JUSTICE IN GEORGIA

Georgian Young Lawyers' Association

GEORGIAN YOUNG LAWYERS' ASSOCIATION

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INTRODUCTION

The on-going reform of the Georgian judiciary has taken a multi-year and a multi-phase nature. It started as early as before 2003 or, in other words, before "the Rose Revolution" and was modified for a number of times. Notwithstanding the permanent "reformation process", public confidence toward the Georgian judiciary is still low. A great many legislative amendments were enacted in the recent period to boost the court system but the society's attitude toward the judiciary remains negative and the effectiveness of courts is low. Although Georgian laws in the field of justice are not, in principle, contradictory to accepted international standards, there are a number of circumstances resulting in the dependence of the judiciary upon the executive authorities; more deplorably, courts tend to impose restrictions and suppress own powers and independence by themselves. The level of public confidence toward the court system is negatively affected also by the fact that video and audio recording of court hearings is restricted – a rule enacted by the Parliament of Georgia on 11 July 2007.[1] Regardless of repetitive demands of the public to allow video and audio recording of court hearings, the matter remains a problem.

With this report, the Georgian Young Lawyers' Association has made an effort to analyze the Georgian legislation, international standards, and practical problems in court practice as comprehensively as possible and to reveal defects of the Georgian court system.

This report tackles, in a detailed manner, all the legal circumstances that, in our view, impede effective and impartial functioning of the judiciary in Georgia. Among the matters discussed herein are the procedure of staffing of and decision-making by the Georgian High Council of Justice and possible ways of influencing the behavior of judges such as 1. the so-called "internal hearings" in the common courts; 2. the practice of assigning a judge of a particular court institution to other court institutions; 3. problems related to internal regulations of courts, etc.

It should be noted that the above-listed circumstances are not perceived as tangible obstacles to impartiality of courts if taken one by one but their combination in their entirety do make a refined and "sophisticated" mechanism effectively able to influence individual judges and make them dependent on policy-making individuals both within and outside the court system.

We hope that the present report concerning the Georgian judiciary system prepared by the Georgian Young Lawyers' Association demonstrates the difficulties the Georgian courts are facing in an understandable and tactile manner and serves as resource for overcoming these problems.

[1] On 11 July 2007, the Parliament of Georgia enacted an Organic Law "on amending the Organic Law of Georgia on Common courts", which restricts making photos and audio and video recording in a courtroom in the course of a hearing.

INDEPENDENCE OF THE JUDICIARY

THE GEORGIAN HIGH COUNCIL OF JUSTICE

Pursuant to the amendments to the Constitution of Georgia made on 27 December 2007, the Georgian High Council of Justice was transformed into an independent structural organ of the judiciary system. Before these amendments, the High Council of Justice was a counseling organ at the President and was chaired by the President. According to the amendments, the President of Georgia is no longer authorized to appoint or dismiss judges and this power is completely vested in the hands of an independent organ – the High Council of Justice.

i. Composition of the Council; Staffing

Presently, according to Article 86[1] of the Georgian Constitution, the High Council of Justice of Georgia is an independent structural organ within the judiciary system of Georgia functions of which are to appoint and dismiss judges and to perform other tasks according to the law. A majority of members of the High Council of Justice are elected by the self-governing organ of judicial officials from the common courts. The High Council of Justice is chaired by the Chairman of the Supreme Court of Georgia.

Activities of the High Council of Justice are specifically articulated in the Organic Law of Georgian "on Common Courts".[2] The Council consists of 15 members who are appointed based on the principle of checks-and-balances, in particular, by the Parliament, the President, and the judiciary.

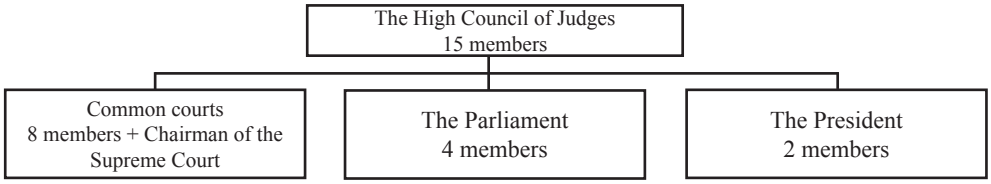
The Parliament is represented by 4 members in the High Council of Justice. Three of them are elected by the Parliament of whom 1 of them should be from a faction that does not belong to the majority in the Parliament or from a list of MPs who are not part of any of the Parliamentary factions. The fourth representative from the Parliament is the Chairman of Legal Affairs Committee of the Parliament who occupies the seat in the Council *ex officio*.

The President of Georgia appoints 2 members of the High Council of Justice.

The judiciary is represented by 8 members elected by a Conference of the Judges of Common Courts and the Chairman of the Supreme Court; the latter occupies the seat in the Council *ex officio*. Of the eight members elected by the Conference of Judges, one serves as the **Secretary of the Council**. Persons representing the judiciary are judges of common courts except for the Secretary of the Council[3] who is not subject to the requirement of occupation of a judicial office.

[2] The Organic Law of Georgia "on Common courts" (No. 2257) was adopted by the Parliament of Georgia on 4 December 2009. The new Law absorbed previously applicable laws "on Common courts", "on the Supreme Court of Georgia", "on Social Guarantees for the Members of the Supreme Court" and "on Guarantees of Social and Legal Protection of Judges".

[3] Organic Law "on amendments to the Organic Law on Common courts" dated 15 July 2008



Official tenure of members of the High Council of Justice is 4 years. *Ex officio* members are elected for an indefinite term; in particular, their tenure ends with the termination of their primary office. The tenure of the Secretary of the Council is 3 years.[4]

ii. Guarantees for the independence of the members of the Council

At a glance, the High Council of Justice consists of members appointed or elected from all of the three branches of State power. The requirement of the Georgian Constitution that more than a half of the Council's composition should be judges also serves the interests of checks and balances.

a. The judicial power

From the judicial power, the Chairman of the Supreme Court is an *ex officio* member of the Council. At the Chairman's recommendation, the self-governance organ of judges elected the remaining 8 members. In our view, it would be more prudent if judges of common courts had the right to recommend themselves or their colleagues to membership of the Council. Although the Chairman of the Supreme Court enjoys specific guarantees of impartiality, other judges should also have the chance to demonstrate themselves. This would serve as an indicator of the Council's transparency and independence and would exclude the possibility of exerting influence within the judiciary itself.

Current quota of judicial members of the High Council of Justice[5] is the following:

- Valeri Tsertsvadze, Chairman of the Tbilisi Appeals Court
- Mikheil Chinchaladze, Chairman of the Administrative Chamber of the Supreme Court
- Giorgi Shavliashvili, Chairman of the Tbilisi City Court
- Mamia Pkhakadze, Chairman of the Administrative Chamber of the Tbilisi City Court
- Lasha Kalandadze, Chairman of the Civil Chamber of the Tbilisi Appeals Court
- Malkhaz Guruli, Chairman of the Kutaisi Appeals Court
- Konstantine Kublashvili, Chairman of the Supreme Court

[4] Article 51(1) of the Organic Law "on Common courts"
[5] By February 2010

The current composition of the High Council reveals the following trend: the members of the Council are the so-called "elite" judges who hold high offices and are policy-makers in the system of common courts. Mostly, they do not perform the judicial function at all; in other words, they do not hear cases and basically are busy with administrative matters[6] only. To summarize, the Georgian reality is that several high-ranking judicial officials who virtually do not perform judicial functions *per se* are determining policy and operation of common courts. Certainly, this is not the best way of staffing of the High Council of Justice because the latter should constitute a forum for real self-governance of judicial officials and, accordingly, each judicial official must have the right to participate in the work of the Council. The Albanian Constitutional Court, in its decision dated 22 May 2006,[7] declared that a member of the High Council of Justice must be an acting judge. The Venice Commission's opinion concerning the Serbian Law on High Judicial Council directly states that interests of each judge must be fairly represented in the High Council of Justice.[8] Judges must be actually involved in the staffing of the High Council of Justice and this problem calls for resolution.

b. The Parliament

The Parliament of Georgia is represented by 4 members in the High Council of Justice. Pursuant to the amendments made to the Organic Law in 2008, at least 1 of the four members must be a member of the Parliamentary majority. In addition to the Chairman of Legal Affairs Committee of the Parliament, 3 members of Parliament are elect who should be complying with the same requirements as the Chairman of the Legal Affairs Committee. According to Articles 189 and 32 of the Regulations of the Parliament, members of the High Council of Justice[9] shall be elected by a majority of listed Members of Parliament. Taking account of the importance of the matter, it is desirable that certain eligibility criteria such as high moral character, appropriate professional experience and others are added to the current list of requirements. The same view was expressed by the Venice Commission. According to the latter, the level of confidence determines political impartiality of members.[10]

c. The President

The President is represented by 2 members in the High Council of Justice. In appointing these members, the President enjoys complete discretion. The President is not required to consult with any institution. He is authorized to dismiss either of his appointed members from their office at any time before formal expiration of their tenure and without giving any reasoning. This power enables the President to control a significant part of the judiciary in Georgia.[11]

[6] See below "The role of the chairman of court in common courts"
[7] The constitutional referral by members of the Parliamentary Assembly of the Republic of Albania concerning the constitutionality of the Law No. 9448 dated 5 December 2005
[8] CDL-AD(2006)006, paragraph 76.
[9] Article 189 of the Regulations of the Parliament contains an error; in particular, it refers to "Council of Justice" instead of the "High Council of Justice". It is advisable to rectify this technical mistake in an appropriate way.
[10] Opinion of the Venice Commission on the Law of the High Judicial Council of Serbia, CDL-AD(2008)006, paragraphs 19,21.
[11] On this, see the next sub-chapter "Decision-making by the High Council of Justice"

In our opinion, the law should include a rule with which the President will no longer have the right to dismiss his appointees to the Council. Such members should be appointed for a definite term. Last but not least, the law should prohibit political activity of the members.

d. Political bias in the Council

One of the greatest problems concerning the members of the High Council of Justice is lack of political neutrality. Judges of common courts, including the Chairman of the Supreme Court, have no right to membership in any political party. However, the law does not require members appointed by the President and the Secretary of the Council[12] to stop their political activity once they start functioning as members of the Council. We think this matter needs to be regulated. The law should prescribe a prohibition for the members of the High Council of Justice to take part in the activities of a political party. This is especially true for members of the Council appointed by the President.

Concerning the legislative organ, bearing in mind that Parliament is a political organ by nature, it requires a specific approach. In particular, the law may prescribe that the Parliament elect politically indifferent persons on its behalf who enjoy high authority in the society and who are not members of the Parliament.

The High Council of Justice deals with and makes decision on such important matters as appointment, assignment to other courts,[13] encouragement and liability of judges. With a politically biased Council, we face an increased risk of unjustified and politically dependant interference with the function of the court system.

iii. *Decision-making by the High Council of Justice*

As mentioned above, pursuant to Article 86^1 of the Constitution, more than a half of the members of the High Council of Justice are those elected by the self-governing organ of judges. Article 5 of the Georgian Constitution prescribes that State power shall be discharged in accordance with the principle of checks and balances implying that different branches of power control and balance each other and isolation of power is excluded.

Articles 86^1 and 5 of the Constitution should be read in strong conjunction when it comes to the High Council of Justice. Consequently, the Council may be limited in power but such limitation should aim at its countervailing and balancing rather than complete monopolization of power.[14] For this very reason, the Georgian Constitution requires that more than a half of the composition of the High Council of Justice should be members elected by the self-governing organ of judges of Georgian courts. Other

[12] Secretary of the Council may not be a judicial official and, accordingly, not be subject to prohibition of political activity

[13] "Assignment to other courts" within the meaning of Article 13 of the Law "on Assignment of Cases and Imposition of Authority on Other Judges in the Common courts".

[14] Opinion of the Venice Commission on the Amendments to the Law on Major Constitutional Provisions of Albania, CDL-INF(1998)009, paragraph 5. Also, Opinion of the Venice Commission on the Constitution Amendments of the Republic of Armenia, CDL-AD(2004)044, paragraph 58.

members elected or appointed by the President and the Parliament are *ipso facto* ensuring horizontal balance of power.

The mentioned procedure of staffing of the High Council of Justice by itself implies that representatives of the judiciary to the Council should have certain privilege in the decision-making by the Council.

Indeed, since the day of its transformation into an independent organ, the Georgian High Council of Justice passes decisions by a majority of votes of attending members.[15] However, by virtue of the amendments to the Law on "Common Courts" passed on 19 June 2007,[16] **election of a judge requires not only an affirmative majority of votes of attending members but also consent of members appointed by all of the branches of power.** For example, if members of the Council appointed by the Parliament vote against a judicial candidate, the candidate will not be elected judge even if the remaining 11 members of the Council support his or her candidature.

The Parliament of the Georgia, being a political organ, may be against a specific candidature. Consequently, its representatives in the Council may vote against and thus make a decision depending on political appropriateness. The same is true for members appointed by the President. Therefore, Article 50(3) of the Organic Law "on Common Courts"[17] enables both the President and the Parliament to block judicial candidates at any time based on political considerations. According to the principle of checks and balances, involvement of two other branches of power in the affairs of the judicial power is warranted for the purpose of ensuring equilibrium and balance of State power. But the aforementioned provision in the law effectively defeats that purpose and establishes control over the judicial power on the part of both the President and the Parliament. Against this background, it can be said that the previous model of High Council of Justice when it was simply a counseling organ at the President has in fact remained in force and the constitutional amendment transforming the Council into an independent body has not taken effect this far. Very much like the previous High Council of Justice, the President enjoys discretion when it comes to appointment of judicial officials.[18]

On 22 June 2007 the Venice Commission published its report concerning standards of appointment of judges.[19] The Commission clearly stated that decision-making on election, appointment and dismissal of judges shall be independent from the executive power. To date, the Georgian President holds a major lever to influence the High Council of Justice that is contrary to accepted international standards.

iv. *Recommendation*

According to the information published on the website of the Supreme Court of Georgia, reformation of the High Council of Justice is now complete.[20] However, the Geor-

[15] Article 65(2) of the old Organic Law on Common courts; Article 50(2) of the 2009 Law on Common courts.
[16] Law No. 4951
[17] Article 65(2[1]) of the previous Organic Law.
[18] President has influence on two members of the Council because he can dismiss them any time.
[19] CDL-AD(2007)028, 22 June 2007.
[20] http://www.supremecourt.ge/News.aspx?sec_id=39&lang=1&news_id=641 [last viewed in December 2009]

gian Young Lawyers' Association urges the Parliament to make the following amendments to the Organic Law "on Common Courts":

- The President's right to dismiss his appointees to the Council should be limited;
- Appointment of members within the presidential quota should be termed;
- When making decisions on appointment of judges, consent of members representing the judiciary, the Parliament or the President should not be compulsory;
- The abovementioned decisions should be made according to regular rules of decision-making in the Council;
- Members of the Council shall be prohibited from taking part in political activities;
- When electing judicial members of the Council, the right to nominate candidatures should not be vested exclusively in the hands of the Chairman of the Supreme Court;
- The Council's composition should allow representation of all of the judicial instances and all of the geographical districts of Georgia;
- Candidatures to membership of the Council nominated by the Parliament should be persons enjoy high moral authority in the society.

There is no uniform rule in the world of forming a Justice Council.[21] Activity and independence of such councils depend on constitutional and legal order of each specific country. In Georgia's reality, active steps were made forward in terms of reformation of the High Council of Justice but, with a view to the said shortcomings, the reform process cannot be considered completed at this point. In our opinion, further legislative amendments are necessary to help make the High Council of Justice an effective and politically unbiased organ. Presently, the applicable law indirectly allows interference with the independence of the Council in its activity.

JUSTICE MINISTER AS MEMBER OF THE PLENUM OF THE SUPREME COURT

By virtue of the 2008 amendments to the Georgian Constitution, then "Prosecutor-General's Office" was renamed into "Main Prosecution Office" and subordinated to the Ministry of Justice. The Main Prosecution Office is headed by the Main Prosecutor and the Justice Minister is Prosecutor-General *ex officio*.

The Justice Minister has a number of tasks prescribed not only by the Law on Prosecution Office but also other laws. One of them is Organic Law "on Common Courts" which prescribes in its Article 18(6) that the Justice Minister participates in the sessions of the Plenum of the Supreme Court with the right to vote. The Organic Law "on Supreme Court of Georgia" previously in force, in its Article 12(7), was granting the same right to the Minister of Justice and the Main Prosecutor. Since the day of entry

[21] Opinion of the Venice Commission on the Reform of the Judicial System in Bulgaria, CDL-INF(1999)005, paragraph 28.

into force of the new Organic Law in 2009, the Main Prosecutor is no longer a member of the Plenum of the Supreme Court.

The Plenum of the Supreme Court of Georgia is composed of the Chairman of the Supreme Court, Deputy Chairmen of the Supreme Court, members of the Supreme Court, and judges of the appeals courts. First of all, the role of the Plenum should be clarified. This matter is governed by Article 18(2) of the Organic Law "on Common Courts":

a) upon recommendation of the Chairman of the Supreme Court, elects members of the Grand Chamber;
b) upon recommendation of the Chairman of the Supreme Court, elects members and chairmen of the chambers of the Supreme Court;
c) appoints 3 members of the Constitutional Court of Georgia;
d) pursuant to Article 89(1)(a) of the Constitution of Georgia, concerning hearing of a specific case or generalization of judicial practice, addresses a submission to the Constitutional Court of Georgia on the constitutionality of specific normative acts;
e) in cases of impeachment, issues its conclusion to the Parliament of Georgia concerning the existence or non-existence of elements of crime in the conduct of public officials. In such a conclusion, the Plenum confines itself only to legal assessment of the conduct considered by members of the Parliament who initiated the impeachment procedure as proven.
f) submits its recommendations to the President of Georgia concerning the conclusion of international treaties on matters falling within the competence of the Supreme Court;
g) hears and assesses information supplied by chairman of Chambers of the Supreme Court as well as reports of heads of structural units within the Office of the Supreme Court; reviews proposals for the betterment of their performance;
h) creates an official gazette of the Supreme Court; upon recommendation of the Chairman of the Supreme Court, appoints the editor and the editorial staff of the gazette;
i) creates a science and consultation council of the Supreme Court; approves its regulations and composition; appoints a scholarly secretary of such a council;
j) within the funds allocated to the Supreme Court in the State Budget, determines the amount of monthly allowances for the members of the Supreme Court according to their ranks and office;
k) upon recommendation of the Chairman of the Supreme Court, approves the Regulations of the Office of the Supreme Court; approves the amount of salaries of the staff and other workers of the Supreme Court;
l) prepares and publishes yearly reports on the situation of justice in Georgia;
m) performs other tasks deriving from the constitutional functions of the judiciary and prescribed by the legislation of Georgia.

Considering that the Supreme Court is the highest cassation instance and the major determinant of court practice, its Plenum is vested with broad rights of which a part is of a technical character and others are of a constitutional-legal nature. These rights are directly connected with the independence of the Georgian judiciary and the proper performance of the judicial functions by courts.

Activities in the Plenum of the Minister of Justice, and of the Main Prosecutor as well – before adoption of the new Law, could endanger impartiality of the judicial system. The Minister of Justice is a member of the executive power – the Government. The Minister is subject to political liability and his office is strongly susceptible to "political fluctuations". Accordingly, membership of the Minister of Justice in the Plenum, the latter being supposed to be stabile and politically unbiased, turns the Plenum into a precarious structure in a way.

The only reasoning that may be drawn to justify the Justice Minister's membership into the Plenum of the Supreme Court is the principle of checks and balances. As in the case of composition of the High Council of Justice, there may be an idea that participation of other branches of State power is also relevant to the work of the Plenum. However, because the Parliament does not have its representatives in the Plenum of the Supreme Court, it follows logically that the Justice Minister's membership in the Plenum is not supposed to be justified by the principle of checks and balances.

According to the Georgian law, the Prosecutor-General of Georgia is responsible for criminal prosecution persons, including those who, by virtue of their office, may be subject to impeachment. The law obliges the Prosecutor-General to support charges at all stages of criminal proceedings, including at the stage of deprivation of criminal immunity – a matter falling within the jurisdiction of the Plenum of the Supreme Court. If such a procedure actually takes place, the Minister of Justice will face a clear-cut conflict of interests.

In our view, activities of the Justice Minister in the Plenum of the Supreme Court should be excluded in any case to avoid unjustified interference with the independence of the judiciary. Similar to this, activities of the Prosecutor-General of Georgia and the Main Prosecutor in the Plenum violates not only the principle of checks and balances but also goes beyond the criminal prosecution function of a prosecutor and contradicts a general European approach in this regard.[22] It further contradicts the general standards accepted by the Venice Commission.[23]

RULES OF COMMUNICATION WITH JUDGES OF COMMON COURTS; RELATED PROBLEMS

For the purpose of increasing the independence of Georgian judges and the Georgian judiciary in general, on 11 July 2007, the Parliament of Georgia adopted Law "on Rules of Communication with Judges of Common Courts". This Law practically has no analogies in the world practice and, in a way, represents a Georgian innovation.

[22] See recommendations of the Prosecutors' Consulting Council of the Council of Europe at www.coe.int/ccpe
[23] http://www.venice.coe.int/docs/2008/CDL-JD(2008)001-e.pdf

The major purpose of the Law is to "enhance guarantees of independence of judges of common courts envisioned by the Georgian Constitution, Georgia's international treaties and agreements, and other laws of Georgia." In particular, the said Law **restricts any kind of communication with the judges of common courts by parties to the proceedings, if such communication is linked with the hearing of a specific case or matter and violates the principles of judicial independence, impartiality and competition of the parties.**

According to the procedure envisaged by the Law "on Rules of Communication with Judges of Common Courts", a judge who has been unlawfully communicated with must, immediately and in a written form, inform the chairman of the relevant court thereon. If the unlawful communication happened with a chairman of a court or with a judge of a court where there is only a single judge, the chairman or the judge shall notify chairman of a higher instance court.

On his turn, the chairman of the court who was notified about unlawful communication can fine the perpetrator or raise a matter on the perpetrator's disciplinary liability before the Secretary of the High Council of Justice.

The primary purpose of adopting the Law "on Rules of Communication with Judges of Common Courts" was to eliminate the chances of interference with the activity or exertion of influence upon the judicial decision-making by public officials. However, the actual application of the Law turns out to show scanty enough statistics in Georgia. According to official information provided by the High Council of Justice:[24]

Following the entry into force of the Law "on Rules of Communication with Judges of Common Courts" ... chairmen of common courts made decisions on fining perpetrators in three cases. In particular, the Terjola District Court fined a citizen on 18 October 2007 with 200 Lari, the Kutaisi City Court fined a citizen on 27 July 2008 with 2,000 Lari, and the Mtskheta District Court fined an attorney on 1 September 2008 with 500 Lari.

According to the same letter, there has been no single fact of violation of the aforementioned Law by judges and, consequently, no liability measures have been taken by the High Council of Justice.

In other words, for the three years since the entry into force of the Law, not a single public official has been fined for any violation of the said Law. Such statistics of application of the Law drives to one of the following conclusions:

1. The Law "on Rules of Communication with Judges of Common Courts" is not an effective mechanism to prevent interference by public officials with the activity of courts; or

2. The judiciary's independence is affected not by public officials' interference with judicial affairs but some other, completely different, circumstances.

It should be noted that the abovementioned Law does not prescribe any mechanisms for the protection of judges if the source of unlawful communication is the chairman of a court or a judge of a higher instance court. As mentioned previously, pursuant to

[24] Letter from the High Council of Justice No. 965/1936-03-o dated 12 October 2009

the procedure envisaged by the law, the judge who has been unlawfully communicated with is obliged to inform, immediately and in written form, the chairman of the relevant court and, in case the addressee of such communication was chairman of the court or a judge who is the only judge in a court, notification should be sent to chairman of a higher instance court. **The Law does not envisage a solution in case the author of unlawful communication is the very chairman of the relevant court, in other words, the individual judge who should be notified about unlawful communication and who then should take measures against the perpetrator.**

This defect in the Law becomes more urgent against the background situation of current court practices in Georgia. As it is known, the so-called "internal hearings" are broadly being used in the Georgian judiciary system. This method was implanted on the motive of establishing a uniform practice and implies that a chairman of a relevant court discusses facts of each case as well as possible outcomes of the case together with the judges of the same court. Such a practice is not based on any normative act but, in reality, is perceived by the judges as a compulsory directive on what the final outcome of the case should be.

At the meeting organized by Georgian Young Lawyers' Association on 14 November 2009 for judges of common courts, the attending judges stated that the so-called "internal hearings" are a major lever of exerting influence upon them.

Even the current wording of the Law "on Rules of Communication with Judges of Common Courts" implies prohibition of unlawful communication between a judge in charge of a specific case and other judges on the specific matter dealt with by the former; However, this provision is not being broadly interpreted in practice and chairmen of courts are discussing merits of specific cases with the relevant judges of the same courts. Such conduct constitutes interference with the decision-making by a judge and violates the requirement of the Georgian Constitution that "No one has the right to demand a judge to account for any specific case."[25]

A judge must be free to make decision in each particular case based on his or her internal beliefs, or, internal beliefs individual judges sitting as a panel – when a case is heard by a judicial panel. Interest of a chairman of the court or of a higher instance judge may adversely affect an outcome of cases under review.

Against this background, the Georgian Young Lawyers' Association deems it appropriate that **the law should contain a direct prohibition for chairmen of courts and judges of higher instance courts to communicate with judges hearing specific cases concerning the details of the cases under review.** If unlawful communication by a chairman of a court or a judge of a higher instance court takes place, the judge who has been unlawfully communicated with **shall be able to directly address the High Council of Justice and raise the issue of disciplinary liability of the perpetrating judicial officials.**

On 25 September 2009, the President used his legislative initiative and submitted to the Parliament draft laws "on amendments to the Law on Rules of Communication

[25] Article 84(3) of the Georgian Constitution.

with Judges of Common Courts" and "on amendments to the Criminal Code of Georgia".

According the explanatory letter accompanying the draft laws, the purpose of the proposed drafts was **to increase the guarantees of independence and impartiality of judges, which will ensure raising public confidence toward the Georgian court system, stronger protection of human rights and strengthening of democracy.**

To achieve these ambitious goals, the draft laws proposed severing of the existing measures of liability for the violation of rules of communication with judges. Emphasis was made only on differentiating liability for "public officials" on the one hand and "political officials" on the other hand and increasing measures of liability applicable against such potential perpetrators.

However, as the above statistics of actual used of the Law shows, there has been no single case of holding public officials liable for violation of the rules of communication with judges; accordingly, it would be closer to reason for the legislator, instead of merely increasing the amount of fines, to pay attention to **investigation of occurrences of unlawful communications with judges and effectiveness of enforcement mechanisms envisaged by the Law**, possibly in conjunction with severed sanctions for violation of the communication rules. Because the defect of the Law is its imperfect content, the problem will remain unsolved irrespective of how impressive the increased amount of fines look.

The Georgian Young Lawyers' Association submitted its written views and specific recommendations on how to eliminate the deficiencies in the Law"on Rules of Communication with Judges of Common Courts" to the Parliament of Georgia.[26] We hope that these recommendations will be reflected in the above-mentioned Law, which will make it possible to apply more effective measures to ensure judicial independence and non-interference with judicial affairs.

ASSIGNMENT OF JUDGES TO OTHER COURTS

On 16 June 1998, the Georgian Parliament adopted Law "on Assignment of Cases and Imposition of Authority on Other Judges in Common Courts". Article 13 of the Law regulates rules of assignment of judges to other courts.

According to the Law, a judge can be assigned to perform judicial functions in other courts in two cases:

a. **when there is an insufficient number of judges is a particular court; or**
b. **when there is a sharp increase of case load.**

In these circumstances, the High Council of Justice is authorized to assign a judge of a first instance court to an appeals court or vice versa. Assignments can happen within the same level of court instances such as from a district court to a district court or from an appeals court to an appeals court.

[26] Letters of the Georgian Young Lawyers' Association No. G-07/93-09 dated 15 October 2009 and No. G-07/96-09 dated 20 November 2009

Pursuant to Article 13(3) of the Law, assignment of judges to other courts can happen until 1 January 2012. Therefore, such assignment is considered to be a temporary measure.

In our view, such practice may, in a way, discredit the judiciary system and infringe upon its independence.

The Georgian Constitution stipulates that "the removal of a judge from the review of a case, his/her pre-term dismissal or transfer to other position shall be permissible in the circumstances determine by law."[27] The same article prohibits interference with the activity of judge.[28]

A judge of a common court can be assigned **without the consent of the judge**. Transfer of a judge to other court located in a different geographical area is connected with various problems such as the change of social environment. In such cases, to preserve independence of a judge subject to transfer, there should be a possibility for the specific judge to refuse compliance with the decision of the High Council of Justice. Nowadays, such refusal may cause the judge to resign from office at his or her will. For example, if a judge's family lives in Tbilisi and he and his family are socially completely linked to the specific are in Tbilisi (children are attending a school in the relevant district, the judge gives lectures in the State University, etc.), his transfer to some district court in the Guria region may cause the judge to refuse to stay in office. In this manner, transfers may be a serious factor adversely affecting judicial independence.

Another matter of concern is determination of salary scales. According to the Law "on Remuneration of Judges of Common Courts", Article 1, the judges assigned to other courts retain their salary; if a judge is assigned to a higher instance court, his or her salary will increase respectively according to the salary scale for judges of the appeals courts. Judges assigned to other court of the same instance will retain his or her regular salary.

As mentioned in previous chapters, the composition of the High Council of Justice is prone to making politically-motivated decisions and both the Parliament and the President have levers to influence the judicial power. Accordingly, increase or decrease of salaries[29] may become an obstacle for the independence of judges because a judge will always be susceptible of acting in a way to please "someone", or else, he or she may turn into a victim of "demotion" in office.

The Venice Commission has published a systemic study on European standards of independence of judges[30], which tackles the matters of assignment to other courts as well. The Commission assesses this matter from the perspective of Paragraph 3.4 of the European Charter on the Statute of Judges,[31] which reads:

"A judge holding office at a court may not in principle be appointed to another judi-

[27] Article 84(2) of the Constitution of Georgia
[28] *Ibid.*, paragraph 1
[29] In particular, a judge assigned to a higher instance court will be paid hire salary but following the termination of such assignment he or she will be getting the old (low) amount of salary.
[30] CDL-JD(2008)002, 3 October 2008.
[31] Adopted in Lisbon on 8-10 April 1999

cial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighboring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4[32] hereof."[33]

As we see, the European standards are high enough and require a judge's free consent to his or her assignment to another court. Such consent is one of the guarantees for preservation of judicial independence.

For example, Article 147 of the Albanian Constitution lists a judge's prior consent to his or her transfer to other position directly as one of the guarantees of judicial independence. The only exception to this rule is when a court is in the process of reorganization.

In Georgia, the matter of assignment of judges to other courts is dealt with inappropriately. Below listed are a number of examples:

- The Criminal Cases Panel of the Tbilisi City Court is hosting the following judges from other court who have been assigned within the temporary assignment described above: **Marine Tsertsvadze**, judge of the Signagi District Court; **Naira Gigitashvili**, judge of the Zestafoni District Court; **Zviad Esebua**, judge of the District Court of Sokhumi and Gudauta; **Lela Nozadze**, judge of the Gali-Gulripshi and Ochamchire-Tkvarcheli District; **Tariel Tabatadze**, judge of the Mestia District Court; **Maia Jvarsheishvili**, judge of the Mtskheta District Court; **David Jugeli**, judge of the Gardabani District Court and **Liana Orkodashvili**, judge of the Telavi District Court. On its turn, the following judges from the Criminal Cases Panel of the Tbilisi City Court are assigned to the Tbilisi Appeals Court: **Giorgi Chemia, Manuchar Kapanadze** and **Maia Tetrauli. Ekaterine Gabrichidze**, judge of the same court, was assigned to the Marneuli District Court till 2009; since then, she has been performing judicial functions in the Bolnisi District Court. Judge **Thea Khamkhaze** is assigned to the Rustavi City Court.

  In our view, the High Council of Justice is carrying out an inconsistent policy. The number of judges assigned to the Criminal Cases Panel of the Tbilisi City Court suggests that this Court lacks a sufficient number of judges for which reason 8 judges from various district courts were assigned to the Court. However, at the same time, 5 judges were assigned from the Tbilisi City Court to various district courts. Naturally, there comes a question: why the five judges were assigned from the Tbilisi City Court to district courts when the Tbilisi City Court

[32] The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.

[33] The Georgian translation is taken from the following publication: *The Right to Fair* Trial, The Georgian Young Lawyers' Association, Tbilisi, 2001.

did not have sufficient number of judges to deal with own caseload? The only conclusion deriving from the existing situation is that **the practice of assigning judges to other courts serves goals other than those prescribed by the law.**

- **Lela Nozadze**, judge of the Gali-Gulripshi and Ochamchire-Tkvarcheli District Court, is assigned to the Tbilisi City Court on the single motive that the court of her primary responsibility does not require a judge of her specialization. For the same reason, **David Kekenadze** is assigned from the Zugdidi District Court. These occurrences prove once again that the policy of assigning judges to other courts is implemented in an inconsistent manner creating a reasonable doubt that it serves to the goal of manipulating with judges.
- **Tamaz Urtmelidze**, judge of the Tsageri District Court, who took his office in 2006, was assigned to the Tbilisi Appeals Court in **2006-2009**; since 2009, he has been assigned to the Bolnisi District Court. Elementary geographic knowledge shows how inconsistently judges are transfer from one deployment area to another across the whole country without taking a series of important factors into consideration.
- The Criminal Cases Panel of the Batumi City Court consists of 5 judges.[34] Of the five judges, three are assigned judges. In particular, **Tamar Bezhanashvili** is assigned from the Kvareli District Court; **Vera Dolidze** is assigned from the Kharagauli District Court; and **Leri Tedoradze** is assigned from the Khobi District Court. In this case too, in our opinion, judges were assigned for some other purposes than those prescribed by law.
- **Miranda Eremadze**, judge of the Mtskheta District Court, and **Ilona Todua**, judge of the Sagarejo District Court are assigned to the Administrative Cases Panel of the Tbilisi City Court.
- The following judges are assigned to the Civil Cases Panel of the Tbilisi City Court: **Levan Gvaramia**, judge of the Marneuli District Court; **Manana Meskhishvili**, judge of the Sokhumi and Gagra-Gudauta District Court; **Lasha Qochiashvili**, judge of the Sachkhere District Court;[35] **Maia Shoshiashvili**, judge of Telavi District Court; and **Anzheli** Khurodze, judge of the Gali-Gulripshi and Ochamchire-Tkvarcheli District Court.
- The following two judges are assigned to the Administrative Cases Chamber of the Tbilisi Appeals Court: **Tinatin Etsadashvili**, judge of the Tbilisi City Court and **Maia Bakradze**, judge of the Tsalka District Court.
- The following judges are assigned to the Tbilisi Appeals Court: **Irakly Adeishvili, Natia Gujabidze, Qetevan Kuchava, Lili Tkemaladze** and **Vano Tsiklauri**, judges of the Tbilisi City Court; **Qetevan Dugladze**, judge of the Bolnisi District Court; and **Khatuna Arevadze**, judge of the Rustavi City Court.

[34] Decision of the High Council of Justice No. 150 (Article 8) dated 9 August 2007
[35] In 2007-2008, he was assigned to the Borjomi District Court and in 2009-2009 to the Kutaisi City Court.

- **Tamar Svanidze**, judge of the Tskaltubo District Court, **Gela Qiria**, judge of the Gali-Gulripshi and Ochamchire-Tkvarcheli District Court, **Teimuraz Sikharulidze**, judge of the Poti City Court, **Natia Kutateladze**, judge of the Samtredia District Court, **Khatuna Khomeriki**, judge of the Abasha District Court, **Levan Meshveliani**, judge of the Tskaltubo District Court and **Marina Siradze**, judge of the Kharagauli District Court are assigned to the Kutaisi Appeals Court.
- **Nino Kordzadze**, judge of the Gali-Gulripshi and Ochamchire-Tkvarcheli District Court, was assigned to the Tbilisi City Court in 2007-2008 and to the Gori District Court in 2008-2009; since 2009, she has been assigned to the Batumi City Court.
- **Violeta Porchkhidze**, judge of the Khoni District Court, and **Lia Avalishvili**, judge of the Tbilisi City Court are assigned to the Batumi City Court.
- **Merab Gviniashvili**, judge of the Marneuli District Court, is assigned to the Bolnisi District Court.
- **Eka Zarnadze**, judge of the Tbilisi City Court, is assigned to the Gori District Court; before that, she was assigned to the Mtskheta District Court. The same Court is hosting also **Malkhaz Enukidze**, judge of the Signagi District Court, **David Mgeliashvili**, judge of the Khashuri District Court and **Revaz Nadoi**, judge of the Tbilisi City Court.
- **Maka Gorgodze**, judge of the Kutaisi District Court, and **Maia Svnianadze**[36], judge of the Sackhere District Court, are assigned to the Zestafoni District Court.
- **Irakly Abshilava**, judge of the Chkhorotsku District Court, and **Lela Tsanava**, judge of the Tsalenjikha District Court, are assigned to the Zugdidi District Court.
- **Shalva Mchedlishvili**, judge of the Dedoplistskaro District Court, was assigned to the Gurjaani District Court in 2005-2009; since 2009, he has been working as judge of the Telavi District Court. **Besarion Tabagua**, judge of the Zugdidi District Court and **Natela Jashiashvili**, judge of the Akhmeta District Court are assigned to the Telavi District Court.
- **Diana Gogatishvili**, judge of the Tbilisi City Court, is assigned to the Mtskheta District Court while **Shorena Guntsadze**, judge of the Tbilisi City Court has been assigned to the Tetritskaro District Court since 2009; and this is against the background that many judges are assigned to Tbilisi City Court from various district courts.
- **Giorgi Maisuradze**, judge of the Lagodekhi District Court, is assigned to and performs judicial functions in the Sagarejo District Court, while **Ilona Todua**, judge of the Sagarejo District Court is assigned to the Tbilisi City Court.
- **Lasha Chkhikvadze**, judge of the Marneuli District Court, is assigned to the

[36] From June to September 2009, she was assigned to the Tskaltubo District Court and, from September to November, to the Ozurgeti District Court.

Rustavi City Court. **Murtaz Meshveliani**, judge of the Kutaisi Appeals Court, is performing judicial functions in the Ozurgeti District Court.

- **Tamaz Jaliashvili**, judge of the Tbilisi City Court, was assigned to the Tbilisi Appeals Court in 2006-2007; currently he is performing judicial functions in the Signagi District Court.
- **Revaz Nadaraia**, judge of the Chkhorotsku District Court is assigned to the Poti City Court.
- **Levan Tevzadze**, judge of the Khelvachauri District Court, **Gocha Abuseridze**, judge of the Sokhumi and Gagra-Gudauta District Court, **Tamar Burjanadze**, judge of the Bagdati District Court, **Shota Nikuradze**, judge of the Tkibuli District Court[37] are performing judicial functions in the Kutaisi City Court.
- **Zurab Kvavadze**, judge of the Tsageri District Court, was assigned to the Bagdati District Court in 2004-2008; currently he is performing judicial functions in the Chkhorotsku District Court.
- **Giorgi Gogichaishvili**, judge of the Gardabani District Court, was performing judicial functions in the Tbilisi City Court in 2008-2009. From May to July 2009, he served in the Telavi District Court. From September to October, he was transferred to the Batumi City Court. Currently he is assigned to the Khashuri District Court.
- **Ana Gelekva**, judge of the Kutaisi City Court, was assigned to Zugdidi District Court in 2009; currently she is performing judicial functions in the Khelvachauri District Court.[38]

The aforementioned data are taken from the official website of the High Council of Justice. For further information, the Georgian Young Lawyers' Association addressed a request for release of public information to the High Council of Justice but the latter left our request without any response.

As the above stated examples show, a majority of judges is not performing their judicial functions in their respective courts.

The main question that arises in relation to such practice is whether it is to be used in such a widespread manner. A general trend in the system of Georgian common courts is a clear lack of sufficient number of judges; accordingly, instead of permanently moving judges from one place to another, each of them should be simply appointed to perform their judicial functions in their respective courts.

Nowadays, there are more than forty judges enlisted in the judicial staff reserve.[39] Article 44 of the Organic Law "on Common Courts" (Article 54^1 of the previous Law) describes conditions in which judges are enlisted in the judicial reserve. While the reserve judges are freely available across the country, it is unclear why such rigorous movement of acting judges is necessary to resolve the problem. What would be rather

[37] Judge Shota Nikuradze was assigned to Zestafoni District Court in 2007-2009 and to the Kharagauli District Court in 2008-2009.
[38] Source: www.hcoj.gov.ge
[39] www.hcoj.gov.ge

logical is the replenishment of the judicial staff of the common courts with judges enlisted in the reserve. Otherwise, the judicial reserve turns out to be meaningless and can be considered as indirectly effective way of firing judges from their jobs.

In order to ensure independence of judges and to improve the current *status quo*, it is strongly advisable to observe the following conditions when assigning a judge from one court to another:

- When assigning a judge to another court, consent of the individual judge to such assignment must be a compulsory requirement; at the same time, if a judge refuses to take the assignment, his or her refusal should be motivated.
- If a judge is being assigned to another court due to heavy caseload, there should a necessary requirement that the judge must be returned to his or her primary court of deployment once the caseload is decreased or reduced to a certain point.
- Assignment of a judge to another court should be termed; term of such assignment should not exceed 6 months (following expiration of which another judge should perform these functions) or should last until a new judge is permanently appointed to the relevant position (even in this case, a maximum term of transfer should be determined).
- If a judge is assigned to another court, the State must bear expenses for social guarantees of the family members of the judge.[40]
- Territorial area of potential assignment of judges to other courts must be defined by law; in particular, such assignments should be limited to courts that are physically located close to the primary deployment area so that the judge can perform judicial functions without having to lose connection with own social environment. In exceptional circumstances when assignment happens to a remote area, the judge's consent should be compulsory.
- Judges can be assigned to other courts also as a form of disciplinary sanction.

If the above-listed conditions are observed, in our opinion, assignment of judges to other courts will become a healthier practice. This would exclude to the highest extent possible risks of manipulation with judicial independence.

SALARY PROVISIONS FOR JUDGES OF COMMON COURTS

The Law of Georgia "on Guarantees of Social and Legal Protection of Judges" determines the rules of remuneration payable to judges.

Pursuant to Article 5(1) of the Law, "Remuneration of judges consists of a fixed-rate salary and a supplement defined by law."

Fixed-rate salary scale is provided in the Law of Georgia "on Remuneration of Judges of Common Courts"; Article 1 of this Law prescribes precise amounts of fixed-rate salaries for judges of each judicial instance. The Law further states that when a judge

[40] Current laws on the social protection of judges do not contain such provisions

is assigned to another court in accordance with Article 13 of the Law "on Assignment of Cases and Imposition of Authority on Other Judges in Common Courts", his or her fixed-rate salary shall be the amount prescribed for judges of the relevant court if that amount is higher than the salary for the court of his permanent appointment.

As regards the supplements to salary, their amounts are determined by a decision of the High Council of Justice. Currently this matter is governed by Decision of the High Council of Justice No. 1/87 dated 2008 "on the determination of salary supplements and rules of reimbursement of housing costs for judges of common courts". The Decision lists a number of conditions it takes into account when determining the amount of salary supplements:

1. Amount of caseload of a specific judge and/or complexity of the cases dealt with by that judge;
2. Amount caseload of a specific district court or appeals court;
3. Assignment to two or more courts other than the court of primary deployment in accordance with Article 13 of the Law "on Assignment of Cases and Imposition of Authority on Other Judges in Common Courts";
4. Assignment of duties of a chairman of a court in accordance with Article 17(4) of the Organic Law "on Common Courts";
5. Performance of duties of a chairman of a court that is a result of a merger of courts;
6. Performance of duties in an area that is remotely located from the place of permanent residence of a specific judge;
7. Other circumstances of special nature.

Some of the above-listed grounds for granting of salary supplement to a judge are very subjective and may serve as an obstacle for independence of the judiciary by its nature.

An example is providing a judge with a salary supplement on the basis that he or she is dealing with complex cases. In our view, this criterion is too subjective for the following reasons: 1. Cases in a court assigned to judges of that court based on objective criteria and, therefore, a judge who was not assigned a case contain serious legal complexities will get a regular salary. 2. Furthermore, it is not the competence of the High Council of Justice to assess judicial decisions as to their complexity or simplicity.

The listed conditions serving as a ground for granting salary supplements are not exhaustive. In particular, one of the grounds is "other circumstances of special nature", which unjustifiably increases the range of circumstances allowing the granting of such emoluments.

In addition, when a judge is assigned to another court, the High Council of Justice may decide to grant him or her either one type of salary supplement or combine the new supplement with the old one.

When it comes to salary supplements, one of the major problems is their amount.

Before the adoption of the aforementioned Decision of the High Council of Justice No. 1/87 dated 2008, the quantitative range of salary supplements, in particular, their

maximum allowable amount was determine by the then-applicable regulations. Specifically, the maximum amount of salary supplements could be no more than a double amount of fixed-rate salary.[41] Nowadays, there is no such limitation, which is not reasonable.

An actual problem in this regard is that remuneration of individual judges may be determined on subjective grounds. Any rule of calculating a judge's salary and emoluments should be based on objective criteria. An individual judge should be getting a remuneration different from other judges only when if this is warranted by an objective necessity.

In order to find out which judges received salary supplements in the years of 2007, 2008 and 2009, the Georgian Young Lawyers' Association addressed the High Council of Justice with a request to release the abovementioned public information. Unfortunately, as it usually happens, our request remained without any response. Accordingly, we have no information as to which judges were most frequently receiving salary supplements as well as what the monetary amount of the High Council of Justice's "thankfulness" to individual judges was.

[41] Decision of the High Council of Justice No. 1/202-2007 dated 25 September 2007

CONDITIONS HINDERING THE FUNCTIONING OF COURTS

A JUDGE AS A PUBLIC OFFICIAL

The Georgian Constitution makes a special emphasis on the independence of judges as a major guarantee of independence of the judiciary as a whole. Judicial independence is a broad notion and contains many aspects, including the rules of appointment of judicial officials, grounds of dismissal of judges, rules of arrest, protection from unlawful interference by justice organs, non-interference with the judicial activity in general and other core principles.

One of the main components of judicial independence is independence of a judge within the judicial system itself. Every judge in the same court is equal. Each of them is busy with the same kind of functions. Accordingly, a judge should be independent with his court of assignment as well and there should be levers to ensure that an individual judge is free from inappropriate influence on the part of other judges. Chairman of the court should not have the right to pass a restrictive act against an individual judge. According to the applicable legislation, both a chairman of the court and a judge of the same court are judges of equal level with the only difference that a chairman is tasked additionally with administrative functions.

According to the Venice Commission's study on the independence of the judicial system, "Judicial independence is not only independence of the judiciary as a whole vis-à-vis the other powers of the State, but it has also an "internal" aspect. In judicial adjudication [a judge] should therefore be independent also vis-à-vis other judges and also in relation to his/her court president or other (e.g. appellate or superior) courts. There is in fact more and more discussion on the "internal" independence of the judiciary."[42] The same idea is supported in report of the Consultative Council of European Judges at the Committee of Ministers of the Council of Europe:[43] "The fundamental point is that a judge is in the performance of his functions no-one's employees; he or she is holder of a State office. He or she is thus servant of, and answerable only to, the law". Accordingly, only law can prescribe that a judge should perform this or that activity and chairmen of courts or court panels have no such right.

What is the current situation in this regard in the Georgian common courts?

Day-to-day activities of judges in the Georgian common courts are governed by their internal regulations. The regulations oblige the judge to come to work at a specific time prescribed therein and to be present at his or her workplace for the entire work day. In addition, a judge must declare the time he or she started and ended the work on a daily basis. For instance, pursuant to the regulations of the Tbilisi Appeals Court (the regulations are approved by the chairman of the Court and apply judges of common courts), judges are obliged to come to work at 9:30 hrs and perform their duties until 18:00 hrs with a half an hour break during the day. If a judge cannot come to work due to a valid cause, he or she must notify the chairman of the Court thereon.[44].

[42] CDL-JD(2008)002, 3 October 2008
[43] Opinion No. 1, accessible at http://www.coe.int/t/DGHL/cooperation/ccje/default_en.asp
[44] Article 14 of the Regulations.

Therefore, similar to other public officials, a judge must be present at his or her workplace during the prescribed working hours.

Is it necessary to regulate daily work activities of a judge in the same detailed manner as in case of regular public officials? In our opinion, no. According to the Georgian Constitution, judicial activity is administration of justice. On its turn, for effective administration of justice, it is sufficient for a judge to be present at judicial hearings and to review cases in a timely manner. All other obligations are of secondary nature. For example, the Estonian legislation grants judges full freedom in terms of planning their work day. In particular, Article 6 of the Estonian Courts Act[45] prescribes that judges independently determine their working hours. At the same time, a judge is obliged to review cases in a timely manner.

Like the Estonian model, a judge must be free to determine own working hours himself or herself. In any case, what is primarily required from a judge is to hear cases timely and make decision lawfully. The Georgian procedural legislation obliges judges to hand down decisions in specifically determined terms. Accordingly, a judge should be free to determine the extent of intensity and frequency of his or her presence at the workplace required to deal with court cases in a timely manner. In our opinion, obliging judges to be present at their workplace at a specific time in a way infringes their independence, especially against the background that violation of internal court regulations can be a basis for starting a disciplinary case against a judge.[46] Furthermore, the obligation of a judge to inform the chairman of the court in advance about his or her absence in order for the absence to be considered permissible legalizes an undue ranking of judges within the same court instance. Presently, a chairman of a court is unduly perceived as a higher judicial official who controls judges' work discipline.

Consequently, judges do not have the adequate feeling of independence they should have on account of their high office. For this reason, it is necessary to make **amendments to internal regulations of courts allowing the judges to determine own working hours independently. Furthermore, violation of work discipline by a judge should be deleted from the list of grounds for staring a disciplinary case against a judge.**

GUIDING PRINCIPLES AND PROPOSALS ON FORMING A UNIFORM COURT PRACTICE

Pursuant to Article 7(1) of the Organic Law on Common Courts, "A judge shall be independent in his or her activity. A judge shall assess factual circumstances and make decisions only in accordance with the Georgian Constitution, universally recognized principles and norms of international law and other laws and his or her internal belief." To what extent is this provision being implemented in practice?

[45] An English version of the Act can be viewed at http://www.legislationline.org/documents/action/popup/id/5731 [last viewed in January 2010]

[46] Law of Georgia "on Disciplinary Liability of and Disciplinary Proceedings against Judges of Common courts of Georgia", Article 2(2)(j)

For the purpose of analyzing and generalizing the existing practice and elaborating guiding principles for the judges of common courts, the Supreme Court of Georgia issued in Order No. 3 dated 5 February 2007 determining the composition of a permanent working commission on these matters.

Recommendations of the commission are being periodically forwarded to judges of common courts. The commission prepares two types of documents: **guiding principles** and **recommendations.**

Guiding principles concern most widely spread crimes and contain the commission's proposals on matters of appointment of punishment and legal qualification of elements of crime.

Recommendations are the commission's pre-determined directions to judges on various problematic matters. Their aim is to explain practical application of various legal provisions.

Formally, the commission's guiding principles and recommendations serve to establishing a uniform court practice. However, a uniform court practice should be achieved in a natural way, without any artificial interference. A judge should comply only with the Constitution and the law. A judge dealing with a specific case should be explaining the law according to accepted methods of legal interpretation. A judge is not legally obliged to accept the interpretation of a specific law provided by a higher instance court.[47] There is only a general obligation to this end because an appeal can result in the change of the lower instance judicial decision. This is how a uniform practice is formed in a natural way on specific legal matters.

Judicial officials must not be subjected to influence of persons or bodies outside of the judicial system. The abovementioned guiding principles and recommendations of the commission at the Supreme Court are being drafted also by persons who are not judicial officials,[48] and there are a number of matters on which the commission has provided its interpretation against the absence of relevant decisions of lower instance courts.

The fact that an outsider is providing judges with own interpretation of law is not consistent with the constitutional principles on judicial independence.

Further, we think it is unacceptable that judges are provided with a compulsory directive as to how a specific law should be interpreted or what a decision on specific cases should be. Pursuant to Article 53 of the Criminal Code of Georgia, when a person is convicted, a judge determines the type and measure of imposable punishment by taking into account various factors. Contrary to this, the guiding principles suggest that pre-determined punishments should be applied.

We would like to emphasize that a uniform court practice within the systems of Georgian common courts should formed only in a way that is compatible with the law and

[47] Except when a higher instance court gives directions to a lower instance court in case of sending a specific case or a specific complaint to the latter for review.

[48] Such as assistants to judges and persons holding administrative positions in the courts (for example, a chief consultant to the Bureau of the Chairman of the Supreme Court).

through presentation of decisions made by higher instance courts. There must not be a situation when a small number of individuals pre-determine imperative rules on administration of justice. Although the mentioned guiding principles and recommendations are not formally compulsory, they are drafted under the auspices of the Supreme Court. All in all, this project is an artificial attempt to form a uniform court practice which puts the achievement of the set goals under a question mark and hinders independent administration of justice by judges.

THE ROLE OF A CHAIRMAN IN COMMON COURTS

Each court within the system of Georgian common courts has its chairman who is an acting judge. Unlike the Chairman of the Supreme Court of Georgia, activity of chairmen of first and second instance courts is not distinguished with any special features because they are not *ex officio* members of the High Council of Justice and they do not perform functions prescribed by the Georgian Constitution. Therefore, it is interesting to look into what their duties and activities are and the extent to which they discharge judicial functions.

Chairmen of district (city) courts are appointed from the judges of the relevant court by the High Council of Justice. In courts where there are judicial panels, a chairman is selected from the chairman of the judicial panels. Any chairman is appointed for the term of 5 years but in any case for not more than official tenure. A chairman of a district court:[49]

- Personally reviews court cases; chairs one of the judicial panels within the court;
- Heads the work of the office (apparatus) of the court; in accordance with law, appoints and dismisses judges and other staff of the courts; decides on imposing disciplinary sanctions;
- According to the procedure prescribed by law, assigns cases falling within the jurisdiction of the district (city) court to judges of the court;
- Deals with general organization of the work of the court;
- Meets with citizens and ensures that their requests, complaints and proposals are dealt with in a timely manner;
- In accordance with requirements set forth in the law, performs generalization (summarizes) courts practice and requests, complaints and proposals received from citizens and submits own conclusions to the High Council of Justice;
- Researches reasons of protraction of the review of cases by the court and presents the appropriate materials to the High Council of Justice;
- Ensures order in the court; in the interest of security during a court session, the chairman can order that parties to the proceedings and other attendees are

[49] Articles 25 and 32 of the Organic Law of Georgia "on Common courts"

physically checked before the start of a court session and that bringing certain items into a courtroom is prohibited; depending on the capacity of seats in a courtroom, the chairman may also limit the number of persons having the right to attend a court session;

- Reviews the matter of imposing forced procedural measures on persons who violate order in the court;
- Performs other tasks prescribed by the law.

Notwithstanding the fact that a chairman of a district court is tasked with certain administrative functions, it remains important for him or her to discharge the primary judicial function of administration of justice.

The present situation is that chairmen of common courts (district court and appeals courts) do not discharge judicial functions. Some of the examples are listed below:

- As stated in the letter dated 24 November 2009 received by the Georgian Young Lawyers' Association from the Batumi City Court, the current Chairman of the Court, Mr. Shaqro Abuseridze, is not performing judicial functions and is busy only with administrative tasks;
- According to the letter dated 30 November from the Tbilisi City Court, Chairman of the Court, Mr. Giorgi Shavliashvili, has reviewed only one 1 case during the years of 2007, 2008 and 2009;[50]
- Chairman of the Tbilisi Appeals Court has reviewed only 1 case at an oral hearing;
- Chairman of the Tbilisi Appeals Court has not reviewed a single case by means of an oral hearing.[51]

In our view, one of the reasons of the above situation is the lack of judicial staff in courts. The fact that 8 judges are assigned only to the Criminal Cases Chamber of the Tbilisi City Court from various courts[52] but the Chairman of the Tbilisi City Court is not dealing with a single case goes beyond logic. We deem that a chairman of a court should be able to perform his primary judicial functions together with administrative and technical functions if properly assisted by the office (apparatus) of the court. Current chairman of the Tbilisi City Court is simultaneously a member of the High Council of Justice. However, as we have already mentioned, he is not performing judicial functions. Accordingly, the stipulation of the Constitution that a majority of members of the High Council of Justice should be judicial officials is being implemented in practice only superficially. A judge who has not been hearing court cases and has been dealing with administrative tasks only since the day of his or her appointment as a judicial official is effectively unable to represent the judiciary in the High Council

[50] According to the letter we received from the Kutaisi City Court, chairmen of court is hearing a sufficient number of court cases; this fact once again drives to the conclusion, chairmen of courts are perfectly able to perform their primary judicial functions together with the secondary administrative tasks. The same fact is true for Rustavi.

[51] Letter from the Tbilisi Appeals Court dated 24 November 2009 and Letter from the Kutaisi Appeals Court dated 27 November 2009 to the Georgian Young Lawyers' Association.

[52] Information available at www.hcoj.gov.ge

of Justice. Presently, a chairman of a court is simply an administrative official rather than a judge.

In its Decision dated 22 May 2006, the Albanian Constitutional Court has stated that a member of the High Council of Justice must be an acting judge. In a situation where a judge is a member of High Council of Justice but is not performing judicial functions, no appropriate guarantees of judicial independence and impartiality can exist.[53] Neither the Georgian Constitution nor the Organic Law on Common Courts provide for the ranking of judges. In relation to chairman of a court or chairman of a court panel the Georgian law prescribes that they are regular judges who additionally are tasked with certain functions for which they are paid additional remuneration and are granted some additional guarantees. However, if these officials are not performing regular judicial functions, we are facing a clearly unfair situation and the court is turned into a regular State institution in which there is a supervisor who simply supervises the application of law by other workers.

A trend observed in the system of Georgian common courts is that Chairman of the Supreme Court is referred to as "the first person of the judicial power".[54] This new term does not seem to be a serious problem at a glance; however, taking into account that judges are fully equal to each other, the mentioned manner of reference in a way contains a certain discrediting sense for other judges. Any judge must have a strong belief that he or she has no "supervisor" with a direct meaning of this word. Existence of "the first person" implies existence of "subordinates". Such approach is clearly incorrect and calls for rectification. The judicial power has no supervisors or subordinates either within itself or within other branches of power.

CRIMINAL LIABILITY OF JUDGES

Until 4 July 2007, the "Official Crimes" chapter of the Criminal Code of Georgia, specifically its Article 336 prescribed the following criminal conduct: **"The passing of an unlawful judgment or other court decision."** Paragraph 2 of the mentioned provision contained elements of this crime: **"the passing of an unlawful judgment, which imposes deprivation of liberty as a punishment"**.

On 8 June 2007 the Legal Affairs Committee of the Parliament of Georgia initiated a draft law[55] aiming at decriminalization of the conduct envisaged by Article 336. An explanatory letter to the draft law[56] was stating the reason for initiating this legislative amendment: **ensuring non-interference with the activity of the judiciary and protection of the principle of its independence.** The explanatory letter was explaining the essence of the draft law as follows: "The draft law envisages decriminalization of the conduct now regarded as crime by the Criminal Code of Georgia.

[53] Decision No. 2006-2-001. See the web page:
http://www.codices.coe.int/NXT/gateway.l?f=templates&fn=default.htm
[54] This term is being frequently mentioned on the official website of the Supreme Court of Georgia; For instance, see http://www.supremecourt.ge/News.aspx?sec_id=39&lang=1&news_id=639
[55] The draft law can be viewed at http://www.civilinlaw.org/Project/p176.pdf
[56] Accessible at http://www.civilinlaw.org/Project/g176.pdf

In particular, Article 336, which establishes criminal liability for the passing of an unlawful judgment or other court decision, will be deleted from the Criminal Code. In our view, assessment of the lawfulness of a particular judgment or other court decision falls within the competence of a higher instance court and this should not be a basis for initiating a criminal prosecution against a judge. Adoption of the proposed draft law will facilitate the reinforcement of judicial independence." As we see from the extract, the aim of the draft was rightly formulated taking into account the principle of checks and balances.

According to the Criminal Procedure Code of Georgia, a judgment shall meet three requirements: it must be lawful, substantiated and just.[57] Violation of any of these requirements is a basis for appellation and, further, cassation. Appellation and cassation should be the only ways of correction of mistakes made by courts leading to passing of an irreproachable decision eventually. Any other form of interference with the activity of the judiciary is impermissible. A judgment or other court decision can be amended only by judicial way. This principle is enshrined in Article 8 of the Criminal Procedure Code of Georgia. The now-cancelled abovementioned provision entitled a prosecutor to initiate criminal prosecution against a judge who had passed an "unlawful" judgment. The provision did not require entry into force of such "unlawful" judgment for the purpose of qualifying its passing as a crime; further, the provision made no distinction of the purpose of criminal liability if the "unlawful" judgment were passed by a judge based on his or her internal belief. The prosecution side was vested with such powers as to place the prosecutor in a manifestly dominant position in time of such proceedings. In any case, the judge would have been intimidated even if he or she would not be found guilty and thus a decision contrary to the prosecution's stance would have been handed down. Finally, even in case of acquittal of the judge, the prosecutor could continue criminal proceedings based on grounds for appeal.

Pursuant to Article 85 of the Georgian Constitution, proceedings in a court are based on the principle of competition of the parties. Competition involves three subjects and, respectively, three functional roles: the court, the defense, and the prosecution. Each of them is independent and does not interfere with others. However, the fact that a prosecutor had the right to start criminal proceedings against a judge was an obvious violation of balance of powers.

The only curbing barrier against criminal prosecution of judicial officials was the requirement of mandatory consent of the Parliament and of the Supreme Court thereto. However, following the expiration judicial tenure and within the prescription term, a criminal prosecution could still be initiated against a judge and even for a decision that was amended by an appeals or a cassation court. This rule was particularly alarming against the background that on 25 August 2006 the Parliament of Georgia established that a prescription term for crimes of public officials was 15 years, which was exceeding the length of judicial tenure – 10 years. Certainly, this could be effectively used to discredit the judiciary.

[57] Article 496 of the Criminal Procedure Code of Georgia

United Nations Basic Principles on the Independence of the Judiciary (Principle 1)[58] state that "it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

The European Charter on the Statute for Judges[59] (Principle V) provides that an initial decision on the liability of a judge should be made by an independent body that is separate from other branches of power. In any case, such authority should not be vested in the hands of a prosecution office.

The Public Defender of Georgia demanded cancellation of the abovementioned provision as a factor hindering the proper functioning of the judiciary and addressed the Parliament of Georgia with a relevant legislative initiative.[60] According to information provided by the Public Defender of Georgia, 9 judges were convicted under Article 336 of the Criminal Code.[61]

By virtue of the amendments enacted by the Parliament of Georgia on 4 July 2007,[62] Article 336 was deleted from the Georgian Criminal Code. However, the Supreme Court of Georgia took a different approach when it provided its interpretation on the deletion of Article 336 from the Criminal Code in the *Case concerning Besik Gvajava*.[63] In the latter criminal case, a former judge, referring to newly-revealed circumstances, was asking for his release from the further service of his sentence because he had been convicted under Article 336 of the Criminal Code.

The Supreme Court stated:

> "By virtue of amendments made to the Criminal Code of Georgia on 4 July 2007, Article 336 (the passing of an unlawful judgment or other court decision) was deleted from the Criminal Code. Although presently the elements of crime prescribed by the mentioned article cannot be found specifically found in the Criminal Code, it does not mean that the conduct in question has lost its criminal nature or threat to public because; conduct prescribed paragraph 1 of Article 336 is, in fact, still punishable by virtue of relevant provisions concerning crimes of public officials.
>
> In the case before us, the punishable conduct committed by convicted B. Gvajava, i.e. the passing of an unlawful judgment or other court decision – a crime under paragraph 1 of Article 336 of the Criminal Code – includes all of the elements of crime contained in the conduct prescribed in Article 332 of the Criminal Code such as the substantial violation of rights of a juridical person, damages inflicted and abuse of official powers in contrary to requirements of public service. Consequently, criminal prosecution against B. Gvajava cannot be terminated because the punishability of the conduct he has committed has not been cancelled or, in

[58] Accessible at http://www2.ohchr.org/english/law/indjudiciary.htm
[59] Accessible at www.coe.int
[60] Public Defender's Report to the Parliament on the second half of 2007
[61] See http://www.ombudsman.ge/index.php?m=8&newsid=640
[62] The Legislative Herald of Georgia No. 5205
[63] Order of the Criminal Cases Chamber of the Supreme Court of Georgia No. 283/Saz dated 10 October 2007

other words, the conduct has not been decriminalized because the elements of crime under Article 336 were a specific instance of the general provision contained in Article 332 of the Criminal Code.

Criminal prosecution against a person who has committed a crime under Article 336 of the Criminal Code can be terminated only if the committed conduct (the contents of which are explained in the bill of indictment or in the accusative part of the judgment) does not contain elements of malfeasance envisaged by Article 332 (misuse of official powers) or Article 333 (exceeding of official powers) of the Criminal Code."

The quoted interpretation of law by the Supreme Court is contrary to the applicable Georgian law. Identity of Article 336 with Articles 332 and 333 is doubtful and not directly derivative from these provisions. Article 336 was to punish the passing of an unlawful judgment. Unlawfulness, on its turn, includes any sort of contradiction with substantive or procedural laws. In general, the criminal procedure legislation requires from judges to conduct proceedings within the frames of lawfulness but the reading of law is sometimes labeled by a higher instance judge as unlawful simply because of dissenting views.

This should not be a formal ground for criminal liability and, by cancelling the mentioned unconstitutional provision, the legislator has resolved the matter by eliminating such ground for liability. Nowadays, criminal liability of a judge may be raised only under other crimes of malfeasance. As regards judgments, they can be subjected to appropriate judicial revision mechanisms and criminal liability has nothing to do here. Unfortunately, the Supreme Court regarded the handing down of a judgment by a judge as a regular public official's area of authority and applied general provisions of malfeasance to a judicial official.

While the Parliament of Georgia clearly expressed its position that a judge could not be brought to criminal liability for handing down a certain judgment or other court decision, the Supreme Court's behavior is unclear. **To say in simple language, the judiciary has itself placed limitations on own guarantees of independence.**

Guarantees of independence of the judiciary become too fragile when a prosecutor is entitled to initiate a criminal case against a judge. Judging from the logic contained in the abovementioned decision of the Supreme Court, criminal prosecution can start in regard to any court decision upholding the demands of an appeals or cassation complaint because all the decisions cancelled by higher instance courts are based on their contradiction with law. Accordingly, objectively there can always be a contradiction with law when it comes to appellation or cassation. If the mentioned ground for bringing criminal liability remains in force, it may be deemed as one of the levers for exerting influence on judges. The risk of courts being intimidated will always be an urgent issue until judges will have guarantees that non-acceptance from the part of the prosecution office of his or her stance on a specific matter will not become a basis for initiating a criminal case by the prosecution office against the given judge.

To demonstrate what influence the prosecution office can exert on judges by means of the way described above, we are hereby providing information on the incident that

took place in 2006 but, in view of the Supreme Court of Georgia, it has remained a topical issue to date.

On 11 October 2006, Zurab Adeishvili, the Prosecutor-General of Georgia, passed a resolution pursuant to which K. Kozhoridze, judge of the Khashuri District Court, was charged with commission of the crime under Article 336 of the Criminal Code.

According to the Prosecutor-General's resolution, judge K. Kozhoridze passed an unlawful judgment. In particular, the circumstances of the case are the following. In 2003, K. Kozhoridze was appointed to the position of a judge for the term of 10 years. On 6 June 2006, K. Kozhoridze started review of the criminal case no. 12060518 in which citizens V.G. and D.M. were charged with the commission of the crime under Article 220 of the Criminal Code. On 30 August 2006, judge K. Kozhoridze passed a judgment finding the accused persons guilty. At the same time, it should be noted that, pursuant to amendments dated 28 April 2006 to the Criminal Code, use of conditional punishment as a measure of duress under the criminal legislation was prohibition without the conclusion of a plea agreement (in other words, the conditional punishment could be appointed only if a plea agreement had been concluded). Because the conduct for which the mentioned persons were convicted had been committed before 28 April 2006 (the date of entry into force of the mentioned amendments), judge K. Kozhoradze, in accordance with Article 3 of the Criminal Code (concerning the retroactive force of criminal laws), applied a provision that was more favorable and envisaged better conditions for the convicted persons. Before the entry into force of the April 2006 amendments, the use of conditional punishment was completely dependent on the discretion of judges and there was no mandatory requirement to having a plea agreement concluded before the use of this measure. The April 2006 amendments were deteriorating the accused persons' conditions because they were directly prohibiting the use of conditional punishment. Contrary to this, the Prosecutor-General's resolution states that the new requirement to have a plea agreement concluded first was not deteriorating the accused persons' conditions and, consequently, that judge K. Kozhoradze passed an unlawful judgment thereby committing a crime envisaged by the Criminal Code.

Prosecution office's reasoning for this case is a separate matter. The prosecution office's arguments were refuted by the Constitutional Court of Georgia in its Decision dated 13 May 2009[64], which *inter alia* reads: "[When] a person is subjected to a conditional punishment instead of actually serving a punishment, this is even more favorable than mitigation of punishment. With such statutory stipulation, the legislator enables the person who committed a crime to avoid a punishment. It follows that cancellation of the possibility of imposing a conditional punishment after the conduct was committed should be considered as indirect aggravation of punishment even though this is not directly prescribed in the system of punishments… When a punishment is imposed on a person, the person is thus deprived of chance of having his or her punishment mitigated which he still had when committing the crime: this should be considered as aggravation of punishment regardless of the fact that a pun-

[64] The Public Defender of Georgia, citizen of Georgia Elguja Sabauri and citizen of the Russian Federation Zviad Mania vs. the Parliament of Georgia

ishment as a normative component may remain the same." The same view is shared by the Venice Commission.[65] The latter's position was the very basis for the Georgian Constitutional Court in interpreting Article 42 of the Georgian Constitution. Accordingly, the prosecution office's resolution was legally unjustified.

Apart from legal substantiation, the prosecution office's aforementioned resolution obviously shows that any "disputable" application of law by a judge may be regarded as "unlawful" by a prosecutor resulting in initiating a criminal case by the prosecutor against the judge. The case of judge K. Kozhoridze clearly illustrates that Article 336 effectively provided the possibility to the Government to exert influence and virtually control the judicial power. However, following the cancellation of Article 336, the Supreme Court of Georgia has provided a very dangerous interpretation again giving the prosecution office the possibility to regard any judgment to which the prosecution office does not agree as unlawful, which **may become a ground for bringing a judge to criminal liability.** The prosecution against judge K. Kozhoridze clearly shows that there should be additional and adequate guarantees of judicial independence in the Organic Law on Common Courts and the Constitution of Georgia.

First of all, we should admit that complete decriminalization may cause the judges to think that they can avoid punishment in any case. Therefore, it is necessary to prescribe additional guarantees when it comes to criminal prosecution of judges.

The Georgian Young Lawyers' Association is of the view that the Organic Law on Common Courts and the Criminal Procedure Code of Georgia should amended in a way to state that a criminal prosecution can start against a judge due to his or her judgment only if the High Council of Justice or the Disciplinary Panel address the prosecution office with a motion requesting the initiation of criminal prosecution. In this case, the High Council of Justice should have the right to provide its consent to prosecuting a judge either based on own initiative (which, on its turn, should be based on a complaint of a specific individual) or on the initiative of the prosecution office.

An independent body has a crucial role in ensuring stability of judgments. The High Council of Justice or the Disciplinary Panel, both of them being independent judicial institutions, may be vested with the right to make a pre-assessment of a judgment and decide on whether to address investigation authorities with a request to investigate lawfulness of the relevant judgment. In such case, the legislation will envisage sufficient procedural guarantees for judges thus ensuring the independence of the judicial system.

[65] Accessible at http://www.venice.coe.int/docs/2009/CDL-AD(2009)012-e.pdf

CONCLUSION

In the present report, the Georgian Young Lawyers' Association discussed problems, which constitute major current obstacles to the independence of the Georgian judiciary. The describes circumstances, if taken separately and individually, do not create any particular difficulties to the independence of the court system but their combination as they exist do hinder the proper work of courts and this is practically reflected in the effectiveness of the Georgian judicial system.

As the report shows, the weaknesses of the Georgian judiciary are mostly coming from the inner system. Individual judges are getting "directives" on specific cases from chairmen of courts at the traditional so-called "internal hearings". Disobedience of such "directives" triggers various mechanisms such as assignment of an individual judge to another court; practically, this means that an "untamed" judge of the Tbilisi City Court may be, without any reasoning or substantiation, transferred to the remotest district court for an indefinite period. Other mechanisms for exerting influence are the subjective grounds of determining the amount of remuneration, the disciplinary liability for violation of internal regulations and even the criminal liability. In such environment, proper administration of justice mostly dependence on a judge's personal brevity and, in fact, "heroism"; thus, judges who lack that level of enthusiasm are completely unable to render any resistance to the overwhelming system.

Nearly all of the above-listed mechanisms are applied within the court system itself, with a minimum interference from the part of outsiders, and, accordingly, those responsible are the so-called "judicial elite" who make policy decision within the judiciary.

The Georgian Young Lawyers' Association reserves the hope that the shortcomings we have underlined as well as our proposed ways of their rectification will be perceived as necessary conditions for the reinforcement of the judiciary system leading the public to demand real changes to that effect and to truly ensuring the exercise of every human being's right to use the services of a fair court and to have own rights and interests defended this way.