

ASSESSMENT OF THE JUDICIAL REFORM

System of Disciplinary Liability of Judges



Assessment of the Judicial Reform System of Disciplinary Liability of Judges



The European Union
for Georgia
EU4Justice

ადამიანის უფლებების მწავლებელი და მონიტორინგის ცენტრი
EMC
Human Rights Education and Monitoring Center



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Introduction

This report has been prepared within the scope of the project – “Facilitating Implementation of Reforms in the Judiciary (FAIR)” which Human Rights Education and Monitoring Center (EMC) is implementing with support from the European Union and in cooperation with Institute for Development of Freedom of Information (IDFI) and the Caucasus Research Resource Center (CRRRC Georgia). The purpose of this document is to assess the system of disciplinary liability of judges in light of the “third wave” reform of the judicial system.

The amendments under the “third wave” reform, which introduced many innovations to the system of disciplinary liability of judges, is dated 8 February 2017. As a result of the changes, the Office of an Independent Inspector was created under the High Council of Justice and the powers of an Inspector were defined; a judge became authorized to request public disciplinary hearings; the terms of preliminary examination and investigation of a disciplinary case were defined; the High Council of Justice became obliged to make a reasoned decision on termination of the disciplinary proceedings and publish it on the website, and more.

This is the second monitoring report, which covers the period from 1 January 2019 to 1 September 2019. The first report was published in early 2019.¹ It analysed the norms and international standards regulating disciplinary liability and the decisions of the High Council of Justice, the Disciplinary Board and Chamber, which were adopted after the enactment of the “Third Wave” judicial reform until 1 January 2019.

¹ See EMC and IDFI Monitoring Report: Assessment of Judicial Reform - Electronic System of Case Distribution, System for Disciplinary Liability of Judges (2019), [available at: https://idfi.ge/en/assessment_of_the_judicial_reform, last visited on 01.09.2019].

Methodology

While working on the present monitoring Report, the project team used the following methods and sources for research and information gathering:

Analysis of legislation – one of the important tools during monitoring was the analysis of legislative framework adopted as a result of the “Third Wave” reform,² also the amendment drafted within the scope of the “Fourth Wave” of reform;

Analysis of international standards and recommendations – in addition to the national legislative normative framework, the team has studied international experience and assessed the compliance of national legislation with relevant recommendations and standards;

Analysis of secondary sources – another source for assessing legislation, international standards and recommendations was reports, researches, and evaluations published by local and international organizations. Also, special attention was paid to the first annual 2017-2018 report of the Office of an Independent Inspector;

Analysis of practice – in order to evaluate the implementation of the legislative changes in practice, the decisions of the High Council of Justice, the Disciplinary Board and the Disciplinary Chamber were analysed;

Collecting and processing statistical information – the project team requested public information from the Office of an Independent Inspector, the High Council of Justice and the Disciplinary Board for several stages and in an intensive manner.

² Provisions regulating the system of disciplinary liability for judges, as well as a detailed analysis of international standards and recommendations are discussed and evaluated in Part I of the monitoring Report.

Main Findings

It should be noted that the main findings identified during different monitoring periods do not differ from one another substantially. However, in addition this monitoring Report includes an assessment of the draft law regulating the norms of disciplinary responsibility of judges, developed within the framework of the “Fourth Wave” of judicial system reform. The Report includes the following primary findings:

- Within the framework of the “Third Wave” of judicial system reform, a judge became authorised to make the disciplinary hearings public when so desired, but no judge has yet exercised this right;
- Although a member of the Council was given the right to dissent in writing, no member of the Council has yet exercised this right;
- Although the terms of pre-examination and investigation of a disciplinary case were strictly defined by the “Third Wave”, similar to the previous monitoring period, timeframes are still violated and the disciplinary proceedings are delayed;
- A number of disciplinary appeals filed to the Office of an Independent Inspector related to the lawfulness of the judicial act still prevail, even though during the disciplinary proceedings the law does not allow scrutiny of legality of the acts rendered by a judge;
- The High Council of Justice continues to hold meetings on disciplinary cases with insufficient frequency, which contributes to the delay in disciplinary proceedings;
- Since the enactment of the “Third Wave” to this day the most common ground for holding a judge responsible for disciplinary misconduct is unjustified delay in hearing a case;
- Violations of judicial ethical norms are widely interpreted in practice, which increases the risk of infringement of the independence of an individual judge;
- The draft law developed within the “Fourth Wave” reform foresees the specific and exhaustive list of types of disciplinary misconduct. It should be assessed positively;

- The provision in the draft law implying that an act which, albeit formally containing signs of any act (offence) prescribed by the law, due to its minor importance did not cause harm that would necessitate the disciplinary responsibility, or did not threaten to create such harm, shall not be considered a disciplinary offense - is problematic. Such an ambiguous provision poses the threat of it being abused and subjectively interpreted;
- It is problematic that the developed draft law does not foresee the responsibility for a judge's act, which contradicts the clearly stated legal norm and regarding to which there is no ambiguity providing that a judge committed the mentioned act with clear and cogent dishonesty and disrespect for human rights that caused significant harm ("legal error plus");
- The draft law changes the rule for dismissal of an independent inspector and provides for the possibility of appealing the decision; also, his/her official salary is determined at the legislative level, which should be assessed positively. However, the procedure for electing an independent inspector remains flawed, which does not ensure the proper institutional independence of an inspector;
- The developed draft law sets the standard of proof at the early stages of the disciplinary proceedings, which should be assessed positively;
- The developed draft law within the framework of the "Fourth Wave", as well as the present-day legislation, does not provide for the publication of an independent inspector's opinions without identification data. Opinions are not available even if they are requested as public information, which is an important challenge in terms of transparency;
- The developed draft law provides for the publication of statistical information on bringing disciplinary charges against judges, which should be assessed positively. However, the fact that decisions made by the Council regarding bringing disciplinary charges against judges are not published is a major flaw in terms of transparency;
- The draft law developed within the "Fourth Wave" framework does not envisage the elimination of the significant flaw, which is related to the decision-making rule for the Disciplinary Board. Under the current legislation, it is possible for two out of five members of the Board to find a judge guilty and impose disciplinary liability and penalty on him/her, which poses a threat to the fairness of the disciplinary proceedings.

Evaluation of the Disciplinary Liability System of Common Court Judges

The system of disciplinary liability of judges serves to ensure accountable justice and the public trust in the court system. In a democratic state, judiciary is independent³ and consists of individual judges. An independent judge makes a decision in accordance with the Georgian Constitution, universally recognized principles and norms of international law, other laws, and his/her inner belief. No one has the right to request an explanation from a judge or to tell him/her what decision to make in a particular case.⁴

A high standard of independence of a judge is not a privilege, he/she is also accountable to those seeking justice. The system of disciplinary liability is one of the mechanisms for holding a judge responsible, as there is always a risk of committing an improper and dishonest act by the judge.⁵ At the same time, imposing disciplinary responsibility contains the potential danger of affecting the independence of the court.⁶ That is why it is important that the system of disciplinary liability of judges ensures respect for the independence of justice system and is exercised before the independent body free of political influence.⁷

I. Legal Framework

During the monitoring period, no changes were made in the rules regulating the disciplinary liability of the common court judges. Consequently, no re-assessing of the legislation has taken place. Instead, the draft law consisting of the norms regulating the disciplinary liability of the judges, developed within the framework of the “Fourth Wave” judicial reform was assessed, which proposes potential changes to be made in legislation.

On 12 June 2019 the following draft amendments to the organic laws of Georgia were registered at the Parliament of Georgia: Amendment to the Organic Law on Common Courts and the Amendment to the Organic Law on Normative Acts (the “Fourth Wave”

3 The Constitution of Georgia, Article 59.

4 Organic Law of Georgia on Common Courts, article 7, para. 1.

5 Robert H. Tembeckjian Judicial Disciplinary Hearings Should Be Open, *The Justice System Journal*, vol. 28, November, 2007, page 419.

6 Decision of the Disciplinary Board of 12 April 2013 on disciplinary case N1/04-12.

7 CCJE opinion N10, Council for the Judiciary in the Service of Society, para. 63.

of Judicial Reform).⁸ The Fourth Wave of reform addresses the key and pressing issues that are crucial for the independence of the court, including the reform of the system of disciplinary liability.

The draft amendment foresees the improved regulation of the system of disciplinary liability, yet certain flaws still remain a challenge. Moreover, it is important for the Parliament to adopt a draft law in a timely manner to eliminate the current challenges.

a. Types of Disciplinary Misconduct of Judges

The draft law developed under the “Fourth Wave” establishes the specific and exhaustive list of types of disciplinary misconduct. The types of disciplinary misconduct under the current legislation have repeatedly been subject to harsh criticism from international⁹ and local¹⁰ organizations. General types of disciplinary misconduct existing today allow for broad interpretation, which poses the risk of diminishing the independence of an individual judge.

The draft law provides for a specific list of misconducts and does not include failure to perform or improper performance¹¹ by a judge as one of the forms of disciplinary misconduct, nor does it address the ethical norms¹² of the court, which should be well received. The specification of those corruption offenses that may serve as a basis for disciplinary liability should also be positively assessed.

Despite the mentioned positive changes, the draft law fails to address the purpose of the disciplinary liability of judges.¹³ It is of great importance for the law to have a clear

8 Available at: <https://info.parliament.ge/#law-drafting/18385>, last visited on 01.09.2019.

9 The 2014 Venice Commission report also reiterates the 2007 recommendation regarding the reviewing the grounds for liability and states that they should be more precisely defined in a way which excludes their use for different purposes, other than the actual purposes of disciplinary proceedings, CDL-AD (20114)032, § 27.

10 EMC and IDFI, Assessment of the Judicial Reform, 2019, pages 44-50, [Available at: https://idfi.ge/public/upload/IDFI_2019/rule_of_law/ENG_WEB.pdf, last visited on: 01.09.2019]

Coalition for an Independent and Transparent Judiciary, The Judicial System: Past Reforms and Future Perspectives, 2017, pages 121-124 [Available at: http://www.coalition.ge/files/_____.pdf, last visited on: 01.09.2019].

11 This type of misconduct has been repeatedly criticized. In the absence of a definition, it is unclear what is meant by a judge's failure to perform or improper performance, which poses the risk of improper application of a disciplinary liability against the judge; EMC and IDFI, Assessment of the Judicial Reform, 2019, page 45.

12 The need for an accurate list of disciplinary violations at the legislative level and the abolition of reference to judicial ethics were addressed in the 2014 Venice Commission's Report. In addition, according to the Venice Commission, it is not clear whether the existing norm refers to the current code of ethics, or also covers general, unwritten rules of ethics, CDL-AD (2014) 032, §28.

13 According to the Venice Commission, the purpose of disciplinary responsibility is to protect the authority of the court and not to ensure the proper application of the law, CDL-AD (2007) 009, §29.

definition of the purpose, as it gives certain directions and simplifies the process of the judicial proceedings and decision-making, and avoids their abuse.¹⁴

The provision in the draft law implying that an act which, albeit formally containing signs of any act (offence) prescribed by the law, due to its minor importance did not cause harm that would necessitate the disciplinary liability, or did not threaten to create such harm, shall not be considered a disciplinary offense - is problematic. Such an ambiguous provision poses the threat of it being abused and subjectively interpreted;

The types of disciplinary misconduct both currently applicable and foreseen by the draft law do not directly imply disciplinary liability of a judge when the judge's error comes with his/her dishonest act and results in significant damage (more than legal error – legal error plus). International standards emphasize that a judge shall be protected from disciplinary liability if the judge made a legal error and in that he/she was acting in good faith. This does not include cases where a legal error was committed with malicious intent or gross negligence.¹⁵

In order to ensure stronger guarantees for the independence of judges and to introduce the consistent practice, it is important for the law to clearly indicate what additional circumstances may result in the judge's disciplinary liability when a legal error is made. The US model of disciplinary legal proceedings is interesting in this regard. In particular, the state California supports the disciplinary liability of a judge in case of committing the legal error when additional circumstances are present. To be more precise, such circumstances exist when the act is committed in bad faith, is biased, contradicts the clearly stated legal norm, is exercised in abuse of state official position and neglects fundamental human rights.¹⁶

It is important that types of disciplinary misconduct foresee the responsibility for conduct, which contradicts the clearly stated legal norm especially when no ambiguity exists as to clarity of the norm and the judge committed an offence in an obvious and persuasive bad faith and in violation of human rights, which resulted in significant harm. In

14 EMC and IDFI, Assessment of the Judicial Reform, 2019, page 44.

15 Council of European Committee of Ministers Recommendation N2010(12), §66; [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afb78, last visited on 19.08.2019].

European Networks of Councils for the Judiciary (ENCJ), Minimum Judicial Standard V, disciplinary proceedings and liability of judges, pp. 39-40. [Available at: https://www.encj.eu/images/stories/pdf/GA/Hague/encj_report_minimum_standards_v_adopted_ga_june_2015.pdf, last visited on 19.08.2019].

16 Oberholzer v. Commission on Judicial Performance (1999),

[Available at: <https://law.justia.com/cases/california/supreme-court/4th/20/371.html>, last visited on 19.08.2019]. In case of “legal error plus”, the imposition of disciplinary liability on judges was supported by the Coalition for Independent and Transparent Judiciary in the research “The Judicial System: Past Reforms and Future Perspectives”, 2017. Responsibility System for Judges, page 122.

this case, it is important that disciplinary liability is imposed after the superior court has confirmed the error (if any).¹⁷

b. Institutional Independence of an Independent Inspector

The draft law developed within the framework of the “Fourth Wave” amends the rule for dismissing an independent inspector and provides for the possibility to appeal a decision. Under the current law, the inspector is dismissed from his/her position by the majority of the Council, which fails to ensure the actual influence of non-judge members of the Council on the decision-making process. Moreover, the possibility and procedure for appealing the Council’s decision are not clearly set out.¹⁸

According to the draft law, the decision to dismiss an independent inspector is made by at least 2/3 of the Council’s full composition. The draft law also allows the appeal of the Council’s decision in the court. It should also be welcomed that under the draft law, “improper performance of duty” is no longer one of the grounds for terminating an inspector’s authority.¹⁹

Under the current legislation, an Independent Inspector is elected for a term of 5 years by the majority of the full composition of the High Council of Justice, by way of competition. The draft law maintains such regulation, which is a significant flaw. In order to ensure the real involvement of non-judge members of the Council in the decision-making process, it is advisable to appoint an independent inspector by 2/3 of the full composition of Council members.

Determination of the salary of an Independent Inspector by organic law is an important change in terms of ensuring the inspector’s independence. Under the draft law, the salary is equal to the remuneration of a judge of the Court of Appeal, which must be positively assessed. By entitling the Council to determine the Inspector’s salary, as it is regulated by the current legislation, the risk of the institution’s dependence on the Council is increased.²⁰

17 EMC and IDFI, Assessment of the Judicial Reform, 2019, page 67.

18 EMC and IDFI, Assessment of the Judicial Reform, 2019, pages 51-52.

19 This ground was too ambiguously and therefore, critically assessed in the Venice Commission’s 2018 report. CDL-AD (2018) 029, §51. [Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)029-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)029-e), last visited on 01.09.2019]

20 EMC and IDFI, Assessment of the Judicial Reform, 2019, page 53.

c. Standard of Proof

Current legislation does not set a standard of proof at the initial stages of the disciplinary proceedings, which is a significant flaw.²¹ The draft law eliminates this flaw. It establishes the standard of probable cause to be used when examining the merits of a complaint, statement or other information by an Independent Inspector; also, when deciding whether to initiate disciplinary proceedings against a judge or take explanations from him/her by the Council. In addition, according to the draft law, while deciding on disciplinary liability, the Council relies on a standard of high probability. Such change should be positively assessed.

d. Access to Independent Inspector's Opinions

Neither current legislation, nor draft law developed within the framework of the “Fourth Wave” envisages the publication of independent inspector's opinion without identification data. The opinions are not available even when requested as public information, which is a significant challenge in terms of transparency. In the Council's decisions published until today, the materials researched after prior examinations and inquiry by the independent inspector are clear and extensive, yet only a small part of an independent inspector's report on the presence/absence of signs of disciplinary misconduct in a judge's action can be seen.²² In order to ensure the transparency of the Office of an Independent Inspector, organic law should require mandatory publishing of the opinions of an independent inspector without disclosing the identification data of the parties.

e. Decisions Made by the Council on Disciplinary Liability

Although the decisions of the High Council of Justice on termination of the disciplinary proceedings are publicly available, neither current legislation nor the draft law envisages the publication of the Council's decision on bringing disciplinary charges against a judge.

The draft law only provides for publication of statistical information on disciplinary liability, which should be positively assessed. However, the public is interested in substantiated decisions and the reasoning of the Council. Therefore, to ensure proper transparency, it is advisable to make the reasoned decision available on the website.

21 EMC and IDFI, Assessment of the Judicial Reform, 2019, page 66.

22 EMC and IDFI, Assessment of the Judicial Reform, 2019, pages 56-57.

f. Decision-making by the Disciplinary Board

The draft law prepared within the framework of the “Fourth Wave” does not address the elimination of the important flaw regarding the decision-making rule by the Disciplinary Board. According to the applicable law, the decision of the Disciplinary Board is made if supported by the majority of the Chamber’s members presented. The Chamber consists of 5 members and is authorized to make decisions if at least 3 members are attending. Taking into account the power of the Disciplinary Board this provision of the law deserves criticism. The fairness of the disciplinary proceedings might be jeopardized since it is theoretically possible for 2 out of 5 members to find the judge guilty and impose disciplinary liability and penalty upon him/her.²³

As of today, the Disciplinary Board has only three judge members. Non-judge members who should be appointed by the Parliament, are not present in the Board.²⁴ This again highlights the danger associated with imposing disciplinary liability on a judge by 2 Board members.

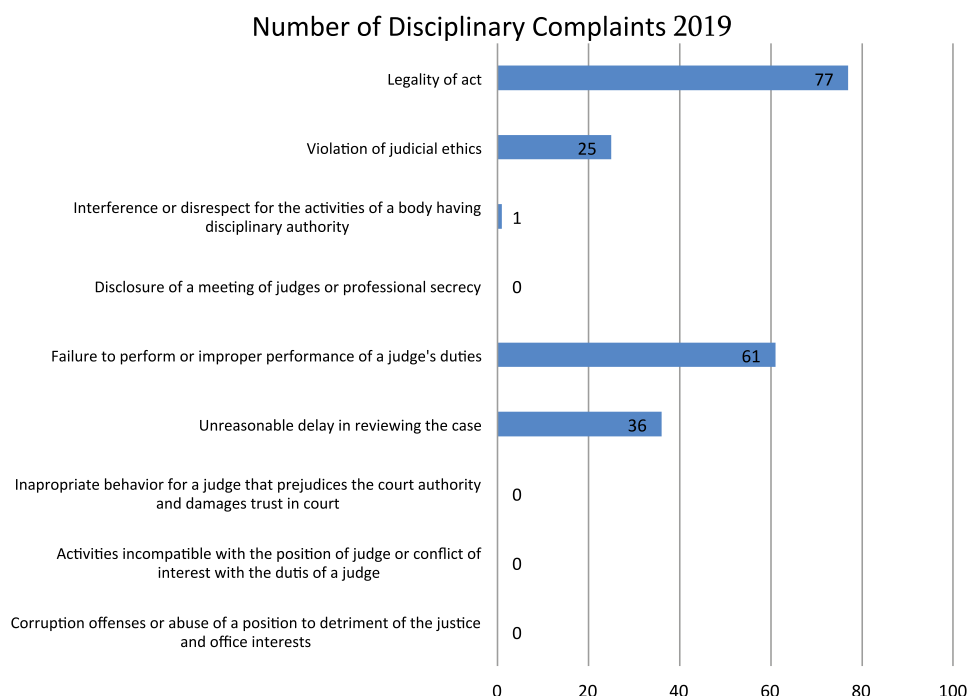
In conclusion, although the draft law developed under the framework of the “Fourth Wave” of Judicial Reform envisages substantially improved regulations of certain key issues, challenges still remain in terms of the disciplinary proceedings that require prompt and effective resolution.

²³ EMC and IDFI, Assessment of the Judicial Reform, 2019, page 66.

²⁴ Information on members of the Board is available at: <https://bit.ly/2ktMU2q>, last visited on 01.09.2019.

II. Statistical Data

According to the information requested from the Office of an Independent Inspector and the High Council of Justice,²⁵ as of 1 September 2019, 151 disciplinary appeals were filed to the Office of an Independent Inspector. They included:



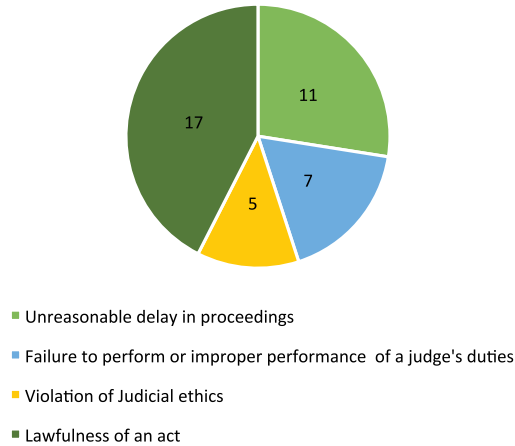
During this period, the High Council of Justice held just two sessions to discuss disciplinary cases.²⁶ According to information provided by the Office of an Independent Inspector, the Council decided to terminate the disciplinary proceedings in 49 cases. 6 out of 49 were terminated because the terms of office for judges expired; 4 cases were terminated because 5 years statute of limitation expired; and 1 case was dismissed as

²⁵ Letter of Independent Inspector dated 30 September 2019, N202/309-03-i.

²⁶ 11 and 13 March 2019.

there was, on the same grounds, a decision of the Council against the same judge.²⁷ The decisions establish that no complaint is dated 2019. The statistics for terminating the disciplinary cases by the Council is as follows:

Cases Terminated by the Council, 2019



It should be noted that, similar to the previous monitoring period, apart from 3 cases, the views of the Inspector and the High Council of Justice largely were the same during this monitoring period. As to the exceptions, the Council did not share the Inspector's conclusion on 2 cases regarding lack of signs of disciplinary misconduct in judge's behaviour (both cases involved unjustified delays); in 1 case the Council disagreed with the Inspector that there were signs of disciplinary misconduct (the case involved violation of norms of ethics).²⁸ It should be noted that since neither Independent Inspector's opinions nor decisions made by the High Council of Justice on commencement of a disciplinary prosecution are available, it is difficult to assess the decisions made on the mentioned cases in terms of their reasonableness.

In the period between 1 January and 1 September 2019, the Council shared 5 opinions submitted to it by an Independent Inspector on the commencement of the disciplinary prosecution against a judge. They included 3 cases on unjustified delays in the case proceedings, 1 case on breach of the ethical norm and 1 case on failure to perform or improper performance of the duties.

²⁷ Letter of Independent Inspector, dated 30 September 2019, N203/3370-03-i.

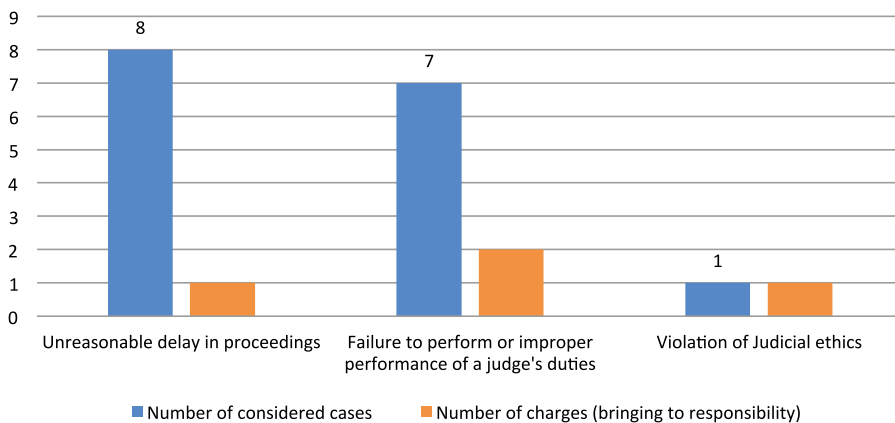
²⁸ Letter of Independent Inspector, dated 30 September 2019, N202/309-03-i.

The Council decided on the commencement of the disciplinary prosecution in 6 cases; 3 of them included unjustified delay in considering the case; 1 included failure to perform or improper performance of the duties; and 2 included violation of ethical norms.

During this period, the High Council of Justice discussed 16 cases with regard to bringing disciplinary charges against a judge. 8 of them covered unjustified delay in a case consideration, 7 of them covered failure to perform or improper performance of duties, and 1 covered violation of ethical norms. In 15 out of 16 cases mentioned above, the Independent Inspector's decision existed regarding possible disciplinary misconduct on the judge's part. Out of 16 cases, the Council decided to bring disciplinary charge against a judge in 4. These cases covered 1 case of unjustified delay, 2 cases of judge's failure to perform or improper performance of duties and 1 violation of ethical norms. Disciplinary proceedings were terminated in the remaining 14 cases, including due to the expiry of the judges' term of the office in 4 cases.²⁹

Similar to 2018, no judge in 2019 has exercised the right to make disciplinary hearing public and no member of the Council has presented written dissent in 2019.³⁰ Also, in 2019 there was no case concerning the recusal of an Independent Inspector.³¹

Cases Related to Bringing a Disciplinary Charge against a Judge in 2019



29 Letter of Independent Inspector dated 30 September 2019, N202/309-03-i

30 Letter of Independent Inspector dated 30 September 2019, N203/3370-03-i.

31 *Ibid.*

III. Generalised Opinions of an Independent Inspector

As mentioned above, the draft law developed within the framework of the “Fourth Wave” of judicial reform contains a relatively refined and comprehensive list of types of disciplinary misconduct, which should be assessed positively as the currently applicable types of disciplinary misconducts remain very vague and do not meet the criteria of foreseeability and clarity.³² Given the general nature of the types of misconduct, it is important for both a judge and a person interested in filing a disciplinary complaint against the judge, how the authorities involved in the disciplinary proceedings define types of disciplinary misconduct.

Definitions of types of disciplinary misconducts can be found in generalized opinions of an Independent Inspector,³³ based on which we can assume that the content of the decision made by the High Council of Justice regarding the termination of the disciplinary cases mostly shares an Independent Inspector’s reasoning in assessing different aspects.

While discussing **the unjustifiable delay in considering a case**, an Inspector focuses on (a) the complexity of a case, (b) actions of the parties, and (c) the actions of a judge considering the case. Attention is also paid to the judge’s workload and individual responsibility.³⁴

It is important to note that while assessing a judge’s workload, the number of cases assigned to a particular judge and the rate of completed cases in the period of a year are taken into account. However, the complexity and so-called “weight” of the cases are ignored.

When assessing unjustified delay in a criminal case, an Inspector focuses on the procedural timeframe set for considering a case and the standard of **reasonable time** for reviewing a case established by the European Convention.³⁵ In one of the cases an inspector established the misconduct of a judge in light of the reasonable standard. It was a non-custodial case, where the judge, despite the absence of evidence proving the necessity of the postponement, systematically adjourned the proceedings after the pleas being lodged by the defence party. The frequent postponement of the case led to a delay

32 EMC and IDFI, Assessment of the Judicial Reform, page 10.

33 Independent Inspector’s generalized conclusions are available in the first annual 2017-2018 report of the Office of an Independent Inspector, pages 24-37.

34 *Ibid*, page 26.

35 *Ibid*, page 28.

in adjudication by more than 2 years. The judge did not take any measures to ensure the timely administration of justice.³⁶

According to the Independent Inspector's assessment, the violation of the procedural time limit is considered to be an unjustified delay in consideration of a case. However, the case complexity, procedural actions, for how long has the case been existed in the proceedings of a particular judge, and the workload of the judge are taken into account while assessing unjustified delay in the proceedings.³⁷

Failure to perform or improper performance of the duties by a judge is assessed by the Independent Inspector as a violation of substantial and imperative norms, which goes beyond the scope of legal error, hence harming the party, court or public interests. In each individual case, the Independent Inspector assesses a case of misconduct by taking into account the evidence and circumstances of the case.³⁸

In terms of improper performance of duties, the Inspector reviews the difference between a legal error and disciplinary misconduct in light of the practice of Disciplinary Chamber. The Chamber excludes any disciplinary liability when a judge makes the decision based on his/her inner belief. However, when the case concerns the execution of discretionary power, the Chamber will consider whether the judge acted within the discretionary powers and whether the imperative requirements of the relevant law were violated.³⁹

The facts of improper performance of a judge's duties relate to delaying the delivery of substantiated judgment and/or judgment to the parties.⁴⁰ The Inspector invokes case law of the European Court of Human Rights, which indicates the obligation of administrative authorities to enforce the court decisions that entered into legal force. This is directly linked to the effective protection of the parties and the restoration of justice.

For this reason, when the author of the complaint refers in his/her complaint to the delay in delivering a decision and/or judgment, the Office of Independent Inspector initiates disciplinary proceedings on the ground of non-performance of the duties by a judge, not on the ground of unreasonable delay in adjudication.⁴¹ A similar practice is found in the decisions of the High Council of Justice.

³⁶ *Ibid*, page 29.

³⁷ *Ibid*, page 30.

³⁸ *Ibid*, page 33.

³⁹ *Ibid*, page 31.

⁴⁰ *Ibid*, page 31.

⁴¹ *Ibid*, page 32.

An independent inspector brings a harm test to the agenda when a judge fails to perform or improperly performs his/her duties. The criterion of the test is whether the offence has a negative effect on a party's rights / public interest.⁴² For example, when delaying delivery of a reasoned decision, the Independent Inspector looks into whether a party is deprived of the right to appeal, that is whether the harm to the party's rights and/or public interests has occurred.

An Independent Inspector applies the Bangalore Principles of Judicial Conduct **when reviewing the violation of the norms of judicial ethics**. In particular, the Inspector assesses whether, in the eye of the external observer, such behaviour undermines a judge's ability to perform his/her duties honestly, impartially, independently and qualitatively. Also, what is the tone and manner of a judge, how thorough are the judge's remarks, is his/her behaviour biased and more. To do this, an independent inspector studies both audio and video protocols. The inspector found disciplinary misconduct when an interpreter was addressed in a loud tone, or a humiliating tone was used to address an attorney, when an appellant's representative was addressed ironically or when a plaintiff's representative was asked to explain why the certain requests were set forth, etc.⁴³

Publishing independent inspector's generalized opinions is an important step forward in terms of transparency of the office of an independent inspector. However, the inability to analyse and evaluate individual cases remains a major challenge in terms of the inspector's accountability.

Apart from the aforementioned types of disciplinary misconduct, in the generalized opinions the Independent Inspector refers to the decision made with regards to the **complaints on the legality** of the Act. The majority of the disciplinary appeals (51%) are complaints about the legality of the judicial act. This is due to the fact that the system of disciplinary liability of the common court judges does not envisage the objective of disciplinary proceedings. In theory, this poses a threat of administering a parallel justice, and in practice leads to an increase in the number of disciplinary complaints. Most of these complaints are characterized by the applicant's assessment that the judge made an unlawful decision. Whereas disciplinary proceedings do not entail an examination of the reasoning or the content of a judgment rendered by a court, an independent inspector is not authorized to examine complaints about the lawfulness of the court decisions.⁴⁴

⁴² *Ibid*, page 33.

⁴³ *Ibid*, pages 34-35.

⁴⁴ *Ibid*, page 36.

It should be noted that a draft law drafted under the Fourth Wave of judicial reform established the power of an independent inspector to terminate disciplinary proceedings if the complaint concerns the lawfulness of the acts rendered by a judge. Draft Organic Law of Georgia on Amendment to the Organic Law of Georgia on Common Courts, article 19, paragraph 1.

IV. Decisions of the High Council of Justice

In the wake of the changes implemented within the framework of the “Third Wave” of the court system, it became mandatory for the High Council of Justice to make a well-reasoned decision to terminate disciplinary proceedings and publish them on its website.⁴⁵ A member of the Council also became authorised to render dissent in writing.⁴⁶ This is an important step forward in terms of transparency of the disciplinary proceedings. Before this change, the disciplinary proceedings were confidential, decisions made by the Council were not subject to mandatory substantiation, they were not published on the website, and were sent to the complainant only upon request.⁴⁷

After the amendment came into force, the High Council of Justice publishes its decisions on its website.⁴⁸ However, it should be noted that the Council hearings on disciplinary matters are rarely held,⁴⁹ leading to delays in disciplinary proceedings and violation of statutory time limits.⁵⁰ As to the dissenting opinions of the members of the Council, to date, no member has dissented on the Council decisions.⁵¹

The decisions published on the website of the High Council of Justice clearly portray how the terms of the disciplinary proceedings are violated, even when the content of the cases is simple. For example, the High Council of Justice terminated 12 disciplinary cases on grounds of termination of the judicial authority of a judge in 2019.⁵² Seven of these cases were terminated on a preliminary examination stage, without putting it to vote,⁵³ and the preliminary examination phase lasted from 6 months to one year.

45 Organic Law of Georgia on Common Courts, article 75¹².

46 *Ibid*, article 758, section 1 and article 75¹³, section 1.

47 Edition of the Organic Law of Georgia on Common Courts before 8 February 2017.

48 [Available at: <http://hcoj.gov.ge/ge/2018-tslis-dashtrikhuli-gadatskvatilebebi/2019-tslis-dashtrikhuli-gadatskvatilebebi>, last visited on 01/09/2019].

49 According to the decisions, in 2019 two Council meetings were held about disciplinary matters, on 11 and 13 March. [last visited on 19 August 2019].

50 Within the framework of the “Third Wave” of judicial system reform, the timeframes for the preliminary examination of the disciplinary case (2 months, which may be extended for 2 weeks) and the examination (2 months, which may also be extended to 2 weeks) were determined. Disciplinary proceedings are terminated if the Council does not reach a decision within such time limits. Article 757, paragraph 1 and Article 75¹⁰, paragraph 1 of the Organic Law of Georgia on Common Courts.

51 Letter of the Independent Inspector of 30 September 2019, N202/309-03-i.

52 According to the Organic Law of Georgia on Common Courts, article 75¹², paragraph 1, sub-paragraph “d”, Disciplinary proceedings will be terminated against a judge if the judge’s term for office is expired. It should be noted that the information on the website differs from the official information provided by the inspector.

53 Disciplinary cases N67-18-1; N81-18-1; N111-18; N123-18; N194-18; N200-18 and N231-18.

Disciplinary prosecution was initiated against a judge in 5 cases. 4 of these cases were triggered by a disciplinary complaint⁵⁴ and have been in proceedings for more than a year. In one case an independent inspector began a preliminary examination and investigation into facts revealed as a result of media reports.⁵⁵

7 cases were terminated unanimously due to the expiration of a statute of limitations.⁵⁶ Out of those cases, one case was on pre-examination stage up to one year,⁵⁷ one case up to 5 months,⁵⁸ 3 cases up to 4 months,⁵⁹ and 2 cases up to 2 months.⁶⁰

The High Council of Justice terminated a case without voting because of the repeated reopening of disciplinary proceedings⁶¹ against the same judge on the same grounds.⁶² The preliminary examination and inquiry of the case lasted for 8 months.

1. Unjustified Delay in Considering a Case

To determine whether a judge's conduct (including inaction) contains signs of disciplinary misconduct, the Council tries to determine what constitutes unjustified delay in considering a case, when the case should be regarded as delayed, and what the term "unjustified" entails. The legislation lacks definitions about this issue, hence the Council, like an inspector, in its evaluation relies upon the decisions of the Disciplinary Board and the Disciplinary Chamber. In order to justify the delay in the proceedings, these bodies, in turn, invoke approaches employed by the European Court of Human Rights according to which the **reasonable time** shall be assessed individually, by taking into account specific facts of the case and all the procedural steps holistically.⁶³

Similar to the Inspector, in its decisions the Council focuses on the complexity of the case, the actions of the parties, and the actions of the trial judge. To determine whether a judge committed an act, the Council also considers the following matters:

54 Disciplinary cases N41-18; N46-18; N142-17 and N224-17.

55 Disciplinary case N86-18-1.

56 Disciplinary case N74-18-4, N286-18-1, N286-18-2, N286-18-3, N82/303-1/18, N263/18 and N82/303-2-18.

57 Disciplinary case N74-18-4.

58 Disciplinary case N82/303-1/18.

59 Disciplinary cases N286-18-1, N286-18-2 and N286-18-3.

60 Disciplinary cases N286-18-1, N286-18-2 and N286-18-3.

61 According to Article 757 of the Organic Law of Georgia on Common Courts, it is inadmissible to re-initiate disciplinary proceedings against the same judge on the same grounds.

62 Disciplinary case N207/18.

63 For example, the Council found a delay in 1 month and 24 days to be insignificant. Disciplinary case N N81/18-2.

- Workload, which means all work performed by a court or judge. This is a combination of all the activities carried out by the court and judges;
- The number of pending cases - that is, the number of cases that a court or judge should consider;
- Cases to be heard - which is the number of cases that a judge has to hear over a period of time;
- Terms - the period of time during which a certain number or percentage of cases should be decided, given the length of the cases;
- Unconsidered cases - these are the number or percentage of pending cases that have not been dealt with within the prescribed period.⁶⁴ The Council also discusses the extent to which a judge's actions contribute to delaying the review of the case in relation to the overall timing of the hearing.⁶⁵

After examining additional circumstances, the Council found no disciplinary offense in the proceedings that lasted for one year and eleven months.⁶⁶ A similar approach was taken by the Council when the cases lasted for one year and three months⁶⁷ and two years and three months.⁶⁸

As of 1 September 2019, the Office of Independent Inspector has received 46 complaints of unjustified delay in adjudication.⁶⁹ As of 1 September,⁷⁰ the High Council of Justice of Georgia has terminated disciplinary proceedings in 12 cases.⁷¹ 11 of them were decided unanimously, while 1 disciplinary proceeding was terminated by 12 out of 13 votes.⁷² In all of the above cases, the deadlines for the preliminary examination and inquiry of the disciplinary case were violated. The court proceedings lasted from 11 months to 14 months.

64 For example, see disciplinary cases: N116/17, N99/17, etc.

65 Decision of 13 March 2019 on disciplinary case N110/18.

66 Disciplinary case N22-18.

67 Disciplinary case N72/18.

68 Disciplinary case N110/18.

69 Letter of the Independent Inspector of 30 September 2019, N202/309-03-i.

70 Refers to the decisions published on the website of the High Council of Justice. Disciplinary complaints are dated 2017 and 2018.

71 These cases are N22-18(11.03.19); N72-18(11.03.19); N79-18(11.03.19); N81-18-2(11.03.19); N93-18-1(13.03.19); N95-18(13.03.19); N99-17(11.03.19); N106-18(13.03.19); N110-18(13.03.19); N116-17(11.03.19); N116-18(13.03.19) and N207-17(11.03.19).

72 Disciplinary case N95/18.

2. Failure to perform duties or improper performance

In assessing complaints filed to the Office of Independent Inspector on the basis of failure to perform or improper performance of duties by a judge, the High Council of Justice, like the Inspector, based on the decision of the Disciplinary Chamber, discusses the difference between a judge's legal error and disciplinary misconduct.⁷³

Under Georgian law, a judge is protected from disciplinary liability for misinterpreting the norm. In particular, the incorrect interpretation of the law, based on the judge's inner belief, is not a disciplinary offense.⁷⁴ In view of the above, the Council explains that it is quite difficult to determine where is the boundary between the legal error, on the one hand, and disciplinary misconduct of a judge, on the other. Therefore, it is important to determine which actions of a judge should be considered disciplinary misconduct and which legal error.⁷⁵ Moreover, when discussing possible misconduct, the Council refers to Article 8 of the Code of Ethics, according to which a judge is obliged to perform his or her rights and duties efficiently, fairly and diligently.⁷⁶ It also focuses on whether a failure to comply with judicial obligations or negligence, or negligent compliance takes place systematically and without justifiable cause.⁷⁷

The Council will qualify a failure to perform or improper performance of an obligation as a disciplinary offence if a judge violates a party's constitutional as well as fundamental procedural rights or due process guarantees, which caused **harm** to the party, court or the public interest. If the judge acts within the limits of the procedural law granted to him/her, the Council terminates the disciplinary proceedings.⁷⁸ Therefore, the Council explains that a judge's wrongdoing/omission is only considered as disciplinary misconduct if it goes beyond the scope of the law and violates the imperative requirements of the relevant law.⁷⁹ This may be a violation by a judge of fundamental norms governing the work of the judiciary or the court, including the fundamental rights of trial participants or guarantees of a fair trial.⁸⁰

73 Decision of the Disciplinary Panel of 21 July 2016, Nds-sh/9-16.

74 The Organic Law of Georgia on Common Courts, article 75¹, paragraph 3.

75 For example see disciplinary case N89-18-1.

76 For example see disciplinary case N90/18-1.

77 Disciplinary case N101-18.

78 In discussing the matter, the Council relies on the decision of the Disciplinary Panel, which discusses the principle of legality (rule of law) and the discretionary power of a judge. According to the Panel, "the principle of legality is based on the rule of law. It is a constitutional principle that no one has the right to take any action against the requirements of the law. While exercising discretionary powers, a judge shall exercise that authority within the limits established by law and not go beyond the law. The court shall exercise the discretionary power vested in it by law", the decision of the Disciplinary Panel of 21 July 2016, Nds-sh/9-16.

79 For example see disciplinary case №89/18-1.

80 Disciplinary case N103/17.

Moreover, when the Council qualifies an action as improper, it takes into account the degree of harm caused, the systematic nature of the violation, whether the judge's error can be fixed, and the judge's motives. Thus, the Council has interpreted the failure to perform or improper performance of judicial duties as a violation of the fundamental norms governing the work of a judge or a court, including the fundamental rights of trial participants or guarantees of fair trial.⁸¹

Similar to the inspector, the Council also finds the delay in delivering decisions or judgments by a judge to be a failure to perform his/her duty or improper performance.⁸² When a court delivered its decision to a party in violation of 6 month period, the Council initiated the disciplinary proceedings against the judge. However, later the case was dismissed upon the judge's explanations.⁸³ The Council clarified that for the purposes of the disciplinary proceedings, it is relevant to identify and assess additional circumstances with regard to the violation of the established procedural rules.⁸⁴ When facing violations of constitutional as well as fundamental procedural rights or due process guarantees that have prejudiced the party, the court or the public interest, it is important to also consider how long it took to deliver the decision to the parties and the number of cases assigned to the judge and his/her workload.⁸⁵

In this case, the Council based on the judge's explanation and workload, considered that although it was confirmed that the judge had violated the procedural rule, yet it was due to the statistical data and workload of the judge. Moreover, taking into consideration the fact that the party did not suffer any harm and his/her fundamental procedural right (right to appeal) was not violated, the disciplinary proceeding was terminated.⁸⁶

As of 1 September 2019,⁸⁷ the Office of an Independent Inspector has received 61 complaints on failure to perform or improper performance of duty by a judge.⁸⁸ As of 1 September, the Council has terminated disciplinary proceedings in 11 cases.⁸⁹ Eight of them were decided unanimously, three other disciplinary cases were terminated by 10 out of

⁸¹ *Ibid.*

⁸² Disciplinary case N90/18-1, N103/17, and N 121/18.

⁸³ Disciplinary case N103/17.

⁸⁴ Disciplinary case N103/17.

⁸⁵ Disciplinary case N 121/18.

⁸⁶ *Ibid.*

⁸⁷ Letter of the Independent Inspector dated 30 September 2019, N202/309-03-i.

⁸⁸ Refers to the decisions published on the website of the High Council of Justice

⁸⁹ These cases are N89-18-1(11.03.19), N90-18-1(11.03.19), N90-18-2(11.03.19), N90-18-3(11.03.19), N91-18(11.03.19), N101-18(13.03.19), N103-17(11.03.19), N105-18(13.03.19), N109-18(13.03.19), N121-18(13.03.19) and N131-17(11.03.19).

14 votes,⁹⁰ 13 out of 14 votes,⁹¹ and 12 out of 13 votes.⁹² In all of these cases, the term set for the preliminary examination and inquiry of the disciplinary case was violated. The proceedings lasted for at least 11 months.

3. Violation of judicial ethics

Violation of judicial ethics, as a form of disciplinary misconduct, based on its wording entails the risks of using a general punitive mechanism. The disciplinary responsibility of judges for violating ethical norms has been critically assessed by the Venice Commission as early as in 2007. The Commission noted that far more precise provisions should be written when it comes to disciplinary liability.⁹³

According to the decisions of the Council, when considering violation of ethical norms, it takes into account judicial ethics, the Bangalore Principles, and the conclusions of the Judicial Advisory Board.⁹⁴ The Council states that *“a judge must adhere to ethical norms. Adherence and demonstration of such adherence to ethical standards are important elements of a judge’s life, both in professional and personal terms. What matters is not what a judge does or does not do, but what a judge does or does in the opinion of those around him. The fact is that society expects high standards of conduct from a judge. A criterion used to reveal incorrect behaviour is to determine whether such behaviour threatens a judge’s ability to perform the duties honestly, impartially, independently and qualitatively, or, if in the eye of an external observer such judge gives an impression that he/she cannot properly perform duties.”*⁹⁵

The decisions of the Council reveal that in practice, the ground for the disciplinary offence will qualify as breach of judicial ethics if the judge’s actions are not ethical and this does not specifically imply a breach of the rules of judicial ethics. Wide interpretation of the norm is vague for a judge as it is not clear for him/her what could constitute disciplinary misconduct and what represents an attempt to keep order in a courtroom.

For example, the Council found no violation of ethical norms when the judge told the attendees: *“You can go outside and laugh as much as you want”*.⁹⁶ On the other hand, the

90 Disciplinary case N89/18-1.

91 Disciplinary case N103/17.

92 Disciplinary case N131/17.

93 EMC and IDFI, Assessment of the Judicial Reform, page 46.

94 Disciplinary case N96/18.

95 Disciplinary case N96/18.

96 Disciplinary case N96/18.

comment addressing the party representative “*I will of course not charge you for my reasoned judgment*” was considered disciplinary misconduct.⁹⁷

As of 1 September 2019, 25 cases concerning violation of ethical norms were filed to the Office of Independent Inspector.⁹⁸ As of 1 September, the Council terminated disciplinary proceedings in 3 cases.⁹⁹ In all cases, decisions were made in more than a year after filing the complaint. No prosecution of the judge was initiated in any of the cases. The decision to terminate the disciplinary case was unanimous in all of them.

4. Disciplinary appeal of an unlawful decision

The Georgian legislation does not define the objective of the disciplinary proceedings, which in theory creates a risk of the administration of parallel justice.¹⁰⁰ This increases the number of disciplinary complaints and applications that challenge the legality of the decisions rendered by the judges. From 1 January to 1 September 2019, 77 cases invoking the lawfulness of the act adopted/issued by a judge were filed to the Office of Independent Inspector.¹⁰¹ As of 1 September 2019, disciplinary proceedings on 17 cases were terminated unanimously.¹⁰²

During disciplinary proceedings it is prohibited to scrutiny the lawfulness of the acts rendered by a judge.¹⁰³ The Council deliberates on appeals related to the lawfulness of an act by only assessing whether a judge acted within the powers conferred on him/her by the procedural law when making an appropriate decision/ruling. The Council lacks entitlement to discuss the lawfulness of a decision/ruling rendered by a judge on the basis of his/her inner belief. Evaluation and decision-making are the sole responsibility of the court.¹⁰⁴

Although such cases are simple, it takes up to one year to conduct their preliminary examination and inquiry.

97 Decision of the Disciplinary Chamber, disciplinary case N 4/01-2018.

98 Letter of Independent Inspector, dated 30 September 2019, N202/309-03-i.

99 Disciplinary case N96/18, 112/18 and N91-18.

100 Coalition for an Independent and Transparent Judiciary, *The Judiciary: Reforms and Perspectives*, 2017. System of Judicial Accountability, page 123.

101 Letter of the Independent Inspector, dated 30 September 2019, N202/309-03-i.

102 Refers to the disciplinary cases published on the website of the High Council of Justice: N62-1-18(11.03.19), N62-2-18(11.03.19), N67-18-2(11.03.19), N72-18(11.03.19), N74-18-1(11.03.19), N74-18-2(11.03.19), N85-18(11.03.19), N90-18-1(11.03.19), N90-18-2(11.03.19), N91-18(11.03.19), N93-18-2(13.03.18), N93-18-3(13.03.18), N94-18(13.03.19), N97-18(13.03.19), N107-18(13.03.19), N112-18(13.03.19), and N118-18(13.03.19).

103 Organic Law of Georgia on Common Courts, article 75¹⁰, paragraph 5.

104 For example, see disciplinary cases N62-1-18, N62-2-18 and others.

V. Decisions of the Disciplinary Board

Since enactment of the “Third Wave” reform of the judicial system, the Disciplinary Board has heard 4 cases - 1 case in 2018 and 3 cases in 2019.¹⁰⁵ Only one of the cases dealt with a violation of the judge’s ethical norms, the rest were related to unjustified delay in the proceedings. In one case of unjustified delay, the judge was acquitted by the Disciplinary Board of the Common Courts,¹⁰⁶ and in two cases the judge was found guilty of disciplinary misconduct and was imposed a disciplinary measure - a private recommendation card.¹⁰⁷ A private recommendation card was also imposed on a judge for violating judicial ethics.¹⁰⁸

Unjustified delay in considering a case

Timeframes for considering a case are extremely important in the context of the right to a fair trial, as setting a timeframe is a fundamental step to measure and evaluate the effectiveness of case management and to conceptually identify ways to reduce the accumulated cases.¹⁰⁹ One of the major challenges in the judicial system is the multitude of cases in the courts and their excessive caseload. This is evidenced by interviews with individual judges as part of the project, as well as statements by members of the High Council of Justice, various surveys¹¹⁰ and statistical information.¹¹¹ Accordingly, it is difficult to determine to what extent a judge’s culpability can be assessed when the case is delayed. It is arguable whether unreasonable delay should be sought in the number of actions or omissions by a judge within a certain period of time, or in the intent of a judge to delay the case or gross negligence that led to one.¹¹²

According to the Organic Law of Georgia on Common Courts, the Disciplinary Board makes a decision based on consistent and convincing evidence.¹¹³ To do so, it must determine whether a judge has committed the act, whether the act is a disciplinary offense

105 Decisions of the Disciplinary Panel of the Common Courts [available at: <https://bit.ly/2m1pge0>, last visited on 01.09.2019].

106 Decision of 21 January 2019, N3/01-2018.

107 Decision of 21 January 24 September 2018, N2/01-2018 and decision of 21 January 2019, N5/01-2018.

108 Case dated 21 January 2019, N4/01-2018.

109 Decision of the High Council of Justice, dated 11 March 2019, N22/18.

110 For example see the PROLoG supported study – Assessment of the Need for Judges in Georgia [available at: <http://ewmi-prolog.org/images/files/4566AssessmentoftheneedforjudgesinGeorgia-ENG.pdf>, last visited on 01.09.2019]. Also IDFI’s research: Compliance with Procedural Time Limits for Considering Cases and Preparing Judgments in Tbilisi City Court – Practice of 2015-2018 [available at: https://idfi.ge/en/compliance_with_deadlines_in_georgian_court, last visited on 01.09.2019].

111 For example, Tbilisi City Court statistical information by years [see: <http://tcc.gov.ge/ka/Statistics>, last visited on 01.09.2019].

112 This does not imply actions by a judge that, in its substance, indicate criminal liability.

113 Organic Law of Georgia on Common Courts, Article 75⁴⁴, paragraph 1.

and whether the judge is to blame. Only upon confirmation of all three circumstances can the Disciplinary Board decide to impose disciplinary liability on the judge. Otherwise, he/she will be acquitted.¹¹⁴

The Board deliberates in all of the above decisions on how long the case can be regarded as delayed and what the term “unreasonable” means. Like the decisions of an independent inspector and the High Council of Justice, the Board has, in order to determine unreasonable timeframes, relied on the practice of the European Court of Human Rights, which assesses (a) the complexity of the case, (b) the actions of the parties in the case, and (c) the actions of the trial judge.¹¹⁵

According to the Disciplinary Board’s assessment, failure to take procedural action by a judge for 1 year and 10 months is clearly a “culpable” delay in the proceedings. However, the Board does not discuss the facts, as to what might have caused this. Unlike the Inspector and the Council, the Board does not discuss what the judge’s workload was, the issue of complexity, what categories of cases did the judge consider during the period when the Board found signs of disciplinary misconduct.¹¹⁶

The practice of the Disciplinary Board in this respect is noteworthy. The Board only assesses the judge’s workload in an acquittal decision,¹¹⁷ in other cases¹¹⁸ the judge’s guilt is established without assessing the judge’s workload, even when the delay is caused by a multiplicity of cases, having no assistant and the combination of the functions of a magistrate judge.¹¹⁹

In its acquittal decision, the Board deliberates on the logical reasoning, namely the internal court factors, such as a judge’s workload and shortage of judges, that is, the scarcity of judges needed for efficient justice.¹²⁰ The discretionary use of these facts in different decisions raises unanswered questions and emphasizes the need for uniform, consistent practice. The scarcity and workload of judges in the courts give rise to objective reasons for delaying the proceedings. Imposing disciplinary measures on a judge for delaying the case proceedings involves the risks of undermining the independence of the judge and may be used as a leverage to influence them. Therefore, it is important in each particular

114 *Ibid.*

115 Decision of 21 January 2019 rendered by the Disciplinary Panel of the Judges of Common Court, N 5/01-2018 and N 3/01-2018.

116 Decision of the Disciplinary Panel of the Judges of Common Court of Georgia, of 24 September 2018, N2/01-2018.

117 Decision of 21 January 2019, N3/01-2018.

118 The decisions are assessed after the enactment of the Third Wave of changes to the judicial system.

119 Decision of 24 September 2018 rendered by the Disciplinary Panel of the Judges of Common Court N2/01-2018.

120 Decision of 21 January 2019 rendered by the Disciplinary Panel of the Judges of Common Court N 3/01-2018.

case to determine whether the breach of the timeframe was due to objective circumstances.

Violation of Norms of Judicial Ethics

The Disciplinary Board rendered an interesting decision regarding the violation of norms of judicial ethics. The author of the disciplinary complaint referred to inappropriate conduct by a judge during the hearing that violated the court's authority and trust.¹²¹ Namely, the judge told the party that "*would not charge*" for a reasoned decision.

The judge's explanation indicated that the party's representative had deliberately avoided answering the court's questions and had sought to divert the court's attention to another matter, hence the controversy between the judge and the representative had been purely legal. Despite the judge's explanation, the Board used a disciplinary measure in the form of a private recommendation card.

According to the Board, the audio protocol showed that during the conversation with the applicant the judge had not used such words, inappropriate form of speech or intonation which would evidence the ironic attitude towards the lawyer. Nevertheless, the judge's comment to a lawyer, or directly to a party - "*I will not charge you for reasoned decision*" - was wrong and the judge should not have addressed the lawyer in this way. The Disciplinary Board found this discourse unethical, as it affected the prestige of the judicial system, which had a direct impact on society's trust towards the judiciary. According to the Board, all judges should be aware and take into account that, given the high status of a judge, each of them is subjected to constant legitimate public interest. For this reason, a judge should foster the professionalism in the judiciary and establish and raise public confidence in fairness and impartiality of the judiciary. The Board also notes that each judge should protect not only himself/herself, meaning the authority and prestige of a separate judge and person, but also the authority of the judicial system as a whole.

An analysis of the decisions of the High Council of Justice and the Disciplinary Board reveals that there is no common practice on such a general and evaluative issue as a violation of judicial ethics. This again highlights the need for concrete types of misconduct enshrined in the legislation in order to make the law clearer and more foreseeable.

121 Decision of 21 January 2019 rendered by the Disciplinary Panel of the Judges of Common Court N 4/01-2018.

VI. Decisions of the Disciplinary Chamber

The Chamber of Disciplinary Cases of the Supreme Court of Georgia considered 4 cases in 2019 in relation to the complaints concerning the former judges of the Tbilisi Court of Appeals and the Supreme Court.¹²² All of them concerned appeal of the 2005-2007 decisions of the Disciplinary Board, as a result of which these judges were dismissed by way of disciplinary proceedings.¹²³

All the above cases have been returned to the Disciplinary Board by the Chamber of Disciplinary Cases due to newly discovered circumstances. The new circumstances were the decisions of the European Court of Human Rights. The Disciplinary Chamber overturned all decisions of the Disciplinary Board (decisions made in 2005-2007) and returned the case for re-examination. In one of them, the Disciplinary Board terminated the case on the basis of statute of limitations, which the party appealed to the Disciplinary Chamber again, but the Chamber upheld the decision of the Disciplinary Board.

It should be noted that the website of the Supreme Court of Georgia does not contain any decision of the Chamber taken in light of the amendments to the legislation within the framework of the “Third Wave” of judicial reform.

Recommendations

- To foster accountable justice, to avoid a sense of corporatism and promote public trust in the courts, it is important for the authorities involved in the disciplinary proceedings of judges to respond promptly, objectively and efficiently to the disciplinary misconduct of judges;
- It is important to take effective steps in the process of disciplinary proceedings of judges that will avoid delay in the proceedings. Such may be the frequency of sessions of the High Council of Justice on disciplinary cases;
- It is important to establish uniform and consistent practice in the disciplinary proceedings. This applies to the decisions of both the High Council of Justice and the Disciplinary Board;

122 Decision of 25 January 2019 on disciplinary case Nssd-11-18; decision of 21 March 2019, on disciplinary case Nssd-04-19, decision of 26 March 2019 on disciplinary case Nssd-06-19 and decision of 4 July 2019 on disciplinary case Nssd-21-19.

123 The decision of the Disciplinary Panel [available at: <http://www.supremecourt.ge/court-decisions/disciplinary-cases/> (last visited on: 01.09.2017)].

- When interpreting specific disciplinary misconduct, it is important to avoid a broad interpretation of the provision to exclude the risks of influence on an individual judge;
- In order to improve the system of disciplinary liability, it is necessary to further refine the draft law prepared within the framework of the “Fourth Wave” of judicial reform and for the Parliament to adopt it promptly;
- It is important that the types of disciplinary misconduct include responsibility for the judge’s actions, which is contrary to the norm of clearly defined law and with respect to which there is no obscurity, if the judge committed the aforementioned act with clear and persuasive dishonesty and disrespect for human rights, which caused significant harm (“legal error plus”). In this case, it is important that disciplinary liability is imposed after the superior court has confirmed an error (if any);
- To strengthen the institutional independence of the Independent Inspector, the draft law developed under the “Fourth Wave” should provide for the appointment of an Independent Inspector by 2/3 of the all Council members to ensure that non-judge members are truly involved in the decision-making process;
- For greater transparency of the disciplinary proceedings, the draft law should envisage publication of opinions of an independent inspector as well as decisions made by the Council on bringing a disciplinary charge against a judge, concealing the identification data of the parties;
- In order to ensure that the Disciplinary Board renders a fair decision (the possibility to take into consideration the opinion of majority of the members), the draft law should envisage decision-making by the Board by a majority of the full composition.