
# Initial remarks and considerations with respect to the draft laws on judicial reform

We present legal analysis of the Coalition on a package of legislative changes related to making amendments to the Organic Law of Georgia on "Common Courts", Law of Georgia on "High School of Justice" and Law of Georgia on "Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia".

We note at the outset that the present document contains only initial viewpoints of the Coalition and we reserve right to present additional considerations to the Parliament of Georgia and to the initiators of the bill.

## With respect to changes to the Organic Law of Georgia on "Common Courts"

The bill concerns important legislative changes, implementation of which was actively supported by Coalition during the past times. We would like to note that the bill improves a number of aspects, including the procedure for election of chairmen, the order of secondments of judges, procedure for collection of information on the candidates prior to their appointment, provisions regulating conflicts of interest, possibility of appeal against the decision of the Council related to the competition, and other issues.

However, it is Coalition's view that a number of issues covered in the bill require additional elaboration, with respect to which we present specific assessments below.

## 1. Election of Chairmen

The bill provides for the possibility of appointment of the chairmen of the courts and of their deputies by the judges of the same court, but at the same time the bill establishes a different process with respect to the chairmen of the chambers/collegiums. It is unclear what caused setting of a different approach in regulating appointment of chairmen of chambers/collegiums.

## 2. Assignment of a case for consideration

Paragraph 5 of Article 30 specifies on which grounds a specific case may be assigned to another specialized composition (panel) within the same court. One must consider the risks related consideration of a case of different specialization by a judge. Such practice used to have an impact on the quality of the exercised justice in the past years and in certain cases had even become the basis for liability of judges. It should also be ascertained whether the given provision gives possibility of instructing a judge to hear a specific case with a different composition, or whether reference is made generally, to adjudication of several cases.

Coalition considers that imposition of specific cases for judicial consideration involves certain risks and at the same time gives possibility of assignment of a specific case to a judge circumventing the order of distribution of cases.

## 2. Announcement of a Competition

Coalition deems it advisable that announcement of selection of judges is publicized not only in the official press agency but on the website of High Council of Justice as well. Application period for

registration of candidates should be 30 calendar days from announcement of the competition. In this context the amount of documents which the candidates have to present upon registration should be taken into account. We believe that 10 calendar days are not adequate for presentation of such a large number of documents.

At the same time, Coalition considers that selection/appointment of judges should be based on the point system of appraisal. The process of appraisal should be open, and consequently, the results of the assessment of the members of the High Council of Justice should be disclosed.

### 3. Appeal on the Decision of the Council

Coalition finds that following provision requires more clearness: "The member (members) of the High Council of Justice of Georgia has (have) exceeded authority granted to him/her (them) by Georgian legislation, as a result of which the rights of the candidate to the judge have been infringed or independence of the judiciary has been endangered". It is general and vague, and also it is unclear what is meant by excession of authority granted to the member of the Council. It is advisable to specify the circumstances envisioned by this provision.

### 4. Procedure for Appointing a Judge Without a Competition

First paragraph envisions appointment of an acting judge to the courts of respective or upper instances without a competition within the scope of his/her authority. Coalition considers it advisable that the given norm regulates an occasion when several judges seek a transfer to another court.

### 5. Promotion

Criteria for promotion of judges should be directly regulated by the Law.

With that, Coalition deems that career principle should be implemented in the system and only those judges should be appointed in the Courts of Appeal who have served as judges in the courts of first instance at least for 5 years.

## 6. Distribution of Cases

It stands to mention that the bill also envisions initiatives related to distribution of cases. Under the bill, the cases shall be distributed among the judges automatically, by means of electronic system, by rotation, which means assigning cases to the judges pursuant to the incoming case turn and turn of a judge.

It is vital to exclude possibility of subjective decisions in distribution of cases and to decrease artificial dominance of chairman of the court or of others. Implementation of case distribution method based on electronic program shall be an important novelty in this respect. However, we should take into account that electronic process alone will not respond to the challenges related to distribution of cases in the large courts.

In the first place, the electronic program should assign cases on the basis of random selection rather than rotation, in order to preclude the possibility of control over rotation, and thereby of manipulation.

Apart from this, in order to consider real scale of problems and the needs, it is necessary that along with introducing electronic program, the practice of division of criminal law judges in various topical or procedural groups (for example, the group hearing prevention measure cases, the group of judges hearing cases on merits, etc.) at large courts be reconsidered. Presently, judges may be divided in the above-noted groups, existence of which, in terms of their legitimacy, requires through assessment, by the individual decision of the chairman of the court.

In case of division of judges in these groups, even with the operating electronic program, it will turn out that the program will not have real impact on the situation since it will allocate the cases related to prevention measure among those judges, who will be assigned to the group of prevention measures by the chairman.

In the event of interest, such possibility may serve as a leverage for manipulation over the process and render the principle of electronic assignment of cases meaningless.

### 7. Termination of Authority of the Chairmen and Reappointment of Court Administration Staff

Pursuant to the bill, within one month of its enactement, court managers should ensure reappointment of the currently working staff members of the court administration envisioned by this Law. It is unclear what is meant under "reappointment" and what rules will govern the process. If the reappointment implies rules of appointment pursuant to the Law on Public Service, there are risks that the process may be used for frivolous dismissal of persons employed by the court system based on partial and undue motives. This may cause irreparable harm to the stability of staff (non-judges) employed by the system.

The bill also foresees automatic termination of the authorities of the chairmen and their deputies. Venice Commission recommended the Government that the acting chairmen should exhaust their term and these kind of changes should not give the ground for large-scale changes in the management of the courts. Coalition supports this recommendation and likewise calls on the authors of the bill to remove such possibility from the bill. It is obscure for the Coalition why is there a critical need for simultaneous, wide-scale dismissal of chairmen of the courts. To the contrary, Coalition holds that such unstable framework will be detrimental for the interests of the judiciary.

## Draft law on amendments to the Law of Georgia on "High School of Justice"

Coalition welcomes initiation of certain progressive novelties in the Law on "High School of Justice" which will improve functionality of the School and reasonable distribution of authorities between the School and the Council. Plausible procedural changes related to publication of information and of the agenda of the session of the Independent Council on the website, as well as of the minutes and of its decision, regulation of the issues of the decision-making powers and conflicts of interest of the Indepdent Council, some time in advance, etc. Coalition also believes that some of the amendments need to be fundamentally elaborated, which will be addressed below.

## 1. Admission to School of Trainees of Justice

Coalition supports and welcomes deliminaton of authorities between High School of Justice and High Council of Justice in the process of selection and admission of trainees of justice. Coalition had always been noting that the competencies of the Council were unduly widened and it used to unreasonably incorporate functions of the School in the process of selection of trainees of justice.

In light of the fact that the system of judicial appointment entails two alternate ways and several mandatory steps, it is necessary to clearly define the role of judicial agencies in this process. Strengthening the role of the School in the process of admission of trainees of justice and elimination of participation of the Council from this process will significantly remediate the process and will increase the significance of the stage of judicial selection at the High Council of Justice. This stage used to lack practical importance when the members of the Council had practically been making their minds up on the judicial appointment of a person upon his/her admission as a trainee of justice at the School.

Under this arrangement representatives of the stream who were exempt from studying at the School were put in an unequal and discriminatory conditions. We believe that the presented distribution of functions between the School and the Council will make the process more just and objective and will bring the agencies to their corresponding mandate.

Despite the significance of delimination of authorities, it is important that communication between the School and the Council is duly regulated. According to the bill "Independent Council shall decide to conduct a competition for admission to the School taking into account the number of judges within the common court system of Georgia." Determination of the number of judges and consequently decision on the related needs within the court system is the competence of the Council. Therefore, when determining the number of trainees of justice to be admitted to the School proposition of the Council on the required quantity of judges, as well as the actual resources and capabilities of the School needs to be taken into account.

## 2. Regulation of Important Matters by the Statute

A substantial flaw of the presented bill is the attempt to regulate important matters by the Statute of the School. According to the bill "The form of competition for admission in the School, registration of candidates for trainees of justice, their selection criteria and other issues regarding the process of conduct of the competition shall be defined under the Statute of the School."

One of the negative attributes of the existing system is exactly the lack of regulation of essential matters in the Law. Transferring such important matters as procedure of admission of trainees of justice, main principles and criteria, into the Statute of the School denotes to diminishing the importance of these matters and their regulation by an unstable legislative act, which is unjustified.

It is impossible to assess the process of admission of trainees of justice given that the whole number of important issues are left for regulation by the Statute of the School revised version of which is not accessible. Coalition urges the authors of the bill to change their approach and regulate essential matters at a legislative level, in order to ensure that there is a due forum to work, discuss and exchange views on these issues; this is not possible if the matter is to be regulated by the Statute of the School.

In order to ensure fair and objective process of admission of trainees of justice the authors of the bill should take into account such questions of principle as requirement of a substantiated decision by the independent committee, which we deem can be achieved by the points system. We find it important that the interview of the Independent Council with the shortlisted candidates be conducted on the basis of a pre-defined questionnaire, while the members of the Independent Council appraise the candidates individually, independently from each other, by giving points. Otherwise, it will be materially difficult to ensure objectivity and substantiate decision-making in the process of admission of trainees of justice.

### 3. Complaints Committee

One of the main challenges of the existing system is statutory regulation of appeals against the results of the competition for trainees of justice. It is significant that the authors of the bill have directed their attention to introduction of this mechanism.

The initiative to create complaints committee is worthy of note, however, in the first place the possibility of appeal against results of the competition by means of courts, namely within the

administrative procedure, needs to be duly considered. It is critical to assess why administrative complaint is not a sufficient legal means and why it is necessary to create an additional unit within the court system.

Apart from this, the bill is vague with respect to the establisment of the committee itself. It cannot be clearly determined wether the complaints committee should be created within the High Council of Justice or within the School. In this case as well, it is unjustified to fully transfer the decision-making power with respect to the number and composition of the committee onto the High Council of Justice. The bill is silent on who may compile the complaints committee, whether members of the High Council of Justice and other external people can be part of it, how the selection is to be made and what criteria must the members of the committee satisfy, etc. We consider that issues of such significance must be regulated by the Law.

As regards procedural and substantive issues, it is not evident from the bill in which circumstances and under what grounds may entrant of the competition apply to the copmlaints committee and appeal against the issue related to the competition. The respective provision of the bill notes that the committee is established for the purposes of hearing complaints related to the procedure and results of the competition. This also means that the decision of the Independent Committee on selection of a certain candidate and rejection of another candidate on a certain ground may as well be appealed to the complaints committee. In such a case it is unclear how the committee is to assess the matter and how would it ascertain whether the Independent Council made a lawful and just choice among the candidates.

Existence of appeal mechanism is essential, all the more that for most who seek to become a judge, admission to the School is the only way of entering the judiciary. Thus, in case of unfair barriers on this path the person will actually be deprived of the possibility of taking the position of a judge. It is thereore important for there to be a controlling body over the actions of the Independent Council. But Coalition considers that such body is the judiciary. As regards the scope of the right of appeal, in light of the nature of the competition, we consider that only procedural issues should be subject of

appeal, but not substantive, including whether a certain candidate complied with the set criteria better than the other.

In addition to the above-mentioned issues, we find that after changing the minimum requirements for appointment of judges, it is important that the terms of participation of the judicial trainees in the competition be also changed. For the purposes of effective and reasonable usage of resources the criteria for the trainees of justice should be appended by the requirement of a master's degree or an equivalent, and increase of the age requirement to 28 years.

## With respect to changes to the Law of Georgia on "Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia"

The bill on the changes to the Law of Georgia on "Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia" contains a number of novelties improving disciplinary proceedings and procedures of judges, which is plausible. It should be noted that with respect to a number of issues, such as, for example designation of the High Council of Justice as the sole body authorized to commence proceedings, elimination of possibility for the Council to address with a private recommendatory notice, introduction of procedural guarantees for protection of judges, and others. These amendments echo the recommendations[1] of the research conducted by the Coalition for an Independent and Transparent Judiciary in 2014, which on their side are based on international standards and good practice examples. This deserves positive appraisal.

Nevertheless, the bill is silent on a number of essential issues, which must be dealt at this stage of the reform, in particular:

1. One of the most serious drawbacks of the current Law is its 2nd article (types of disciplinary infringements), formulation of which is vague and does not meet the standards of clarity and foreseeability established by the European Court of Justice. The interviews conducted with acting and former judges within the framework of the Coalition's research in 2014 has obviated that they do not have a clear idea on what basis they may be subject to disciplinary liability;[2]

On a legislative basis there is no general definition of disciplinary infringement, as a basis for disciplinary liability. Likewise, there are no interpretations/definitions of specific types of disciplinary

infringements; The Law does not define a list of actions for which a judge may not be jusbject to liability, such as error of law, which according to the explanation of the disciplinary board, differs from infringement in several ways, including: possibility of correction of the error, its degree, repetitiveness and recurring nature, conscientiousness and motive of the judge.[3] Since the law does not provide definition of types of disciplinary infringements, it is possible that similar actions of the jduges be differently assessed by disciplinary bodies, which will hinder creation of a forseeable legal framework;

Coalition has positively appraised deletion of "gross violation of law" from the grounds of disciplinary liability already in 2012; however, possibility still remains that an act which used to be considered as a gross violation of law will today fall under the definition of undue execution of authority by a judge. Thus, the risk of intervention in judicial activities has not been lessened in practice after the legislative changes; Since 2012, after "gross violation of law" has been deleted from the types of violations, till preparation of the research (April 2014) the absolute majority of decisions made by disciplinary board (5 cases from 6 decisions) concerned undue performance of authority by a judge;[4]

We consider that the bill must take into account the above-noted issues and they must be resolved in the course of a legislative reform. At the same time, we consider necessary that the Law gives definition of each disciplinary infringement.

2. There is certain bifurcation between the types of disciplinary infringements listed in article 2 of the Law and other provisions of the Law, Judges Ethics Code and the Criminal Code.
For example, it is uncertain what is meant under "such corruptive transgression, which does not result in criminal prosecution", which is one of the disciplinary infringements, whereas Article 338 of Criminal Code entails all general characteristics of corruption crimes.
Individual cases of disciplinary infringement (for example unsuitable conduct for a judge), is on the one hand, an independent type of infringement under the Law, and on the other hand, ethical norm under the Ethics Code. Violation of Ethics Code is by itself, an independent infringement under the Law;

Activities incompatible with the position of a judge on the one hand, represent a type of disciplinary infringement, and on the other hand, automatic ground for dismissal from the position of a judge.

The interplay between the Law and the Ethics Code should be regulated; this is a vague aspect under the present Law and neither does the new bill envision regulation of the issue. We consider that the Law should make references to the specific provisions of the Ethics Code, infringement of which may result in disciplinary liability of a judge. In case of overlap between the Law and Ethics Code the infringements should remain in the Ethics Code.

3. The presented bill increases procedural guarantees for protection of judges' rights, though it is desired that these guarantees are complemented by such important guarantees foreseen by international standards as the presumption of innocence, access to the disciplinary case documents, adequate time for preparation of one's position, right to a substantiated decision. It would be preferable if the bill also determined obligation to publish decisions of the Council on disciplinary prosecution of a judge in a shaded form, as it is the case for the decision on termination;

4. An important novelty of the bill - determination of the standard of burden – deserves positive appraisal, although some of the equally important issues are left unregulated, such as issues of obtainment, admissibility and legal force of evidence;

5. One of the novelties of the bill is possibility for the judge to admit his/her disciplinary liability. Although introduction of this institution maybe justified from pragrmatic point of view (saving of time and resources, etc.), it is important for the Law to incorporate due guarantees, so that the given institute is not misused and does not incite into the pressure over the judges. With respect to the dangers of pressure over the judges, it should be taken into account that the legislation still contains a norm according to which disciplinary proceedings shsall be terminated upon resignation of a judge from the position, which may in a way encourage judges to resign from their positions by their own application. Recent statistics of judges leaving the judiciary at their own will should be taken into account.

6. Negatively should be assessed the fact that the bill still envisions commencement of disciplinary proceedings on the basis of a reporting notice of an officer of the High Council of Justice.

A provision in the Law pursuant to which disciplinary proceedings against a judge may be commenced on the basis of a reporting notice of an officer of the High Council of Justice is a danger for judicial independence. This possibility grants authority to the administrative officer to start examination of judge's activity proactively, without any ground, with the purpose of detecting an infringement; such authority of the officer of the Council should be abolished.

7. Form of the complaint – current Law as well as the presented version of the bill mandate that the disciplinary complaint (application) lodged with the Council should comly with the sample form approved by the Council. We suggest that the applicant should not be limited this way and if the application contains necessary and sufficient information for resolution of the issue it should not be sent back to the applicant for formal reasons only.

8. Current Law as well as the presented bill foresees possibility of a challenge, however it leaves blank such important issues as definition of conflict of interest, which would be the most logical ground for the challenge.

9. Under the current regulation decisions within the disciplinary board shall be made with the majority of the members present, which in theory may be less than half of the board memers (decision of 2 members); it is vital that the amendments also relate to this issue so that sufficient degree of engagement of the members, and consequently, higher level of legitimacy, is ensured by the corresponding amendment.

It is likewise noteworthy that the amendments provide that a disciplinary matter at the High Council of Justice shall be decided by simple majority, instead of 2/3, as provided by the currentlee regulating norms. Coalition finds that the presently existent general reference to 2/3 of majority requires specificity. However, Coalition did support decision-making by 2/3 majority for disciplinary prosecution of a judge.

10. Currently existing legislation related to criminal prosecution of judges needs to be materially amended. In particular:

- Special norms related specifically to judges need to be inserted in the chapter of the Criminal Code covering all public officials, including judges. Also, apart from material norms, it is vital that procedural legislation is adapted to the specificities of judicial authority (including, procedure of questioning, etc.);

- The article on intentional unlawful arrest needs to be revised;
- The main difference between a disciplinary infringement and a crime is “material damage”, which requires better specificity and objectivity;
- The mechanism of the “individual consent” of the Chairman of the Supreme Court of Georgia with respect to lifting of judicial immunity should be abolished and the scope of absolute judicial immunity should be reconsidered. The authority of lifting an immunity should be granted to a collegial body, by qualified majority of votes. This could be 2/3rd majority of High Council of Justice or the Supreme Court Plenum.

It would be reasonable if the discussion on the above-mentioned issues and their resolution takes place in parallel with improvement of legislation on disciplinary proceedings.

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[1]Analysis of the system of liability of judges, Human Rights Education and Monitoring Center, Georgian Young Lawyers' Association, Transparency International - Georgia, (Tbilisi 2014).

[2] Ibid.

[3] Decision of the Disciplinary Board of the judges of the common courts of Georgia dated 12 April, 2013

[4] Ibid.