



კოალიცია  
დამოუკიდებელი  
და გამჭვირვალე  
მართლმსაჯულებისთვის  
Coalition for  
an Independent and  
Transparent Judiciary

## Opinions of Coalition of an Independent and Transparent Judiciary Regarding a Draft Law Prepared by Ministry of Justice

The Coalition of an Independent and Transparent Judiciary presents its opinions regarding a draft law prepared by the Ministry of Justice of Georgia, which proposes a system of evaluation of judges appointed for a probation period.

First, we would like to recall that the Coalition has repeatedly expressed its position about the introduction of a probation period for judges. In a statement released on 28 September 2013, the Coalition refused to support the draft law envisaging the appointment of judges for a three year probation period.<sup>1</sup> Thereafter, on 3 October of the same year, the Coalition called on the parliament of Georgia to suspend discussions in the committee and to engage in a deeper conceptual discussion of the issue together with representatives of judiciary.<sup>2</sup> After the parliament had adopted the law, the Coalition appealed to the High Council of Justice to refrain from appointing judges for a probation period as the rule and principles of monitoring the performance of judges were unknown.<sup>3</sup>

Nevertheless, some 12 judges appointed for three years of probation period have already been working in the system and taking into account a competition which is underway in the Council, the number of such judges will probably increase in the foreseeable future. It is noteworthy that in parallel with the ongoing competition, the High Council of Justice, on the one hand, is amending the rules of selecting judges,<sup>4</sup> whilst the Ministry of Justice, on the other hand, is working on the improvement of procedures for evaluating judges. Such processes prove that fundamental problems exist in the system of selecting and appointing judges. These problems have been repeatedly discussed by the Coalition in recent years. Nonetheless, no fundamental and systemic reform in the selection/appointment system has been initiated yet. Instead, today we have to discuss a legal initiative which, in our view, is based on a fundamentally wrong principle – the appointment of judges for a

<sup>1</sup> [http://www.coalition.org.ge/article\\_files/189/Coalition Statement September 2013.pdf](http://www.coalition.org.ge/article_files/189/Coalition%20Statement%20September%202013.pdf)

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[http://www.coalition.org.ge/article\\_files/188/Coalition Statement English Oct 2013.pdf](http://www.coalition.org.ge/article_files/188/Coalition%20Statement%20English%20Oct%202013.pdf)

<sup>3</sup> [http://www.coalition.org.ge/article\\_files/195](http://www.coalition.org.ge/article_files/195)

<sup>4</sup> text of amendments:

<http://hcoj.gov.ge/files/pdf%20gadacyvetilebebi/gadawyvetilebebi%202014/26-2014.pdf>

### Coalition Members:

Article 42 of the Constitution  
Multinational Georgia  
Solidarity to Illegal Prisoners  
Georgia Small and Medium  
Enterprise Association  
Civil Integration Foundation  
Georgian Lawyers for  
Independent Profession  
Liberal  
Center for Protection of  
Constitutional Rights  
International Society for Fair  
Elections and Democracy  
Association Green Wave  
The Union "21 Century"  
Georgian Young Lawyer's  
Association Human Right  
Center  
Transparency International  
Union of Meskhetian Democrats  
Liberty Institute  
Georgia Bar Association  
Civil Development Agency  
United Nations Association of  
Georgia  
The European Law Students'  
Association  
Civil Society Institute  
Open Society Georgia  
Foundation  
Institute of Democracy  
American Chamber of  
Commerce  
Association of Civic Initiatives  
and Employees Defense  
Eurasia Partnership Foundation  
Institute of Development of  
Freedom of Information  
Human Rights Priority  
Tbilisi Media Club  
Human Rights Education and  
Monitoring Centre  
Foundation for the Support of  
Legal Education  
Institute of Civil Engagement

probation period - and consequently, repeats the shortcomings of this principle.

Bearing in mind a degree of development of democratic institutions, the tradition and culture of relationship between the branches of power, and past experience, the Coalition believes that at a current stage of the country's development, the state must refrain from the establishment of such mechanisms which will further increase the risks associated with the independence of courts.

Since the Coalition disapproves of the system of appointing judges for a probation period, we cannot offer the Ministry of Justice any other, improved model of evaluating performance of judges. We believe that it is extremely difficult to insure against those threats that are associated with the appointment of judges for a probation period, which is also proved by the presented draft law.

*a) The principle and criteria of evaluation*

According to the draft law, a judge is evaluated by the criteria of honesty and competence. At the same time, to obtain information necessary to evaluate a judge, the Council creates a department for the evaluation of performance of judges. However, **the draft law must be more explicit about the methods to be applied for examining the conformity of judges with the criteria, the ways of collecting the information and the sources to be used for obtaining complete information.** The draft law states that in the process of evaluating a judge it is compulsory to examine at least five cases which a judge in question has considered and decided upon, including two cases the final decisions on which were either fully or partially overturned by a higher court (if such cases exist). However, the examination of cases alone cannot be sufficient for evaluating a judge by all those criteria the draft law specifies. **Identifying the sources of information is important to evaluate the fairness of the process.** Moreover, it is obvious that an overturned ruling or any other decision of a higher court does not represent a clear-cut indicator for evaluating the conformity of a judge with any of the criteria.

One of means of evaluating a judge is a meeting in person and interviewing a judge, according to the draft law. However, it is not specified what issues can and cannot be discussed by a Council member with a judge. It is **ambiguous whether a Council member is allowed to ask a judge about those decisions which the judge took on cases he/she considered.** Such an unrestricted power of Council members may create an unhealthy relationship between members of the Council and judges.

### *b) Rights of a judge in the evaluation process*

The draft law provides a judge with the right to appeal to the Council, if he/she considers that a Council member evaluating a judge's performance abuses official powers. Even though this is an important element in protecting interests of a judge, the draft law does not adequately ensure the protection of the rights of judges.

According to the draft law, if an arithmetic mean of scores received by a judge during the evaluation is lower than 75 percent, the Council does not discuss the issue of appointment of that judge for life and without putting the issue to vote, denies the appointment for life to such a judge. **According to the legislation, a decision on appointing a judge shall be taken by the Council as a collegial body, not its individual member, and therefore, an issue must be discussed by the Council at its session.** A binding nature of the evaluation prepared by Council members, however, affects the mentioned constitutional power of the Council. It is important to ensure that those Council members, or a segment thereof, who conduct the evaluation of a judge are not allowed to take a decision on appointing/not appointing judges without considering the issue at a Council session or the participation of other Council members.

The draft law also does not provide a judge with a possibility to appeal a document of evaluation itself. This is especially important for those judges whose evaluation score is below 75 percent and consequently, their cases are not discussed at a Council session at all.

### *c) Decision making by the Council*

According to the draft law a decision on appointing a judge whose score exceeds 75 percent is taken by the majority of votes of the total composition of the Council. This provision in the draft law alters currently existing requirement of the law for a two-third of votes for the appointment of a judge. Given that the draft law is not enclosed with an explanatory note, it is not clear whether this is a technical mistake or an intended change. If it is not a mistake, this means that the Ministry aims to change the requirement for a quorum of two-third's approval, which, in our view, is a subject of a separate discussion.

However, it is clear that **the appointment of a judge must have a uniform definition which must contain both the appointment for a three year probation period and for life. In either of the cases the required quorum of approval must be established by the legislation.**

### *d) Appealing a decision of the Council*

The draft law envisages a possibility to appeal the refusal of the Council on the appointment of a judge for life at a court. A court is entitled to declare a decision on the refusal to appoint a judge for life void and task the Council to take a decision on appointing a judge for life.

The above logic of the draft law is based on viewing a Council's decision on appointing a judge as an individual administrative legal act. A legal nature of separate decisions of the Council has long been a topic of debate and it clearly needs to be defined in a timely and explicit manner.<sup>5</sup> It must be noted, however, that **in the process of appointing a judge the High Council of Justice performs a constitutional authority and its decision on whether or not to appoint a judge cannot be qualified as an individual administrative-legal act. Moreover, a court tasking the Council to take a decision on the appointment of a judge is the interference in constitutional functions of the Council and means that a court takes a decision as who must be appointed as a judge, which is unjustifiable.** In this regard, the Council is merely left with a formal role to execute a court decision.

The draft law does not make it clear either how a court is supposed to take a decision. Whether a court is authorized to additionally study the conformity of a judge with the criteria or it must take a decision based on submitted evaluation alone.

Finally, we would like to note once again that the Coalition sees the interest of society and judiciary in improving the process of selecting and appointing judges and not in introducing

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<sup>5</sup> This issue is discussed in the report prepared by GYLA and Transparency International Georgia on the results of the monitoring of the High Council of Justice; [http://gyla.ge/uploads/publications/2014/HIGH\\_COUNCIL\\_OF\\_JUSTICE\\_MONITORING\\_REPORT\\_2\\_GEO.pdf](http://gyla.ge/uploads/publications/2014/HIGH_COUNCIL_OF_JUSTICE_MONITORING_REPORT_2_GEO.pdf); pg. 15