the High Council of Justice, deputy court Chairperson, Chairperson of a panel/chamber, etc. with a 25% margin. For the same reasons she/he is also authorized to reduce the workload of judges with 50% margin due to their health conditions or certain family situation.

According to the regulation adopted by the High Council of Justice, as needed for certain administrative and criminal cases with the adjudication timeframe of no more than 72 hours, the court Chairperson establishes duty schedules and the cases are distributed between the judges during working and non-working hours according to the schedule. The duty schedules are normally instituted only in the first instance courts for immediate adjudication of criminal and administrative cases. As elaborated by the Court Management Department of the High Council of Justice, the one-month schedule approved by the court Chairperson is submitted to the Department in order to insert the information in the software. In response to the question about the frequency of changes in the approved schedules, the staff member of the Department explained that there had been such occasions in practice during which the Department was informed a couple of days in advance in order to change the schedule accordingly in the program.

**Department of the Court Management:** *“There have been cases of modifying the duty schedule. The judge may not be able to fulfill his duty for certain reasons, so there’s a need to change the schedule. The Department needs to be informed about it at least a couple of days earlier.”*

The powers of the court Chairperson to determine the composition of judges in narrow specialties (thematic/procedure-specific groups) are particularly noteworthy and concerning in the new model of case distribution. Even though the High Council of Justice establishes the necessity to form narrow specialty/thematic compositions, the court Chairperson is authorized to unilaterally select the judges in accordance with the narrow specialties,<sup>57</sup> which produces real risks of influencing the case distribution process. The software allocates the cases between the judges of narrow specialties, however, the decision to assign specific judges to respective specialties rests with the Chairperson only. This issue is further aggravated by the fact that the law does not recognize the formal procedures and stages of assigning judges to narrow specialty groups. Thus, these powers of court Chairpersons continue to be one of the main challenges of the new system for case distribution.

Currently the narrow specialization of judges is established within the Tbilisi City Court<sup>58</sup> and Court of Appeals.<sup>59</sup> Determining the composition of judges in the narrow specialty is

57 For example, the decree issued by the Chairperson of Tbilisi City Court on April 8, 2016.

58 June 29, 2018 decree of Tbilisi City Court Chairperson №30-ბ.

59 May 3, 2018 decree of Tbilisi Court of Appeals Chairperson, №05-53.

particularly troublesome in the Court of Appeals where cases are heard by 3-member judicial panel. According to the current rules of random case distribution, in the Court of Appeals the electronic program assigns the case only to the speaker judge. Therefore, as the unjustified relocation of judges is permissible, the risks of interfering in the formation of the composition of narrow specialty judges are also high.

In response to the criticism towards such powers of court Chairpersons, on May 21, 2018 the High Council of Justice approved another modification<sup>60</sup> in the Court of Appeals resolution on establishing narrow specialties. According to this modification, where necessary, in order to avoid delays in justice, the judge appointed by Article 58<sup>1</sup> of the organic law of Georgia on Common Courts in criminal, administrative and civil cases chambers is now allowed to participate in the hearing of a narrow specialty case of the same chamber. This provision is similarly vague; therefore, it fails to adequately address the challenges in the process of assigning judges to narrow specialties:

- (1) References to “where necessary” and “avoidance of delays in justice” are quite ambiguous and relative to each occasion;
- (2) It is unclear who is responsible for establishing the presence of prerequisites and who makes a decision on selecting a judge from the specialties provided for by Article 58<sup>1</sup> of the organic law of Georgia on Common Courts;
- (3) The procedure is not imperative. The provision is disposed to allow selection of judges from other specialties but does not require mandatory implementation of the procedure;
- (4) It is unclear whether the provision allows for selecting two members of the judicial composition.

The project team requested<sup>61</sup> statistical information on the how many times and when the judge appointed by Article 58<sup>1</sup> of the “Organic law of Georgia on Common Courts” participated in the hearing of a narrow specialty case of the same chamber, however, the High Council of Justice did not provide claimed data.

According to the interviewed judges and chancellery personnel, the electronic distribution system prevents the Chairpersons from participating in the allocation of cases to the judges;

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60 May 21, 2018, Decision of the High Council of Justice, [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/191.pdf>, accessed on: 09.10.2018]

61 Correspondence of Human Rights Education and Monitoring Center (EMC) №g01/647/2018.

however, as the broad discretion and ambiguous powers of court Chairpersons are enforced in the legal acts adopted by the High Council of Justice itself, it can be argued that there might not be a need for Chairpersons to interfere directly.

## Electronic System Failures

Pursuant to the general rules, in the event of electronic system failure for more than 2 days the relevant staff member of the court chancellery allocates cases based on the sequential rule. The case distribution provisions also provide for exemptions where another person with required authority is allowed to allocate cases based on their sequence. Specifically, the administrative cases, which must be heard immediately, also those which must be reviewed in 24, 48 or 72 hours, are distributed by an authorized chancellery personnel through the sequential rule<sup>62</sup> when the system failure lasts for more than 3 hours.<sup>63</sup>

The project team requested information about the job position of the authorized staff person of the chancellery and the availability of additional legal acts addressing the sequential distribution of cases in the event of technical failure of the program.

Importantly, despite the January 8, 2018 modification based on which during technical issues the authorized personnel of the chancellery can distribute cases instead of the court Chairperson, a number of courts were not aware of this modification. With regard to the procedures for case distribution and responsible individuals during the technical failure, the information collected during July-August 2018 from the Batumi City Court<sup>64</sup> and the district courts of Gurjaani,<sup>65</sup> Ozurgeti,<sup>66</sup> Gori<sup>67</sup> and Khelvachauri<sup>68</sup> indicates that in such events cases are allocated by court Chairpersons based on the sequential rule. Notably, the report and the act produced by the Gurjaani District Court during the technical delays of the program do not offer a clear explanation as to who distributed the cases applying the sequential rule.

The language of the transitional provisions in the regulation on case distribution is also problematic and unclear. According to these provisions, in the event of any type of technical

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62 Rules for distributing the cases based on the order of their submission and alphabetical order of the judges.

63 High Council of Justice decision №1/56, Article 6.

64 July 30, 2018 decision of Batumi City Court, №6183/3.

65 August 8, 2018 decision of Gurjaani District Court, №2576.

66 August 1, 2018 decision of Ozurgeti District Court, №887.

67 August 8, 2018 decision of Gori District Court, №9152.

68 July 30, 2018 decision of Khelvachauri District Court, №985.

failure in the electronic system unforeseen in the regulation adopted by the High Council of Justice, the relevant staff person of the chancellery is authorized to distribute the cases applying the sequential rule.<sup>69</sup>

As determined by the High Council of Justice, the court Chairperson, deputy Chairperson, Chair of the panel/chamber or the authorized staff person of the chancellery informs the Management Department of the High Council of Justice, Department of the Common Courts and the person responsible for uninterrupted performance of the software about the electronic system failure which is then formalized in a corresponding act.<sup>70</sup> After the technical flaw is eliminated, the authorized personnel of the chancellery submits a report to the High Council of Justice where they provide information about the cases distributed by them based on the sequential rule.<sup>71</sup> According to the Management Department, if the examination of submitted reports reveals the sequential distribution of cases, which pursuant to the Council regulation, do not fall under the category of cases allowed to be distributed using this method, the Department contacts the respective personnel of the concerned chancellery to request clarification. If the communication confirms that the case should not have been allocated based on the sequential rule, the case is returned to the chancellery of the respective court, re-registered in the system and re-allocated after the electronic system resumes working.

***Department of the Court Management:*** “If the chancellery personnel distributes the case wrongly applying the sequential rule, the department contacts them in order to clarify the grounds for sequential distribution. If it is confirmed that the case shouldn’t have been distributed this way, it is returned to the initial stage where the case is registered electronically and distributed by the program. Obviously, corresponding paperwork is also prepared.”

The regulations approved by the High Council of Justice do not provide instructions for the contents and submission deadlines of reports and acts to be prepared in such cases. Nevertheless, in the course of face-to-face interviews the chancellery personnel point out that in practice responses to technical failures of the system are immediate and after the elimination of the technical issues, reports are shortly submitted to relevant individuals. The respondents believe that availability of reporting templates provided by the High Council of Justice and

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69 May 21, 2018 decision of the High Council of Justice [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/konsolidirebuli%20gadackvetilebebi/56.pdf>, accessed on: 09.10.2018] Article 8.

70 *Ibid*, Article 6.

71 *Ibid*.

the requirement to submit paperwork within a specific period of time will make it easier for them to fulfill their duties.

After informing the High Council of Justice, the authorized staff person of the chancellery denotes the sequentially distributed cases in the electronic system with the words: “Without Electronic Registration”.

As for the system failures occurring between December 31, 2017 and October 10, 2018, according to the information provided by the High Council of Justice,<sup>72</sup> there have been 6 instances of delays as a result of which 46 cases have been distributed based on the sequential rule:

a) 16 cases in Telavi District Court:<sup>73</sup>

- Two motions for applying deprivation of liberty as a punishment;
- Two criminal cases (regarding the approval of procedural bargaining);
- Two administrative cases;
- One civil case;
- 9 motions regarding investigatory actions.

According to the reports prepared by Telavi District Court, the technical delay lasted from 10:15 AM to 17:25 PM on January 12. Pursuant to the provisions of the High Council of Justice, in the event of electronic system failure which does not last for more than 2 days but exceeds 3 hours the sequential distribution is applied only to those administrative cases which must be heard immediately or within the period of 24, 48 and 72 hours. It is concerning that the reported cases which had been distributed based on the sequential rule include those which did not have to be reviewed within 24, 48 and 72 hours; for example, the two criminal cases regarding the approval of procedural bargaining. It is also unclear specifically what type of a claim is meant under the civil case and if it was absolutely necessary to hear the case in the reduced period of time.

b) Based on the report prepared by the lead specialist of the chancellery and admissions department of Kutaisi City Court, the following cases were allocated applying the sequential distribution method due to the temporary failure of the electronic system:<sup>74</sup>

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72 High Council of Justice correspondence №2150/2981-03-0.

73 *Ibid.*

74 High Council of Justice correspondence №382/308-03-0.

- 3 secured claims;
- Protocols of administrative offences;
- The motion for applying deprivation of liberty as a punishment;
- The motion for requesting bail;
- The motion for recognizing the lawfulness of searching the house and the storage room;
- The motions for recognizing the lawfulness of seizure;
- Criminal case.

The report accessed by the authors of the report does not specify the exact number of distributed cases; however, communication with the relevant authorized person in Kutaisi City Court established that a total of 17 cases had been distributed without the software.

The way that Kutaisi City Court allocated the criminal case during the failure of the electronic program is particularly interesting. According to the submitted report, after the end of the pre-trial session, by January 23, the case had not been returned to the chancellery either in an electronic or a physical copy in order to be re-allocated to a judge to hear it, while the hearing of the case on merits was scheduled for January 24. In order to avoid delays in justice the authorized personnel of the chancellery distributed the case to be heard on merits based on the sequential rule. The technical failure of the program in Kutaisi City Court lasted less than 3 days, therefore, there was no legal grounds for the sequential distribution of the criminal case.<sup>75</sup>

c) Failures in the electronic case distribution system and access to Internet services occurred in Gurjaani District Court at 14:00 PM on April 5, 2018. According to the court personnel, the technical failure lasted more than 3 hours so the authorized personnel distributed one secured claim with the sequential method. The system resumed working in 3 hours and 5 minutes after the technical failure, at 17:05 PM.

d) The electronic case distribution program in Rustavi City Court began experiencing technical problems at 9:00 AM on June 29, 2018.<sup>76</sup> As the duration of the technical failure exceeded 3 hours, the court distributed the following cases based on the sequential rule:

- One secured civil case;
- The motion for requesting permission for secret video and audio recording;
- The motion for recognizing the lawfulness of the seizure of a cell-phone;
- Two motions for requesting detention;
- Two motions for applying deprivation of liberty as a punishment;

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<sup>75</sup> *Ibid.*

<sup>76</sup> High Council of Justice correspondence №2150/2981-03-09.

- The motion for requesting permission for listening in and audio recording;
- Two cases of administrative offence were allocated to a magistrate judge.

The software resumed working at 13:53 PM on the same day, as confirmed by the relevant paperwork.

e) Technical failures in the electronic case distribution system in Khoni Magistrate Court occurred at 14:00 PM on July 16, 2018.<sup>77</sup> According to the court, as the duration of the technical failure exceeded 3 hours, the court distributed the following cases based on the sequential rule:

- The motion for requesting bail;
- The motion to adjudicate the case without its consideration on merits.

As reported in the paperwork regarding the system failure, the technical problems were eliminated in the program by 9:00 AM on July 17.

f) The electronic case distribution system in Gardabani Magistrate Court experienced technical issues on August 13, 2018. Although, according to the court personnel the technical delay lasted more than 3 hours: from 9:40 AM to 15:13 PM, there was no claim filed with the court during this period of time that could be allocated based on the sequential rule.

## Organizational Support of the Case Distribution System

The Management Department of the High Council of Justice and the chancellery personnel of Tbilisi City Court and Court of Appeals believe that the court system responded to the challenges that occurred during the initial stages of instilling the new system in a well-organized and mobilized manner.

**Department of the Court Management:** *“I believe that the court system addressed the challenges during the first stages of putting the new program in operation in a very well organized and mobilized way. Despite the difficulties, whenever there were questions, there was active communication between the courts as well as with the staff of the Management Department.”*

**Chancellery of Tbilisi Court of Appeals:** *“The court was completely prepared. As of today, there have been no delays in the operation of the program.”*

<sup>77</sup> High Council of Justice correspondence №2150/2981-03-0.

Pursuant to the regulations adopted by the High Council of Justice, the Court Management Department of the Council is responsible: to register the judges in the respective specialty compositions/panels/chambers/narrow specialties in the electronic system; to enter changes in the registration; to correct or expand them and finally, to delete the registration data. The same department is also in charge of entering the information about vacation, missions or temporary incapacity of judges in the software.

Based on the decision of the High Council of Justice, the composition of the Management Department should consist of 7 staff persons; however, currently there is only one authorized senior consultant and one consultant in the department. With the October 8, 2018 decision the Council announced about a job opening in order to recruit the Chairperson of the Management Department, however the results of the competition were not known by 31 December 2018.<sup>78</sup>

In the words of the Management Department, it is only thanks to the extremely hard work of the two staff persons that the program has not yet experienced any significant failures or errors. The two consultants are not informed about possible reasons for the failure to recruit the necessary number of people in the department.

## Case Distribution in Practice

According to the operational directory of the electronic case distribution system,<sup>79</sup> the distribution module is built in the proceedings program, which has a log-in option; thus, the distribution module does not require independent (separate) log-in action.

As for the actual distribution of cases, the functional specification determines the steps to be fulfilled by the relevant authorized personnel of the chancellery to allocate the cases in the Common Courts:

- (1) The chancellery personnel register the claim/application submitted to the court after which it is assigned the status of the case to be distributed;
- (2) The authorized personnel select one case out of the number of cases to be distributed and indicates the appropriate principle from the case distribution principles,

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<sup>78</sup> October 8, 2018 decision of the High Council of Justice [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202018/264.pdf>, accessed on: 12.10.2018]

<sup>79</sup> High Council of Justice correspondence №1821/2456-03-0.

provided for in the regulations adopted by the High Council of Justice. Specifically, in the District Courts the software offers the authorized personnel to choose from five possible principles of distribution: Random Distribution; without rule; based on the duty schedule; distribution in exceptional circumstances; allocation to the magistrate official. In case of sufficient number of judges in the relevant specialization, only two types of distribution are functional in the Court of Appeals: random and exceptional; as for the Supreme Court each case is distributed on the basis of random distribution;

**Random distribution** – means that the case is allocated to the judge of the respective panel/chamber/narrow specialization, who is selected automatically;

**Distribution based on the duty schedule** – where necessary, for certain administrative and criminal cases with the adjudication timeframe of no more than 72 hours, the court Chairperson establishes duty schedules and the cases are distributed between the judges during working and non-working hours according to the schedule. In such event the number of allocated cases is not taken into consideration.

**Distribution in exceptional circumstances** – is applied to the type of cases, which cannot be randomly distributed as determined by the High Council of Justice;

**Allocation to the magistrate official** – this principle is applied to the type of cases to be adjudicated by a magistrate judge;<sup>80</sup>

**Without rule** – if the case has to be distributed to the court where there is only one judge in the panel and/or of the required specialty, the case is allocated without the rule.

(3) After the case is distributed, the software generates the bar code and returns the document confirming the bar code which contains the following information: the case number; the date the case was filed with the court; the case distribution number; the applied principle of distribution; the judge; the court; the court chairperson.<sup>81</sup>

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80 The principle of distribution on a Magistrate official is defined in functional specification as the distribution of cases to the magistrate judges, but in view of the incompatibility of the term, it is possible to assume that the above-mentioned principle implies for instance to the cases under the indisputable proceedings.

81 While it has been established by the High Council of Justice that the court chairpersons must be restricted from participating in the process of case distribution, it is unclear as to why the signature of the court chairperson is required on the case distribution file as a pre-requisite for the distribution.



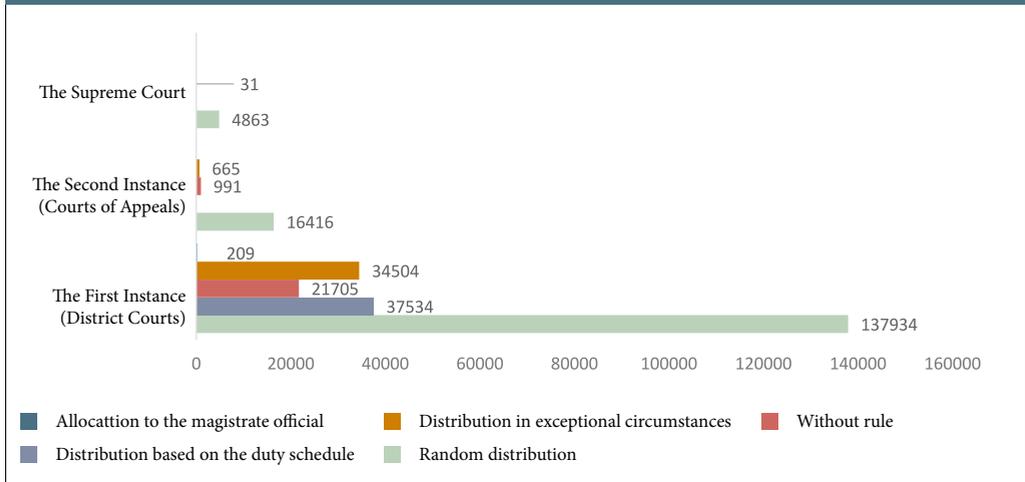
**თბილისის საქალაქო სასამართლო**

**საქმის განაწილების დამადასტურებელი  
დოკუმენტი**

საქმის ნომერი	330310018002263924
საქმის შემაჯანბნის თარიღი	18.01.2018 14:37:32
შემომტანი	██████████
საქმის განაწილების თარიღი	18.01.2018 17:38:54
საქმის განაწილების ნომერი	0332018011815331
საქმის განაწილების პრინციპი	შემთხვევითი
მოსამართლე	თამარ ოქროპირიძე

განაწილდა საქმეთა ელექტრონული განაწილების სისტემის მეშვეობით

### Cases distributed at the Common Courts between December 31, 2017 and December 31, 2018



In order to collect information about the practical distribution of cases per the instances of courts, the project team interviewed the personnel of Tbilisi City Court and Court of Appeals and the Supreme Court who are directly responsible for allocating the cases registered with their respective courts. The interviews exposed a number of issues that are of particular interest:

(1) A specialist in the service center of the court registers the cases filed with the court during the day. The cases then are assigned to secondary specialists who fill in the information sheets about the cases, scan the files and send the electronic and physical copies of the files to authorized personnel. The authorized individual then distributes the cases according to the appropriate category and specialization in the electronic program and in compliance with the appropriate principle. All cases filed with the court during the day are distributed by the end of the day, by 18:30 PM at the latest and they are handed over to the respective assistant to the judge. As for criminal cases, they are also dealt with in the same manner, distributed electronically for pre-trial hearings and after these hearings, they are re-allocated randomly by the electronic program. The timeframe allowed for the electronic distribution of the case depends on the volume of the case. Cases to be heard in reduced periods of time are distributed immediately;

(2) Cases referred by the first instance courts to the second instance ones are sorted into categories and recorded in the registry on the same day they are received by the court (for example, cases are submitted to the Civil Cases Panel on Mondays, Wednesdays and Fridays) and allocated in stages. For instance, cases referred by the first instance courts to the Ad-

ministrative Cases Panel are divided into three categories: private claim; appeal and offence. Cases of the same category are distributed first. At the end of the day the allocated cases are handed over to the assistant to the judge. Availability of the electronic copy of the case is a mandatory requirement in order for the case to be distributed. If the first instance court fails to upload the electronic copy of the referred case/claim/application in the software, the chancery of the Court of Appeals is unable to allocate the case and returns the case to the first instance court, indicating the reason for return;

(3) Submission of electronic copies of cases by the lower instance courts is also mandatory for the Supreme Court to distribute the cases. Cassation claims are posted to the Supreme Court on the designated days during the week. Upon being collecting from the courier, the cases are recorded in the registry and handed over to the personnel who are directly responsible for their distribution. These individuals then compare the physical and electronic copies with each other. The cases are not stockpiled but handed over to the responsible individuals immediately upon receipt. If there are cases about extradition referred to the Criminal Cases Panel, distribution of such cases is prioritized due to the necessity to hear them in the reduced timeframe. The time taken to distribute the cases depends on the quantity of cases referred; however, by the end of the day all cases are certainly allocated. After the distribution, the distribution confirmation document is attached to physical copy of the case and handed over to the assistant to the judge who has been selected to hear the case.

## Recommendations

Assessment of the legal acts adopted to this date by the Parliament of Georgia, High Council of Justice and court chairpersons and monitoring of the performance of the new system in the pilot mode and its application throughout the country has exposed the need for systematic efforts to improve the new regulations. The following important actions should be taken in order to achieve the unimpeded operation of the new system for random case distribution:

- The stages of distributing cases through the electronic system and during the system failure should be prescribed in the legislation;
- Random distribution of cases should be enforced in all courts, including the magistrate courts, by means of ensuring the needed number of judges;
- The duty schedules of judges should be developed so that to restrict the possibility of directly allocating the case to one specific judge disregarding the requirement for specialty and random distribution;
- The High Council of Justice should assign the judges to the narrow specialties established by the Council itself, in a justified, transparent and clear manner;

- All three judges for panel hearing of cases should be randomly selected by the electronic program;
- Procedures and deadlines for re-distribution of cases after recusal/self-recusal should be clearly defined and should exclude the participation of the court chairperson in the process;
- The grounds and procedures for temporary allocation of the case to another judge in the event of special circumstances should be clearly defined;
- The court Chairpersons should be stripped of the authority to reduce or increase the workload of judges;
- Fair and objective consideration of the volume of the case should take place during equal distribution;
- Performance of the program should be monitored consistently and the court personnel should be educated regularly about the changes in the system and the challenges identified through monitoring; monitoring reports should be prepared periodically;
- The Court Management Department of the High Council of Justice should be supported with the needed number of staff;
- Electronic platform for processing statistical data about case distribution should be created and executed in order to collect, process and analyze the data from each court in a timely and comprehensive fashion.

**The System for Disciplinary Liability  
of Judges and the Performance  
of the Independent Inspector**

## Evaluation of System for Disciplinary Liability of Judges of Common Courts

Independence of the judiciary is one of the most important measures for democracy in sovereign states. Independent court does not exist without the independence of an individual judge. Independence of the judges is not a privilege but it serves the interests of the persons seeking justice and rule of law.<sup>82</sup> While most judges have respectful attitude towards their profession, there is often a risk of inappropriate and dishonest behavior by some judges,<sup>83</sup> which often occurs in the name of independence. That is why in the democratic states the system of disciplinary responsibility of judges has been developed, which should ensure respect for the principle of independence of judiciary and must be carried out in front of an independent authority, free from political influences.<sup>84</sup>

Disciplinary responsibility in a modern democratic state serves the interests of protecting the court authority and the public confidence in the court system. In addition, the judicial accountability and responsibility system should, on the one hand, ensure to prevent dishonest and inappropriate behavior of the judge and in case of wrongdoing take appropriate steps, and, on the other hand, take into account the solid guarantees of independence of individual judges in order not to turn into a leverage for pressure against the judges. The aforementioned golden mean is the cornerstone of the independence of the individual judges as well as of the entire judicial system.

The legislation of Georgia provides for guarantees of independence of judges<sup>85</sup> and at the same time includes regulatory norms for disciplinary liability system of judges of Common Courts. The latter has repeatedly been a subject of strict criticism from local and international organizations. As a result of changes made in the legislation in different times, judges' disciplinary liability and procedural norms were more or less improved. Special positive changes have been identified after the "Third Wave" of the judicial reform in the legislation.

Changes envisaged by the "Third Wave" of the judicial reform are an important step forward in the direction of advancing disciplinary proceedings. Prior to the entering into force of

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82 Opinion of the Consultation Council of European Judges N1 on standards concerning the independence of the judiciary and the irremovability of judges, para. 10.

83 Robert H. Tembeckjian Judicial Disciplinary Hearings Should be Open, *The Justice System Journal*, vol. 28, November, 2007. pg. 419.

84 Opinion of the Consultation Council of European Judges N10, *Judiciary at the service of society*, para. 63.

85 According to Article 63 of the Constitution of Georgia, the judge is independent in their activities and is subject only to the Constitution and the law; No one has the right to require a judge to report on a particular case; All acts which restrict judicial independence are void.

these amendments, the disciplinary liability of judges and the process of disciplinary proceedings were totally confidential, which made it impossible for the public to exercise certain control over these processes. The difference between the number of disciplinary complaints and the number of judges who have been imposed disciplinary charges<sup>86</sup> have led to the feeling of failure of judges' accountability system in society.

Later, from the “third wave” judicial reform, additional amendment introduced to the Organic Law of Georgia on Common Courts. According to the amendment, dismissal of a judge, as one of the disciplinary penalties for disciplinary offense is not applicable to the and judges of Supreme Court, because their dismissal is possible only through the impeachment procedure<sup>87</sup> and only on the grounds of violation of the Constitution of Georgia or the signs of offense in the action of a judge.<sup>88</sup>

Despite significant improvements, the shortcomings identified in practice discussed below indicate that there is a need for clarification of certain existing norms in law and for continuation working on improvement of the legislation.

## The Purpose of Disciplinary Liability of Judges and the Types of Misconduct

Despite the positive changes provided by the “Third Wave” reform, the current version of Organic Law does not determine the objectives of disciplinary liability for judges. That creates the risk of parallel justice.<sup>89</sup> The basic principles and objectives of disciplinary liability clearly defined in the law are of great importance as they provide certain direction and simplify the proceedings and decision-making processes and provide for the guarantees against its misuse.

However there is lots of criticism from the local and international organizations on the grounds of disciplinary liability and types of disciplinary misconduct as regulated by the legislation,<sup>90</sup> changes envisaged by the “Third Wave” do not address the types of disciplinary misconduct and the list still contains broad definitions.<sup>91</sup> The types of disciplinary miscon-

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86 For example, in 2016, there were 488 disciplinary proceedings at the High Council of Justice, and judge was subjected to disciplinary sanctions in only one case, in 2015 there were 375 disciplinary cases, and in 1 case the judge was subjected to disciplinary sanctions. In 2014, there were 383 disciplinary proceedings, and in no case was the judge subjected to disciplinary sanctions, 272 cases were launched in 2013, none of the judges were imposed liability. Disciplinary statistics are [available at: <http://hcoj.gov.ge/ge/distiplinuri-samartaltsarmoeba/sadistsiplino-statistika>, accessed on: 05.12.2018]

87 Organic law of Georgia of July 21, 2018, N3262.

88 Article 48 of the Constitution of Georgia.

89 Coalition for Independent and transparent Judiciary, *Judicial system: Reforms and Perspectives*, 2017, System of disciplinary Liability of Judges, page 123.

90 See, for example: The findings of the Venice Commission of 2007 and 2014 on Disciplinary Responsibilities of Judges of Common Courts of Georgia, also the Coalition for Independent and Transparent Judiciary criticized the types of disciplinary misconduct several times in various studies. See also analysis of judicial liability system, 2014 EMC, GYLA and Transparency International Georgia research, etc.

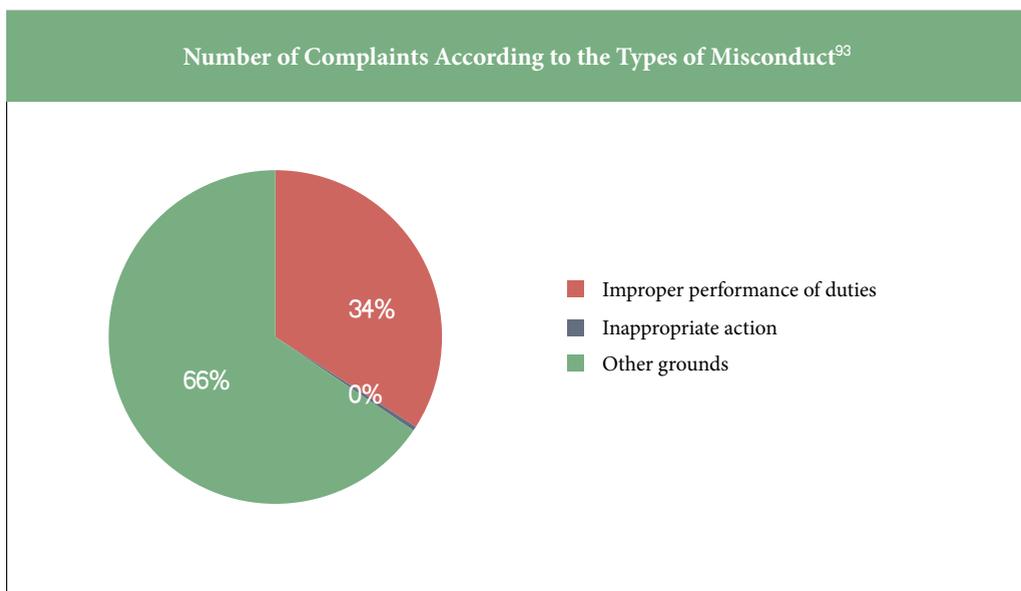
91 The types of disciplinary misconduct are envisaged by Article 751 (2) of the Organic Law of Georgia on Common Courts

duct established by the Organic Law are still very general and vague and cannot meet the criteria of foreseeability and clarity.

It should be mentioned that the working group created in the framework of “Fourth Wave” reform, elaborated draft of law that defines detailed list of disciplinary misconducts as the grounds for disciplinary liability of the judges. Aforementioned work is valuable but the draft of law is not initiated in the Parliament of Georgia yet.<sup>92</sup>

### Improper Performance of Duties and Inappropriate Action

Due to the absence of definition, it is unclear what is meant by improper performance of duties or not performing duties at all, which is a type of disciplinary misconduct. The same applies to the inappropriate action of the judge, who betrays the authority of the court and damages the trust towards the court. The general formulation of the types of disciplinary misconducts, the absence of their definitions, makes a possibility of broad interpretation of the norm and, on the one hand, it creates risks of misusing disciplinary liability against a judge, therefore threatening the independence of individual judges, and, on the other hand, it creates obscurity for the author of the complaint/application.



92 Shadow Report of Human Rights Education and Monitoring Center (EMC) and Institute for Development of Freedom of Information (IDFI) – Implementation of the Judicial Strategy and the Action Plan. 2018 p.75-76.

93 Source: Letters N84/3312-03- and N13/35-03- of December 5, 2018 and January 18, 2019 of the High Council of Justice Independent Inspector to Institute for Development of Freedom of Information. Data covers the number of alleged disciplinary misconduct (sometimes one disciplinary case covers more than one alleged disciplinary misconduct).

In addition, the types of disciplinary misconduct prescribed by law are, in some ways, overlapping. For example, unreasonable delay of consideration of the case may be regarded as non-fulfillment of judicial responsibilities or improper fulfillment of a judicial duty.

## Violation of Ethic Norms and the “Law on Conflict of Interest and Corruption in the Public Institutions”

The violation of the judicial ethic norms as a type of disciplinary misconduct requires further specification in the concrete actions. If the aforementioned regulation implies violation of the rules of judicial ethics, the definition must be made and the concrete Articles on rules of ethics must be specified, because the breach of any ethical norms should not be grounds for the disciplinary responsibility of the judges.<sup>94</sup> Creation of a general punitive mechanism for violation of ethical norms was negatively assessed by the Venice Commission in 2007, it was noted that much more accurate provisions should be written out when it comes to disciplinary liability.<sup>95</sup> In relation to the necessity to specify concrete Articles in the existing forms of disciplinary misconduct, the same applies to the corruption or abuse of official powers against judicial and work related interests,<sup>96</sup> since considering the formulation of the organic law, all the norms of the Law on conflict of interest and corruption in public institutions may also apply to the judges.

## Undue Delay of Hearing of the Case

Independent Inspector’s Office often receives complaints concerning undue delay of court hearings by the judge. It should be highlighted that even in case of confirmed violation of deadlines of the hearing, disciplinary proceedings are terminated by the Council on grounds of overloading of the court. While substantiating decision, Council refers to the statistics of the yearly assigned and completed cases by the judge.<sup>97</sup> This deserves criticism, since the statistical data and the percentage of the completed cases cannot determine the culpability of the judge in unreasonable delay of the hearing of the case.

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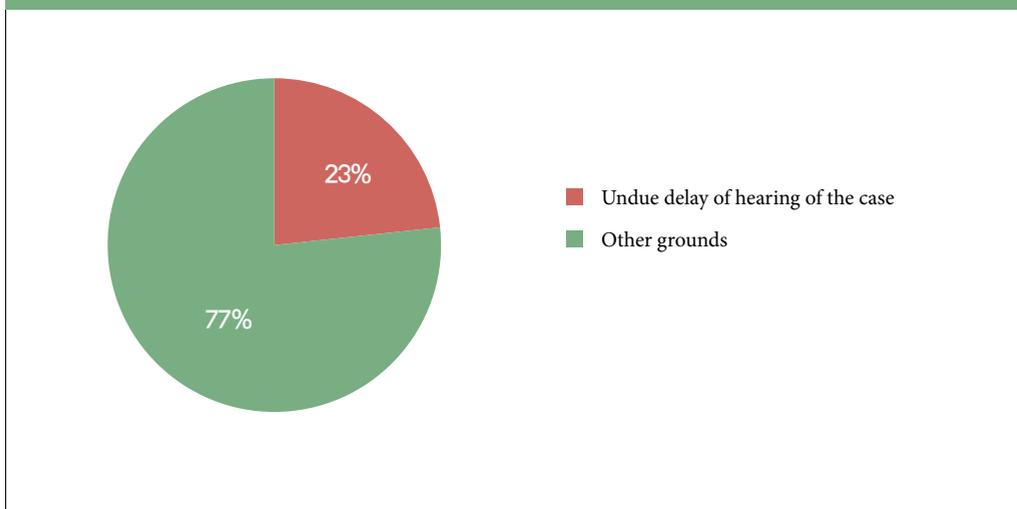
94 Judicial Integrity Group, Commentary of the Bangalore principles 2007, pg. 32. [available: [https://www.judicialintegritygroup.org/images/resources/documents/BP\\_Commentary\\_Engl.pdf](https://www.judicialintegritygroup.org/images/resources/documents/BP_Commentary_Engl.pdf), accessed on: 05.12.2018]

95 Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia adopted by the Venice Commission at its 70th Plenary Session 2007, para 17.  
Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) on the draft Law on Amendments to the Organic Law on General Courts of Georgia, 2014, paragraph 28.

96 Organic Law of Georgia on Common Courts Article 751, para. 2 (a).

97 The said cases are: N46/17, N52/17, N80/17, N112/17 and etc.

### Number of Complaints According to the Types of Misconduct<sup>98</sup>



It is also unknown what percentage of the completed cases can be considered that duties of the judges are duly fulfilled. It is important that in addition to the various procedural actions carried out on a particular case, the difficulty of other cases considered by the judge should also be taken into consideration, in case the judge has low percentage of closed cases during the year. Otherwise, the objective perception of the overloading of the judge will be difficult to assess.

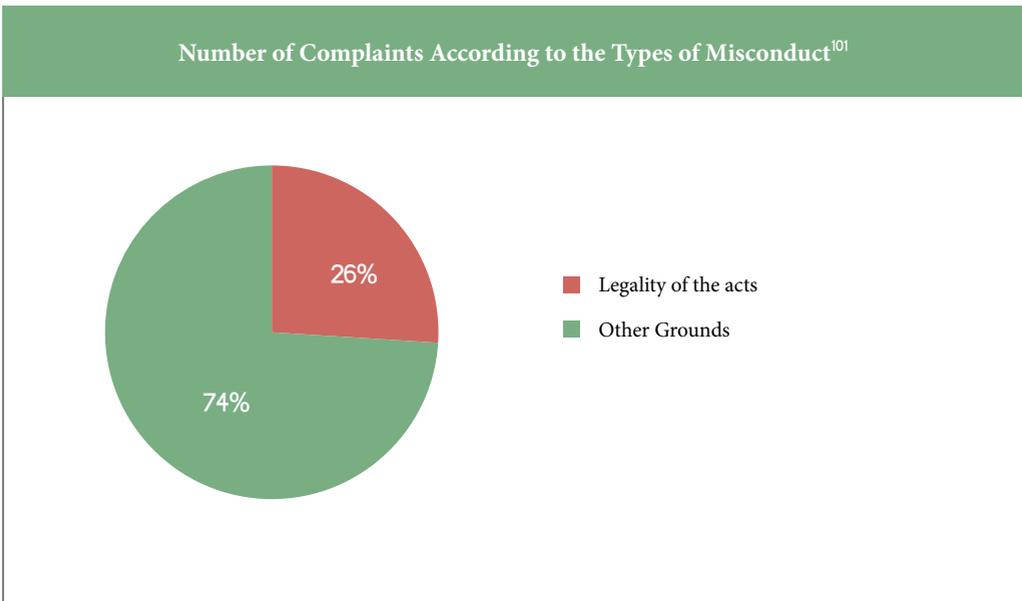
Statistics of the cases assigned to and completed by the judge over the year is not mentioned in cases when the Disciplinary Committee of the Judges of the Common Courts is considering the case regarding imposing disciplinary liability to the judge due to unreasonable delay of court hearing.<sup>99</sup> Consequently, it is difficult to determine in what cases the disciplinary proceedings can be terminated on the grounds of overloading of the judges and in what cases the judge may be subject to disciplinary liability.

<sup>98</sup> Source: Letters N84/3312-03-0 and N13/35-03-0 of December 5, 2018 and January 18, 2019 of the High Council of Justice Independent Inspector to Institute for Development of Freedom of Information. Data covers the number of alleged disciplinary misconduct (sometimes one disciplinary case covers more than one alleged disciplinary misconduct).

<sup>99</sup> See: Decision of 24 September 2018 of the Disciplinary Committee of Judges of Common Courts N2 / 01-2018. With this decision, the judge was imposed disciplinary sanction – reprimand letter for undue delay of the case hearing.

## Disciplinary Complaints/Statements on the Basis of the Legality of the Acts

According to the law, during disciplinary proceedings supervision of the legality of the acts issued by the judge is prohibited.<sup>100</sup> Despite this fact, in practice many complaints regarding the legality of the acts issued by the judge is received at Independent Inspector's Office. This that highlights low awareness of the authors of the complaints on the disciplinary proceedings. Since the Independent Inspector's Office does not have the right not to receive disciplinary complaint/application, the Office examines all the statements and complaints and reviews whether the judge acted within their capacity.



Then, the Inspector's conclusions and proposals are presented to the Council and the Council terminates disciplinary proceedings on grounds that the disciplinary misconduct as specified by the law cannot be proved.<sup>102</sup> In the survey conducted within the project, the employees of the Independent Inspector's Office, identified excessive number of complaints regarding the legality of the acts issued by the judge as one of the challenges, that is the result of the authors' low awareness on the objective of the system of the disciplinary liability.

100 This change was introduced in the legislation in March 2012 and is discussed in the following subsection.

101 Source: Letters N84/3312-03-0 and N13/35-03-0 of December 5, 2018 and January 18, 2019 of the High Council of Justice Independent Inspector to Institute for Development of Freedom of Information. Data covers the number of alleged disciplinary misconduct (sometimes one disciplinary case covers more than one alleged disciplinary misconduct).

102 The said cases are: N108/17, N141/17, N153/17, N198/17, N196/17, N158/17, N164/17, N144/17, N180/17, N120/17 and etc.

According to them, in addition to the fact that the above-mentioned complaints increases statistics of incoming disciplinary cases / complaints, it requires extra human resources and affects the difference between the suspended cases by the Council and the number of cases where the judges were imposed disciplinary liability.

### More than Legal Error (Legal error plus)

In terms of the grounds of disciplinary misconduct, the judge's disciplinary liability for the interpretation of the law is still a challenging issue.

Imposing disciplinary liability for the interpretation of the norm or for the legal mistake was criticized by the Venice Commission in 2007 report when assessing the disciplinary issues. Commission noted that incorrect interpretation of the law based on a judge's internal faith could only be changed by the higher court (Court of Appeals or Cassation) and disciplinary punishment of the judge for the violation of the law was contrary to international standards.<sup>103</sup>

In this regard, the legislation of Georgia was improved by the amendments introduced in March 2012 and a new subsection was added to the law, according to which, disciplinary liability did not apply to the incorrect interpretation of the law by the judge, due to their internal faith in the process of judicial conduct.<sup>104</sup> This was assessed as a positive change in terms of enhancing the freedom and independence of the judge. Although the current edition of the law does not provide for disciplinary liability for the interpretation of the law, there are cases in practice when the interpretation of the law by the judge is qualified as unfulfillment or improper performance of the duties of the judge.<sup>105</sup> In terms of ensuring the independence of the judge, this once again indicates to the need to improve the types of disciplinary misconduct.

Types of current disciplinary misconduct does not directly cover the case when the judge's mistake is accompanied by their dishonest action and leads to significant damage. International organizations emphasize on protecting the judge from disciplinary liability in case of the legal error of a judge when they act honestly and cases where a legal error has been

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103 Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia adopted by the Venice Commission at its 70th Plenary Session, 2007), para 29.

104 The mentioned norm is covered by paragraph 3 of Article 751 of the current version of the Organic Law.

105 See: Disciplinary Committee decision, [available at: <http://dcj.court.ge/uploads/Legislation/GEO-Legislation/sadisciplinokolegiis2016wlis20maisgadawyvetileba.pdf> and disciplinary chamber decision, which upheld the decision of the disciplinary Committee <http://www.supremecourt.ge/files/upload-file/pdf/21-ivlisi-9-16.pdf>, [accessed on: 05.12.2018]

committed by a preliminary understanding, corruption or other improper motive is not included here.<sup>106</sup>

In practice a judge can be held disciplinary liable for a legal error if the judge acts intentionally and his/her actions bring significant damage. For example, in the Decision No. 1 / 04-12 of Disciplinary Committee of April 12, 2013, the Committee discusses the case when a legal error may be qualified as a disciplinary offense if a legal error first and foremost hurts state and public interest, if a mistake has led violation of public order, If the judge knew in advance that he/she was making a legal error and still went ahead. Judge's motive is also of great importance, whether the error was made in good or bad faith.<sup>107</sup> It also is worth to mention here that the practice is not uniform in this regard.<sup>108</sup>

In case of legal error, it is important to define in law which additional circumstances may cause disciplinary liability in order to strengthen independence of the judges and for making homogeneous practice. In this regard, the US model of disciplinary proceedings, in particular the model of the State of California is interesting, as it supports judges' disciplinary liability for the legal error if additional circumstances are supplemented to the action. In particular if the action is contrary to the well-established norm of the law, is grounded with dishonesty and impartiality, is conducted with the use of public authority and ignores fundamental human rights.<sup>109</sup>

According to the assessment of the majority of the surveyed judges the types of disciplinary misconduct defined by the law are unforeseeable and of with general nature. To the question whether the disciplinary responsibility should be imposed on a judge for legal error, if the error is accompanied by the judge's intent or gross negligence, the majority of the judges sided with the opinion that judge should be punished for a legal error, when the error is accompanied by a dishonest action of the judge and causes significant damage.

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106 For example, see: CM Rec N 2010 (12) para. 66, European Networks of Councils for the Judiciary recommendation on minimum standards of judges disciplinary liability pg.39-40, [available at: [https://www.encj.eu/images/stories/pdf/GA/Hague/encj\\_report\\_minimum\\_standards\\_v\\_adopted\\_ga\\_june\\_2015.pdf](https://www.encj.eu/images/stories/pdf/GA/Hague/encj_report_minimum_standards_v_adopted_ga_june_2015.pdf), accessed on: 05.12.2018]

Also, Opinion no. 3 of the Consultative Council of European Judges (CCJE) on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 55.

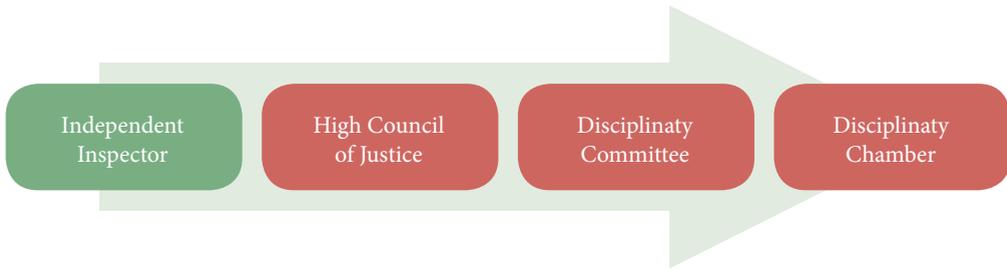
107 Disciplinary Committee decision [available at: <http://dcj.court.ge/geo>, accessed on: 31.10.2018]

108 Regarding the non-uniformity of disciplinary practice on judicial error see Judge Sulakadze disciplinary case N 1/04-12 Analysis: Coalition for Independent and Transparent Judiciary, Court system: Reforms and challenges, 2017. Judicial liability system pg. 121-123.

109 Constitution of the State of California, Article VI, §18, California Judicial code of ethics, Article 1. Explanation of the court on the case Oberholzer v. Commission on Judicial Performance (1999) 20 Cal.4th 371. Available at: <https://law.justia.com/cases/california/supreme-court/4th/20/371.html> (date of access 05.12.2018). Disciplinary liability for the "legal error plus" was supported by the Coalition for Independent and Transparent Judiciary Court system: Reforms and Perspectives, 2017. Judicial liability system pg. 122.

## Office of the Independent Inspector

With the amendments made by the “Third Wave” of the judicial reform, Independent Inspector’s Office of the High Council of Justice was introduced in the judicial system, which should conduct objective, impartial and thorough review and preliminary examination of alleged disciplinary misconduct of the judges of the Common Courts.



Establishment of Independent Inspector’s Office is a step forward, because it limits the exclusive authority of the Council’s Secretary at the initial stage of disciplinary proceedings. The establishment of an Independent Inspector’s Office was positively assessed in the opinion N937/2018 of the Venice Commission of December 17, 2018, and it was noted that, due to the importance of the Inspector’s Office in the Georgian judiciary, legislation should envisage the guarantees of the independence of the Inspector’s Office and its accountability.<sup>110</sup> Aforementioned statement in the opinion of the Venice Commission emphasizes once again that the acting legislation does not properly guarantee the Inspector’s institutional independence, and that there are separate shortcomings in the scope of her authority and duties. In addition, it should be noted that the legislation does not specify the status of an Independent Inspector in public service.

### Institutional Independence

According to the Organic Law, the Independent Inspector is elected and dismissed by the High Council of Justice of Georgia for a term of 5 years by a majority of the total composition. The Conference of Judges of Georgia is entitled to address the High Council of Justice

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<sup>110</sup> Opinion No. 937 / 2018 by European Commission for democracy through law (Venice Commission) opinion on the provisions on the prosecutorial council in the draft organic law on the prosecutor’s office and on the provisions on the high council of justice in the existing organic law on general courts. para. 51 [available [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)029-e) accessed on: 20.12.2018]

of Georgia with the request to dismiss an independent inspector, on relevant grounds, with no less than 1/3 of the total composition.<sup>111</sup>

The High Council of Justice consists of 15 members.<sup>112</sup> The judge members of the Council make up the absolute majority and the Independent Inspector is entrusted to examine alleged disciplinary misconduct of the judges. The procedure prescribed by the Organic Law on the appointment and dismissal fails to ensure the actual influence of non-judge members of the High Council of Justice in the selection and dismissal of the Inspector and leaves the Inspector dependent on the judge members to a certain degree. In addition, the law is limited to general and broad grounds for the dismissal of the Inspector, and the possibility and the rule to challenge the decision made by the Council of Justice at the court is not clearly defined.<sup>113</sup>

One of the general grounds for the rule of dismissal of the Inspector - the improper performance of the duties<sup>114</sup> was deemed to be overly vaguely and critically evaluated in the Venice Commission's 2018 opinion.<sup>115</sup> Since there is no objective criterion for proper and improper fulfillment of duty, the Venice Commission calls on the legislators to change the record and provide more specification for the grounds for dismissing the Inspector. The Independent Inspector has one of the most important functions in the process of disciplinary proceedings. Inspector is obliged to examine the circumstances of the alleged disciplinary misconduct specified in the disciplinary complaint, application or other information provided by law. The High Council of Justice makes a decision based on the materials collected by the Inspector. Consequently, large share of public trust towards disciplinary proceedings goes towards an Independent Inspector. That is why it is important that the appointment and dismissal of the Inspector should be open and maximally transparent in order to choose a worthy candidate who satisfies the independence and impartiality criteria.

According to the Organic Law, the High Council of Justice is responsible for determining the rule of conducting the competition for the position of an Independent Inspector.<sup>116</sup> Ac-

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111 Paragraph 2 of Article 51<sup>1</sup> of the Organic Law of Georgia on Common Courts.

112 8 members are elected by the self-governing body of judges of Common Courts of Georgia, 5 members are elected by the Parliament of Georgia and 1 member is appointed by the President of Georgia. The Chair of the Supreme Court is an ex-officio member of the Council.

113 Paragraph 6 of Article 51<sup>1</sup> of the Organic Law of Georgia on Common Courts.

114 Paragraph 6(თ) of Article 51<sup>1</sup> of the Organic Law of Georgia on Common Courts.

115 Opinion No. 937 / 2018 by European Commission for democracy through law (Venice Commission) opinion on the provisions on the prosecutorial council in the draft organic law on the prosecutor's office and on the provisions on the high council of justice in the existing organic law on general courts. Para. 51. [Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)029-e), accessed on:10.10.2018]

116 Paragraph 2 of the Article 51<sup>1</sup> of the Organic Law.

According to the amendments made to the Rules of Procedure of the High Council of Justice on March 31, 2017,<sup>117</sup> the competition for selection of Independent Inspector was defined by the rules envisaged by the “Law of Georgia on Public Service”, which included the selection process and the interviews with the contestants.<sup>118</sup> However, there were no criteria for selection of the Inspector for the interview, the principles of conducting competition and other important issues. As a result, after a 9-month delay from the enactment of the amendments (the selection process included one failed competition), in a close, non-transparent process, an Independent Inspector was appointed to the position and even later was the office fully staffed. This led to the delay in starting disciplinary proceedings on disciplinary complaints/applications and other information provided by law and other delayed processes.<sup>119</sup>

In terms of financial independence, it is important to note that according to the current edition of the Organic Law, the salary of the inspector is determined by the Council, and the Inspector does not have an opportunity to determine the number of their staff members and their remuneration.<sup>120</sup> These functions are in the hands of the High Council of Justice, which once again creates the risk of Inspector’s Office’s dependence on the Council.

In the survey of professional groups conducted within the framework of the project, the creation of Independent Inspector’s Office was positively evaluated by all of the judges. One of the reasons for such positive evaluation was the assertion that positive steps are taken towards increasing public confidence. The current procedure for selection of the inspector was not problematic for any of the judges.

The questions regarding the Inspector’s independence were asked to the Independent Inspector and their staff. All of them think that the Inspector is sufficiently independent today, but most of the respondents think that it would be preferable if the votes of non-judge members of the council could have some influence on the selection/dismissal of the Inspector. In their opinion, the decision on dismissal of the Inspector should be appealable in Courts, according to the general rule.

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117 See High Council of Justice decision: [available at: <http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202017/34-2017.pdf>, accessed on: 05.12.2018]

118 The terms of the contest announced for selection of independent inspector can be seen here: [available at: <https://www.hr.gov.ge/JobProvider/UserOrgVaks/Details/42986> accessed on: 28.05.2017 and available on: <https://www.hr.gov.ge/JobProvider/UserOrgVaks/Details/45482>, accessed on: 06.11.2017]

119 Independent Inspector’s letter of August 1, 2018 N1734/2185-03-o to IDFI says that in 2017 Independent Inspector’s Office processed 131 complaints on 159 disciplinary cases. 102 were transferred to the inspector for their review, [available at: <http://independent-inspector.ge/Legislation/Decision/17>, accessed on: 05.12.2018]

120 The draft law elaborated in the framework of “Fourth Wave” reform defines Inspector’s remuneration by the law, but aforementioned draft law is not initiated to the Parliament of Georgia yet. Source: Shadow Report of Human Rights Education and Monitoring Center (EMC) and Institute for Development of Freedom of Information (IDFI) – Implementation of the Judicial Strategy and the Action Plan. 2018 p.84.

## The Scope of the Authority of the Independent Inspector

It is noteworthy that the Inspector's Office is the only body authorized to initiate disciplinary proceedings. Analysis of the acting legislation reveals that there are separate shortcomings in the scope of the Independent Inspector's authority, which might question the effectiveness of the work of Inspector's office.

An Independent Inspector begins disciplinary proceedings against a judge. Inspector also implements preliminary study and examination of the disciplinary case. The Independent Inspector submits their conclusions and opinions to the High Council of Justice of Georgia. Interference in their activity to influence disciplinary proceedings is prohibited. The Inspector is obliged to examine the mitigating and aggravating circumstances of the judge's disciplinary liability.<sup>121</sup>

Inspector is obliged to conduct the preliminary inspection of the substance of the received complaint/application or other information within 2 months after receiving them. There is the same deadline for the examination of the disciplinary case and the term may be extended for two weeks in both cases. Unlike examining the disciplinary case, the law does not specify what actions the Independent Inspector should take during preliminary examination of the substance/grounds of the disciplinary case. In the course of the examination, they may take a written explanation from the author of the complaint (statement), if they wish, and from the judge, regarding whom the Council has decided to initiate disciplinary prosecution and order a written explanation. Independent Inspector is entitled to request all the necessary information, documents and materials related to the fact of committing a disciplinary offense, invite other persons and listen to their information. Consider the judge's motion against whom the disciplinary proceedings are being conducted.<sup>122</sup>

Under the Organic Law, it is unclear at what stage the Inspector submits their conclusions and opinions. After completion of preliminary inspection (assessment of grounds of disciplinary prosecution), after the completion of examination or in both cases. This is shown neither in the decisions of the Council on termination of disciplinary liability published on their website. The information requested from the Inspector's Office confirms that the Inspector submits their conclusions and opinions to the Council before the start of disciplinary prosecution, but there is nothing said about the conclusion of the Inspector to the moment the Council is deciding on the start of the disciplinary prosecution.<sup>123</sup> Interviews conducted with the Independent Inspector's staff reveal that the Inspector lacks authority to provide conclusions and proposals when the Council undertakes a decision on judge's dis-

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121 Articles 51<sup>1</sup> and 75<sup>6</sup> and 75<sup>10</sup> of the Organic Law of Georgia on Common Courts.

122 Article 75<sup>10</sup> of the Organic Law of Georgia on Common Courts.

123 July 20, 2018 Letter of Institute for Development of Freedom of Information to the Independent Inspector, N FOI 07/18-005 and the response letter of August 1, 2018 to the Independent Inspector, N1734/2185-03-ᄁ.

ciplinary liability and the Inspector’s involvement in the disciplinary proceedings is limited to starting disciplinary prosecution against the judges. This deserves criticism because most important part of the disciplinary proceedings is conducted exactly by the Inspector and he/ she has primary access on any document or information related to the disciplinary case. The main actions related to establishing the circumstances of the disciplinary case are examined during the examination of the disciplinary case.

According to the information requested from the Independent Inspector, the number of incoming disciplinary complaints / applications is increasing. In addition, the Law does not envisage the possibility of Inspector identifying the shortcoming of the complaint and giving extra time to eliminate it (to submit a complete complaint / application).

Below is a list of disciplinary complaints / statements submitted in 2017 and 2018 to the Independent Inspector’s Office or the number of other information provided for by the Law on the alleged disciplinary offense, according to the type of disciplinary misconduct.<sup>124</sup>



124 The data includes the number of disciplinary complaints / statements or other information submitted to the Inspector’s Office from the day the organ was created to January 10, 2019. The data also includes the disciplinary complaints/ statements regarding lawfulness of the act, however, this is not included in the list of disciplinary violations as determined by the law, moreover organic law prohibits disciplinary proceedings on the supervision of the legality of the acts issued by the judge, but the incoming disciplinary complaints/statements on these grounds are still prevalent at the inspector’s office.

125 Source: Letters of the High Council of Justice Independent Inspector to Institute for Development of Freedom of Information N84/3312-03-0 and N13/35-03-0 of December 5, 2018 and January 18, 2019. Data includes number of alleged disciplinary misconduct (in many cases one disciplinary case covers several disciplinary misconducts).

Law imposes on the Council an obligation to inform the judge on the complaint/statement or other information received by the Independent Inspector.<sup>126</sup> However, it is an exclusive right of the Inspector to start disciplinary proceedings and any disciplinary complaints, statements or other information provided by the law of the alleged commission of disciplinary offenses is gathered in the Inspector's office at first. Interviews with Independent Inspector's staff revealed that in practice not the Council, but the Independent Inspector informs the judge about the complaint/statement or other information. This practice should be commended; however, the abovementioned provision remains problematic.

For the same reason, it should be criticized that High Council of Justice, instead of Independent Inspector, is authorized to suspend disciplinary proceedings and address the investigative bodies.

The Organic Law does not specify the standard set for assessment and case study by the Inspector, as well as the quality of the body of evidence that should be the basis of the conclusion of the Inspector on the existence/absence of signs of disciplinary misconduct. This is also important for the Council's disciplinary decisions.

The Organic Law does not clearly specify the role of the Independent Inspector's conclusion on the initiation of disciplinary prosecution by the High Council of Justice. In particular, there is no specific norm in the Organic Law whether the Inspector has the authority to address the Council with the recommendation on whether to initiate/or not the disciplinary prosecution.

Most of surveys employees of the Office of the Independent Inspector do not agree with the opinion that they have the right to suspend the case and address the relevant authorities if the signs of the misconduct appear in the action of the judge. The respondents gave preference to the collegiate body to solve this issue. They also did not agree with the idea that the inspector should be authorized to appeal against the decision of the High Council of Justice on termination of the proceedings.

## Transparency of the Independent Inspector's Office

The Transparency of the Independent Inspector's Office is a significant challenge. In particular, the Independent Inspector's conclusions are not published. Within the scope of the study, the project team had requested the Independent Inspector's conclusions on separate disciplinary cases without identifying the parties' identification data, although these conclu-

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126 Article 75<sup>5</sup>, para.3 of the Organic Law of Georgia on Common Courts.

sions were not provided by the Inspector on the basis of confidentiality of the disciplinary proceedings.<sup>127</sup>

In the decisions published by the Council to date there is extensive and clear evidence from the inspection and examination by the Independent Inspector, however, only a small part of them contain the Independent Inspector's opinion on the existence/absence of signs of disciplinary misconduct in a judge's action.<sup>128</sup>

The Organic Law also does not specify the obligation of the Inspector to proactively and periodically publish information on appeals to the Council, grounds of misconduct and the decisions taken by the Council on the basis of the address of the Independent Inspector. At present, the Organic Law states that the Inspector shall submit its report to the High Council of Justice and the Conference of Judges in case of request.<sup>129</sup>

The majority of interviewed judges favor the opinion that the Independent Inspector's conclusions should be published without the identification data.

As a result of the survey of the staff of the Independent Inspector, it has been established that the Office regularly administers statistical information on the number of alleged disciplinary misconducts of the judges, grounds of misconduct and the decisions taken by the Council on the basis of the address of the Independent Inspector.

## Different Aspects of Disciplinary Proceedings

As a result of the changes of the “Third Wave” of the judicial reform, the process of disciplinary proceedings has been improved in different directions. Specifically, the institute of Independent Inspector was introduced, the timeframe for preliminary inspection and examination of the disciplinary case was established, the judge was given the right to publicize disciplinary hearings, the Council was obliged to make a substantiated decision on termination of the disciplinary case and publish it on the website etc. However, besides these positive changes, there are still number of problematic issues, which are discussed below. The transitional provision following the changes, which found that the disciplinary misconduct committed before the enactment of the amendments and/ or already started disciplinary proceedings should be carried out according to the

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127 Letter No: FOI09/14-002, September 4, 2018 of Institute for Development of Freedom of Information to the Independent Inspector, Letter and the response letter N14/6 – 03-0, September 14, 2018 of the Independent Inspector.

128 May 14, 2018 decisions on disciplinary cases N50-17, N78-17, N99-17, N114-17, N118-17, N119-17, N120-17, N130-17, N136-17, N139-17, N140-17, N144-17, N146-17, N146-17-1, N146-17-2, N150-17 and N159-17.

129 Article 51<sup>1</sup> para. 12 of the Organic Law of Georgia on Common Courts.

rules before the amendments, deserves criticism.<sup>130</sup> Consequently, those judges against whom disciplinary proceedings were started or who had committed disciplinary misconduct before the enactment of the “Third Wave” found themselves in the differentiated position because they would not benefit from improved rules envisaged by the “Third Wave” reform. As a result, the substantially equal persons (both the judges and the authors of the complaint/application) were put in a significantly different position.

## Confidentiality

Taking into account the importance of judicial disciplinary proceedings, the transparency of the disciplinary process is of great importance, since transparency is an important factor of public trust towards the Court and protects it from the risk of political influences inside the Court or from acting out of personal interest.<sup>131</sup> For the purpose of protecting the interests of a judge participating in disciplinary proceedings, international organizations recommend that confidentiality should be protected at the initial stage of disciplinary proceedings.<sup>132</sup> The decision of the Constitutional Court of Georgia in the case of the Public Defender of Georgia and the citizen Ketevan Bakhtadze against the Parliament of Georgia, supports above-mentioned provision, where the court relates the confidentiality of the disciplinary proceedings with the high public authority of the Court and the judge and the need to protect and preserve it.<sup>133</sup>

The procedure of disciplinary proceedings under Organic Law is confidential. However, with the changes envisaged by the “Third Wave” of the judicial reform, the judge has the right to publicize the hearing of the High Council of Justice on the decision on imposing disciplinary prosecution (except for meeting and decision making procedures) and sessions of the Disciplinary Committee and the Disciplinary Chamber.<sup>134</sup> The abovementioned is a positive step forward to the extent that it protects the rights of the judges, on the one hand and, on the other hand, serves the interest public control over the disciplinary proceedings.

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130 Article 2 of the Law of Georgia on the “Disciplinary Responsibility and Disciplinary Proceedings of Judges of Common Courts of Georgia” of 8 February 2017 on making amendments to the Law of Georgia. This provision was challenged by the Public Defender of Georgia at the Constitutional Court and is available on the website [<http://www.constcourt.ge/en/court/sarchelebi> Complaint N1291 accessed on: 30.10.2018].

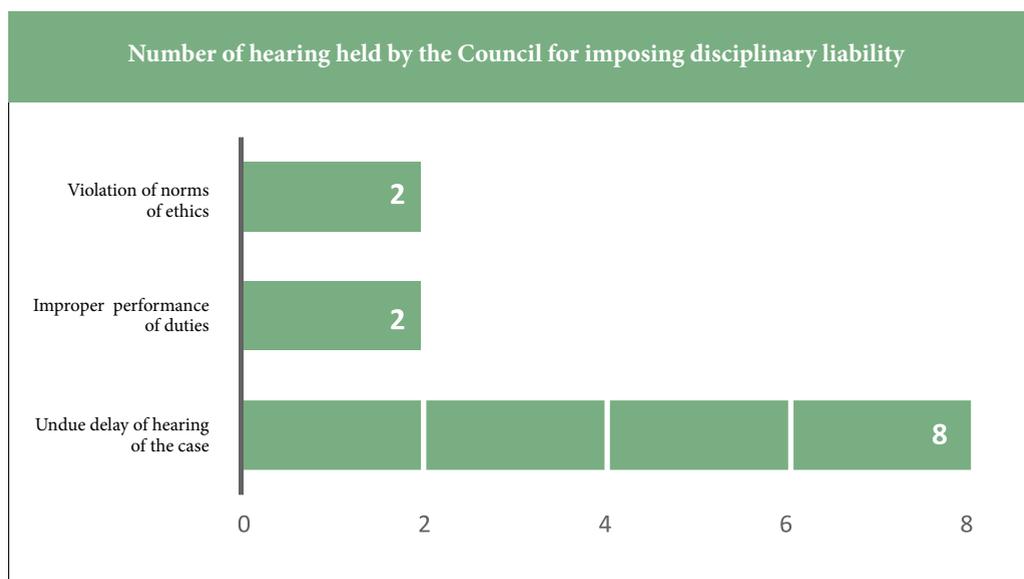
131 Venice Commission Conclusion on the Draft Law on Amendments to the Law On Disciplinary Responsibility and Disciplinary Proceedings of Judges of Common Courts of Georgia (2014), para 17.

132 United Nations Basic Principles on Independence of the Judiciary, paragraph 17, Recommendation of European Networks of Councils for the Judiciary on minimum judicial standards disciplinary proceedings and liability of judges, p. 36.

133 The decision can be found here: [<http://constcourt.ge/ge/legal-acts/judgments/saqartvelos-saxalxo-damcveli-dasqartvelos-moqalaxe-qetevan-baxtadze-saqartvelos-parlamentis-winaagmdeg-121.page>, accessed on: 05.12.2018]

134 Article 75<sup>4</sup> para. 1 of the Organic Law of Georgia on Common Courts.

Since the entry into force of the “Third Wave” changes until today, the High Council of Justice has held 12 hearings to decide on the issue of judicial disciplinary proceedings and in none of the cases the judges made the hearing public. Consequently, there is no case for an open disciplinary hearing in the High Council of Justice where the interested persons would be able to attend and monitor the process.<sup>135</sup>



In the framework of the survey of the professional groups, most of the judges positively assess the judge’s right to make disciplinary hearings public. Half of the interviewed judges responded positively to the question whether they would make the disciplinary hearing on their case public.

### Timeframe for Preliminary Inspection and Examination

Unlike the situation before the amendments, when there were no timeframes for High Council of Justice to start the disciplinary prosecution or terminate the proceedings, the “Third Wave” specified the deadlines for preliminary inspection and examination in the disciplinary proceedings and termination of disciplinary proceedings.

<sup>135</sup> Source: Letter N13/35-03-09 of January 10, 2019 Independent Inspector of the High Council of Justice to Institute for Development of Freedom of Information.

Determining deadlines in the process of disciplinary proceedings should be considered as a step forward, since it avoids unreasonably delayed processes and the Council is obliged to terminate the process due to failing to establish a disciplinary offense within the established timeframe. Unfortunately, it is impossible to determine how realistic are the deadlines set by the Organic Law, due to the delayed appointment of the Independent Inspector.



Study of the professional groups suggest that all interviewed judges as well as employees of the Independent Inspector’s Office positively and sufficiently assess the timeframe for preliminary checks and examination as specified by the law.

Stages of the disciplinary proceedings of the judges:



From the creation of an Independent Inspector’s Office until October 8, 2018,<sup>136</sup> all disciplinary proceedings, which were terminated for various reasons by the Council, were being conducted in violation of the timeframes established by the Law. One of the reasons for this may be the delay of appointment of an Independent Inspector and her staff, which deferred the amendments, proposed by the “Third Wave” of the judicial reform for almost 9 months and caused a delay in reviewing disciplinary complaints, statements and other information. From the decisions, it is difficult to determine whether the timeframe for the preliminary checks and examination of the disciplinary case by the Independent Inspector’s Office, as established by the law, is sufficient for a thorough examination of the case. Decisions indicate the date of submitting the conclusion by the Independent Inspector, but it is not clear when the Inspector began preliminary examination of the disciplinary case.

After the establishment of an Independent Inspector’s Office, in the process of the disciplinary proceedings not only the deadlines for the initiation of disciplinary proceedings, but also other deadlines are being disregarded. In particular, the Organic Law requires the disciplinary case to be completed within 2 months after the decision on receiving explanation from the judge. If necessary, this term may be extended no more than 2 weeks. At the same

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136 These are the decisions published on the website of the High Council of Justice of Georgia on January 1, 2018 about termination of disciplinary proceedings.

time, the High Council of Justice may request that an Independent Inspector should conduct additional examination and this process may last for 2 months. In the decisions made available on the website as of January 1, 2019, only few decisions can be found by the High Council of Justice on termination of disciplinary proceedings against a judge and in all the cases, the deadlines established by the Law for examination of the disciplinary case are missed.<sup>137</sup>

In the published decisions, we find occasions when the conclusion prepared by the Independent Inspector is considered by the High Council of Justice with delay. In particular, several disciplinary cases show that,<sup>138</sup> an Independent Inspector has prepared a report on April 30, 2018, which was submitted to the Council for consideration at the session of 16 July 2018. In another case, a report was prepared on July 18 2018 and was submitted to the Council for consideration at the session of December 17, 2018. Due to the delayed appointment, the submission of the conclusion was delayed by an Independent Inspector. However, the Council holds the sessions on disciplinary cases once a month.<sup>139</sup> This leads to a longer delay in reviewing the conclusions prepared by an Independent Inspector.

Within the survey, the staff of the Office of the Independent Inspector named the accumulation of cases due to the delay of the complete composition of the Office as one of the biggest challenges, which is still causing delays in the process of disciplinary proceedings.

## Terminating Disciplinary Proceedings by the Council

In the framework of the “Third Wave” reform, the High Council of Justice was instructed to make a substantiated decision on termination of disciplinary proceedings and to publish these decisions on their website.<sup>140</sup> This change promotes the formation of uniform practice on disciplinary cases and introduces a sort of public control mechanism on the activities of the Council. The obligation to publish the decision made by the Council on termination of disciplinary proceedings was positively assessed by half of the interviewed judges.

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137 For example, on disciplinary case N83 / 17 the High Council of Justice decided to initiate disciplinary prosecution and request an explanation from a judge on 23 March 2018 and made a decision on the termination of disciplinary proceedings on 16 July 2018. Also, in disciplinary case N112 / 17, the deadline for the termination of the disciplinary case envisaged by law is delayed by 2 months and in the disciplinary case N206 / 17 where the decision on the initiation of the disciplinary proceedings was made by the Council on 2 April 2018 and the proceedings were discontinued on July 16 2018 because it was not confirmed that the judge committed the disciplinary offense.

138 See the disciplinary cases N161/17, N185/17 N187/17, N190/17, N208/17, 215/17, N216/17, N219/17, N229/17, N237/17, N199/17, №49/18, N51/18-1, N51-18-2 etc.

139 High Council of Justice conducted disciplinary hearings on- February 26, March 12, April 2, May 14, June 15, July 16, October 8 and December 12 2018.

140 Article 75<sup>12</sup> of the Organic Law of Georgia on Common Courts.

## a) Dissenting Opinion in the Council's Decisions

The Law envisages 6 cases of termination of disciplinary proceedings by the High Council of Justice.

- 1) When the grounds for termination under Article 75<sup>12</sup> para. 1 of the Law are presented, namely:
  - a) The fact of committing a disciplinary misconduct defined by the law or culpability of the judge in disciplinary misconduct is not confirmed as a result of examination of a disciplinary case;
  - b) The deadline for imposing disciplinary liability and sanction to a judge has expired;
  - c) There is a decision on the same disciplinary grounds, against the same judge made by the body carrying out disciplinary proceedings;
  - d) Judge's judicial authority has been terminated.
  
- 2) When disciplinary proceedings are terminated in case the quorum needed for initiating disciplinary prosecution was not achieved <sup>141</sup> and
  
- 3) When disciplinary proceedings are terminated in case the quorum needed for imposing disciplinary liability was not achieved.<sup>142</sup>

In the last two cases, the Law envisages that the dissenting opinion which contradicts the council decision to be attached to the case. In addition, the Law does not directly cover the obligation to publish the dissenting opinion together with the decision. Furthermore, since the High Council of Justice is a collegial body, dissenting opinion of the members of the Council is important not only on the basis of termination of disciplinary proceedings on the aforementioned grounds, but also in cases of terminating disciplinary proceedings under Article 75<sup>12</sup>, paragraph 1, sub-paragraph "a" ("The fact of committing a disciplinary misconduct defined by the law or culpability of the judge in disciplinary misconduct is not confirmed as a result of examination of a disciplinary case").

It is noteworthy that dissenting opinion of any Council member is supplemented to none of the decisions on termination of disciplinary proceedings published on the website of the Council. The fact that none of the members of the Council has written a dissenting opinion on the decision of termination of the disciplinary proceedings is also confirmed by the public information provided by the Independent Inspector.<sup>143</sup> Attaching dissenting opinion on the disciplinary case and its publication together with the decision on termination of disciplinary proceedings is important especially when the votes of the Council members are

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141 Article 75<sup>8</sup> of the Organic Law of Georgia on Common Courts.

142 Article 75<sup>13</sup> of the Organic Law of Georgia on Common Courts.

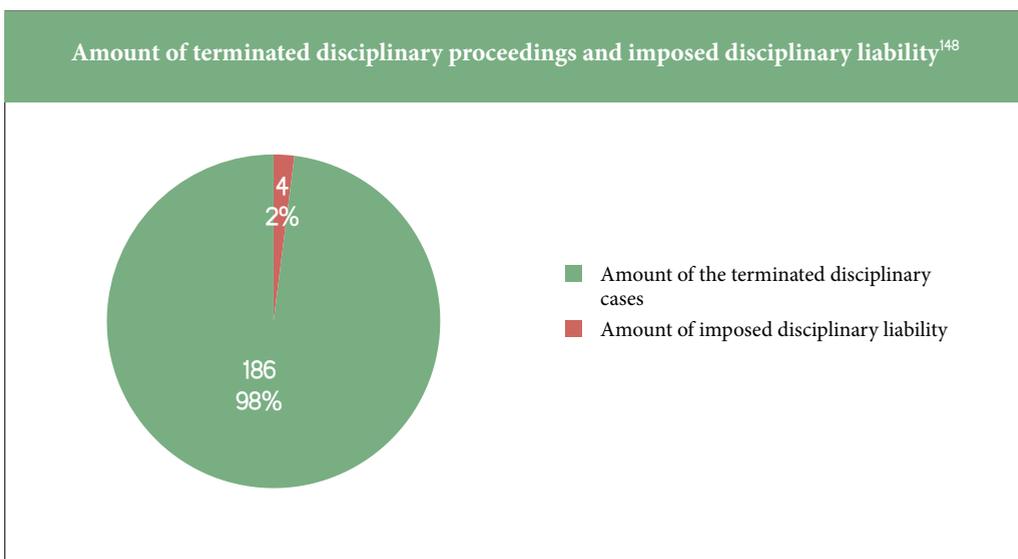
143 Letter N13/35-03-00, January 18, 2019.

significantly divided and in reality, 4 or 6 members actually influence the decision on termination of disciplinary proceedings.<sup>144</sup>

## b) High Quorum Required for Making a Decision

The decision on disciplinary cases shall be made by a qualified majority of 2/3 of the total members of the Council.<sup>145</sup> The same qualified majority is also required to initiate disciplinary prosecution against a judge, to request the explanation from the judge, and to impose a disciplinary liability of the judges. Disciplinary proceedings are terminated in case of failing to reach this qualified majority.<sup>146</sup>

The current statistics show that out of 699 facts of alleged disciplinary misconduct, disciplinary proceedings were initiated in 33 cases and only in four cases a judge was charged with disciplinary liability.<sup>147</sup> This practice is a continuation of the previously existing trend of rare usage of the disciplinary sanctions against judges because setting the quorum so high promotes the termination of disciplinary proceedings at an early stage.



144 In disciplinary cases N139/17 and N60/17 9 members of the council believed that there were signs of misconduct in the actions of the judge and 4 members believed that there were no specific grounds for disciplinary misconduct. Also disciplinary case N83/17, where 9 members believed that the disciplinary proceedings should be suspended and 6 members considered that the judge had to be subjected to disciplinary prosecution for unreasonable delay of the case.

145 Article 50 (3) of the Organic Law of Georgia on Common Courts.

146 Articles 75<sup>8</sup> para. 1 and 75<sup>13</sup> para. 1 of the Organic Law of Georgia on Common Courts.

147 Data covers the period from establishment of the Office of the Independent Inspector until January 10, 2019.

148 Source: Letters N84/3312-03-ᄁ and N13/35-03-ᄁ of December 5, 2018 and January 18, 2019 of the High Council of Justice Independent Inspector to Institute for Development of Freedom of Information.

The need for a qualified majority (2/3) to start the disciplinary prosecution was criticized by the Venice Commission in 2014, which considered that such a high quorum limit would create serious risk that many complaints would remain unanswered with the influence of the internal corporation approach of the High Council of Justice.<sup>149</sup>

The distinctive discrepancy between the cases suspended and the judge's disciplinary prosecution was explained by the staff of the Independent Inspector's Office due to the large number of cases which were terminated on grounds of the legality of the court decision. In the survey of professional groups, all interviewed judges positively assessed 2/3 majority of the full composition of the Council needed for the decision on disciplinary issues.

### c) The Problem of Legal Assessment in the Decisions

The decisions published by the Council on its website contain certain problems in terms of justification, and one of the reasons could be that the law does not specify what should be included in the judgments of the High Council of Justice on termination of disciplinary proceedings the same way it is specified for the decisions of the Disciplinary Committee.<sup>150</sup> In addition, it is not clear in the Law that any decision on termination of disciplinary proceedings needs justification. Including those disciplinary cases, which were suspended due to the absence of the necessary quorum of the members of the Council to make a decision on the start the prosecution, collecting explanation from the judge and imposing disciplinary liability on the judge. It is not specified either in what timeframe the substantiated decision should be published on the Council's website.<sup>151</sup>

The cases that are discontinued at the stage of reviewing the grounds of the initiation of disciplinary proceedings are characterized by special problems in terms of justification. Unlike cases suspended on other grounds,<sup>152</sup> these decisions<sup>153</sup> do not include the Council's legal assessment of the evidence collected by the Independent Inspector during the preliminary examination and reasoning and justification on why the initiation of the disciplinary prosecution is suspended. Decisions are terminated without justification and only the actual

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149 Opinion of the Venice Commission on Draft Law on Amendments to the Law "On Disciplinary Responsibility and Disciplinary Proceedings of Judges of Common Courts of Georgia" (2014), para. 24.

150 Article 75<sup>51</sup> of the Organic Law of Georgia on Common Courts.

151 In practice the decisions are published on the Council's website after one month delay.

152 Disciplinary case N140 / 17 does not contain legal assessment of the circumstances established by the inspector and is therefore unjustified as well as which has been terminated because the fact that the judge committed disciplinary violation was not proven and does not contain any legal assessment.

153 See disciplinary case N139/17, N60/17 and N209/19.

circumstances established by the Independent Inspector and the grounds for termination of disciplinary proceedings are defined.<sup>154</sup>

## The Role and Authority of a Judge in the Process of Disciplinary Proceedings

According to the current version of the Organic Law, the judges are more involved and informed about disciplinary proceedings against them, which should be positively assessed. The Organic Law provides for the obligation to immediately notify the judge regarding the complaint, application or other information on the disciplinary misconduct committed by them.<sup>155</sup> However, it is noteworthy that informing is not only a notification regarding received complaint / application or other information provided by the law, but together with the notification, the judge should also be informed of the circumstances which led to the initiation of disciplinary proceedings against him. Should be explained the content of the application / complaint or receive a copy of it, so that the judge is informed what circumstances led to start of the disciplinary proceedings against him/her.

A judge, against whom disciplinary proceedings are being conducted, has a right to counsel after the disciplinary prosecution is initiated. They may request lawyer or other judge or other representative as a defender.<sup>156</sup> During the examination of the disciplinary case, he/she may file a motion before an independent inspector. He/she can also request the submission of additional explanations. They may also file a motion for recusal of an Independent Inspector and if there is a substantiated doubt that the Inspector is biased, the motion should be accepted. According to the public information provided by the Independent Inspector's Office, none of the judges has filed a motion for recusal of an Independent Inspector yet.<sup>157</sup>

The High Council of Justice is obliged to invite a judge and to invite the author of a disciplinary complaint (if they wish so) at the hearing to decide on a judge's disciplinary prosecution.

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154 The exception is the Disciplinary Case N202 / 17, which is suspended under Article 75<sup>8</sup>, contains an independent inspector's legal assessment of the investigated materials as a result of preliminary inspection and examination and is more or less substantiated.

155 Article 75<sup>5</sup>, para. 3 of the Organic Law of Georgia on Common Courts.

156 Article 75<sup>10</sup>, para.2 of the Organic Law of Georgia on Common Courts.

157 Letter N13/35-03-0 of January 18, 2019 of the High Council of Justice Independent Inspector to Institute for Development of Freedom of Information.

## Standard of Proof

The “Third wave” reform specified the standard of proof to some extent and defined that the Disciplinary Committee shall take a decision on disciplinary liability of the judge and on the imposed penalty, if at the disciplinary hearing of the Disciplinary Committee a collection of mutually compatible and convincing evidence proves the judges culpable commission of one or several disciplinary misdeeds envisaged by the law.<sup>158</sup> The Organic Law does not specify the issue of reliability and admissibility of evidence when the Independent Inspector or the High Council of Justice is taking a decision on whether the judge committed disciplinary misconduct.

Standards of proof in the process of disciplinary proceedings was positively assessed by all of the interviewed judges.

## The Quorum Required for the Disciplinary Committee to Decide on an Issue

The Disciplinary Committee establishes whether the judge has committed an act for which he / she has been subjected to a disciplinary allegation, and whether or not this action is a disciplinary misconduct in accordance with the Law. The Disciplinary Committee also establishes whether the judge is guilty of disciplinary misconduct. The Committee consists of 5 members, from which 3 are elected by the Conference of Judges and 2 are appointed by the Parliament of Georgia. According to the Organic Law, the Committee has the authorization if 3 members attend the session and the decision is made by a majority of the attendees.<sup>159</sup> Due to the powers of the Disciplinary Committee, the aforementioned rule deserves criticism, as it endangers the fairness of the disciplinary proceedings, since theoretically it is possible that 2 members out of 5 of the total membership of the Committee could hold the judge liable and impose disciplinary liability and penalty.<sup>160</sup>

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158 Article 75<sup>46</sup> of the Organic Law of Georgia on Common Courts.

159 Article 75<sup>19</sup> of the Organic Law of Georgia on Common Courts.

160 Decisions of the Disciplinary Committee №2/01-2018, №21/01-18, №1/01-17, №1/04-12, №1/03-12, №1/02-12, №1/01-12 №1/02-11 1/01-11 are taken unanimously, but by three members. Source: Letter N 21/03 of December 14, 2018 of the Disciplinary Committee of the Common Courts of Georgia.

## Recommendations

- It is important that the draft law on disciplinary liability of the judiciary elaborated within the “Fourth Wave” of the judicial reform should be updated and timely submitted to the Parliament. Also, the law should explicitly include the objectives of the disciplinary proceedings in order to prevent the misuse of disciplinary liability. In addition, the types of disciplinary misconduct must include specific cases of professional misconduct which are serious and unacceptable in nature<sup>161</sup> or discredits the whole justice system;<sup>162</sup>
- It is important the types of disciplinary misconduct to include responsibility of the judges for the actions which contradict the established norm of the law, and in which there is no obscurity, if the action was carried out by the judge with a clear and convincing dishonesty and disrespect for human rights, which caused significant damage (“legal error plus”). In this case, it is important to note that disciplinary responsibility results from the decision of the higher instance court, in the proved cases of misconduct (in case of its existence);
- In terms of institutional independence of the Independent Inspector, it is important that appointment and dismissal of the Independent Inspector to be determined by the 2/3 of the total composition of the Council, also the grounds of the dismissal of the Inspector should be specified and the appeals procedure should be defined. In addition, in terms of the financial independence of the Institute, it is important that the law should define the remuneration of an Independent Inspector;
- In terms of increasing accountability and transparency towards the public, it is important that Independent Inspector should be given a status of an official in accordance with the Georgian Law on “Conflict of Interests and Corruption in the Public Institution”.
- Independent Inspector should have authority to identify deficiencies of disciplinary complaint / application and to set deadlines for the author of the disciplinary complaint for remedies, that will simplify the part of disciplinary proceedings the Independent Inspector is responsible for;
- Instead of the Council, an Independent Inspector should have an obligation to immediately notify the judge and indicate the circumstances, which led to the disciplinary proceedings or have the copy of the complaint/application forwarded to the judge. In addition, the Law shall define the authority of the inspector to suspend disciplinary proceedings in the presence of signs of the criminal offense in the action of the judge and apply to the relevant authorities without the consent of the High Council of Justice;
- The law should specify the standard for assessment of the collected information and the standard for the case proceedings and the quality of the collection of the evidence

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161 Judicial Integrity Group- The Record of the Sixth Meeting of the Judicial Group on Strengthening Judicial Integrity, Responsibilities of the State, Discipline of the Judges, para 15.1.

162 Kiev Recommendations on judicial independence in eastern Europe, South Caucasus and Central Asia, para 25.

that should be the basis of the conclusion of the inspector on the presence of signs of disciplinary misconduct. This issue is also relevant for initiating the prosecution of a judge with respect to the disciplinary decisions of the Council and imposing the disciplinary prosecution;

- It is important to clarify in the law that an Independent Inspector addresses the Council with recommendation on whether or not to initiate a disciplinary prosecution. In addition, after the examination of a disciplinary case, the Independent Inspector should present the Council his/her own conclusion and opinion at the stage of imposing disciplinary liability to the judge, because the major part of the proceedings is conducted by the Independent Inspector and Inspector is the first person who comes in contact with all the documents and information regarding the disciplinary case.
- For more transparency of the disciplinary proceedings, an Independent Inspector should be obliged to publish the conclusions prepared by him/her by concealing the identification data of the parties.
- The law should define the obligation of the Inspector to proactively publish the information regarding the number of received complaints on alleged disciplinary misconduct, the grounds for misconduct and the decisions made by the Council on the basis of an address of the Independent Inspector.
- During disciplinary proceedings, actions to be carried out during the preliminary inspection of the case and the review of the disciplinary case should be explicitly distinguished.
- To avoid inconsistent practices, it is important to define the standard of justification for the decision on termination of disciplinary proceedings by the Council. Including that the decisions should take into consideration the content of the Independent Inspector's conclusion or their position; In addition, the Law should clearly state the obligation of the Council to make a substantiated decision on terminating disciplinary proceedings on any grounds;
- It is important that whether or not the existence of the disciplinary misconduct is proven by the Council, a member of the High Council of Justice to have the right to express their dissenting opinion; In addition, the law should specify not only the obligation to attach the dissenting opinion of the member of the Council who disagrees with the decision of the Council on termination of the disciplinary case, but also that the Council should publish it together with the decision on termination;
- To ensure a fair decision made by the Disciplinary Committee (the possibility to take into consideration the opinion of majority of the members), it is important for the Committee to make decisions with the majority of the general composition of the Committee.