



**Institute for Development
of Freedom of Information**

**IDFI's opinions within the scope of Justice, Liberty and Security Subcommittee (JLS)
and the Human Rights Dialogue (HRD)**

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Judiciary

Despite the “four waves” of judicial reform implemented in recent years, independence of Georgian judiciary has not been achieved. Fundamental deficiencies remaining in legal framework constitute an important challenge. Achievement of judicial independence is significantly hindered by the influential judicial group-members who hold important administrative positions within the system. They deliver arbitrary decisions, and use their high positions and legislative deficiencies to strengthen their influence over the system.ⁱ

Current rule for selection of the Supreme Court judges is not fully consistent with international standardsⁱⁱ and does not ensure merit-based appointment process. The constitutional appeal of November 11, 2019 of the Public Defender challenges the provisions on the Organic Law on Common Courts regarding the selection of the candidacy for the nomination to the Parliament by the High Council of Justice (HCOJ). The Public Defender considers that the existing rule contradicts the right to hold public office and the right to a fair trial guaranteed by the Constitution.

IDFI has filed an *amicus curiae* brief regarding the abovementioned constitutional appeal. IDFI considers that the procedure envisaged by the Organic Law fails to ensure the practical and effective exercise of the right to hold public office guaranteed by the Constitution. The uninformed decision of the HCOJ during the first stage of secret ballot poses a risk that candidates with higher qualifications and integrity will be excluded from the selection process arbitrarily and without justification. Three-stage secret ballot excludes the possibility of taking reasoned decision and creates the risk of arbitrary decision-making, which contradicts international standards. The lack of relevant guarantees for appointment of the competent and honest judges creates the risk of violation of the right to a fair trial, in particular, the right of a person to be heard by an independent and impartial tribunal established in accordance with the requirements of the Constitutionⁱⁱⁱ.

Significant problematic issues were identified in the process of competition for the selection of the Supreme Court judges in 2019, such as the participation of members of the HCOJ in the selection process, despite the existence of a conflict of interest, as well as the distribution of votes with the same scheme during the first secret ballot. This once again highlighted the gaps in the legislative framework and raised question marks in the society.^{iv} The hearing of candidates in the Parliament demonstrated that many candidates could not even answer basic legal questions. Majority of the candidates inadequately perceive existing challenges in the judiciary, do not recognize the problems existing in the past and at present, or are not willing to talk about them.^v Selection of 14 new judges in the Supreme Court gave rise to severe criticism by the international community^{vi} as well as NGOs as it has a detrimental impact on judiciary.

There are further deficiencies in the legal framework related to the Supreme Court: Certain broad powers of the Chief Justice and vagueness of functions of the deputy Chairpersons, which creates an unjustified hierarchy in the Supreme Court, are problematic. The presence of the Chairpersons of the Courts of Appeal in the Supreme Court Plenum (a body taking decisions on the management and administration of the Supreme Court) is a significant challenge. This does not comply with the role and the place of the Supreme Court in the judicial system. Certain excessive powers of the Plenum remain as an important challenge, such as the right to determine the amount of a monthly supplement to the official salary of a judge, which poses the risk of corruptive practices. The practice of exercising judicial power in another Chamber by a judge of a particular Chamber is flawed. The rule of case allocation is problematic as it creates the risk of arbitrary selection of panel members beyond legal regulation.^{vii}

The Court Chairpersons of the first and appellate instances are appointed by the HCOJ through a vague and non-transparent procedure. It is advisable to ensure election of the Chairpersons by the judges of the same

court which would be in line with the requirements of the principle of internal independence of the judiciary.^{viii} Significant power assembled in the hands of the Court Chairpersons still remains a challenge.^{ix} Court Chairpersons can be the members of the HCOJ which contributes to the concentration of excessive powers within the hands of the narrow group of judges. Although electronic distribution of cases is established in common courts, Court Chairpersons have the power to distribute judges to narrow specialization arbitrarily, which may endanger the system of random distribution of cases.

Within the scope of recent judicial reforms certain positive amendments were enforced with regard to the High School of Justice (HSOJ). However, the real institutional independence of the HSOJ has not been achieved as 4 out of 7 members of the board of the HSOJ are appointed by the HCOJ, which enables the latter to have a considerable influence upon its activities. The procedure for enrolment of justice trainees is regulated by the Charter of the HSOJ and not by the law, substantiation of decisions and appeal mechanism is not guaranteed, which constitutes a significant challenge.

As a result of the four waves of judicial reform, the system of disciplinary liability of judges has been improved, however, certain flaws still remain.^x Procedure for electing an Independent Inspector remains flawed (decision is made by simple majority of the HCOJ), which does not ensure proper institutional independence of an Inspector. It is advisable to appoint Inspector by 2/3 majority of the HCOJ.

Transparency of the judiciary still remains a challenge. In 2019 the Constitutional Court of Georgia ruled that the provisions of the Law on Personal Data Protection were unconstitutional as they prohibited access to the full text of court decisions delivered within the scope of a public hearing by Common Courts.^{xi} The Court held that the disputed norms would be void from May 2020 and gave the Parliament time to harmonize existing legislation with the requirement of the Constitution. However, as of today, the Parliament has not yet adopted relevant legislative amendments. Therefore, access to the full text of court decisions is not ensured.

Legal framework does not provide for the objective and transparent process of promoting judges.^{xii} Promotion of judges is closely related to their periodic evaluation. “The rule for evaluation of effectiveness of performance of judges of common courts” approved by the HCOJ is largely focused on the entire judicial system and not on individual judges. The existing rule for the evaluation of judges is ineffective for the purposes of assessing the performance of individual judges as well as the entire judicial system.^{xiii} Therefore, initiating reform in this regard is of utmost importance.

The excessive caseload of common courts is a significant challenge. Procedural delays in case consideration pose a risk of violating the right to a fair hearing within a reasonable period.^{xiv} In order to ensure quality and efficiency of justice, relevant measures should be taken in this regard.

Recommendations:

- Guarantee independence of the judiciary by reforming the system of appointment of judges, ensure justification of decisions and merit-based appointments;
- Eliminate deficiencies in the legal framework related to the Supreme Court in order to restrict broad powers of the Chief Justice, remove Chairpersons of Courts of Appeals from the Plenum, limit excessive powers of the Plenum, and effectively separate competencies between the HCOJ and the Supreme Court;
- Strengthen transparency of the judiciary by ensuring access to the full text of court decisions;
- Continue the reform of the HSOJ in order to achieve its genuine independence, and to ensure quality and efficiency of justice;

- Further improve the system of disciplinary liability of judges with the aim of strengthening institutional independence of the Independent Inspector's Office, and ensure sufficient transparency of its activities;
- Strengthen internal independence of the judiciary by amending the rule for appointment of Court Chairpersons and by limiting their excessive powers;
- Take measures to ensure efficiency of justice by addressing the issue of excessive caseload and procedural delays in common courts;
- Initiate the reform of the judicial promotion and periodic evaluation system;
- Improve the system of electronic case allocation in order to ensure equal distribution, and avoid manipulation and arbitrary assignment of cases.

Prosecution Service

The independence accorded to the PSG through the recent reform is an unequivocally positive breakthrough. However, despite the reforms, there are remaining challenges that necessitate further efforts and strong addressing mechanisms in the institution.

Even though the Minister of Justice is no longer a member of the Prosecutorial Council, (Council) is the only change made to the Council composition rules, which became a target of Civil Society^{xv} as well as the Venice Commission criticism, raising the issue of low representation of the civil society in the Council.^{xvi}

Constitutional amendments enforced in 2018 granted the Council the role to ensure independence, transparency, and effectiveness of the PSG, but without relevant legislative amendments this remains just a formality.

Individual prosecutors' independence remains a challenge. Prosecutors need effective and functional legislative guarantees to ensure their neutrality and impartiality while carrying out criminal proceedings. Chief Prosecutor's orders are obligatory for all prosecutors. It is important to further empower individual prosecutors and enhance the independence of the lower level prosecutors.^{xvii}

According to the new Organic Law on the PSG (Organic Law), appointment, promotion, disciplining and dismissal of prosecutors is a competence of the Prosecutor General. Even though the advisory body is formed in relation to above-mentioned issues, its decisions are not mandatory and the final decision is made by the Prosecutor General. Overall, such system may affect the independence of the individual prosecutors and concentrate excessive powers in the hands of the Chief Prosecutor.^{xviii}

The Organic Law sets the criteria of selection and promotion of prosecutors;^{xix} however, Prosecutor General has a great discretion to appoint a prosecutor without competition. The Organic Law does not require justification for promotion of prosecutors, which was underlined in the reports of international organizations.^{xx} Promotion criteria for prosecutors and investigators are not detailed in the Organic Law. Even though the new Organic Law defines the basis for employee rotation in more detail, it does not include full procedural guarantees and criteria regarding an appeal of decisions on the reassignment (even mandatory) of a prosecutor/investigator to a different position.^{xxi}

The Organic Law provides general criteria for a candidate on the position of the Prosecutor General. However, there are no further criteria set forth in the legislation to choose between those candidates who have met general criteria set forth by the law and are taking part in the competition. Further, Prosecutor General is elected by the majority of the full composition of the Parliament of Georgia.^{xxii} This does not guarantee depoliticization of a selection process as has been recommended by international organizations.^{xxiii}

Recommendations:

- Minimize the participation of political subjects (e.g. Members of the Parliament, a representative of the Minister of Justice) in the work of Prosecutorial Council;
- Broaden the Prosecutorial Council functions to make it able to perform its constitutional role;
- The role of the Council for Career Management, Ethics, and Incentives needs to be strengthened;
- Composition of the Prosecutorial Council needs to be reviewed and civil participation needs to be increased;
- Detailed promotion criteria for prosecutors and investigators as well as justification for assignment or promotion need to be prescribed by the law;
- Full procedural guarantees and criteria regarding an appeal of decisions on the reassignment (including mandatory) of a prosecutor/investigator to a different position need to be enshrined in the law;
- Additional qualifications for a candidate on the position of the Prosecutor General need to be evaluated when interviewing those, who have met formal criteria set by the law and guarantee the depoliticization of a candidate selection.

Non-discrimination

Since Georgia ratified the Convention of the Council of Europe on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)^{xxiv} in 2017, the State has made significant legislative amendments to harmonize the national legislation with the Istanbul Convention. As a result, article 53¹ was added to the Criminal Code by which aggravating circumstances of punishment are regulated separately. The abovementioned article provides aggravation of the criminal liability in case of commission of crime on the basis of discrimination with the reason of intolerance.

However, article 53¹ is not appropriately applied in practice. The case of the murder of human rights defender Vitaly Safarov^{xxv} once again confirms that identifying a component of signs of discrimination with the reason of intolerance in hate crimes is still a challenge.

2018 report of the Public Defender points out that most of the victims (sexual minorities) complain about harassment and homophobic treatment from law-enforcement officials.

Prosecution launched on possible hate crime committed by law enforcement officers is still very low. It is not welcoming that there are no outcomes for investigations that started in 2016 – no victims or convicts are identified. This proves that there are challenges in this direction.

Recommendations:

- Increase knowledge regarding hate crimes and raise sensibility of prosecutors regarding intolerance and discriminatory motives;
- Carry out relevant measures to increase the number of detection as well as prosecution for hate crimes allegedly committed by public officials;
- Ensure the availability of the comprehensive guidelines and their application in practice for establishing unified approach to fighting discriminatory crimes.

Gender-based Violence

Despite the positive steps, the situation analysis and evaluation by the international^{xxvi} and local organizations^{xxvii} show that the Prosecution Service of Georgia (PSG) is still facing the challenge of an efficient and comprehensive prosecution of the gender-based violence. In majority of cases, prosecutors are not

sufficiently informed on standards and special approaches to gender based crimes,^{xxviii} which represents a gap in justice on the one hand and is a barrier in protecting the rights of the victims of the crime of the type on the other. Thus, proving a gender-based motive for prosecution in domestic offence, cases of violence against women and domestic violence is a complex issue and remains a significant challenge for the administration of gender-sensitive justice.

One of the main complications is the insufficient number of specialized prosecutors for domestic offences, violence against women and domestic violence, which causes increase of workload of specialized prosecutors. There is no comprehensive monitoring mechanism for prosecutors' workload, which negatively affects the effectiveness of prosecution. By 2019, 193 prosecutors have been trained in domestic violence and violence against women, but given the large number of cases, the number of specialized prosecutors is insufficient.^{xxix} In some cases, the prosecutor has to deal not only with different criminal cases at the same time, but to participate in trials scheduled one after another that result in one, two and more hours of delays of the hearings. This reflects on the quality of prosecutor's preparation and causes delay of the process. This, in the end, has a clear negative impact on both the process and the quality of criminal proceedings in general.

Recommendations:

- Continually improve the qualification of prosecutors and continue their specialization in the areas domestic violence and violence against women with the aim of ensuring adequate number of prosecutors and, consequently, eliminating excess workload of specialized prosecutors;
- Establish a comprehensive monitoring system for the workload of specialized prosecutors for implementation of effective criminal prosecution;
- For the purpose of quick and efficient administration of justice, it is important that specialized prosecutors only work on the categories of crimes for which they are trained.

Freedom of Expression/Access to Information

The Constitution of Georgia guarantees the high standard of freedom of expression, however, in recent years, initiatives of certain public officials threatened freedom of expression several times.^{xxx} There have been attempts to limit criticism of judges, to impose liability for insulting religious feelings, and statements regarding tightening regulatory norms of defamation, which should be negatively assessed.

The politicization of media content remains a challenge.^{xxxi} Recently serious concerns have been raised regarding the environment for media pluralism.^{xxxii} Concerns persist regarding government interference with some media outlets. In 2019 Adjara Public Broadcaster (APB) voted to dismiss its general director, citing mishandling of public funds and mismanagement of program priorities, among other things. International monitors had previously considered the APB an impartial media source. The decision raised concern for "the country's democratic development and media freedom record." Afterward, the journalists protested against the new director, claiming he was interfering in their work and attempting to influence the station's editorial policy.^{xxxiii}

In 2019 a number of journalists sustained injuries during the June 20-21 protests. Multiple local and international organizations, including Reporters without Borders and the OSCE media representative, strongly criticized the use of force by police against journalists and issued statements calling for a prompt investigation into the incidents involving journalists.^{xxxiv}

As for access to information, Georgia has basic legal provisions on this issue in the General Administrative Code, but there is no stand-alone law on freedom of information. There is also no dedicated oversight authority that would ensure enforcement of relevant regulations. In 2014 IDFI together with its partner CSOs

and with the support of Open Society Georgia Foundation (OSGF) prepared a draft law on Freedom of Information and submitted it to the Ministry of Justice. Shortly after, Georgia undertook the obligation to adopt a Law on Freedom of Information within the auspices of different strategic policy documents. Among them the 2015-2016 National Anti-Corruption Strategy of Georgia, 2014-2015 Human Rights Protection Action Plan, 2014-2015 Open Government Partnership Georgia Action Plan and the Agenda of the Association Agreement between Georgia and the EU.^{xxxv} However, as of to-date the draft law has not been initiated to the Parliament of Georgia.

Georgia faces significant challenges regarding the proactive disclosure of public information. As of May 2019, over a dozen of central public institutions or their subordinate legal entities either did not have a public information section on their websites or did not have a website at all. Moreover, in recent years, the overall picture of the proactive disclosure of public information has worsened as compared to 2014.^{xxxvi}

Proactive publication of the information was one of the most important commitments taken by Georgia within the framework of the Open Government Partnership (OGP) in 2013. After active consultations, meetings and negotiations with civil society, and with the active advocacy from IDFI, in 2013 the Government of Georgia adopted the Decree on the Electronic Request and Proactive Disclosure of Public Information. The decree includes the list of information to be published proactively and the frequency of updating it. Although the decree was a significant step forwards, it is only applicable to central public institutions. Currently, there is no uniform standard of proactive publication of information in Georgia. The topic is not regulated by the law. Instead, the General Administrative Code gives wide discretion to public institutions to develop secondary legislation (sub-legal acts) on the topic.

Recommendations:

- Ensure that freedom of expression and media pluralism are fully respected;
- Strengthen guarantees of access to information by adopting the Law on Freedom of Information, establishing a supervisory body and introducing sanctions for violating regulations on freedom of information (e.g. refusal to disclose public information, disclosing false or misleading information, violating the timeframes set by the legislation, destroying public information, etc).
- Adopt uniform standards for proactive disclosure of public information and ensure that the standards are met.

Protection of Personal Data

Secret surveillance system in Georgia remains an important challenge. Excessive power concentrated within the hands of the Operative-Technical Agency (subordinate body to the State Security Service) and weak oversight over its activities creates the risk of arbitrary and unlawful interference with privacy.

In 2016 the Constitutional Court ruled that the technical access of the State Security Service to telecommunication operator networks was unconstitutional. This access allowed for unlimited monitoring of communication and data collection. According to the ruling, the legislation failed to ensure control of real-time acquisition of information on the internet.^{xxxvii} The legislative amendment adopted in 2017 did not comply with the requirements of the Constitutional Court decision. As a result, more than 300 citizens filed a constitutional appeal against the new amendments, which is still pending at the Constitutional Court.

Recommendation: Take measures to ensure that provisions regulating secret surveillance fully respect constitutional and international standards of human rights.

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- ⁱⁱ Venice Commission, CDL-PI(2019)002, 16.04.2019, available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2019\)002-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2019)002-e)
OSCE/ODIHR opinion on draft amendments relating to the appointment of Supreme Court judges of Georgia, 17.04.2019, available at: <https://www.osce.org/odihr/417599?download=true>
- ⁱⁱⁱ IDFI filed an amicus curiae brief regarding the Constitutional appeal of the Public Defender, available at: https://idfi.ge/en/idfi_filed_an_amicus_curiae_brief_regarding_the_constitutional_appeal_of_the_public_defender
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- ^{vi} Monitors regret appointment of 14 judges by Georgian Parliament, available at: <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7737&lang=2>
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- ^{xi} Access to Court Decisions – Constitutional Court Grants the Appeal of IDFI, available at: https://idfi.ge/en/constitutional_court_decision_on_idfi_case_about_access_to_court_decisions?fbclid=IwAR3kDYiMZuQIEzFT2bkZwQL-9ZTn1tRkxVfANSrBDFJmW5N9rYjKXfSmgM
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- ^{xxiv} Council of Europe Convention on preventing and combating violence against women and domestic violence, 12 April, 2011, available at: <https://rm.coe.int/168046031c>
- ^{xxv} In the case of the murder of human rights defender Vitaly Safarov on September 30, 2018 the investigation was launched under Article 108 of the Criminal Code (murder), which was disputed from the outset for those who witnessed the crime. Following the spread of the video footage, the complicity of both accused persons in the crime became apparent. In addition, the witnesses pointed to the motive of hatred and noted that the dispute broke out on the ground of intolerance. It is important, that the accused were aware of Safarov's being Jewish which was expressed in their shouting when committing the crime. However, the prosecution initially did not appeal the hate motive, and the qualification of the crime was only changed in April 2019 under Article 109 part two (d) and (e) of the Criminal Code, which implies intentional murder under aggravating circumstances – by a group of persons due to racial, religious, national or ethnic intolerance. Tbilisi City Court ruled out intolerance motive for both accused and found them guilty of the intentional murder by a group of persons, which both sides appealed.
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