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მართლმსაჯულებისთვის
Coalition for
an Independent and
Transparent Judiciary

THE COALITION'S OPINION ABOUT THE THIRD WAVE OF JUDICIAL REFORM

14 July 2015

In this brief, the Coalition's views about the draft laws related to judicial reform are presented. In our opinion, the draft laws offer preliminary solutions to a series of issues, but some of these initiatives would benefit from more development as they may threaten the independence of the judiciary if adopted.

I. General points

The Coalition thinks positively about a number of matters envisaged by the draft laws, including:

- **The exclusion of the "automatic termination of the tenure of court presidents" statute,** as this was endangering the interests of independence of the judiciary;
- **Elective position of presidents,** meaning that judges of the relevant court will elect a president of their court;
- **Case allocation reform**, which envisages that court cases will be allocated automatically using an electronic software, based on a random selection principle;
- Gathering **credible information about judicial candidates,** which will facilitate making objective and reasoned decisions by the High Council of Justice;
- Introduction of the **possibility to challenge the results** of a current competition for a vacant judicial position;
- **Improved mechanism for assigning judges to district courts** and additional guarantees for continued independence.

That said, we believe the draft law contains negative component that may contain threats to the judiciary. The Coalition thinks negatively about the following initiatives:

- **Establishment of a Management Department**, which denotes setting up a body with broad and unbalanced authorities with the vague function of overseeing administration and management of common courts. In addition to overlapping the Council's tasks, there is a danger of the Department intruding into the autonomy of courts.
- **Changed rules of election of members to the High Council of Justice,** meaning that the Parliament will elect all five members of the High Council of Justice by unanimous vote instead of a 2/3 majority. This new rule will finally exclude any consensus among political forces vesting only one political team with the exclusive power of staffing the Council.
- **Number of the Supreme Court judges determined by law**, which creates a threat of the Parliamentary majority taking hold of an unbalanced power of manipulating the composition of the Supreme Court.

- **Tasking a judge with examination of a case**, which implies the hearing of a specific case by a judge from another specialized panel of the same court. This rule allows for manipulation and deliberate pre-selection of judges for hearing certain cases.
- **Changed rules of decision-making in disciplinary cases**: according to the draft law, disciplinary issues will be decided by a simple majority, not by a 2/3 majority, of the Council members, making it unreasonably simple to bring a judge to disciplinary liability.
- **Improper distribution of roles between the High School of Justice and the High Council of Justice and keeping the School's role down to a minimum in the process of admission of listeners to the School**.

II. Detailed description of the Coalition's views

Below we present reasoning for the Coalition's views about issues the Coalition feels negative about.

1. Election of presidents

The draft law allows the judges of any given court to elect a president to their court among themselves, including chairpersons of chambers and panels, for the tenure of 3 years. Presidents get elected by secret ballot by a majority of attending members, but at least 1/3 of the full composition. The draft law proposes a different rule of electing chairpersons of chambers and panels. The reasons of introducing a different approach to chairpersons of chambers and panels remain unclear.

2. The Supreme Court composition

According to the Justice Ministry's initiative, the prescribed number of Supreme Court judges should be 28. The Supreme Court agrees with this initiative, stating that Article 14(3) of the Organic Law on Common Courts should determine this increased number of judges of the Supreme Court. It has been mentioned many times that it would be prudent to correctly evaluate the impact of this change upon the institutional independence of the Supreme Court. The determination of the figure of 28 judges by a law should not serve as a ground for the breaching the checks-and-balances between the judiciary and the legislature in favor of the legislature.

More specifically, a political force that holds majority in the Parliament should not be able to increase the number of judges in the Supreme Court without any substantiation. In this context, account should be taken of the fact that members of the Supreme Court are elected by the Parliament with a simple majority. If, along with this authority, the Parliament should have the power of independently determining the number of judges the Parliament will thus find itself possessing disproportionately broad powers, without any counterbalance, to influence the composition of the Supreme Court.

In light of the Supreme Court's significance to the justice system, it would be more sensible to determine the number of the Supreme Court judges not in the Organic Law but in the Constitution as in the case of the Constitutional Court judges.

3. Election of members of the High Council of Justice by the Parliament

The proposed draft law significantly changes the rules of electing the members of the High Council of Justice by the Parliament. According to the current rule, at least one member of the Council should be elected by the Parliament by a 2/3 majority. Now, the draft law proposes abolition of the current rule and introduction of a simplified procedure: the Parliament will elect all of the five members of the Council right in the first round of nominations by a unanimous vote.

We regard the proposed procedure impermissible. This initiative directly contradicts the meaning of consensus, which in turn shields a person appointed to the Council membership from being a representative of any given political force. Instead of developing an improved model of electing the Council members that would serve to achieve a consensus and prevent a "deadlock" from happening (for example, introduction of

a reconciliation commission), the proposed version further weakens the dignity of the Council and goes against the democratic principles.

4. Tasking a judge with hearing a case

The provisions of the draft law on tasking a judge with hearing a case need further elaboration; in particular, the grounds on which a president may task a judge with hearing a case in a different specialty than their own should be more specific. Consideration should be given to the risks associated with hearing a case by a judge who is not specialized in the given category of cases. Such practice has been affecting the quality of judgments in the recent years and has sometimes resulted in disciplining judges. Further, it should be specified whether or not the above-mentioned provision prescribes the possibility of hearing a specific case by a judge on another bench or hearing several cases at once is being contemplated.

The Coalition believes that obliging a judge to hear a specific case or to hear a case outside of their own specialty is associated with certain risks. Furthermore, it allows for entitling a judge to hear a specific case in avoidance of the established rules on case allocation.

5. Challenging a Council's decision

The Coalition thinks the following provision needs more clarity: "Member(s) of the High Council of Justice exceeded their powers endowed by the Georgian legislation resulting in a breached right of a judicial candidate or a threat to the independence of the judiciary." This stipulation is too broad and vague; it further unclear what the "exceeding of powers endowed to a Council member" stands for. It would be wise to specify the circumstances implied by the said provision.

6. The procedure of appointing a judge without a competition

Paragraph 1 envisages appointing a judge without a competition for a judicial position of the same or higher position within the competence area of that judge. The Coalition thinks it would be more appropriate if this provision described a situation where several judges wish to occupy to a vacant position in another court.

7. Promotion

It would be rather prudent to articulate judicial promotion criteria right in the Law. The Coalition also believes that a carrier development principle should be introduced allowing for appointment of judges to judicial positions at courts of appeals only if they have served in the first instance courts for at least 5 years as judges.

8. The Management Department

The draft law proposes establishment of a Management Department, a new organizational structure, in the High Council of Justice. The Management Department is supposed to oversee administration and management of common courts. We think the change carries a lot of risks because it undermines not only the independence of individual judges but also the autonomy of courts and the legitimate interest of independent functioning of courts. According to the draft law, the Department is responsible for analyzing information and furnishing recommendations to the relevant court and the High Council of Justice on workload of courts and case hearing index, need for seconding judges, quality of case management and citizen services, overseeing the operation of the electronic case management software, analyzing international experience in the area of court management and promoting the raising of managerial culture in common courts based on international practices. A chairperson of the Department will be elected by the Council through competition.

Of special interest is the Department's power to oversee "effective" and "thrifty" use of court resources because such authority may give rise to the threat of the Department intervening in the internal administration court matters. The implication of the right to "analyze case hearing indices" is uncertain and

it is unclear whether there exist any legitimate grounds for intervening in this matter by even the High Council of Justice as a constitutional body, not to mention a newly-established Department.

We do not quite understand the reasons warranting the creation of the Department outside the courts, which will have the some of the responsibilities of a court president, court office and court manager simultaneously. Concentration of such broad powers and different responsibilities in the hands of one department may lead to constant intervention into the matters falling within the courts' internal business ultimately endangering the autonomy of courts. In other words, the problem is twofold: existence of the Department as a sort of an external oversight body and too broad of powers vested in the hands of the Department.

Further, if there is a need for additional regulation of the court administration system, it is unclear why the High Council of Justice is not able to discharge this authority as a constitutional body with higher legitimacy.

The draft law gives the impression that it creates an additional body of control with a series of broad and vague functions able to intrude into the autonomy of individual courts.

9. Case allocation

We think a new rule of case allocation in courts proposed by the draft law is an important initiative. In particular, cases in district courts and courts of appeal will be distributed by electronic software based on equal and random distribution principles. Also, in case of temporary malfunction of the software, cases can be allocated manually according to the list number.

Although the proposed new rule is an undoubtedly more fair and a more democratic mechanism, it still raises the question whether it fits into the expected objective. In particular, does this provision prevent the risk of court presidents deciding to allocate cases by their subjective views and does it still leave levers in the hands of court presidents to manipulate the process?

Consideration should be given to the current practice of assigning criminal judges to the so-called thematic groups; in other words, judges are allocated to judges are assigned to a specific case bracket, wherein each bracket focuses on a specific type of civil or criminal case. If the presidents of courts are to retain their authority to allocate judges to the above-mentioned thematic groups, the new rule of electronic distribution will be effective and will not be able to protect against arbitrary distribution of cases. This is because the cases to be examined on merits identified as such by the electronic software will go to judges in the thematic group dealing with merits and cases related to application of interim measures to will go judges who in the interim measures group only. Furthermore, judges are allocated to those groups based a unilateral decision of the president of the relevant court.

10. Types of disciplinary misconduct

One of the major flaws of the current law is its Article 2 (types of disciplinary misconduct), a vaguely formulated provision that does not meet the requirements of clarity and foreseeability as established by the European Court of Human Rights. Results of interviews conducted with current and former judges within a Coalition-led survey in 2014 showed that judges did not have a clear idea about grounds which they may be disciplined on.[1]

There is no general legal definition of grounds for disciplinary liability; nor are there definitions or explanations of specific types of disciplinary violations. The law does not provide a list of actions which a judge may not be disciplined for. Legal error, which differs from misconduct in that there is a possibility of mending a legal error, it varies in degree, has a systematic nature and is committed by a judge who acted in good faith, is an example of this lack of clarity [2] Since the law does not provide definitions of types of disciplinary misconduct, the same action may be interpreted differently by disciplining authorities – something that does not promote a legally foreseeable environment.

[1] Decision of the Disciplinary Panel of Judges of Common Courts as of 12 April 2013
[2] Ibid.

The Coalition positively assessed the deletion of the "rude violation of law" from the list of disciplining grounds in 2012; however, it is still possible today to qualify a behavior that would previously be labeled as rude violation of law as "improper performance of duties". In other words, the changes in the law in 2012 have not in fact served to minimize the risk of interference with judicial activity. After the "rude violation of law" was deleted from the types of misconduct in 2012, almost all of the cases dealt with by the Disciplinary Panel (5 cases out of 6 decisions) since then until the time the research was carried out (April 2014) have been qualified as "improper performance of duties".[3]

We believe these issues need to be given consideration in the draft law and solutions should be found within the current reform process. We also believe the law should provide definitions of disciplinary misconduct.

The types of disciplinary misconduct listed in Article 2 of the Law are sort of duplicated in other provisions of the same law, the Judicial Ethics Code and the Criminal Code. For example, the meaning of "a corruptive wrongdoing that does not entail criminal liability", one of the types of disciplinary misconduct, is unclear while Article 338 of the Criminal Code refers to all of the general features of the crime of corruption.

Furthermore, more clarity should be added to the relationship between the Law and the Ethics Code. This matter is a problem under the current version of the Law and the proposed draft law does not provide any solution to that effect. We think the Law should be referring to specific provisions of the Ethics Code, which judges may be disciplined for if they breach those norms. In cases where the Law and the Ethics Code duplicate each other, these types of misconduct should remain in the Ethics Code only.

11. The Independent Inspector

A major novelty proposed by the draft changes is the creation of an Office of the Independent Inspector at the High Council of Justice. According to the draft law, the Office is intended to be a disciplinary investigation body.

Under the current rules, disciplinary proceedings may be commenced by the Chief Justice, presidents of courts of appeals and the High Council of Justice. The Council is also authorized to carry out disciplinary prosecution.[4] The proposed draft intends to change the current model vesting the powers of commencing disciplinary proceedings, conducting a preliminary examination of disciplinary cases and carrying out an inquiry in the hands of the Independent Inspector.

As it is known, one of the reasons for this change is to separate the preliminary examination/inquiry from disciplinary prosecution and to designate separate bodies in charge of these functions. According to the proposed changes, the Council will remain responsible for disciplinary prosecution only.

The importance and the objective of separating the prosecution and the investigation stages from each other are clear; however, in view of the nature of disciplinary proceedings and risks associated with it, it is necessary that this new concept of an Independent Inspector is protected from inappropriate influence and its independence is guaranteed by law. The authors of the draft law should strive to establish an independent body with high legitimacy. In this context, special attention should be paid to proper regulation of the rules of appointment and dismissal of the Inspector, including the grounds thereof. Despite its non-dangerous nature, we believe insufficient legal regulation of the Inspector concept may result in generating threats to the independence of individual judges.

It is for these reasons that the draft law needs further elaboration, in particular, with a view of defining the grounds for termination of an Inspector's tenure very clearly.

12. Decision-making on matters of discipline

Even if the authors of the draft law wish to change the rule of 2/3 majority, we believe a high majority such as 2/3 must stay at least at the stage of decision-making on whether to bring a judge to disciplinary liability.

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[3] Ibid.

[4] See the Law on Disciplinary Liability of and Disciplinary Proceedings against Judges, Article 7

We understand the difficulties with decision-making on disciplinary matters but we do not think this issue can legitimately be overcome by simply removing all the barriers. A simplified decision-making process would endanger an even more important and valuable interest such as the independence of judges.

13. Standard of proof

We positively assess the draft law's proposal to determine the standard of proof, but it leaves open issues of no less importance such as evidence gathering, admissibility and legal weight.

14. Admission of disciplinary accusations

One of the new concepts introduced by the draft law is giving the judge a possibility to acknowledge disciplinary accusations. Although the concept of acknowledgement may be justified by pragmatic considerations (saves time and resources, etc), it is important to embed guarantees in the Law to ensure this mechanism is not used for inappropriate purposes that encourage exerting pressure on judges. In the context of a threat of pressure faced by judges, consideration should be given to the current rule – which will stay – that disciplinary proceedings will cease should a judge resign; this rule may work as an encouragement for making judges resign as if they are doing so at their own will. The statistics of past years of judges leaving the court system at their personal wish should be taken into account as well.

15. Internal memos

The possibility of commencing disciplinary proceedings on the basis of a memo drafted by another judge, court or a staff member of the Office of the High Council of Justice remains unchanged. Moreover, the draft law is adding "a member of the High Council of Justice" to the above list. In other words, members of the High Council of Justice will now have the right to address the Council with an internal memo about possible commission of disciplinary misconduct by a judge.

We regard it unacceptable for staff members of the Office of the High Council of Justice to have the right to issue a memo on the commission of misconduct by a judge. The threats here are both subjective attitude of persons releasing such memos (such as employees of the Office of the Council or members of the Council) and lack of precise legal regulation of the procedure. These factors significantly escalate the danger of improper limitation of judicial independence and unjustified interference with the judicial activity. It is likely that this will turn into a control mechanism in the hands of the Office of the Council of Justice especially in cases where no disciplinary complaint has been lodged against a judge and the parties are not having a dispute.

The Council of Justice is authorized to commence a disciplinary process without any parties or interested persons involved, simply on the basis of an internal memo submitted by an employee of the Office of the Council (and, if the draft law is adopted, also by any member of the Council). The law does not determine how the memo should be drafted and used, which means the Office of the Council of Justice may find itself vested with unlimited powers.[5]

16. Decision-making by the Disciplinary Panel on matters of discipline

The current law stipulates that, for the Disciplinary Panel to make a decision, a majority of its attending members should vote in favor. Hypothetically, this number could be less than a half of the Panel members (a decision by 2 members). We believe the draft law should also tackle this matter by providing for an increased involvement of the Panel members in the decision-making by the Panel thereby ensuring a proper level of legitimacy of Panel decisions.

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[5] See *Analysis of Judicial Disciplinary Liability* authored by the Human Rights Education and Monitoring Center, the Georgian Young Lawyers' Association and the Transparency International – Georgia, p. 38, motives for commencing a disciplinary process

17. Admission of listeners to the School

The Coalition welcomed and supported the version of the draft law that aimed for fair and objective separation of the listener selection and admission competences between the School of Justice and the Council of Justice. The Coalition has always been emphasizing excessively broad competences of the Council, which unreasonably holds some of the listener selection functions that should normally be the responsibilities of the School.

Contrary to the current system, which implies two different ways of getting a judicial appointment and several mandatory steps, it is important for the role of judicial organs to be clearly defined. Reinforcing the School's role at the listener admission stage and exclusion of the Council from this process would be of crucial importance to ensuring a fair judicial appointment process. This would also increase the value of judicial selection stage at the High Council of Justice. The latter stage makes no sense at present because the Council members have already decided appointment of a person when they make a decision to enroll him/her in the School.

Against this background, judicial candidates who are released from the obligation of attending the School have found themselves in an unfair and discriminated situation. We believe the distribution of functions between the School and the Council as proposed in the initial version of the draft law (the School to hold listener admission competitions by itself) was offering a fairer and more objective process putting the relevant bodies back into their mandates. It is therefore unclear why the authors of the draft law changed their mind to worsen this part of the draft law without any preliminary notice or discussion.

18. Claims Commission

The reworked final version of the draft law no longer contains the possibility of challenging listener competition results. The initial version of the draft law envisaged a Claims Commission mechanism, which is missing in the final draft.

Despite some procedural and substantive questions about the complaints mechanism, we believe finding a correct legal solution to the matter is crucial. Having a complaints mechanism is important, especially, given the fact, that admission to the School is the only way for a majority of those wishing to get a judicial appointment to enter the judiciary system. Consequently, unfair obstacles on the way to achieving this goal basically deprive a person of the chance to become a judge. Therefore, existence of an independent control body is important. The Coalition does not find it clear why this issue has not got on the agenda of the authors of the draft law even against the background that the High Council of Justice retains the power to make decision on listener admissions.