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GEORGIA**

უფლებები საქართველო

MONITORING ACTIVITIES OF THE INDEPENDENT INSPECTOR AND THE HIGH COUNCIL OF JUSTICE IN DISCIPLINARY PROCEEDINGS

**Report and
Recommendations**

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Summary

This project, Monitoring Independent Inspector, and the High Council of Justice in Disciplinary Proceedings, funded by the East-West Management Institute's Programme (Promoting Rule of Law in Georgia), has been implemented since April 2020. The project envisages a review of disciplinary legislation and practice, analysis of their compliance with International standards, identification of existing shortcomings and development of relevant recommendations, as well as strategic litigation in the disciplinary process.

An independent and strong judiciary is a necessary precondition for the democratic development of a country, the protection of human rights and the rule of law. In a democratic society, the independence of the judiciary must be balanced by its accountability. The system of judicial disciplinary liability is an important part of the court's accountability.

The system of disciplinary proceedings of judges must meet the following basic criteria:¹

- » must determine in advance the unacceptable action of a judge; this action must be foreseeable both for the judge and the public;
- » respond effectively to the public's claims against the judge and return a reasoned response to the public;
- » protect the rights of judges;
- » be transparent and public within the framework of the interests of disciplinary proceedings, and ensure the protection of the rights of judges and the public; and
- » establish a fair balance between the independence of the judiciary and accountability.

Until 2012, the disciplinary system of the common courts was completely held in camera. The decisions of the Disciplinary Board were not published, which was why judges and the public had no information about what misconduct was meant by the broad definitions offered by the law (e.g., improper performance of duty). The Disciplinary body - the High Council of Justice formed the Disciplinary Board, which was why there was no formal mechanism for the independent review of disciplinary cases, and there was no specialised body with the authority to investigate disciplinary cases, which had even formal guarantees of independence.

Until 2012, the disciplinary system (as well as other administrative tools) was often used to intimidate and subjugate politically disobedient judges.² The institution of a reporting letter in the High Council of Justice was used to identify undesirable judges, detect their violations, and punish them.³

¹ See, the Need to Introduce Independent Inspector in the common court system, proposed changes and clarification. [Http://bit.ly/3oiLrqR](http://bit.ly/3oiLrqR)

² See, Art. 42 of the Constitution, Research of the opinion of Practicing Lawyers on the Factors Undermining Judicial Independence in 20062-12.

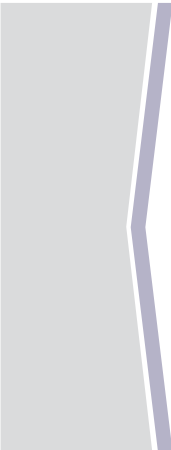
³ See, the Need to Introduce Independent Inspector in the common court system, proposed changes and clarification. [Http://bit.ly/3oiLrqR](http://bit.ly/3oiLrqR)

Although the Venice Commission recommended on 19 March 2007 to remove gross violations of the law from the grounds of disciplinary misconduct, this legislative innovation was implemented only with the 27 March 2012 amendments. That is, it took 5 years for the legislature to remove from the law a vague and widely used norm that threatened the independence of judges.

Between 2005 and 2012, the Disciplinary Board reviewed more than 300 disciplinary cases. 206 judges were disciplined. Out of these, 37 judges were dismissed, 29 were severely reprimanded, 59 judges were reprimanded, 58 judges were warned, and 33 judges were given a private recommendation letter. In many cases, disciplinary action was taken based on formal violations which did not have any detrimental effect on either the parties or the authority of the court. Threats of disciplinary action were sometimes used to force a judge to resign “voluntarily”. In this way, 14 judges were dismissed in past years.⁴

The Georgian Dream, which came to power in 2012, announced a large-scale judicial reform. Changes related to judicial reform in the form of waves of justice reform were implemented and covered judicial administration in many areas such as the formation of the High Council of Justice, the rules of procedure of the Conference of Judges, the rules of appointment of judges, disciplinary responsibility and transfer.

Among the significant legislative changes that have taken place, the following should be specially mentioned:

- 
- » Establishment of an independent body for reviewing disciplinary cases - a disciplinary board;
 - » Introduction of the Institution of Independent Inspector;
 - » Clarification of the burden of proof and the standard of proof;
 - » Increase in the rights of judges in disciplinary proceedings;
 - » Adoption of a detailed list of disciplinary misconduct; and
 - » Publication of the decisions of the Disciplinary Board and the High Council of Justice.

Despite these changes, the disciplinary system still failed to gain the public’s trust. Respondents (lawyers) interviewed by the project often indicate that they do not trust the disciplinary system, which is why many of them refrain from filing a disciplinary complaint.

The two most common complaints filed with the Independent Inspector relate to improper discharge of the judge’s duties and delays in litigation. The first ground was removed from the list of violations provided by the law in the 2019 legislative amendment, while the second ground is practically no longer punishable. Delays in processing cases due to judicial overload is considered excusable and the vast majority of judges against whom a complaint is lodged on this basis are released from disciplinary liability.

According to some of the respondents interviewed by the project, mistrust towards the disciplinary system is also caused by the informal governance in the judiciary, due to which all the important decisions within the system are made by a narrow group of people behind closed

4 See- Practice and statistics of Disciplinary Board of Common Courts of Georgia dcj.court.ge.

doors; these decisions are formalized by formal mechanisms only later.⁵

Statistically, there is a clear difference between the disciplinary systems in place before 2012 and after 2012. While 206 judges were disciplined in 2004-2012, only 9 judges were disciplined in 2013-2020.

In 2014-15, the Disciplinary Board of Judges of the common courts did not consider any cases. Since 2012, the Disciplinary Board has reviewed 19 cases and only 9 judges out of them have been found guilty of disciplinary misconduct.

Prior to 2019, there was no change in the grounds for disciplinary liability, that could justify the statistical difference between the periods before 2012 and the period after 2012 (except for removal for gross violation of law in 2012, which was identical to improper performance of duties). This difference can only be explained by the change in political power. If before 2012 the disciplinary system was too strict and focused on punishing judges, the system became too liberal after 2012, which in some cases also raises suspicions of protectionism.

1. Project Methodology

During the research, national legislation and practice were studied and compared with International standards / advanced systems abroad, along with the opinions of users of the disciplinary system and disciplinary statistics.

More specifically, the study was conducted in the following areas:

1. Review of Legislative Changes in Disciplinary Proceedings Since 2012

The project examined the major changes that have taken place in disciplinary legislation since 2012 and assessed their impact on disciplinary proceedings.

2. Compliance of Georgian Legislation with the Conclusions and Recommendations Submitted Since 2012

The project studied and analysed the recommendations submitted by international and national organizations after 2012, which were compared with the legislative changes implemented from 2012 to date.

3. Compliance of Georgian Legislation with International Standards (International Documents of Advisory Nature)

The project reviewed the compliance of Georgian legislation with international documents of advisory nature, as well as the legislation of advanced countries.

4. Comparison of Georgian Legislation with the Disciplinary Systems of Foreign Countries

⁵ As to the survey conducted by the research see below

This section discusses Georgian legislation against the background of the advanced disciplinary systems of foreign countries.

5. Analysis and Comparison

The project analysed the disciplinary practices and decisions of the disciplinary bodies (Independent Inspector, High Council of Justice, Disciplinary Board and Disciplinary Chamber) of advanced countries abroad were studied.

6. Evaluation of Disciplinary Practice Against the Standards Set by the European Court of Human Rights

The project examined disciplinary practice within the standards set by the European Court of Human Rights.

7. Deficiencies in Disciplinary Proceedings - Results of Surveys Conducted with Practising Lawyers

Surveys were conducted through focus groups, as well as questionnaires and individual interviews with the stakeholders of the justice system, viz., practising lawyers, judges, members of parliament, non-governmental organizations and the Public Defender.

8. Disciplinary Statistics

Disciplinary statistics were reviewed and compared with advanced countries (US and France)

9. Disciplinary Complaints

After consulting with the project beneficiaries, the project prepared 5 disciplinary complaints which were submitted to the Independent Inspector.

2. Shortcomings and Recommendations of the Disciplinary System

This chapter will discuss the legislative and practical recommendations of the project in terms of both the grounds for disciplinary liability and disciplinary proceedings. The presented shortcomings are divided into regulatory and practical shortcomings.

2.1. Regulatory Gaps

2.1.1. Goals of Disciplinary Proceedings and Disciplinary Sanction

Disciplinary legislation does not describe the purposes of disciplinary proceedings and the imposition of disciplinary sanctions. The formulation of goals has not only theoretical but also

practical significance. Disciplinary proceedings and the imposition of disciplinary sanctions must be carried out in accordance with these objectives.

➤ Recommendation: The Organic Law on Common Courts should define the purposes of disciplinary proceedings and disciplinary action.⁶

2.1.2. Legislative Formulation of the Intent and Negligence

According to the Organic Law on Common Courts, the intent and negligence of disciplinary misconduct is tied to the damage caused by the misconduct and does not take into account the fact that a part of the disciplinary misconduct contains formal definitions (without result).

➤ Recommendation: The legislative formula for intention/negligence should be changed to reflect both material (requiring result) and formal disciplinary misconduct.

2.1.3. An Incomplete List of Disciplinary Violations

The Organic Law on Common Courts provides an exhaustive list of disciplinary violations by judges. However, this list is incomplete and does not provide some of the offences, which are recognized in the legal systems of the world's advanced countries

Recommendations

New disciplinary offences should be added to the new list of violations under international experience, in particular the following:

- » The clear bias of a judge in the performance of duties which violates the duty to Impartiality or evokes such perception in the eyes of an objective observer;
- » The use of a position of authority by a judge to gain an unlawful advantage for oneself or another;
- » Knowingly providing false information in official documents and public statements; and
- » Misuse of official resources for personal purposes, thereby harming official interests.

2.1.4. Case Delay and Violation of Deadlines


The wording given in the law, by which the delay of the proceedings is related only to the violation of the procedural deadlines, is incorrect since the delay of the proceedings can be done even in observing the statutory deadline for the consideration of the case.

➤ Recommendation: Change the wording of case delay as misconduct so that it is not limited to the violation of the procedural deadline.

⁶ Goals of the disciplinary proceedings can be formulated as follows: identification of disciplinary violations, timely and fair resolution, adequate qualification and imposition of adequate sentence. Goals of disciplinary sentence can be described as follows: goal of disciplinary punishment is not to retaliate against the judge but to protect integrity and reliability of the judiciary, prevent future violations from the judges.


2.1.5.Lack of Clarifications on Disciplinary Misconduct

Although the legislation includes a detailed list of disciplinary offences, many of these violations are general and require clarification. The disciplinary practice is scarce and there is no official source for the definition of many misconducts.

 Recommendation: Commentary for disciplinary violations should be created to explain each disciplinary misconduct and provide examples.


2.1.6.Informing the Author of the Disciplinary Complaint About the Refusal to Initiate a Case

Under Article 75¹² of the Organic Law on Common Courts, the Independent Inspector in some cases may refuse to initiate disciplinary proceedings, although the law does not say anything about sending this decision to the complainant.

 Recommendation: The complainant should be notified of the refusal of the Independent Inspector to initiate disciplinary proceedings.


2.1.7.The Right of a Judge to Request Evidence in the Course of a Preliminary Examination and Investigation of a Disciplinary Case

During the preliminary examination and investigation of a disciplinary case, the judge has no right to petition the Independent Inspector to request documents and other evidence from the relevant institutions.

 Recommendation: The judge should be able to petition the Independent Inspector to request evidence.


2.1.8.Number of Votes Required to Initiate Disciplinary Proceedings in the High Council of Justice

The Organic Law on Common Courts provides for a high quorum (2/3 of the full membership of the High Council of Justice) to initiate disciplinary proceedings against a judge. In some cases, when there are obvious signs of disciplinary misconduct in a judge's action, the number of votes may be artificially reduced (some members may abstain from voting in favour), in which case the High Council of Justice no longer substantiates the decision.

 Recommendation: The number of votes required to initiate disciplinary proceedings against a judge should be changed. Prosecution should be possible by a simple majority of the members of the board.

2.1.9.Terms of Disciplinary Proceedings

Although the terms of disciplinary proceedings in the High Council of Justice are prescribed by law, these deadlines are regularly violated, with no legal consequences. It is necessary to link the violation of these deadlines to the legal outcome and terminate the disciplinary proceedings in case of violation of the deadlines.


 Recommendation: Violation of deadlines during the investigation and preliminary examination of a disciplinary case should result in the termination of the disci-

plinary case.

2.1.10. Competition for the Selection of Independent Inspector

Competition for the selection of Independent Inspector is closed and the identities of the participants are not known to the public, which does not contribute to the establishment of public trust towards the institution;


The Independent Inspector is currently elected by the High Council of Justice by a majority vote.

 Recommendation: The competition for the Independent Inspector should be open. Candidates' CVs should be made public in advance.

It is advisable to elect the Independent Inspector by 2/3 of the votes of the members of the High Council of Justice.


2.1.11. Publicity of Hearing

A disciplinary case is essentially heard in a closed session, although a judge concerned may request the publicity of sessions of the Disciplinary Board as well as the High Council of Justice.

 Recommendation: A disciplinary case should be heard in an open hearing, which may be closed at the request of a judge.


2.1.12. Publication of Disciplinary Decisions

The current legislation does not provide for the publication of the intermediate findings of the Independent Inspector and the decisions of the High Council of Justice (on the disciplinary action of a judge), which is essential for the transparency of the disciplinary system.

 Recommendation: The law should make it mandatory to publish the intermediate findings of the Independent Inspector and the High Council of Justice (indictment of the judge) with anonymized personal data.


2.1.13. Delay of Proceedings (Violation of Procedural Deadlines for Inexcusable Reasons)

Deadlines for reviewing cases established by civil procedural law (1 month, 2 months and sometimes 5 months) are in some cases unrealistic and cannot be fully complied with.

 Recommendation: The deadlines set by the procedural legislation should be revised and made realistic.

2.1.14. Number of Votes Required for a Decision in the Disciplinary Board

A 5-member panel is authorized to make a decision by a majority of those present at the hearing, which is problematic as it means that the Disciplinary Board can take a decision by at least 2 votes.

 Recommendation: The decision of the Disciplinary Board of Judges of the Com-

mon Courts should be made by at least three votes.

2.2. Practical Shortcomings

2.2.1. Calculating Deadlines When Transferring a Case from One Judge to Another

When transferring from one judge to another, the High Council of Justice re-starts the counting of the duration of proceedings, which is not a correct interpretation of the law. The time limits for hearing cases under procedural law are tied not to the judge but to the case.

▶ Recommendation: When transferring a case from one judge to another, the time limit for hearing a case established by the procedural law should not start all over again to assess disciplinary misconduct.

2.2.2. Violation of Deadlines

Although the law strictly sets deadlines for the preliminary examination and investigation of disciplinary cases, the commencement of disciplinary proceedings against a judge and the prosecution of a judge, these deadlines are systematically violated.

▶ Recommendation: The Independent Inspector and the High Council of Justice should adhere to the deadlines for the preliminary examination, investigation and decision-making in a disciplinary case.

2.2.3. Termination of Disciplinary Proceedings Due to the Expiration of the Statute of Limitations

In two cases, where the European Court of Human Rights found a violation of the right to a fair trial in disciplinary proceedings, the persons dismissed from the disciplinary proceedings appealed to the Disciplinary Board and the Disciplinary Chamber. However, the disciplinary bodies did not consider their case on the merits but terminated them due to the expiration of the statute of limitations. The project considers that the statute of limitations for disciplinary proceedings is a guarantee created to protect a judge, which should not be used against a judge. Accordingly, the bodies hearing the disciplinary cases must consider these cases on the merits and make the appropriate decision.

▶ Recommendation: A disciplinary case should not be terminated due to the expiration of the statute of limitations if the judge objects.

2.2.4. Wrong Practice of Partial Termination of Disciplinary Cases


If a disciplinary complaint concerns the legality of a court decision and other disciplinary misconduct at the same time, the Independent Inspector divides the case in half and terminates a part of the case for the reason of refusal to control the legality of the decision. Such a division of the disciplinary case is inadmissible.

▶ Recommendation: If a disciplinary complaint concerns the legality of a court decision and other disciplinary misconduct at the same time, the Independent Inspector should not partially terminate the case and, after preparing a conclusion on the

entire case, refer the case to the High Council of Justice.


2.2.5. The Position of Independent Inspector in the Decisions of the HCOJ

In most cases, in the decisions of the HCOJ, the position of the judge, as well as the position of the Independent Inspector, is not clear. Therefore, it is impossible to understand whether the High Council of Justice agreed or disagreed with the position of the Independent Inspector.

 Recommendation: The position of the Independent Inspector should always be clear in the decisions of the High Council of Justice.


2.2.6. Substantiation of the Decisions of the High Council of Justice

A number of decisions of the High Council of Justice are not properly substantiated; the appellant's arguments are not shown or not answered. Part of the cases was terminated without any justification (due to lack of quorum). It is obvious that the absence of a quorum in these cases is used as a mechanism to terminate a disciplinary case without justification.

 Recommendation: The quality of substantiation of the decisions of the High Council of Justice should be increased. The applicant's arguments should be clearly shown, and these arguments should be answered.

2.2.7. Termination of Disciplinary Proceedings in the Absence of Significant Circumstances.

In some cases, disciplinary proceedings were terminated on the grounds that the circumstances relevant to the case had not been established, even though it had been possible to establish them through a proper investigation.

 Recommendation: A disciplinary case should not be terminated on the grounds that the circumstances relevant to the case have not been established if such circumstances can be established by an investigation.


2.2.8. The Reasoning of Disciplinary Sanction

The reasoning behind disciplinary sanction offered by the board is often stereotypical and the criteria used are not discussed in detail.

 Recommendation: Disciplinary sanctions should be duly substantiated.

2.2.9. Disciplinary Statistics

Disciplinary information published by bodies within the system of common courts (Independent Inspector, High Council of Justice, Disciplinary Board, Disciplinary Chamber) is incomplete.

 Recommendation: It is important to collect and publish all the necessary data that give a picture of the work of the disciplinary system, its effectiveness and timeliness.

2.2.10. Awareness of New Disciplinary Misconduct

Surveys have shown that the awareness of the new list of disciplinary offences among lawyers is low.

➤ Recommendation: Conduct training for lawyers on new grounds for the disciplinary liability of judges and the disciplinary process.

Additional Recommendations

Temporary suspension of a judge as a form of disciplinary sanction should be added to the list of disciplinary sanctions;

Considering the foreign experience, the factors to be taken into account when imposing the disciplinary sanction may additionally include the duration of the misconduct, the judge's past performance, the judge's acknowledgement of misconduct, and his/her sense of responsibility and cooperation with disciplinary bodies;

It is necessary to determine by law that the burden of proof in the disciplinary process rests with the High Council of Justice;

An advisory body should be set up, with which judges will be able to receive free and anonymous consultation about whether an action constitutes a disciplinary offence;

A hotline should be set up in the office of the Independent Inspector, where citizens can consult personally or anonymously on the issues of disciplinary responsibility of judges; and

A disciplinary case management program should be established, which will have the functions of electronically uploading materials, recording case movements, and finding and producing statistics. This program should also record the disciplinary appeal to the Supreme Court and its results.

3.A Brief Overview of Changes in Disciplinary Legislation from 2012 to Date

In 2013-2019, several stages of judicial reform were implemented in the field of justice, which are also called the waves of judicial reform. The changes also affected the field of disciplinary proceedings. The most significant changes were made on 1 May 2013, 8 February 2017 and 13 December 2019 (first, third and fourth waves of judicial reform). It is noteworthy that the 20 April 2018 amendment repealed the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of the Common Courts of Georgia, and its norms were added to the Organic Law on Common Courts.

Amendments to the disciplinary legislation in 2013-2019 (a detailed overview can be found in the appendix) introduced many important innovations in the disciplinary system, in particular, increased the level of awareness of the complainant, changed the rules of composition of the Disciplinary Board and the Disciplinary Board became independent from the HCOJ. These amendments removed the right of court presidents to initiate disciplinary proceedings, the rights of judges involved in disciplinary proceedings have been increased and specified, the power to pre-examine and investigate disciplinary cases has been transferred from the Secretary of the High Council of Justice to the Independent Inspector, the awareness of the author of the complaint has been increased, the standard for initiating disciplinary prosecution, indicting and convicting a judge has been specified, a new list of disciplinary misconduct was adopted, (failure to perform judicial duties due to non-disciplinary liability or improper performance of disciplinary liability was removed), statute liability for disciplinary offences has been reduced from 3 to five years and a new punishment - deduction from a judge's salary - was introduced.

Overall, the implemented changes should be positively evaluated, taking into account several reservations:

- A. The issue of the publicity of the Independent Inspector selection sessions, the public's access to the information about the participants in a competition were not resolved. Consequently, the selection of the Independent Inspector will take place in a closed session; the identities and CVs of the candidates are not publicly available;
- B. A high quorum (2/3 of the votes) was set for charging a judge, which threatens the effectiveness of the proceedings;⁷
- C. The Independent Inspector is appointed to the position by a simple majority of votes;
- D. Improper performance of the duties of a judge was removed from the list of disciplinary violations (instead of clarifying this misconduct). This leaves a certain vacuum in terms of impunity for a wide range of misconduct of judges (so-called legal error plus). However, given that the judiciary is currently run by an influential group of judges, which has all the administrative leverage and there is a danger of their improper use, it is not yet expedient to restore this mechanism;

E. The list of disciplinary misconduct is not exhaustive, and some disciplinary misconduct may be added to this list (see recommendations below);

F. While, according to the new Constitution, dismissal as a disciplinary sanction is not used in the Supreme Court of Georgia, the Organic Law on Common courts retains this possibility (Article 75⁷²). Accordingly, the mentioned norm should be removed;

G. The disciplinary legislation does not contain the purposes of disciplinary proceedings and the imposition of disciplinary sanctions. The formulation of goals has not only theoretical but also practical significance. Disciplinary proceedings and the imposition of disciplinary sanctions must be carried out in accordance with these objectives;

H. The amendments of 13 December 2019 to the Organic Law on Common Courts explained intent and negligence in committing disciplinary misconduct,⁸ although it should be noted that a significant part of the so-called disciplinary misconduct are formal violations and do not require damages at all.⁹ Therefore, it is important to change the wording of the law so that it also takes into account the formal misconduct;¹⁰

I. Although the statute of limitations for disciplinary action has been reduced from 5 to 3 years, according to the Organic Law on Common Courts, the 5-year period for imposing disciplinary liability is retained in Article 75 (35), which needs to be amended.

⁸ In particular, see 75¹, paragraph 4 and paragraph 5.

⁴ A deliberate disciplinary misconduct is an act of which the judge was aware of the possibility of causing harm through his/her action.

⁵ A disciplinary misconduct shall be considered as negligent if the judge did not take into account the possibility of causing harm by his/her action, although he/she should have taken it into account and could have taken it into account.

⁹ Examples include a judge violating a time limit set by law for an inexcusable reason, a judge refusing to dismiss a case, a judge joining a political party, and so on.

¹⁰ Intentional disciplinary misconduct is considered to be an act during which the judge realized the illegality of his/her action and / or the possibility of damages.

⁵ A disciplinary misconduct shall be considered as negligent, if the judge did not take into account the lawfulness of his/her action and / or the possibility of harm resulting from his/her action, although he/she should have taken it into account and could have taken it into account.

4. Judges' Disciplinary Liability and Compliance with International Documents of Advisory Nature (Recommendations, Conclusions and Guidelines)

In this part of the report, we shall discuss the compliance of Georgian legislation with universal and regional instruments of advisory nature (recommendations, conclusions, guidelines).

In the last 30-40 years, many international documents were dedicated to judicial independence and adopted by international organisations (UN, OSCE, COE) or international judicial associations. A majority of these documents also concern grounds of disciplinary liability, disciplinary sanctions and principles of their application as well as the main aspects of the disciplinary process. These documents are indeed advisory, but their provisions directly or indirectly derive from the principle of a fair trial, which is recognized by the Constitution of Georgia and international human rights law.

Documents of international nature on the issues of judicial independence and judicial discipline can be divided into two groups, namely, into universal and regional instruments.

Universal Instruments:

- » The Universal Charter of Judges adopted by the International Association of Judges in 1999. (Updated in 2017);¹¹
- » Basic Principles of Judicial Independence, adopted by the 7th Congress of the United Nations on Crime Prevention and Treatment of Criminals, 1985;¹²
- » Draft Principles for the Independence of the Judiciary, 1981 (Syracuse Principles);¹³ and
- » Measures for the effective implementation of the Bangalore Judicial Conduct Principles, developed by the Judiciary Integrity Group, 2010.¹⁴

Regional Instruments:

Council of Europe Judges Advisory Council, N.J. 3 Opinions on the rules and principles governing the professional conduct of judges, in particular ethics, inappropriate conduct and impartiality, 2002;¹⁵

- » CCJE Opinion no. 10 Opinion “Council for Judiciary in the Service of Society”;¹⁶
- » Magna Carta of Judges (Fundamental Principles) adopted by the European Council in 2010, the Judicial Advisory;¹⁷
- » Council of Justice of the European Network, disciplinary responsibility of judges and disciplinary proceedings minimum standards, 2015;¹⁸
- » Council of Europe Recommendation CM / REC 2010-12 on the independence, efficiency and responsibilities of judges;¹⁹
- » OSCE ODIHR, Standards and Best Practice in Judicial Disciplinary Responsibility, 2018;²⁰
- » OSCE ODIHR and Max Planck Research Group Recommendations on Judicial Independence, Kyiv, 2010;²¹ and
- » Istanbul Declaration on judicial transparency and measures to be implemented, 2018 (adopted by the Presidents of the Supreme Courts of the Asian Region).²²

Conclusions of the Venice Commission

- » The Venice Commission and the Council of Europe Directorate of Human Rights on the Law on Disciplinary Liability of Judges in Moldova (2014);²³
- » Venice Commission Conclusion on the Law of Bulgaria on the Judicial System, 2017;²⁴
- » Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Council of Europe on the Draft Amendment to the Law on Disciplinary Responsibility and Disciplinary Proceedings of Judges of the Common Courts of Georgia (2014) https://www.venice.coe.int/webforms/documents/?pdf=CDL_2014_032-e ; and
- » Conclusion of the Venice Commission on the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of the Common Courts (2007) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)009-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)009-e).

¹⁶ <https://www.coe.int/en/web/ccje/opinion-n-10-on-council-for-the-judiciary-in-the-service-of-society>.

¹⁷ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063e431>.

¹⁸ https://www.ency.eu/images/stories/pdf/GA/Hague/ency_report_minimum_standards_v_adopted_ga_june_2015.pdf.

The analysis of the legislation will be implemented in the following thematic sequence: Each topic will be discussed in the light of International standards:

- » Basics of disciplinary liability;
- » Assessment of the judge's guilt;
- » The need for an advisory body;
- » Deadlines for disciplinary proceedings;
- » The right to file a disciplinary complaint;
- » The applicant's right to information;
- » The limitation period for disciplinary liability;
- » The body authorized to initiate disciplinary proceedings;
- » Consideration of manifestly unsubstantiated complaints;
- » Initiation of disciplinary proceedings;
- » Suspension of a judge;
- » Restriction of the promotion of a judge;
- » Confidential nature of disciplinary proceedings;
- » Investigating a disciplinary case;
- » Judge's rights in the disciplinary proceedings;
- » Substantiation of the decisions of the High Council of Justice;
- » Disciplinary proceedings, the body that reviews the case on the merits;
- » Publicity of disciplinary sessions;
- » Substantiation of the decision of the Disciplinary Board;
- » Disciplinary sanctions;
- » Reimbursement of disciplinary proceedings costs.

An International standard will be discussed for each topic, which is given by the above-mentioned instruments, and then the compliance of Georgian legislation with this standard will be discussed.

4.1. Grounds for Disciplinary Liability;

4.1.1. Legal definition of Disciplinary Misconduct.

4.1.2. International Standard.

According to the UN Basic Principles on the Independence of the Judiciary, the disciplinary responsibility of a judge should be based on a pre-established standard of judicial conduct.²⁵

According to the Magna Carta of Judges (of CCJE), the list of disciplinary misconduct should be determined by law or by a fundamental charter adopted by judges.²⁶

4.1.3. Georgian Legislation

Georgian legislation provides for a list of disciplinary misconduct under Article 75¹ of Organic Law on Common Courts. This article lists 29 different types of misconduct. 10 of them are described in a blank form, i.e., refer to 10 different articles of the Law of Georgia on Corruption and Incompatibility of Interests in Public Service.

4.1.4. Conclusion:

In this part, the legislation of Georgia complies with the above-mentioned International standard.

4.2. The Need for a Detailed and Clear List of Disciplinary Misconduct

4.2.1. International Standard

According to a joint report by the Venice Commission and the Directorate of Human Rights (2014), disciplinary misconduct must be formulated with sufficient accuracy so that relevant entities can anticipate the consequences of their actions and regulate their behaviour accordingly. A detailed and concrete list of the grounds for disciplinary liability will reduce discretion and subjectivity.²⁷

The Consultative Council of European Judges does not consider it necessary or possible to establish a list of disciplinary misconduct by judges at the common European level. Making such a list is at the discretion of individual states.²⁸

²⁵ UN Basic Principles on the Independence of the Judiciary: Para. 19 Disciplinary action should be determined under established standards of judicial conduct.

²⁶ Magna Carta of European Judges, para. 19.

²⁷ Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Council of Europe on the Law on Disciplinary Liability of Moldovan Judges (2014) Para. 16 Legislation in some countries ranks disciplinary misconduct by severity, which is linked to specific types of sanctions. This was provided for in Article 54 of Law of Georgia on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts, although there is no international standard regarding the need for such a ranking. (See Opinion of CCJE N. 3, para. 63).

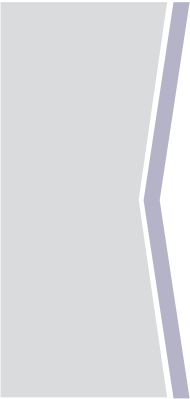
²⁸ CCJE no. 3 Opinions on the rules and principles governing the professional conduct of judges, especially ethics, inappropriate conduct and impartiality, para. 60.

In one of its recommendations, the Venice Commission considers that the term “action that undermines the authority of the court” used by the law to formulate a disciplinary offence may be overly vague. Accordingly, the law may list examples such as excessive drunkenness in public places, disturbance of public order, non-fulfilment of civil obligations, gambling addiction, criminal relations, etc. These examples include most unethical behaviours and at the same time will be indicative where flexible formulas are unavoidable.²⁹

ces of disciplinary proceedings against judges, consider that in the formulation of disciplinary misconduct we cannot miss the terms that are widely used, such as “inappropriate behaviour for judges”, “political activity” and others. The risk of misuse of such broad terms should be reduced by developing and publishing guidelines and setting up an advisory body for judges, from which appropriate clarifications can be obtained.³⁰

4.2.2. Georgian Legislation

Article 751 of the Organic Law on Common Courts contains a rather detailed list of disciplinary misconduct, most of which is formulated with sufficient accuracy and allow for the foresight of punitive actions. However, in this list, several norms need to be specified, in particular when it comes to “obstruction of disciplinary proceedings by a judge”. This norm is too general in its wording. The legislature may provide a sample list of what would be considered an impediment to litigation. Examples include:

- 
- » Providing false information to a disciplinary body;
 - » Threats or other pressure on persons involved in disciplinary proceedings;
 - » Failure to provide official documents requested by the disciplinary body;
 - » Destroying or falsifying evidence in a disciplinary case (if there are no signs of a crime).³¹

A judge’s refusal to give an explanation (unlike early disciplinary practice³²) will not be considered an impediment to disciplinary proceedings as, according to the Organic Law on Common Courts, it is the right of the judge to provide clarification.

There are no commentaries on disciplinary misconduct in Georgia, which would interpret the disciplinary misconduct and give specific examples.

29 Recommendation of the Venice Commission on the Law of Bulgaria on the Judicial System, 2017, para. 108.

30 OSCE ODIHR, Standards and Best Practice in Disciplinary Responsibility for Judges, 2018.

31 See. Draft Law (List of Disciplinary Offenses) prepared by non-judicial members of the Disciplinary Board of Common Courts and their commentaries, 2015 http://dcj.court.ge/uploads/mnishvnelovaniproeqtebi/gadacdomebischa_monatvalidaganmartebebi1.pdf.

32 <http://dcj.court.ge/uploads/Practice/Practice2004-2013Criminal.pdf> Article 369 of the Criminal Code punishes falsification of evidence by a participant in a civil or administrative case or his / her representative. A disciplinary case is not a civil or administrative case under national law.

4.2.3. Conclusion

Georgian legislation in this regard is partially in line with International standards.

4.3. Court Decision as a Subject of Disciplinary Action

4.3.1. International Standards

Interpretation of the law by a court, an assessment of facts or evidence may not constitute grounds for civil or disciplinary action against a judge other than in case of malicious intent or gross negligence.³³

Correction of errors made by a judge should be possible through appeal procedures.³⁴

A judge should not be held personally liable when his or her decisions are overturned or changed on appeal.³⁵

Council of European Judges N. 10 Opinion (para. 62) “If a judge is subject to disciplinary or other legal sanctions for his decisions, neither the independence of the judiciary nor the balance between the branches of government can be maintained.”

According to the Kyiv Recommendations on the Independence of the Judiciary: Disciplinary liability of judges should not extend to the content of judicial decisions or miscarriages of justice, or criticism of a court.³⁶

The legal interpretation provided by a judge in contrast with the established case law, by itself, should not become a ground for disciplinary sanction unless it is done in bad faith, with intent to benefit or harm a party at the proceeding or as a result of gross negligence .³⁷

4.3.2. Georgian Legislation

Until 27 March 2012, the Organic Law of Georgia on Common Courts determined a disciplinary offence gross violation of law³⁸ and until December 2019 - non-performance or improper performance of a judge.³⁹ Most of the disciplinary complaints filed with the High Council of Justice were directed against the illegality of a judge’s decision. A new interpretation of “improper performance of judicial duties was offered by the Judicial Disciplinary

Committee on 12 April 2013, in which it was noted that in drawing the line between legal error and judicial misconduct, the disciplinary bodies should take into account the possibility

33 Council of Europe Recommendation CM / REC 2010-12 on the Independence, Effectiveness and Responsibility of Judges, para. 66. A similar approach is found in OSCE ODIHR standards: “A judge’s action should be considered as misconduct only if committed with malicious intent or negligence. OSCE ODIHR, Standards and Best Practice in Disciplinary Responsibility for Judges, para. 36.

34 Magna Carta of the Consultative Council of European Judges, para. 21.

35 Recommendation of the Committee of Ministers of the Council of Europe 2010 (12), para. 70, the same is indicated by the conclusion of the Advisory Council of European Judges n. 10.

36 Kiev Recommendations on the Independence of the Judiciary, 2010, para. 25.

37 The Venice Commission and the Council of Europe Directorate of Human Rights on the Law on Disciplinary Liability of Judges in Moldova (2014) 2020. <https://undocs.org/A/75/172>

38 Art. 2.2.b. of the law on Disciplinary Liability and Disciplinary Proceedings against judges of the Common Courts of Georgia.

39 See the Organic Law on Common Courts and Law on Disciplinary Liability and Disciplinary Proceedings Against Judges of Common Courts.

of rectifying the violation, the degree, the repeated nature and the honesty of the judge, his motive. This approach is based on the American “legal error plus” doctrine. Consequently, the court decision could have become the basis for disciplinary proceedings. An amendment to the Common Courts Act of December 2019 removed the misconduct of a judge from disciplinary misconduct.⁴⁰

Consequently, as a result of the legislative changes made in 2019, judicial error was completely removed from the grounds of disciplinary misconduct. Deliberate violation of the law by a judge can only become a ground for disciplinary action if it constitutes another misconduct at the same time under the law (e.g. deliberate discrimination of a party or exercise of power through personal, social or political influence).

4.3.3. Conclusion

Georgian law meets the above International standards.

4.4. Violation of the Rules of Judicial Conduct (Code of Ethics) as a Basis for Disciplinary Liability

4.4.1. International Standard

Violation of the Code of Conduct for Judges, as this basis of liability is too general and vague.⁴¹

Council of Europe Recommendation CM / REC 2010-12 72 72 states that breaches of the rules of professional ethics can also be punished in a disciplinary manner, although these rules should not only include punitive sanctions but should also be of a guiding nature for judges.⁴²

A different standard is developed by the Consultative Council of European Judges. “Disciplinary misconduct should differ from standards of professional conduct. Their identification with each other will hinder the development of professional conduct standards and create a risk of confusing professional conduct standards and discipline goals. Standards of professional conduct are the best practices of behaviour that judges should aspire to.” However, this opinion of the Consultative Council at the same time recognizes that a violation of the standard of professional conduct can become a basis for liability. For this, it is necessary that the judge’s conduct be serious and clearly blatant.⁴³

A similar reference is made by the Bangalore Principles Implementation Guide, which states that a breach of professional conduct by a judge may then become grounds for disciplinary action, if it is so severe as to justify the imposition of a disciplinary sanction.⁴⁴

40 See. The Difference Between Judge’s Legal Error and Disciplinary Misconduct, American Experience <http://dcj.court.ge/uploads/Articles/differencebetweenlegaleerrorandjudicialmisconduct.pdf>.

41 See, for example, the Venice Commission’s Opinion on the Law of Georgia on Disciplinary Liability and Disciplinary Proceedings, 2007.

42 Judges should be guided in their activities by ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary measures but offer guidance to judges on how to conduct themselves.

43 CCJEN. 3 Opinion on the rules and principles governing the professional conduct of judges, ethics, inappropriate conduct and impartiality, para. 60.

44 Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct Article 15.

4.4.2. The Legislation of Georgia

Until 13 December 2019, the Organic Law on Common Courts retained a disciplinary offence of “breach of judicial ethics”. The Venice Commission recommended that the provision was vague and needed to be detailed.⁴⁵

In December 2019, the amendments to the Organic Law on Common Courts removed the general reference to the norms of ethics and added to the list of violations in the law a number of judicial breaches, which were provided by the Code of Judicial Conduct, namely:

- » Exercise of judicial duty under personal interest, political or social influence;⁴⁶
- » Prior expression of opinion on a case;⁴⁷
- » Public opinion of a judge expressed on a case under consideration;⁴⁸
- » Membership of a political union;⁴⁹
- » Discrimination against a participant in the process;⁵⁰
- » Ex parte communication with a party;⁵¹
- » Refusal to disqualify from a case when there are unequivocal grounds for disqualification;⁵²
- » Incorrect treatment of trial participants, court staff;⁵³ and
- » Responding to a breach of ethics by a court official.⁵⁴

45 See. Joint Opinion of the Venice Commission and the Directorate of Human Rights on Amendments to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts, 2014. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)0-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)0-e), Fri. 18; Conclusion of the Venice Commission on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts”, para. 14, [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2007\)009-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2007)009-e)

46 Article 2 of the Rules of Judicial Ethics “A judge must be faithful to the law and the oath of a judge, in the administration of justice - a guarantor of the rule of law. His opinion should not fluctuate due to political, social, party interests, public influence or other relations, or fear of criticism.”

47 Article 5 of the Rules of Judicial Ethics: In the performance of his judicial duties, a judge must be free from any preconceived notions or views. It should avoid behaviours that are perceived by participants in the process or the public as preconceived notions.

48 Article 16 of the Code of Judicial Ethics: The judge, when dealing with the media, should refrain from expressing his or her opinion on a case under consideration or under consideration, unless it concerns the organizational or technical side of the case.

49 Article 26 of the Rules of Judicial Ethics: A judge should not engage in political activities. He may not be a member of a political organization or perform a party task or speak on behalf of a political organization.

50 Article 10 of the Rules of Judicial Ethics: The judge is obliged to ensure equality of the participants in the process before the law. It is inadmissible to allow the racial, national, ethnic, linguistic, rank, position, property, religion, sex or other circumstances of the participant in the proceedings to influence the judge’s decision or the proper exercise of his powers.

51 Article 7 of the Rules of Judicial Ethics: A judge is prohibited from receiving or communicating with the participants in the proceedings and / or the person interested in the case, from the moment the case enters the court until the entry into force of the court decision. In addition, the judge shall immediately notify the chairperson of the court in writing of any attempt by the prosecutor, lawyer or other party to the proceedings to attempt to communicate in a manner prohibited by law.

52 Article 3 of the Rules of Judicial Ethics: The judge must strengthen the public belief in the independence, fairness and impartiality of the judiciary at the institutional and individual level.

53 Article 9 of the Rules of Judicial Ethics: The judge must treat the participants in the proceedings and the attending public with dignity and due courtesy. Article 11: The judge must respect the court staff.

54 Article 12 of the Rules of Judicial Ethics: The judge is obliged to respond appropriately to the violation of the norms of professional ethics by a court official, a party or his representative.

4.4.3. Conclusion

Georgian legislation complies with the above International standards in this section.

4.5. The Need to Assess the Guilt of a Judge in Each Particular Case

4.5.1. International Standards

The Venice Commission considers that it is necessary to assess the degree of guilt of a judge in the assessment of any disciplinary misconduct.⁵⁵

4.5.2. Georgian Legislation

Under Article 75.2 of the Organic Law on the Common Court, a judge shall be liable to disciplinary action only if the conduct was committed with guilt, i.e., if the judge could objectively take the appropriate action to prevent disciplinary misconduct but did not do it.

Under part 3 of the same article, disciplinary misconduct is an intentional or negligent act committed by a judge.

4.5.3. Conclusion

Georgian legislation complies with the above International standards in this section.

4.6. The Need for an Advisory Body of Judges

4.6.1. International Standard

There may be an advisory body from which judges will receive an explanation in advance as to whether this or that action constitutes a disciplinary offense.⁵⁶

4.6.2. Georgian Legislation

There is no such body under Georgian law at present.

4.6.3. Conclusion

It is recommended that an advisory body be established by law.

4.7. Time Limits

4.7.1. International Standard

A complaint against a judge must be dealt with promptly.⁵⁷

The deadlines for investigating a disciplinary case, making a decision and imposing a sanction should be determined in advance. These time limits may be extended only in exceptional cases, such as the complexity of the investigation, the illness of the judge or pending criminal investigation.⁵⁸

⁵⁵ Venice Commission Report on Macedonian Law on Disciplinary Liability of Judges and Evaluation of Judges, 2015, para. 18.

⁵⁶ OSCE ODIHR, Standards and Best Practice on Disciplinary Responsibility for Judges, para. 36.

⁵⁷ UN Basic Principles on the Independence of the Judiciary, 17, 1985. See also Universal Declaration of Independence of the Judiciary, 1989, para. 26.

⁵⁸ European Network of Councils of for the Judiciary, Minimum Standards for Judicial Disciplinary Responsibility and Disciplinary Proceedings, Standard 9.

4.7.2. Georgian Legislation

Under Article 75.7 of the Organic Law on Common Courts, in case of receiving a complaint, application or other information on the commission of disciplinary misconduct by a judge, the Independent Inspector shall check its merits in advance within 2 months of its receipt. The pre-inspection period can be extended to 2 weeks or suspended in case of inability to conduct a pre-inspection.

Article 788 reads as follows: After Preliminary examination, the Council of Justice estimates the validity of the disciplinary prosecution against the judge within the terms stipulated by Article 757 of the law and with a 2/3-majority takes a reasoned decision towards the judge on initiating disciplinary proceedings and asking the judge for an explanation.

Under Article 7510 of the law, the disciplinary case must be completed within 2 months after the decision to receive clarification from the judge. If necessary, this period can be extended to no more than 2 weeks.

On the other hand, the violation of the deadlines for the preliminary examination and investigation of a disciplinary case is not related to any procedural outcome. As the study of disciplinary practice proves, these deadlines are often violated.

The legislation also stipulates the deadline for the High Council of Justice to refer the case to the Disciplinary Board.

In particular, Article 754 of the Organic Law on Common Courts paragraphs, 3 and 4 state that a copy of the decision shall be handed over to the judge against whom disciplinary proceedings are pending within 5 days after its adoption, together with copies of the case file.

Under par. 4 of the same article, “the concerned judge shall have the right to submit a written response to the decision of the High Council of Justice of Georgia on his / her disciplinary liability and relevant evidence within 10 days after receiving a copy of the decision. Within 3 days after the submission of the response by the judge or the expiration of the term established for the submission of the response, the materials of the disciplinary case together with the documents submitted by the judge shall be sent to the Disciplinary Board of Judges of Common Courts of Georgia.

However, under Article 74⁴ of the same law, the judge shall not be held responsible for the disciplinary offence if 3 years have passed after the commission of the offence and 1 year has passed after the committal of the judge.

Under Article 75²⁵, the Disciplinary Board of Judges of the Common Courts shall consider the case no later than 2 months after its receipt.

4.7.3. Conclusion:

The terms of disciplinary proceedings are strictly regulated by the legislation of Georgia, therefore the legislation in this part complies with the International standard.

4.8. The Right to File a Disciplinary Complaint

4.8.1. International Standard

Anyone who claims to have suffered harm as a result of a judge's disciplinary misconduct should have the right to file a complaint against the judge with the appropriate body.⁵⁹ The perpetrator of a disciplinary complaint should normally be identifiable.⁶⁰

4.8.2. Georgian Legislation

Under the first paragraph of Article 75² of the Organic Law on Common Courts, the reason for initiating disciplinary proceedings against a judge may be the complaint or statement of any person other than an anonymous statement.

4.8.3. Conclusion

Georgian legislation complies with the abovementioned standard.

4.9. The Applicant's Right to Information

4.9.1. International Standard

The complainant should be informed of the results of the examination of the disciplinary complaint filed by him.⁶¹

4.9.2. Georgian Legislation

Under Article 75¹⁵ of the law, the High Council of Justice is authorized to invite the author of the complaint/statement to the session when discussing the issue of the disciplinary liability of a judge.

Under Articles 75⁴, 75⁵² and 75⁶⁸ of the Organic Law on Common Courts, the final decisions made by the disciplinary bodies, including the decisions to terminate the disciplinary case, suspend, initiate disciplinary proceedings against the judge and disciplinary action, shall be sent to the author of the complaint (case) before the completion of the case in the connection of which the disciplinary proceeding is underway. The only exceptions are the decision of the Disciplinary Board on the acquittal of a judge⁶², as well as the decisions of the Disciplinary Chamber,⁶³ which are sent to the appellant before the completion of the main case in the common court.

Under Article 75¹² of the Law, the Independent Inspector in some cases decides to refuse to initiate disciplinary proceedings, although the law does not say anything about sending this decision to the complainant.

⁵⁹ Measures for Effective Implementation of the Principles of Judicial Conduct in Bangalore, Article 15.

⁶⁰ European Network of Councils of Judiciary, Minimum Standards for Disciplinary Liability of Judges and Disciplinary Proceedings, Standard 5.

⁶¹ Istanbul Declaration on the Transparency of the Judiciary, 2015, para. 15.

⁶² Organic Law, Article 75⁴¹.e).

⁶³ The Organic Law, Article 75⁶⁸.

4.9.3. Conclusion

Georgian legislation partially complies with the above-mentioned International standard. To be in full compliance with the standards, the complainant must be notified of all summary decisions that conclude the disciplinary proceedings, including the Independent Inspector's decision refusing the initiation of the disciplinary proceedings.

4.10. The Limitation Period for Disciplinary Liability

4.10.1. International Standard

A disciplinary complaint should be filed only within specific deadlines, which may be extended only in exceptional cases.⁶⁴

4.10.2. Georgian Law

Under Article 75² Organic Law, a judge will not be subject to disciplinary liability if 3 years have passed from the day of committing the disciplinary misconduct to the beginning of the disciplinary proceedings for this misconduct, and 1 year from the date of deciding to indict the judge.

Under Article 75¹¹ of the Organic Law,

b) Should an objective difficulty or obstacle arise during the investigation of a disciplinary case (e.g. the illness of a judge against whom the disciplinary prosecution is in progress, or any other case) that makes the investigation temporarily impossible, the Independent Inspector shall, by his/her decision, suspend the disciplinary proceeding. When the grounds for suspending the disciplinary proceeding are eliminated, the Independent Inspector shall resume the proceedings.

2. The period of suspending a disciplinary proceeding shall not be included in the period determined under this law for the investigation of a disciplinary case, nor shall it be included in a one-year period of imposing disciplinary liability, but the period of suspension shall be included in a five-year period determined by this law for imposing disciplinary liability.

Thus, the law contains a defect: the 5-year period is left in the law from the previous version (which in 2018 was changed to 3-year period of legislative changes) and should be replaced with a 3-year period.

The term of disciplinary action of a judge is a guarantee to the judge that he/she will not be disciplined after the expiration of this term. Unfortunately, these safeguards were used against judges in cases 29-19 and 21-19 of the Supreme Court's Disciplinary Chamber. The judges involved in these cases were found guilty of disciplinary misconduct and sentenced to dismissal as a punishment. These judges filed applications with the ECtHR. The State admitted the violation of Article 6 against the judges in these cases. After receiving judgments from ECtHR, the Judges reapplied to disciplinary bodies and asked for an acquittal. However, the Disciplinary Board dismissed these cases based on the expiration of 5-year statutory limitation from the commission of a disciplinary offence.

⁶⁴ The European Network of Councils of Judiciary, Minimum Standards for Disciplinary Responsibility and Disciplinary Proceedings of Judges, Standard 8.

4.10.3. Conclusion

Georgian legislation is partially in line with the above International standard.

It is necessary to amend the Organic Law to make it clear that the termination of disciplinary proceedings against a judge due to the expiration of the statute of limitations is inadmissible if the judge opposes it.

4.11. The Body Authorized to Initiate Disciplinary Proceedings; Exclusion of Court Presidents from Entities Authorized to Initiate Disciplinary Proceedings

4.11.1. International Standard

There should be a special body or official responsible for receiving disciplinary complaints and deciding whether to initiate disciplinary proceedings against a judge.⁶⁵

In order to ensure an independent and objective review of disciplinary complaints, court presidents should not have the power to initiate disciplinary proceedings or impose disciplinary sanctions,⁶⁶ although they should be able to file disciplinary complaints.^{67&68}

4.11.2. Georgian Legislation

Under Article 75⁶ of the Organic Law, the Independent Inspector initiates disciplinary proceedings against a judge, conducts a preliminary examination and investigates a disciplinary case.

Before 2017, disciplinary proceedings against a judge could also be initiated by the Presidents of the Supreme Court and the Courts of Appeal (see Article 7 of the Law on Disciplinary Responsibility and Disciplinary Proceedings of Judges of the Common Courts). However, later this power of the court presidents was removed.

4.11.3. Conclusion

Georgian legislation complies with the above International standard.

4.12. Screening Unsubstantiated Complaints at the Initial Stage

4.12.1. International Standard

The body conducting the disciplinary investigation should be able to screen unsubstantiated complaints at an early stage.⁶⁹

⁶⁵ Council of European Judges N. 3 Opinions on the rules and principles governing the professional conduct of judges, particularly with respect of ethics, inappropriate conduct and impartiality, para. 68.

⁶⁶ Kiev Recommendations on the Independence of the Judiciary, 2010, para. 14.

⁶⁷ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 2020, para. 28 <https://undocs.org/A/75/172>.

⁶⁸ Bangalore Principles, Article 15.3.

⁶⁹ Measures for Effective Implementation of the Principles of Judicial Conduct in Bangalore, Article 15.3.

4.12.2. Georgian Legislation

Under Article 75⁵, paragraph 3 of the Organic Law:

If the disciplinary complaint is anonymous or does not state the fact of the violation, the Independent Inspector shall establish the defect and give a 10-day time limit to the author of the complaint. In case if the defect is not eradicated within the given time, the complaint shall not be handled.

Under the first paragraph of Article 75¹²:

The Independent Inspector shall make a reasonable decision on the disciplinary proceedings against a judge or the judge's refusal of the disciplinary proceedings, if:

- a) the statutory limitation for imposing a disciplinary liability against the judge expired;
- b) there is a decision made by the body conducting the disciplinary proceedings against the same judge due to the same action;
- c) the judge's judicial authority has been terminated; and
- d) the complaint concerns the legality of the act committed by the judge.

Under the first paragraph of Article 75.⁸ of the same law: as a result of the preliminary examination, the High Council of Justice assesses the merits of initiating disciplinary proceedings against a judge, to initiate disciplinary proceedings against him/her and take from the judge an explanation. In making this decision, the High Council of Justice of Georgia relies on the standard of substantiated assumption. If the High Council of Justice of Georgia fails to make this decision, the disciplinary proceedings against the judge will be terminated.

At the same time, according to the Venice Commission's 2014 report on amendments to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts, 2/3 is a very high quorum for deciding at the initial stage of disciplinary proceedings. This may create the risk that a large proportion of complaints will not be able to move to a later stage due to corporate attitudes in the High Council of Justice.⁷⁰ This was confirmed by the study of the decisions of the High Council of Justice, where a part of the cases was terminated without any justification due to the lack of a 2/3 quorum. It is therefore recommended that this recommendation of the Venice Commission should be taken into account and that a 2/3 rule be changed to a simple majority rule to decide at an early stage.

4.12.3. Conclusion

Georgian legislation is partially in line with the above International standard. It is recommended to change the rule of decision-making by 2/3 in the High Council of Justice to starting disciplinary proceedings by a simple majority rule.

⁷⁰ See [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)032-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)032-e), para. 24.

4.13. The Body Charging the Judge

4.13.1. International Standard

The Venice Commission of the Council of Europe supports the disciplinary indictment of the judge to be considered by the Council of the Judiciary, which may also include persons appointed by the legislature and the executive.⁷¹

According to the OSCE ODIHR Kiev Recommendations, the body dealing with the issue of disciplinary liability of judges should not include court presidents.⁷²

4.13.2. Georgian Law

Under Article 75¹³ of the Organic Law, the issue of indicting the judge is decided by the High Council of Justice. Under Part 2 of Article 47 of the Organic Law, the High Council of Justice consists of judges elected by the Conference of Judges, 5 members elected by the Parliament of Georgia and 1 member elected by the President of Georgia.

Under paragraph 4 of Article 47 of the Organic Law, more than half of the members elected by the Conference of Judges of Georgia to the High Council of Justice may not be the Chairman of the Court, his/her First Deputy or Deputy or the Chairman of the Judicial Panel or Chamber.

At present, the members of the High Council of Justice are represented by the chairpersons of three courts - the Chairperson of the Tbilisi City Court, the Chairperson of the Kutaisi Court of Appeal and the Chairperson of the Supreme Court. The membership of the President of the Supreme Court is defined by the constitution,⁷³ while the other presidents are elected by the Conference of Judges.

4.13.3. Conclusion

Georgian legislation only partially complies with the above-mentioned International standard. The law does not preclude the election of court chairpersons to the High Council of Justice; it limits their number to only four.

4.14. Suspension of a Judge in Disciplinary Proceedings; International Standard

In exceptional cases, a judge may have his or her powers suspended.⁷⁴ In such a case, the judge should retain his / her salary unless he/she intentionally delays the proceedings or does not cooperate with the investigation.⁷⁵

71 The Venice Commission and the Human Rights Directorate of the judicial discipline in the Moldovan law.

72 See. Kiev Recommendations on the Independence of the Judiciary, 2010, para. 7.

73 See art. 64.2 of the Constitution of Georgia.

74 European Network of Councils of Justice, Minimum Standards for Judicial Disciplinary and Disciplinary Procedures, Standard 10.

75 OSCE ODIHR, Standards and Best Practice in Disciplinary Responsibility for Judges, para. 50.

4.14.1. National Legislation

Under Article 75¹⁶ of the Organic Law on Common Courts, it is inadmissible to remove a judge from the hearing of a case and exercise their other official powers.

4.14.2. Conclusion

The relevant International standard provides for the suspension of a judge before the termination of disciplinary proceedings in exceptional cases where, due to the gravity of the alleged disciplinary misconduct, the activities of the judge endanger the prestige and authority of the court. However, on the other hand, since individual independence of judges in the common courts of Georgia is fragile and the High Council of Justice already has broad rights, the introduction of this additional mechanism of interference in the work of judges is not recommended. Suspension of authority may instead be introduced as a disciplinary sanction.

4.15. Restriction of Judges' Promotion

4.15.1. International Standard

Disciplinary Proceedings may restrict a judge's right to a promotion.⁷⁶

4.15.2. Legislation of Georgia Under 75⁷⁷ of the Organic Law on Common Courts

1. A judge, who has been imposed with disciplinary liability by a decision of the High Council of Justice of Georgia or whose disciplinary penalty imposed has not been expunged, shall be restricted from getting promoted for a respective period.
2. A respective body or an official shall not appoint a judge to a court of higher instance if he/she has been imposed with disciplinary liability by a decision of the High Council of Justice of Georgia, or if a disciplinary penalty imposed on him/her has not been expunged.

4.15.3. Conclusion

Georgian legislation complies with the above International standard.

4.16. Confidential Nature of the First Stage of Disciplinary Proceedings

4.16.1. International Standard

The review of a judge's complaint at an early stage may be confidential unless the accused judge requests publicity.⁷⁷

⁷⁶ SCE ODIHR, Standards and Best Practice in Judicial Disciplinary Matters, para. 51.

⁷⁷ UN Basic Principles on the Independence of the Judiciary. 17, 1985. See also Universal Declaration of Independence of the Judiciary, 1989, para. 26.

4.16.2. Georgian Legislation

Under Article 75⁴ of the Law: the process of disciplinary proceedings is confidential. A judge against whom disciplinary proceedings are pending has the right to request that the hearing before Disciplinary Board of Judges of the Common Courts of Georgia and the Disciplinary Chamber of the Supreme Court be made public, as well as the hearing of High Council of Justice of Georgia to indict the judge.

Accordingly, a judge cannot request the publication of a session of the High Council of Justice, at which the issue of initiating disciplinary proceedings against a judge is decided, however, this is logical since the judge himself is not informed about this session and does not attend it.⁷⁸

Under Article 75³ of the Organic Law, if a judge requested the disclosure of the disciplinary proceedings, the decision on the dismissal of a case against the judge made by HCOJ shall be published.

4.16.3. Conclusion

Georgian legislation in this section complies with the above International standard.

4.17. Powers of the Investigative Body

4.17.1. International Standard

An inquiry should be able to obtain both oral and written evidence.⁷⁹

4.17.2. Georgian Legislation

Under Articles 75⁷ and 75¹⁰ of the Organic Law, the Independent Inspector is authorized to use various electronic databases at the disposal of the state and request personal information from the Ministry of Internal Affairs during the preliminary examination and investigation of a disciplinary case. In addition, the Independent Inspector can request all necessary information, documents and materials related to the fact of committing disciplinary misconduct, invite another person and hear his / her information. The Independent Inspector is obliged to consider the motion of the judge against whom the disciplinary action is being taken and to take from the judge, at his / her request, an additional explanation. However, the preliminary examination and investigation of the disciplinary case must be carried out objectively, thoroughly and impartially. Both mitigating and aggravating circumstances of a judge's liability should be considered.

4.17.3. Conclusion

Georgian legislation in this section complies with the above International standard.

⁷⁸ Article 75⁸ of the Organic Law on Common Courts.

⁷⁹ European Network of Councils of Justice, Minimum Standards for Disciplinary Responsibility and Disciplinary Proceedings of Judges, Standard 6.

4.18. Judge's Right to Offer a Clarification on a Disciplinary Complaint

4.18.1. International Standard

A judge should have the right to make a statement on a disciplinary complaint made against him or her at an early stage.⁸⁰ However, this does not mean that he/she should be notified immediately of all complaints, especially those that may have been initially declared inadmissible.⁸¹

4.18.2. Georgian Legislation

The Independent Inspector shall promptly notify the relevant judge of the receipt of a complaint, application or other information about disciplinary misconduct by a judge.⁸²

Under Article 75.8 of the Organic Law, the High Council of Justice simultaneously decides to initiate disciplinary proceedings and obtain an explanation from the judge. According to the second paragraph of Article 75.10, the Independent Inspector is obliged to consider the motion of the judge against whom the disciplinary action is being taken, and to take from the judge, at his/her request, an additional explanation.

4.18.3. Conclusion

Georgian legislation in this section complies with the above International standard.

4.19. Substantiation of Decisions on Disciplinary Matters

4.19.1. International Standard

Disciplinary decisions must be substantiated.⁸³

4.19.2. Georgian Legislation

Under Articles 75¹² and 75¹³ of the Organic Law on Common Courts, decisions of the Independent Inspector and the High Council of Justice to terminate disciplinary proceedings or bring a judge to disciplinary liability must be substantiated. A member of the High Council of Justice of Georgia, who does not agree with the decision of the High Council of Justice, may formulate his / her dissenting opinion in writing, which will be attached to the disciplinary case.

Under Article 75¹⁴ of the Organic Law on Common Courts, the charging decision should formulate the substance of disciplinary prosecution. In taking this decision, the HCOJ relies on the standard of a high degree of probability.

80 Universal Declaration of Independence of the Judiciary, 1989, para. 2.32.

81 Its purpose may be to ensure that the judge is not "disturbed" or that his or her independence is unduly threatened, cf. European Network of Councils of Justice, Minimum Standards for Judicial Discipline and Disciplinary Proceedings, p. 37.

82 Organic Law on Common Courts art 75⁵ par. 4.

83 Council of European Judges N. 10 Opinion, Councils of Justice in the Service of the society, Para. 39.

The requirement of substantiation also applies to Independent Inspector, namely, under Article 75⁶ of the Organic Law on Common Courts, the decisions of the Independent Inspector should also be substantiated.

4.19.3. Conclusion

Georgian legislation complies with the above International standard.

4.20. Rights of the Judge and Guarantees of a Fair Trial

4.20.1. International Standard

The disciplinary proceeding should be conducted by an independent body or court with all the guarantees of a fair trial, and the judge should have the power to appeal the decision and the sanction.⁸⁴

A fair and full hearing of the case must be ensured in the disciplinary proceedings,⁸⁵ including the principle of adversarial proceedings and equality of arms.⁸⁶

The judge participating in the disciplinary process should have the following minimum rights:

To receive full information about the case against him/her;

To have a counsel;

Request reimbursement of expenses in case of acquittal;

Present oral or written evidence;

Promptly receive information on the case;

Be informed of the timing of the investigation and decision;⁸⁷

Make any decision in a reasoned manner and appeal the decision against him/her.⁸⁸

84 Council of Europe Recommendation CM / REC 2010-12 on the Independence, Efficiency and Responsibilities of Judges, para. 69.

85 Universal Declaration of Independence of the Judiciary, 1989, para. 28.

86 OSCE ODIHR, Standards and Best Practice in Disciplinary Responsibility for Judges, para 41.

87 The High Council of Justice in Europe does not recommend that judges be immediately informed of a disciplinary complaint for the purpose of “protecting the judge from unnecessary harassment or of encroaching on his or her impartiality and independence, or of publicly perceiving such an infringement.” ENCJ Minimum Judicial Standards, 2014-14, p. 37.

88 European Network of Councils of Justice, Minimum Standards for Disciplinary Responsibility and Disciplinary Proceedings of Judges, Standard 14.

4.20.2. Georgian Legislation

According to the Organic Law on Common Courts, the judge has the following rights:

- » To participate in the case against him/her.

The High Council of Justice is obliged to invite the judge to the session when deciding on the issue of disciplinary liability of a judge.⁸⁹ The judge will be notified of the time and place of the hearing of the case in the Disciplinary Board.⁹⁰

- » Right to the publicity of the hearings

A judge is entitled to have his/her case publicly heard in the Council of Justice, the Disciplinary Board and the Disciplinary Chamber.⁹¹

- » Hearing of the case based on the principles of adversarial proceedings and equality of arms.

Under Article 7524, the Disciplinary Board shall review the proceedings based on the principle of equality and adversarial proceedings.

Under Articles 7533 paragraphs 4 and 5 of the Organic Law, a judge has the right to answer an accusation at the session of the Disciplinary Board, ask questions to the party, present evidence, initiate motions, invite witnesses and request relevant court materials.

- » Double jeopardy

It is impermissible to start disciplinary prosecution once again on the same grounds that have already been exercised in the past.⁹²

- » Right to a counsel

The judge has the right to have a counsel upon the examination of the case⁹³ as well as during the main hearing.⁹⁴

- » The right to recusal

The judge has the right to recuse the Independent Inspector⁹⁵ any member of the Disciplinary Board⁹⁶ as well as a disciplinary chamber.⁹⁷

89 Article 75¹⁵.

90 Article 75³².

91 Article 75⁴.

92 Article 75⁷.

93 Article 75¹⁰.

94 Article 75³³.

95 Article 75¹⁰ para. 4. In case of the challenge of Independent Inspector, his duties shall be exercised by a member of the HCOJ chosen by ballot.

96 Article 75²⁹.

97 Article 75⁶⁰.

» Right to refuse to testify against oneself

Under Article 75⁸ of the Organic Law, the judge has no duty to give clarification, which is his right.

» Right to obtain information and materials of the case

Upon receiving an application, statement or other information, the Independent Inspector is bound to notify the concerned judge immediately ⁹⁸.

Within 5 days after the High Council of Justice indicts a judge, a copy of the decision of the High Council of Justice shall be handed over to the judge, together with a copy of the case file.⁹⁹

» Right to adduce evidence and give clarification
The judge charged in a disciplinary process

has the right to give clarification.¹⁰⁰

Also, under paragraph 4 of Article 75¹⁴ of the Organic Law, a judge has the right to submit a written response to the decision of the High Council of Justice of Georgia on a disciplinary action within 10 days after receiving a copy of the decision and relevant evidence.¹⁰¹

» Examination of the case based on the principle of adversarial proceedings

Under Article 75²⁴ of the Organic Law, the Disciplinary Board reviews a disciplinary case impartially and objectively, based on the principle of equality of arms and adversarial proceedings.

Under paragraphs 4 and 5 of Article 75³³ of the same law, a judge has the right to answer the accusation at the session of the Disciplinary Board, ask questions to the party, present evidence, initiate motions, invite witnesses and request relevant court materials.

» Right to appeal the decision of a disciplinary chamber

A judge has the right to appeal the decision of the Disciplinary Board to the Disciplinary Chamber of the Supreme Court.¹⁰²

4.20.3. Conclusion

In this section, Georgian legislation complies with International standards.

98 Article 75⁵ para. 4.

99 Article 75¹⁴.

100 Article 75¹⁰ para. 2.

101 Article 75¹⁰ para. 4.

102 Article 75⁵⁴.

4.21. The Body in Charge of Adjudication of a Disciplinary Case

4.21.1. International Standard

The principle of a “lawful judge” implies that a disciplinary body should be established by law. The creation of an ad hoc Disciplinary Board each time does not meet the standard of institutional independence of the judiciary.¹⁰³

The issue of the disciplinary liability of a judge should be considered by a court or commission with a majority of judges.¹⁰⁴ The composition and activities of this body should be regulated by law.¹⁰⁵

In the opinion of the CCJE, the judges’ disciplinary body should not consist exclusively of judges and should include non-judges.¹⁰⁶

The same body should not investigate the disciplinary case and consider it on the merits.¹⁰⁷

4.21.2. Georgian Legislation

The Disciplinary Board consists of 5 members, 3 of whom are judges of the common courts of Georgia, and 2 are not judges. The members of the Disciplinary Board are elected by the Conference of Judges of Georgia. Any judge present at the Conference of Judges may nominate a candidate for membership to the Disciplinary Board before the Conference of Judges of Georgia. Non-judge members shall be selected by Parliament of Georgia.¹⁰⁸

4.21.3. Conclusion

Georgian legislation complies with International standards in this section.

4.22. The Reasoning and Publication of the Decision

4.22.1. International Standard

Disciplinary responsibility of the decision must be reasoned and must be published.¹⁰⁹

4.22.2. Georgian Law

Under 75¹² par. 3 of the Organic Law on Common Courts, the Independent Inspector’s and

¹⁰³ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 2020, para. 23 <https://undocs.org/A/75/172>.

¹⁰⁴ The Universal Declaration of Independence of the Judiciary, 1989, para. 26.

¹⁰⁵ European Network of Councils of Justice, Minimum Standards for Disciplinary Liability and Disciplinary Procedure of Judges, Standard 7.

¹⁰⁶ Kiev Recommendations on the Independence of the Judiciary, 2010, para. 9. It also states that the body of disciplinary responsibility of judges should not be controlled by the executive or have any political influence on its activities.

¹⁰⁷ Kiev Recommendations on the Independence of the Judiciary, para. 5.

¹⁰⁸ Article 75¹⁹.

¹⁰⁹ Kiev Recommendations on the Independence of the Judiciary, 2010, para. 26.

the HCOJ's decisions on the termination of the disciplinary proceedings shall be published without personal data. If the judge requests that the hearing be made public, it shall be published in full in this case.

Under Article 75⁷³ of the Organic Law on Common Courts:

1. Decisions of the Disciplinary Board and the Disciplinary Chamber shall be published without identifying the information of a judge, unless the judge himself/herself requires the disciplinary proceeding be public, on an official website upon their entry into legal force. A decision on dismissing a judge shall be published in full.
2. Copies of the legally effective decisions of the Disciplinary Board and the Disciplinary Chamber shall be handed to any person upon request.

4.22.3. Conclusion

Georgian legislation complies with International standards in this section.

4.23. Publicity of Disciplinary Hearings

4.23.1. International Standard

According to the Kiev Recommendations on the Independence of the Judiciary, disciplinary proceedings against a judge should normally be public. The hearing may be closed at the request of the judge.¹¹⁰

4.23.2. Georgian Legislation

Under Article 75⁴ of the Organic Law on Common Courts of Georgia, the process of disciplinary proceedings shall be confidential. A judge against whom disciplinary proceedings are in progress shall have the right to demand that the meetings of the Disciplinary Board of Judges of General Courts of Georgia and the Disciplinary Chamber of the Supreme Court of Georgia are public and that the meeting held by the High Council of Justice of Georgia to decide under Article 75¹³ of this law (except for the deliberations and decision-making procedures) be public. Duly authorised officials and public servants shall keep the confidentiality of any information that has become known to them during disciplinary proceedings, except as provided for by this law.

4.23.3. Conclusion

Georgian legislation in this regard is partially in line with the above standard. It is recommended that the disciplinary case be heard in public unless the judge requests closure.

¹¹⁰ Kyiv Recommendations on the Independence of the Judiciary, 2010, para. 26. A different standard is set by the Universal Declaration of Independence of the Judiciary (Montreal Declaration, which states that a hearing should be closed but may be made public at the request of a judge, para. 2.32.

4.24. Appeal

4.24.1. International Standard

A decision on a judge's disciplinary liability should be appealed to an independent body.¹¹¹

4.21.2. Legislation of Georgia

Under Article 75³⁴ the Organic Law on Common Courts of Georgia:

1. A Disciplinary Board decision may be revised by appealing it to the Disciplinary Chamber of the Supreme Court (the Disciplinary Chamber). Only the decisions under Article 7541(1) (b-e) of this law may be appealed. The parties to a disciplinary case shall have the right to appeal.

4.22.3. Conclusion

Georgian legislation complies with the above-mentioned International standard.

4.25. Disciplinary Sanctions

4.25.1. International Standard

Disciplinary sanctions must be prescribed by law.¹¹²

As for the diversity of disciplinary sanctions, there is no International standard on this issue. The Consultative Council of European Judges considers it permissible to impose both formal sanctions (warnings, reprimands) as well as sanctions (fines) and dismissals in the form of extreme measures.¹¹³

The dismissal for disciplinary purposes of a judge who is appointed for life may take place only in the event of serious disciplinary misconduct,¹¹⁴ which shows that the judge clearly does not comply with the position held.¹¹⁵

The sanction should be proportionate to the misconduct committed by the judge.¹¹⁶

111 UN Basic Principles on the Independence of the Judiciary.

112 Ibid.

113 Opinion of the European Judicial Advisory Council No. 3 on the rules and principles governing the professional conduct of judges, in particular ethics, misconduct and impartiality, para 73.

114 CoE Recommendation CM/REC 2010-12,50: The terms of office of judges should be permanent; an appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilities-of-judges/16809f007d>.

115 Draft Principles of Judicial Independence, 1981 (Syracuse Principles).

116 OSCE ODIHR, Standards and Best Practice in Disciplinary Responsibility for Judges, 2018.

4.25.2. Georgian Legislation

Under the first and second paragraphs of Article 75⁵⁰ of the Organic Law on Common Courts of Georgia:

1. The Disciplinary Board considers that the dismissal of a judge is an extreme measure, and this measure is used in special cases. The Disciplinary Board shall decide on the dismissal of a judge if he/she deems it inappropriate to continue the exercise of judicial authority by this judge, taking into account the severity of the specific disciplinary misconduct as well as the disciplinary misconduct committed in the past.

2. If a judge has been given a disciplinary sanction for previous disciplinary misconduct - a severe reprimand - independently or in accordance with a disciplinary measure provided by law, and this sanction has not been revoked, the panel shall consider the issue of selecting a disciplinary sanction of dismissal for new disciplinary misconduct.

Under Article 75³ of the Organic Law on Common Courts, disciplinary penalties are a) note; B) reprimand; C) Strict Reprimand; D) Deduction of salary by 5% -20% -for no more than 6 months; and E) Dismissal from the position of the Court Chairman, First Deputy or Deputy;

Under Article 75⁴⁷ of the Organic Law on Common Courts,

1. A disciplinary penalty and a disciplinary action shall be imposed by following the principle of independence of a judge and non-interference in the activities of a judge. When selecting a disciplinary penalty and a disciplinary action for a judge, the Disciplinary Board shall consider the nature and gravity of disciplinary misconduct, the consequences it entailed or may have entailed, and the degree of guilt.

4.25.3. Conclusion

Georgian legislation complies with the above International standard.

4.26. Reimbursement of Expenses

4.26.1. International Standard

A judge acquitted in disciplinary proceedings should be able to demand compensation for the expenses incurred as a result of the disciplinary process. ¹¹⁷

4.26.2. Georgian Legislation

There is no relevant provision in Georgian legislation.

4.26.3. Conclusion

This part of the legislation is not in line with international standards.

¹¹⁷ European Network of Councils of Justice, Minimum Standards for Judicial Disciplinary Responsibility and Disciplinary Proceedings, Standard 13.

5. Compliance of Georgian Legislation Since 2012 to Recommendations of International and Non-Governmental Organizations

Over the last 10 years, a number of recommendations have been developed by international organizations and local non-governmental organizations to address the shortcomings of Georgia's disciplinary system. The project reviewed the compliance of Georgian legislation with the following recommendations:

- » Human Rights Education and Monitoring Centre (EMC) and the Institute for Development of Freedom of Information (IDFI) - Judicial Reform Assessment - Disciplinary Responsibility System, 2019;
- » Rules for Avoiding Conflict of Interest by Judges and a full Analysis of Legislation on the Application of Standards, " Council of Europe, January 2018;
- » US Embassy in Georgia, "Proposals for the Parliament of Georgia on the Main Directions of the 4th Wave of Judicial Reform", 2018; and
- » Recommendations from USAID PRoLOG Expert Victoria Henley on the list of disciplinary misconduct.

Many of these recommendations have been gradually reflected in Georgian justice reforms. Here are some recommendations which have not yet been implemented by the legislature:

5.1. Recommendation: For strengthening the institutional independence of the inspector, it is important to elect the Independent Inspector by 2/3 majority of the HCOJ." ¹¹⁸

Under paragraph 2 of Article 51 of the Organic Law of Georgia on Common Courts, the Independent Inspector shall be elected on a competitive basis for a five-year term, and dismissed, by the majority of the full composition of the High Council of Justice of Georgia.

Consequently, this recommendation has not been implemented to date.

5.2. Recommendation: "The Independent Inspector should address the board with a recommendation on whether to initiate disciplinary proceedings;"¹¹⁹

The Organic Law on Common Courts does not envisage the possibility for the Independent Inspector to address the High Council of Justice with a recommendation to initiate or not initiate disciplinary proceedings. Therefore, we share the above recommendation and we believe that the Organic Law on Common Courts should include a provision that clearly states the content of the Independent Inspector's recommendation.

5.3. Recommendation: "To make the disciplinary proceedings more transparent, it is important that the draft law mandates the publication of the conclusions prepared by the Independent Inspector as well as the decisions made by the board on disciplinary liability, hidingth-identifying data of the parties." ¹²⁰

As of today, this recommendation has not been implemented. We believe that, to ensure the transparency of the disciplinary process, the above decisions should be published without identifying data.

5.4. Recommendation: “The inspector should be empowered to determine the number of members of his/her staff and their salaries;”¹²¹

we believe that the consideration of this recommendation will contribute to the greater autonomy of the Independent Inspector.

5.5. Recommendation: To eliminate the conflict of interests, we also consider it important that the inspector should be restricted by law, for a certain reasonable period, after the expiration of the mandate to start working in the court system.¹²²

We believe that the implementation of this recommendation will contribute to the greater independence of the Independent Inspector.

5.6. Recommendation: “To ensure a fair decision by the Disciplinary Board (the ability to take into account the opinion of the majority of members), it is important to stipulate the decision of the board by a majority of the full membership.”¹²³

At present, even 2 members can decide on behalf of the board. We believe that the implementation of this recommendation is important to properly represent the voice of non-judicial members in the Disciplinary Board.

At the same time, however, the law should state that this norm does not apply if one or more members of the Disciplinary Board have been removed.

5.7. Recommendation:¹²⁴ Formal commentary on the grounds of disciplinary liability should also be published, which will be developed under the auspices of the Supreme Court, as the Supreme Court is the final instance judge of judges’ disciplinary cases. As in California, comments can be developed by a Judicial Advisory Committee, which will include the High Council of Justice, the Disciplinary Committee, the Disciplinary Chamber, the Conference of Judges and other interested groups’ representatives.

We believe that this document can be approved by the decision of the High Council of Justice.

6. Comparison of Georgian Disciplinary Legislation with the Disciplinary Systems of Foreign Countries

Within the framework of the project, the disciplinary legislation was compared with the disciplinary systems of advanced foreign countries (American and European). A detailed analysis of these systems is given in the appendix. In this chapter, we present only those issues which in our opinion are recommended in the Georgian legislation.

6.1. Disciplinary Liability Grounds

In advanced legal systems, disciplinary misconduct is codified by legislative acts. The list of misconduct is in some places more detailed than in others (although further clarified through case law). Legislation in some countries classifies disciplinary misconduct into serious and less serious misconduct. The purpose of this classification is to apply different types of sanctions and different statutes of limitations.

The analysis of the disciplinary legislation of foreign countries reveals several violations, which in our opinion is recommended to be considered by the Georgian legislature.

In particular, according to the Law of Georgia on Common Courts, it is disciplinary misconduct to exercise judicial powers under social, political or personal influence.¹²⁵


The apparent bias of a judge is an objectively provable fact, although the given legislative formula also requires the determination of a judge's motive, which must be personal, political or social. We think that this formula is practically unusable. Therefore, in the presence of obvious bias, the establishment of a judge's motive should no longer be necessary. We think that, in accordance with the legislation of Macedonia and Kosovo, the formula given in the law should be changed to the following formula "obvious bias of a judge in the course of hearing of a case".

In practice, obvious bias can be determined by the following facts, for example,

- » by showing obvious familiarity, sympathy, or antipathy towards a party,¹²⁶
- » Not giving the floor to a party against the law; and
- » By questioning the credibility of the party, and so on.

Bias must be distinguished from discrimination, which is also a disciplinary offence under the Organic Law on Common Courts.¹²⁷

The distinguishing features are as follows:

- 
- » Discrimination needs a basis, while bias as disciplinary misconduct does not need a basis;
 - » Discrimination can be committed against any person, including a witness and a person present at the trial whereas bias can only be exercised against a party; and
 - » Discrimination requires a comparator (i.e., evidence of different treatment of different cases by a judge) and bias does not require a comparator.

In addition, we think that, out of the disciplinary misconduct provided by the legislation of foreign countries, three additional types of misconduct may be included, namely, entering false information in official documents (Spain),¹²⁸ using the official position for illegal gain (Spain, Moldova), as well as using personal resources for personal gain, thus harming the public interest. These formulations should be taken into account by the legislation of Georgia.¹²⁹

6.2. Disciplinary Sanctions

Disciplinary sanctions can be divided into three groups, namely, moral (verbal) financial and career-related sanctions. In terms of sanctions, Georgian legislation takes into account the experience of advanced disciplinary systems. The Organic Law on Common Courts provides for both moral and career as well as financial sanctions. It is noteworthy, however, that the legislation of some countries (Spain, the Netherlands) provides for the suspension of a judge as a disciplinary sanction.

The Organic Law on Common Courts does not provide for the suspension of a judge as a disciplinary sanction. We think that the application of such a sanction may in some cases be effective and fair. Accordingly, it is advisable to amend the Organic Law on Common Courts and introduce suspension of the powers of a judge as a sanction (with other accompanying legislative changes) for a period of 6 months to 2 years.

Legislation in many countries specifically provides a list of circumstances that will be taken into account when selecting a disciplinary sanction. This list is quite extensive: severity of disciplinary misconduct, number of misconduct (Bosnia, Macedonia), the form of guilt (Bulgaria), consequences of misconduct (Bosnia, Macedonia), damage to the reputation of the court (Germany), circumstances in which the act was committed (Bosnia, Bulgaria, Macedonia, Croatia), duration of misconduct (Germany), personal characteristics of a judge (Germany), past work and achievements of a judge (Bosnia), awareness of his / her actions and sense of responsibility (Bosnia, Germany), cooperation with disciplinary bodies (Bosnia) and other-

¹²⁸ During the consultation with the project partners, it was expressed that the mentioned formula contains a danger that the judge's mistake will be punished in a disciplinary manner. Also, due to the inaccuracy in filling in the property declaration, the judge will be subject to both disciplinary and administrative (financial) sanctions, which contradicts the principle of punishing the same act twice. Contrary to this, it should be said that, as in the case of other misconduct, the disciplinary bodies here must distinguish between intent and negligence. As for the principle of punishing the same act twice. This principle does not apply to different types of litigation. For example, in the case of drunk driving or petty hooliganism, a judge may be subject to both disciplinary and administrative sanctions.

¹²⁹ Article (4) of the Law of Georgia on Conflict of Interest and Corruption in Public Institutions stipulates: "A public servant must follow the principle of economy and efficiency while performing his/her duties. A public servant should not abuse his/her service resources in order not to waste them."

circumstances that may affect the penalty (Bosnia, Croatia).¹³⁰

Article 75⁴⁷ of the Organic Law on Common Courts states that, while selecting a disciplinary sanction and disciplinary measure for a judge, the Disciplinary Board shall take into account the content and severity of the disciplinary misconduct, the consequences that it has had or could have had, and the degree of the guilt.

Based on foreign experience, to the list of circumstances which are taken into account at the time of sentencing, the following may be added: duration of the misconduct, the judge's past performance, the judge's admission of misconduct and liability, and cooperation with disciplinary bodies.

7. Review of Decisions of Disciplinary Bodies (High Council of Justice, Disciplinary Board of Judges of Common Courts and Disciplinary Chamber of the Supreme Court)¹³¹

The project analysed the decisions of the disciplinary bodies (High Council of Justice, Independent Inspector, Disciplinary Board and Disciplinary Chamber). A total of 296 decisions of the High Council of Justice, 20 decisions of the Independent Inspector, 8 decisions of the Disciplinary Board and 14 decisions of the Disciplinary Chamber were reviewed.

7.1.Process

7.1.1.Initiation of Proceedings; Deficiencies in the Disciplinary Complaint

A citizen's statement (complaint) is the reason for initiating legal proceedings in all the considered cases. Only two cases 86 / 18-1 (11.03.2019) and 86 / 18-2 (17.12.2018) were initiated based on media reports.

7.1.2.The Position of the Independent Inspector in the Decisions of the High Council of Justice

Many of the decisions of the disciplinary bodies do not specify the position of the Independent Inspector, therefore it is impossible to find out in what part his/her conclusions and assessments were shared by the Council and in what part the Council's reasoning is presented.

7.1.3.Deadlines for the Preliminary Examination of a Disciplinary Case

Under the first paragraph of Article 75⁷ of the Organic Law, the preliminary examination of a disciplinary case must be completed within 2 months; this period can be extended for 2 weeks.

Under the first paragraph of Article 9 of the same law, as a result of the preliminary examination, the High Council of Justice of Georgia assesses the merits of initiating disciplinary proceedings against a judge and, within the total time limit set for the preliminary examina

¹³⁰ See supra.

¹³¹ The findings of the Independent Inspector are not publicly available.

tion, decides by a 2/3 majority to initiate disciplinary proceedings against a judge. If the High Council of Justice of Georgia fails to make this decision, the disciplinary proceedings against the judge will be terminated.

Under the first paragraph of Article 75¹ of the law:

1. The investigation of a disciplinary case must be completed within 2 months after the decision to seek an explanation from a judge. If necessary, this period can be extended to no more than 2 weeks.

A study of the practice of disciplinary bodies has shown that, in most cases, this deadline is violated by both the Independent Inspector and the High Council of Justice. There are frequent cases when the inspector's report is drawn up 5-8 months after the submission of the complaint, and the decision of the council is made 1 year after the submission of the inspector's report.

The project examined the length of disciplinary proceedings in 200 cases reviewed by the High Council of Justice in 2017-2019. The study found that only 16 cases were completed in the two-and-a-half-month period from the filing of a disciplinary complaint to the issuance of the inspector's report. The average time from the issuance of the Independent Inspector's report to the final decision of the HCOJ is 220 days.

In the case of 26-19, where the above-mentioned deadlines were violated by the High Council of Justice, the judge requested the termination of the case against him according to the law, which states as follows, "if the High Council of Justice fails to make this decision, disciplinary proceedings against the judge will be terminated." However, the Disciplinary Board imposed a disciplinary liability on the judge. The decision of the Disciplinary Board was appealed to the Disciplinary Chamber of the Supreme Court. The Disciplinary Chamber acquitted the judge for lack of disciplinary misconduct, but unfortunately did not discuss the interpretation of this provision in the law and thus avoided to clarify the matter.

Given the abovementioned, it is clear that the current practice of violating these deadlines does not lead to any legal consequences. It is, therefore, necessary to specify in the law that, if the High Council of Justice must decide on the prosecution within that period and if the Council does not make that decision, the disciplinary action must be terminated.

7.1.4. Absence of Clarification from the Judge

Under the amendment of 8 February 2017, judges have the right to adduce observations and clarifications.¹³² According to the information provided by the High Council of Justice, even though the judge was given a disciplinary action and required to provide an explanation, the judge did not provide an explanation in 6 cases. We believe that this is a problem since, without the explanation of the judge, it may be impossible to establish the facts in a disciplinary case. Prior to 2012, there were cases when a judge was charged for obstructing the activities of the disciplinary body by refusing to provide an explanation.¹³³ We think that this legislation should be restored and in case of disciplinary charges, an explanation by the judge should be mandatory.

¹³² See the art. 9.2. of the law on Disciplinary Liability and Disciplinary Proceedings of the judges of Common Courts of Georgia.

¹³³ <http://dcj.court.ge/uploads/Practice/Practice2004-2013Criminal.pdf>.

7.1.5.Submission of Case Materials to the Prosecutor’s Office

Under Article 75⁷ of the Organic Law Georgia, during the preliminary examination and investigation of a disciplinary case, if the Independent Inspector is satisfied that there are signs of a criminal offence in the case, he/she shall apply to the High Council of Justice to decide it.

According to the information provided by the High Council of Justice, since the enactment of the institution of the Independent Inspector, the Independent Inspector has never applied to the prosecutor’s office.

7.1.6.Consideration of Appeals Against the Review of the Legality of Decisions

The legislative amendment of 13 December 2019 gave the Independent Inspector the power to terminate a disciplinary case if the complaint concerned the legality of an act rendered by a judge. The Statistical Report of the Independent Inspector for the second quarter of 2020 explains the following:

In case the complaint concerns both the grounds for the termination of a case provided for in the first paragraph of Article 75¹² of the Organic Law of Georgia as well as disciplinary misconduct, the disciplinary misconduct will be discussed at a disciplinary hearing of the HCOJ. If there are grounds for a termination decision by the Independent Inspector, the partial decision to terminate the proceedings will be made by the Independent Inspector.

We consider that this practice is wrong. Artificially dividing a disciplinary complaint and responding to it separately is not justified. In case the disciplinary complaint concerns both the legality of the judicial act and other grounds, the case should not be terminated by the Independent Inspector but should be sent to the High Council of Justice with a relevant conclusion.

7.1.7.The Rationale for HCOJ Decisions

The main challenge in assessing the disciplinary decisions is that the content of the complaint, the legal arguments and facts presented, as well as the attached evidence, are not available to the objective observer. Consequently, the position of the complainant can be determined only from the decision of the disciplinary body, where it may be presented in an incomplete, modified and/or summarized form only. Consequently, we are limited only to this extent to assess the extent to which it responds to the arguments of the complainant, to which the disciplinary body itself refers in the decision.

In many cases, it is not clear whether the High Council of Justice is considering a single offence or more offences.

In most cases, the decisions of the High Council of Justice respond to the complainant’s arguments, although there are decisions where the violations identified by the complainant are left unanswered. E.g., in Case no. 61-1-18, the applicant alleged that the judge had falsified the case file and changed the date of his appointment, although the HCOJ had not responded. Decision 114-17 (concerning the failure of the judge to rule in absentia) does not explain why the court did not rule in absentia despite the expiration of the time limit for filing a counterclaim against the defendant.

In some cases, the arguments of the complainant are mentioned in general, without concrete

details (which is necessary to understand the complaint). For example, in the case of 94 - 18, the complaint refers to the fact that the judge did not withdraw from the case even though there was a ground for challenge. The HCOJ's decision does not explain the prerequisites for the challenge pointed out by the complainant.

Case no. 78-17 claimed that the judge unlawfully dismissed the motion dealing with the additional evidence. The HCOJ's decision does not indicate the additional evidence requested by the party and why the court did not grant the motion.

In Case no. 150- 17, where the party argued that the judge had expressed bias with questions and violated the adversarial process, it is not clear what kind of questions the judge asked, thus making it impossible to discuss the party's complaint.

In Case no. 162/18, the party argued that the judge made rude insulting remarks during the trial. The decision of the High Council of Justice does not describe the expressions the party focused on. It is only stated that, after listening to the audio recordings of the hearing, it was determined that there was no unethical appeal by the judge. We believe that, if the party did not indicate specific statements in the complaint, the Independent Inspector in the case should have contacted the complainant and found out which statements of the judge were referred to. This claim of the party should have been considered and evaluated in detail in the decision of the High Council of Justice.

In Case no. 101-17, the appellant indicated that the judge was pressuring him, threatening him with severe punishment if he did not agree to the plea agreement. Upon the termination of the case, the Council of Justice indicated that the facts in the complaint had not been substantiated. However, in the decision of the HCOJ, the phrases used by the judge against the accused was not discussed.

In Case no. 125-17, the party requested an inspection of evidence on the spot, which the court rejected. The High Council of Justice limited itself to quoting the relevant norm and did not discuss whether it was incumbent on the judge to grant a party's request in the present case. It only indicated that the resolution of the matter was within the discretion of the judge.¹³⁴

In some cases, the board's reasoning and legal explanations are irrelevant. For example, in Case no. 103/17, where the case concerns the late delivery of a reasoned decision to a party, the board devotes a single page reasoning to explain the difference between a judicial error and disciplinary misconduct that is not relevant in the present case.¹³⁵

When substantiating the decision of the Council, we often find a general reference to Article 75¹ of the Organic Law of Georgia¹ without reference to the sub-paragraph of this article. For example, in cases 85-18, it is stated that "there are no grounds referred to in Article 75¹ of the Organic Law of Georgia. This is incorrect since the decision of the board must specifically indicate which misconduct is not established as a result of the examination of the case file. It is well known that each type of disciplinary offence has its own set of elements (like a criminal offence). When establishing the facts of disciplinary misconduct, the High Council of Justice should clarify the elements this misconduct contains and should discuss the existence or absence of specific signs of misconduct. Such reasoning is often not found in the decisions of the High Council of Justice.

¹³⁴ During this period, the version of the law was still in force, which provided for improper performance of duties.

¹³⁵ Improper enforcement does not always imply the existence of a judicial error as with the practice of disciplinary bodies, delaying the delivery of a court decision also qualifies as improper enforcement.

Several decisions of the High Council of Justice are reasoned only by the lack of quorum required for decision-making even though there are signs of disciplinary misconduct in a case, e.g., (60-17) (139-17) (207 / 17-2). This can be a way for the High Council of Justice to avoid reasoning a decision. Accordingly, this issue needs to be resolved through legislation.

7.1.8. The Burden of Proof, Evidentiary Process, and the Issue of the Adequacy of Evidence

The Organic Law on Common Courts does not regulate the issue of the burden of proof in disciplinary proceedings. In some countries, this issue is explicitly regulated. For example, in Montenegro, the burden of proof rests with the prosecution.¹³⁶

Legislative amendments to the Organic Law on Common Courts of 13 December 2019 set standards of proof in disciplinary proceedings, namely, the initiation of disciplinary proceedings is based on the standard of reasoned presumption,¹³⁷ judges are indicted with a high degree of probability,¹³⁸ and a judge is convicted based on clear and convincing evidence.¹³⁹

A study of the practice of disciplinary bodies confirms that the problem of the standard of proof rarely arises in disciplinary proceedings as the circumstances of the case are unequivocally established by the case file (including the minutes of the hearing),¹⁴⁰ although there are cases where the video is missing and the judge cannot be convicted (6. 17). (Case no. 172-17).¹⁴¹

In the practice of the High Council of Justice, there are frequent cases when a particular circumstance is not confirmed by the materials provided by the plaintiff or otherwise available but requires additional investigation. We think that, in such a case, the disciplinary case should not be stopped, and the Independent Inspector should conduct an investigation. For example, in Case no. 4-18, in which the appellant argued that the judge was the defendant's neighbour, the High Council of Justice pointed to the grounds for dismissal that the declaration filed by the judge did not prove that the judge had a plot of land next to the defendant. We think that the High Council of Justice was obliged to receive an explanation from the judge to verify the issue of ownership of the disputed land and should have not been satisfied only with the declaration filled out by him.

In the 156/17, where during the break of the session, a 19-second ex parte communication took place between the judge and the prosecutor outside the session, which was confirmed only by a video (and not audio) recording. Nevertheless, the Council stated that "the law on communication with common law judges was not violated as the content of the communi

136 Kakha Tsikarishvili, *Disciplinary Responsibility of Judges and Disciplinary Proceedings in Different European Countries*, 2014. _

137 Article 75⁸, first paragraph.

138 Article 75¹⁴, first paragraph.

139 Article 75⁴⁶.

140 For example, in the case of 112-18, the judge threatened to convict the plaintiff if he did not sign the plea agreement. The threat was not confirmed from the audio recording of the session.

141 Also, in this respect, interesting is the Case no. 72-18, where the procedural error indicated by the complainant (that the judge did not send the increased demand to the defendant) allegedly has caused violation of the right of the party. however, in this case the audio record became unusable and the video record was lost.

cation was not established.¹⁴² We consider that the termination of this case by the High Council of Justice to be unjustified, as the High Council of Justice was obliged to investigate the case and determine the content of this conversation, including the judge's explanation and interrogate the prosecutor involved in the communication.

In Case no. 60-18, the defendant stated that the judge was obliged to remove himself from considering the issue of a restraining order against him because the judge had a personal interest in his wife, which led to a previous conflict between the judge and him. To prove this, the accused submitted the correspondence between him and his ex-wife. The High Council of Justice noted at the outset that the authenticity of these records had not been established. In our view, the case should not have been terminated by the Council, and it should have received an explanation from the judge, the accused's spouse and other relevant persons to establish the facts raised in the complaint.

In case - 136/17, the applicant argued that a citizen appeared at the hearing and the court stood up to meet him, he attended the court hearing and left the courtroom with the opposing party satisfied and the case was dismissed due to the lack of evidence. Strangely, the video recording of the session was lost from the case, and it was impossible to establish the mentioned fact through the audio recording. We believe that the High Council of Justice should not have terminated the case but should have conducted a full investigation to determine the circumstances of the case (including by interviewing those present at the hearing). The clear familiarity between a judge and a party in a disciplinary practice can be a disciplinary offence in some other countries.¹⁴³

In case (128-17), the judge asked the complainant (a journalist) at one of the hearings: "Who are you?". The applicant replied that he was a journalist. Then the judge said: "I thought you were the wife of the party". According to the applicant, the judge knew his identity. Clearly, such cynical treatment of a person in the courtroom is not appropriate for a judge, although the High Council of Justice concluded that there had been no breach of ethics by the judge. The decision was not properly reasoned, and it was not established if the judge knew the applicant's identity. This was crucial to define whether his appeal was cynical. We think that here too the High Council of Justice was obliged to conduct a full investigation of the case and establish this important circumstance in the case.

The law on judges' disciplinary responsibility and disciplinary proceedings was amended on 8 February 2017. The amendment established the standard of proof in disciplinary proceedings as follows:

The Disciplinary Board shall decide on finding a judge guilty of committing disciplinary misconduct and imposing disciplinary liability and penalty on him/her, if the culpable commission of one or several disciplinary misconducts under this Law by the judge has been proved, by inter-compatible and convincing evidence collectively, as a result of hearing a disciplinary case by the Disciplinary Board and the Disciplinary Board deems it appropriate to impose one

¹⁴² The judge explained at the hearing that the communication between him and the prosecutor took place during a telephone call with the witness' lawyer. The Council pointed out the following: In case of sharing the existing version, it should be noted that the topic of conversation is related to the case under consideration, however, when evaluating the action, it does not meet the requirements of Article 3 of the Law of Georgia on ex parte communication with the judges. Namely, making a call with the witness' lawyer does not violate the principle of impartiality of the judge and adversarial proceedings.

¹⁴³ E.g. According to the practice of the California Judicial Conduct Commission, it was considered a disciplinary offense for a judge to hug a party after the trial is over. <http://dcj.court.ge/uploads/kvlevebi/Researches/california.pdf>.

of the disciplinary penalties under Article 753(1) of this Law on the judge.¹⁴⁴

A legislative amendment of 13 December 2019 established the following:

1. The substantiated decision to impose disciplinary charges on a judge shall state the content of the disciplinary charge brought against the judge. In making this decision, the High

Council of Justice of Georgia relies on a high degree of probability standard.

In Case no. 89-18-2 (Judgment of 9 September 2020), the High Council of Justice, in contrast to those standards, used the standard of infallible evidence, which is higher than this standard. In the present case, the party argued that the judge had asked the other party to stay in the courtroom after the trial and had a separate conversation with him. A representative of the other party did not rule out this assertion, noting that he had had many administrative cases with the said judge although he did not speak to the judge about that particular case. The judge categorically denied this information. No such evidence was found in the minutes of the hearing (which is natural since the hearing was over).

The High Council of Justice stated, terminating the case, as follows:

“Given the above, it is impossible to irrefutably confirm whether he remained in the courtroom or - in case of staying - what he was talking about with the judge. Evidence of this fact could not be found or presented by the party.”

We think that the use of the standard of infallible evidence by the High Council of Justice is wrong. At the stage of disciplinary responsibility of a judge, the High Council of Justice should have applied the high degree of probability standard given in Article 75¹⁴ of the Organic Law on Common Courts.

According to the law, the High Council of Justice of Georgia is also authorized to instruct the Independent Inspector to conduct additional investigations into a disciplinary case and to give him / her relevant instructions. According to the information received from the High Council of Justice, in 2017-20, the High Council of Justice Inspector was never instructed to conduct an additional investigation of a case.

Under Article 75¹⁰ of the Organic Law, a judge has the right to petition the Independent Inspector and request an additional explanation to be taken, however, this has never taken place in practice.

7.1.9. Right of a Judge to a Lawyer

Under Article 75¹⁰ of the Organic Law on Common Courts, a judge has the right to exercise the right of counsel. According to the information provided by the High Council of Justice, in 2017-20, judges did not exercise their right to a lawyer.

7.2. Disciplinary Misconduct in Georgia and Abroad; Practice of Disciplinary Bodies

7.2.1. “Decriminalization” of Disciplinary Misconduct

On 13 December 2019, the amendment to the Organic Law on Common Courts changed the

¹⁴⁴ This standard has been transposed in the same way in Article 75⁴⁶ of the Organic Law on Common Courts.

list of disciplinary misconduct. Some misconduct (e.g., misconduct or improper performance) has been eliminated, while some have been newly worded. Accordingly, the issue of retroactive force of substantive disciplinary legislation was brought to the agenda.

The High Council of Justice avoids in its decisions the question of whether a judge can be held accountable for an action that was a misdemeanour at the time of its commission but is no longer punishable today. In particular, in December 2019, an amendment to the Organic Law on Common Courts removed the following disciplinary misconduct: failure to perform the duties of a judge or improper performance. In Case no. 195/18, the party's complaint against the judge was related to his improper performance of duties, on which, on 18 October 2018, the Independent Inspector submitted a positive conclusion. At its meeting on 9 September 2020, the High Council of Justice discussed this conclusion and considered that the judge's action did not constitute an improper performance of duty and terminated the case on this basis. However, we think that the High Council of Justice should have first discussed disciplinary law and the fact that improper performance of duty no longer constitutes disciplinary misconduct.

7.2.2. Minor Infractions

According to an amendment to the Organic Law of Georgia on Common Courts of 13 December 2019, the following shall not be deemed as disciplinary misconduct: an act that formally contains the elements of a disciplinary offence, but did not cause minor damage that would have necessitated disciplinary action or posed a threat of such damage (Article 75.1.7).

A similar provision is provided by the legislation of different countries (de minimis requirement) and specifically mentioned in the UN Special Rapporteur's report as a recommendable International standard.¹⁴⁵

This provision was used in cases of breach of procedural deadlines where it was noted that the breach of the timeframe was negligible and did not cause harm to the party.¹⁴⁶ For example, in Case no. 160-18-2, where a reasoned judgment was sent to the parties approximately 1 month and 12 days later, the appellant filed a formal appeal against the judgment. However, in the Council's view, this was not a significant violation, as the party had not been deprived of its procedural right to appeal to a higher court. We cannot agree with this reasoning as a formal filing of a cassation appeal cannot ensure the full realization of the right to appeal and forcing a party to appeal a decision without having a reasoned decision cannot be considered a minor violation.

In some cases, a minor violation is considered to be a delay of several days (see, for example, Case no. 91.18).

7.2.3. Judges' Independence, Impartiality, Observance of the Principle of Equality of Arms, Prior Expression of Opinion in a Case

Article 75¹ paragraph 8 of the Organic Law on Common Courts: Disciplinary misconduct is the exercise of judicial power by a judge through personal interest, political or social influence.

¹⁴⁵ Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, 2020, p. 12, <https://undocs.org/A/75/172>.

¹⁴⁶ See. E.g. Case no. 160-18-2.

Prior to 13 December 2019, this issue was regulated by subparagraph “h” of this article, under which disciplinary misconduct is a “violation of the norms of judicial ethics”.

Under Article 3 of the Code of Judicial Ethics, “a judge must strengthen the public belief in the independence, fairness and impartiality of the judiciary at the institutional and individual levels.”

Under par. 8.b.a. of Article 751 of the Organic Law on Common Courts, the public expression of an opinion by a judge on a case pending before a court amounts to disciplinary misconduct. In addition, it is not considered a disciplinary offence for a judge to make explanations on organizational and technical issues related to this case in order to inform the public.

In setting the standard for the impartiality of a judge, the High Council of Justice often uses the first article of the Code of Judicial Ethics, according to which a judge is independent in the administration of justice and makes decisions only under the law. Under Article 3, the judge must strengthen the public belief in the independence, fairness and impartiality of the judiciary at the institutional and individual levels. Under Article 2.2 of the Bangalore Principles, a judge should ensure that his/her conduct, both in and out of court, protects and enhances trust in the impartiality of the judge and the court, both from the public and the legal profession and the parties.

In applying precedential case-law of the ECtHR, the HCOJ stated the following:¹⁴⁷

“According to the case law established by the European Court, impartiality implies the absence of preconceived notions or influences, for the purposes of Article 6 of the European Convention. The subjective test includes personal opinions, the behaviour of a particular judge - whether the judge had a personal interest in the outcome of the case or whether he/she had a preconceived negative attitude. An objective test includes whether proper guarantees for excluding doubt are secured (*Fey v. Austria*; *Wettstein v. Switzerland*). Where it is difficult to obtain evidence against the presumption of a judge’s subjective impartiality, the requirements of objective impartiality (objective test) are an important guarantee. The court must be impartial from an objective point of view as well. It must offer the public sufficient guarantees to rule out legitimate suspicion in this regard (*Pullar v. The United Kingdom*).

On the issue of the judge’s preconceived notions, the High Council of Justice often refers to paragraph 58 of the Commentary on the Bangalore Code of Conduct, according to which a preconceived notion can be expressed verbally or physically, for example, epithets, insinuations, offensive nicknames, negative stereotypes, stereotypes fed by bad jokes (e.g., gender, any culture or race affiliation), etc.¹⁴⁸

Bias or prejudice to the existence of grounds to be determined by considering a variety of criteria such as “increased probability”, “real possibility”, “high probability”, as well as “reasonable suspicion” about bias. The allegation of bias must be substantiated.¹⁴⁹

During the reporting period, the High Council of Justice reviewed a number of disciplinary cases in which the applicant alleged a manifest bias on the part of the judge.

147 See, C.g. Case no. 177-18-1.

148 See, e.g., Case no. 155-18.

149 177-18-1.

In Case no. 155-18, the HCOJ did not consider the address to the party as a preliminary expression of bias: “You can make these arguments in the Supreme Court ... if you continue the dispute, you will substantiate your case ...”. In this case, too, we do not agree with the decision of the High Council of Justice as these words show a reference to the judge that he intends to rule against the party. This context has not been properly assessed by the High Council of Justice.

In Case no. 63-17, the High Council of Justice did not consider it bias on the part of a judge of the Court of Appeal to point out that 80 per cent of the decisions of the Court of First Instance remain in force. He also noted that the amount imposed on the party could be modified to another specific amount. The High Council of Justice did not consider this to be a violation as the judge might have indicated the specific outcome of the case to reach a settlement.

With a similar approach, the High Council of Justice did not consider the judge’s appeal to the party to be biased, saying: “It is true that you do not have a 100 per cent power of attorney and you are not a physical person, but I still want to talk to you about a settlement. You see an 87-year-old man. I want the parties to reach a settlement on this issue ... He is 87 years old, lives in a nursing home and maybe you should pay this 200 GEL.”¹⁵⁰ As the High Council of Justice explained, according to the procedural law, a judge is not only authorized but obliged to take all necessary measures to settle as stipulated by the civil procedural law, in particular, to explain to the parties to agree on the completion of a case and propose a settlement to the parties.¹⁵¹

The phrase used by the judge, “... so far there is no basis for the use of a preventive measure,” was not considered as evidence of a judge’s bias (Case-118-17).

In Case no. 136/17, the applicant argued that the court stood up to greet the person who appeared at the hearing, attended the hearing and left the courtroom with the opposing party satisfied; the case was dismissed due to lack of evidence. Strangely, the video recording of the session was lost from the case, and it was impossible to establish the mentioned fact through the audio recording. The High Council of Justice was obliged to conduct a full investigation of the case and establish the existence or non-existence of the circumstances indicated by the applicant.

In Case no. 150-17, the Chamber did not consider the judge’s reference to the party to be a disciplinary offense. In particular, the judge corrected the party’s position by stressing that the party had not conducted an expert examination but that the examination had already been sufficient to establish the party’s position.

In Case no. 165-17, the party argued that the judge was a lecturer at a particular university and was receiving remuneration from that university, therefore he could not be impartial in the dispute against him. The decision of the council states that the participation of this university in the case reviewed by the judge was not confirmed.

In contrast, in Case no. 76-18, the judge considered a case where the party represented a university where the judge had a proven academic position. The judge did not recuse himself from the case. In this case, the Inspector confirmed the existence of disciplinary misconduct in the judge’s action, i.e., violation of the rules of ethics. The High Council of Justice did not share this conclusion.

150 175/18.
151 Supra.

“Judges should not be isolated from society. They should have the opportunity to share their knowledge and experience with future lawyers. Consequently, the fact that a judge reviews a private complaint of the university where he/she holds a remunerative position does not constitute a grounded presumption for a suspicion of a judge’s impartiality, as the party has not appealed to the judge to avoid it. It is important to note, however, that the judge himself would have the obligation to exercise self-immolation only if, given the subjective test, he had a preconceived notion of a particular dispute. However, it should be noted that disciplinary misconduct is a case where there is a clear ground for recusal. In this case, since the party did not appeal to the court and the judge had no clear grounds for recusal, there are no signs of misconduct in this disciplinary case.”

We think that in this case, the High Council of Justice has explained the judge’s discretion too broadly. When a judge considers a dispute against his or her employer, there is already a clear reason to avoid the judge, and the judge should have avoided the case himself.

In Case no. 4-18, the applicant argued that the judge should have declared his resignation during the civil case. The High Council of Justice pointed out while closing the case that the fact of being godchild of the aunt of the judge, which is an unconfirmed fact, even if confirmed, does not constitute a ground for recusal provided by law.

As for the fact that the judge has a plot of land next to the defendant, HCOJ stated that this is not confirmed by the financial declaration filled out by the judge. We think that this case should not have been dismissed and the HCOJ should have checked whether the judge owned the land next to the defendant.

In Case no. 166/17, after hearing the closing arguments of the prosecution, the judge returned to the stage of examining the evidence and gave the defence the right to examine the witness on a motion. After which the prosecution could no longer exercise its right to present concluding remarks. The High Council of Justice considered that the prosecution was given the opportunity to assess the testimony of a witness during the reply, hence the principle of adversarial proceedings was not violated.

In Case no. 75-18, the High Council of Justice held that the fact that the judge and the plaintiff’s brother were working in the same department did not constitute grounds for the judge’s recusal, therefore there was no breach of the obligation of impartiality.

When considering issues of ex parte communication with a judge, the High Council of Justice made the following explanation:

“The impartiality of a judge is a necessary condition for him to perform his duties properly. It applies not only to the content of the decision but also to the process that precedes the decision. The judge should refrain from communicating with the parties in a way that might give rise to reasonable suspicion or present the situation as if it were driven by some kind of bias. Feelings of bias and preconceived notions lead to feelings of dissatisfaction and injustice and shake trust in the judiciary. The standard of the outside observer is used as a criterion in determining how impartial a judge looks in the eyes of the public. A judge’s impartiality may be called into question by excessive communication with his party (40-18).

Nevertheless, the issue of application of this standard by the Council is questionable, in particular in Case no. 40-18, where a judge left one side of the courtroom to speak privately with the other side.

After listening to the audio and video recordings of the hearing, it was revealed that the judge at the hearing on 6 February 2018 apologized to the plaintiff for leaving the courtroom for a few minutes and explained that he had talked to the defendant about the terms of the settlement (16:40:15). The High Council of Justice itself, in its decision to dismiss the case, states that the settlement must be made in the presence of both parties and not individually with each party. Nevertheless, the High Council of Justice terminated the disciplinary case due to lack of required quorum, namely 4 members of the Council did not support the prosecution.

As mentioned above, an amendment to the Organic Law on Common Courts in December 2019 provided for disciplinary misconduct: “Exercising judicial powers by a judge through personal interest, political or social influence.” According to the High Council of Justice: “In the case of a judge’s personal interest in the case, an action that may be considered a misdemeanour may be a judge’s biased attitude towards one of the parties to the case, improper performance of obligations or a judge’s refusal to perform his duties.”

This means that improper performance of a judge’s duties, despite his removal from the law, still constitutes a misdemeanour in certain cases¹⁵².

Numerous examples of overt bias, one-sided communication and prejudice by a judge are found in the disciplinary practice of foreign countries (USA, France). In particular, the following cases were considered as disciplinary misconduct:

- » judge announcing the outcome of the case to the party in advance;¹⁵³
- » Hearing the case by a judge even though he had an intimate relationship with the party;¹⁵⁴
- » The judge heard a case in which the party was represented by his friend and his company;¹⁵⁵
- » The judge gave legal advice to the party in a particular case and then considered the case himself;¹⁵⁶
- » The judge did not avoid a case in which his sister’s ex-girlfriend was the defendant; In the same case, he spoke unilaterally over the phone to the defendant and gave him various information and advice regarding the progress of the case;¹⁵⁷
- » The judge unilaterally, secretly met with one of the parties to the case and asked him to intimidate his lawyer, who threatened to file a disciplinary complaint;¹⁵⁸
- » In one criminal case, a judge and a member of the panel chatted familiarly with each other via Twitter, which was made available to the general public and was reported in the media;¹⁵⁹

152 See Case no. 184/18.

153 Collection of decisions of the High Council of Magistracy of France <http://dcj.court.ge/uploads/kvlevebi/Researches/csmsummariesFRANCE.pdf> Case no. 11 Decision.

154 Ibid., Case no.079.

155 Case no. 96.

156 Case no. 152.

157 Case no.179.

158 Case no.193.

159 Case no. 21.

- » Demonstrate obvious sympathy or antipathy towards the party;¹⁶⁰
- » Criticizing or praising a jury verdict;¹⁶¹
- » The judge hugged the accused after the hearing;¹⁶²
- » The judge said that the hearing of this case is a waste of time;¹⁶³
- » The judge in one of the criminal cases said that his son would have acted in the same way as the accused;¹⁶⁴
- » The judge assigned the case of his friends to himself and a made preferential decision (removal of fines) (or expedited review)¹⁶⁵
- » Seek external information on the case on their initiative (the judge called a witness and questioned the facts relevant to the case);¹⁶⁶
- » The judge, after avoiding the criminal case, established communication with the substitute judge about the substance of the case and explained the reasons why he had set a specific amount of bail;¹⁶⁷
- » In the Pulver case, the judge considered the case of his nephews and son-in-law, which was considered disciplinary misconduct;¹⁶⁸
- » The judge who looked at the criminal case had the victim as Facebook friends, family members of the victim and a police officer who arrested the perpetrator.¹⁶⁹

As we can see, the Georgian practice of judicial impartiality is rather limited compared to traditional systems abroad, but at the same time much more liberal. The fact that the High Council of Justice did not consider the trial of a judge against its employer as a mandatory ground for avoidance shows the unjustified ambition of the High Council of Justice.

7.2.4. Failure to Perform or Improper Performance of a Judge

Although an amendment to the disciplinary law in 2009 abolished “gross violation of the law” as a basis for disciplinary action, the definition of “improper performance of a judge’s duties” has always been problematic in disciplinary practice.

In distinguishing between disciplinary misconduct and legal error, the High Council of Justice often invokes the Disciplinary Board’s decision of 12 April 2013, stating that “the possibility of correcting the error, its quality, its repetitive and repeated nature, the good faith of the judge,

160 see.213.Review of the Basics of Disciplinary Liability in the Practice of the California Judicial Conduct Commission, <http://dcj.court.ge/uploads/kvlevebi/Researches/california.pdf>

161 Ibid.

162 Ibid.

163 Ibid.

164 Ibid.

165 Ibid.

166 Ibid.

167 Ibid.

168 Ibid.

169 <http://judicialconductboardofpa.org/wp-content/uploads/2018-Annual-Report-Judicial-Conduct-Board-of-Pennsylvania-1.pdf>.

which creates its discretion, must be taken into account in distinguishing between misconduct and legal error.”

The High Council of Justice also frequently refers to the decision of the Disciplinary Board N 21 / C / 9-16 of 21 July 2016, where the Board clarified the criteria for distinguishing between legal error and disciplinary misconduct. According to the Disciplinary Board, the relevant provision of the law should be interpreted in accordance with the principle of legality of the two most important principles and the rule of exercising the discretionary power of a judge. The principle of legality is based on the rule of law. This is a constitutional principle according to which no one has the right to take any action against the requirements of the law. When exercising discretionary powers, the judge is obliged to exercise these powers within the limits established by law and not go beyond the law. The court is obliged to exercise the discretionary power granted to it within the law. Thus, it should be clarified that, in accordance with existing practice, a judge’s misconduct/omission is considered disciplinary misconduct only if it exceeds the limits prescribed by law for a judge and violates the imperative requirements of the relevant law.¹⁷⁰

Accordingly, a judge’s discretion, which is not subject to disciplinary action, may relate to an interim court decision, for example, admissibility of new evidence (89/17) or inadmissibility (Case No. 78-17), (Interrogation of witnesses 214-17), failure to notify a claim to the defendant through a public notice (Case no. 108-17), waiver of litigation due to jurisdiction (13-18), exemption of party from the fee (137-19), admissibility of the cassation appeal (200-17-1), etc. The HCOJ noted that this was at the discretion of the judge and therefore did not discuss the legality of the decision.

It may also apply to concluding court decisions (Case no. 138/17) even if that decision has been amended or quashed by appeal or cassation (Case no. 189-17).

For example, in Case no. 67-18-2, the court found that the victim could not obtain the case file in the criminal proceedings. It was an administrative dispute and the case was dismissed on this ground. The plaintiff filed a complaint against the judge. The High Council of Justice refused to discuss the content of the decision, indicating that the matter was at the discretion of the judge. The same applies to reviewing the legality of judgments in criminal cases (cf. 17). In Case no. 200/17-1, the disciplinary body also did not consider whether the cassation claim was correctly declared admissible under Article 34 of the Administrative Procedure Code. In many cases, the Board indicated that the party had not used legal remedies to appeal the decision (for example, without reviewing the claim). In passing judgments (Case no. 123-17), the High Council of Justice also considers that the application of an incorrect procedural norm by analogy, if it did not cause any harm, does not constitute grounds for disciplinary liability (Case no. 93/17).

In cases where the appellant complains of an unjust sentence, the Council of Justice is limited to checking whether the sentence imposed by the judge is within the minimum and maximum (Case no. 144/17).

¹⁷⁰ Auxiliary sources also often refer to the laws and practices of foreign countries (France, Italy, Spain), according to which “failure to perform or improper performance of duties by a judge may be considered the violation of a fundamental guarantee of a party’s constitutional as well as fundamental procedural right to a fair trial, infringing interests of a party, court or public.”

In Case no. 05-18, the applicant indicated that the judge had taken an unusually short time to consider the defence's 22-point motion. The record of the hearing showed that the judge was in the deliberation room for 54 minutes, which, according to the High Council of Justice, is not an inappropriately short time.

Cases, where a judge has gone beyond his or her jurisdiction, may be subject to disciplinary control. In Case no. 67/17, for example, the applicant argued that the judge had instructed a third party to inherit. The High Council of Justice, after reviewing the case file, found that no such thing had taken place.

In Case no. 07-18, where the appellant argued that the judge had not allowed the motion to dismiss, the examination of the minutes of the hearing had not found the same.

On the other hand, in practice, there are cases when the High Council of Justice discusses the legality of a judge's decision, for example, in Case no. 157-17, where the applicant argued that he had been wrongly imposed with a court fee, the High Council of Justice decided that the judge acted in accordance with the first part of Article 53 of the Code of Civil Procedure.

In Case no. 112-18, where a party argued that a judge had allowed illegally obtained evidence (investigative action - the recording of the conversation took place without a court order), the Board discussed the legality of obtaining evidence and noted that the evidence was admissible under the CCP. Article 112.

As mentioned above, the High Council of Justice also takes into account the judicial error that led to the violation of the rights of the parties.

For example, in Case no. 172/17, where the counsels and judge incompletely explained his rights to the accused, the Council pointed out that the accused had two defence lawyers and obtained clarification of his rights to him three times during the investigation; consequently, his interests were not harmed.

In Case no. 195-18, the judge issued a public notice to the respondent (and subsequently rendered an absentia judgment) even though he knew the actual address and telephone number of the defendant. The High Council of Justice pointed out at the closing of the case that there was a judicial error which was not accompanied by an unscrupulous motive and, in the end, this error was corrected on appeal.

In Case no. 202-17, the Independent Inspector found a court decision based on an invalid norm to be an improper performance of duty, and the Council of Justice did not consider it disciplinary misconduct and dismissed the case on the grounds that the judge did not show intentional or gross negligence or improper performance, accordingly, the right of the party was not violated.¹⁷¹

In contrast, in Case no. 1 / 01-17, the Disciplinary Board found that the judge had performed his duties improperly by violating Article 124 of the Detention Code, according to which the accused has the right to make a telephone call thrice a month at the expense of the administration until 1 January 2016, each call lasting no more than 15 minutes, only with the permission of the investigator, prosecutor or court. The panel found that the failure to allow the accused to make telephone calls substantially violated his rights.

171 The case is also described in the Independent Inspector's 2017-18 report.

In Case no. 222-17, the High Council of Justice refused to examine the proportionality of the sentence (a fine of GEL 5,000) with the damage caused by the crime (\$ 25,000).

In some cases, the board avoids such reasoning despite the request for an appeal. For example, in Case no. 114-17, the decision does not explain why the court did not make an *absentia* decision despite the expiration of the time limit for filing a counterclaim.

In the Case no. 166/, the judge, after hearing the closing arguments of the prosecution, returned to the stage of examining the evidence and gave the defence the right to cross-examine the witness. The Council of Justice considered that the judge had indeed violated the norm of criminal proceedings but had done so to protect a higher value, such as the right of the accused to a fair trial. He further pointed out that it is the competence of a higher court to judge the legality of a court's action and should not be examined in disciplinary proceedings.

Under Article 216 of the Civil Procedure Code, "with the consent of the parties, a judge may consider a case and/or decide during non-working hours, including holidays and weekends." It was not considered a disciplinary offence to exceed the working hours by 36 minutes, to which the parties did not complain and did not suffer any harm.

In the case of a breach of the time limit for the transmission of a reasoned decision to a party, it may or may not qualify as improper performance due to the workload of the judge. For example, the case was dismissed in 154-17, where the delay did not lead to a violation of the right to appeal. Also, due to the workload of the judge, it was excused to submit a reasoned decision with a delay of 6 months in cases 103-17; the decision of the Court of Cassation on the admissibility of the appeal was delayed for of 4 months and the hearing was held after a year and five months in Case no. 53-18; the delay was 8 months in Case no. 131-17¹⁷² and 9 months in Case no. 49-18.

The most notable in this regard is Case no. 197-18, which originated in 2015, where the parties have not yet received a decision as of 2018 (3 years and 2 months). However, given the workload of judges (up to 500-600 cases per year), the High Council of Justice has also deemed it excusable.¹⁷³ It should be noted that, when violating the time limit for a reasoned decision, the High Council of Justice does not take into account how difficult the case was and how time-consuming it was. Such an approach is not reasonable.

In general, breaches of the deadline to deliver a reasoned court decision are quite common. Attorneys file a formal complaint with the Court of Appeals to ensure that the deadline for appeal is not violated, with the proviso that the appeal will be substantiated after the decision has been served. Based on such practice, the disciplinary body states that the delay in submitting the decision does not prevent the party from appealing and, thus, its interests are not harmed. Consequently, the disciplinary body, in turn, contributes to the "legalization" of this practice. With such an approach, the existence of procedural deadlines provided by law loses its meaning and calls into question the reasonableness of the length of the proceedings.

¹⁷² In contrast, in the Case no. 1/01/17, the Disciplinary Board considered that the preparation of the verdict with a delay of 5-6 months and its delivery to the party (18 counts) was an improper performance of duty.

¹⁷³ The conclusion of the Independent Inspector in this case was positive. Interestingly, 4 members supported the termination of the case against 9 members who voted for its continuation.

In Case no. 58-18, the parties did not file an appeal with the Court of Appeals due to the procedural deadline, as they were not given a reasoned court decision. In its assessment of the case, the High Council of Justice ruled that “the appeal by the party against the decision in violation of the time limit is caused by his guilty action. Examination of the case file does not confirm the fact that the judge committed disciplinary misconduct.”

Also, considering the workload of a judge (216 cases per year), it was not considered to be a disciplinary offence to refer a case to the Court of Cassation within two and a half months after the appeal (180/18). We think that exceeding the deadline by several months for sending the case cannot be explained by the workload of the judge. After the decision is written, the transfer of the case to a higher instance is the responsibility of the court staff and the delay cannot be justified by citing the judge’s workload (12-18).

In case N94 / 315-18, the judge changed the qualification of the action in the operative part of the judgment while correcting the inaccuracy under Article 287 of the Criminal Code. In particular, as a result of eliminating the inaccuracy in the verdict, instead of the crime provided for in Article 180, Part 2, Subparagraph A of the Criminal Code of Georgia, the con

vict was found guilty under paragraph 3 ((b) of the same article. The Independent Inspector considered that there was no disciplinary misconduct on the face of it, as the elimination of inaccuracy did not change the nature and size of the sentence. However, the reasoning presented by the court in the motivational part of the judgment was not changed. Thus, the elimination of inaccuracy in the judgment by the judge in the above-mentioned manner cannot be considered as circumstances that affect the court’s conclusion on the qualification of the convict’s action and the measure of punishment. We cannot agree with this reasoning because a change in the qualification of the action may have a legal effect on the convict’s condition, for example when applying amnesty or pardon to him.

Numerous examples of non-performance or improper performance can be found in the disciplinary practice of advanced countries:

- » Failure to extend the term of detention, thus holding persons in illegal detention;¹⁷⁴
- » Delivery of decision 2 years from the hearing of the case;¹⁷⁵
- » Dating of decisions by the judge at a later date;¹⁷⁶
- » Loss of case materials by a judge;¹⁷⁷
- » Absence from the office of the President of the Court;¹⁷⁸
- » Failure to hear the case;¹⁷⁹.
- » Refusal to perform his duties during a judge’s transfer to another location;¹⁸⁰

174 Collection of decisions of the Supreme Council of France, <http://dcj.court.ge/uploads/kvlevebi/Researches/csmsummariesFRANCE.pdf>, Case no. 081.

175 Ibid., Case no. 071.

176 Ibid., Case no. 063.

177 Ibid., Case no. 063.

178 Ibid., Case no. 10.

179 Ibid. Case no. 018.

180 Ibid. Case no. 024.

- » Non-termination of criminal cases despite the expiration of the statute of limitations on the case;¹⁸¹
- » Claim fees from the parties which they were not due to pay;¹⁸²
- » Even though the judge was deprived of the case, he continued the proceedings;¹⁸³
- » After the convict made a noisy protest against the sentence, the judge changed the sentence and doubled the punishment;¹⁸⁴
- » The judge met and heard witnesses beyond trial;¹⁸⁵.
- » The chairperson of a three-judge panel announced in the courtroom a decision against the decision made by the majority (on the release of the juvenile from pre-trial detention);¹⁸⁶
- » Following the decision, the judge unilaterally changed the operative part of the decision without the consent of the other members of the panel;
- » The judge did not appear at the hearings and returned the case to the president of the court;¹⁸⁷
- » The judge did not appoint a defence counsel whose appointment was required by law;¹⁸⁸
- » The judge issued a restraining order without any legal preconditions (request, hearing, hearing the arguments of the parties); only based on the information that he accidentally learned during the civil case;¹⁸⁹ and
- » The judge found the defendants guilty of violating the terms of the probation period and sentenced them to imprisonment, without observing their constitutional rights, clarification of the essence of the charge and substantive hearing of the case.¹⁹⁰

7.2./5. Inappropriate Address to the Parties and Participants in the Process

Under Article 75¹, Paragraph 8 of the Organic Law on Common Courts, expressing obvious disrespect by a judge towards another judge, a staff member of the court or a participant in the trial amounts to disciplinary misconduct.

181 Ibid Case no. 027.

182 Ibid. Case no. 029.

183 Ibid. Case no. 081.

184 Ibid. Case no. 135.

185 Ibid. Case no. 136.

186 Ibid. Case no. 201.

187 Case no. 162.

188 Review of California Judicial Conduct Commission Decisions, <http://dcj.court.ge/uploads/kvlevebi/Researches/california.pdf>.

189 Review of California Judicial Conduct Commission Decisions, <http://dcj.court.ge/uploads/kvlevebi/Researches/california.pdf>.

190 Review of California Judicial Conduct Commission Decisions, <http://dcj.court.ge/uploads/kvlevebi/Researches/california.pdf>.

In reviewing the standards of the judge's relationship with the participants in the proceedings, the High Council of Justice often applies the Bangalore principles. Under paragraph 6.6 of the same, the judge must maintain order and etiquette in all court hearings, be patient, dignified and polite to parties, witnesses and others with whom the judge is interacting in his/her official status. The judge should require similar behaviour from the parties' representatives, court staff and others who are subject to the judge's influence and leadership.

The High Council of Justice also invokes paragraph 214 of the Commentary on the Bangalore Principles, according to which a judge should restrain irritability and anger. No matter what the particular subject matter of the hearing is, the judge's response should be calm, measured and balanced. Even if a lawyer's rude behaviour is intended to provoke, the judge must take appropriate measures to maintain control of the courtroom, without taking any retaliatory action against the lawyer. If a remark is necessary, sometimes it is better not to make it during the hearing.

The HCOJ also invokes para. 215 of the Commentary on the Bangalore Rules of Conduct,

according to which a judge must always be polite in and out of court and respect the dignity of those around him/her. The judge should require the same attitude from all participants in the trial, both court staff and others under his or her jurisdiction or control. The judge should stand above personal antipathy and should not single out any of the lawyers appearing in court. The judge's unfounded remarks to the lawyer, insulting comments to the parties or witnesses in the courtroom, jarring jokes, sarcasm and unrestrained, biased behaviour violate the order and etiquette appropriate for the courtroom. If the judge wants to intervene, the tone and manner of the speech should not overshadow his/her impartiality.

The High Council of Justice also relies on the CCJE's Opinion # 3 of 2002, which states that existing methods of resolving legal disputes should always be trusted. The powers that judges are endowed with are directly related to values such as justice, truth and freedom. The standards of conduct applied to judges are based on these values and are the basis for the administration of justice (para. 8). Under Article 9 of the Code of Ethics for Judges, a judge must treat the participants in the process and the attending public with dignity and due courtesy. In addition, the presiding judge in the courtroom is obliged to ensure the observance of a court order, act in accordance with the law and demand a correct attitude towards the court from all persons present at the trial.

Interestingly, the High Council of Justice itself commented on the importance of rules of ethics, in particular, the High Council of Justice stated in Case no. 162-18 as follows:

"A judge must uphold ethics. Upholding ethics and demonstrating ethics are important elements of a judge's life, both professionally and personally. What matters is not what the judge does or does not do, but what the judge did or could have done in the opinion of those around him/her. The fact is that society expects high standards of conduct from judges. The criterion for misbehaviour is to determine whether such conduct harms a judge's ability to perform his or her duties as a judge honestly, impartially, independently and in a qualified manner, if, in the opinion of an outside observer, it gives the impression that a judge cannot perform his or her duties properly."¹⁹¹

We believe this phrase “What matters is not what the judge does or does not do, but what the judge did or could have done in the opinion of those around him/her” does not depict judicial activity appropriately.

We think that this misrepresents the meaning of judicial activity. Equally important in the administration of justice are the actions of the judge, as well as the perception of these actions by the public, as evidenced by a well-known quote: Justice must not only be done but seen to be done.¹⁹²

In Case no. 128-17, where the judge told a journalist in the courtroom that he thought he was the wife of the party, the High Council of Justice did not qualify this as disciplinary misconduct because it did not notice any irony or sarcasm in the judge’s address. It is impossible to verify this because we do not have access to the minutes of the hearing from which it would be possible to read the intonation of the judge.

In Case no. 206-18, the judge addressed the accused with the following words: “I did not think that you would refuse to let the victim come here today. You became ill today, you cannot do it today, what is happening to you? Are you a man after all?!” These words caused dissatisfaction to the accused who asked the judge not to evaluate his “manhood” in the courtroom.

The High Council of Justice considered that the judge might have addressed the party unethically but did not consider this to be a disciplinary offense. The High Council of Justice considered that the appeal was only aimed at conducting the process properly, which served to protect the rights of the parties.

In substantiating this decision, the High Council of Justice also referred to the CCJE Resolution # 3, which stated that “it would not be appropriate to equate a breach of professional standards with misconduct that could lead to disciplinary action. Professional standards, in particular, are the best practice that every judge should strive for. Identifying these standards with misconduct that could result in a disciplinary action will halt the future development of the standards and make them meaningless. For misconduct to result in disciplinary action, the misconduct must be not only a violation of disciplinary standards but also a serious and unjustifiable act.”

When considering issues of improper address to a party, the High Council of Justice pays attention to context and wording. For example, the Council of Justice considered that the words, “you are not participating in the settlement disputes for the first time, are you, yes, you probably had such cases before,” do not constitute a derogatory address to the party.

Interesting is the decision of the High Council of Justice in Case no. 96/18 in which the judge expelled the party from the courtroom for laughing. Asked by a party whether he has the right to laugh, the judge replied that when nothing funny happens, he has no right to laugh. The judge’s conduct in this case was not considered to be a disciplinary offense.

In Case no. 97-18, where the party stated that the judge did not call an ambulance even though the party became unwell, the Council of Justice concluded after hearing the minutes of the hearing that the party’s conduct (becoming unwell) meant to delay the process and therefore the judge did not violate ethics.

¹⁹² “It is not merely of some importance, but it is of fundamental importance that justice should not only be done but should be manifestly and undoubtedly seen to be done.” <https://www.casemine.com/judgement/uk/5a938b4160d03e5f6b82bd71>

In Case no. 1/18, threats of punishment against a party were not considered by the High Council of Justice to amount to disrespect to a party.

The Independent Inspector considered it disciplinary misconduct for a judge to address a plaintiff loudly who, in the judge's estimation, did not speak concerning the case, did not answer his questions adequately and was wasting time.¹⁹³

On 4 January 2018, the judge addressed the party with the words, "Of course there will be a reasoned judgment, I will not ask you to be thankful for that ..." The High Council of Justice considered that the words were said in an ironic tone and consequently an unethical address was made to the party. The case was referred to the Disciplinary Board, where the judge was found guilty of disciplinary misconduct and was given a private reprimand.

In Case no. 209-17, the author of the complaint indicated that the judge had made didactic speeches, but this was not discussed by the Council.

In Case no. 178-19, a judge's comment to a lawyer, "If you cannot do your duty, this is not my problem," was considered a violation of ethics by the Independent Inspector because it called into question the lawyer's professionalism in the eyes of the accused.¹⁹⁴

In Case no. 101-17, where the judge addressed the interpreter in a loud tone, the Independent Inspector found that there was a breach of ethics, while the High Council of Justice disagreed and dismissed the case because the interpreter's actions were aimed at disrupting the process and the judge called on him to perform his duties.¹⁹⁵

Various examples of mistreatment and disrespect towards parties and others can be found in the disciplinary practice of foreign countries:

- » The judge made a note in the record of the case where he disrespectfully referred to the lawyer and called him "an accomplice to an international fraud";¹⁹⁶
- » The judge issued a letter criticizing his colleagues for their recklessness, stupidity, and silliness¹⁹⁷
- » The judge sexually harassed a juvenile intern;¹⁹⁸
- » The chairperson of the court used rude methods of addressing, abusive expressions and shocking comments about the physical appearance of the staff;¹⁹⁹
- » The juvenile judge humiliated social workers in the eyes of the parties, casting doubt on their activities, and humiliated and harassed the staff of the court administration;²⁰⁰
- » The judge often was drunk at the hearings, due to which it was hard for him to talk (addressed court reporter by nickname);²⁰¹

193 Case no. 57-19 is given only in the Independent Inspector's 2019 Report. The decision of the council on this case is not yet available.

194 The case is given only in the Independent Inspector's 2019 report. The decision of the council on this case is not yet available.

195 The 2017-18 report of Independent Inspector.

196 Collection of decisions of High Council of Magistracy of France <http://dcj.court.ge/uploads/kvlevebi/Researches/csmsummariesFRANCE.pdf>, Case no. 073.

197 Ibid., Case no. 083.

198 Ibid., Case no. 102.

199 Ibid., Case no. 145.

200 Ibid., Case no. 164.

201 Ibid., Case no. 177.

- » A harmless joke on the prosecutor’s age does not qualify for the disciplinary offence; familiarity jokes with court personnel also were not considered as disciplinary misconduct, but a joke on a lawyer’s husband’s nationality and children’s sexual orientation (you do not seem to be successful if we consider the fact that your husband is from Senegal and your daughter a lesbian”) was considered as disciplinary violation. A joke concerning the obesity of the defendant (based on your shape I will not believe that you do not love eating) also was held as misconduct;²⁰²
- » Ridicule, humiliation (because of appearance, ethnicity) and shouting cynical appeal to the parties was qualified as misconduct;²⁰³
- » Reprimanding and humiliating court staff in the eyes of citizens;²⁰⁴
- » Questioning a lawyer’s qualifications in front of a client;²⁰⁵
- » Sexual offers and address to the staff;²⁰⁶
- » Telling the defendant that they would admire his smile in prison;²⁰⁷ and
- » The judge downplayed the lawyer’s university education.²⁰⁸

7.2.6. Delaying the Hearing / Violation of the Deadline for Submitting a Decision

Under Article 75¹ of the Organic Law on Common Courts, disciplinary misconduct is a substantial violation of the term established by the procedural legislation of Georgia for an unexcused reason. Violation of this term will not be considered unreasonable if the judge failed to meet the deadline due to objective circumstances (number of cases, the complexity of the case, etc.).

Under Article 59.3 of the Civil Procedure Code of Georgia, the court will consider the civil case no later than 2 months after receiving the application. In a particularly difficult case, the court may extend it for a period not exceeding 5 months, except for alimony, mutilation or other damage to health or the death of a breadwinner, employment claims, claims arising out of the law on housing, and claims arising out of Georgian law. Cases of real estate recovery must be considered no later than 1 month. However, under the same article, in cases provided for in Article 184 of the same Code, civil cases are considered no later than 45 days after the documents are served to the defendant or after the publication; this time may be extended to 60 days in exceptionally complex cases.

We believe that these deadlines set by the law are too short (especially 1-month and 2-month deadlines), it is impossible to meet them even at average workload when the case is complex, so these deadlines need to be revised.

The High Council of Justice almost always refers to Article 6 of the European Convention on Human Rights (which includes the right to a fair trial within a reasonable time) and the crite-

202 Ibid., Case no. 200.

203 Overview of California judicial misconduct board <http://dcj.court.ge/uploads/kvlevebi/Researches/california.pdf>.

204 Ibid.

205 Ibid.

206 Ibid.

207 Ibid.

208 Ibid.

ria used by the European Court of Human Rights in finding a violation of Article 6. Namely, according to HCOJ, to determine whether a case was dealt with within a reasonable time, it is important to determine –

1) The complexity of the case, which may be related to both the factual and legal complexity of the case (*Katte Klitsche de la Grande v. Italy*, para. 55; *Papachelas v. Greece*, 39); the involvement of several parties in the case (*HV United Kingdom*, para. 72), the examination of evidence (*Human v. Poland*, para. 63), etc. However, even when the case is not complex, although national law is unclear, this circumstance may also lead to unreasonable delays in the hearing (*Lupeni Greek Catholic Parish and others v. Romania*, para. 150);

(2) Actions by the parties, including, for example, frequent changes of lawyers (*Konig v. Germany*, para. 103), motions to delay the proceedings, (*Acquaviva v. France*, para. 61), as well as other actions related to the extension of the case consideration period; and

3) Actions of the judge hearing the case; attention should be paid to the judge's failure to perform a procedural action over a long period (*Pafitis and others v. Greece*; para. 93; *Tiece v. San Marino*; para. 31; *Sormeli v. Germany*, para. 129.) However, attention should also be paid to the following circumstances: the European Court of Human Rights explained that the time limit for hearing a case was reasonable whether it should be assessed on a case-by-case basis, taking into account the specific circumstances of the case (*Frydlender v. France*, para. 43) and taking into account all procedural actions in unison (*Konig v. Germany*; para. 98).

Often these International standards are referenced in the decision, although the circumstances of the case are not considered in accordance with all of these criteria. In considering the delay of the case, the High Council of Justice also takes into account the period of the judge's stay on sick leave (156-18) and also the period when the case file is not physically present with the judge (the case was sent to the Court of Cassation with a private complaint) (223-17).

If the judge hears the case within the time limit established by national law, the High Council of Justice shall not establish disciplinary misconduct. This applies particularly to 24 month-term in non-custodial cases. For example, the consideration of a non-custodial case for a year and seven months was not considered a delay (Case no. 107-17). In Case no. 14-18, the judge reviewed the civil case for 4 months and 24 days. (Within 5 months), therefore the HCOJ no longer entered into a discussion as to whether the judge had properly extended the time limit for hearing the case.

In some cases, the judge extends the statutory time limit in violation of the law. For example, under Article 309²⁰ of the Civil Procedure Code, a claim for damages is considered by the court within 1 month of its receipt in the proceedings. The Civil Procedure Code does not provide for the extension of this period. Nevertheless, the judge extended the term to 5 months by a ruling, which the High Council of Justice deemed lawful (Case no. 80 / 17). In Case no. 166-17, the judges considered non-custodial cases for 3 years and 4 months. There were 54 hearings in the case, which were postponed sometimes at the initiative of the defence and sometimes at the initiative of the prosecution. The High Council of Justice has also cited Article 8. 2 of the Criminal Procedure Code in dismissing the case, according to which the accused has the right to refuse a speedy trial if it is necessary for the proper preparation of the defence.

When a case is transferred from one judge to another, the High Council of Justice starts re-calculating the 5-month term, which should not be considered a legally correct approach.

In the practice of the High Council of Justice, there are cases when the delay in the hearing of the case is obvious, but the High Council of Justice still refuses to pursue disciplinary proceedings. The decision is justified only by the fact that it fails to get the required number of votes for the decision. For example, in Case no. 68-17, a judge adjourned civil proceedings for almost two years, but the disciplinary prosecution did not begin because nine members of the council supported the termination of the prosecution. (See also Case no. 207 / 17-2)

In Case no. 178-18, a judge heard a civil case within 1 year and 11 months. The party indicated that the judge had postponed the process 7 times to reach a settlement between the parties, although he did not agree to any settlement. In this case, the Council of Justice recognized the actions of the judge as excusable due to his workload (543 cases in total and 286 completed cases in two years). We do not consider the approach of the Council to be justified, as the multiple postponements of the process under the pretext of an agreement between the parties, when the party does not agree to it, should not be considered excusable.

When discussing delays in hearing a case, the Council of Justice often considers what kind of actions a judge has taken in the case and his or her workload. Although in some cases the breach of the time limit is excused only due to the workload of the judge, in such cases the Board often cites the decision of the Disciplinary Board of 12 April 2013: "Disciplinary liability is an extremely delicate and important issue. The disciplinary system poses a potential threat to the independence of the judiciary... A judge is subject to disciplinary action if he or she is found guilty of an act that constitutes disciplinary misconduct. Accordingly, the basis for imposing a disciplinary sanction is solely and exclusively the fault of the judge for the disciplinary misconduct. Therefore, it is very important to accurately determine that the act committed constitutes disciplinary misconduct."

Consequently, due to the workload of the judge, e.g., the HCOJ exempted the judge from liability in the following cases:

- » Extending the 20-day period for reviewing a complaint on a ruling on an interim measure by a month and a half (52-17);
- » Hearing of a civil case (determination of paternity and assignment of surname) for two years and three months (Case-112-17);
- » Hearing of a civil case - a successor to the right to inheritance and recognition of the right to inherit by transmission for 9 months (case - 99-17);
- » Failure to schedule a hearing in a civil case for a year and 6 months (Case no. 116-17); and
- » The absence of any procedural action in a civil case for 11 months (129-18)²⁰⁹, 9 months (164-18-1²¹⁰) and 6 months (145-18-2).²¹¹

209 The reason for the termination was the excessive workload of the judge, although it is not explained exactly what it was.

210 The judge handled up to 700 cases each year, which is why delays were considered excusable.

211 Judges completed 230 to 318 cases each year.

In Case no. 178-18, the High Council of Justice noted the following: The materials provided confirm that the judge handled over 11,778 cases for review in 2017, of which he completed 3,428 cases (29.1%). In 2018 (data for the first 9 months), 14,380 cases were submitted for review, of which 2,753 cases were completed (19.1 %). These statistics make it virtually impossible for a judge to complete a case within the timeframe provided by law.

In contrast, the workload was much less for the judge in charge of cases 26-18, where the High Council of Justice deemed it excusable to hear a criminal case on appeal (instead of 2 months) for a year and 8 months. The judge was assigned up to 200 cases each year, of which he completed 120-121 cases. The High Council of Justice indicated that 15 hearings had been scheduled in the case, 6 of which had been postponed due to the parties' failure to appear. We think that the dismissal of this case is not justified as the workload of the

judge was not large and, on the other hand, the management of the hearings should be the responsibility of the judge, thus he should have avoided numerous delays in the proceedings.

In some cases, the judge's performance of minimal procedural actions in the case (forwarding the case to the defendant, public publication) is considered excusable given the workload, for example, such as exceeding the 5-month time limit by 2 months and 23 days (100-17-02). Exceeding the time limit is never automatically considered disciplinary misconduct. Exceeding the deadline by several days is usually considered minor misconduct (Case no. 91.18).

Given the actions taken by the judge, it was considered excusable to consider the alimony case for 9 months although the law stipulates 1 month for such cases (Case Nos. 146-17).

The Council treats leniently the periods when there is no activity, such as the alimony dispute, which according to the law must be reviewed within 1 month. Hearing a real estate case in four months was considered excusable (146-17-1). (See also Case no. 95-17)

In contrast, in Case no. 2/01-2018, in which no procedural steps have been performed for a year and ten months, the judge was charged and convicted for procedural delay despite the workload. (The decision of the Disciplinary Board did not specify the workload of the judge).

In disciplinary practice, we find cases that have been repeatedly transferred from one judge to another and always the purpose of transferring the case was to relieve the judge. After each of these transfers, the Council of Justice starts recalculating the five-month timeframe, which, in our view, is a mistake. The time limits for hearing a case should relate to the case and not to the judge.

The High Council of Justice cites the complexity of a case as one of the criteria for assessing the reasonableness of the time limit for hearing a case, although the complexity of a particular case is seldom assessed in the Council's decisions. The submission of numerous motions and statements by the parties in Case no. 114-17 was considered as one of the factors determining the complexity of the case.

In Case no. 172/18, the complexity of the case was cited as the reason for the violation of the deadline for the submission of a reasoned decision, among other factors, and the High Council of Justice pointed out the following:

"The case file proves that the decision of 23 February 2018 was prepared on 17 July 2018. However, to determine whether there is a fact of disciplinary misconduct, an assessment must be made of the objective circumstances that led to the violation of the statutory time limit by the judges. The case file proves that the case was of special complexity and concerned

the annulment of the agreement between the parties and the determination of the share between the disputing parties on this basis. The special complexity of the case is confirmed by the fact that the decision of 23 February 2018 consists of more than 100 pages and its thorough argumentation by the judge required familiarity and analysis of Georgian domestic legislation, international agreements and case law of foreign countries. The preparation of the said decision by the judge in due time goes beyond a reasonable expectation. Accordingly, given the workload of the judge, the procedural actions taken by him and the complexity of the present case, this action does not contain any indication that the judge committed disciplinary misconduct.”

The actions of the party may also be one of the criteria for assessing the length of a case. For example, in Case no. 22d / 26-19, where a judge heard a non-custodial case for 3 years and 5 months, the Disciplinary Board found the judge guilty of delaying the hearing, but the Disciplinary Chamber acquitted him of the fact that court hearings were repeatedly postponed due to the illness of the party.

Complaints about delays in hearing cases show the following tendency: Numerous complaints indicate that the hearing has been delayed or that no action has been taken at the time of filing the complaint. By the time the High Council of Justice hears the complaint, which usually takes place several months later, the substantive hearing of the case has already been completed and the acceleration of the process by the judge coincides in time with the filing of the disciplinary complaint.

For example, at the time of filing a disciplinary complaint in the Case no. 22-18, a preparatory hearing was not scheduled for 2 years after the filing of the claim. Within 1 year after the filing of the disciplinary complaint, the judge has already completed the consideration of the claim. The disciplinary body does not pay any attention to the initiation of the case and does not discuss its connection with the disciplinary complaint (See also Case no. 110-18). According to amendments to the Organic Law on Common Courts in December 2019, substantial violation of the time limit established by the procedural legislation constitutes misconduct. The High Council of Justice defined a substantial violation as “a violation by a judge of both the constitutional and fundamental procedural rights of a party or fundamental guarantees of a fair trial that has harmed the party, the court or the public interest.”²¹²

Examples from the disciplinary practice of foreign countries:

» In Case # 173, the judge was found guilty of delaying civil cases. The judge cited his inexperience, the large number of cases, and the judge’s diligence to examine every case in detail as the reasons. The Magistrates’ Council emphasized the disorganization of the judge in handling the cases and also pointed out that other judges had successfully handled similar burdens;²¹³

» By the decision of the French Magistrates’ Council, it was considered misconduct to consider civil cases in violation of the three-month time limit;²¹⁴

212 The French Superior Council of Magistracy, Case no. 173-18.

213 French Superior Council of Magistracy, Case no. 173.

214 Decisions of the French Superior Council of Magistracy, Case no. 034.

- » According to the decision of the French Magistrates' Council, it was considered misconduct to write decisions after a long delay;²¹⁵ and
- » The judge had significant delays in hearing cases (in some cases more than a year from the oral argument before a decision was made); The judge justified himself that he heard a large number of cases, although the Magistrates' Council indicated that the judge should be able to make 15-20 decisions per month²¹⁶.

7.2.7. Violation of the Secrecy of the Deliberation by the Judge

Under Article 2 (2) (g) of the Law of Georgia on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts, the disclosure of a judge's deliberation secret or professional secrecy amounted to disciplinary misconduct. This norm has been changed by Article 75¹ of the Organic Law on Common Courts paragraph 8.d)c) into the disclosure of the secrecy of a court session by a judge.

The change was justified by the fact that the disclosure of professional secrets is a violation of the Law on Conflict of Interest and Corruption in Public Service, which is also a disciplinary violation.

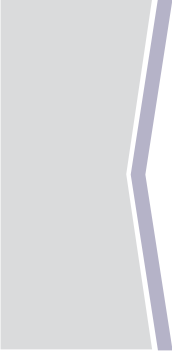
In Case no. 160-18, the complainant noted that the judicial assistant had confirmed to the party's representative in a telephone conversation before announcing the decision that the party's appeal has been rejected. The Independent Inspector and the High Council of Justice did not consider this action to be a violation, noting that the secrecy of the deliberation ensures the freedom of the judge to express his or her views on individual issues as well as decisions without restraint. The secrecy of the deliberation is the reasoning between the judges. In this case, this fact could not be considered a violation of the secrecy of the deliberation, as, under current law, the assistant prepares the case on the instructions of the judge, drafts the decision/judgment, therefore, based on the essence of the activity, the assistant has all the information about the case. The action of the assistant was not discussed by the Independent Inspector, as it was beyond the scope of the Independent Inspector.

7.2.8. Disclosure of Professional Secrets / Disclosing the Personal Data of a Party by a Judge

One of the cases considered by the High Council of Justice was related to the disclosure of personal data of a party, namely, during one of the civil cases the judge publicly stated at the trial, "This is the third lawsuit I have seen against this person." As noted by the High Council of Justice, the names of the parties are systematically placed on the information board of the courthouse and the mentioning of the parties' last name at trial does not constitute a violation of personal secret which may infringe upon the parties' rights.²¹⁷

215 Ibid., Case no. 139 .
 216 Ibid, Case no. 139.
 217 Case no. 175-18.

Examples of disclosure of official secrets by a judge can be found in the disciplinary practice of foreign countries, in particular:

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- » - Violation of the secrecy of the preliminary investigation by the investigating judge: The judge allowed the journalist to access the documents and attend the investigative events, which resulted in the publication of the preliminary investigation materials;²¹⁸ and
 - » - The judge handed over the juvenile interrogation report to a third party.²¹⁹

7.2.9. Obstruction of Disciplinary Proceedings by a Judge

Article 2 of the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of the Common Courts contained a formulation of misconduct, viz., obstruction or disrespect for the activities of a body with disciplinary powers.

This ground was laid down in a modified form in the Organic Law on Common Courts, in particular, the disrespect of the disciplinary body was removed, leaving only the obstruction of the body's activities.

One of the cases considered by the Independent Inspector concerned obstruction of the activities of Independent Inspector's service. In this case, the Independent Inspector wrote a letter to the judge in December 2018 asking for case materials in connection with the disciplinary complaint. A repeated letter for the submission of case materials to the Office of the Independent Inspector was sent to the judge on 10 January 2019, 28 days after the first letter was sent, although the judge sent the case file to the Office of the Independent Inspector only in early February 2019, 1 month and 25 days later. Thus, the judge's action was aimed at obstructing the disciplinary body because, despite numerous appeals, the case materials necessary for the investigation of the disciplinary case were not sent to the Independent Inspector's Office within a reasonable time²²⁰.

According to the disciplinary case law before 2012, the refusal of a judge to provide an explanation was qualified as obstruction of the disciplinary body.²²¹ We believe that previous version of the law should be restored and, in case of disciplinary charges, the explanation of the judge should be mandatory, because without the explanation of the judge it may be difficult to establish the facts in the disciplinary case.

7.3. Justification of the Sanction Applied by the Disciplinary Board.

Under Article 75⁴⁷ of the Organic Law on Common Courts, the Disciplinary Board shall consider the content and severity of the disciplinary misconduct when selecting a disciplinary sanction and disciplinary measure for a judge, content of the disciplinary violation, the degree of guilt and the consequences that have or may have occurred.

The sanctions used in the decisions of the Disciplinary Board are not duly substantiated. The

²¹⁸ Ibid., Case no. 033.

²¹⁹ Ibid., Case no. 113.

²²⁰ See Case no. 27-19. The case is described only in Independent Inspectors' report <http://independent-inspector.ge/Legislation/Decision/9> which is not publicly available.

²²¹ [5] http://dcj.cout.ge/uploads/practice/2004-2013_criminal.PDF

reasoning for a sanction is often formulaic, and the Disciplinary Board points to a number of circumstances that are taken into account when imposing a sanction, although these circumstances are not discussed and evaluated in detail when discussing a sanction.

For example, in Case no. 1 / 01-17, a judge was found guilty of improper performance of duty (Violation of time limits - 18 counts) as well as for the violation of the rights of the accused (the judge did not permit the defendant to have a telephone conversation). The disciplinary sanction (admonishment) was justified by the following wording: “The Disciplinary Board considered the judge’s reputation, took into account the content, severity, consequences and the number of disciplinary violations, and believes that the judge should be disciplined and punished by an admonishment.”

The decision does not say what the judge’s business and moral reputation is.

In the case law of the panel, the use of a private recommendation card was justified by the workload of the judge, which is a mitigating circumstance for the charge.

In Case no. 5.01.18, which concerned the delay in the hearing, the Disciplinary Board justified the use of a private recommendation letter due to the large number of cases pending before the judge, which mitigated the judge’s guilt.

In Case no. 2 / 01-2018, which also concerned the delay in the hearing, the Disciplinary Board justified the use of a private recommendation letter both due to the workload of the judge and by the fact that the judge had to exercise his powers periodically without an assistant.

In Case no. 4.01.2018, where the judge addressed the party with the words, “Of course there will be a reasoned decision, you will not thank me for that ...”, The Disciplinary Board justified the use of a private recommendation card with the following words:

“The Disciplinary Board of Judges of Common Courts, in deciding the issue of imposing a disciplinary sanction, took into account the judge’s business and moral reputation, took into account the content and consequences of disciplinary misconduct and issued the judge a private letter of recommendation.”

In this case, too, the reasoning is formulaic, and it is not clear what the judge’s business reputation is and the consequences of disciplinary misconduct.

8. Case Law of the European Court of Human Rights and Disciplinary Proceedings Against Judges

This chapter discusses the application to disciplinary proceedings of Article 6 of the European Convention on Human Rights (ECHR) and its provisions that could be relevant in this context.

Article 6 of the ECHR does not expressly mention that procedural safeguards under Article 6 should apply to disciplinary proceedings. Under Article 6.1, in the determination of one's civil rights and obligations or of any criminal charge against one, one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6.2 safeguards the principle of presumption of innocence in criminal proceedings and Article 6.3 guarantees minimum rights in criminal proceedings also.

For Article 6.1 of the Convention to apply to proceedings, these proceedings should be conducted by a body considered to be a "tribunal" for the purpose of Article 6; the procedure should equate to civil proceedings and concern the determination of a person's civil rights and obligations or be criminal proceedings and concern the determination of any criminal charge against a person.

8.1. Disciplinary Body – a Tribunal for the Purpose of Article 6

This subchapter concerns whether a disciplinary body determined by law can be deemed to be a tribunal for the purpose of Article 6 of the ECHR. This subchapter concerns the application of Article 6 of the Convention to the High Council of Justice proceedings involving the examination and decision about the disciplinary liability of a judge and dismissal of a judge (apart from a Supreme Court judge) based on a submission; its application to the Disciplinary Board considering disciplinary cases against judges and a Disciplinary Chamber examining a decision of the disciplinary section based on an appeal.

Under the Court's case law, the fact that a body performs many functions - administrative, regulatory, adjudicative, advisory and disciplinary – does not preclude it from being deemed a "tribunal".²²² The use of the term "tribunal" is warranted only for a body which satisfies a series of further requirements, namely, independence of the executive and the parties to the case, duration of its members' term of office and guarantees afforded by its procedure, several of which appear in the text of Article 6 para. 1.²²³

The Court is not prevented from qualifying a particular domestic body, outside the domestic judiciary, as a "court" thereby rendering Article 6 applicable to civil servants' disputes. In the case of *Oleksandr Volkov v. Ukraine*, the Court found that, in determining the applicant's case and making a binding decision, the High Council of Justice, the Parliamentary Committee and the plenary meeting of Parliament were, in combination, performing a judicial function. The binding decision on the applicant's dismissal was further reviewed by the High Administrative Court, which was an ordinary court within the domestic judiciary.²²⁴

²²² *H. v. Belgium*, application no. 8950/80, judgment of the Plenum of the European Court of Human Rights, 30 November 1987, para. 50.

²²³ *Le Compte, Van Leuven and De Meyere v. Belgium*, applications nos. 6878/75 and 7238/75, judgment of the European Court of Human Rights of 23 June 1981, para. 55.

²²⁴ *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment of the European Court of Human Rights of 9 January 2013, paras. 88-90.

Disciplinary Proceedings – Civil Proceedings for the Purpose of Article 6

Stemming from Article 6.1 of the Convention, Article 6 safeguards apply to either criminal or civil proceedings. However, according to the Court, various proceedings may fall under the former or latter category and, thereby, Article 6 will apply to them and a person will have a legal standing to claim the violation of Article 6 safeguards in his/her case.

In the case of *Muller-Hartburg v. Austria*,²²⁵ the ECtHR observed that a disciplinary provision is not addressed to the general public but the members of a professional group possessing a special status. The disciplinary procedure is designed to ensure that members of the bar comply with the specific rules governing their professional conduct. Therefore, this procedure is not criminal but disciplinary in nature.²²⁶

This approach was confirmed in the case of *Oleksandr Volkov v. Ukraine*²²⁷ specifically with regard to disciplinary proceedings against judges. Labour disputes involving judges fall within the realm of Article 6, i.e., within its civil limb.²²⁸

The Necessity of the Outcome of Disciplinary Proceedings for Article 6 to Apply

It is the Court's well-established case law that disciplinary proceedings in which the right to continue to exercise a profession is at stake give rise to "contestations" over civil rights within the meaning of Article 6.1 of the Convention. This principle has been applied to proceedings conducted before various professional disciplinary bodies.²²⁹ In this context, it should also be noted that the applicability of Article 6 to disciplinary proceedings is not only determined by the sanctions which are actually imposed by the professional disciplinary bodies. What is important in this assessment is the sanctions which an individual risked incurring in the disciplinary proceedings.²³⁰

Accordingly, in the case of *Gautrin and Others v. France*,²³¹ where the applicants only received a reprimand, the Court took into account the penalties the professional disciplinary bodies could impose and whether the right to continue to practise as a private practitioner gave rise to "contestations over civil rights" within the meaning of Article 6.1.²³²

Since Article 75.3.1.f of the Organic Law of Georgia on Common Courts provides for the dismissal of a judge as a disciplinary penalty as a result of disciplinary proceedings, all stages of disciplinary proceedings conducted in accordance with the Organic Law should be considered as civil disputes for the purpose of Article 6 of the Convention and fall within the scope of application of Article 6.1. It is irrelevant in this regard that, under Article 7550, this penalty can only be used as a last resort. For the purpose of this report, the Convention standards certainly remain relevant in those cases as well where disciplinary proceedings are discontinued or a disciplinary offence was not ultimately established.

225 *Muller-Hartburg v. Austria*, application no. 47195/06, judgment of the European Court of Human Rights of 19 February 2013.

226 *Ibid.*, paras. 44-45, 49.

227 *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment of the European Court of Human Rights of 9 January 2013.

228 *Ibid.*, paras. 92-95.

229 *Maručić v. Croatia*, application no. 79821/12, decision of the European Court of Human Rights of 23 May 2017, para. 71.

230 *Ibid.*, para. 72.

231 *Gautrin and Others v. France*, application no. 21257/93, judgment of the European Court of Human Rights of 20 May 1998.

232 *Ibid.*, para. 33.

8.2. Provisions of Article 6 That Are Relevant to Disciplinary Proceedings

In the case of *Ramos Nunes de Carvalho e Sa v. Portugal*,²³³ the European Court of Human Rights confirmed that the application of Article 6 of the Convention applies to disciplinary proceedings. However, the Court explained that Article 6.3 of the Convention could not apply to this procedure since these provisions determine safeguards for criminal proceedings.²³⁴

According to the same logic, the application of Article 6.2 of the Convention does not extend to disciplinary proceedings. The European Court of Human Rights had to explain regarding all the mentioned and other applications submitted by incumbent and former judges that disciplinary proceedings are considered to be civil and criminal proceedings for the purpose of Article 6 and which provision of this article applies to this proceedings. It is also necessary to mention that the respective legislation of Georgia provides for terminology typical for criminal law.²³⁵

It should be noted, however, that, as the European Court of Human Rights explains in its case law, the procedural safeguards provided for in paragraphs 2 and 3 of Article 6 of the Convention are implied in the right to a fair trial under Article 6.1 of the Convention and therefore apply to civil proceedings as well respectively.

Given the above reasoning, in the present study, the standards of the European Convention on Human Rights are applied for evaluating the actions of a judge by disciplinary bodies and for legal proceedings conducted by the disciplinary bodies themselves.

8.3. Examination of a Case by a Judge Within a Reasonable Time

Case Law of the European Court of Human Rights

Under Article 6.1 of the ECHR, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 31.1 of the Constitution of Georgia guarantees the examination of a case within a reasonable time.

Under Article 4.2 of the Constitution of Georgia, “The State acknowledges and protects universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law. The Constitution shall not deny other universally recognised human

²³³ *Ramos Nunes de Carvalho e Sa v. Portugal*, applications nos. 55391/13 and 57728/13 et al, judgment of the Grand Chamber of the European Court of Human Rights of 6 November 2018.

²³⁴ *Ibid.*, para. 128.

²³⁵ See the Organic Law of Georgia on Common Courts, Article 75.1.

rights and freedoms that are not explicitly referred to herein, but that inherently derive from the principles of the Constitution.”

Article 6.1 imposes on the Contracting States the duty to organise their legal systems in such a way that their courts can meet each of the requirements of that provision, including the obligation to hear cases within a reasonable time.²³⁶ The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.²³⁷ This period covers the whole of the proceedings concerned, including appeal proceedings.²³⁸

Delays at different stages, taken separately, may not give rise to a breach of the first paragraph of Article 6, but cumulatively violate the requirement of the reasonableness of the length of the proceedings.²³⁹ Thus, for example, the length of the proceedings at each stage (approximately, a year and a half) may not be considered unreasonable, but the length of the proceedings as a whole may be deemed excessive.²⁴⁰ Conversely, delays in the proceedings may be allowed at some point, provided that the entire length of the proceedings is not exceeded.²⁴¹ A national body can be diligent during proceedings that are delayed due to procedural shortcomings so that Article 6 is not considered to be violated.²⁴²

Suspending proceedings for a long period without any explanation being presented is unacceptable.²⁴³

The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the particular case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.²⁴⁴

The Complexity of the Case

The complexity of a case may relate both to the facts and the law;²⁴⁵ it may relate, for instance, to the involvement of several parties in the case,²⁴⁶ and the need to obtain evidenc-

236 Yaman and Others v. Turkey, application no. 46851/07, judgment of the European Court of Human Rights of 15 May 2018, para. 46.

237 Mirjana Mari v. Croatia, application no. 9849/15, judgment of the European Court of Human Rights of 30 July 2020, para. 89.

238 Konig v. Germany, application no. 6232/73, judgment of the Plenum of the European Court of Human Rights of 28 June 1978, para. 98.

239 Deumeland v. Germany, application no. 9384/81, judgment of the Plenum of the European Court of Human Rights of 29 May 1986, para. 90.

240 Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, application no. 931/13, judgment of the Grand Chamber of the European Court of Human Rights of 27 June 2017, paras. 210-2011.

241 Pretto and Others v. Italy, application no. 7984/77, judgment of the Plenum of the European Court of Human Rights of 8 December 1983, para. 37.

242 Nicolae Virgiliu Tanase v. Romania, application no. 41720/13, judgment of the European Court of Human Rights of 25 June 2019, para. 213.

243 Beaumartin v. France, application no. 15287/89, judgment of the European Court of Human Rights of 24 November 1994, para. 33.

244 Nicolae Virgiliu Tanase v. Romania, application no. 41720/13, judgment of the European Court of Human Rights of 25 June 2019, para. 209.

245 Bennich-Zalewski v. Poland, application no. 59857/00, judgment of the European Court of Human Rights of 22 April 2008, para. 64.

246 H. v. the United Kingdom, application no. 9580/81, judgment of the Plenum of the European Court of Human Rights of 8 July 1987, para. 72.

such as an expert opinion, to make a decision.²⁴⁷ The case may be legally difficult due to the lack of precedents at the national level.²⁴⁸

While the European Court may recognise the complexity of the proceedings, it may deem that the delay in the proceedings was still unjustified.²⁴⁹ The case itself may not be difficult, but the vague and unpredictable nature of domestic law complicates consideration and contributes to delays in litigation.²⁵⁰

The Applicant's Conduct

Article 6.1 does not require applicants to actively cooperate with judicial authorities. They cannot be blamed for making full use of the remedies available to them under domestic law²⁵¹ or for consequences due to a medical condition.²⁵² Nevertheless, the national government cannot be held responsible for the delays caused by these factors.²⁵³

The person concerned is required only to show diligence in carrying out the procedural steps relating to him/her, refrain from using delaying tactics and avail of the scope afforded by domestic law for shortening the proceedings.²⁵⁴ An applicant's behaviour constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account to determine whether or not the reasonable time referred to in Article 6.1 has been exceeded.²⁵⁵ An applicant's conduct cannot by itself be used to justify periods of inactivity. Some examples concerning the applicant's conduct:

a lack of alacrity by the parties in filing their submissions may contribute decisively to the slowing-down of the proceedings,²⁵⁶ frequent/repeated changes of counsel,²⁵⁷ requests or omissions which have an impact on the conduct of the proceedings,²⁵⁸ an attempt to secure a friendly settlement,²⁵⁹ proceedings brought erroneously before a court lacking jurisdiction, etc.²⁶⁰

247 *sahin Karakoç v. Turkey*, application no. 19462/04, judgment of the European Court of Human Rights of 19 April 2008, para. 30; *Nicolae Virgiliu Tanase v. Romania*, application no. 41720/13, judgment of the Grand Chamber of the European Court of Human Rights of 25 June 2019, para. 210.

248 *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, application no. 931/13, judgment of the Grand Chamber of the European Court of Human Rights of 27 June 2017, para. 212.

249 *Cipolletta c. Italie*, application no. 38259/09, judgment of the European Court of Human Rights of 11 January 2018, para. 44.

250 *Lupeni Greek Catholic Parish and Others v. Romania*, application no. 76943/11, judgment of the Grand Chamber of the European Court of Human Rights of 29 November 2016, para. 150.

251 *Erkner and Hofauer v. Austria*, application no. 9616/81, judgment of the European Court of Human Rights of 23 April 1987, para. 68.

252 *Nicolae Virgiliu Tanase v. Romania*, application no. 41720/13, judgment of the Grand Chamber of the European Court of Human Rights of 25 June 2019, para. 211.

253 *Idem*.

254 *Unión Alimentaria Sanders S.A. v. Spain*, application no. 11681/85, judgment of the European Court of Human Rights of 7 July 1989, para. 35.

255 *Poiss v. Austria*, application no. 9816/82, judgment of the European Court of Human Rights of 23 April 1987, para. 57.

256 *Vernillo v. France*, application no. 11889/85, judgment of the European Court of Human Rights of 20 February 1991, para. 34.

257 *Konig v. Germany*, application no. 6232/73, judgment of the European Court of Human Rights of 28 June 1978, para. 103.

258 *Acquaviva v. France*, application no. 19248/91, judgment of the European Court of Human Rights of 21 November 1995, para. 61.

259 *Beaumartin v. France*, application no. 15287/89, judgment of the European Court of Human Rights of 24 November 1994, para. 33.

260 *Pereira da Silva v. Portugal*, application no. 77050/11, judgment of the European Court of Human Rights of 22 March 2016, paras. 76-79.

Conduct of the Competent Authorities

The State is responsible for all its authorities; not just the judicial organs, but all public institutions.²⁶¹ Delays attributable to the State alone may justify a finding of failure to comply with the “reasonable time” requirement.²⁶² The Court examines the proceedings as a whole, which means that, although the national authorities may be deemed responsible for certain procedural defects, which caused delays in the proceedings, they may still have complied with their duty to examine the case expeditiously under Article 6.²⁶³

Even in legal systems where the principle that the procedural initiative lies with the parties is applied, the latter’s attitude does not absolve the courts from the obligation to ensure a speedy trial required by Article 6.1.²⁶⁴

The same applies where the cooperation of an expert is necessary during the proceedings; responsibility for the preparation of the case and the speedy conduct of the trial lies with the judge.²⁶⁵

While Article 6 requires that judicial proceedings be expeditious, it also lays emphasis on the more general principle of the proper administration of justice.²⁶⁶ Nevertheless, a chronic overload cannot justify the excessive length of proceedings.²⁶⁷ The fact that court case-load has become the norm does not justify the irrationality of the length of the proceedings.²⁶⁸

Since it is the responsibility of the Contracting States to arrange their legal systems in such a way as to ensure the right of a person to make a decision within a reasonable time, the excessive workload cannot be taken into consideration.²⁶⁹

The judge may pay inadequate attention to a specific fact, despite the expert’s opinion, may have doubts about a specific circumstance, which may lead to an unreasonable delay in the proceedings.²⁷⁰

A strike by members of the bar cannot by itself render a Contracting State liable concerning the “reasonable time” requirement. However, the efforts made by the State to reduce any resultant delay are to be taken into account for determining whether the requirement has

261 *Martins Moreira v. Portugal*, application no. 11371/85, judgment of the European Court of Human Rights of 26 October 1988, para. 60.

262 *Buchholz v. Germany*, application no. 7759/77, judgment of the European Court of Human Rights of 6 May 1981, para. 49.

263 *Nicolae Virgiliu Tanase v. Romania*, application no. 41720/13, judgment of the Grand Chamber of the European Court of Human Rights of 25 June 2019, para. 211.

264 *Mylonas v. Cyprus*, application no. 14790/06, judgment of the European Court of Human Rights of 11 December 2008, para. 66.

265 *Versini v. France*, application no. 40096/98, judgment of the European Court of Human Rights of 10 July 2001, para. 29.

266 *Von Maltzan and Others v. Germany*, applications nos. 71916/01 et al., decision of the Grand Chamber of the European Court of Human Rights of 2 March 2005, para. 132.

267 *Probstmeier v. Germany*, application no. 20950/92, judgment of the European Court of Human Rights of 1 July 1997, para. 64.

268 *Unión Alimentaria Sanders S.A. v. Spain*, application no. 11681/85, judgment of the European Court of Human Rights of 7 July 1989, para. 40.

269 *Vocaturro v. Italy*, application no. 11891/85, judgment of the European Court of Human Rights of 24 May 1991, para. 17; *Cappello v. Italy*, application no. 12783/87, judgment of the European Court of Human Rights of 27 February 1992, para. 17.

270 *Bock v. Germany*, application no. 11118/84, judgment of the European Court of Human Rights of 29 March 1989, para. 47.

been complied with.²⁷¹ Accordingly, the disciplinary bodies, in the presence of similar or other delaying factors, should at least check the judge's conduct and assess whether appropriate measures have been taken to minimise the delay.

The same applies to delays in proceedings due to a change of judge when a new judge begins to review the case file again. The European Court finds that this does not relieve the State of its obligation to ensure that the proceedings are conducted within a reasonable time.²⁷² However, the European Court, in this context, also speaks precisely of the liability of individual judges and finds that the trial judges must take into account the outcome of the proceedings against the applicants and must treat the case with particular urgency.²⁷³ However, it should be noted that the European Court of Human Rights provides for the assessment of the reasonableness of the length of the proceedings by the ombudsman.²⁷⁴

What is at stake in the dispute?

Examples of categories of cases which call for particular expedition by their nature:

- » Particular diligence is required in cases concerning civil status and capacity;²⁷⁵
- » Child custody cases²⁷⁶ all the more so where the passage of time may have irreversible consequences for the parent-child relationship;²⁷⁷ likewise, cases concerning parental responsibility and contact rights call for particular expedition;²⁷⁸
- » Employment disputes²⁷⁹ this category includes pensions disputes;²⁸⁰
- » A complaint lodged by an individual alleging that he had been subjected to violence by police officers;²⁸¹
- » A case where the applicant's disability pension made up the bulk of his resources, the proceedings by which he sought to have that pension increased due to the deterioration of his health;²⁸²

271 Papageorgiou v. Greece, application no. 24628/94, judgment of the European Court of Human Rights of 9 May 2003, para. 47.

272 Lechner and Hess v. Austria, application no. 9316/81, judgment of the European Court of Human Rights of 23 April 1987, para. 58.

273 Ibid., para. 58.

274 Idem.

275 Bock v. Germany, application no. 11118/84, judgment of the European Court of Human Rights of 29 March 1989, para. 49;

276 Hokkanen v. Finland, application no. 19823/92, judgment of the European Court of Human Rights of 23 September 1994, para. 72.

277 Tsikakis v. Germany, application no. 1521/06, judgment of the European Court of Human Rights of 10 February 2011, paras. 64 and 68.

278 Paulsen-Medalen and Svensson v. Sweden, application no. 16817/90, judgment of the European Court of Human Rights of 19 February 1998, para. 39.

279 Vocaturo v. Italy, application no. 11891/85, judgment of the European Court of Human Rights of 24 May 1991, para. 17.

280 Borgese v. Italy, application no. 12870/87, judgment of the European Court of Human Rights of 26 February 1992, para. 18.

281 Caloc v. France, application no. 33951/96, judgment of the European Court of Human Rights of 20 July 2000, para. 120.

282 Moci v. France, application no. 46096/99, judgment of the European Court of Human Rights of 8 April 2003, para. 22.

- » An action for damages brought by a senior citizen;²⁸³ and
- » Right to education.²⁸⁴

Compliance: Georgian Legislation and the Practice of Disciplinary Bodies

Failure to Comply with Procedural Time-Limits

Under Article 75.1.8.f.a) of the Organic Law of Georgia on Common Courts:

Substantial violation of the term established by the procedural legislation of Georgia by a judge for an unreasonable reason amounts to the violation of the principle of competence and diligence. The reason for the violation of this term should not be considered unreasonable if the judge was unable to observe the term due to objective circumstances (number of cases, the complexity of the case, etc.).

In connection with the disciplinary misconduct of substantially violating the time limit established by the procedural law, the project team identifies both legislative and practical problems.

With regard to the law, the team considers that the gist of the disciplinary misconduct should be related not to an unreasonable violation of the time limit established by the procedural law of the proceedings, but to an unreasonable delay in the proceeding. One of the forms of it should be defined as an unreasonable violation of the term established by the procedural legislation. As it is clear from the case law of the European Court of Human Rights, the mere fact that the time limit for the proceedings has not been exceeded does not imply that the proceedings were conducted within a reasonable time. When it is objectively possible to conduct proceedings before the deadline, but the relevant agency/ official delayed the proceedings, the first paragraph of Article 6 of the European Convention on Human Rights is violated.²⁸⁵

The above statutory wording clearly leads to the wrong practice of disciplinary bodies. If the judge hears the case within the time limit established by national law, the High Council of Justice shall not establish disciplinary misconduct. This applies, to *inter alia* 24 month-term of non-custodial cases. In case no. 107-17, for example, a non-custodial hearing for a year and 7 months was not considered a delay.

In reviewing the cases, the project team found that sometimes disciplinary bodies do not even take existing legislation into account. In some cases, the judge extends the term prescribed by law in violation of the law. For example, Article 309²⁰ of the Code of Civil Procedure, a claim for damages shall be considered by the court within 1 month of its receipt in the proceedings.

The Civil Code does not provide for the extension of this term. However, a judge still extended this term by a decision for another 5 months, which was considered to be legal by the High Council of Justice (80/-17).

Also, taking into account the actions taken by the judge, it was considered excusable to consider the alimony case for 9 months (although the law stipulates 1 month for the consideration of such category of cases (Case no. 146-17).

²⁸³ Codarcea v. Romania, application no. 31675/04, judgment of the European Court of Human Rights of 2 June 2009, para. 89.

²⁸⁴ Orsus and Others v. Croatia, application no. 15766/03, judgment of the Grand Chamber of the European Court of Human Rights of 16 March 2010, para. 109.

²⁸⁵ See in detail, the review of the case law of the European Court of Human Rights.

Exceeding the time limit is never automatically considered a disciplinary offence; exceeding the time limit by a few days is usually considered a minor violation (Case no. 91.18).

Consequently, there is a problem both in terms of legislative gaps and flawed practices, as well as in terms of misuse of existing legislative regulations.

The second problem identified by the project with the legislation is related to the following wording:

“The reason for the violation of this term will not be considered unreasonable if the judge was unable to comply with this term due to objective circumstances (number of cases, the complexity of the case, etc.).”

This wording can be interpreted in such a way that the objectively existing problem in the justice system, which is related to the courts’ caseload, relieves the judge of disciplinary responsibility.

This approach is confirmed by a review of the practice of disciplinary bodies.

When discussing delays in hearing a case, the Council of Justice often looks at the actions taken by the judge in the case and the workload. In some cases, the breach of the time limit is excused due to the workload of the judge.

In such cases, the council often cites a decision of the Disciplinary Board of 12 April 2013:

“Imposition of disciplinary liability is a very dangerous and important issue. Disciplinary action poses a potential threat to the independence of the judiciary... A judge shall be subject to disciplinary action if he/she is found guilty of an act, which constitutes disciplinary misconduct. Accordingly, the basis for imposing a disciplinary sanction is solely and exclusively the fault of the judge for the disciplinary misconduct. Given the above, it is important to determine precisely that the act committed constitutes a disciplinary offense.”

Accordingly, it was not considered a misdemeanour due to the workload of the judge, for example:

- » Extending the 20-day review period for a decision on a security measure by a month and a half (Case no. 52-17).
- » During the civil case (determination of paternity and assignment of surname) for two years and three months (Case no. 112-17).
- » In the case of a civil case - recognition of the right of inheritance as a legal successor and the recognition of the right to inherit by transmission within 9 months (Case no. 99-17).
- » In some cases, the judge’s delay in performing minimal procedural actions in the case (forwarding the claim to the defendant and public publication) is considered excusable given the workload. For example, exceeding the 5-month time limit for processing cases by 2 months and 23 days (Case no. 100-17-02).

Due to caseload, the council takes a lenient approach towards periods in the case when there is no activity for a long time, for example, in the alimony dispute, which according to the law must be reviewed within 1 month. See also Case no. 95-17. The same approach was taken concerning the failure to schedule a civil hearing for a year and 6 months (Case no. 116-17).



The above-mentioned legislative formulation and the relevant practice of the disciplinary bodies contradict the practice of the European Court of Human Rights, as the European Court does not rule out the possibility of assessing the responsibility of a judge in terms of ensuring a reasonable length of proceedings in the event of the systemic caseload.²⁸⁶



Caseload is a serious problem for the Georgian judiciary that has remained unresolved for years. The Parliamentary Reports of the Public Defender of Georgia discuss the scale of this important issue from year to year and express concern that this crucial aspect of a fair trial is not provided in Georgia.²⁸⁷ With all this in mind, it is clear that the legislative wording and the relevant practice of the disciplinary bodies need to be changed.

The same goes for the complexity of the case. As the practice of the European Court of Human Rights shows, the complexity of the case does not automatically relieve the judge of the obligation to minimise the length of the hearing.²⁸⁸

The High Council of Justice cites the complexity of the case as one of the criteria for assessing the reasonableness of the time limit for hearing a case, although the complexity of a particular case is seldom judged in the Board's decision. The submission of numerous motions and statements by 114-17 parties in the case was considered as one of the factors determining the complexity of the case.

One of the criteria for assessing the length of a case may also be the actions of the party. For example, in Case no. 22d/26-19, where a judge heard a non-custodial case for 3 years and 5 months, the disciplinary panel found the judge guilty of delaying the hearing of the case. However, the Disciplinary Chamber also justified taking into account the fact that the court hearings were repeatedly postponed due to the absence of the accused, which was caused by his illness.

Complaints about delays in hearing cases tend to be as follows: Not a single complaint indicates that the hearing has been delayed or that no action has been taken at the time the judge filed the complaint. By the time the High Council of Justice hears the complaint, which usually takes place several months later, the substantive hearing of the case has already been completed and the expediting of the process by the judge coincides with the timely filing of the disciplinary complaint.

²⁸⁶ See in detail, the review of the case law of the European Court of Human Rights.

²⁸⁷ The 2019 Report of the Public Defender of Georgia, p. 148 et seq., available at: <http://ombudsman.ge/res/20200402449134pdf> The 2018 Report of the Public Defender of Georgia, p. 97 et seq., available at: [t:http://ombudsman.ge/res/20200402449134pdf](http://ombudsman.ge/res/20200402449134pdf) The 2019 Report of the Public Defender of Georgia, p. 104 et seq., available at: <https://drive.google.com/file/d/1cgvWDczQKnj> etc.

²⁸⁸ See in detail, the review of the case law of the European Court of Human Rights.

For example, at the time of filing a disciplinary complaint in Case no. 22-18, a preparatory hearing is not scheduled for 2 years after the filing of the claim and, within 1 year after the filing of the disciplinary complaint, the judge has already completed the consideration of the claim. The disciplinary body does not pay any attention to the initiation of the case and does not discuss its connection with the disciplinary complaint (see also Case no. 110-18). For example, in a civil case, 116-17, hearings were not scheduled for a year and 6 months.

In the practice of the High Council of Justice, there are cases when the delay in the hearing of the case is obvious, but the High Council of Justice still refuses to pursue disciplinary proceedings. The decision is justified only by the fact that it fails to get the required number of votes for the decision. For example, in Case no. 68-17, the judge delayed the hearing of civil cases for almost two years, although the prosecution did not start because nine members of the council supported the termination of the prosecution. (See also Case no. 207 / 17-2).

Disciplinary bodies almost always refer to Article 6 of the European Convention on Human Rights (which includes the right to a fair trial within a reasonable time) and the criteria used by the European Court of Human Rights in finding a violation of Article 6 (case review) due to the violation of the reasonable time requirement. Disciplinary bodies develop the following reasoning:

» “In order to determine whether a case was dealt with within a reasonable time, it is important to determine - 1) the complexity of the case, which may be related to both the factual and legal complexity of the case (*Katte Klitsche de la Grande v. Italy*; para. 55; *Papachelas v. Greece*, para. 39), which may be related to the involvement of several parties in the case (*H. V. United Kingdom*, para. 72), the examination of evidence (*Human v. Poland*, para. 63), etc. However, even when the case is not complex in nature, but the national law is not clear, this circumstance may also lead to unreasonable delays in the hearing (*Lupeni Greek Catholic Parish and others v. Romania*, para. 150); 2) actions by the parties, which include, for example, frequent changes of lawyers (*König v. Germany*, para. 103), petitions that are intended to delay the process, or simply relate to a certain deadline (*Acquaviva v. France*, para. 61), as well as other actions related to the extension of the case; and 3) actions of the judge hearing the case; attention should be paid to the judge’s failure to perform a procedural action for a long time (*Pafitis and Others v. Greece*; para. 93; *Tiece v. San Marino*; para. 31; *Sürmeli v. Germany*, para. 129.) Disciplinary bodies note that attention should also be paid to the fact that, according to the European Court of Human Rights, whether the time limit for hearing a case was reasonable should be assessed on a case-by-case basis, taking into account the specific circumstances of the case (*Frydlender v. France*, para. 43) and as a result of taking into account all procedural actions as a whole (*König v. Germany*; para. 98).”

This reasoning is repeated from decision to decision. Clearly, the application of the case law of the European Court is of great importance in the practice of disciplinary bodies. However, it is implied that the standards established by this practice should not simply be listed and repeated stereotypically, but rather the factual circumstances should be analysed in the context of these standards. Unfortunately, according to the project team, in the decisions of the disciplinary bodies, the above International standards are referred to in a template so that the

circumstances of the case are not discussed in depth in accordance with these criteria and their context.

This is further indicated by the fact that the error made in the above judgments of the European Court of Human Rights is invariably copied in all judgments where even the standard of reasonable time of the proceedings is mentioned.

In particular, instead of *Katte Klitsche de la Grande v. Italy*, it should read as *Katte Klitsche de la Grange v. Italy*. Instead of *Lupeni Greek Catholic Parish and others v. Romania*, it should read as *Lupeni Greek Catholic Parish and Others v. Romania*. The cases - *Tiece v. San Marino and Human v. Poland* - have never been examined by the European Court. However, they are still repeated in the latest decisions of the disciplinary bodies along with the other shortcomings mentioned above.²⁸⁹ Presumably, the cases *Tierce and Others v. San Marino and Humen v. Poland* are implied here.

In addition, the criteria for reasonableness of proceedings by disciplinary bodies are not fully cited. For example, the important criterion for assessing the interest of the person in the delayed proceedings has been omitted.²⁹⁰

Based on the above, it is concluded that, although disciplinary bodies cite certain cases from the case law of the European Court of Human Rights, this citation is superficial and incomplete and not adapted to the factual circumstances of a particular case or incorrectly adjusted (overload, complexity and so on).

The shortcoming of the legislative formulation, which determines the composition of disciplinary misconduct through the non-observance of the procedural deadlines and not through the non-observance of the obligation to conduct the proceedings within a reasonable time, is not corrected by the practice of disciplinary bodies.

Consequently, the assessment by the disciplinary bodies of the observance of the obligation to conduct the proceedings within a reasonable time is not done in accordance with the practice of the European Court of Human Rights.

8.4. Right to an Effective Legal Remedy

The Committee of Ministers of the Council of Europe

The instruments adopted by the Council of Europe provide for the obligation of the Member States to provide for effective remedies against delays in proceedings.

²⁸⁹ See for instance, Judgment of the Disciplinary Chamber of the Supreme Court of Georgia of September 27, 2019 in case no. 26-19, Judgment of the Disciplinary Board of Judges of Common Courts of Georgia of 21 January 2019 on case no. 3/01-2018, available at:

<http://hcoj.court.ge/uploads/gadackvetilebebi/pdf>; Decision of the High Council of Justice of Georgia of 11 March 2019 on case no. 22/18, available at <http://hcoj.gov.ge/files/2019/pdf>; Decision of the High Council of Justice of Georgia of 16 July 2018 on case no. 107/17, available at: <http://hcoj.gov.ge/files/2018/107-17pdf>

²⁹⁰ See in detail, the review of the case law of the European Court of Human Rights.

Georgia is committed to stepping up its efforts in the spirit of the idea of joint responsibility for the implementation of the Convention at the national level, including the creation and improvement of effective domestic remedies against alleged violations of the rights guaranteed by the Convention, whether specific or general.²⁹¹

Ineffective implementation of the Convention at the national level, in particular with regard to problems that are significant systemic and structural violations of human rights, remains a major challenge to the Convention system. The overall state of human rights in Europe depends on the actions of states. According to the principle of subsidiarity, the Contracting State is the main guarantor of the European Convention and the most important aspect of this principle is the right to an effective remedy under Article 13 of the Convention.²⁹²

The European Court of Human Rights

The European Court of Human Rights envisages practical rights, not theoretical and illusory ones. This is especially true of the guarantees provided for in Article 6 of the Convention, given the importance of the human right to a fair trial in a democratic society and the procedural guarantees provided for in Article 6 of the Convention.

The principle of subsidiarity therefore requires that the outcome of the domestic remedies dispute be brought in line with the European Convention on Human Rights. Otherwise, the articles of the Convention, including Article 6, would be devoid of any meaning.²⁹³

In view of the above, after analysing how disciplinary agencies assess a judge's delay in litigation within the meaning of Article 6 of the Convention, the project team considered the following issues in the context of the case law of the European Court of Human Rights: what is the effect of the remedy and can the disciplinary bodies provided by the legislation of Georgia be considered as an effective remedy for the right within the meaning of Article 13 and the first paragraph of Article 35 of the Convention?

According to the European Court of Human Rights, the standards set out in Article 13 of the Convention include the contracting party to the Convention to ensure that a competent domestic authority considers a complaint about a violation of a right guaranteed by the Convention substantially and ensures restitution. The Contracting Party shall have some consideration as to which route it chooses to fulfil its obligation under this regulation.²⁹⁴ According to the European Court of Human Rights, the means of the legal remedy required by Article 13 of the Convention must be effective in both law and practice.²⁹⁵ In the context of a reasonable time in the proceedings, the remedy shall be deemed effective if it can be used to expedite the decision of the trial court and thus prevent delays or provide the party with adequate compensation for any delays that have already occurred.²⁹⁶

The European Court of Human Rights has commented on the number of cases pending

291 The Council of Europe, Committee of Ministers, The Copenhagen Declaration, 2018, para. 16.a).

292 Ibid., paras. 12-13.

293 *Cocchiarella v. Italy*, application no. 64886/01, judgment of the Grand Chamber of the European Court of Human Rights of 29 March 2006, para. 83.

294 *The Lukenda case*, para. 86.

295 *The Lukenda case*, para. 97.

296 *Mifsud v. France*, application no. 57220/00, judgment of the Grand Chamber of the European Court of Human Rights of 11 September 2002, para. 17; *Rachevi v. Bulgaria*, application no. 47877/99, judgment of the European Court of Human Rights of 13 September 2004, para. 98.

before the courts and questioned the extent to which preventive remedies were available at the national level to prevent delays. The Court also noted that the State had failed to provide relevant examples to rule out doubts as to the validity of the existing legal mechanisms.²⁹⁷

The European Court of Human Rights considers that a remedy is effective if it can expedite proceedings that are unreasonably delayed or compensate for a right violated as a result of an already protracted proceeding.²⁹⁸

Rachevi v. Bulgaria, 2004

In the Rachevi case,²⁹⁹ the applicants alleged that they had not been able to use effective legal remedies at the domestic level concerning the reasonableness of proceedings. Under pre-1999 legislation, no specific procedure was provided for appealing to the High Council of Justice and the existing proceedings as a result of the subsequent amendments could not be considered effective, as it did not provide for the possibility of receiving compensation for the delay of the proceedings.³⁰⁰

It should also be noted that, even if the Convention is incorporated in domestic law and directly applicable in the state, it does not necessarily imply the availability of effective legal remedy at the national level. The state is expected to demonstrate an example of a litigant having successfully relied on the Convention to apply to a domestic authority to obtain the acceleration of the examination of his or her civil action. This absence of any case law indicated the uncertainty of this theoretical remedy in practice.³⁰¹

With regard to restorative measures, the court failed to find that Bulgarian law provides for compensation or other restorative means for protracted litigation by which they would expedite the protracted litigation.³⁰² Apart from that, as regards compensatory measures, the court could not establish such a remedy in Bulgarian law. Accordingly, the European Court has found a violation of Article 13 of the Convention.³⁰³

Lukenda v. Slovenia, 2005

In the Lukenda v. Slovenia case,³⁰⁴ the total duration of the proceedings had been five years and three months. Although an opinion of a medical expert was required to decide the case, the latter was neither procedurally nor factually of exceptional complexity. Moreover, there was no evidence suggesting that the applicant had contributed in a significant way to the length of the proceedings. Hence, the overall length of the proceedings had been excessive, in particular the duration of the proceedings before the first-instance court, which had exceeded four years. The European Court of Human Rights found the violation of Article 6.1.³⁰⁵

297 Ibid., para. 47.

298 Ibid., para. 51.

299 Rachevi v. Bulgaria, application no. 47877/99, judgment of the European Court of Human Rights of 13 September 2004.

300 Ibid., para. 94.

301 Ibid., para. 64.

302 Ibid., paras. 102-103.

303 Ibid., para. 104.

304 Lukenda v. Slovenia, application no. 23032/02, judgment of the European Court of Human Rights of 6 October 2005.

305 Ibid., paras. 72-79.

As seen in the latest court statistics published by the Ministry of Justice of the respondent state, it was clear that the length of judicial proceedings remained a major problem in Slovenia. The violation of the applicant's right to a trial within a reasonable time was not an isolated incident but rather a systemic problem that resulted from inadequate legislation and inefficiency in the administration of justice.³⁰⁶ Under Article 46 of the Convention, a state's legal obligation is not just to pay those concerned the sums awarded by way of just satisfaction, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress the effects as far as possible. In conclusion, the Court identified some of the weaknesses of the legal remedies guaranteed by the respondent state, whilst acknowledging that certain recent developments showed reassuring improvements. Hence, to prevent future violations of the right to a trial within a reasonable time, it encouraged the respondent state to either amend the existing range of legal remedies or add new ones to secure effective redress for violations of this right.³⁰⁷

Luli and Others v. Albania, 2014

In the case of *Luli and Others v. Albania*,³⁰⁸ the European Court of Human Rights examined whether the High Council of Justice assisted by an Inspectorate in disciplinary proceedings could be considered an effective remedy.³⁰⁹ The High Council of Justice's responsibility extends solely to judges of first-instance courts and the courts of appeal, no authority being extended to the measures of appointment, dismissal, appraisal and discipline of Supreme Court judges. While the High Council of Justice Act empowers the High Council of Justice to institute disciplinary proceedings against a judge of the first-instance court or of the court of appeal, no provision enables it to provide redress for excessively long (pending or terminated) proceedings and the government submitted no information (relevant case law) to the contrary. Accordingly, the European Court held that the High Council of Justice of Albania could not be deemed an effective remedy.³¹⁰

Mirjana Maric v. Croatia, 2020

In 2020, the European Court of Human Rights in its recent case reiterated that a remedy for raising a complaint of a breach of the "reasonable time" requirement laid down in Article 6.1 of the Convention could not be considered effective if it had neither preventive nor compensatory effect over the length of the proceedings complained of.³¹¹ At the material time, the Grand Chamber established this approach in the *Cocchiarella* case,³¹² where it opined that, for countries where length-of-proceedings violations already exist, a remedy designed only to expedite the proceedings – although desirable for the future – may not be adequate to redress a situation in which the proceedings have already been excessively long.³¹³

306 *Ibid.*, para. 93.

307 *Ibid.*, paras. 89-98.

308 *Luli and Others v. Albania*, applications nos. 64480/09 64482/09 et al., judgment of the European Court of Human Rights of 1 April 2014.

309 *Ibid.*, para. 57.

310 *Ibid.*, para. 82.

311 *Mirjana Maric v. Croatia*, application no. 9849/15, judgment of the European Court of Human Rights of 30 July 2020, para. 72.

312 *Cocchiarella v. Italy*, application no. 64886/01, judgment of the Grand Chamber of the European Court of Human Rights of 29 March 2006.

313 *Ibid.*, para. 76.

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While the possibility of complaining about the delay of a trial under Georgian law is possible only before the disciplinary bodies, disciplinary bodies will not be considered a means of effective remedy within the meaning of the European Convention on Human Rights either from a legislative or practical point of view. Georgian law does not provide for effective legal remedy in case of delay of proceedings and the disciplinary bodies do not expedite the proceedings in practice.³¹⁴ They, moreover, do not grant compensation. Accordingly, the requirement of Article 13 of the European Convention of Georgia regarding the right guaranteed by Article 6 to have the proceedings conducted within a reasonable time has not been complied with.

Reform of National Legislation in Accordance with the Case Law of the European Court

The European Court of Human Rights notes the efforts of the Contracting States to carry out reforms to expedite legal proceedings, but the implementation of such reforms should not delay the consideration of ongoing cases.³¹⁵ The European Court of Human Rights assesses the adequacy of the measures taken by a state based on the principles established by the Court.³¹⁶

It should also be noted that taking a measure favourable to the applicant at the national level is usually not sufficient to deprive him/her of the status of a “victim” unless the national authority directly or substantially acknowledges the violation of the right guaranteed by the Convention and takes action to remedy the violation and restores the person to his / her original legal position as much as possible (*restitutio in integrum*).

Whether a person has retained the victim status that is whether the state has restored the person to his/her original legal status and whether the applicant can continue the dispute before the European Court of Human Rights, is directly related to an effective remedy.

In this regard, the European Court of Human Rights clarifies the extent to which the legislation needs to be reformed in order for a person to be able to effectively defend his or her rights at the national level in the context of ensuring proceedings are conducted within a reasonable time.³¹⁷

Article 6 of the Convention imposes an obligation on the Contracting Parties to set up a court system in which they can enjoy the procedural rights guaranteed by Article 6, including the consideration of cases within a reasonable time.³¹⁸

When there is a problem with this at the national level, there should be an effective measure of domestic legal protection aimed at speeding up the legal process to avoid further delays. A similar legal remedy is most effective. Such a remedy has an indisputable advantage over a purely compensatory remedy because it also avoids having to find successive violations for the same procedure and is not limited to acting only a posteriori.³¹⁹

314 However, there were cases when the judge himself expedited the case after filing a disciplinary complaint.

315 *Fisanotti v. Italy*, application no. 32305/96, judgment of the European Court of Human Rights of 23 April 1998, para. 22.

316 *Scordino v. Italy* (no. 1), application no. 36813/97, judgment of the Grand Chamber of the European Court of Human Rights of 29 March 2006, para. 178 et seq. and para. 223.

317 *Ibid.*, para. 182.

318 *Susmann v. Germany*, application no. 20024/92, judgment of the Grand Chamber of the European Court of Human Rights of 16 September 1996, para. 22.

319 *Scordino v. Italy* (no. 1), application no. 36813/97, judgment of the Grand Chamber of the European Court of Human Rights of 29 March 2006, para. 183.

However, the above remedies are effective only if the decision of the national agency can expedite the proceedings.³²⁰

According to the European Court of Human Rights, some states have the best solution in terms of combining both remedies, i.e., acceleration and compensation; these countries are Austria, Croatia, Spain, Poland and Slovakia.³²¹

The European Court of Human Rights clarifies that the Contracting Parties have a certain margin of appreciation in the manner of ensuring the rights of individuals guaranteed by Article 13 of the Convention and the path they take in fulfilling their obligations under this article.³²²

In this context, the principle of subsidiarity is also important so that individuals are not systematically forced to apply to the European Court of Human Rights and their rights are protected, primarily at the national level.³²³

It is recommended that amendments be made to Georgian legislation to provide effective remedies for both expediting and preventing further delays as well as providing reasonable compensation for already protracted proceedings, within the discretion of the state and based on the principle of subsidiarity.

8.5. Impartiality

Impartiality normally denotes the absence of prejudice or bias. This definition is given in both earlier judgments³²⁴ and recent judgments.³²⁵

The European Court of Human Rights has developed two approaches/tests to examine whether the court is impartial.

Subjective Approach

In applying the subjective test, the Court has consistently held that “the personal impartiality of a judge must be presumed until there is proof to the contrary”.³²⁶

As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or made sure to have a case assigned to him/herself.³²⁷ The mere fact that a judge made unfavourable procedural decisions does not prove the judge’s subjective bias.³²⁸

320 Bacchini v. Switzerland, application no. 62915/00, decision of the European Court of Human Rights of 21 June 2005.

321 Holzinger (no. 1); Slaviček v. Croatia (dec.); Fernández-Molina González and Others v. Spain (dec.); Michalak v. Poland (dec.); Andrúšik and Others v. Slovakia (dec.).

322 Kudla v. Poland, application no. 30210/96, judgment of the Grand Chamber of the European Court of Human Rights of 26 October 2000, para. 154-155.

323 Scordino v. Italy (no. 1), application no. 36813/97, judgment of the Grand Chamber of the European Court of Human Rights of 29 March 2006, para. 188.

324 Kyprianou v. Cyprus, application no. 73797/01, judgment of the Grand Chamber of the European Court of Human Rights of 15 December 2005, para. 118; Micallef v. Malta, application no. 17056/06, judgment of the Grand Chamber of the European Court of Human Rights of 15 October 2009, para. 93.

325 Šekerija v. Croatia, application no. 3021/14, judgment of the European Court of Human Rights of 5 November 2020, para. 134.

326 A.K. v. Liechtenstein, application no. 38191/12, judgment of the European Court of Human Rights of 9 July 2015, para. 66.

327 De Cubber v. Belgium, application no. 9186/80, judgment of the European Court of Human Rights of 14 September 1987, para. 25.

328 Khodorkovskiy and Lebedev v. Russia, (no. 2), applications nos. 51111/07 and 42757/07, judgment of the European Court of Human Rights of 14 January 2020, para. 430.

Objective Approach

It must be determined whether, apart from the judge's conduct, there are ascertainable facts that may raise doubts as to his/her impartiality. When applied to a body sitting as a bench, it means determining whether, apart from the personal conduct of any of the members of that body, there are ascertainable facts which may raise doubts as to the impartiality of the body itself. This implies that, in deciding whether in a given case, there is a legitimate reason to fear that a particular judge lacks impartiality.³²⁹

The standpoint of the person concerned is important but not decisive. What is decisive is whether a person's fear about a judge's bias can be objectively justified.³³⁰

The objective test mostly concerns hierarchical or other links between the judge and other actors in the proceedings.³³¹

Therefore, it must be decided in each case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal. In this respect, even appearances may be of certain importance or, in other words, "justice must not only be done, it must also be seen to be done".³³² This refers to the confidence that the courts must instil in the community and the respective party.

Thus, any judge suspected of bias should recuse himself/herself.³³³ In particular, it implies the obligation of the individual judge to identify any obstacle that prevents him/her from participating in the case and to withdraw or, when this is not clear enough, notify the parties and give them the opportunity to challenge the judge's recusal.³³⁴

Failure by national courts to consider claims of impartiality, which at first glance is not manifestly ill-founded, could lead to a violation of Article 6.1 of the European Convention on Human Rights.³³⁵

In its decision on non-admissibility in the case of *Ökten v. Turkey*, the Court observed that even the fact that a judge has made decisions about a particular person "does not in itself justify suspicions of a judge's bias."³³⁶

Moreover, in the case of *Khodorkovskiy and Lebedev v. Russia*,³³⁷ the applicants, co-accused persons, alleged that their case had been considered by the same judge, thus violating their right to an impartial tribunal. The European Court of Human Rights again held that the mere fact that a judge has already heard the case of an accused's co-defendant was not sufficient

329 *Morice v. France*, application no. 29369/10, judgment of the Grand Chamber of the European Court of Human Rights of 23 April 2015, para. 73; *Scerri v. Malta*, application no. 36318/18, judgment of the European Court of Human Rights of 7 July 2020, para. 69.

330 *Morice v. France*, application no. 29369/10, judgment of the Grand Chamber of the European Court of Human Rights of 23 April 2015, para. 76.

331 *Micallef v. Malta*, application no. 17056/06, judgment of the Grand Chamber of the European Court of Human Rights of 15 October 2009, para. 97.

332 *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment of the European Court of Human Rights of 9 January 2013, para. 106.

333 *Morice v. France*, application no. 29369/10, judgment of the Grand Chamber of the European Court of Human Rights of 23 April 2015, para. 78.

334 *Sigrður Elín Sigfúsdóttir v. Iceland*, application no. 41382/17, judgment of the European Court of Human Rights of 25 February 2020, para. 35.

335 *Remli v. France*, application no. 16839/90, judgment of the European Court of Human Rights of 23 March 1996, para. 48.

336 *Ökten v. Turkey*, application no. 22347/07, decision of the European Court of Human Rights of 3 November 2011, para. 41.

337 *Khodorkovskiy and Lebedev v. Russia*, applications nos. 11082/06 and 13772/05, judgment of the European Court of Human Rights of 25 July 2013.

to cast doubt on a judge's impartiality in hearing that accused's case. The court clarified that, otherwise, the functioning of the criminal courts would be impossible.³³⁸

Compliance: Georgian Legislation and the Practice of Disciplinary Bodies

Under the current wording of the Organic Law on Common Courts, the bias of a judge, taken separately, does not constitute disciplinary misconduct although the list provided by law includes certain misconducts that are associated with the bias of a judge.

- » The exercise of judicial power by a judge through personal interest, political or social influence;
- » Interference by a judge in the activities of another judge to influence the outcome of the case;
- » Public expression of opinion by a judge on a case pending before a court;
- » Pre-disclosure of the result of the case to be considered by the judge, except in cases provided by the procedural legislation of Georgia;
- » Ex parte communication of a judge with a party or interested party that violates the principle of independence, impartiality and adversarial proceedings.
- » Refusal of the judge to recuse himself/herself when there is a clear ground for recusing from the case provided by law;
- » Membership of a judge in a political union, his/her political activities, public support of an election subject in any form or public expression of his/her political views;
- » Illegal interference in the distribution of cases by a judge in court;
- » Establishment of personal and intensive (friendly, family) relations by the judge directly with the participant in the case under consideration, which leads to the bias of the judge and/or preference for the participant of the process, if he/she had information about the party; and
- » Discriminatory actions of a judge, verbally or otherwise, in the exercise of judicial powers, against any person on one ground or another.

The cases heard by the disciplinary bodies mainly concerned the possible display of bias by the judge during the hearing of the case. The analysis of the practice shows that the disciplinary bodies take a lenient approach with the allegations of bias on the part of the judge.

For instance, in Case no. 155-18, the judge did not consider the appeal to the party as a preliminary expression and bias: "You can make these arguments in the Supreme Court ... Do not continue the dispute, substantiate your case ..." This decision greatly expands the standard of bias as these words show the judge's reference to the fact that he intends to rule against the party. This context has not been properly assessed by the High Council of Justice.

338 Ibid., para. 544.

In Case no. 150-17, the board did not consider the judge's reference to a party to be disciplinary misconduct, where the judge corrected the party's position, stressing that the party had not conducted an examination but that the examination had already been sufficient to substantiate the party's position. We think that this case, given the context, might have been considered a manifestation of bias.

In Case no. 76-18, the judge considered a case where the party represented a university where the judge had been proven to hold an academic position. The judge did not recuse himself from the case. In this case, the inspector confirmed the existence of disciplinary misconduct in the judge's action, viz., violation of the rules of ethics.

The High Council of Justice did not accept this finding and pointed out that "The fact that a judge reviews a private complaint of a university where he holds a remunerative position does not constitute a reasoned presumption to doubt a judge's impartiality when the party does not seek the judge's recusal.

It is important to note, however, that the judge himself would have the obligation to recuse himself only if, given the subjective test, he had a preconceived notion about the outcome of a particular dispute. However, it should be noted that disciplinary misconduct exists in a case where there is a clear ground for not presiding over that case. In this case, since the party did not appeal to the court and the judge did not have clear grounds for recusal, there are no signs of misconduct in this disciplinary case.

We think that, in this case, the High Council of Justice explained the discretion of the judge too broadly. When a judge sees a dispute against his or her employer, there is already a clear reason to recuse oneself and the judge should have recused himself from the case. The High Council of Justice in this case uses only a subjective test of bias that is not valid; both an objective and a subjective test of bias should be used.

8.6. Foreseeability of Disciplinary Liability

According to the case law of the European Court of Human Rights, the law that allows for interference with Convention rights should meet qualitative requirements. This, *inter alia*, concerns legislation governing disciplinary liability.

The qualitative requirement clarified by the European Court of Human Rights, which must be met by law, including the law governing disciplinary liability, implies the accessibility of law and the foreseeability of its consequences.³³⁹

In the case of *Guz v. Poland*, a judge was subjected to disciplinary liability for undermining the dignity of the office of judge. The applicant alleged that national regulation of this disciplinary offence did not comply with the requirements of the case law of the European Court of Human Rights.³⁴⁰

The European Court of Human Rights reiterated in this case that a legal provision could not be regarded as a "law" within the meaning of the Convention unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He or she must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail. Those consequences need not be foreseeable with absolute certainty. While certainty is desirable, it may bring in its train excessive

³³⁹ *Brisic v. Romania*, application no. 26238/10, judgment of the European Court of Human Rights of 11 December 2018.

³⁴⁰ *Guz v. Poland*, application no. 965/12, judgment of the European Court of Human Rights of 15 October 2020.

rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice.³⁴¹

The European Court of Human Rights maintains that the level of precision required of domestic legislation – which cannot provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed. The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails.³⁴²

In the present case, the applicant challenged the foreseeability of the domestic provision that provides that a judge is liable for actions undermining the dignity of a judicial office. The term employed by that provision (“undermining the dignity of a judicial office”) inevitably includes an element of vagueness and is subject to interpretation by the courts.

In this regard, the European Court of Human Rights took into account that there was a case law of the Supreme Court that defined the “dignity of a judicial office” in combination with other provisions binding on judges. The disciplinary courts referred to the Supreme Court’s case law regarding the appropriate manner of addressing criticism to another judge. Therefore, the Court considered that the applicant, being a judge, was wellversed in the law and aware of the rules aimed at upholding the integrity and dignity of a judicial office.³⁴³

In view of these two factors, the Court found that the national legislation had met the requirement of foreseeability.

Compatibility: Georgian Legislation and Practice of Disciplinary Bodies

Article 75¹ of the Organic Law on Common Courts provides the basis for a judge’s disciplinary liability and the types of disciplinary misconduct. Para. 8 identifies the types of disciplinary misconduct. According to subparagraph g), the following is defined as disciplinary misconduct:

“g) any other act of a judge which is not commensurate with the high status of a judge (an act, conduct) unsuitable for the high status of a judge, committed in or out of court, which clearly violates public order or generally accepted moral norms and thereby undermines the court’s authority or harms the court) .”

This wording of disciplinary misconduct may raise the problem of foreseeability.

Just as the European Court of Human Rights in the case of Poland agreed with the Polish Constitutional Court’s argument that it was impossible to determine the exact list of disciplinary misconduct,³⁴⁴ it would be unjustified to require the legislature to determine exhaustively all actions that may constitute disciplinary misconduct.

However, the European Court of Human Rights found in *Guz* case that the requirement of prejudice was satisfied because the case law of the Polish Supreme Court explained in detail

³⁴¹ Ibid., para. 76.

³⁴² Ibid., para. 77.

³⁴³ Ibid., paras. 78-79.

³⁴⁴ *Guz v. Poland*, application no. 965/12, judgment of the European Court of Human Rights of 15 October 2020, para. 78.

the composition of the disciplinary misconduct and that judges could regulate their conduct in addition to the requirements.³⁴⁵

Given that there is no practice of disciplinary bodies in relation to this norm, it is recommended that the High Council of Justice issue a document explaining the content of the misconduct provided for in Article 751-8 of the Organic Law on Common Courts, thus ensuring the foreseeability of the law.

8.7. The Reasoning of a Decision

According to the established practice of the European Court of Human Rights, the principle of proper substantiation of court decisions is closely related to the proper administration of justice. The courts must duly indicate the arguments on which they base their decision.³⁴⁶

The purpose of reasoned decisions is to show that the court has heard the parties, which also helps to facilitate greater acceptance of the decision by the parties. In addition, a judge is obliged to substantiate his/her opinion on objective arguments and at the same time protect the rights of the parties.

However, the extent to which this duty to give reasons applies may vary according to the nature of the decision.³⁴⁷ Article 6.1 of the Convention cannot be interpreted as requiring giving detailed reasons to each argument of the party.³⁴⁸ However, a court decision should clearly demonstrate that the key issues at hand have been addressed.³⁴⁹ Domestic Courts should indicate with sufficient clarity those grounds on which they are basing their arguments to allow a party to appeal the decision effectively.³⁵⁰

Compatibility: Georgian Legislation and Practice of Disciplinary Bodies

Disciplinary legislation requires substantiation of both interim and final decisions against the judge.³⁵¹

As a result of the review of the disciplinary practice, the problem of substantiation of decisions is mainly related to the fact that the decisions of the High Council of Justice do not sufficiently and clearly present the arguments of the complainant. Sometimes, important arguments are not addressed and, in some cases, the disciplinary case is terminated only

due to lack of quorum, without substantiation. The problem with justification is also that some aspects of disciplinary misconduct sometimes are not identified or discussed in the decisions of disciplinary bodies. The reasoning for a sanction imposed by the Disciplinary Board is in some formulaic and not accompanied by a detailed analysis of relevant factors.

345 Vide supra.

346 Papon v. France, application no. 2 54210/00, judgment of the European Court of Human Rights of 15 November 2001.

347 Ruiz Torija v. Spain, application no. 18390/91, judgment of the European Court of Human Rights of 9 December 1994, para. 29.

348 Van de Hurk v. the Netherlands, application no. 16034/90, judgment of the European Court of Human Rights of 19 March 1994, para. 61.

349 Boldea v. Romania, application no. 19997/02, judgment of the European Court of Human Rights of 15 February 2007, para. 30.

350 Hadjianastassiou v. Greece, application no. 12945/87, judgment of the European Court of Human Rights of 16 December 1992.

351 See for instance Articles 758, 75127513, 7514, 7562 of the Organic Law of Georgia on Common Courts.

9. Analysis of Disciplinary Statistics

9.1. Types of Statistical Information

Accounting and processing of statistical information during disciplinary proceedings is important both for measuring the effectiveness of the system and legal policy considerations. Collecting and publishing statistical information is also a requirement for system accountability.

The obligation to publish or submit minimum statistical information is set out in the Organic Law on Common Courts itself. In particular, under Article 49, par. 4 of the Organic Law on Common Courts, The High Council of Justice is obliged to publish statistical information on the findings submitted by the Independent Inspector (hereinafter - Independent Inspector) of the High Court and on the initiation of disciplinary proceedings and disciplinary action by the Council. Under Article 51¹, Paragraph 12 of the Organic Law on Common Courts, "The Independent Inspector shall, upon request, but at least once a year, submit a report on the activities carried out (including complaints and relevant conclusions) to the High Council of Justice and the Conference of Judges of Georgia. Information on the activities of the Independent Inspector (including complaints received and relevant findings) is proactively published on the website of the Independent Inspector's Office at least once every 4 months.

Under Article 75⁸⁰ of the same law, statistical information on the activities of the Disciplinary Board and the disciplinary cases is periodically sent to the Conference of Judges of Georgia and the High Council of Justice of Georgia.

It is possible to distinguish conditionally three types of statistical information from each other: 1. Legal, 2. Management statistics, and 3. Demographic statistics.

Legal statistics include types of disciplinary misconduct and sanctions, categories of cases (civil, criminal, administrative), legal consequences of case review (acquittal, dismissal), satisfied and rejected motions, etc.

Management statistics include all the information necessary to effectively manage the flow of cases (number of cases, number of hearings, timeframes) and control the average timeframe of proceedings.

Demographic statistics include the number and characteristics of persons subject to litigation by different instances and regions.

9.2. Statistical Information Is Proactively Published by Disciplinary Bodies

At present, disciplinary statistics are proactively published by the following bodies: a. Independent Inspector, b. High Council of Justice, and c. Disciplinary Board.

The Independent Inspector produces and publishes the following standard information:

- » Reason for initiating disciplinary proceedings (complaint from the party, representative, Public Defender, media report);
- » Number of incoming disciplinary complaints (even those drawn up without completing the standard form);

- » Division of disciplinary complaints into categories of cases (civil, criminal, administrative);
- » Number of complaints by the court;

Number of conclusions drawn by the Independent Inspector according to their content (positive and negative conclusions);

- » Recusal of the Independent Inspector;
- » The number of meetings of the High Council of Justice on disciplinary issues; and
- » Dissenting opinion of a member of the High Council of Justice.

The High Council of Justice publishes the following statistical information:³⁵²

- » The number of disciplinary complaints;
- » The number of conclusions reviewed by the High Council of Justice;
- » Results of the review of cases in the High Council of Justice;
- » The number of cases submitted to the Disciplinary Board and the number of judges indicted; and
- » Results of the review of cases in the Disciplinary Board.

Statistical information published by the Disciplinary Board is relatively scarce. In particular, it includes:

- » The number of incoming, completed and remaining cases; and
- » Case review results.

Even more scarce are the statistics published by the Disciplinary Chamber. In particular, it includes:

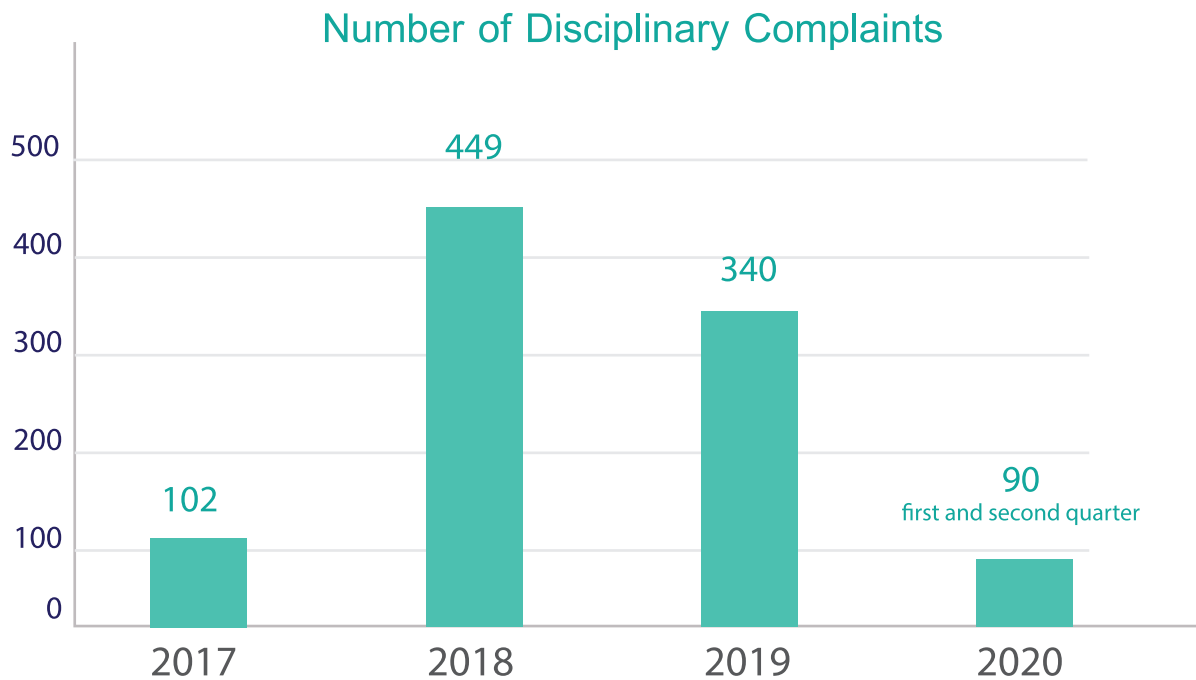
- » Incoming, examined and unexamined cases;
- » The number of decisions left in force; and
- » granted and rejected complaints.

The Disciplinary Board does not publish information on the categories of cases reviewed, the number of hearings held and on the appellants of the decision of the panel, the judge, or the High Council of Justice.

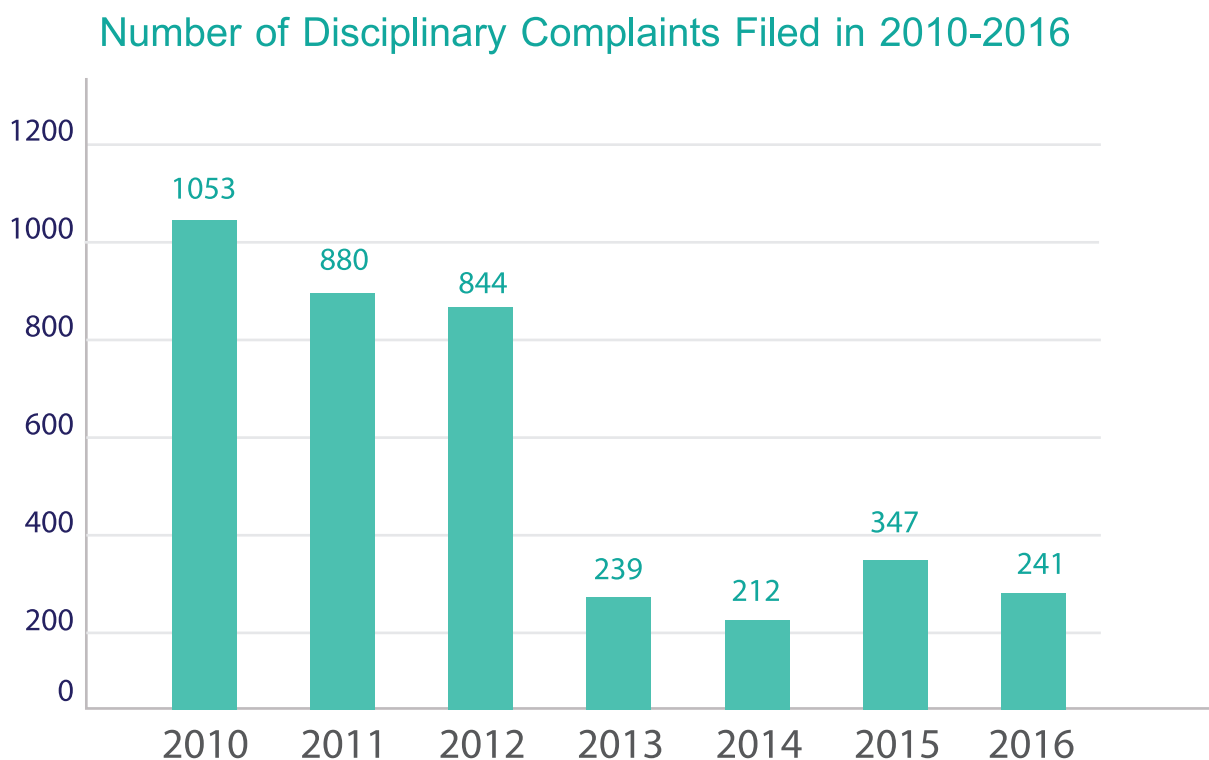
352

<http://hcoj.gov.ge/ge/distsiplinuri-samartaltsarmoeba/sadistsiplino-statistika/distsiplinuri-samartaltsarmoebis-statistika-2017-2019>; 2020 data have not been published.

The number of complaints (statements) received by the Independent Inspector in 2017-2020 (first half) is as follows:³⁵³



For comparison, the number of complaints filed in 2010-2016 with the HCOJ is as follows:³⁵⁴

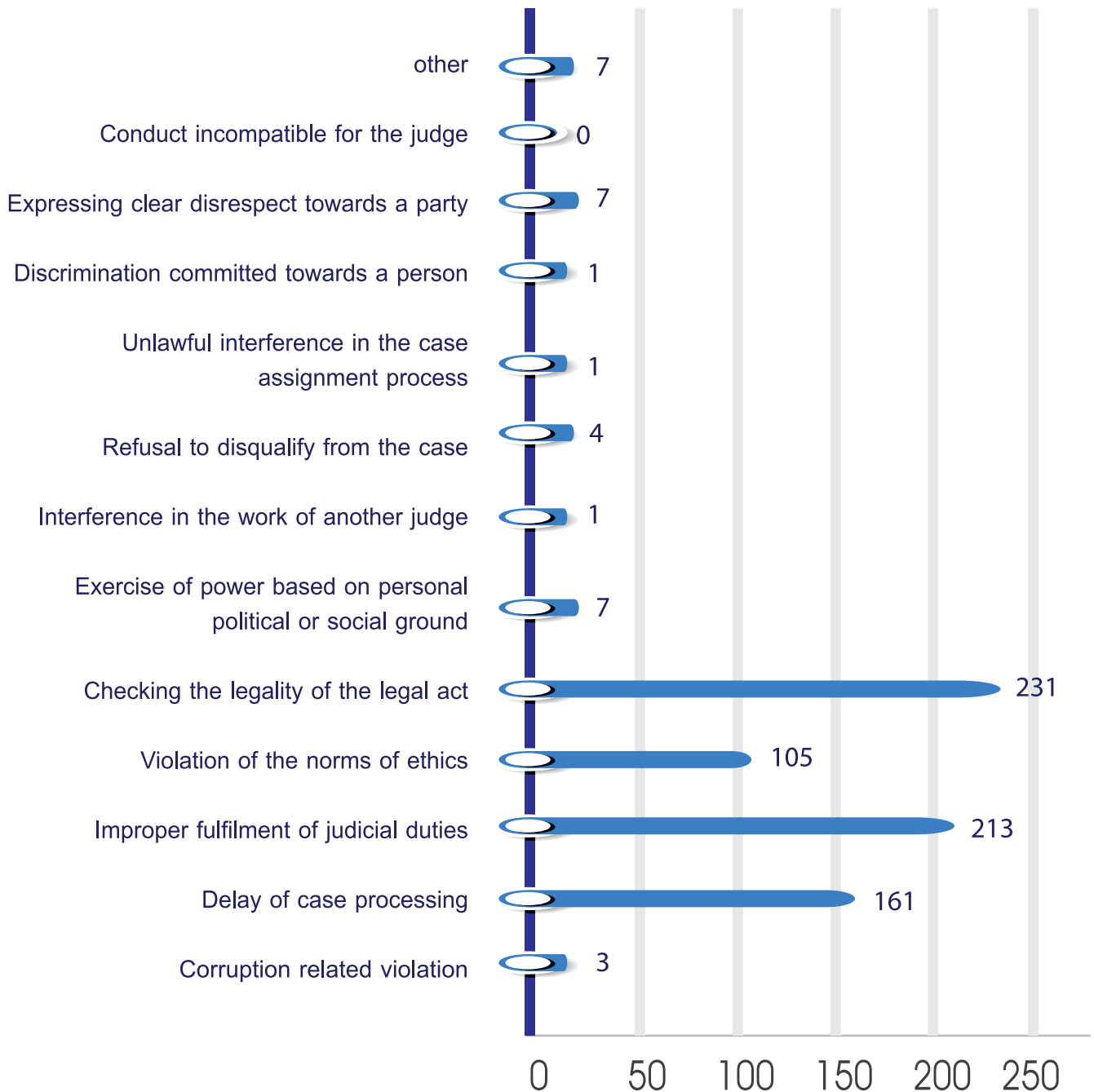


³⁵³ Source, Independent Inspector website <http://independent-inspector.ge/>.

³⁵⁴ source – webpage of HCOJ <http://hcoj.gov.ge/distiplinuri-samartalwarmoeba/sadisciplino-statistika2004-217>

According to the information provided by the Independent Inspector, the complaints filed in 2017-2020 (first half) are distributed by subject matter as follows:

Disciplinary Complaints 2017-20



9.3. Findings of the Independent Inspector / Decisions of the High Council of Justice by Years³⁵⁵

Year	2018	2019	2020 as of June	Total
Complaints / Letters Received by the Independent Inspector	318	215	53	586
Conclusions Reviewed by the HCOJ	173	41	21	235
Positive Conclusions	46	10	10	66
Endorsed by the HCOJ	33	6	1	40
Resulted in the Indictment of the Judge	4	4	0	8

Decisions made by the Independent Inspector and the High Council of Justice in 2018-20 are distributed as follows.

In 2020, the Independent Inspector made 32 decisions to discontinue disciplinary proceedings.

Based on the letter of the Independent Inspector dated 6 June 2020, as well as the information published by the Independent Inspector in 2017-2020:

- » The Independent Inspector has not yet applied to the High Council of Justice for the transfer of case materials to the Prosecutor's Office;
- » No complainant was invited to the session of the High Council of Justice;
- » Despite the request, the judge did not provide explanations in 6 cases;
- » The High Council of Justice has not instructed the Independent Inspector to investigate the case further;

³⁵⁵ Source: Statistical information on the Independent Inspector website, as well as a letter sent by the Independent Inspector 292/139 / -03.

- » None of the judges petitioned before the Independent Inspector;
- » None of the judges exercised the right to a defence counsel; and
- » None of the judges raised the issue of challenging the Independent Inspector, nor did the Independent Inspector recused himself/herself.

The statistical information provided by the Independent Inspector, as well as published information, enables the following conclusions:

- » The most common grounds for a disciplinary complaint are traditionally the non-performance or improper performance of the judge, the examination of the legality of the act rendered by the judge and the unreasonable delay in the proceedings;
- » The vast majority of complaints come from civil cases, which are likely to be caused by delays;
- » 28% of the Independent Inspector’s findings are positive;
- » 60% of the positive findings of the Independent Inspector are endorsed by the High Council of Justice; and
- » In case of prosecution, 20% of the cases end with the indictment of the judge.

Statistics of case examination in the Disciplinary Board:³⁵⁶

Year	2018	2019	2020
Filed Cases	2	7	2
Examined on the merits	2	10	2
Dismissed	1	3	0
Acquitted		4	0
Disciplinary Sanction Imposed	1 Private Recommendation letter	2 Private Recommendation letters	1 reprimand and 1 private recommendation letter

³⁵⁶ Source: Website of the Disciplinary Board; Statistics - shorturl.at/eACW9

For comparison: in 2013-2017, the Disciplinary Board reviewed 6 cases and imposed disciplinary liability on 4 persons. (None of the cases has been considered by the Disciplinary Board in 2014-2015).

For comparison: in 2005-2012, the Disciplinary Board reviewed more than 300 disciplinary cases and 206 judges were disciplined. Of these, 37 judges were dismissed, 29 were severely reprimanded, 59 judges were reprimanded, 58 judges were given admonishment, and 33 judges were sanctioned with a private recommendation letter³⁵⁷.

Interestingly, there has been no change in terms of the grounds for disciplinary action before 2019, which could explain such a radical difference between the periods before 2012 and the period after 2012. This difference can only be explained by a change in political power.

Cases reviewed by the Disciplinary Chamber in 2018-2020:³⁵⁸

Year	2018	2019	2020
Incoming Cases	1	9	N/A
Reviewed Cases	0	7	N/A
Remained in Force	0	4	N/A
Granted	0	1	N/A
Partially Granted	0	2	N/A
Pending	0	1	N/A

As mentioned above, most of the decisions made by the Disciplinary Board (80-90%) are appealed to the Disciplinary Chamber. The Disciplinary Chamber grants about 1/3 of the complaints in full or in part.

³⁵⁷ Source: Website of the Disciplinary Board; statistics-shorturl.at/eACW9

³⁵⁸ Source - Supreme Court Statistics, <http://www.supremecourt.ge/files/upload/pdf/2019-weli-wigni-sadisciplino.pdf> _ 2020 statistics are not published.

Recommendations regarding the publication of statistical information:

In addition to the information published by the disciplinary bodies, it is recommended to additionally collect, process and publish the following types of statistical information:

- » The number of cases when the complainant was summoned to a session of the High Council of Justice;
- » The number of complaints filed in the particular case of a judge after or before the conclusion of the proceedings by the judge (complaints divided into these two subcategories);
- » The number of complaints filed with the Independent Inspector, broken down into types of deficiencies of the complaints;
- » The number of complaints that were re-filed after the defect was rectified;
- » The number of cases merged;
- » The number of cases when the High Council of Justice instructed the Independent Inspector to conduct an additional investigation;
- » Information on the number of cases the decision of the Independent Inspector or the High Council of Justice sent to the complainant;
- » The number of cases during which the case materials were sent to the Prosecutor's Office of Georgia;
- » The number of sessions held by the Disciplinary Board;
- » The categories of cases reviewed by the Disciplinary Board;
- » In the Disciplinary Board, in case of termination of the case, the grounds for termination of the case (for example, termination of the case due to the expiration of the statute of limitations);
- » Partial acquittals of the Disciplinary Board (when the judge was acquitted in part of the charges);
- » Type of hearings on disciplinary cases (open or closed hearings);
- » Average length of examination of cases in disciplinary bodies;
- » The findings of the Independent Inspector drawn up in compliance with, or violation of, the deadlines set by law;
- » Cases considered by HCOJ and Disciplinary Board in compliance with the deadlines established by law and in violation of these deadlines; and
- » Categories of misconduct in the Disciplinary Chamber and legal consequences of hearing cases.

9.4. Disciplinary Statistics in Other Countries

9.4.1. Statistical Reports Published by the Pennsylvania Judicial Conduct Board³⁵⁹

An interesting feature of the reports filed by Pennsylvania Judicial Conduct Commission is that the statistical information is not given in the raw form, but accompanied by relevant definitions (stages, legal terms used, relevant legal norms, etc., that should be understandable to a person with an average education.

These reports provide the following information:

- » Number of complaints received according to disciplinary misconduct;
- » Number of appeals by the court;
- » Number of explanations requested from the judge;
- » Number of cases terminated according to the grounds and stages of termination; and
- » Outcomes of cases.

9.4.2. Disciplinary Reports Published by Superior Council of Magistracy in France

The Superior Council of Magistracy in France, like the High Council of Justice, is equipped with the functions of administering the judiciary as well as appointing judges and disciplinary responsibilities.

Disciplinary statistics are given in the joint report of the Superior Council of Magistrates.³⁶⁰

Like the reports of the Pennsylvania Board of Judicial Conduct, the reports of the Superior Council of Magistrates include a description of disciplinary proceedings in a language that everyone can understand.

In the report, the Council of Magistrates regrets that a large proportion of the applicants are applicants dissatisfied with the court decision, equating disciplinary proceedings with appellate proceedings.

The reports contain the following statistical information:

- » Number and dynamics of incoming complaints (comparison of years);
- » Legal consequences of complaints according to the stages of the proceedings;
- » Reasons for inadmissibility of complaints; and
- » Number of appeals by categories of courts and cases.

³⁵⁹ Available at: <http://judicialconductboardofpa.org/wp-content/uploads/2018-Annual-Report-Judicial-Conduct-Board-of-Pennsylvania-1.pdf>.

³⁶⁰ Available at: <http://www.conseil-superieur-magistrature.fr/publications/reports-annuels-dactivite>.


Annexe - 1. Detailed Overview of Changes in Disciplinary Legislation from 2012 to Date

In 2013-2019, several stages of judicial reform were implemented in the field of justice, which are also called the waves of justice reform. The changes also affected the field of disciplinary proceedings. The most significant changes were made by the legislative acts of 1 May 2013, 8 February 2017 and 13 December 2019 (the first, third and fourth waves of judicial reform). It is noteworthy that the 20 April 2018 amendment repealed the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of the Common Courts of Georgia in connection with the enforcement of the Constitutional Court decision “Citizen of Georgia Omar Jorbenadze v. Parliament of Georgia”.

In this chapter, we briefly review the major legislative changes and evaluate these innovations.

1.1. Legislative Amendments of 1 May 2013 to the Law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts

In May 2013, significant amendments were made in the law which affected:

- 
- » The rights of the complainant;
 - » The rules for staffing the Disciplinary Board; and
 - » The procedure for publishing the decision of the Disciplinary Board.

More specifically:

- » The provision of the law was changed, mandating the information of the author of the complaint about the results of the disciplinary complaint only based on his / her written request. Under the amendment, the outcome of the case will be notified to the complainant in any case;³⁶¹
- » The provision which mandated the confidentiality of the grounds of private recommendation letter was removed;³⁶²
- » The authority to establish the rules of procedure of the Disciplinary Board was transferred from the High Council of Justice to the Conference of Judges;³⁶³
- » The rules for the formation of the Disciplinary Board have been changed, viz., if previously 3 members of the Disciplinary Board were elected by the Conference of Judges only on the recommendation of the Chairman of the Supreme Court, after the change, any judge was allowed to nominate members. If previously 2 members of the Disciplinary Board were elected by the High Council of Justice, this authority was

361 [1] Paragraph 4 of Article 49 of the Organic Law on Common Courts.

362 Article 51¹ paragraph 2.

363 Article 51¹ paragraph 2.

transferred to the Parliament of Georgia. In addition, the qualification requirements for non-judicial members of the Disciplinary Board and the submission procedure were defined;³⁶⁴

» Remuneration for non-judicial members of the Disciplinary Board was determined from the budget of the common courts,³⁶⁵ and

» The rules for publishing the decisions of the Disciplinary Board and the Disciplinary Chamber have been changed³⁶⁶. In particular, unlike the previous version, which enabled hiding personal data (though the decision could be fully published), the law stipulated that disciplinary decisions are published. However, on request, certified copies shall be delivered to any person.³⁶⁷

Thus, changes have been made to increase the independence, accountability and transparency of disciplinary bodies. These changes can be positively assessed.

1.2. Amendments of 8 February 2017

The legislative changes of 8 February 2017 (the third wave of judicial reform) in the disciplinary legislation were quite extensive. They concerned the publicity of the proceedings, the rights of the appellant, the cause for initiating disciplinary proceedings, the judge's awareness, the judge's rights, the judge's participation in the disciplinary proceedings, the investigative body, the quorum required for the decision, the standard of proof, the publication of the decisions of the Disciplinary Board and the Disciplinary Chamber in anonymized form, the dismissal of a judge as an extreme measure and the possibility of extending the statute of limitations.

One of the most important changes since 8 February 2017 is the introduction of Independent Inspector in the common court system. Under the amendment, disciplinary misconduct will be investigated by a specialised officer with certain guarantees of independence.

More specifically:

» An indicted judge was given the right to make the sessions of the disciplinary bodies public;³⁶⁸

» The summary decisions in a disciplinary case were divided into two groups. It is mandatory to inform the author of the disciplinary complaint about the termination, suspension, renewal or acquittal of the judge before the completion of the current case in the common courts. Other summarizing decisions are notified to the complainant only after the relevant case has been completed in the common courts;³⁶⁹

» The Presidents of the Court were deprived of the authority to initiate dis-

364 Article 753 paragraph 2, sub-paragraph "b".

365 Article 511. paragraph 3.

366 Which is to be expected, since the author of a disciplinary complaint has very limited rights in the disciplinary process.

367 Which is to be expected, since the author of a disciplinary complaint has very limited rights in the disciplinary process.

368 Article 5 (1) of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

369 Article 5 (2) (3) of the law of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

ciplinary proceedings;³⁷⁰

» The report of the member of the High Council of Justice, as well as the information provided in the reports of the Public Defender also became a ground for the initiation of disciplinary proceedings against the judge;³⁷¹

» The submission from the Disciplinary Board was removed as a basis for initiating proceedings against the judge;³⁷²

» A complaint filed without observing the official template can no longer be a ground for refusing to accept the complaint;³⁷³

» The obligation of the High Council of Justice to notify the judge immediately upon the receipt of a disciplinary complaint has been established;³⁷⁴

» The authority to pre-examine and investigate a disciplinary case has been delegated to the Independent Inspector and removed from the Secretary of the High Council of Justice;³⁷⁵

» The decision to initiate disciplinary proceedings against a judge is no longer made individually, but is made by the High Council of Justice;³⁷⁶

» The decision to initiate a prosecution in a disciplinary case and the decision to receive an explanation from the judge were tied to the deadlines for the preliminary examination and investigation of the disciplinary case. (Although violation of these deadlines has no legal consequences);³⁷⁷

» It has been established that giving explanations is the right of a judge;^{378]}

» It was specified that the High Council of Justice decides to initiate disciplinary proceedings against a judge or to prosecute him/her by 2/3 of the votes and the disciplinary case is terminated if the Council of Justice fails to make that decision;³⁷⁹

» It was specified that the High Council of Justice was empowered to instruct the Independent Inspector to conduct further investigations into the case and give ad-

370 Article 7 of the of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia. law

371 Article 6.1.D of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

372 Article 6.1.E of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

373 Article 6.2 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

374 Article 6.3 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

375 Articles 8 and 15 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

376 Article 9 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

377 Articles 9 and 11 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

378 Article 9.2 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

379 Articles 9 and 15 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

ditional instructions;³⁸⁰

» The deadlines for submitting case materials to the judge, submission of answer by the judge and sending case materials to the Disciplinary Board were set;³⁸¹

» The obligation to invite the judge to a session of the High Council of Justice and the possibility to invite the complainant were established;³⁸²

» The judge was given the possibility to plead guilty to a disciplinary charge, in which case the judge shall be indicted, and the case file will be referred to the Disciplinary Board;³⁸³

» The High Council of Justice was deprived of the authority to use a private recommendation letter directly against a judge;³⁸⁴

» In case of expiration of the term of disciplinary responsibility, the Disciplinary Board has been authorised not to terminate the prosecution if the delay in the proceedings is caused by a deliberate culpable delay of time by the judge;³⁸⁵

» The authority of the Disciplinary Board to apply to the High Council of Justice in case of discovery of new disciplinary misconduct has been revoked;³⁸⁶

» The obligation of the Disciplinary Board to send a private recommendation letter to the author of the disciplinary complaint was defined;³⁸⁷

» The standard for finding the judge guilty was defined, viz., clear and convincing evidence;³⁸⁸

» It has been established that the dismissal of a judge is an extreme measure;³⁸⁹

» The quorum for appealing the decision of the Disciplinary Board by the High Council of Justice was determined at 2/3 of the votes;³⁹⁰

380 Article 15.2 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

381 Article 16 Para. 3 and 4 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

382 Article 17.5 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

383 Article 17.6 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

384 Article 19 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

385 Article 36.2 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

386 Article 46 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

387 Article 51.3 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

388 Article 53.1 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

389 Article 58.1 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

390 Article 60.3 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

- » The law mandated the publication of decisions of the Disciplinary Chamber and the Panel without identifying data, except for the decision to dismiss a judge;³⁹¹ and
- » The law prohibited the promotion of a judge indicted by a decision of the High Council of Justice or found guilty of disciplinary violation by a decision of the Disciplinary Board.³⁹²

1.3. Legislative Changes of 13 December 2019 in the Organic Law on Common Courts

The Legislative changes of 13 December 2019 address the grounds for disciplinary misconduct, the publication of the Independent Inspector's decisions and statistical information, number of votes required for dismissal of the Independent Inspector, the salary of the Independent Inspector, obligation to publish information proactively, the prohibition of reduction of the Independent Inspector's budget, the introduction of new disciplinary sanctions, the procedure for finding deficiency in the complaint, standard for initiating the prosecution and disciplinary proceedings and empowering the Independent Inspector to dismiss the case as well as the principle of the economy for disciplinary sanctions.

- » The obligation of the High Council of Justice to publish statistical information on the conclusions submitted by the Independent Inspector, statistical information on the initiation of disciplinary proceedings and indictment of the judge by the Council were defined;³⁹³
- » The HCOJ shall be able to dismiss the Independent Inspector by \square of votes instead of a simple majority;³⁹⁴
- » The procedure for appealing the dismissal of the Independent Inspector in court was established and the deadlines for reviewing the complaint were set;³⁹⁵
- » The dismissal of the President of the Court, the First Deputy or Deputy President, the President of the Judicial Panel or the Chamber, which had previously been a measure of disciplinary action, has become a form of disciplinary sanction;³⁹⁶.
- » The qualification requirement for a person to be appointed as the Independent Inspector has increased and a master's degree has become mandatory;³⁹⁷
- » Improper performance of duty was removed from the grounds for dismissal of the Independent Inspector. On the other hand, a gross violation of the rights of the complainant was added as a separate ground for the dismissal of the inspector;³⁹⁸

391 Article 81.1. of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

392 Article 80, para. 1 and 2 of the law on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts of Georgia.

393 Article 49.4 of the Organic Law on Common Courts.

394 Article 51¹ par 2¹ of the Organic Law on Common Courts.

395 Article 51¹ Par 2¹ of the Organic Law on Common Courts.

396 Article 75³ para. 2.B. of the Organic Law on Common Courts.

397 Article 51¹ para. 3 of the Organic Law on Common Courts.

398 Which is less probable because the author of the disciplinary complaint has limited rights in the process.

- » Intentional or gross negligent disclosure of confidential information related to disciplinary proceedings was added as an additional ground;³⁹⁹
- » The grounds for dismissal of the Independent Inspector have been changed: “Inappropriate behaviour that tarnishes the name of the Independent Inspector’s Service”, was replaced with the following wording: “An act that violates public order (for which the Independent Inspector has an administrative penalty) and undermines the authority of the judiciary;”⁴⁰⁰
- » The salary of the Independent Inspector was determined, which is equal to the remuneration of a judge of the Court of Appeals;⁴⁰¹
- » It was established that the Independent Inspector has an independent document flow (the reference to the High Council of Justice as the seat of the Independent Inspector has been removed);⁴⁰²
- » The obligation to proactively publish information periodically, at least once every 4 months, has been established;⁴⁰³
- » It was determined that the current budget of the Independent Inspector could not be reduced compared to the costs of the previous year;⁴⁰⁴
- » The established new list of disciplinary violations defined intentional and unintentional violations; disciplinary sanctions may be imposed only for a premeditated violation and an action which formally meets the definition of a disciplinary offence, but is of minor importance, shall no longer be punishable;⁴⁰⁵
- » The statute of limitations for disciplinary misconduct has been reduced from five to three years;⁴⁰⁶
- » A new disciplinary sanction has been introduced, viz., deduction from 5% to 20% of salary for not more than 6 months; the dismissal of the President of the Court, the First Deputy or Deputy President of the Court, the President of the Judicial Panel or the Chamber was envisaged as a disciplinary sanction (unlike the previous version of the law, where this was a disciplinary measure);⁴⁰⁷
- » In case of non-indication of the judge’s identity or disciplinary misconduct, the Independent Inspector was obliged to identify the defect and give 10 days to the complainant to correct it;
- » The obligation of the Independent Inspector to substantiate the conclusions and opinions has been established;⁴⁰⁸

399 Article 51¹ para. 6 of the Organic Law on Common Courts.
400 Article 51¹ para. 6 of the Organic Law on Common Courts.
401 Article 51¹ para. 8¹ of the Organic Law on Common Courts.
402 Article 51¹ para. 9 of the Organic Law on Common Courts.
403 Article 51¹ para. 12 of the Organic Law on Common Courts.
404 Article 51¹ para. 13 of the Organic Law on Common Courts.
405 Article 75² of the Organic Law on Common Courts.
406 Article 75² of the Organic Law on Common Courts.
407 Article 75⁵ para. 3.
408 Article 75⁶ of the Organic Law on Common Courts.

- » Preliminary examination of the case by the Independent Inspector and initiation of prosecution by the High Council of Justice shall be done based on a reasoned presumption;⁴⁰⁹
- » The authority of the Independent Inspector to use the electronic databases of public agencies and public services in the preliminary examination and investigation of a disciplinary case has been established;⁴¹⁰
- » The submission of the case to the prosecutor's office is no longer a ground for the suspension of the case;⁴¹¹
- » The Independent Inspector was empowered to terminate the case on certain formal grounds;⁴¹²
- » The obligation for the Independent Inspector to publish the decision to terminate the disciplinary case was established;⁴¹³
- » A high degree of probability was established to indict a judge;⁴¹⁴
- » The tie of disciplinary sanctions to specific misconduct has been lifted and the principle of economy of disciplinary sanctions has been established, which implies the application of a stricter penalty only if a light penalty fails to meet the objectives of the penalty;⁴¹⁵and
- » A Supreme Court judge can no longer be removed by way of disciplinary proceedings.⁴¹⁶

Ultimately, changes should be viewed positively (especially important to increase the guarantees for the independence of the Independent Inspector) given certain reservations.

Annexe 2. Comparison of Georgian Disciplinary Legislation with Disciplinary Systems of Other Countries

This chapter provides a comparative analysis of the basics of disciplinary liability and the main stages of the disciplinary process, namely, comparing the Georgian, European and American systems. The purpose of the analysis is to identify similarities and differences with common systems and provide recommendations for improving Georgian legislation.

2.1. Basis of Disciplinary Liability

Disciplinary misconduct in the legal systems of different countries is codified by legislative acts. The list of misconduct is sometimes more and sometimes less detailed (though further

409 Article 75⁷ para.1 and Art 75⁸ para. 1.

410 Ibid.

411 Article 75¹¹ of the Organic Law on Common Courts.

412 Article 75⁶ para. 1 of the Organic Law on Common Courts.

413 Article 75⁶ Para. 3 of the Organic Law on Common Courts.

414 Article 75¹⁴ of the Organic Law on Common Courts.

415 Article 75⁴⁸ para. 1 of the Organic Law on Common Courts.

416 Article 75⁴⁸ para. 1 of the Organic Law on Common Courts.

clarified through case law). Legislation in some countries categorizes disciplinary misconduct by severity, i.e., severe or less serious misconduct. The purpose of this classification is to apply different types of sanctions and different statutes of limitations.

Italy, Spain and Slovenia are distinguished by their detailed legislative regulation of types of disciplinary offences, where the legislation recognizes up to 30 disciplinary offences. A relatively small list is given in the legislation of France, Poland and Montenegro.

Under Italian law, misconduct is divided into two groups: 1) misconduct that may be committed by a judge in the course of judicial activity, and 2) misconduct, which may be committed outside the scope of the activity.⁴¹⁷

The present list contains the offences that are not found in the Law of Georgia on Common Courts or found in a modified form.⁴¹⁸

a. Violation of the Law by a Judge During the Hearing of a Case

A study of the experience of European and American systems reveals that a breach of the law by a judge in a case may be the basis for disciplinary action if it is accompanied by any additional preconditions (separately, or in combination with other prerequisites). These preconditions may be a violation of the imperative norm of procedural law; committing a gross, blatant or gross violation of the law; deliberate (with prior knowledge) violation of the law; violation of the rules of a fair trial or fundamental procedural guarantees or the constitutional rights of the parties; finding a violation by a court decision that has entered into force; unreasonable ignorance or negligence of a judge; systematic commission of violations; damage to the authority of the court, and abuse of power by a judge.⁴¹⁹

The American system of disciplinary responsibility of judges is familiar with the so-called doctrine of Legal Error Plus, according to which a judge's violation of the law can be disciplined if he/she violates a clear and established norm of law, in bad faith, or violates a person's constitutional right, or is of a systematic nature, or it cannot be appealed.⁴²⁰

Prior to the 27 March 2012 amendment, the Law of Georgia on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts contained "gross violation of the law" as disciplinary misconduct. It should be noted that a similar wording is still common in post-Soviet countries today.⁴²¹

B. Failure to Perform the Duties of a Judge (See, for example, Slovenia, Italy, Kosovo and France)⁴²²

Until 13 December 2019, the Common Courts Law contained "non-performance or improper performance of a judge's duties" in the form of disciplinary misconduct. The decision of the Disciplinary Board on 12 April 2013, which was inspired by legal error plus doctrine, indicated

417 See. Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

418 A list of offences by different countries can also be found on the website <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportDisciplinaryMeasures.aspx>.

419 see. Kakha Tsikarishvili, *Disciplinary Responsibility of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

420 Ibid.

421 Ketevan Bekauri, *Peculiarities of Disciplinary Proceedings, Disciplinary Responsibility and Ethics of Judges in Post-Soviet Countries* <http://dcj.court.ge/uploads/kvlevebi/Researches/PostsovietPractice.pdf>.

422 The 1958 Law on the Supreme Council of Magistrates: "Failure to fulfil obligations shall be considered a serious and premeditated violation of the procedural rules established by the final decision of the court, which represents the fundamental guarantee for the participants of the procedure."

that, in drawing the line between disciplinary misconduct and legal error, the possibility of its remedy, the nature of the violation, degree, its repeated nature, honesty and motives of the judge should be taken into account.⁴²³

Through the legislative changes of 13 December 2019, this misconduct has been removed from the Common Courts Law, which means that judicial misconduct is no longer punishable under disciplinary action unless it falls under one of the narrow categories provided by Article 75¹ of the Organic Law on Common Courts.

C. Explicit Bias During the Trial

Overt bias is a ground for disciplinary liability. The Law on the Kosovo Judicial Council (Article 34) punishes biased conduct of trials, especially in terms of equal treatment of parties.

According to the Law of Georgia on Common Courts, disciplinary misconduct is the exercise of judicial power by a judge through personal interest, political or social influence.⁴²⁴

The apparent bias of a judge is an objectively provable fact, although the given legislative formula also requires the determination of the judge's motive, which must be personal, political or social. We think that this formula is practically unusable; in the presence of obvious bias, approval of a judge's motive should no longer be necessary. Accordingly, the formula given in the law should be replaced by the following formula: "Obvious bias of a judge during the hearing of a case".

An obvious bias can be established by the following facts, for example:

- » By manifesting obvious familiarity, sympathy, or antipathy towards the party;⁴²⁵
- » By not giving the floor to a party against the law; and
- » By questioning the credibility of the party, and so on.

Bias must be distinguished from discrimination, which is also a disciplinary offence under the Common Courts Act.⁴²⁶

423 It seems that the Venice Commission shares the doctrine of legal error plus. "A judge's interpretation of the law contrary to established practice can never be a ground for disciplinary action unless committed with unreasonable motives, for the benefit or harm of a party, or through gross negligence." CDL-AD (2014) 006, Joint Opinion on the draft Law on disciplinary liability of Judges of the Republic of Moldova, para.22.

424 The Organic Law on Common Courts, Article 75¹.1.

425 Standards of communication with citizens in Common Courts, Article 14.7. - The judge, as a neutral arbiter, should not express his/her personal attitude and emotions, neither verbally nor non-verbally (facial expressions, body movements, etc.). <http://www.tcc.gov.ge/index.php?m=552&newsid=4> See U.S. Disciplinary Practice. E.g. In the case of Antony Edwards, where the judge held the first filing hearing in his friend's criminal case, appointed him a defence counsel, marked the date of the hearing on the restraining order, descended in the courtroom and hugged the accused. See: http://cj.p.ca.gov/res/docs/public_admon/Edwards_2-7-12.pdf A commentary on the Bangalore Principles of Judicial Conduct (para. 58) indicates the following: Bias can be shown by epithets, abusive hints, nicknames, negative stereotypes, comments about sex, culture or race."

426 See. Article 8 of Article 75¹ of the Organic Law on Common Courts, e.g. Subparagraph "Discriminatory act of a judge verbally or otherwise expressed in any exercise of judicial authority against any person on one ground or another."

Among the distinguishing marks are the following:

- » Discrimination needs a basis, while bias as disciplinary misconduct needs no basis;
- » - Discrimination can be committed against any person, including a witness and a person present at the trial, bias can only be exercised against a party; and
- » - Discrimination requires a comparator (i.e., evidence of different treatment of different cases by a judge), while bias does not require a comparator.

C. Gaps in the Judgment

Under the laws of some countries, a judgment may, on account of its form, content or vocabulary, constitute grounds for disciplinary action against a judge. In particular, when a court decision: 1. is not accompanied by a mandatory justification (Albania, Italy and Romania); 2. motivational and resolution parts of the decision conflict with each other (Italy); and 3. the judge uses inappropriate, offensive terminology in the decision (Spain, Romania)⁴²⁷.

D. Delay in Hearing a Case by a Judge

This is usually punishable if committed on a single occasion or is frequent (Serbia) or recurrent (Albania), or manifested in non-compliance with a specific case schedule (Macedonia).

E. An Action that Significantly Impedes the Functioning of the Court. (Poland)

F. Falsification of Information in Official Documents (e.g., leave applications, declarations). (Spain)

G. Use of Position to Gain an Unlawful Advantage

This type of misconduct is the use of a position by a judge for preferential treatment (Spain, Moldova) or unsubstantiated gain.

H. Improper Use of Official Resources (Slovenia and USA)⁴²⁸

I. Absenteeism or Other Breaches of Work Discipline

Missing or leaving a job is usually not considered a disciplinary offence, unless it is done in serious violation of the established rules (Macedonia) for several days in a row (Spain), without a good reason (Spain, Romania), repetitive (Romania)⁴²⁹.

J. Failure to Comply with an Educational Obligation

This type of misconduct is found in Bosnian and Macedonian legislation, where it is punishable to avoid compulsory vocational training courses. In Macedonia, it is also a form of disciplinary misconduct to omit to conduct professional training for assistant judges⁴³⁰.

427 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

428 See AJS Comments on Preliminary Draft of Revisions to ABA Model Code of Judicial Conduct; "A judge shall not use the judiciary, resources, stationery, equipment for non-judicial activities except for occasional and minimal use - for political activities or for matters relating to law, the legal system or the administration of justice."

429 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

430 *Supra*.

Under the laws of some countries (e.g., Poland), a judge is also liable for acts committed before his or her appointment as a judge by which he or she violated the duties of a public servant or due to which he or she does not deserve a judicial position⁴³¹.

We think that out of the listed disciplinary offences, there may be three types of misconduct, namely, 1. falsification of information in official documents; 2. use of office for illegal gain; and 3. use of official resources for personal profit, thereby harming the interests of the service to be provided for by the legislation of Georgia⁴³². As for the gross violation of the law in the presence of additional circumstances (legal error plus), given the current situation in court, we do not recommend the re-introduction of this violation.

2.2. Disciplinary Sanctions

Disciplinary sanctions can be divided into three groups, viz., moral (or verbal), financial and career-related sanctions.

2.2.1. Moral Sanctions

The laws of all recent legal systems provide for sanctions that negatively assess a judge's actions without material legal consequences, such as reprimand, severe reprimand and warning.

The Organic Law of Georgia on Common Courts recognizes the following moral sanctions: notice, reprimand and severe reprimand⁴³³.

2.2.2. Financial Sanctions

Most advanced legal systems are familiar with financial sanctions, which can be fines (Germany and Spain) or deductions from salary (Bosnia, Bulgaria, Macedonia, Montenegro, Kosovo, Romania, Serbia and Croatia). The law stipulates the maximum amount of the fine. For example, in Germany, it is one month's salary, while in Spain it is 6000 euros. As for deductions from the salary, the law sets the framework in terms of both duration and deductible interest. In this regard, the laws of Bosnia and Serbia are relatively strict, which provides for a deduction of salary for up to 1 year, up to 50%. Romanian law is relatively lenient, which provides for a salary deduction of up to 20% for a period of 1 month to 6 months. Other countries occupy an intermediate place⁴³⁴.

Under Article 75³ of the Law of Georgia on Common Courts, the financial penalty is a deduction from 5% to 20% of the salary for not more than 6 months.

431 <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportDisciplinaryMeasures.aspx>.

432 According to art. 13 2(4) Law of Georgia on Conflict of Interest and Corruption in Public Service "A public servant must follow the principle of economy and efficiency in the performance of his / her duties. A public servant should not abuse his / her official resources in order not to waste them.

433 Organic Law on Common Courts art. 75³.

434 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

2.2.3. Career-Related Sanctions

This group includes sanctions that affect a judge's authority or career, such as transfer to another court (Bosnia, Albania, Germany and Spain), demotion (Bulgaria), reduction in the length of service (Italy), limitation of promotion for a certain period, (Serbia), dismissal of the chairperson or general manager (e.g., Italy and Bosnia), suspension of powers (Spain and Netherlands), forced retirement (Portugal) and dismissal.

Under Georgian law, career-related sanctions include the dismissal of a judge and dismissal of a court chairperson, first or deputy court chairperson, and presiding judge of a judicial panel or chamber. Georgian legislation does not provide for demotion and transfer to another court as disciplinary sanctions.

The Organic Law on Common Courts does not provide for the suspension of a judge as a disciplinary sanction. We think that the application of such a sanction may in some cases be effective and fair. Accordingly, it is advisable to amend the Organic Law on Common Courts and suspend the powers of a judge under a sanction (with other accompanying legislative changes) for a period of 6 months to 2 years.

Under Article 75⁷⁷ of the Organic Law on Common Courts, a judge who has been indicted by the decision of the High Council of Justice of Georgia or on whom the disciplinary sanction imposed has not been expunged, shall be restricted from the right to be promoted for an appropriate period.

2.3. The Sanction for a Combination of Misdemeanours

It is interesting to note that, in the case of a combination of misconduct (several offences), a judge is usually given only one sentence. An exception to this rule is found in Italian law, where, in the case of a combination of misdemeanours, when several penalties of different severity are applied, the person is ultimately sentenced to the heaviest of them, and in the case of the same penalties - one degree heavier (Article 5)⁴³⁵.

Under Article 75³⁷ of the Organic Law on Common Courts of Georgia, one sentence will be imposed in case of finding a judge guilty of several misconducts.

2.4. Circumstances to Be Considered When Applying a Disciplinary Sanction

The laws of many countries specifically provide for a list of circumstances to be taken into account when selecting a disciplinary sanction. The list is quite extensive: severity of disciplinary misconduct, number of misconducts (Bosnia and Macedonia), the form of guilt (Bulgaria), consequences of misconduct (Bosnia and Macedonia), damage to the reputation of the court (Germany), circumstances in which the act was committed (Bosnia, Bulgaria, Macedonia and Croatia), duration of misconduct (Germany), personal characteristics of the judge (Germany), past work and achievements of the judge (Bosnia), awareness of the judge's own actions and sense of responsibility (Bosnia and Germany), co-operation with disciplinary bodies (Bosnia) and other circumstances that may affect the sentence (Bosnia and Croatia)⁴³⁶.

The laws of some countries also stipulate what kind of penalties can be used for committing a misdemeanour of a certain severity. For example, Spanish law, which distinguishes between

435 *Supra.*

436 *Supra*

3 categories of misconduct (minor, serious and particularly serious), indicates that minor and serious misconduct is punishable by a warning or a fine, and especially serious misconduct is punishable by suspension, compulsory leave or dismissal⁴³⁷.

Under Article 75⁴⁷ of the Organic Law on Common Courts, when selecting a disciplinary sanction and a disciplinary measure for a judge, the Disciplinary Board shall take into account the content and severity of the disciplinary misconduct, the consequences that it has had or could have had, and the degree of the guilt.

Under Article 75⁵⁰ of the Organic Law on Common Courts, the dismissal of a judge is an extreme measure, and this measure is used in special cases. The Disciplinary Board shall decide on the dismissal of a judge if it deems it inappropriate for the judge to continue the exercise of judicial power, taking into account the severity and extent of particular disciplinary misconduct and the violations committed in the past.

3. Disciplinary Process

3.1. Reason (Cause) for Initiating Disciplinary Proceedings

The legislations of different countries provide for various causes for initiating disciplinary proceedings, the most common of which is a citizen's complaint. Anonymous complaints will not be allowed in most European countries⁴³⁸. In some countries (e.g., Bosnia, Moldova), disciplinary proceedings may be initiated by the investigator without any formal cause. This approach is not justified as it creates the risk of abuse of disciplinary authority. In some countries (e.g., Poland), disciplinary proceedings may be initiated based on a court review. A similar approach was prevalent in Georgia until 2012 when cases considered by an undesirable judge were studied to detect disciplinary misconduct⁴³⁹. In Moldova, the Judicial Performance Evaluation Commission is authorized to raise the issue of disciplinary liability of a judge in case of violation. In our view, this approach is not justified as it is not advisable to relate the judge's assessment of his/her discipline. In some countries (e.g., Azerbaijan)⁴⁴⁰, the reason for a judge's disciplinary liability may be a decision of the European Court of Human Rights or a domestic higher instance court that assessed the legality of a judge's decision. The reversal of a judge's decision by higher instances does not automatically imply the existence of disciplinary misconduct. Consequently, this approach is also not justified. In some post-Soviet countries (e.g., Kazakhstan), there is an institution of private judgment, which can be the basis for initiating disciplinary proceedings against a judge⁴⁴¹.

Article 755 of the Organic Law on Common Courts provides a list of reasons, based on which disciplinary proceedings may be instituted. These reasons can be divided into two groups: a. sources within the court system: a report from another judge, a member of the court or

437 Supra.

438 See ENCJ Report, Minimum Judicial Standards v. Disciplinary Proceedings and Liability of judges, p. 25. https://www.encj.eu/images/stories/pdf/GA/Hague/encj_report_minimum_standards_v_adopted_ga_june_2015.pdf.

439 See Need to introduce Independent Inspector in Court system, p. 7 <http://www.supremecourt.ge/files/upload-file/pdf/nino-gvenetadzis-moxsenebis-sruli-texti.pdf>.

440 Ketī Bekauri, Disciplinary Proceedings in Post-Soviet Countries, <http://dcj.court.ge/uploads/kvlevebi/Researches/DCJ-PostsovietLegislations.pdf>.

441 Supra.

a member of the High Council of Justice of Georgia or an official of the staff related to the commission of a disciplinary misconduct by a judge; B. out-of-court sources: complaints or statements of any person other than an anonymous complaint or statement; a notification from the investigating authority; Information disseminated through mass media as well as information provided in the report and/or proposal of the Public Defender of Georgia on the commission of an action by a judge, which may be considered a disciplinary violation.

Georgian law does not allow the initiation of disciplinary proceedings based on an anonymous complaint.

Therefore, it can be said that the list of reasons for disciplinary proceedings provided by the legislation of Georgia is balanced and consistent with the experience of advanced countries.

3.2. Initiation of Disciplinary Proceedings, Investigation of a Disciplinary Case and Preliminary Examination

The initiation and investigation of disciplinary proceedings in different countries is carried out by different bodies or officials. External court subjects (e.g., Minister of Justice – Albania and Latvia⁴⁴²) have the right to initiate proceedings as well as internal subjects (e.g., court presidents, inspectors – e.g., Montenegro, Poland and Portugal⁴⁴³). Until 2017, according to the model then in force in Georgia, both the presidents of the courts and the High Council of Justice had the right to initiate disciplinary proceedings. With the amendment of 8 February 2017, the authority to initiate disciplinary proceedings was delegated only to the Independent Inspector⁴⁴⁴.

In some European countries, disciplinary proceedings are conducted by an out-of-court entity, such as the Ministry of Justice Inspection. In Eastern Europe, the investigation is conducted usually by a judiciary council body (Inspection or Disciplinary Office).

The model used in the United States relates to judicial conduct commissions, some of whose members are appointed by the judiciary, some by the state governor and some by the bar association⁴⁴⁵. The investigator is often appointed by the judges' conduct commissions from former judges⁴⁴⁶.

In some cases, a disciplinary investigator may be appointed ad hoc investigator (Germany, Portugal), although in most cases, the case is investigated by a permanent official, often an acting judge (see, for example, Bulgaria). In some countries, there is a special disciplinary service or officer, staffed by the High Council of Justice (Kosovo, Romania, Slovenia).

In European countries, the preliminary investigation (investigation) of a disciplinary case is conducted by one official (prosecutor, inspector, investigating judge, etc.). However, there is also a model when the case is investigated by a collective body. For example, in Croatia, a case is investigated by a disciplinary committee appointed by the Judicial Council, consisting

442 <https://likumi.lv/ta/en/en/id/57677-judicial-disciplinary-liability-law>.

443 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014. also, <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportDisciplinaryMeasures.aspx>.

444 Law on Disciplinary Liability and Disciplinary Proceedings of the judges of Common Courts of Georgia, art 7.

445 Synthia Gray, *How Judicial Conduct Commissions Work*, https://www.ncsc.org/_data/assets/pdf_file/0021/17508/how-judicial-conduct-commissions-work.pdf.

446 https://iaals.du.edu/sites/default/files/documents/publications/recommendations_for_judicial_discipline_systems.pdf p. 6.

of 3 different members, at least one of whom must be a judge⁴⁴⁷.

In countries where the preliminary investigation is the responsibility of one official (and not a collective body), there are two different models: this person is either a judge or a non-judge.

Judges conduct investigations in countries such as the United Kingdom, Germany, Spain, Serbia and Poland, and in countries such as Bosnia, Romania, Kosovo, Slovenia and others. In some countries, the investigation is carried out by a person specially selected through a competition for this purpose, who has deputies, or who leads the entire service⁴⁴⁸.

The Service of Disciplinary Inspectors in Romania is part of the High Council of Justice and consists of 32 inspectors, who are judges selected on a competitive basis. The service is headed by the Chief Inspector⁴⁴⁹.

According to the legislation of Georgia, disciplinary proceedings are initiated, investigated and pre-examined by the Independent Inspector of the High Council of Justice, who is elected by the High Council of Justice on a competitive basis for a term of 5 years. The Independent Inspector has his/her apparatus.

Investigating by a specialized officer who has guarantees of independence has its advantages, but at the same time, there is a risk of monopolizing disciplinary action and the investigation in the hands of one agency.

3.3. Investigative Actions During the Preliminary Examination and Investigation of a Disciplinary Case

Detailed legislation on investigative actions is not stipulated by any legislation known to us. In Spain, an investigating judge can gather evidence and take any action deemed necessary. Kosovan law explicitly states that the relevant provisions of the Criminal Procedure Code apply to the right of a judge to collect evidence and be held accountable⁴⁵⁰. It is also interesting to note that in Spain the sanctioning authority can refer a case back to an investigating judge for further investigation⁴⁵¹. A similar regulation is provided in Article 75¹³ of the Organic Law on Common Courts of Georgia.

Under Articles 75¹⁰ of the Organic Law on Common Courts, the Independent Inspector has the right to request information from the databases of public agencies and request all documents, facts or materials related to the fact of disciplinary misconduct. At the same time, the preliminary examination and investigation of the disciplinary case must be carried out objectively, thoroughly and impartially. Both mitigating and aggravating circumstances of a judge's liability should be considered⁴⁵². However, it should be noted that the Independent Inspector does not have the right to conduct any kind of investigative action that the investigator can perform in the criminal process - search, seizure, wiretapping, summoning a witness before a magistrate judge, etc. The witness is not liable for knowingly giving false testimony to the inspector.

447 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

448 *Supra*.

449 *Disciplinary Liability of Judges in Romania*, <http://newjustice.org.ua/wp-content/uploads/2018/10/Georgiana-Disciplinary-liability-of-judges-in-Romania-ENG.pptx>.

450 <https://md.rks-gov.net/desk/inc/media/9C0BBF11-FCEE-407B-B070-C1105A070746.pdf> art. 12.

451 *Supra*.

452 *Organic Law on Common Courts* art. 75¹⁰.

The laws of different countries differ when it comes to the obligation of a judge to give an explanation. For example, a judge has such an obligation under Kosovan law⁴⁵³, but not under Serbian law⁴⁵⁴.

In Georgia, the legislative changes of 8 February 2017 provide a judge with the right to give an explanation⁴⁵⁵.

According to the information provided by the High Council of Justice, despite the fact that a judge was given disciplinary action and an explanation was required, no explanation was provided by the judge in 6 cases. We believe that this is a problem, because, without the explanation of the judge, it may be impossible to establish the facts in a disciplinary case. As per the practice before 2012, the refusal of a judge to provide an explanation was qualified as obstructing the activities of the disciplinary body⁴⁵⁶. We think that this norm should be restored, and, in case of disciplinary charges, an explanation should be mandatory.

In some countries (e.g., Kosovo⁴⁵⁷), a disciplinary judge has the right to petition the investigating authority to cross-examine witnesses and obtain written evidence. The law does not provide for the possibility of filing such a motion in Georgia. The judge can only file a motion to offer an additional explanation⁴⁵⁸.

In some countries, a plea agreement and a disciplinary sentence agreement between the prosecuting authority and the judge may be allowed⁴⁵⁹. Nearly half of all disciplinary cases in the United States end in a plea agreement. There is no such institution in Georgia. A judge has the right to admit disciplinary misconduct, although in this case the case is referred to a disciplinary board of judges of common courts⁴⁶⁰. If a judge pleads guilty during the hearing, the substantive hearing of the case is terminated and a decision is made finding the judge guilty, resulting in a sanction⁴⁶¹.

As a rule, as a result of the investigation of a disciplinary case, the investigating body prepares a conclusion, which is submitted to the decision-making body (in many cases the High Council of Justice). The conclusion is substantiated and can be both positive and negative⁴⁶².

In some countries the deadline for a judge to file a response is set, for example, it is 20 days in Portugal⁴⁶³.

In some countries, the disciplinary body has the power to terminate a case if there are manifestly ill-founded or malicious complaints⁴⁶⁴. In Georgia, the Independent Inspector has the right not to initiate or terminate a disciplinary case when there is a formal basis for termination⁴⁶⁵.

453 <https://md.rks-gov.net/desk/inc/media/9C0BBF11-FCEE-407B-B070-C1105A070746.pdf> See article 2.11.

454 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

455 Law on Disciplinary Liability and Disciplinary Proceedings of the judges of Common Courts of Georgia art. 9.2.

456 <http://dcj.court.ge/uploads/Practice/Practice2004-2013Criminal.pdf>

457 <https://md.rks-gov.net/desk/inc/media/9C0BBF11-FCEE-407B-B070-C1105A070746.pdf>, art. 12.

458 Organic Law on Common Courts, art. 75¹⁰.

459 <https://md.rks-gov.net/desk/inc/media/9C0BBF11-FCEE-407B-B070-C1105A070746.pdf> art. 12.6.

460 Organic Law on Common Courts, art. 75¹⁵ par. 3.

461 Organic Law on Common Courts, art. 75³⁶.

462 See e.g. Portugal <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportDisciplinaryMeasures.aspx>

463 <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportDisciplinaryMeasures.aspx>

464 OSCE ODIHR Notes on Good Practices on international standards on disciplinary liability against judges.

465 Organic Law on Common Courts, art. 75¹²

3.4. Rights of the Defence in the Disciplinary Process

Rights of defence are often scattered in different articles of disciplinary law, although in some countries, such as Serbia, Bosnia and Albania, this issue is regulated by a separate article of the law. Some of them also emphasize the judge's right to file a response to charges against him/her (see, for example, the United Kingdom, Macedonia, and Serbia)⁴⁶⁶.

The rights of a judge subject to the disciplinary process in Georgia are stipulated in different articles of the law. In particular, a judge has the right to have public disciplinary hearings of the HCOJ, the Disciplinary Committee and the Disciplinary Chamber, the right to raise a challenge, have access to the case file, submit responses, attend the hearings at the HCOJ, the right to a counsel, present evidence and motions, appeal the decision of the panel, etc⁴⁶⁷.

Adjudicating Bodies

In European systems, the case is considered essentially by either the Judicial Council or an outside body.

In countries belonging to the first group, the case is considered by the full Judiciary Council (Croatia, Portugal) or its Disciplinary Board (Bulgaria, Spain, Macedonia, Kosovo, Romania, France)⁴⁶⁸. In countries where the case is heard by a panel outside the council, the members of this body are, in some cases, mainly judges selected by the Council of Justice (Bosnia, Serbia, and Slovenia) or elected by the judges themselves (Poland). In Hungary and Poland, disciplinary cases are heard by special disciplinary courts⁴⁶⁹. A peculiar system operates in England, where the Chancellor imposes a penalty upon the recommendation of the investigating authority. It should also be noted that in countries such as Bulgaria, Germany and, Spain, the President of the Court also has the power to impose a light disciplinary sanction (warning). In addition, a peculiar system operates in Sweden, where the disciplinary offences committed by judges, as well as high-ranking public officials, is reviewed by a 5-member panel of disciplinary misconduct, whose members are appointed by the government⁴⁷⁰.

In the United States, disciplinary misconduct of judges is substantially dealt with by judicial conduct commissions, whose membership ranges from 3 to 28⁴⁷¹. Judicial members are usually appointed by the Supreme Court; representatives of the bar are appointed by the bar association, while members of the public are appointed by the governor. Judges do not make up the majority of members in all states⁴⁷². Most of such commissions have both a case investigation and a substantive review function, although higher courts do not consider such an arrangement unconstitutional because the commission's decision is appealed to the Supreme Court, where breaches of conflict of interest can be remedied⁴⁷³.

466 Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

467 Relevant articles of the Organic Law of Common Courts.

468 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

469 <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportDisciplinaryMeasures.aspx>.

470 <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportDisciplinaryMeasures.aspx>.

471 https://iaals.du.edu/sites/default/files/documents/publications/recommendations_for_judicial_discipline_systems.pdf.

472 *Supra*.

473 https://iaals.du.edu/sites/default/files/documents/publications/recommendations_for_judicial_discipline_systems.pdf. p6

The issue of disciplinary liability of judges in Georgia is decided by the Disciplinary Board of Judges of Common Courts, which consists of 5 members and the majority (3 members) are judges elected by the Conference of Judges. 2 non-judicial members of the panel are elected by the Parliament of Georgia⁴⁷⁴. The activities of a non-judicial member are remunerative. At the same time, a non-judicial member has no right to engage in any other paid activities other than scientific, pedagogical and creative activities⁴⁷⁵.

3.5. Substantive Hearing of the Disciplinary Case

The legislations of different countries regulate in more or less detail the process of substantive review of a disciplinary case, which includes an oral examination of evidence, hearing of the parties' arguments and decision-making.

The standard of proof varies from country to country. In some U.S. states, a standard of reasonable assumption is sufficient to convict a judge of disciplinary misconduct⁴⁷⁶.

Provisions associated with the burden of proof are rare. The rules adopted by the Montenegro Judicial Council, for example, provide that the burden of proof rests with the prosecution⁴⁷⁷.

The collegial body that essentially reviews the disciplinary case usually decides to impose disciplinary liability on a judge by a majority vote. In Macedonia, however, the decision to dismiss a judge is made by a two-thirds majority vote of the council members⁴⁷⁸.

The legislation regulating the substantive hearing of a disciplinary case in Georgia is quite detailed. The Organic Law on Common Courts governs the scope of examination⁴⁷⁹, time limits⁴⁸⁰, the main principles of operation of the Disciplinary Board⁴⁸¹, the issue of disqualification of members of the panel⁴⁸² and the representative of the HCOJ and the sequence of actions during the main hearing of the case⁴⁸³.

To find a judge guilty of a disciplinary offence under Article 75⁴⁶ clear and convincing evidence standard of proof must be met.

The Disciplinary Board makes decisions by a majority of votes, which means that in Case no. 3 members are present at the meeting, the decision can be made by 2 members of the board⁴⁸⁴.

There are 4 different models in terms of publicity of disciplinary proceedings: 1. in some countries (e.g., Bosnia, Poland and France) the case is public, although it can be closed only in certain circumstances, such as public order, or the secret of private life, or the interests of justice; 2. in some countries (Italy and Montenegro), the hearing is public but may be closed

474 Organic Law on Common Courts art. 75¹⁹.

475 Supra.

476 Synthia Gray, How Judicial Conduct Commissions Work, https://www.ncsc.org/_data/assets/pdf_file/0021/17508/how-judicial-conduct-commissions-work.pdf

477 Kakha Tsikarishvili, Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries, 2014. _

478 See Kakha Tsikarishvili, Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries, 2014. _

479 Organic Law on Common Courts, art. 75²³.

480 Organic Law on Common Courts, art. 75²⁵.

481 Organic Law on Common Courts, art. 75²⁴.

482 Organic Law on Common Courts, art. 75²⁵.

483 Organic Law on Common Courts, art. 75³³.

484 Organic Law on Common Courts, art. 75⁶².

at the request of the parties; 3. in some countries (Bulgaria, Macedonia and Kosovo), the disciplinary process is completely closed; and 4. disciplinary proceedings in Georgia are closed, although a judge has the right to request that the sessions of the High Council of Justice and the Disciplinary Board be made public.

We think that the second model is the most reasonable when the disciplinary case is open, although it may be closed upon the initiative of the judge.

3.6. Publication of Decisions Made by the Disciplinary Board

In some countries, decisions imposing disciplinary liability are published in full (e.g., Poland, Kosovo, Austria and Bulgaria), and in some in an anonymized form (e.g., Netherlands, France and Latvia). In England, the Chief Justice and the Chancellor themselves decide on the publication of judgments⁴⁸⁵.

Under the Organic Law on Common Courts, decisions of the Independent Inspector, the High Council of Justice, the Disciplinary Board and the Disciplinary Chamber are published without personal data. If the judge requests that the hearing be made public, the case shall be published in full and the decision to dismiss the judge shall be published in full⁴⁸⁶.

3.7. Appealing Against a Decision Made by a Disciplinary Board

Appealing against a disciplinary sanction imposed on a judge is enabled by the legislations of all advanced countries, albeit with certain peculiarities. In particular, in countries where the case is considered substantively by the panel of the Council of Justice, the full composition of the Council of Justice reviews the decision of this body. In countries where the case is considered by a body outside the Council of Justice, its decisions are appealed in court⁴⁸⁷. Also, of interest is the Bulgarian legislation where, in the event of a judge being dismissed, there is another additional appeal mechanism, namely, this decision is appealed from a 3-member panel of the Supreme Court to a 5-member panel⁴⁸⁸.

The laws of some countries set out in detail the grounds for appeal, in particular Kosovan law, which may include: 1. violation of the law or by-laws relating to judges and jurors; 2. false or incomplete evidence or confirmation of facts; and 3. Violation of disciplinary procedures. An appeal under Article 65 of the Rules adopted by the Montenegrin Judicial Council may be a breach of procedural rules, which could have affected the decision-making process; Incorrect or incomplete determination of facts; misapplication of substantive law.

Article 75⁶⁶ and 75⁶⁷ of the Law of Georgia on Common Courts contain a list of procedural violations in which the Disciplinary Chamber may overturn a decision of the Disciplinary Board and make a new decision or return the case for reconsideration. One of the grounds for reconsideration of the case is that the decision is not legally sufficiently substantiated, or the reasoning is so incomplete that it is impossible to verify the legal validity of the decision.

485 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014. See also, Law on Latvia on Disciplinary Liability of Judges ;11⁶ <https://likumi.lv/ta/en/en/id/57677-judicial-disciplinary-liability-law>; Law of Kosovo on Disciplinary Liability of Judges and Prosecutors. 7 <https://md.rks.gov.net/desk/inc/media/9C0BBF11-FCEE-407B-B070-C1105A070746.pdf>.

486 Art. 75¹² par. 3. of the Law on Common Courts.

487 Supra.

488 Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014.

3.8. Limitation Periods of Disciplinary Liability and Expunging of Disciplinary Sanctions

The limitation period for disciplinary proceedings in different systems is calculated from the commission of the offense or its detection. The statute of limitations in different countries varies from one to five years, e.g., disciplinary proceedings cannot be instituted in Macedonia if 1 year has elapsed since the misconduct; it is 5 years in Albania and Poland⁴⁸⁹. Other countries hold intermediate positions (2 years in Spain and Bulgaria, 3 years in Poland and 2 years in Croatia)⁴⁹⁰.

The statute of limitations that counts from the detection of an offence is even tighter. In Macedonia, Montenegro in particular, this period is 3 months; in Croatia and Bulgaria it is 6 months and in Albania 1 year. In some countries, the statute of limitations for imposing sanctions is also prescribed. For example, it is 3 years from the discovery of disciplinary misconduct in Montenegro and, it is 5 years from the commission of disciplinary misconduct in Poland⁴⁹¹.

Under Article 75² of the Organic Law on Common Courts of Georgia, a judge will not be subject to disciplinary liability if 3 years have elapsed from the date of the disciplinary misconduct to the beginning of the disciplinary proceedings, and 1 year from the date of the decision to indict the judge.

The laws of some countries also provide for deadlines for the expungement of disciplinary sanctions. E.g., under Bulgarian law, a sentence is considered expunged within 1 year of its execution (except for dismissal) and may be revoked early at the initiative of the investigating authority. In Croatia and Albania, this term is 2-3 years (depending on the severity of the offence or penalty), while in Poland it is 5 years⁴⁹².

Article 57⁶ of the Organic Law on Common Courts of Georgia provides for different terms for the revocation of a disciplinary sanction according to the severity of the sanction, namely, a reprimand shall be considered expunged 6 months after its imposition; a reprimand - 9 months and a severe reprimand is expunged after 1 year if the judge does not commit another offence in this period. However, it is inadmissible to lift the disciplinary sanction before the expiration of the terms established by law⁴⁹³.

Appendix 3. Results of Online Surveys, In-Depth Interviews and Focus Group Meetings

The project Monitoring Disciplinary Proceedings Conducted by the Independent Inspector and High Council of Justice, surveyed judges, lawyers, the Public Defender's Office and non-governmental organizations in June-September 2020, through focus groups, written questionnaires and in-depth interviews.

59 lawyers and 8 judges took part in the online polls; 16 lawyers, 2 judges, representatives of the Public Defender and 4 non-governmental organizations, 2 Members of the Parliament were interviewed.

Online surveys and in-depth interviews were conducted using pre-compiled questionnaires.

489 <https://www.aeaj.org/media/files/2019-02-20-99-disciplinary%20proceedings%20against%20judges%20and%20prosecutors.pdf>.

490 See Kakha Tsikarishvili, *Disciplinary Liability of Judges and Disciplinary Proceedings in Different European Countries*, 2014. _

491 *Supra*.

492 *Supra*.

493 *Supra*.

The questions related to disciplinary misconduct, shortcomings in disciplinary proceedings, system efficiency and impartiality and the recommendations of the survey participants to improve the system. The focus group meeting was held on 16 July 2020 and was attended by 22 lawyers.

Effectiveness of the Disciplinary System, Fairness and Impartiality

When asked how effective the system of the judicial discipline of judges is, the majority of lawyers surveyed online - 74% - believe that the system is either too inefficient or more ineffective than effective. In contrast, 6 out of 8 judges surveyed believe that the system is more effective than ineffective. In the in-depth interviews, some respondents indicated that the system's inefficiency also stems from the fact that judges who have a good relationship with the influential group in the judiciary have a full guarantee of impunity. According to some respondents, the reason for the inefficiency of the system is also that the complainant is often not informed about the results of the review of the complaint.

A significant proportion of the respondents, especially lawyers, believe that the High Council of Justice is more concerned with protecting judges than with effectively investigating and prosecuting disciplinary cases.

When asked how fair the disciplinary system is, 51% of lawyers surveyed believe the system is fair, or fairer than unfair, and 49% believe it is unfair, or more unfair than fair.

The answers from the judges were different: 1 judge considers the system to be fully fair; 6 judges consider it more fair than unfair and 2 judges consider it more unfair than fair.

Dealing with Disciplinary Proceedings; Obstacles to Filing a Disciplinary Complaint

71% of attorneys surveyed online indicated that they had no contact with disciplinary proceedings. Only 11% of the lawyers interviewed in writing have filed a disciplinary complaint, while 13% have carried out a consultation in disciplinary proceedings.

According to some of the respondents, the lawyers refrain from making disciplinary complaints against judges because they are afraid that the judges will create problems for them in future. Some lawyers do not file a disciplinary complaint on the grounds that the disciplinary system is ineffective, and judges are no longer held accountable. Also, in many cases, the complainant is not notified of the outcome of the complaint examination⁴⁹⁴. In addition, some of the lawyers do not file a disciplinary complaint because they do not receive any practical benefit and the disciplinary complaint does not have any legal impact on the outcome of the case. In some cases, the lawyers do not complain about the delaying of a case by a judge because he/she represents the party that is interested in delaying the case.

Perceptions of Disciplinary Misconduct in the Legal Professions

As the results of an online survey have shown, awareness of new grounds for disciplinary liability is relatively low among lawyers. Only 30% of the surveyed lawyers are well aware

⁴⁹⁴ The reason can be the stipulation of the law according to which the author of the complaint shall be notified about the indictment of the judge only in case if the relevant case is no longer pending in common courts of Georgia. (Organic Law on Common Courts, art. 75⁴.)

of the new disciplinary offences (legislative changes of 13 December 2019), while 30% are either poorly aware or not at all aware. 6 out of the 8 judges surveyed indicated that they knew the basics of disciplinary misconduct well, while 2 indicated that they knew more than they did not.

Clarity of the Grounds of Disciplinary Liability

To the question, how clear the new grounds of disciplinary liability are, a small portion (22% of lawyers and only 1 judge out of 8 judges) indicates that the grounds are completely clear. 38% of interviewed lawyers said the new grounds are completely or partially obscure. Most of the judges interviewed (7 judges) believe that the new disciplinary misconduct is clearer than vague. One judge believes that the list of disciplinary misconduct allows for a broad interpretation, which makes the norm vague and may be misused. More specifics are needed for the norm to become foreseeable.

Common Disciplinary Violations

To the question, which is the more common disciplinary offence, lawyers pointed out the violation of procedural timeframes, exercise of power for personal interest, political or social influence. Less widespread are illegal interference in the distribution of cases by a judge, conduct incompatible for the judge and interference by a judge in the exercise of another judge's powers. According to the judges, none of the listed disciplinary misconduct is widespread, but violations of procedural deadlines by a judge for an unexcused reason still exist (6 judges); obvious disrespect to the participant in the process (5 judges); the exercise of power by a judge under some influence (4 respondents) and interference in the activities of another judge (3 judges).

Removing the Improper Performance of a Judge's Duty as a Basis for Disciplinary Liability

By a legislative amendment of 13 December 2019, improper performance or non-performance of duty was removed from the list of disciplinary misconduct. There is a difference of opinion among respondents as to how much this misconduct should be punished. A part of the respondents opposes a judge's punishment on this basis and think that it threatens the independence of the judges, especially considering the fact that the court is run by an influential group that has all the levers of administration and they use this leverage to influence the judges. In addition, the misapplication of the law by a judge can be appealed and remedied. According to some respondents, the incompetence of a judge should be corrected through training and not through discipline. The second part of the respondents, on the other hand, think that a violation of the law by a judge, which was committed intentionally, or with obvious incompetence or gross negligence, or which resulted in irreparable damage, should be punished. This part of the respondents thinks that the appellate and cassation appeals cannot insure against the risks that may arise from the negligent performance of their function by a judge. The interviewed lawyers also base this opinion on the fact that the unqualified and negligent performance of their functions by a lawyer, which harmed the client, is punishable. Accordingly, a judge should also be punished for similar behaviour. Some respondents think that extreme cases of blatant incompetence can be punished as a misdemeanour that

involves conduct that undermines the reputation of the court. Some respondents believe that improper performance may not be punished with a severe sanction, but the judge should still receive a reprimand for violating the law. Some respondents believe that improper performance should be punished only if it is systematic. Examples of improper performance are the fact that the judge did not discuss requests of the party in the decision at all, the judge ruled on facts for which there was no evidence, and so on.

Delay of Proceedings by a Judge

According to the respondents, deliberate delay by a judge is one of the most common disciplinary offences. Part of the respondents thinks that a judge cannot be released from responsibility just by indicating that he has 500 cases in the proceedings or hears 500 cases during the year. During the examination of each complaint, the following should be examined: the category and complexity of the cases handled by the judge, whether the delay is caused by the fault of the party, why the judge appoints hearings on the case filed 2 months ago but does not schedule hearings on the case filed 3 years ago, etc. Part of the lawyers think that the reason for the delay is that, in some cases, the judges themselves have no interest in completing the case on time, they postpone hearings for any reason, as if trying to avoid the obligation to produce written decisions. According to one respondent, a judge should have the opportunity to address the administration and ask for a solution to the administrative problems that are causing the case to be delayed. If the administration does not resolve this issue, the judge should be relieved of responsibility. According to one respondent, some judges are overburdened with non-judicial activities, such as lectures, which can prevent them from handling cases. Part of the respondents, including judges, think that if a judge has not scheduled a single hearing on a case for a long time, it is already unreasonable, no matter what the workload of the judge.

Inappropriately Addressing the Parties

According to respondents, it is common in practice for judges to address the parties inappropriately. More often, it may be the judge's cynicism, or questioning a party's qualifications⁴⁹⁵. According to some of the respondents, judges are more likely to violate ethical norms when the microphone is turned off. An example of improper address may be the excessive familiarity of the judge⁴⁹⁶, but if the microphone is turned off, the judges are freer; although, in this case, the complaint is pointless as the relevant evidence is no longer available. Some respondents think that an overly didactic tone of a judge can also be an example of the unfair treatment of a party. According to one of the respondents, an example of unfair treatment is a judge who fined a party completely unreasonably in the trial.

Judges' Apparent Bias

According to one respondent, the judge's apparent bias was manifested in the fact that he assumed the function of the prosecutor and asked questions to be asked by the prosecution to witnesses. (However, it should be noted that, in the current situation, such a thing will go unpunished). Explicit bias can also be expressed by the judge instructing the party which

495 For example, the words "are you a lawyer at all".

496 For example: address to the party: were you sleeping, what were you doing during this time".

evidence to present in the case. An example of obvious bias could be a judge fining a lawyer completely unjustifiably. According to some of the respondents, the wording given in common courts “Exercising judicial power by a judge through personal interest, political or social influence” is completely ineffective as it is practically impossible to prove the influence.

Interference by a Judge in the Case Distribution System

One respondent indicated that there was also disciplinary misconduct in his practice, viz., interference by a judge in the case distribution system. In particular, he filed a well-founded complaint against this judge in a particular case, after which this judge tried to avoid all the cases of this lawyer. For some reason, it has been years since any case has been assigned to this judge with the participation of this lawyer. Nevertheless, according to the majority of respondents, illegal interference in the case distribution system by a judge is rare.

Other Disciplinary Offences That Should Also Be Punished

Some respondents believe that disciplinary punishment should not only be attached to a judge’s refusal to self-recusal, but also a completely unjustified self-recusal.

The Institution of the Independent Inspector

Majority of the respondents welcome the introduction of the Independent Inspector in the judiciary. Part of the respondents thinks that the inspector does not have sufficient guarantees of independence. The inspector was elected in a closed session and the selected candidate is not independent of the influential group of judges in the judiciary.

Recommendations for Improving the Disciplinary System

When asked what recommendations do, they have for improving the disciplinary system, one respondent believes that judges should be banned from using social networks, as citizens have a desire to communicate with judges through social networks and there are other risks of violating ethics.

According to one respondent, the majority in the Disciplinary Board of Judges should not be elected by the Conference of Judges as this body pursues corporate, intra-institutional interests. There should also be one member elected by the Bar Association to the board.

According to one of the interviewed judges, when making a disciplinary decision, it is necessary to have a larger number of votes of the members of the Board for the judge to be protected as much as possible.

According to one of the respondents, there should be a mechanism for removing a judge from office or suspending a judge who violates ethical norms (before a final decision is made).

One of the respondents believes that the time limits for disciplinary proceedings must be reduced.

One respondent expressed the opinion that the law could be changed, and the sessions of the Disciplinary Board should be made public and closed only at the request of the judge.