Judicial Independence in the Eastern Partnership Countries

(Armenia, Azerbaijan, Belarus, Georgia)

While the judicial independence remains one of the most challenging issues for the democratic development of the Eastern Partnership countries, the progress achieved in this direction in Armenia, Azerbaijan, Georgia and Belarus leaves much to be desired. The present report does not have the ambition to be a comprehensive study of the judiciary systems in the partner countries - it represents a compilation of researches carried out by the CSOs active in the field. The paper analysis legislative framework existing in the partner countries regarding the appointment, dismissal and promotion of the judges that could be serving as an impediment for the genuine transformation of the judicial systems in Armenia, Azerbaijan, Belarus and Georgia into accountable, transparent and independent judicial branch.

The present report has been prepared by of Helsinki Committee of Armenia (Armenia), The Legal Education Society (Azerbaijan), the Foundation for Legal Technologies Development (Belarus) and the Georgian Young Lawyers' Association (Georgia).

1. Armenia

Overview of the Situation

Though the Constitutional amendments marked the beginning of the second phase of judicial reform in the Republic of Armenia, in the framework of which positive improvement were made, real separation of powers, existence of guarantees for genuine independence of judges and prosecution and consistency of the reforms remain questionable.

The general rationale behind the reforms introduced into the Armenian Judicial Code in 2007 was enhancement of the independence and professionalism of the judiciary. In addition to the previous three-tier system of judiciary - a Court of Cassation, Civil and Criminal Courts of Appeal and courts of general jurisdiction-specialized criminal and civil courts were established together with a distinct Administrative Court. The 2008 judicial code assigned new roles to the Court of Cassation, including the provision of uniform application of law, its correct interpretation, and support in the development of legislation.
Following the public statement by the President of the Republic of Armenia on the work of the Chairman of the Court of Cassation, the latter resigned the next day. With the appointment of a new chairman, the newly launched judicial system began to crumble and the previous judicial reform policy and newly created specialized courts were abandoned. The judiciary reverted to its original model: a three-tier system: courts of general jurisdiction, courts of appeal and the Court of Cassation.

The Constitutional reform was aimed at creating not only an independent judiciary, but also a Prosecutor’s Office independent from all the branches of the power. It also implied a structural change of the prosecution system, which was reflected in the new Law on the Prosecution of the Republic of Armenia, adopted on February 22, 2007.

The Law enshrined the main principles of the organization and functioning of the Prosecutor’s Office, the new procedure for the appointment of the Prosecutor General of Armenia (upon nomination by the President of the Republic, the Prosecutor General is now appointed by the National Assembly for a term of 6 years; in cases prescribed by law, the National Assembly may, upon recommendation by the President of the Republic, remove the Prosecutor General by a simple majority vote of the members of the National Assembly), the prosecution system, structure, the terms and procedure of the subordination, appointment, and dismissal of prosecutors, as well as guarantees of immunity and material and social safeguards for the prosecutor. Undoubtedly, the main achievement of the Law was the removal of the criminal case investigation function from the Prosecutor’s Office, as a result of which the Prosecutor’s Office is now expected to focus mainly on supervising the lawfulness of the pre-trial investigation of criminal cases.

On the other hand, the legislative changes were proved to be ineffective in securing genuine independence of the judiciary and prosecution. The analysis of the legislation and practice demonstrates shortcoming in the following directions:

**INCONCLUSIVE AND INSUFFICIENT LEGISLATIVE GUARANTEES OF THE JUDICIAL INDEPENDENCE FROM THE PRESIDENT**

The current legislation provides the President with undue leverage over judiciary, which curbs its independence and undermines all legislative improvement to ensure independence. Particularly, while the Official Lists for appointment and promotion of judges are compiled in by the Council of Justice, the President has discretion to choose “candidates acceptable to him” to be appointed judges (Article 117 of the Judicial Code), to promote judges (Articles 137(9) and 138(8) of the Judicial Code). Moreover, if not selected by the President to be appointed or promoted, the judge is deemed rejected and drops out from the process. The procedure is effectively the same for the appointment of candidates nominated for the vacant position of judges of the universal jurisdiction court. If the candidate agrees, the Chairman of the Cassation Court proposes the candidacy to the Council of
Justice. Through an open vote, the latter issues a positive opinion on the proposed candidacy, if the procedures stipulated by the Code have not been violated. If the Council of Justice issues its positive opinion, the candidacy is presented to the President of the Republic. If the President does not appoint the judge within two weeks of receiving the proposal, the candidacy is deemed rejected, the person’s name is removed from the List of Judge Candidates, and the nomination for the vacant position starts anew (Paragraphs 9 and 10 of Article 123 of the Judicial Code).

These provisions vest the President with wide discretionary power and leave loopholes for abuses and arbitrary use of powers. In practice, the above-mentioned leverages that are planted in the legislation are often used to pressure judiciary. Most explicitly, disciplinary measures are used to “punish” judges who attempt to go against the executive’s control. Direct pressure on the judges by the executive is a clear message to the rest that the executive will not tolerate disobedience.¹ This is easily done since the legislative regulation does allow for that: it is only with the presidential approval that the Council of Justice can go through with such disciplinary measure as removing a judge (Article 157 (1) of the RA Judicial Code). Moreover, if in the course of two weeks the President does not give its approval, the motion of the Council of Judges is considered to be rejected and a different, much milder, punishment (25% salary cut for a year and a reprimand) goes into force (Article 166 of the RA Judicial Code).

Examples of executive control and pressure are numerous; most recent ones are the following. While the Chairman of the Court of Cassation resigned per his own will by submitting resignation letter, this happened on the next day of the President’s highly critical speech with explicit hints “to go.” Another judge who ruled against the tax authority (a rare—if not unique-case) was removed from the office. And yet another proof of the fact is absence of a single ruling in favor of plaintiffs from the Northern Avenue cases, even though the Constitutional Court ruled that the government’s expropriation of property on the Avenue to be unconstitutional.

**Dependence on the Court of Cassation**

Practice indicates that in reality the judges of first instance courts and appeal courts are not independent from the Court of Cassation. According to Article 153 of the Judicial Code, serious violation of material and procedural rule is a ground of disciplinary responsibility. In practice if the case is not agreed beforehand with the Court of Cassation, in reversing the court decision, the Court of Cassation artificially qualifies the violation “serious” irrespective of the nature and seriousness of the violation, which leads to disciplinary proceedings. In contrast, if the outcome of the case is agreed with the Court of Cassation even the most serious violation and arbitrary ruling of the court will not entail any negative consequences for the judge.

¹ 2008 Human Rights Report: Armenia. US Department of State
INSUFFICIENT GUARANTEES FOR SOCIAL INDEPENDENCE OF JUDICIARY

The judiciary is financed from the state budget. Each year the National Assembly approves the annual budget for the courts. The draft of state budget is prepared and sent for the National Assembly’s approval by the government, with its approval and objections. Therefore, in financial and social security matters the judiciary is also dependent on the Executive.

RECOMMENDATIONS

- Ensure genuine safeguards for the independence of judges, by restricting the President’s discretionary powers in endorsing the list of judges, by removing the test of “acceptability of the candidacy of the judge for the President” from the text of the Law, as well as terminating the duties of judges.
- Exclude any pressure from the executive on judiciary.
- Ensure independency of the judges within the judicial system.
- Reform the service for the compulsory enforcement of judicial acts to ensure effective and timely enforcement of court decisions, especially in administrative matters.
- Improve the free legal aid system by adopting a special law on free legal aid.

2. Azerbaijan

Overview of the Reforms of the judicial system of Azerbaijan

The fact that the judicial system of Azerbaijan is in the terrible situation now is confessed at very high official levels. Courts are absolutely dependent of the executive power. The judges’ corps established in 2001 is made of people that fit the image of judge neither in terms of professional level nor the personal features. It is not accidental, that the adoption of legislation compatible with the requirements of the Council of Europe and reestablishment of the judge’s corps on its basis was exactly the condition for Azerbaijan at a time of accession to the Council of Europe.

Azerbaijan had adopted the legislative acts defining the procedures on formation of the judges’ corps very much close to the deadline. These are covered in the Act on Courts and Judges and Act of Legal-Judicial Council. However the common view of the legal community with regards to those acts are as follows: these acts do not provide for establishment of independent judicial power and professional corps of judges, there is a great space within for the executive power to keep the judicial system under the control and put a pressure on it.

By the way, it is very unfortunate to mention that the discussion and adoption of these very acts, much important for establishment of judges’ corps and from the point of view of legal-judicial system as a whole, were closed and almost with no participation of the legal community. Another regretful fact is that the Council of Europe has had a manifested close collaboration with the Government of
Azerbaijan, which is, being “devoted” to such an inglorious practices as closed drafting, discussion and adoption of law that are of particular public significance, very much in favor of employing methods of excepting the participation of community in the discussions about important state issues. The fact of this practice becoming more of a tradition now is of very much of a concern and causes the damage to the name of the international organizations. The representatives of the independent legal organizations were not invited to the arrangements, including round-table discussions conducted in Baku, on discussing these draft laws organized by the Council of Europe together with the Ministry of Justice.

A number of provisions of legislation on establishment of the corps of judges contradict the provisions of the legislation of the Republic of Azerbaijan and international agreements it is party to, as well as principles defined the Council of Europe. The new law even strengthens the anti-constitutional control of executive power over the courts. The composition of the Legal-Judicial Council of 15 members is mostly set by the executive power and the vast majority of the council is formed by the relevant bodies of the power. This in itself even contradicts the provisions of the Article 1 of the Law itself about LJC being the self-governance body of the judicial power. The Law, instead of excluding the dependence of judicial power on the executive power makes this dependence even stronger and, moreover, makes judges dependent on the chairman of the court. The regulations on evaluation of the performance of judges also lead to dependence on the executive power and maintaining the court within the sphere of influence.

The provisions on nomination of candidates to the positions of judges, submission of candidature and punishment of judges are not clear and advanced enough and there is quite a number of objective criteria. All of above jeopardize the independence of judges through leading to subjectivism, self-willed actions and other undesirable cases.

Although legislation envisages the Legal-Judicial Council (LJC) as “a body for implementation of the self-governance functions of the judicial power” dealing with ensuring the organization of the legal system in the Republic of Azerbaijan, organization of selection of judges to the vacant positions, evaluation of performance of judges, promotion of judges to higher positions and calling them in to a disciplinary account, as well as resolve other issues related to courts and judges within the scope of own authorities, today all we “have in our hands” is LJC looking like a structural unit of the Ministry of Justice.

The fact that the majority of members of Legal-Judicial Council are appointed by the executive power, the Minister of Justice is at the same a chairman of the LJC, the actual status of distribution of power within the country, Parliament not being independent and other reasons bring a lot of doubts that the establishment of corps of judges will take place in objective, fair and unbiased way. The regulations on composition and operation of the LJC contradict the provisions of the European Charter on the Status of Judges of the Council of Europe adopted in July 8-10, 1998. It states that the body dealing with selection of candidates to the position of judge, appointment, promotion to the higher position and cancellation of authority of the judge’s to implement own functions must be independent.
If the information of establishment of LJC was closed for public, the information on its operation is almost classified as state secret. For example, very few people know about, with the exception of few members, who are the members of the LJC, when and how were they appointed. For example, how did the Ministry of Justice, Supreme Court, Collegium of Advocates, association of judges, etc nominated and appointed their candidates to the Council? Were they selected during the general meeting of these organizations or the head of those organizations resolved this matter through a order of resolution? If there was a collegium or meeting when that happened, how many participants were at the meeting? The fact that everything related to this is kept secret makes one believe that not everything is in order in this field.

The association of judges is also mentioned in the Law on Courts and Judges as self-governance body of judges. The international practice employs the regulation of issues of association of judges, its authorities and operation guidelines through legislation. This is attributed to the significance of the functions that are implemented by these bodies. The approach of the legislation of the Republic of Azerbaijan is very much shallow: it limited itself to just mentioning the name of the association of judges. By the way, these entities play a significant role in other countries and they are entrusted with some functions that are currently within the authorities of executive power bodies of our country. Six members of the LJC are nominated by the association of judges. The information on the existence of association of judges for courts in Baku and its districts, as well as on association of judges of Economic Court, leaks from time to time through some speeches. However the understanding about the association of judges is very much limited both among judges and public. In the best case they are established by the Ministry of Justice and implement the instructions of the ministry.

CSOs attempted for a number of times to get information on when and where the association of judges nominated own candidates to LJC, how many judges had participated, what is the procedure on nomination to LJC but all attempts were wasted.

It is very difficult to make people believe that in the conditions of legislation with gaps and closeness the process of establishment of the judges’ corps will be transparent and objective. These conditions open great opportunities for discretionary behavior. It is enough to look at the Regulations on selections of judges to vacant positions adopted by the Ministry of Justice on Mart 11, 2005. This document is more of “authorizing the candidates to be a judge”.

The Regulations clarify more the procedures on the selections of judges. But these clarifications, in some cases, are contrary to the legislation and create artificial barriers for the establishment independent corps of judges, allows for subjective selection based on political speculations.

Although legislation requires written and verbal examination and interview, Regulations extend this process till 8 stages:

1. first phase of written examination

2. second phase of written examination
3. verbal examination
4. written and verbal examination upon graduation
5. final interview in JSC
6. conversation with judges in LJC
7. review of submission of LJC in the Presidents Office
8. selection of judges of higher instance courts in the Parliament.

The Article 2.2 of the Regulations envisages the evaluation of world-outlook of a candidate but doesn’t set any rules of requirements for that. The Article 3.46 of the Regulation states that during verbal examination the legal questions, as well as questions to expose the ability of the candidate to make logical decisions, general world outlook and the level of knowledge should be asked. The Article 3.0.9 of the “Charter on the Committee for Selection of Judges” listing the authorities f the committee says that the Committee defines the professional appropriateness of candidates for judges. It is not clear how, based on what criteria, based on what rules and methods this can be done by using 10 abstract questions. Moreover, it is not clear why the candidates who passed training courses and passed written and verbal examinations for a number of times should be asked legal questions.

Finally, the implementation of the procedures for selections of judges set by the legislation starts resembling to fight without rules. These rules more look like “giving the candidates the access to the position of judge”.

Although applications of the candidates started to be collected since March 1, 2005, the Regulations were adopted only on March 11 and published two months later, on May 6, 2005 and this was when the candidates gained the chance to get familiarized with them. Another absurd point is that applications were returned back to applicants 20 days or a month later due to different reasons. For example, the applications of professionals with 20-30 years of experience of work in law-enforcement bodies and high ranks got their applications back and it was explained to them that they need to submit certificates of recognition of their education they got in Russia. This is even against the Article 3.7 of the Regulations. According to the Article only incomplete applications and those that doesn’t comply with the requirements of Regulations should be rejected.

It is believed that confidentiality over the operation of the Legal-Judicial Council, as well as over the decisions it made, activities related to the selection of judges shall be removed and these processes shall be transparent and more open for public. Violation of the principle of transparency shall be treated as a fact of corruption.

The rule of administrative system that denies any in kind of independence, including the independence of judicial power, accumulated in the hands of power for long period time made the courts to become a body that serves the executive power and quite frequently protects its illegal interests or otherwise made the courts just a brunch of the executive power.
Today, the independence of courts doesn’t suit the other two branches of the power. These words specifically refer to the executive power. This power always trends to be above the laws and that is why it considers the independent courts that can control it as an undesirable barrier.

The pressure of the executive power on to the courts like it was during old regime is the reality of our days. Moreover, these facts are so apparent and so disgraceful that old style of pressure look much better in comparison.

All the hopes for quality changes in administration of justice expected based on legislative changes in the structure of the judicial system during recent years were wasted. It worth mentioning at least the fact that the court of appeal which is supposed to look at complaints on the decisions of the first instance courts operates like conveyor: 5-10 cases are handled on half, maximum in 1 hour. The time spent by judges in the discussion room is just 4-5 minutes and review of the whole case takes 5-10 minutes only. It is natural that nobody can speak about any review of the case within this period of time. All the processes that take place in the formation called Court of Cessation has nothing to do with administration of justice.

The fact that the number of judges is limited and there is a huge work load per judge (in average 50-60 cases per judge) leads to the point when most of the judges get familiar with the case at the moment of hearing.

To sum up all the above mentioned, it could be said that the new Regulations on selection of judges doesn’t allow for the formation of independent, professional, unbiased corps of judges. The reasons for that can be formulated as follows:

- The full control over the nomination of candidates to the selection by the executive power and prevalence of political speculation during selection of candidates;
- Absence of the political will to establish independent corps of judges and to ensure the operation of independent judicial system;
- The facts of corruption while being appointed to the position of judge;
- Absence of independent self-governance bodies for judges;
- Inclusion in to the current legislation the provisions that contradict the requirements of the Constitution and other Laws and limitation of rights envisaged by laws;
- Abuse of power by the executive power and its non-compliance with legislation;
- Appointment of the Chairman of the Supreme Court, Court of Appeal and the Court on Severe Crimes by the President with no consultation with anybody and the way that goes beyond any procedures;
Absolute dependence of appointment, dismissal, motivation and punishment and social and material provision of judges on the executive power and use of this dependence as a tool for pressure on to the courts;

The authoritarian system of administration that exists in the country prevents the independence of judges; and oth.

**Relationship with the Ministry of Justice**

There is one thing that comes out of the nature of the judicial power: it implements the preventive function in relation to other two branches of the power. And this, quite frequently, doesn’t fall within the scope of interests of the power bodies. That is why, they attempt to override it. To eliminate this fact the legal grounds for the independence of judges shall be established. I would like to dedicate some time for some of those.

Ensuring the actual independence of judges requires revising the relationships between the justice bodies and the courts. These relations shall be built on absolutely different principles. If we have the objective of building the rule of law state the abnormal case when the Ministry of Justice being the body of the executive power manages courts shall be abolished.

One may object that this kind of presentation of the issue doesn’t reflect the actual situation: none of the laws set for these authorities of the Ministry of Justice. I absolutely agree, but there are enough opportunities in the legislation that allow for this control over the activities of courts by the Ministry of Justice. Thus, based on the Law on Courts and Judges, the Ministry of Justice applies to the Legal-Judicial Council with the request to call the judges, except for those of the Supreme Court, in to a disciplinary account or even cancel their authorities in case if there are signs of grounds for calling then in to a disciplinary account and other provisions set forth in the legislation (Article 112), as well as "while being adhere to the independence of judges as set forth in the legislation of the Republic of Azerbaijan implements the activities to ensure upgrading the professional training of judges except for those of the Supreme Court, Economic Court and Court of Appeal, deals with ensuring the necessary conditions for the operation of courts, provision of courts with relevant documentation of legislation and other logistical issues". Legislation also refers issues like keeping statistic records, execution of court’s decisions, implementation of secretarial work for courts, ensuring the labor and social rights of judges, ensuring the administrative and labor discipline in courts to the authorities of the Ministry of Justice. The Ministry of Justice has rights to implement the supervision over all of these fields with regards to all the courts except for the Supreme Court, Economic Court and the Court of Appeal. Provision of the judges with apartments is also within the scope of authorities of the Ministry of Justice.

If one will take into account the point that, the decisive voice in establishment of the corps of judges belongs to the Ministry of Justice or namely to the Minister of Justice, it becomes clear that this makes judges to be careful about the relations with this entity.
Opponents mostly object to this statement that in Germany, Italy and France the justice bodies are also in charge of nomination of candidates, selection of judges, review of records of courts, etc. but the justice bodies of those countries implement own functions with absolutely no intervention in to the functions of courts. No way any changes with regards to some terminology (even though significant) in the norms guiding the operation of the justice bodies brought any quality changes on to the relations between the bodies of justice and the courts. Today, when the number of cases of intervention of Ministry of Justice in to the process of administration of justice through to the pressure on to the judges that are peculiar to these relations, the status of implementation of activities entrusted by the legislation to the Ministry of Justice, namely ensuring the material and technical provision of courts, implementation of activities to further ensure the independence of judges, etc remains to be poor. The poor level of material and technical provision of courts, the status of building where the courts are located, lack of general equipment, judges being powerless, etc. is just a short list of achievements made during the patronage of the Ministry of Justice over the courts.

One may object to this saying that a number of court buildings are being currently renovated; the rooms of the judges are being decorated with nice and fancy furniture and office equipment. But a simple interview will reveal that the Ministry of Justice has nothing to do with this. These all are done on account of “internal resources” of judges. I guess, there is not need how these expenditures will be “compensated” later on.

According to the Law of the Republic of Azerbaijan on Courts and Judges, “the courts of the Republic of Azerbaijan shall draft reports in the way set forth by the legislation of the Republic of Azerbaijan not less than once a year. The chairman of the relevant court is responsible for the accuracy of date indicated in reports”. Legislation makes the Ministry of Justice responsible for defining the format of the statistical reports of the courts and summarizing the statistic data about courts. But very few people are informed about any activities implemented by the Ministry of Justice in this field.

On of the reasons for such a wide spread intervention of the justice bodies in the operation of courts is the very much general definition of its authorities. For example, the justice bodies still believe that they are the ones to supervise the timely consideration of cases in courts. However, given the point the time is procedural understanding it is impossible to supervise the reasons of non-compliance of judges with time requirements without reviewing the grounds for actions (delays in processing applications, delays in hearing the cases, etc.) made by judges and law doesn’t allow for this.

It should be noted that in vast majority of cases the delays are caused by the objective reasons that are not dependent on judges – delays in expertise, delays in implementation of decisions on compulsory bringing the parties in front of the court, elimination of deficiencies made during the preliminary investigation and collection of additional evidences and others that define the imperfectness of the arrangements for judges to fulfill the obligations they are legally bound to. The justice bodies, frequently criticizing the courts and judges for non-compliance with time limits in all the meeting and collegiums quite frequently forget that they are exactly responsible for resolving the most of the above-mentioned matters.
Only one body shall evaluate the performance of judges in the field of administration of justice. These are the professional unions of judges. As it happens in other countries, these are exactly the institution that shall transform in our country in to a main body that ensures the independence of judges and transparency in the corps of judges. That is true, that there is no such a body yet here, which would be able to implement this function. However, only few people know about the existence of such organizations at all, and public, including judges has very little information about its roles and responsibilities. The reason for that is the point that they were not organized based on the understanding of the necessity to establish such bodies. So it hard to expect that something established based on the order from above will be in a position to set the policies in this field and be able to influence it. If judges themselves will not feel the necessity to have such organizations and will not establish those themselves, all of that will exist just on a paper. So far, nobody feel that necessity and there may be two reasons for that: one of those is that may be judges are not interested in any changes in this field, the second can be formulated like judges don’t want to create additional problems to themselves knowing that the end of these kinds of initiative is not well. So we again end up with two things: problems with the quality of the corps of judges and the independence of judges.

**Relations with the Constitutional Court**

The functions of the Constitutional Court comprised of checking the compliance of laws and other legislation with the Constitution, as well as supervision of the compliance of legislation to the hierarchy of normative legislation. The supervision functions of the Constitutional Court is implemented upon the requests of the Supreme Court, Prosecutor General, Cabinet of Ministers, Parliament of the NAR, President of the Republic and the Parliament of the country.

Based on the referendum dated August 24, 2002 the Section V of the Article 130 of the Constitution was amended allowing the population to apply to the Constitutional Court directly. According to this amendment, any person can complaint to the Constitutional Court of the Republic of Azerbaijan for the rehabilitation of human rights and liberties violated by the legislation or the normative acts of the executive power, as well as the decisions of municipalities and courts and for the rehabilitation of human rights and liberties. However, there is a great need in improvement of the legislation in this field as well. The issues of the place of the Constitutional Court in the judicial system, scope of its authorities to review the decisions of courts, procedures of applying to the CC without applying to the courts of other instances, executions of the decisions of the CC, etc. still have to be resolved in the legislation.

The Law on the Constitutional Court was enforced on January 8, 2004. The Law reflected on the implementation of the complaint institution previously stated in the Constitution (Article 130) and in the Law on Protection of Human Rights and Liberties. The complaints can instituted with regards to legislative acts and normative acts of the executive power, as well as the decisions of municipalities and courts that violated one’s human rights and liberties, to resolve issues stated in the paragraphs 1-7 of the Section III of the Constitution and for the purpose of rehabilitation of one’s human rights and liberties.
In other words, the decisions of courts, acts of municipalities and normative acts can be the subject of a complaint. In some countries, for example Russia, only laws can be the subject of a complaint. From this perspective, the broader scope of the subject of a complaint set forth in our legislation is a positive point.

According to the Law on the Constitutional Court, the complaint, inquiry and the application can be a reason.

The authorities of the President, Parliament, Cabinet of Ministers, the Supreme Court, Prosecutor’s Office, the Supreme Soviet of the Nakhchivan Autonomous Republic to make an inquiry with regards the issues mentioned in the Section III and IV of the Article 130 on the Constitution and the Commissioner on Human Rights (Ombudsman) on the issues mentioned in the Section VII of the Article 130 of the Constitution are envisaged in the Article 32 of the Law.

The Article 33 of the Law sets forth the provision for Parliament and the courts of the country to make inquiries to the Constitutional Court with regards to the issues set forth in the Section III of the Article 104 and Sections VI of the Article 130 respectively.

The Article 34 states that any person can complaint to the Constitutional Court of the Republic of Azerbaijan for the rehabilitation of human rights and liberties violated by the legislation or the normative acts of the executive power, as well as the decisions of municipalities and courts and for the rehabilitation of human rights and liberties.

If the situation with inquiries and applications is somewhat clear in the legislation, the part with complaints is so controversial and broad that this kind of provisions set the situation with executions of the right to complaint to a zero level. For example, it is not clear, why NGO to be abolished based on the decision of court after 3 warnings from the Ministry of Justice or citizen of a public union that complaints to the court on the decision of the Central Election Commission preventing NGO from participation in elections as an observer should pass through all the stages of the judicial system before applying to the Constitutional Court on compliance of this norms with the Constitution? Anyway, all the courts will give the reference to the act in question. By the way, Act allows for only once instance: “In case of impossibility to prevent through other courts the severe or unrecoverable damage to the applicant due to the violation of applicant’s rights and liberties the complaint can be instituted with the Constitutional Court directly”.

This is a so much broad definition that can easily can exactly the same kind of broad discussion. Who is in charge of defining the degree of a threat? For example, in the example we provided above, can NGO believe that its prevention from participation in the elections as an observer is a severe and unrecoverable damage to the NGO itself, as well as the society? I believe that there are enough people in the courts, including the Constitutional Court, who think different: if it is up to them they will not just prevent NGO from participation in elections, but abolish all of the completely at all.
Azerbaijan is such a country that even a tiny uncertainty, controversy in the text of the law will be used against the citizen and render vast opportunity to the official to behave arbitrarily and abuse the power. Constitutional Court Act is no exception to this.

It will not be correct to link the problems of the shortcoming of the Constitutional Court in the consideration of complaints to the legislation. There are three aspects that are of special concern.

Firstly, although Section 34.3 of the Constitutional Court Act proscribes the Constitutional Court from looking into the substance of the cases tried by the Supreme Court in its capacity of the court de cassation (court of final appeal), the former continues its illegal practice to do so thereby surpassing the limits.

So far the Constitutional Court have scrutinised and quashed the judgments of the Supreme Court upon considering more than twenty complaints by citizens. This judgements of the Constitutional Court fall outside of its competence. One may object that the Supreme Court has issued illegal judgements on large scale and that it is the Constitutional Court that has overturned these judgments. One may pose a question, ‘what is the detriment?’

Let me start by saying that the Constitutional Court is not entitled to consider this sort of complaints and issue this kind of judgments. That the Constitutional Court quashes the court judgments on the ground that the provisions of the Civil Procedure Code have been breached makes it the superior courts. Constitutional Court has not been granted these powers. Constitutional Court is indeed entitled to quash the judgments of the Supreme Court, but not on the ground that the provisions of the Criminal Procedure Code have been violated, but when the provision cited by the court was in contradiction with the Constitution.

Secondly, by interpreting Section 34 of the Constitutional Court Act as making itself the Court of the highest level in respect of the courts of the law, the Constitutional Court made a wide interpretation that has granted it with excessive powers. Although filing complaints against the court decisions and restoration of the breached human rights and duties are confines by the Acts to the objectives of resolving the issues arising from subparagraph 4 paragraph III Section 130 of the Constitution, as a matter of fact, the Constitutional Court has entitled itself to consider the complaints against any court decision.

Thirdly, one may deduce the Constitutional Court is more interested in quashing the illegal decisions of the Supreme Court, rather than engage in its proper tasks.

An excessive interpretation of Section 36 of the Act regarding the right of preliminary examination of the complaints at the office of the Court has led to the situation when the court clerks have misappropriated the judicial discretion by making the decisions on illegal returning the complaints to the complainants. In other words, there is a need to put the legislation and practice of the constitutional court in order.
Constitutional Court stands on the top of the pyramid of the Judiciary and it shall be capable to stand up not only to the Executive, but, if necessary, to the legislative branch of power. This, in its turn, stipulates the existence of the safeguards provided by the Constitution and statutes on one side, and depends on the existence of the professional corps of judges in the Constitutional Court, on the other side.

How well is the Constitutional Court equipped to do so in Azerbaijan?

Suffice it to cast a glance at the Constitutional Court Act:
Subject to the Constitution and this Act,

1. it is the supreme constitutional justice body
2. its is an independent public institution that is in no way dependent on any other institution, neither its decision may be quashed, amended nor interpreted in an official manner.

Constitutional Court is entitled to consider the issues of compatibility of the legislation with the Constitution, disbandment of political parties and civil unions, resolution of power sharing disputes between the legislative, executive and judicial powers, as well as impeachment of the president.

Nevertheless, the Constitutional Court lacks the power to initiate the proceedings, depends on the limited number of petitioners entitled to initiate these proceeding, unwillingness of those petitioners to engage themselves in ‘problematic’ issues, and the lack of the right of citizens and legal persons to apply directly to the Court, which makes it eventually restricted in its capabilities.

There are hundreds, perhaps, thousands pieces of legislation in Azerbaijan that contradict to the Constitution. This constitute one of the reasons why the fundamental human rights and freedoms, such as the right to association, freedoms of speech, liberty of conscience, freedom of assembly, right to protection from torture, guaranteed by the Constitution and international instruments remain at the declarative level.

Sometimes the Constitutional Court just provides its recommendations to the Parliament in lieu of quashing such decisions. For example, the constitutional provision on the right to appeal against the arrest or other coercive measure decision remained non-effective from 1995 till April 1999 when the Constitutional Court finally considered this issue. While considering this issue of gross violation of human rights and breach of the Constitution, the Constitutional Court stopped short of quashing abrogating of legislation that contradicted the Constitution and international law by just recommending the Parliament to bring the legislation in line with the Constitution. As a result the rights of the citizens had been violated for few years.

Subject to Section 130 of the Constitution the number of judges in the Constitutional Court shall be nine. However, the Court operated for long time in the panel of seven judges. Not long ago the eighth judge was appointed. Yet the position of the ninth judge still remains vacant for five years. It is quite a controversial topic, given the growing number of the applications.
The State authority may be restricted only by law within the boundaries of a country. The primary tools of restriction shall remain with the Constitutional Court. An appropriate political and administrative situation shall exist in the country so that the Constitutional Court to become the supreme constitutional justice body, the agents and area of the constitutional proceedings shall be enlarged and it shall be composed of persons that deserve to belong to the supreme constitutional justice body. Constitutional Court shall turn into the insurmountable barrier for the perpetrators.

Section 34.1 of the Constitutional Court Act provides that everyone shall be entitled to appeal against the legislation that breeches ‘his/her’ rights and freedoms. The law does not provide the right to appeal against the violation of other’s right. The only exception is the Human Rights Commissioner (ombudsman). However, granting such power to other persons, such as non-governmental organizations, of which principal objectives are to protect human rights and freedoms, will serve to the strengthening of this instrument.

Restoration of the rights and freedoms by means of the Constitutional Court is a complex process involving various public institutions. Thus, recognition of the incompatibility of the legislation breaching the rights and freedoms of the complainant subject to the complaint of the latter is only one part of the process. Passing of new legislation in place of the abrogated one, or reconsideration of the substance of the issue is within the competence of other institutions. Unfortunately, there still remain problems with the implementation of the judgements of the Constitutional Court. According to the law, the judgments of the Constitutional Court are final in their effect and shall be implemented unconditionally. In order to implement the decision of the Constitutional Court, the legislative and executive bodies shall pass the appropriate legislation, provide necessary financial, technical, logistic and organizational support, and the courts shall alter their practice of application of the Constitution and the acts. Unfortunately, there are no sufficient grounds to speak about success in this field.

**Recommendations**

The organizations of the judicial system and the status of its operation requires the implementation of reforms in the following directions:

- Stimulation of the establishment of the jury courts in civil cases may improve judicial system, augment the quality of justice, reduce corruption instances and relieve the burden of the workload of courts.

- Logistic and technical support shall be taken from the Ministry of Justice and vested in the special service under the Supreme Court and the financial means allocated from the state budget shall be spent through this service.

- The discretion of the court presidents to allocate cases among judges leads to the dependence of judges on the president, on one hand, promotes illegal actions and arbitrariness. Use of the principles excluding subjective factors in the allocation of cases (such as allocation by mean of random computer selection of a judge) seems necessary in terms of prevention.
• Court premises shall be constructed in a design that corresponds to the objectives of administration of justice. The pattern of the building shall promote the principle of adversarial process. This is one of the factors contributing to the status of the courts.

• Specialization among judges, in the field of civil and criminal law, family, taxes, labor, etc, will contribute to the quality of administration of justice.

• Entitlement of the citizens to apply to the Judicial-Legal Council to initiate administrative liability of the judges will increase the efficiency of this mechanism.

• Normal conditions shall be established in the country in order to make the Constitutional Court a supreme constitutional justice body, the agents and subject matter of the constitutional proceedings shall be enlarged and it shall be composed of people deserving to be members of the supreme constitutional justice body. Constitutional Court shall turn into insurmountable barrier for perpetrators of any sort and at any level.

It is necessary to improve legislations related to the relations between the Constitutional Court and general jurisdiction courts; delineate their competence; determine the boundaries of trying cases at the cassation level on one hand and in the Constitutional Court, on the other hand; procedures for re-trying the cases quashed where the judgments were overturned by the Constitutional Court and mode of implementation of court decisions; execution of court decisions in general, and retribution of executed court decisions.

3. Belarus

1. Assignment of judges. Who is responsible. What criteria are applied. Conformity with international standards.

1.1. In the Republic of Belarus 6 out of 12 judges of the Constitutional Court (hereinafter referred to as the CC) and all judges of courts of general jurisdiction and of economic courts are appointed by the President. The President with the approval of the Council of the Republic (art.84 of the Constitution) appoints the judges of the Supreme Court (hereinafter referred to as the SC) and of the Supreme Economic Court (hereinafter referred to as the SEC), and the Chairperson of the CC. In practice, this approval is expressed post factum, i.e. relevant decrees of the President on the assignment or dismissal of the above-listed judges include an order of further endorsement by the Council of the Republic. Cases of rejection of any candidature by the Council of the Republic are not known. All other judges of courts of general jurisdiction and of economic courts are appointed by the President alone. Judges of courts of general jurisdiction and of economic courts are assigned for the term of five years and can be reappointed for one more term or for an unlimited period. Judges execute their duties until they reach the age limit for the government service – 65 years. Judges of the CC are appointed (elected) for
a term of eleven years and can be reappointed (reelected) for another term, the age limit for the position is 70 years.

1.2. 6 judges of the CC are elected by the Council of the Republic (art.98 of the Constitution). Candidatures for the positions of judges are suggested by the Chairperson of the CC. The elections of judges of the CC are regulated by the legislation in a rather detailed way. But the consideration of candidatures can be held “behind closed doors”. The law allows the President, his representatives, members of the Government, Chairpersons of the SC, SEC, CC and the Prosecutor General to attend private sessions of the Council of the Republic.

1.3. The criteria used for the appointment of a judge are introduced in the Constitution, the Judicial Code, the Law on the government service and the Law on the military duty and military service (in relation to judges of military courts). The criteria provided by this legislation are not of a discriminatory character. They include experience, qualification, moral qualities, and results of a qualification examination. At the same time only a commissioned officer on military service can be appointed judge of a military court.

1.4. Other judges of courts of general jurisdiction (district (municipal), oblast and Minsk municipal courts) and of economic (oblast and Minsk municipal) courts are assigned by the President with a joint proposal of the Minister of Justice and of the Chairperson of the SC or the Chairperson of the SEC respectively (art. 99 of the Judicial Code). The assignment of these judges is regulated by the Judicial Code and by the Decrees of the Ministry of Justice. The selection of candidates and the appointment of judges have several phases:

- selection of aspirants for a position of a judge and presentation of their candidatures to an examination board (fulfilled by the SC, SEC and the Ministry of Justice);

- a qualification examination for the position of a judge with the aim to evaluate the level of professional knowledge and skills of aspirants for a position of a judge, their practical, moral and psychological qualities. A qualification examination is held by examination boards created under the SC and SEC with the participation of representatives of the Ministry of Justice. Basing on the performance at a qualification examination a decision to approve or to reject the registration of an aspirant as a candidate for a position of a judge is made;

- if there is a vacancy of a judge, a qualification panel of judges recommends a registered candidature for the appointment to this position;

- a candidature is endorsed by local authorities, Secretariat of the Council of Security, Ministry of Justice, Panel of the SC;

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2 Decree of the Ministry of Justice of 8 April 2008 N 22 includes the most detailed regulation of appointment and dismissal of judges of courts of general jurisdiction.
- a draft decree with a necessary package of documents is sent to the Administration of the President.

The assignment of judges of economic courts is also regulated by the subordinate Decree of the Ministry of Justice and does not have any significant difference from the assignment of a judge of a court of general jurisdiction.

1.5. Thus, after a positive answer of a qualification panel of judges on the correspondence of a person to all the requirements to a candidate for a position of a judge, there is a possibility of a rejection of the appointment from the administration of local executive committees, State Secretary of the Council of Security of the Republic of Belarus, Minister of Justice of the Republic of Belarus and Chairperson of the Supreme Court of the Republic of Belarus. The necessity of going through all these instances by a candidate to a position of a judge is envisaged not by a legislative act, but by the subordinate Decree of the Ministry of Justice which does not include clear criteria that are followed by the above-listed officials while considering a candidate to a position of a judge.

1.6. At the same time in accordance with p.10 of the Basic principles on the Independence of the Judiciary any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of political or other opinion. Therefore, it is not possible to affirm that the appointment of judges in the Republic of Belarus is impartial and based on objective criteria. The possibility to reelect judges constantly for a five-year term makes them dependent on the renovation of a fixed-date work contract and, in the end, makes the position of judges unstable. Also, candidates for a position of a judge during the process of assignment are obliged, in fact, to avoid conflicts with all officials who endorse the appointment (p. 1.4. of the report). In addition, the Judicial Code does not allow regulate the assignment questions by a subordinate act. It is directly indicated in the art.3 of the Code. This means that the dispositions of the Decree of the Ministry of Justice on the endorsement of the appointment to a position of a judge are not legally based. These conclusions conform to the conclusions of the UN Special Rapporteur who during his fact-finding mission in Belarus from 12th to 17th of June 2000 heard a lot of claims that “this process [appointment of judges] is deprived of transparency and is defined to a considerable extent by political considerations” (p.48).

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3 A body of the judicial community that is formed by judges at a Plenary session (supreme courts) or at conferences of judges (oblast and Minsk city courts). See art. 143, 169, 171, 173 of the Judicial Court.
4 Appointed and dismissed by the President of Belarus (art. 119 of the Constitution)
5 Appointed and dismissed by the President of Belarus (p. 27 art. 84 of the Constitution)
6 Appointed and dismissed by the President of Belarus (p.7 art. 84 of the Constitution)
7 Appointed and dismissed by the President of Belarus with the approval of the Council of the Republic of the National Assembly (p. 8 and 11, art. 84 of the Constitution)
8 They include the Constitution of Belarus, the Judicial Code and other laws, decrees of the President of the Republic.
9 Adopted by the 7th UN Congress on the prevention of crime and treatment of offenders, Milan, 26 August - 6 September 1985; and approved by the UN General Assembly resolution 40/32 of 29 November 1985
10 E/CN.4/2001/65/Add.1 p. 22
2. **Dismissal of judges (disciplinary proceedings). Who makes a decision. Grounds for a disciplinary examination. Conformity with international standards.**

2.1. The dismissal of a judge of a court of general jurisdiction and of an economic court is regulated in detail in the Constitution and the Judicial Code. According to p.11 art. 84 of the Constitution, the President dismisses judges and the Chairpersons of the SC, SEC and CC by a notification of the Council of the Republic. It is necessary to note that the President assigns only one half of judges of the CC, but he dismisses all judges of the mentioned court. In addition, art.84 of the Constitution introduces only the right of the president to appoint other judges, but does not say anything about his right to dismiss. Nevertheless, in accordance with art.124 of the Judicial Code the dismissal of all judges is done by the decision of the President.

2.2. All grounds for a forced dismissal are regulated by art.124 of the Judicial Code. The decision of a dismissal of a judge can be appealed in the SC.

2.3. Disciplinary proceedings are regulated by Chapter 11 of the Judicial Code. A judge can be made disciplinary liable: for the violation of the legal requirements during exercise of justice; for the violation of the Code of honor of a judge of the Republic of Belarus; for the violation of office regulations by judges, commitment of any other official misconduct (art.111 of the Code). The annulation or amendment of a court decision does not entail liability of a judge who participated in the pronouncement of the indicated court decision with the exception of those cases when an illegal decision was pronounced on purpose. There are following types of a disciplinary penalty: reprimand; reproof; notification about insufficient professional qualifications; demotion in a qualification rank of a judge for a period of up to six months; dismissal. When a penalty is imposed, the type of a violation and its consequences, the gravity of misconduct, the personality of a judge, and the degree of his guilt are taken into consideration.

The right to initiate disciplinary proceedings and preterm dismissals belongs to: the President (in relation to all judges); the Chairperson of the SC (in relation to all judges of courts of general jurisdiction); the Chairperson of the SEC (in relation to all judges of economic courts); the Minister of Justice (in relation to all judges of courts of general jurisdiction and of economic courts except chairpersons, vice-chairpersons and judges of the SC and SEC); chairpersons of inferior courts (in relation to judges of these courts); and heads of departments of justice in appropriate oblast executive committees (in relation to judges of district courts).

2.4. Disciplinary proceedings are executed in two ways: ordinary procedure and extraordinary procedure. As a rule, they are executed by a qualification penal of a concerned court. In relation to the Chairpersons of the SC, SEC and CC, as well as judges of the CC disciplinary proceedings are not executed. The President, given sufficient grounds introduced by the Judicial Code, can impose any disciplinary penalty on any judge without initiating disciplinary proceedings (art.122 of the Code). Thus, de jure the President is authorized to discharge judges even if it is “camouflaged” as disciplinary
proceedings. This extraordinary procedure of disciplinary proceedings is an accelerated one and is executed not by judges, but by the Administration of the President, that runs counter to the definition of the independence of justice as it is interpreted in the Basic principles on the Independence of the Judiciary.

2.5. Decisions resulted from considerations of cases on disciplinary liability of judges can be appealed judicially. The decision of the President made in accordance with art.122 of the Judicial Code, in our opinion, can be appealed judicially, though there is no direct indication about it in the legislation and there is no practice of such cases.

2.6. In our view, the ordinary procedure and the grounds for the dismissal of a judge, in general, correspond to p. 17-20 of the Basic principles on the Independence of the Judiciary, except the fact that a decision on dismissal is made by the President of the Republic of Belarus, and under the extraordinary procedure – without taking into consideration other opinions. These broad powers of the President invade, to our mind, the independence of judicial bodies as well. Also, the right of the President to impose a disciplinary penalty on judges without any public and legally defined procedure of examination does not correspond to p. 1, 7, 17, 19, 20 of the Basic principles.

3) Whether the bodies making decisions on the appointment, initiation of disciplinary proceedings and dismissal of judges are independent. Conformity with international standards.

3.1. The President disposes of the majority of judicial levers that allow control any sphere, including the judicial one, both directly and indirectly.

3.2. The Chairpersons of the SC and SEC and the Minister of Justice are appointed and dismissed by the President of the Republic. And in case of removal of chairpersons of supreme courts of the Republic of Belarus it is not necessary to get the endorsement of the Council of Republic, but to submit a notification to this body.

3.3. Thus, basing on the principle of the independence of the judiciary as it is interpreted by the Basic principles on the Independence of the Judiciary, it is possible to talk about a relative independence in qualification panels of judges formed by court corps. But all decisions are checked depending on the situation by the Ministry of Justice, the Council of Security, the Panel of the SC (Chairperson of the SC or SEC), the President; and the last word belongs to these above-mentioned state bodies, this fact gives the evidence of the dependent position of the judicial power in the human resources questions.

4) Whether the promotion criteria are well defined and fair. Conformity with international standards.

4.1. Norms of the promotion of judges can be deduced from systematic interpretation of the Judicial Code. The promotion of judges is defined as:
a) award of a next or special higher qualification rank that gives the possibility to be appointed to superior judicial bodies. The Judicial Code regulates in detail the questions of the award of qualification ranks, terms of a rank tenure, rank demolition and disqualification. All these decisions are made by the President;

b) appointment of judges for a new five-year term or for an unlimited period that represents, in general, a promotion for a judge;

c) appointment to the post of a chairperson, vice-chairperson of a district (city), oblast, Minsk city, Belarusian military court, an oblast or Minsk economic court is executed by the joint proposal of the Minister of Justice and the Chairpersons of the SC and the SEC.

d) appointment (election) of judges of the SC, SEC and CC.

e) appointment to the post of the Chairpersons of the SC, SEC and CC, to the post of judges of mentioned courts.

4.2. All the above-listed variants of promotion, except the last one, are accompanied by a regular or extraordinary attestation regulated by the Judicial Code. The attestation is executed by qualification panel of judges.

At the attestation they take into consideration also:

a) academic and honorary titles, state awards and awards of the Ministry of Justice.

b) number of examined cases, quality of examined cases, complexity of cases, work efficiency, how many cases of a judge are withdrawn from cassation, number of interlocutory judgments, letters to a judge, cases of making a judge liable for violations, preventive work of a judge (number of circuit sessions, lectures, appearances in mass media, articles, reviews, interlocutory judgments), workload.

4.3. Thus, the main promotion criteria include work experience (first of all as a judge), correspondence to formal requirements to candidates to a post of a judge and work quality at a previous poste of a judge. The anxiety concerns the fact that many criteria are introduced in subordinate regulatory acts – decrees of the Ministry of Justice that contradicts the Judicial Code. In general, the promotion process corresponds to p.13 of the Basic principles; it is executed in accordance with objective factors, in particular with abilities, moral qualities and experience. At the same time, the role of the Ministry of Justice and of the President in the promotion process is still significant, that diminishes the role of the judicial community represented by qualification panel of judges that gives its conclusion on the basis of the package of documents that will be further examined by the above-mentioned state bodies.
4. Georgia

General Overview of the Situation

Although reform of the judicial system is one of the top priorities of the ENP Action Plan, the judiciary still remains one of the most challenging issues for the country’s democratic development. Since 90’s Georgian judicial system underwent several waves of reforms. While reform started in 1997 was significant, due to the lack of the corresponding reforms in other sectors, it did not manage to achieve sustainable result. Though the reform initiated in 2005 was indeed successful in some of the directions, Georgian judiciary faced another serious and dramatic challenge: extremely low level of independence.

US Department of State Human Rights Report for Georgia, among the main human rights abuses reported during the year of 2010 lists “lack of due process [and] government pressure on the judiciary.” The courts’ impartiality is most seriously questioned when it comes to the adjudication of cases where it is believed that the authorities have some ‘political interest’. The rate of acquittals in criminal cases remains low below 0.04% and judges are thought to follow police instructions in high profile cases of administrative detention. In its Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motives, the Georgian Young Lawyers’ Association noted:

“Legal analysis [of 24 criminal and administrative cases] determined methodical errors in the execution of criminal justice in relation to individuals who can be considered as possible opponents of the authority due to political or public activities of these persons or their friends and families . . . Judicial authority fails to properly control arbitrary actions of the investigative authority. Furthermore, position of the prosecution is always upheld by the judicial authority, whose role in the implementation of justice is profoundly graded.”

The OSCE’s report on the May 30 municipal elections raised concerns about the handling of election grievances by the courts, noting that "most appeals were dismissed by the courts, even when during the hearings substantial evidence and testimonies on violations were presented."

The need for more independent judiciary was recognised by the high ranking officials, including the President of Georgia and the Head of the Supreme Court. To address the issue, the President, promised a ‘new wave of democratic reforms’ in September 2008. This proposed amendments to the Law on Rules of Communication with Judges of Common Courts, life-long appointment of judges of

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11 THE GEORGIAN YOUNG LAWYERS’ ASSOCIATION, Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive, Executive Summary, June 2011, Tbilisi
12 Information obtained from the website of the Supreme Court of Georgia, http://www.supremecourt.ge/files/upload-file/pdf/3-sixxli.pdf
common courts, inclusion opposition member in the High Council of Justice and introduction of jury trials.\textsuperscript{14}

After two years and a half almost all of the suggested promises have been fulfilled. However, it is felt that authorities failed or preferred to refrain from comprehensively addressing \textit{roots of the problem}. The amendments to the Law on Rules of Communication with Judges of Common Courts increased the rate of the fine for illegal correspondence with a judge and clarified the scope of the law extending it to officials serving in political positions. However, statistics suggest the number of prosecutions for illegal communication with judges is extremely low, even though the law has been in effect for four years.\textsuperscript{15} Life-long appointment of judges has been noted by the EC in the \textit{Progress Report for 2010} as strengthening the independence of the judiciary. However, concerns of the Venice Commission and the civil society groups over the long probation periods before appointment of judges have been shared. \textsuperscript{16} “\textit{Judges on probation are more exposed to political influence}” – reads the Progress Report by the EC.\textsuperscript{17}

Overall, although introduction of jury trials, life-time appointment of judges and amendments to the Law on Rules of Communication with Judges are seen as generally positive developments, these measures will not serve as a precondition for the independence and impartiality of the judiciary if more systematic problems with composition of the High Council of Justice, procedure for appointment of judges, guaranteed tenure, aspects of internal independence; transfer, removal and discipline of judges are not addressed.

\textbf{Disciplinary Prosecution}

In 2007 the European Commission for Democracy through Law (Venice Commission) prepared Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia. In the Opinion, based on Article 5.1. of the European Charter on the statute for judges, the Venice Commission presented the following basis for disciplinary proceedings brought against judges based on the rule of law:

- Violation of a duty expressly defined by law;
- Decision of a body composed at least to one half of elected judges;
- Fair trial with full hearing of the parties and representation of the judge;

\textsuperscript{15} According to the judiciary during 2010 there were no disciplinary actions taken against sitting judges or other public officials for such violations; this also was the case in 2009
\textsuperscript{16} Under the newly amended Constitution (Article 86, paragraph 2), probation period could last up to three years.
\textsuperscript{17} supra, footnote 2, p. 4
• Definition of the scale of sanctions by law;
• Imposition of the sanction subject to the principle of proportionality;
• Right to appeal to a higher judicial authority.

In addition to other basis for dismissal of judges, Article 43 of the Organic Law on Common Law Courts of Georgia also provides for commission of disciplinary violation. In the noted case, the law requires nomination of the Disciplinary Collegium to the Council of Justice for the dismissal. The Council makes decisions about judiciary dismissals. Dismissal of judges due to disciplinary penalties, authorized agencies and rules for their decision-making are set out by the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia.

As the report by the consultative council of European Judges, Council of Europe’s Committee of Ministers noted, *disciplinary prosecution shall be justified by a serious and outrageous violation.* With regard to judiciary dismissals, the Venice Commission noted the following in its report: “early termination of the mandate of a judge should only be used as a last resort in exceptional cases, for instance if found guilty of a criminal offence, or for health reasons or if s/he is permanently prevented from performing his or her duties.”

**Judiciary Dismissals Due to Disciplinary Violations**

The Georgian legislation sets out the following cases of disciplinary violations by judges as grounds for judiciary dismissals as disciplinary punishments: a) *Gross violation or repeated violation of law in the process of discussion of a case;* b) *Corruption law violation, or a misuse of a public office doing harm to justice and official interests;* c) *Activity incongruent with the position of a judge or incongruence of interests with the duties of a judge;* d) *An action inappropriate for a judge, which abuses the prestige and authority of a court or promotes the loss of confidence towards a court;* e) *Improper fulfillment of or failure to fulfill duties of a judge;* f) *Violation of judicial ethics norms.*

Furthermore, Article 43 of the Organic Law on Common Law Courts of Georgia also envisages *“holding an office incompatible with the status of a judge or incompatible activity”* as grounds for judiciary dismissals, which in its turn amounts to one of the forms of disciplinary violation and institution of disciplinary prosecution against a judge and imposition of a “severe reprimand” or “dismissal from the office” of a judge as a form of a sanction is possible on the noted grounds.\(^{19}\) Para. 1c, Article 43 of the Organic Law authorizes the High Council of Justice to make a decision about

\(^{18}\) Opinion on the law on Disciplinary Responsibility and disciplinary prosecution of judges of common courts of Georgia”, 2007, para.25

\(^{19}\) Para. 1b of Article 54\(^1\) of the Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts
judiciary dismissals by averting disciplinary prosecution of judges, in which a judge is no longer entitled to a number of rights guaranteed in disciplinary prosecution, including the right to present and state their positions, motions and evidence, additional documents, summon persons, solicit appropriate case, as well as the right to be entitled to assistance of a counsel, and the right to appeal the decision of the Disciplinary Collegium in Disciplinary Chamber of the Supreme Court only once. Therefore, it is unclear when an incompatible activity is considered as disciplinary violation, calling for disciplinary prosecution and when the same violation can serve as grounds for dismissal of a judge without the decision of a disciplinary Collegium.

**Agencies Carrying out Disciplinary Prosecution**

Disciplinary cases brought against judges of common law courts of Georgia are examined by the Disciplinary Collegium of Judges of Common Law Courts. The Disciplinary Collegium decides to dismiss a judge from the office, if in consideration of gravity and number of given disciplinary violation, as well as disciplinary violations committed in the past it deems inexpedient for the judge to continue carrying out his authority. Furthermore, if a judge has already been imposed with a disciplinary punishment – a strict reproof - for a past disciplinary violation and the punishment has not been extinguished yet, when selecting a disciplinary punishment the Collegium is authorized to discuss dismissal of the judge.

The Disciplinary Collegium is composed of 6 members, including three member judges of the High Council of Justice elected by the Conference of Judges of Georgia based on nominations by Chairperson of the Supreme Court and three non-judge members, elected by the High Council of Justice from amongst its members. Furthermore, the High Council of Justice itself is an agency that brings disciplinary case against on a judge concerned, which means that after disciplinary examination of a case, based on the nomination of secretary of the High Council of Justice, the High Council of Justice makes a decision to bring a disciplinary case or terminate the disciplinary prosecution.²⁰

Although the Georgian legislation is in full compliance with the Charter stipulation that a case should be examined by an agency at least half of whose members are judges, it should be noted that under the given legislative regulation, members of the Disciplinary Collegium are also members of an agency that brings a disciplinary case against a judge concerned. Although the noted individuals do not participate in the meeting held on disciplinary issues or the decision making process where the issues pertinent to bringing a disciplinary case against a judge concerned or terminating the

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²⁰ Para. 2, Article 15 of the Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts
disciplinary prosecution are discussed,\textsuperscript{21} it was criticized in the Opinion of the Venice Commission prepared in 2007, pointing out that “It should not be possible for those initiating a disciplinary procedure to also have influence on the composition of the deciding body”\textsuperscript{22}.

In consideration of the fact that during disciplinary proceedings judges should be entitled to the right of a fair trial, the Disciplinary Collegium should not be composed from members of the Council. Furthermore, judges or individuals who have experience as judicial office holders should participate in the process of discussion of the case.

**Composition of the Council of Justice**

According to international recommendations, judicial branch should be completely independent from other branches of the authority; furthermore, its independent should be guaranteed by existence of a truly independent agency that will be statutorily authorized to make important decisions concerning judicial authority.

Under the Georgian legislation, existing model for recruitment of the High Council of Justice Members, composed of 15 members appointed/elected by all three branches of the government, aims at creation of the mechanism of checks and balances for the work of the Council. However, the rule determining composition of the Council fails to provide meaningful grounds for fulfilling the noted goal.

**Judicial authority in the High Council of Justice**

Judicial authority is represented by 9 members in the High Council of Justice, including chairperson of the Supreme Court as an \textit{ex officio} member. As for rest of the members, they are elected by the conference of judges, based on the nomination of chairperson of the Supreme Court. Out of the eight members elected by the conference of judges, one serves as a secretary of the Council of Justice and unlike other elected individuals he may not be a judge of a common court. As for members of the Council who are judges, under the Organic Law of Georgia on Common Law Courts, they can be nominated \textit{solely by the chairperson of the Supreme Court}\textsuperscript{23}, which affects due and complete representation of judicial corps in the High Council of Justice. Furthermore, such regulation promotes unhealthy processes within the judicial authority and allows for exerting influence over judicial corps. Current composition of the Council demonstrates that policy and functioning of common court system is defined by judges who are holding particularly high offices and hardly fulfilling functions

\textsuperscript{21} Para. 3, Article 17 of the Law of Georgia on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts
\textsuperscript{22} See \url{http://www.venice.coe.int/docs/2007/CDL-AD(2007)009-e.pdf}
\textsuperscript{23} Para. 4, Article 47 of the Organic Law of Georgia on Common Law Courts
related to an office of a judge\textsuperscript{24}. Therefore, noted procedure of appointments with quota for judiciary authority fails to fulfill the requirement of independence of the High Council of Justice, as it fails to provide best opportunity possible for staffing the Council. The Council should serve as a meaningful self-governance forum of judges, which first and foremost should be guaranteed by legislation allowing any ordinary judge to participate in the work of the Council. To this end, the authority to nominate candidates for membership should not be solely vested in chairperson of the Supreme Court.

\textit{Political neutrality of the High Council of Justice}

Political neutrality of the Council should also be addressed as it is directly linked with requirements of independence and objectivity of judicial authority. Georgian legislation prohibits membership of a political party to common court judges, including the chairperson of the Supreme Court; \textbf{however, the legal stipulation prohibiting political activity does not apply to members appointed within the quota of Georgian MPs and the president or to the chairperson of the High Council of Justice (if the latter is not holding the office of a judge in a common law court).} Hence, the law allows participation of individuals with concrete political agendas, positions and responsibilities in administration of judicial authority. We believe that the law should create guarantees for political neutrality of the High Council of Justice, which should be based on prohibition of political activities of individuals appointed within the quota of Parliament and the president. The noted position is also laid out in the Opinion of the Consultative Council of European Judges: “If in any state any non judge members are elected by the Parliament, they should not be members of the Parliament, should be elected by a qualified majority necessitating significant opposition support”\textsuperscript{25}

\textbf{Appointment, Promotion of Judges}

According to different international acts, judicial appointments/selections should be merit-based. Furthermore, objective criteria and transparency of the process is required.\textsuperscript{26} As for characteristics of a candidate, he or she should be honest, capable, and particularly able to deliver free and objective assessments, able to apply law correctly in consideration of dignity of an individual concerned. A candidate should also be duly qualified in law. An issue of an agency responsible for selecting and appointing officers occupies a particular place in international acts. Judiciary selections and

\begin{flushleft}
\textsuperscript{24} Justice in Georgia, GYLA, p. 7  \\
\textsuperscript{25} CCJE Opinion #10, para.32  \\
\textsuperscript{26} See corresponding international acts: Siracusa Principles, IBA minimum standards for judicial independence, UN Basic Principles on the Independence of the Judiciary, the so-called Singhvi Declaration, Universal Charter of the Judge, the European Charter on the statute for judges, Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities
\end{flushleft}
appointments should be carried out by an independent agency, where judiciary corps is represented and which is independent from legislative and executive branches.

**Initial selection/appointment of judges**

Georgian legislation provides for the following two possibilities for initial selection/appointment of judges:

a) **Students of justice**\(^{27}\) - upon submission of an application to the High Council of Justice for appointment as a judge, they are considered as judicial candidates.

b) **Individuals who are exempt from attending the High School of Justice**\(^{28}\) - upon submission of an application to the High Council of Justice to for participating in a competition for a given position opening after the competition has been announced, they are considered as judicial candidates.

The legislation fails to clearly provide for the circumstances when the Council announces competition for vacant positions and furthermore, the issue of holding the competition itself is rather ambiguous. The applicable norms delegate the Council with the authority not to announce the competition at all or, despite announcement of the competition, not to review applications of candidates who have been exempt from attending the High School of Justice, which deprives these individuals from an opportunity to get into the judiciary system in any other way.

Furthermore, it is ambiguous when (at which stage) and how a student of justice applies to the High Council of Justice for judiciary appointment. It becomes further obscure in consideration of the fact that the High School of Justice itself provides the list of students to the High Council of Justice. Correspondingly, it is unclear whether students of justice are appointed as judges based on their applications or based on their nomination by the High School of Justice. In absence of legislative regulations, the noted issues fall under the discretionary power of the High Council of Justice, which clearly needs to be unambiguously regulated by law particularly in consideration of the fact that in practice judges of High Council of Justice are selected in the process of admission to the High School of Justice, as opposed to during stages of judiciary selection as prescribed by law.

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\(^{27}\) An individual who based on competitive selection and under the decision of the High Council of Justice of Georgia was accepted at the High School of Justice and received corresponding certificate.

\(^{28}\) These are the following individuals that are exempt from attending the High School of Justice:

- An individual put forward as a candidate for the position of a Supreme Court Judge;
- Former judge who has passed qualifying exams and has minimum of 18 month-long work experience as a judge;
- An individual on the list of students of justice, notwithstanding the term for which he or she was holding the position of a judge or whether he or she was appointed to the position of a judge;
- Former or acting judge of the Constitutional Court.
Additionally, it should be noted that the legislation does not provide for a clear border-line between authorities and competences of the High Council of Justice and the High School of Justice throughout the whole process of admission of students, their evaluation and consideration of candidates for judicial offices. It contributes to obscurity of the process. The legislation should provide a clear border-line between competences of the Council and the School. Furthermore, their competencies should be in full compliance with the function and the extent of responsibility of each agency.

Another outstanding issue is the rule for making a decision by the High Council of Justice about direct judicial appointments. Under the existing rule, direct judicial appointments shall be decided by majority of votes of members of the Council in attendance but no less than one third of full composition of the Council, including consent of members appointed by all three branches of the government. It should be considered that generally the High Council of Justice makes decisions by majority of votes, meaning that it does not require consent of members appointed on the basis of presidential and parliamentary nominations. Therefore, we deem it expedient for the Council to be guided by the general rule for decision making, so that representatives of the branches of the government no longer have an opportunity to block a judiciary candidate.

**Judiciary Promotions**

Article 41 of the organic law of Georgia on Common Law Courts governs promotion of judges. Under the noted Article, the High Council of Justice is obligated to develop promotion criteria and evaluate judges based on the criteria. As of now, such criteria have not been developed; however, it is important to take the following issues into account when working on the criteria:

- The High Council of Justice should have no right to resort to the opportunity of judiciary promotion, provided the judge concerned has not been practicing the judiciary authority in a city (district) court for at least 2 years;
- It should be prohibited to promote a judge during the period for which he or she has been subjected to disciplinary proceedings.

Furthermore, it is important that judiciary promotions are based on criteria measured objectively, as much as possible. It will allow for evaluation of decisions made about professional careers of judges and the process in general.

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20 Para. 3, Article 50 of the organic law of Georgia on Common Law Courts