

Evolution of clan based governance in Georgian judiciary since 2007

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Since the declaration of independence Georgia could never manage to create a truly independent judiciary. Low level of judicial independence was conditioned by several reasons, including the absence of political will.

Since 2004, Georgian judiciary could overcome systemic corruption, however, found itself under strict control of executive power. A small group of persons, the clan, with high administrative positions ensured the obedience of judges towards the political party in power and ensuring execution of the demands of the executive¹.

Thus, by term “clan” we mean a group of interconnected people occupying high administrative or judicial positions in judiciary and controlling the judges through various formal or informal tools.

One of the main election promises of Georgian dream coming to power in 2012 was the restoration of justice and formation of independent judiciary. Indeed, in 2013-2015, the government produced a legislative package, one of the main goals of which was the reform of the defective judicial governance. However, these changes could not ensure the formation of the sound judicial system, on the contrary, the clan, which kept a tight control over judiciary under previous government has quickly adapted itself to the new political and legal reality and regained power in the judiciary.

From 2015, the leading political party in power moved from open confrontation to collaboration with the clan. As the result of this collaboration, the clan obtained additional mechanisms and leverages, it has gained control of all judicial positions in HCOJ and majority of non-judicial positions. Also, the majority of key administrative posts in judiciary. It started to appoint judicial candidates based loyalty to the clan as opposed to judicial integrity and expel its opponents from judiciary while reappointing its supporters for life.

The clan, which under the previous government was only was the implementer of the will of the executive and transmitter messages of to the judges now converted itself to the autonomous entity which dictates new rules and conditions to the government. This rules and conditions do not serve to strengthening of judicial independence but reinforcement of the power of the clan. In order to become a judge today one needs to enter into a secret deal with the clan in one form or another; Judicial self-government does not serve its true purpose: while the judicial self-government is supposed to be elected based on competition and clash of ideas, today there is no such competition inside judiciary, the candidates nominated by the clan have no competitors, there is no group of judges able to compete with the clan; the system of disciplinary liability of judges is practically non-functional.

The negative effects of the clan-based government for the judiciary are much more devastating than they seem at the first sight. While it is widely recognized that the judicial system should be constructed on values and principles such as independence, impartiality, accountability, fairness, integrity, respect for differences, the clan, by its ideology and actions is diametrically opposed to these values. It inspires fear, conformism, nepotism, secret deal-making, banning critical opinion and elimination of individualism among judges. Thus it morally destroys the judicial system and corrupts the newcomers.

After 2013-2018 legislative changes, the Georgian society confronted with the new challenge, the clan was given the opportunity to appoint the judges for life. That means, the current system of judicial government shall remain as it is for the next 15-20 years.

Thus, at the beginning of 2019, the Georgian civil society and political parties came to a common understanding that the judicial system cannot be rehabilitated under the governance of this clan and independent judiciary cannot be created. Thus a manifesto and a petition requesting the resignation of the members of the clan was prepared and signed by active part of organizations and individuals involved in justice sector;

The operation of the clan is described in multiple reports and research², however, the present document is the first attempt to gain the inside of the topic starting from 2007 till now.

What does a healthy judicial system look like

Before approaching the issue of clan-based government, let us recap several attributes, which must characterize a healthy and independent judicial system:

- The judges should be selected and promoted based on competence, integrity and merits. Along with personal qualities, judicial candidates should enjoy high public trust and reputation.
- The judicial system should encourage the promotion of core judicial values by the judges.
- The judges should decide cases independently without internal or external interference.
- Elections for the judicial self-government should ensure wide judicial representation in government bodies
- Gross violation of the rules of conduct should trigger the liability for the judges;
- The application of any type of sanction towards the judge should be based on objective pre-described criteria and fair procedures.
- The judiciary should not receive instructions or orders from the executive and neither should enter into secret deal with executive or legislative power.

The operation of the clan in the judicial system conflicts with all above mentioned principles or ideas.

Things that happened before 2012

Since Rose Revolution of 2003, Georgian judiciary underwent many positive changes such as eradication of systemic corruption, creation of proper material bases for the operation of the judiciary, increase of salaries of judges, formation of the High School of Justice, refinement of legislative framework, etc. However, a key problem remained the lack of independence and dependence on executive. In 2005-2007 two influential groups were formed in judicial system, the leaders of which – Valeri Tsertsvadze (the chairman of Tbilisi Court of Appeal) and Mikhail Chinchaladze (deputy Chairman of the Supreme Court)³

were directly communicating with the Minister of Justice Zurab Adeishvili and ensured strict control of the judiciary by the executive.

Despite the fact that following 2007 legislative changes, the Minister of Justice was no longer a member of HCOJ, in reality he still remained the governor of judiciary. He was participating in the government of the judiciary through Mr. Tsertsvadze and Chinchaladze. All key decisions related to the appointments were preliminarily agreed with the Minister of Justice including the appointment of members of HCOJ, the justices of the Supreme Court and Court presidents as well as the regular judges. Also, the outcomes of high profile cases in which the government had a vital interest were discussed and agreed with the Minister of Justice⁴;

At the same time, Valeri Tsertsvadze and Mikhail Chinchaladze were directly communicating with the court presidents, which were monitoring the execution of the will of the executive by judges. At the same time, they were leading the day-to-day operation of the HCOJ. Namely, in 2007-2013 Mr. Valeri Tsertsvadze was the Secretary of HCOJ, while Mr. Mikhail Chinchaladze was the member.

It is known that in these years, the judiciary showed high degree of obedience to the executive, which is also corroborated by statistical data, including the extremely low level of acquittal rates and extremely high rate of granting prosecutorial requests. This was caused by the fact that the judges were informally prohibited to acquit or reject a prosecutorial motion (particularly related to the preventive measures) without prior consent of the court president⁵. On his side, the court president was communicating on this issue with the local or district prosecutor or general prosecutor or the President of the Supreme Court Chamber.

The outcomes of the gross administrative disputes were also agreed in advance with the court presidents. On their side, they communicated directly with Mikhail Chinchaladze or the administrative bodies who were the party to the dispute.

Thus, majority of court (chamber, panel) presidents were involved in this communication scheme and therefore, the leaders of the clan – Valeri Tsertsvadze and Mikhail Chinchaladze, together with the court presidents constituted a channel of communication through which the executive body strictly controlled the governance of the court (particularly, appointment policy) as well as the outcome of individual cases.

The obedience of the judges could be secured by using a number of mechanisms such as different sanctions against disobedient judges (disciplinary, criminal liability, non voluntary transfer, etc⁶), different incentives for obedient judges (promotion, bonuses, study visits outside Georgia, etc). Also the court presidents were manipulating with the system of case assignment in order to give sensitive cases to the proper judge who would execute the instruction well⁷. Moreover, the judge executing the order from the executive was also aware that superior instances were informed about it and therefore, there was widespread saying among judges. “Appellate court is informed about this case, cassation court is informed about this case”⁸.

The President of the Supreme Court was not apparently involved in agreeing the outcomes of individual cases, however, he consulted with the Minister of Justice all key decisions related to the administration of the court system.

Things that happened after 2012

After 2012, when Georgian dream came to the power, the connection of the executive branch with the clans was naturally broken. The management of judiciary and the ruling party showed clear antagonism and mistrust towards each other. The ruling party was trying to remove the clan from the power by using legislative tools, though the members of the clan were trying to stay in power. From the government side, these actions were expressed in following actions:

1. By 2013 legislative changes, the HCOJ was disbanded and reorganized and its members were dismissed pre-term. The court presidents were removed from membership of the HCOJ (first wave of judicial reform).
2. 2013 legislative changes have introduced new procedure for the election of members of HCOJ according to which each judge was given the possibility to propose a candidate (first wave of judicial reform, 2013)
3. In January, 2015 Ministry of Justice proposed an initiative, which envisaged the extension of jury trial on the cases involving high officials. According to the proposed change, the defendant could no longer reject jury trial without consent of the prosecutor. In the end, the defendant reserved his/her right to waiver but this fact proves that the government did not trust judges and wanted to rely on jurors⁹.
4. A new method for the selection of court presidents was proposed, according to which the judges were entitled to elect local court presidents, while the acting court presidents would have their mandate terminated pre-term (Legislative package of 3d wave of judicial reform, 2014)
5. Powers of the secretary of HCOJ were reduced and delegated to the persons elected by HCOJ such as independent inspector and director of Management Department (third wave of judicial reform 2017)¹⁰.

How did the clan respond to these changes.

On its side the clan took following measures in response:

1. In 2012, acting court presidents were swiftly reappointed for 5 year term by HCOJ.
2. In 2013 elections, the clan gained decisive victory in the elections of HCOJ and occupied all judicial vacancies in HCOJ (alternative association of judges – the Unity of Judges could not obtain any single vacancy in HCOJ)
3. The clan appointed its supporters for all crucial administrative positions (such as independent inspector, director of High School of Justice)
4. In 2013-2015, the courts were taking stand quite often against executive branch on high profile criminal cases, where defendants were acquitted and prosecutorial motions for imprisonment were rejected¹¹, which often caused the government to publicly express the dissatisfaction¹².
5. The HCOJ arbitrarily suspended the admission of candidates in High School of Justice, which prevented the entry of new people in the judicial system and created an artificial pretext for rapid reappointment of former judges.

From all this, it became clear that the clan won the tactic battle against the government and retained power in court despite the first and second wave of judicial reform. In parallel, the clan made clear to the government that they could work in confrontation or in collaboration with the government.

Start of cooperation between government and the clan

From 2015, the deliberation of third wave of judicial reform legislative package was suspended in Parliament almost for one year. As it seems, in parallel secret negotiations between the government and the clan were ongoing. Finally the deal was reached between the governing party and clan which was reflected inter alia in following.

1. The Parliament finally gave up with the initiation of preterm terminations of office of court presidents and their election by their colleagues (third wave package of judicial reform).
2. The court presidents recovered their rights to be elected as members of HCOJ (third wave of judicial reform).
3. Members of HCOJ selected by Parliament of Georgia in 2013 (Eva Gotsiridze, Kakha Sofromadze, Vakhtang Tordia, which were in full confrontation with the judicial members of HCOJ before 2015, started collaborative actions from 2015¹³, which resulted among others, in the appointment of the leaders of the clan, Levan Murusidze and Mikhail Chinchaladze. Three non-judge members of HCOJ selected by Parliament of Georgia since 2017 always agree and never dissent the decisions of the clan.
4. The government finally gave up with the creation of the special commission on miscarriages of justice, the functioning of which would result in the identification and punishment of those judges who were grossly distorting justice in 2005-2012
5. The power to select Supreme Court justices was delegated from President of Georgia to High Council of Justice (Constitutional Amendments of 2017).

In 2017, the two clans existing in the judiciary merged, which ended up in the resignation of Valeri Tsertsvadze from presidency of the court of appeal and the appointment of Mikhail Chinchaladze on his place. Thus, the active supporters of Valeri Chinchaladze now appear together with the clan and moreover, some of them were even proposed among the Supreme Court candidates presented by HCOJ to the Georgian Parliament in 2018.

At the same time, as it was noted above, the clan found itself in possession of important leverages for the administration of judicial system and it started to clean judiciary from its opponents and to appoint its supporter judges. This was expressed inter alia in following

1. The alternative association of judges – the Unity of Judges was disbanded (The association formally exists but it no longer has acting judges as members).
2. While the term of office of almost totality of judges expired in 2013-2018 and three years probation period was enacted, also considering the fact that the clan was already in control of HCOJ, the clan expelled from the judiciary the judges who were openly or secretly opposed to the clan using different means including illegal dismissals (such as the case of Tbilisi City Court Chairman Mamuka Akhvlediani¹⁴, or refusal for reappointment¹⁵, also compulsion to resign (such

as public statement of former Chief Justice-Nino Gvenetadze that she was the victim of violence, after which she has voluntarily resigned)

3. Many supporters of the clan and the leader of the clan were reappointed for life, often against the public opinion (such as the lifetime appointment of Levan Murusidze and Mikhail Chinchaladze).
4. Before 2012, significant part of acting court presidents were reappointed to administrative positions, which implied that the clan retained the management tools and communication channels that they had prior to 2012.
5. Active supporters of the clan were appointed in appellate court by way of accelerated procedures, which resulted in taking control of court of appeal by the clan.
6. The court system was closed and became inaccessible for the outsiders¹⁶

As to the impact of clan-based government on the outcome of individual cases, while on the one hand the statistical picture (including the acquittal rates) significantly improved compared to that existing prior to 2012. On the other side, the way in which the high profile cases were decided by the court (such as Rustavi 2 case or “cables” case) created the perception whenever there is strong governmental interest in a specific case, the clan can always produce the outcome of the case in favor of that interest.

The unification of judges in support of the clan may be explained by various factors, among them by fear of losing the job, as well as by career aspirations: on the one hand, before 2012 the judges perceived the HCOJ as repressive body, therefore, after the change of government they elected the most discredited colleagues¹⁷, who would not have moral right to punish their colleagues for the past misdeeds. On the other hand, the members of the clan were promising to the judges the full immunity, lifetime appointment and other privileges¹⁸ (as opposed to the civil society, political parties and even the government who were threatening judges with liability, dismissal, revelation of their past misconduct and etc). Thus, judicial self government had adverse effect on Georgian judiciary. Instead of electing a progressive team, which would care about rehabilitation of Georgian justice system and restoration of public trust, the judges elected those who were promising full immunity, avoidance of liability, lifetime appointment, promotion and who started to fulfill those promises.

Thus, after the Georgian dream came to power, the clan could satisfy two significant interest – one from the inside and one from the outside: on the one hand, it has complied with the request of judges on immunity and reappointment and on the other hand the request from the government on taking control over judiciary.

Things that happened in December 2018 and thereafter.

In December 2018, High Council of Georgia presented to the Parliament 10 member list to be appointed as Supreme Court Justices drafted arbitrarily, in the absence of any criteria or procedures. The list contained the names of members of the clan and its supporters¹⁹. The list caused wide public concern. The chairman of legal affairs committee of parliament resigned and Parliament has suspended the consideration of this list.

After the presentation of this list, the civil society and political parties (except for ruling party) reached a wide consensus that the judicial reform in Georgia is in deadlock. That the clan dominating the judiciary is undermining the independence and stability of the entire justice system.

In January 2019, the non governmental organizations and citizens of Georgia have signed a manifesto requesting the resignation of judicial and several non judicial members of HCOJ²⁰, while in February 2019, similar petition was drafted in cooperation with political parties.

As the result of civil activity, all 10 candidates applied to the parliament requesting the dismissal of their candidacy.

In February 2019, part of MPs of Georgian dream have presented a legislative draft aiming at the suspension of lifetime appointment of judges before 2024. The failure of this draft law has led former chairperson of legal committee of Parliament Eka Beselia and the initiating MP s to leave the ruling party.

From January 2019, the ruling party has started to work on the procedure and criteria for the appointment of Supreme Court judges. The draft amendments presented by ruling party envisaged wide discretion for the High Council of Justice and thus triggered severe criticism from civil society, political parties and international organizations. In parallel, several legislative drafts were proposed aiming to minimize the role of HCOJ in the selection of Supreme Court judges or give leverage to individual members, also to increase transparency and accountability in decision making process.

In February 2019, the Free Democrats presented a new concept of judicial reform, which envisages the replacement of HCOJ by temporary State body, the members of which will be appointed by Parliament of Georgia.

In sum, it must be said that Georgian Judiciary is facing of serious crisis. From 2013 till now, the clan-based government is gaining a strong foothold. This dominating group is stacking Georgian judiciary with its supporters and continuously taking over high hierarchical positions (this time it's the turn of the Supreme Court). The judiciary cannot manage to recover from the past and to carry out a sound dialogue with the society.

One of the main causes of the failure of judicial reform in 2012 was the absence of comprehensive study of the systemic problems existing in courts and their causes, while a thorough diagnosis would enable a good planning and implementation of the reform.

We believe that today the resignation of the clan is almost a unique solution of this situation. In case of contrary, the interference from the outside seems inevitable, the purpose of which will be to terminate clan-based government by way of legislative intervention.

On the other side, it is necessary to evaluate the activity of the clan in the judicial system and its outcome through an official evaluation (resolution adopted by judicial conference or Parliament) which will prevent the repetition of the same mistake, which happened in the recent past. A working group created by wide consensus should be created, which will discuss the crisis existing in the judiciary and possible remedies.

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Article 42 of the Constitution

Chair of the Board

¹ See e.g. the interview of Speaker of Parliament – Irakli Kobakhidze “Before 2012, the judicial system was useless, the judges were doing what they were told by Minister of Justice Adeishvili”

<https://marshalpress.ge/archives/218424> ‘ Acting Minister of Justice also corroborates that the courts were under the influence of Valeri Tsertsvadze and Mikhail Chinchaladze: <https://for.ge/view/18992/Tea-wulukiani-sazogadoebam-kargad-unda-gaigos-rom-am-xalxs-aTavisuflebs-kublaSvilis-sasamarTlo-da-ara-prokuratura.html>

² See inter alia: Article 42 of the Constitution, Factors Impeding the Independence of the Judiciary, Survey of Practicing Lawyers <https://article42.ge/media/1001447/2019/01/09/df8851f838d9e9c59df59bc5630f41a9.pdf> ;

Transparency International, State of Georgian Judiciary - 2012-2016,

https://www.transparency.ge/sites/default/files/post_attachments/sasamartlo_sistemis_mdgomareoba_2012-2016_0.pdf; Transparency International, Corruption Risks in the Judicial System, p. 28.

https://www.transparency.ge/sites/default/files/corruption_risks-geo.pdf

³ See for example the interview of former Tbilisi City Court Chairperson <http://pirveliradio.ge/?newsid=69981>;

The acting Minister of Justice also corroborates that the judiciary was under control of Chinchaladze and Tsertsvadze: <https://for.ge/view/18992/Tea-wulukiani-sazogadoebam-kargad-unda-gaigos-rom-am-xalxs-aTavisuflebs-kublaSvilis-sasamarTlo-da-ara-prokuratura.html> ; See also the statement of former Chairman of GBA, Zaza Khatishvili: „ You shall probably ask yourself through whom Zurab Adeishvili was managing the judiciary under previous government, who was accepting political assignments from the outside, transferring to judges and ensuring execution. Georgian Dream could not name any such person since 2012. I think such person was Michail Chinchaladze, who was governing judiciary through clan of court presidents“.

<https://www.timer.ge/zaza-khatishvili-thanamemamuleno-vighupebith/>

⁴ See e.g. the interview of Speaker of Parliament – Irakli Kobakhidze “before 2012, the judicial system was useless, the judges were doing what they were told by Minister of Justice Adeishvili”

<https://marshalpress.ge/archives/218424> <https://marshalpress.ge/archives/218424>

⁵ See for example the research carried by Article 42 of the Constitution: “Opinion survey of legal practitioners related to the factors affecting judicial independence”

<https://article42.ge/media/1001447/2019/01/09/df8851f838d9e9c59df59bc5630f41a9.pdf> . See e.g. the interview of Speaker of Parliament – Irakli Kobakhidze “the judges were massively distorting justice”

<https://marshalpress.ge/archives/218424>

⁶ See for example, Article 42 of the Constitution: “Opinion survey of legal practitioners related to the factors affecting judicial independence”

<https://article42.ge/media/1001447/2019/01/09/df8851f838d9e9c59df59bc5630f41a9.pdf>

⁷ See *ibid*.

⁸ See *ibid*

⁹ See January 13, 2013 amendment in criminal procedure code

¹⁰ See more detailed analysis of legislative changes “Transparency International – State of Judiciary in - 2012-2016,

https://www.transparency.ge/sites/default/files/post_attachments/sasamartlo_sistemis_mdgomareoba_2012-2016_0.pdf

¹¹ See the television interview with the former Prime Minister Bidzina Ivanishvili - „Through the court system we could not get imprisonment for the real offenders“ https://www.youtube.com/watch?v=I_KsyRpHjyA

¹² See the statement of Minister of Justice Tea Tsulukiani - „The public should realize that these people are liberated by the Kublashvili court and not by the Prosecutors Office.“. <https://for.ge/view/18992/Tea-wulukiani-sazogadoebam-kargad-unda-gaigos-rom-am-xalxs-aTavisuflebs-kublaSvilis-sasamarTlo-da-ara-prokuratura.html> ; Bidzina Ivanishvili: The judiciary under influence was trying to oppose and obstruct the government in the first stage“ - https://www.youtube.com/watch?v=I_KsyRpHjyA&feature=youtu.be&t=101

¹³ See also <http://netgazeti.ge/news/142288/> ; Transparency International, Corruption risks in the judiciary, p.,

28. https://www.transparency.ge/sites/default/files/corruption_risks-geo.pdf

¹⁴ See e.g. Ombudsman “ HCOJ has dismissed Mamuka Akhvlediani unlawfully” <http://netgazeti.ge/law/126161/>

¹⁵ See Trasparency international, corruption risks in the judiciary, p. 39.

https://www.transparency.ge/sites/default/files/corruption_risks-geo.pdf

¹⁶ See e.g. the Interview with Member of HCOJ Nazi Janezashvili, <https://1tv.ge/news/nazi-janezashvili-tu-kandidatura-justiciis-sabchom-unda-waradginos-msjeloba-sabchos-skhdomez-unda-gaimartos-da-ara-restoranshi-chinchaladzis-kabinetshi-an-sadme-skhvagan/>

¹⁷ See <http://geworld.ge/ge/5215/> ; See https://www.transparency.ge/sites/default/files/corruption_risks-geo.pdf

¹⁸ See the interview with former judge “we were giving orders and you were executing, so if we win, we shall protect you” See transparency international, Corruption risks in Georgian Judiciary, p. 24.

https://www.transparency.ge/sites/default/files/corruption_risks-geo.pdf

¹⁹ 10 member list was agreed only among judicial members of HCOJ, presented as a surprise for non judicial members on December 24 and approved on the same day.

²⁰ See English translation attached