

# **Analysis of the Judicial Liability System**

(National Legislation, International Standards and Local Practices)

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ადამიანის უფლებების სწავლებისა და მონიტორინგის ცენტრი



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## Introduction

The right to independent and fair trial is the fundamental human right enshrined in number of international instruments, constitutions and laws of various countries. However, the concept of judicial independence is far broader than the protection of a single right. It is widely recognized, that the independent and unbiased judiciary is a substantial precondition for the protection of human rights in general<sup>1</sup>. Weakening of the judicial independence guarantees is directly linked with the increase of frequency and gravity of the human rights violations<sup>2</sup>. Considering all the above mentioned, one of the major responsibilities of the state is to take all the necessary measures to guarantee the independence of the judiciary.<sup>3</sup>

Independence means freedom from any improper influence coming from the outside of the court (whether it is one of the branches of the authority or some groups having their interest), as well as independence from any possible internal influences. The UN Basic Principles on the Independence of the Judiciary outline, that the “[Judiciary shall be independent from] restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any actor or for any reason”.<sup>4</sup>

It should be noted, that according to the UN principles, as well as other international instruments, the independence is not only the right, but also the responsibility of the judiciary. For example: the recommendation by the Council of Europe issued in 2010 underlines the following:

*“The independence of the judiciary secures for every person the right to a fair trial and therefore is not a privilege for judges, but a guarantee of respect for human rights and fundamental freedoms, allowing every person to have confidence in the justice system;”<sup>5</sup>*

The recommendation also outlines:

*“The independence of judges is not a prerogative or privilege granted in judges’ own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice.”<sup>6</sup>*

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<sup>1</sup> See for example: The Commission on Human Rights, Resolution 1994/41 adopted at the 55th meeting of the Commission on 4 March 1994. Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)

<sup>2</sup> The Commission on Human Rights, Resolution 1994/41 adopted at the 55th meeting of the Commission on 4 March 1994.

<sup>3</sup> See for example: General Comment 32, also see: Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)

<sup>4</sup> Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

<sup>5</sup> Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies), Preamble

Wearing the robe of the judge grants the person not only the rights, but also the responsibilities. As outlined by the European Networks of Councils for the Judiciary (RECJ), the gradual evolution of the role of the judge resulted in the situation, when the judges are not just “law presenters” but to some extent the judge is also the law-maker, that requires acting with responsibility and respect of the ethics rules.<sup>7</sup> Therefore, the judicial independence being the most important guarantees, the need for the prevention of judicial misconduct and using the judicial independence as a prerequisite for it, still exists.<sup>8</sup> It is important for the independence to be balanced by the accountability of the judge in front of the law and the public. Within the democratic governance, the judicial authorities, like any other institution shall be accountable in front of the people.<sup>9</sup>

The above presented need and the goals of the accountability system are clearly and strictly formulated in the mandate of the Commission on Judicial Performance of the State of California:

*“The commission's mandate is to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system. An effective method of disciplining judges who engage in misconduct is essential to the functioning of the judicial system.”*<sup>10</sup>

Accountability and independence may seem to be the contradictory notions, although in reality the accountability reinforces the independence of the judiciary. The accountability of the judiciary, realization of its responsibilities in front of the public may reduce its vulnerability against the outside pressures, since in this case, the argument that the judge was forced to take certain decision by external forces can not exist.<sup>11</sup> However the accountability system taken separately is not sufficient to achieve the set goals. The judicial independence is a complex issue and it covers topics such as: the rule of appointment, tenure of the judges, remuneration of judges and etc.<sup>12</sup>

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6 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies), also see: Draft Universal declaration on the Independence of Justice. “Singhvi declaration”;

7 European Network of Councils for the Judiciary (ENCJ) ENCJ WORKING GROUP, Judicial Ethics Report 2009-2010

8 See: International Principles on the Independence and Accountability of Judges and Lawyers and Prosecutors, Practitioners Guide No.1, International Commission of Jurists.

9 GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development (2002)

10 <http://www.cjp.ca.gov>

11 GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY, Office of Democracy and Governance Bureau for Democracy, Conflict, and Humanitarian Assistance U.S. Agency for International Development (2002)

12 Ibid

## About the Study

“The Analysis of the Judicial Liability System is the study developed in the framework of the **Coalition for an Independent and Transparent Judiciary**. The study incorporates the system analysis of judicial accountability, the review of the national legislation, international standards and the best practices of other states, as well as analysis of the local practices concerning the disciplinary and criminal liability of judges throughout the recent years.

The initial goal of the study is to support the reform of the Judicial Accountability System through the reinforcement of the judicial independence and realization of the need of relevant tools.

In general, the independence of an individual judge, as well as the judiciary as a whole, is the crucial guarantee for fair, effective and efficient justice that needs to be strengthened with the help of the undergoing and future reforms. Besides, it is important for the system to promote public confidence. The beneficiaries of the judicial system should be confident that the adequate accountability tools are available inside and outside the system that will serve as the guarantees for preventing nonprofessional and dishonest actions and prompt and effective response to the cases of misconduct during the justice administration procedure. The healthy system of judicial accountability and liability is an essential tool for ensuring the quality justice administration and promoting public confidence towards judicial system.

As mentioned in the beginning, the study focuses on the system analysis, that envisages the analysis of the scales and differences between the disciplinary and criminal liability of judges, gaps and weaknesses of the acting accountability system, and visions of future development of the system. The review of the international context enabled the authors of the study to draft the presented recommendations.

*The study is composed of 3 basic parts: Part I – is dedicated to the analysis of the local legal framework on the judicial liability; Part II – presents the review of the international standards and best practices of the other countries; Part III – is the analysis of the practices of judicial liability. The paper provides the basic findings of the study and the recommendations drafted by the authors of the study.*

The authors of the study are grateful to the organizations and persons supporting the conduct of the given study, as well as the persons participating in the interviews and focus groups.

## Methodology

The study included several directions: analysis of the goals of the disciplinary liability system of judiciary; grounds, rules and procedures of imposing liability; the role of the institutions and other authorized persons undertaking the disciplinary proceedings; rights of the judges in the disciplinary proceedings; types of sanctions and etc. In addition, the line between the disciplinary responsibility and the criminal liability of judiciary was analyzed. The Project also envisaged the review of the international standards and practice of the other states concerning the judicial accountability issues.

The study was conducted using the following methodology:

- Retrospective analysis of the legal acts;
- Analysis of the international standards;
- Study of the legislations of other states in the fields of disciplinary, civil and criminal liability of judges;
- Focus groups with the organizations working on the justice issues;
- Individual in-depth interviews with persons working on justice issues, including former and practicing judges, representatives of the High Council of Justice of Georgia, Disciplinary Panel and other bodies;
- Collection and analysis of the public information;
- Collection and analysis of the decisions rendered against the judges as a result of disciplinary and criminal proceedings.

### *Analysis of the Legal Acts;*

Considerable part of the paper is dedicated to the analysis of the legal framework regulating the judicial responsibility. For this purpose, the authors of the study have analyzed all the basic legal acts in this field. The focus was made not only on the acting publications of the norms, but also on their old or/and primary versions, as well as draft laws available during the study period that were aimed at amending the norms of the interest of the study.

The topics presented in the study were selected considering their acuteness. The following basic topics were selected: grounds of disciplinary liability and punishments, challenging topics of the disciplinary

proceedings, transparency of the disciplinary liability system, line between the disciplinary responsibility and the criminal liability.

The authors of the study have selected the topics considering the problems outlined in the available reports, studies, public meetings and conferences, as well as the experiences of relevant organizations.

### *Analysis of the International Standards*

The study presents the review of the standards and opinions by different international organizations and experts concerning the independence and responsibility of judiciary. They include the Council of Europe Committee of Ministers, European Court of Human Rights, Venice Commission, European Judicial Council, UN Human Rights Committee, UN Special Reporter on the issues of Independence of Judiciary and Prosecutors, OSCE office of Human Rights and Democratic Institutions and etc. In addition number of important international documents, such as the European Charter on the Judicial Status, Kyiv Recommendations and others were analyzed in the framework of the study.

### *Experience of other states*

The organizations conducting the study also reviewed the legislations of the states with various legal systems and history such as the US, the EU member states (for example UK, Germany, Belgium, Italy, the Netherlands and etc.), the former Soviet Union Countries (for example, the Ukraine) and etc. The legislations of other states are reviewed to the extent that concerns the urgent and problematic issues preselected by the authors of the study. While studying the legislations of specific states, the standards determined by the above mentioned international organizations were used for guidance. The examples of these states are referred to illustrate the use of the relevant standards in the state practices, and in some cases to demonstrate the practice other than the given standard, which also aims to encourage the discussions on problematic issues.

### *Focus groups*

During the study, the authors conducted 2 focus groups according to the predeveloped discussion plan. The participants of the first focus group were the member organizations of the Coalition for an Independent and Transparent Judiciary. The second focus group was composed of the participants from



those international institutions that have expertise in the justice issues. In total 7 persons participated in focus groups, including the representatives of the following organizations: “Article 42 of the Constitution”, the “Human Rights Center”, the “Center for Business and Economic Research” (CBER), the “International Society for Fair Elections and Democracy” (ISFED), the “Georgian Lawyers for Independent Profession”, UNDP, US Department of Justice. The focus groups were held in February and April, 2014.

### *Interviews*

For the additional identification of the problems and analysis of the attitudes and opinions, organizations undertaking the research conducted individual, in-depth interviews. The interviews were conducted according to the predesigned interview plan that consisted of about 30 questions on disciplinary and criminal liability of judiciary. The authors asked over 30 persons to take part in the research. Finally 17 persons agreed to participate. Therefore 17 interviews were held. The respondents of the interviews were the practicing and former judges, representatives of the Disciplinary Panel and the Disciplinary Chamber, lawyers, representatives of the Prosecutor’s Office:

- 6 practicing judges;
- 2 former judges;
- 2 prosecutors;
- 3 lawyers;
- 2 non-judge members of the High Council of Justice;
- 2 non-judge members of the Disciplinary Panel.

Interviews were conducted in February and March, 2014.

### *Obtaining and analysis of the public information*

During the research, the authors obtained most of the information by means of requesting the public information. Considering the research issues, the organizations addressed the High Council of Justice, the Disciplinary Panel and the Disciplinary Chamber, the Supreme Court of Georgia, the Archives of the

Common Courts and other subjects to request the needed public information. It should be noted, that as a rule, the parties would immediately respond to the written requests of the authors of the study.

### *Analysis of the Judicial Liability practices*

The organizations undertaking the research, studied those cases of disciplinary prosecution of judges that are available to interested parties. The decisions rendered by the Disciplinary Panel are published since 2012. By the time of the research 6 cases were available and they are all published on the web-page of the High Council of Justice of Georgia.

As for the cases involving criminal prosecution, the authors of the research requested the information from the High Council of Justice of Georgia, the Supreme Court of Georgia, different city (district) and appellate courts, court archives and the Prosecutor's Office. According to the information provided by the Supreme Court of Georgia, since 2000 twenty-two judges were subjected to criminal liability for various offences, including offences related to public service. The authors of the research collected and analyzed the majority of the judgments discharged against the judges since 2000.

## **Basic Findings and Recommendations**

### **The basic findings of the study:**

#### ***General issues:***

- The disciplinary liability system is not stable neither institutionally nor on the legislative level, which provides for the possibility of using inconsistent and biased practices against the judges;
- Extent of disciplinary liability is restricted only by the judges of common courts. The legislation does not provide the tool of supervision over the members of the High Council of Justice or/and tool to supervise the observance of the ethics norms.

#### ***Grounds of disciplinary prosecution:***

- The legislation does not provide the general definition of a disciplinary misconduct to be used as the grounds for bringing disciplinary liability against a judge, neither definitions/explanations of specific types of disciplinary misconduct;

- The law does not define the list of the actions that can not serve as the grounds for holding the judge liable such as for example the legal error. Since the law does not provide the definition of the types of disciplinary misconduct, the one and the same conduct of different judges may be qualified differently by disciplinary bodies, which will hinder the establishment of the predictable legal framework;
- Deleting the “grave violation of law” from the disciplinary grounds is a positive step, however, it provides for the possible to fit the conduct qualified as grave violation of law under the improper performance of judicial authorities. Therefore, the legal amendments in fact did not reduce the risk of interference in the judicial practice;
- Since 2012, after the “grave violation of law” was deleted from the types of violations, up to the research period (April, 2014), the majority of decisions rendered by the Disciplinary Panel (5 decisions out of 6) were related with the improper performance of judicial authorities;
- The acting norms of judicial ethics are of too general in nature and on one hand even the judges have vague idea of their responsibilities and on the other hand, the public is confused about the circumstance when the judge should be held liable;
- It is not clear, what they mean in “act of corruption not lead to criminal liability”, which is one of the disciplinary violations while the Article 338 of the Criminal Code of Georgia involves all the elements of offence of corruption;
- As a result of the interviews with the practicing and former judges, it was concluded, that they do not have the clear understanding of what can serve as the grounds for disciplinary liability;
- Separate types of disciplinary misconduct (for example: an action inappropriate for a judge) are the independent forms of violation in the law on the one hand and on the other hand, violations of the norms of the Code of Ethics. Violation of the Code of Ethics is an independent violation according to the law.
- An activity incompatible with a judicial office is the form of disciplinary misconduct, as well as the ground for the automatic removal of the judge from the office;
- The acting legal framework does not provide possibility of expunging the punishment for the dismissed judge or/and legal possibility of returning the dismissed judge to the judicial system.

### *Procedure of disciplinary prosecution*

- The note in the law stating that the disciplinary proceedings against a judge can be initiated on the bases of the report by the servant of the Office of the High Council of Justice of Georgia, is dangerous for a judge. This enables a servant to launch inquiries against a judge proactively, without having any grounds, aiming to reveal some violation;
- The right of the chairman of the court to initiate disciplinary proceedings against a judge, independently from the High Council of Justice poses a threat to the independence of the judiciary and may serve as the bases for unhealthy relationship inside the judicial system;
- The law does not clearly distinguish the stages of disciplinary proceedings from each other. The persons authorized to make decisions on separate stages are not determined either;
- The law requires the approval of 2/3 of the Council members to resolve the disciplinary issues, although the legislation does not provide the stage, or stages of disciplinary proceedings where the approval of the 2/3 is needed. It means, that at least 10 Council members have to support the decision of any type concerning the disciplinary issues;
- Demand on the approval of 2/3 of the Council members in case of termination of prosecution may cause delay of the case adjudication and during the statute of limitations maintaining of the case under consideration;
- Procedure rights of a judge during the consideration of disciplinary case require further clarification. The law does not clearly define the issue of accessibility to the case files, timeframe for the preparation, right of reasoned decision and etc.;
- The law does not determine the deadline for rendering decisions on disciplinary issues, which leads to the delay of case adjudication;
- The law does not clearly provide the fair case consideration procedures (including the rights of the judges), the standard of proof, or the issues of obtaining, admissibility and legal power of evidences;
- Submission of a complaint automatically leads to initiation of a prosecution against the judge regardless of reasoning and grounds behind the complaint;

- Disciplinary panel can make a decision with a majority of votes, which theoretically can be less than a half of the panel members (decision of 2 members).

### ***Transparency of the disciplinary liability system***

- Confidentiality of the decision rendered on the complaint in the High Council of Justice makes it impossible to study and analyze the practice of disciplinary misconduct and it is unclear for the judges, plaintiffs and general public what is the explanation of the Council concerning the specific action;
- The High Council of Justice is restricted with publishing only the statistical information on the disciplinary cases. The Council does not provide the generalization of the available practice and it was negatively assessed from the side of respondents.
- A judge wishing his/her proceedings to be public for better protection of his/her interests does not have a legal means of requesting the transparency of the proceedings that may harm the interest of his/her defense;
- Majority of respondents negatively assessed the full confidentiality of the disciplinary proceedings in the past and expressed the willingness to make proceedings more transparent in the future. However, all the respondents outlined the need for finding the balance between the interest of individual judge and the legitimate public interest.

### ***Criminal Liability System:***

- The chapter of the Criminal Code of Georgia on the crimes committed by the public servants does not contain special guidelines on judiciary. Therefore, it provides the possibility to be fitted to a wide range of relationships, that may be threatening;
- It is difficult to draw a line between the disciplinary misconduct and the crimes envisaged under the Criminal Code of Georgia;
- Differences between the actions involving elements of corruption are not clear, although the law qualifies them as disciplinary misconduct and crime at the same time;

- The line between the crime of abuse of authorities and the abuse of official powers to detriment to the interests of justice and the interests of the office, which is the disciplinary misconduct;
- In the majority of cases, the substantial damage is the basic sign for reviewing the action beyond the disciplinary prosecution framework, as a criminal action. But the concept of substantial damage depends on the evaluation and provides the prosecution bodies with unreasonably broad authorities;
- General dispositions of the Criminal Code of Georgia such as exceeding official authorities and service-related negligence require further clarification to make it clear when can they be applied against the judges;
- Disposition of “deliberate illegal imprisonment” from the CC contains risk of prosecuting the judge on the grounds of the decision contents rendered by him/her;
- “Individual consent” of the Chairman of the Supreme Court of Georgia on the criminal liability does not serve as relevant guarantee for the protection of a judge and contains a risk of creating unhealthy relationship between the judges and the chairman of the Supreme Court;
- The immunity of a judge is of absolute nature, which means, that an approval is needed to hold a judge liable under any type of crime, including non-service related crime;
- Besides the substantial norms, the provisions of procedure legislation may also contain risks that for example does not envisage special/different principle for the interrogation of a judge. This may be in contradiction with the Constitution, prescribing, that the judge shall not be held liable for the decision he/she has rendered.

### **Basic Findings of the Study of the International Standards and practices of Various States:**

#### ***Grounds of disciplinary proceedings and sanctions:***

- Conduct improper to the professional status of a judge, that is grave and can not be forgiven and that disgraces the judiciary as an institution may serve as the grounds for launching disciplinary prosecution;

- In addition, it should be specified what can be considered as an action of this type by the National legislation, that should on its side comply with the standards of clarity and predictability of the law;
- General and vague formulation of grounds of disciplinary liabilities pose threat to the independence of judiciary;
- The law should specify gravity level of improper action that would lead to imposition of disciplinary sanction;
- As a rule, a judge should not be held liable for the contents of the rendered decision, legal error, misinterpretation of the law, facts or evidences, or because the decision rendered by him/her was changed or annulled by a higher instance court;
- Disciplinary sanctions should be prescribed by the law and they should be applied based on the principle of proportionality;
- Early discharge of a judge from the office is allowed only in exceptional cases, such as: incapacity of a judge to proceed with fulfilling his/her duties, commission of a criminal offence, or substantial violation of rules of disciplinary conduct;
- It is preferable if the law implies that after the expiration of certain period, the judge should be considered under no effect of disciplinary penalty, if the later does not commit other disciplinary violation during this time.

***Disciplinary prosecution procedure:***

- Throughout the disciplinary proceeding, a judge shall have the right to fair trial (for example: accessibility to case materials, right to have a representative, presumption of innocence and etc.);
- A judge should also have the right to reasoned decision and appealing to higher instance court;
- A charge, or a complaint submitted against the judge shall be examined promptly, without delay;
- Examples from the practice of other countries reveal that the stages of disciplinary proceedings are strictly differentiated from each other. On the starting stage, the disciplinary bodies are examining, whether the disciplinary complaint submitted against a judge complies with the

formal admissibility criteria (for example: if the mentioned action fits into the list provided by the law on disciplinary violations), whether the complaint contains all the important information and whether this information is sufficiently reasoned. (At this stage, frequently the judge is not even informed about the received complaint); after the complaint overcomes the mentioned stages, the detailed information is being collected, the judge is informed about the case proceedings and provided with a possibility to defend himself/herself. This stage involves examination of the complaint and the obtained information, and rendering decision by relevant bodies.

***Transparency of the Disciplinary Liability System:***

- The grounds for the initiation of the disciplinary proceedings, the proceedings itself and the rendered decisions need to be transparent;
- Internal legal framework of many states envisages the obligation of the disciplinary proceedings body to inform the applicant about the results of the complaint filed by him/her concerning the disciplinary proceedings;
- In the context of the rights of an applicant, the examples of England and Texas, US are interesting to review. In England, an applicant has the right to address the ombudsmen with a separate complaint for the violations committed in the process of examining his/her complaint and in the State of Texas, US an applicant has the right to appeal the decision rendered on his complaint;
- Different levels of transparency obligation may be determined for different levels of disciplinary proceedings. If the judge is requesting to make the proceedings public, confidentiality of the proceedings may violate the right of the later on fair trial. But if the judge is requesting the confidentiality of the proceedings the relevant authority should make a decision whether it is admissible from the point of view of observing balance between the interest of a judge and the public interest;
- Regardless of whether the trial is public, or closed, the decision is public in any case. However, for example according to the US legislation public, as well as nonpublic sanctions (for example: warning), the information on their imposition and specific contents shall not be made public. The applicant is provided only with the information about the type of the imposed measure.



### ***Criminal responsibility System:***

- Criminal and civil immunity adequate to a judge should be guaranteed by the Constitution, or an act of similar power. The procedure of removing this immunity should be prescribed in the law;
- According to the international standards, immunity of a judge is of functional nature, which means, that immunity applies only while exercising judicial authority, or actions undertaken in the judicial capacity. In other cases, he/she is held liable as an ordinary citizen;
- If during the interpretation of the law, assessment of the facts and evidences, the judge acts with negligence, or with ill faith, the international standards allow to bring disciplinary, as well as criminal liability against him/her. (This is also possible according to the legislations of number of EU member states).

### ***Other Recommendations:***

- The tool for restoring the illegally dismissed judge in the office on the same position (or position similar to the one held) need to be available. In addition, the judge should retain the same rank, class, salary and other benefits that he had by the time of removal from the office.

### **The authors of the study have elaborated the following recommendations:**

#### ***General issues:***

- The law should clearly define the goals of disciplinary system. Besides, it is important to broaden the scope of disciplinary system, so that it covers the ethics issues of the members of High Council of Justice and the Disciplinary Bodies;
- The rule for the formation of the disciplinary panel should be changed and it should be composed of the members of the Conference of Judges instead of the plenum.

#### ***Grounds of Disciplinary Misconduct and Punishments:***

- Definition of each disciplinary misconduct should be added to the law;

- If the grounds of disciplinary misconduct are repeated in the Code of Judicial Conduct and the Law on Disciplinary Proceedings, the violations should be retained only in the Code of Ethics;
- The law should indicate/refer to the specific norms of the Code of Ethics the violation of which may lead the to the disciplinary liability of a judge;
- The conference of judges should start working on the revision of the Code of Ethics;
- Corruptive offence should be deleted from the types of disciplinary misconduct. Corruptive actions should fully be covered by the Criminal Code of Georgia;
- An activity incompatible to judicial office should only be the form of disciplinary misconduct and should be deleted from the grounds for dismissing the judge from the office;
- Disciplinary body should explain the non-performance or improper performance of judicial duties in a manner that covers all the activities that were qualified as the gross violation of law in the past;
- The law should prescribe which punishment and measure of disciplinary effect should be applied for each disciplinary violation;
- The law should specify the specific grounds of issuing private recommendation letter, its contents and goal;
- The law should prescribe the tool and procedure of examining the cases of the judges having a substantiated assumption of being illegally dismissed from the office; In case if dismissal is proved to be illegal, the law should ensure their restoration in the office on the same position;
- If the above mentioned recommendation can not be fulfilled, the blanket prohibition is preferable to be abolished, according to which, if the judge is dismissed from the office for the commission of disciplinary misconduct, he/she is prohibited to be restored on the position of a judge.

***Procedure-related issues:***

- The law should strictly prescribe the stages of proceedings and the persons authorized to make decisions on each stage;

- The law should prescribe the specific time frames for the High Council of Justice to make a decision on disciplinary case;
- The law should clearly define the standard of proof while reviewing the disciplinary case in the High Council of Justice, as well as in the Disciplinary Panel;
- The law should prescribe the issues of collecting evidences, their admissibility and legality in a disciplinary case;
- The authority of the Council servant to initiate the disciplinary proceedings against a judge based on the official report should be abolished;
- Only the High Council of Justice should be given the authority to launch disciplinary proceedings;
- The law should prescribe the obligation of the High Council of Justice and the Disciplinary Panel to summon and hear the position of a judge while considering his/her case;
- The law should specify what types of decisions can be approved by 2/3 of the council members. The decision on holding the judge liable should be made with higher number of votes, compared to the number needed for the decision on terminating the prosecution against a judge;
- The disciplinary panel should review the issue of needed number of votes to avoid the theoretical possibility rendering a decision only with 2 votes;
- Relevant amendments should be entered into the law, so that submission of a complaint should not mean the automatic launching of the prosecution;
- The procedure rights of a judge and the applicant should be prescribed by the law;
- The law should cover the procedure rights of a judge such as the right to access case materials, right to adequate time for preparation and right to reasoned decision;

***Transparency:***

- The law should prescribe the right of a judge to request the public disciplinary proceedings at any stage;

- At any stage of the disciplinary proceedings, the Council should make a reasoned decision on disciplinary issues;
- The decision of the Council rendered on a disciplinary case should be published on the web-page of the Council without disclosing personal information;

***Criminal responsibility:***

- The Chapter of the Criminal Code on a crime committed by a public servant that applies to all public servants, including the judge, need to specify the special norms that would apply only to judges. In addition, except for the substantial norms, it is important for the procedure legislation to envisage the specifics of the judicial authorities (including the interrogation rules and etc.);
- The article on deliberate illegal arrest, needs to be reviewed;
- The main difference between the disciplinary misconduct and the crime is the “substantial damage”, that needs to be more specific/detailed and objective;
- The approach of using “unilateral consent” for the criminal prosecution of a judge needs to be changed and the volume of absolute immunity needs to be reviewed. This authority should be assigned to a collegial body with the qualified majority of votes. It can be 2/3 of the High Council members, or panel of the Supreme Court.

## Part I. Analysis of the Local Legal Framework

### Chapter 1: Types of Disciplinary Misconduct and Punishments

#### 1.1 Stages of development of types of disciplinary misconduct and punishments

Disciplinary misconduct is the topic of fierce discussions. Discussions are ongoing about the concept of disciplinary misconduct, the line between the disciplinary misconduct and the legal error and etc. During the interview, a non-judge respondent outlined that *“nowadays, it is absolutely unclear what the disciplinary misconduct is. The judges are completely confused about what will be considered as a disciplinary misconduct and what will not. Even if the practice is generalized, many of the past violations, may not be considered as a misconduct by the panel and visa versa, the panel may consider some issues as misconduct that have not be qualified as a misconduct before. Therefore, regardless of the generalization the current practice is vague and needs further development”*.

Prior to the law entering into force, the issues of judicial disciplinary liability and disciplinary proceedings were regulated by the temporary provisions.

The below presented chart reflects the changes in the types of disciplinary misconduct since 1998 (when the provisions were adopted) up to today:

<b>Provision</b>	<b>Original Version of the Law</b>	<b>Current Formulation of the law</b>
a. Violation of the law committed during the case consideration;	a. Gross violation of a law by a judge during the trial;	
b. An action damaging the reputation, or disgracing the judiciary;	b. Corruptive offence, or abuse of official powers to the detriment of the interests of justice and the interests of office;	b. Corruptive offence, or abuse of official powers to the detriment of the interests of justice and the interests of office;
c. Corruptive offence;	c. An activity incompatible with the judicial office, or conflicting with judicial duties;	c. An activity incompatible with the judicial office, or conflicting with judicial duties;
d. Violation of work discipline;	d. An action inappropriate for a judge that disgraces the judiciary or damages	d. An action inappropriate for a judge that disgraces the judiciary or

	the trust towards judiciary;	damages the trust towards judiciary;
	e. Undue delay of adjudication of a case, non-performance, or improper performance of judicial duties, or other violation of work discipline;	e. Undue delay of adjudication of a case;
	f. Disclosure of the secrecy of judicial deliberation or professional secret;	f. non-performance, or improper performance of judicial duties
	g. Hindrance to the activity or contempt of a disciplinary organ;	g. Disclosure of the secrecy of judicial deliberation or professional secret;
	h. Violation of judicial ethics norms.	h. Hindrance to the activity or contempt of a disciplinary organ;
		i. Violation of judicial ethics norms.

It should be noted, that the provisions provided the definition each the disciplinary misconduct.

Recently, number of amendments concerning the grounds of disciplinary misconduct were entered to the law. In 2004, article 2 of the law was amended in the form of a note. The note provided the definition of two types of judicial disciplinary violations – gross violation of the law and the corruptive offence. In 2005, the norm of the law, that considered the gross violation of the law to be the form of the disciplinary misconduct, the following terms were added: “Gross or/and **repeated** violation”. Accordingly the amendment was added to the note that explained that **repeated violation would be the violation of the law for 3 or more times. According to the same change, one more form was added to the types of disciplinary punishments and measures of disciplinary effect: Removing the judge from the waiting list of the Judges of Common Court.**

On 25 November, 2005, number of changes was entered to the law and they entered into force on 15 March, 2006. According to this change, the following sentence was added to the note on the norm of gross violation of the law: the gross violation of the law would be the substantial violation of the law that

incurred damage (or could incur damage) to the legal rights and interest of the participant of the proceedings and the third person, or **the public interest**.

The following changes have been entered to the grounds of disciplinary misconduct in 2007: the gross or/and repeated violation of law by the judge while reviewing the case was replaced with **gross violation of the law by the judge while exercising judicial powers**. The same paragraph specifies the meaning of gross violation of the law. The disciplinary misconduct, such as nonperformance, or improper performance of judicial duties and violation of work discipline were made into separate paragraphs. Accordingly undue delay of adjudication of a case was also formulated as a separate disciplinary misconduct.<sup>13</sup>

Significant amendments were made to the law on 27 March, 2012. **Particularly, gross violation of the law while exercising judicial authority and violation of internal regulations were deleted from the types of disciplinary misconduct.**

The current formulation of the law includes 8 types of disciplinary misconduct, 5 types of punishments and 2 types of measures of disciplinary effect.

One of the respondents made an interesting statement concerning the types of disciplinary statements: *“The grounds of disciplinary liability should be deliberate diversion of justice administration, which clearly demonstrates, that the justice was seriously violated and it was done on purpose (the gross violation of law may be committed by negligence as well).”* It should be noted, that the law does not prescribe the definitions of types of disciplinary misconduct, neither the definition of disciplinary misconduct itself.

As for the types of disciplinary punishments, some of the interviewees outlined, that according to the law, it is difficult to identify which punishment needs to be applied in the given case. In addition, they mentioned the need to increase the choice of sanctions to ensure that the sanction is proportionate and fair in all the cases. A non-judge respondent also indicated the need of financial sanctions: *“There are no financial sanctions; therefore it would be good to have them. It may not be proper at this stage and the judges may not agree to it, but if needed financial sanctions can also be introduced at some other stage, since such practice exists in many countries”*.

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<sup>13</sup> See subparagraphs “a” and “b”, Article 2 of the Law on “Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia”

## *1.2 Violation of norms of ethics*

While working on the study, the judicial authorities initiated a draft law to the Parliament of Georgia, according to which, violation of norms of judicial ethics by the judge is a disciplinary misconduct.

Being an urgent issue, the authors of the study asked the participants questions concerning the Code of Ethics. Majority of the surveyed judges directly stated that the disciplinary liability shall be based only on the violation of norms of ethics. While other respondents think that the acting Code of Ethics needs to be revised. One of the judges explained, that the norms and the concept of ethics is too general: *“I think, using of the ethics violation as the only grounds, will broaden the scope of disciplinary liability grounds instead of narrowing it down. Therefore it is not just about writing the violating in, but making it specific ethics violation. And it should be stated separately, which is the one”*.

It should be noted, that all the surveyed respondents supported the idea of limiting the disciplinary liability with the norms of ethics.

Some of the judge and non-judge participants of the study outlined the need of the Code of Ethics to be more specific. During the interview, one of the judges mentioned, that the ethics of a judge is his/her independence, impartiality and good faith, and these 3 words cover everything, but at the same time most important is that everything needs to be very clear and specific and the conference of judges need to work on this. The same opinions was expressed by the non-judge member, who stated the following: *“the general principles reflected in the Code can be found in the Constitution and the law as well, so the Code does not say anything new. The Code needs to be changed and the detailed definitions need to be added in order to make it functional.”*

According to the assessments of the authors of the study, undertaking of the changes in the proposed manner, deleting the other types of disciplinary violations in the code and leaving only the norms of judicial ethics without defining the concept and scope of ethics norms will yield negative results. A judge may take an action that may lead to the violation of public order that would harm not only the interests of specific parties, but also the interested parties and the general public. Regardless of this damage, if the ethics norms are vague, the action of a judge may not be responded adequately, which is not in the interest of public or the justice.

Development of disciplinary proceedings tool against the judges should serve as an important guarantee for the independence of judiciary. Disciplinary liability involves potential threat of putting pressure on the judicial independence and therefore it requires protection of a judge with adequate guarantees. These guarantees may include openness/public proceedings, predictability of norms and ensuring the guarantees



to fair trial. Regardless of the existing risks, the concept of judicial independence should not be viewed separately from the judicial accountability. If the facts of undue delay of the adjudication of deliberation, non-issuance of execution notice, improper imposition of a fee, or violation of other norms of law that happen for several times or/and case grave, or unrestorable violation of fundamental human rights are neglected without relevant response, it will create the threat of improper perception of judicial independence. And this will definitely not facilitate to the creation of independent and unbiased judicial system and effective administration of justice.

Majority of respondents, judges and not judges believe, that availability of higher instance court and right to appeal does not mean releasing the judge without liability for illegal or/and unreasoned decision discharged by him/her. But whatever is possible to correct through proceedings, or by the higher instance court, or by a judge of the same instance court can not serve as the grounds for disciplinary liability. However, one of the judge respondents believes, that *“if they notice, that the judge does not accept the application, in other words tries to find reasons to reject the complaint, it is easy to make an assessment. The fact, that the judge rejected to accept the application for proceedings can not serve as the bases for taking measures against the judge. But when we see that the judge does not accept the application for one and the same reason several times during the year, it leads to some doubts and the issue of disciplinary liability may arise”*.

According to the draft changes, even in case if it is determined, that the judge abused his/her judicial authority or/and he acted in bad faith, biasness, had personal interest, or gained some benefit, his/her action may not be qualified as disciplinary misconduct.

Also, according to the acting formulation of the law, the action of a judge that is based on internal belief can not serve as the bases for imposing disciplinary liability. In other works, if the judge makes an error and they determine, that he/she was exercising his authority according to internal belief and good faith, believing to be acting properly and did not have any personal interest, it is not allowed to hold the judge disciplinary liable on these grounds. Otherwise it will pose direct threat to the judicial immunity and independence of a judiciary as a whole. Therefore the action of a judge is not considered as a disciplinary misconduct and he/she will not be subjected to disciplinary punishment if he was acting according to his internal belief. Although this current formulation of the law creates the protection guarantees, it is important for the law to be further clarified, particularly on what is the internal belief, what is the scope of this term and how to determine acting with internal belief.

According to the acting norms of ethics, limiting of the disciplinary liability would not be fair, since the ethics norms are not predictable and the norms, such as undue delay of the adjudication of deliberation,

improper performance of duties and others will be left unresponded. According to the interview of one of the judge respondents, it is important for the Code of Judicial Ethics to be more specific and be in compliance with the Bangalore principles that list the ethical responsibilities of the judges clearly and in details.

The acting Code of Ethics involves general provisions related with the independence and impartiality of judges, competence and sense or responsibility, non-judicial activities of the judge and other general rules. The principles prescribed by the Code of Ethics are general and may integrate many ethical norms of specific meaning. The principles are general, but the judge is independent during the justice administration and renders the decision only in compliance with the law. The more specific norm of ethics is closer to reflecting its concept. In addition, the Conference of Georgian Judges is the self-governing body of the Georgian Common Courts that adopts rules of judicial ethics on the nomination of High Council of Justice of Georgia. Accordingly, in case of implementing these changes, only the self-government body has the authority to determine the rules of conduct, which may lead to closure of the judicial system and violation of balance between the branches of authority.

During the individual interviews, the majority of respondents mentioned, that the violation of norms of ethics should be the bases of disciplinary misconduct, although they mentioned that the acting code of ethics is vague and needs further development. Some respondents believe, that the judges should not be found liable only in accordance with the norms developed by them and the norms of ethics need to be reviewed by the Parliament or other body, or be further specified and integrated with the law on disciplinary proceedings.

During the interviews, majority of non-judge participants were against self-regulation principle. One of the respondents stated, that the system needs more transparency and it should not be a closed. Another non-judge respondent shared the same opinion and said: *“The Parliament should not be left without the authority to regulate the judicial discipline with the means of law and so to say, we can not exclude the legal intervention completely. The issue of self-regulation of the judicial profession is questionable - in will the Parliament allow the judiciary to become fully self-regulated? The Conference of Judges can change the Code of Ethics and draft a new Code and accordingly the substantial-disciplinary law will be managed by the Conference of Judges. This way the Conference of judges will become the legislator and the judiciary will become the self-regulated profession. At this stage, I do not think it is necessary and proper for the Code of Ethics to be the only regulator and exclude the legislator. But at some stage it may be possible”.*

One of the judges supporting the disciplinary liability only on the bases of the violation of ethics rules, mentioned that the norms of ethics may be revised by the Parliament, or other body, or may be further completed and merged to the law on disciplinary proceedings.

The former judge supported the possibility of self-regulation saying, that it would be better if more tools are assigned to judges and if independent and unbiased self-government exists - in the form of Conference of Judges – then it should determine the grounds for disciplinary liability.

### *1.3. Non-performance, or improper performance of judicial authorities*

Gross violation of the law, as a disciplinary misconduct, existed in the legislation till 27 March, 2012. This action envisaged “violation of the Constitution of Georgia, International Treaties signed by Georgia, requirements of the Georgian legislation by the judge in the process of exercising judicial authorities and that incurred substantial damage (or could have damaged) to the legal rights and interests of the participant of the proceedings, the third party, or the public interest”.

This norm posed threat to independence of judiciary, since it granted broad authorities to the body undertaking the disciplinary prosecution, that was authorized to launch prosecution<sup>14</sup> in any case, without any reasoning against any judge for the gross violation of law while exercising the judicial authorities.

According to the study<sup>15</sup> conducted by the Disciplinary Panel of the Judge of Common Court of Georgia, out of 98 disciplinary misconduct (on administrative cases) 49 were qualified as gross violation of law. As for the civil cases, 62 out of 190 were qualified as misconduct.

It is difficult to draw a line between a gross violation committed by a judge during the performance of judicial duties and non-performance, or improper performance of judicial duties. It is complicated because non-performance, or improper performance of judicial duties by itself involves negligence of law, non-fulfillment of the imperative requirements of the law or/and improper fulfillment. The law means not only criminal, civil or administrative procedure law, but also the Constitution of Georgia, International treaties and agreements ratified by Georgia, other requirements of the Georgian legislation as referred to in subparagraph “a”, article 2 of the Law of Georgia on “Disciplinary liability and disciplinary proceedings of the judges of the Common Court of Georgia” (gross violation of law).

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<sup>14</sup> See subparagraph “b”, Article 6 of the Law on “Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia”

<sup>15</sup> See the above mentioned study

The fact that it is difficult to draw a line between the gross violation and non-performance, or improper performance of judicial duties is once again proved since in many cases the disciplinary panel<sup>16</sup> of the judges of Common Courts of Georgia qualified one and the same misconduct as gross violation (providing the applicant with a decision on non-admission of a complaint and rejection of applying a measures with a delay of several weeks) in one case and improper performance in another (providing the reasoned decision to a party with a delay of several months).

Therefore, in fact the changes made to the law did not reduce the risk of interfering in the activities of the judge while exercising judicial authorities. Even worse, the decisions published by the Disciplinary Panel prove that after deleting the gross violation of the law from the violation grounds, all the cases, where the judges were held disciplinary liable, were qualified as non-performance, or improper performance of judicial duties. The judges believe that holding a judge liable on the bases of non-performance, or improper performance of judicial duties is related with risks. The conducted interviews further confirmed these concerns. One of the judge respondents said that it is unclear what is meant by the term “improper performance” and it provides for the possibility of launching unfair and groundless prosecution against a specific judge. According to the judge, the punishment, or non-punishment of a judge should not be dependent upon the goodwill of a person undertaking the disciplinary prosecution.

Besides, according to the judge respondents ‘gross violation’ that was deleted from the law contained many risks, since the term gross violation of law could be interpreted in many different ways. Gross violation of law at some point led to mixing with each other the concepts of disciplinary misconduct and legal error. In addition, the study of using substantial or/and procedure legislation by the judge always led to intervention in the contents from the side of disciplinary bodies. Therefore this norm of gross violation definitely posed threat to the independence of judiciary. However, as mentioned above, deleting the “gross violation of law” did not fully eradicate the threats it implied. The law still has the concept of improper performance of duties that to some extent covers the cases of gross violation of law.

In these conditions, probably it would have been better if the gross violation of law and improper performance of duties were revised at the same time in the law. These concepts could have been merged into a misconduct of one type, a clear definition is formulated containing the following principles:

“the violation of law in ill faith, with biasness, with prior understanding that the action was beyond the authority of the judge (or in the circumstances, when the judge was supposed to know that it was beyond

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<sup>16</sup> See the above mentioned study

his/her legal authority), (by neglecting fundamental rights), (deliberate neglect of the requirements of the law), or for any other reason, that does not envisage performing judicial duties with good faith”.<sup>17</sup>

Unfortunately, as a result of the very general changes, more serious problems could not have been eradicated. In addition, since the reform was spontaneous and not systemic, the concept of the issue was not understood and proper identification of the scope of independence and accountability of judiciary still remains to be a problem together with balancing of the protection of interests and creation of institutional guarantees.

Taking into account the fact, that the state does not have the long-term tradition of independent judiciary and the trust of the public towards the judiciary is still under formation, the law needs to create a balanced and objective system of accountability and liability, that would allow the reduction of the risks of intervention in the activities of the judges.

#### *1.4 Line between the legal error and misconduct*

At the preparation stage of the study, we were actively debating on the line between the legal error and the disciplinary misconduct. The issue is very important, since on the one hand it is related with the scope of judicial authority and on the other hand with the scope of disciplinary liability. First of all, we should outline that the legislation does not provide the definition of any of them, that would enable us to establish difference between these terms at least on legislative level.

The Disciplinary Panel tried to define these terms based on its own practice. In one of the cases, the judge determined the longer timeframe for the reimbursement of the anticipated damage than it was prescribed in the legislation (the party was given 10 days instead of 7 days prescribed by the law). The Disciplinary Panel considered this case and qualified the action of the judge as improper performance of judicial duties. In the other case, the judge determined the wrong date in the court decision – namely provided 14 days instead of 7 for the appeal. But this case was qualified as a legal error by the same Panel. Later, the Disciplinary Panel<sup>18</sup> of the judges of Common Courts of Georgia made the following comment on the above mentioned fact: While drawing the line between the disciplinary misconduct and the legal error, it should be taken into account, whether it is possible to correct the error, what was the scope, was it a repeated error, whether the judge acted in good faith and what was his/her motive. The Panel stated, that

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<sup>17</sup> Victoria Henley Overview of Judicial Disciplinary Systems, Comments on Proposed Amendments to Disciplinary Law of Georgia, Georgia 2011.

<sup>18</sup> Decision by the Disciplinary Panel of the Judges of Common Courts of Georgia issued on 12 April, 2013 (<http://hcoj.gov.ge/ge/saqrtvelos-saerto-sasamartloebis-mosamartleta-sadistsiplino-kolegiis-gadatskvetelebebi>)

the judge should be held disciplinary liable only in case if it is determined that his/her action is a disciplinary misconduct, but if the action falls under the scope of legal error, the judge should be released from liability. Improper reference to the appeal time in the court decision was considered to be a legal error.

Before the decision of 12 April, 2013 was made, the improper reference of the deadline in the procedure document was considered as a disciplinary misconduct and was qualified as improper performance of the judicial duties. This approach of the Panel actually means that any type of misconduct related with the improper reference of the deadline in the procedure documents, will be qualified as a legal error.

If the indecisiveness of the faith of the material evidence in the judgment, that was qualified as improper performance of the judicial duties by the panel for several times, can not cause substantial damage to the legal rights and interests of the procedure party, the third party or the public interests, improper reference of the appeal deadline in the court decision may cause substantial harm to the legal rights and interests of the procedure party, the third party or the public interests. Finally all these may result in loosing of the right to appeal and refusal to justice administration from the part of the judiciary.<sup>19</sup>

As outlined by the Panel, while drawing line between the disciplinary misconduct and legal error, the possibility of correcting the error should be taken into account. Correcting of the error envisages empowering the Panel to address the court with a request to correct the wrong appeal deadline indicated in the decision.

Determining wrong deadlines in the decision, may be the indication of improper performance of judicial duties (that may be caused by various reasons: too much caseload of the judge, high level of trust towards the court office, negligence and etc.), but definitely while drawing the line between the disciplinary misconduct and legal error, its scope, frequency, good faith and motivation of a judge should be taken into account. At the same time the fact of causing harm to a party should be considered, impossibility of correcting the error, the public trust towards the judicial decision (especially towards the resolution part of the decision). As a result of the objective assessment of all these circumstances, the action of the judge may not be used for holding him liable because of the minor importance of the error and the insignificance of the charge.<sup>20</sup>

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<sup>19</sup> The Panel considered a case, where the party appealed the decision within the 15 days, that was improperly determined, but the higher instance court did not consider the appeal with an argument, that the appeal was submitted with the violaiton of deadlines.

<sup>20</sup> See the referred study – “Failure to indicate the address and the location of the court in the resolutioin of the judgement. The judge was acquitted for the insignificance of the misconduct and the built.

One of the non-judge respondents believed, that an error should not be punishable and instead, it can be easily corrected. But it should not be defined broadly and an evident violation should be relevantly responded. In this case, 3 basic criteria should be applied: was the action committed, is the action punishable and is there guilt. Therefore the guilt is misconduct and not error.

Besides the above-mentioned circumstances, the important criteria to consider the error as a disciplinary misconduct is the real possibility to correct the mistake in the higher instance court. Although one of the respondents fairly mentioned, that “institutionalism serves the purpose of correcting the non-intentional errors. However, the criteria introduced for the admissibility to the cassation court in 2007, were so high that in fact it meant avoiding institutionalism”.

Violations should be dealt with uniform approach that will ensure the creation of protection guarantees for the judges and on the other hand comply with the requirement of objectiveness and impartiality of the disciplinary proceedings. It also implies uniform approach to the violations committed by the judge while exercising judicial power. The initiative of the Disciplinary Panel to define the normative contents of the important terms based on its own case law was a positive step on the stage of developing disciplinary liability system. Although, the Panel had no institutional framework to act in this manner and therefore it was a completely unsustainable event that can be subjected to a change any time depending upon the attitudes of the Panel members.

### *1.5 Vagueness of Disciplinary Misconduct*

The list of disciplinary misconduct provided by the law on Disciplinary Liabilities and Disciplinary Proceedings of the Judges of Common Courts of Georgia is not well-structured. It is proved by the fact, that the disciplinary misconduct such as incompatibility with the office, an activity incompatible with a judicial office, non-performance, or improper performance of judicial duties and disclosure of professional secret are already implied in the rules of Judicial Ethics of Georgia. Therefore there is no need for them to be listed separately and it would be enough to refer to the subparagraph “I” of this law, particularly to the violation of the norms of judicial ethics.

The violations can also be different according to their contents. Some violations, such as activity incompatible with the judicial office, impediment of the activities of the body having the disciplinary authority and violation of judicial ethics, clearly fall under the disciplinary misconduct. As for sthe other group of violations (corruptive offence, abuse of official authorities, nonperformance, or improper performance of duties and etc.), it is difficult to state for certain whether in those cases the judge should

be subjected to disciplinary punishment, or criminal liability. This confusion is the result of insufficient specification of the criminal law norms, as well as the law on disciplinary proceedings. It is difficult to define what is meant by corruptive offence, which does not lead to criminal liability, while the article 338 of the Criminal Code on corruptive offence covers all the general elements of the corruptive offence. Therefore possibility of launching disciplinary proceedings on this kind of action becomes unnecessary when criminal liability can be applied.

There are two vague grounds of disciplinary liability: undue delay of the adjudication of the case and non-performance, or improper performance of judicial duties. Besides the fact, that non-performance, or improper performance of judicial duties may as well imply delay of adjudication of case, these terms are themselves too broad and need to be further specified, so that the judges are aware of the cases, when the disciplinary prosecution will be initiated against them. According to one of the respondents: *“There are some norms, that are too general and they can be used against the interests of judges. Undue delay of the case adjudication is one of the forms of misconduct. This is a very general statement and makes the trust towards the system questionable. Specific timeframes are determined for case consideration procedures. For example, Proceedings on bankruptcy case should take up to one month, although the case may include 1500 creditors. It is impossible to complete such a case by observing all the relevant procedures just in a month”*.

## *1.6. Disciplinary punishments and measures of disciplinary effect*

### *1.6.1 Private recommendation letter*

Sending of a private recommendation letter is not the disciplinary liability measure. It is the measure of disciplinary effect.<sup>21</sup> According to the law of Georgia on Disciplinary Liability and Disciplinary Proceedings of Judges of Common Courts”, a private recommendation letter is the letter sent by the disciplinary panel to the judges who have committed the disciplinary violation. The letter reflects the negative assessment of the fact of disciplinary misconduct by the judge. In addition, the letter provides recommendations and advices of the disciplinary panel on the eradication of the violations, ways of overcoming the challenges and problems related with the performance of judicial duties.

**A private recommendation letter shall be aimed at supporting the judge to improve the performance of judicial duties. However, the authors of the research found out, that according to**

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<sup>21</sup> Article 4 of the Law on “Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia”



**the available practice the recommendation letter sent to the judge did not provide any “advice-recommendation” on eradication of violations.** As a rule, recommendation letter refers to a fact of specific disciplinary misconduct, type of misconduct, guilt of a judge in the commission of a specific disciplinary misconduct and reference to procedure action to be performed.

General guidelines, recommendations can be published and regular trainings can be conducted on the ways and means of eradication of violations, overcoming the challenges and problems related with the performance of judicial duties. To avoid the delay of the adjudication of case, the pool of judges should be permanently refreshed with new staff having relevant professional skills and devoted to moral principles and qualified assistants.

According to one of the non-judge respondents: *“It is possible to introduce the tool of providing unofficial instructions, or advices, where the systems of consulting and disciplinary liability will be separated from each other. It is possible just to provide the judge with an advice like: you have not deliberated on the status of material evidence and you have to correct the error, or take into account the status of the material evidence for the future cases”.*

The contents of the private recommendation letter should be proportionate of its goal. It should serve the purpose of increasing the role of each judge in the judicial system, further development and improvement of the justice proceedings. An effective system of accountability and liability of judiciary should be established in order to identify the ways and means of eradicating violations, overcoming the challenges and problems related to the performance of judicial duties. The new system should be transparent and efficient, as well as complying with the principles of judicial independence.

#### *1.6.2 Dismissing Judge from the office*

One of the non-judge respondents mentioned during the interview, that a judge may be dismissed from the office in the following cases: *“1. The judge is too incompetent, unqualified and unethical to be worth for the system to keep him/her in office... 2. The judge has committed such a grave action, that dismissing from the office would be the only adequate measure for the public. Unless the judge is dismissed from the office, the public will consider that the system is trying to neglect the violation and is focused on protecting judiciary, rather than the citizens.”*

According to the law, dismissing the judge from the office, as a type of disciplinary punishment can be imposed upon a judge for commission of the following disciplinary violations<sup>22</sup>:

- Corruptive offence, or abuse of official powers to the detriment of the interests of justice and the interests of office;
- An activity incompatible with a judicial office or conflicting with judicial duties;
- An action inappropriate for a judge that disgraces the judiciary or damages the trust towards the judiciary;
- Non-performance or improper performance of judicial duties;
- Violation of judicial ethics norms.

While the study was undergoing, the draft law developed by the Ministry of Justice of Georgia was initiated in the Parliament of Georgia. According to this draft law:

“Disciplinary panel shall take into account, that dismissal of the judge from the office is the measure of last resort and it shall only be applied in special cases. The Disciplinary Panel shall make a decision on dismissing the judge from the office if it considers improper for the judge to proceed with exercising judicial authorities considering the gravity and number of disciplinary misconduct, as well as the cases of past disciplinary misconducts.”<sup>23</sup>

The proposed change clearly restricts the authorities of the Disciplinary Panel to use the dismissal of the judge as a measure of disciplinary punishment in all the cases, but as a measure of last resort and only in special cases.

Majority of the interviewees supported the idea, that a judge should be dismissed from the office only in special cases, for a repeated crime or/and extremely gross violation. Concerning the given issue, the former judge mentioned, that in case of dismissal of a judge from the office, the statute of limitation for annulling the punishment need to be available.

However, it should be noted, that even when these changes are not yet introduced, the panel is still restricted by number of factors while dismissing the judge from the office. The factors include: gravity of the specific disciplinary misconduct committed by the judge, number of committed misconducts, disciplinary misconduct committed by the judge in the past. The Opinion of the Venice Commission

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<sup>22</sup> Article 54<sup>1</sup> of the Law of Georgia on “Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts”

<sup>23</sup> Article 56 of the Law on “Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia”

issued in 2007<sup>24</sup> states that an early termination of the mandate of a judge should only be used as a last resort in exceptional cases, for instance if found guilty in a criminal offence, or for health reasons or if she/he is permanently prevented from performing his or her duties. Therefore, it would be better if the law defines the concept of exceptional cases, to avoid assigning the Panel with unlimited authority to determine any case as an exceptional one.

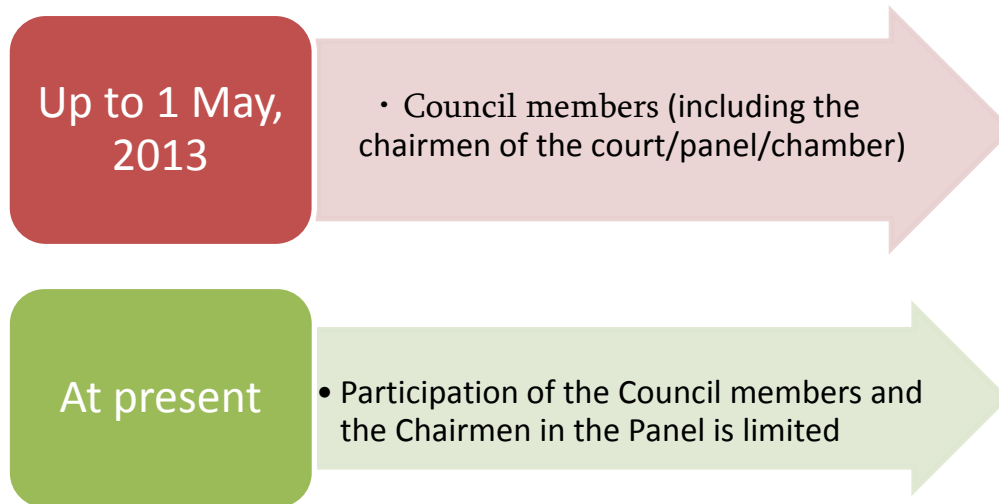
## Chapter 2. Procedures of Disciplinary Liability

### *2.1. The rule of forming disciplinary bodies*

The High Council of Justice of Georgia, is the highest body administering the judiciary and its most important competence is the administration of disciplinary proceedings against the judges of the Common Courts of Georgia. For the purpose of administration of disciplinary proceedings, two independent bodies are functioning inside the judicial system: Disciplinary Panel of the Judges of Common Courts of Georgia and Disciplinary Chamber of the Supreme Court of Georgia.

In 2013, the rule of staffing the disciplinary panel was completely changed by means of entering the changes in the legislation. The changes better defined the place of the body inside the system and its independence.

The below presented diagrams depict the basic contents of the changes in the rule of staffing the disciplinary panel:



<sup>24</sup> Paragraph #25, Opinion of the Venice Commission on the law of Georgia on “Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts” issued in 2007.

The change of the rule of formation of the disciplinary panel has increased the level of the Disciplinary Panel independence from the High Council of Justice. In addition, the guarantees of ensuring the quality of the Panel representation have been established.

However, number of issues related with the formation of the disciplinary body are still to be regulated. For example - the rule of forming the Disciplinary Chamber of the Supreme Court of Georgia. According to the acting rule, the Chamber is formed based on the decision of the Plenum from the judges of the Supreme Court of Georgia. Some of the respondents mentioned, that there was a problem of confidence between the judges and the Chamber. It could have been the result of the participation of judges in the formation of the Chamber. The plenum of the Supreme Court was also involved in the formation of the Chamber, but the body still does not have the representative nature and it can not be regarded as reflecting the official will of the judiciary. Considering all these, it could have been better if the Conference of Judges was involved in the formation of the Chamber, since the conference involves the judges from all the courts and it is legitimate to make this kind of decision. This type of change may increase the trust of the judiciary towards the disciplinary chamber.

## *2.2. Scope of Disciplinary Liability*

Legislation regulating the disciplinary liability of judiciary only applies to the cases of disciplinary misconduct of the judges of Common Courts. Article 1 of the law is a good proof of it, since it defines the scope of functioning of the law.

According to these regulations, the representatives of the disciplinary bodies and the members of the High Council of Justice are beyond the disciplinary liability. While working on this research, the authors of the research came across number of cases, when the issues of ethics and legality of the activities by the individual members of the HCJ were crucial. But there is not any normative ground regulating this issue. According to the Rules of Procedure of the HCJ, the members of the Council shall perform their duties properly. In response to that, regular failure to perform, or improper performance of duties may serve as the bases for dismissing the Council member from the office. However, neither the law, nor the regulations of the Council envisage the availability of tool for considering the violations of law or/and norms of ethics by the Council members. It means that the grounds provided in the regulations are just a formality and in fact it is impossible to determine proper performance of duties. The law does not define the subject, who would have the authority to assess the actions of the Council members and undertake

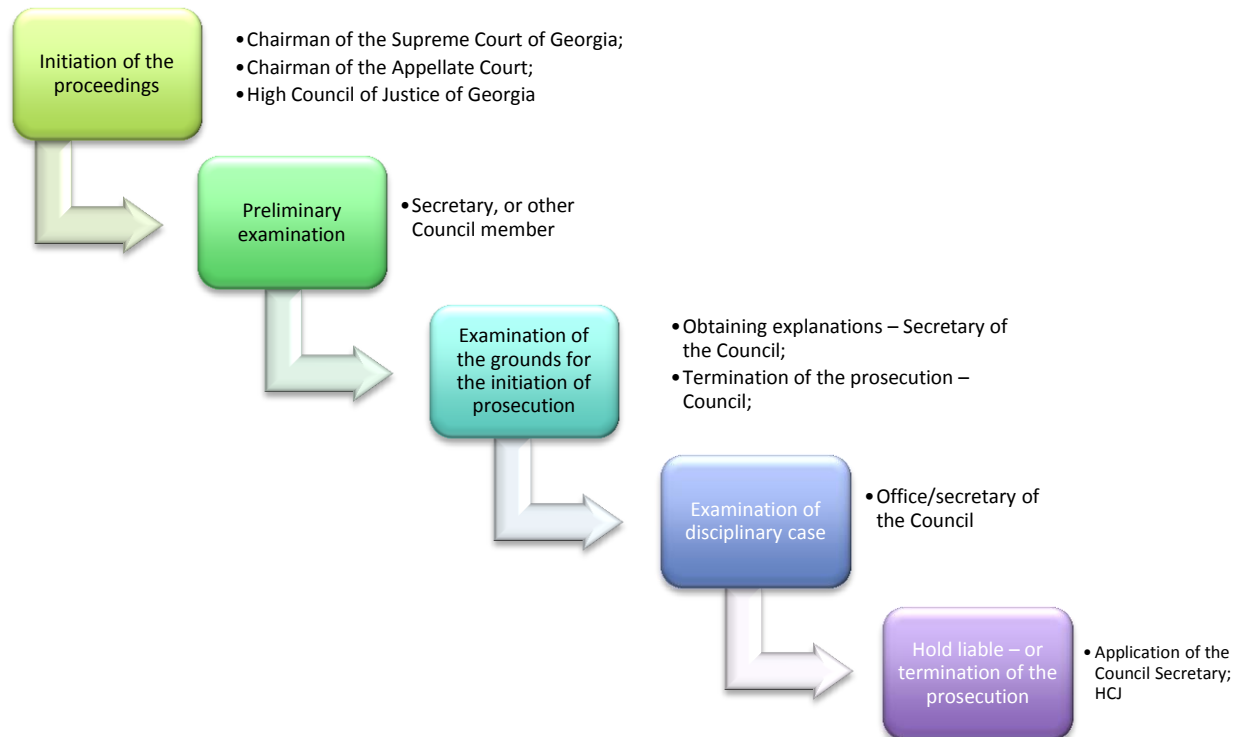
measures of effect. The violation of the rules of conduct on the part of the Council members, and not the legality and properness of the decisions rendered by the Council, may become the subject of the court control.

The law regulating the disciplinary liability of judges, does not mention whether the law applies to those judges, that at the same time carry out authorities of the Council member and are acting within this capacity. The issue of regulating the activities of non-judge members of the Council is still unresolved and it is important to regulate this issue. The Council reviews and discharges decision concerning the number of issues that influence the legal status of specific persons. The activities of the Council encourage the formation of public opinion regarding the judicial system. Therefore it is important to develop common rules of ethics and conduct of judge and non-judge members of the HCJ, as well as the tool for the supervision of their fulfillment.

Defining the ethics rules of disciplinary bodies, disciplinary panel and panel members is equally important for the increase of the public confidence towards these bodies. Defining of the norms of conduct will promote and have positive influence on the development of the judicial system in general and strengthening of the important institutions inside the system.

### 2.3 Stages of disciplinary proceedings

According to the acting legislation, the functions of the HCJ envisage several stages of disciplinary proceedings. The below presented diagram describes all the important stages of the procedure and indicates the subjects authorized to make decisions:



### 2.3 Reasons for the initiation of disciplinary proceedings

The acting legislation prescribes the following reasons for initiation of disciplinary proceedings and the persons authorized to initiate the proceedings:

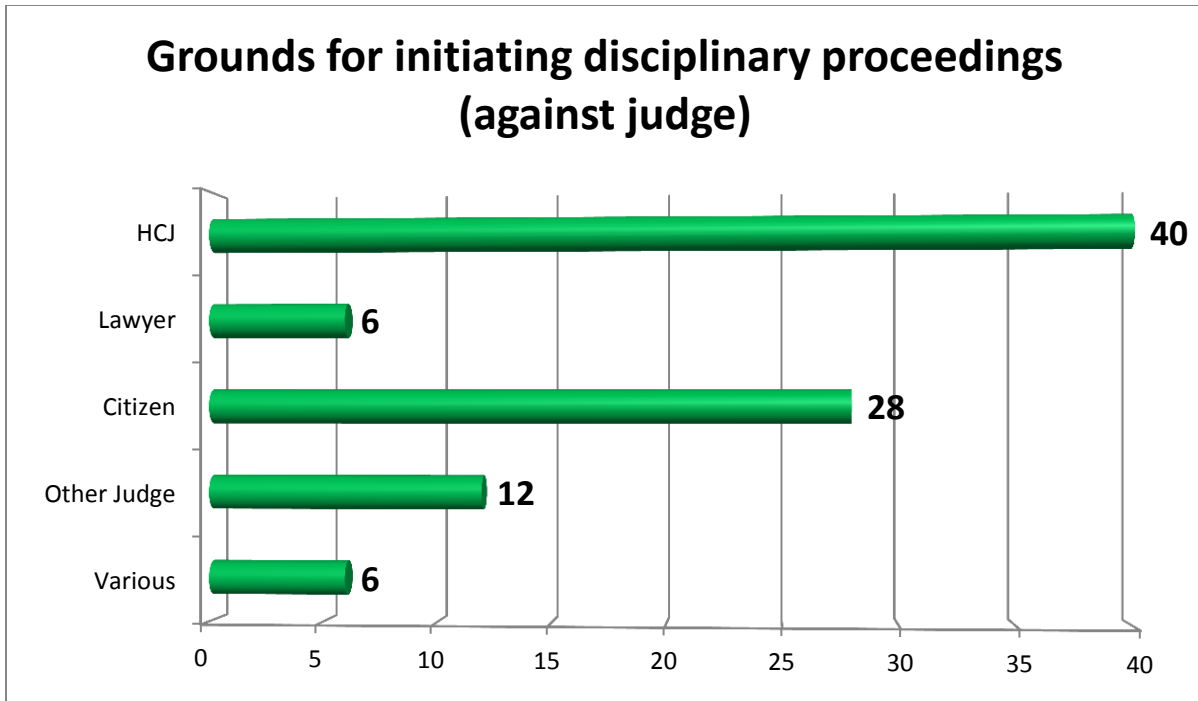
Reasons for the initiation of disciplinary proceedings

- a. Application or complaint submitted by any person, except for anonymous applications, or complaints;
- b. Official report of another judge, court or a servant of HCJ about the commission of disciplinary misconduct by a judge;
- c. Notification by the investigative body;
- d. Information disseminated by mass media about the commission of a conduct by a judge, that may be deemed to be the disciplinary misconduct;
- e. Recommendation of the Disciplinary Panel to initiate disciplinary prosecution against a judge based on a new ground.

Person authorized to initiate proceedings

- a. Chairman of the Supreme Court of Georgia;
- b. Chairman of the Appellate Court;
- c. High Council of Justice of Georgia.

Analysis of the law makes it clear, that the HCJ can initiate the disciplinary proceedings based on the official report by HCJ servant even in those cases, when the parties/interested parties are not filing a case. The law does not provide the rules for drafting and using the official report, which provides the possibility of unlimited authority to the Council. According to one of the practicing judges, the legislation should strictly serve the set goal and there should be less possibilities for subjective intervention. The person initiating the disciplinary proceedings shall not be the staff member of the judicial system and the HCJ. While regulating the issue, one should take into account the practice of the relationship between the Council and individual judges and the history of the Council using the mentioned authorities. The Disciplinary Panel of the Judges of Common Courts of Georgia conducted a study based on the analysis of their own cases. The study outlines, that during 2007-2013 the reason for the initiation of disciplinary proceedings most frequently was the official report submitted by the servant of the HCJ office.



2007-2013

In the given environment, where the judicial independence is not sufficiently guaranteed by the legislation and strengthened by the practice, there is a threat, that the body undertaking the disciplinary proceedings – such as the HCJ – may retain dangerous tools, the competence of which is overburdened with other important and exclusive functions. For example: appointment and dismissal of judges from the office, promotion, business trip and etc.

### *2.3 Authority to initiate disciplinary proceedings*

According to the law, in case of initiation of disciplinary proceedings, the chairman of the Supreme Court of Georgia and the Chairman of the Appellate Court are obliged to provide the HCJ with relevant materials in order to facilitate the proceedings following the disciplinary prosecution. However the fairness of the fact that the high officials of the judicial system are benefiting from the same authorities as the HCJ is arguable.

The right of the chairmen to make individual decision on initiating disciplinary prosecution against a judge, may empower the chairman to subject a specific judge to pressure. This definitely does not promote a healthy relationship between the judges and the chairmen of the appellate courts in the judicial system. Since the HCJ is a collegial body, the members are observing certain procedures while



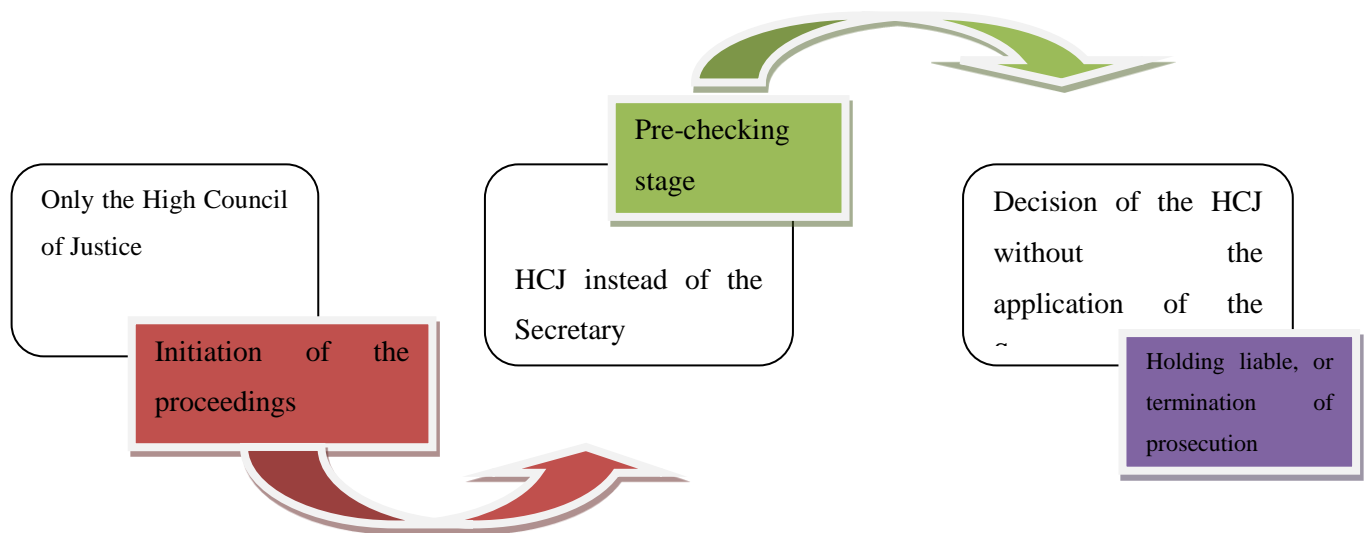
considering the issue of disciplinary prosecution. In case of the Chairmen of the Appellate Courts, the law does not refer to any similar procedures. Therefore, the decision made by the collegial body is more legitimate and generates more trust. Therefore, it would be preferable, if the authority on the disciplinary proceedings is consolidated within a single body, HCJ.<sup>25</sup>

#### 2.4 The stage of pre-checking the grounds for launching disciplinary prosecution

According to the current formulation of the law, the Secretary of the High Council of Justice makes decision on termination of the disciplinary proceedings, or requesting a judge to provide explanation after undertaking pre-checking of the reasonableness of initiating disciplinary prosecution and on the following stage, the Council approves the decision.<sup>26</sup>

While working on this study, the Ministry of Justice of Georgia developed a draft law. The explanatory note accompanying the draft law states, that certain authorities of the secretary of the HCJ during the disciplinary proceedings are restricted for the optimization of the stages of disciplinary proceedings.

The presented chart provides a visual illustration of the changes proposed in the draft law concerning the changes in regards to the concepts of Council and the Secretary on various stages of proceedings:



<sup>25</sup> While working on this study, the Ministry of Justice of Georgia initiated a draft law, according to which, only the High Council of Justice shall be authorized to launch disciplinary proceedings against the judges of the Common Courts of Georgia.

<sup>26</sup> Paragraph 1, Article 9 of the Law of Georgia on Disciplinary Liability and Disciplinary Proceedings of the Judges of Common Courts.

Regardless of the fact that it is clear, what they wanted to achieve through the proposed changes, it should be noted, that the current legislation does not provide the Secretary of the HCJ with the right to make an individual final decision on holding the judge disciplinary liable, or terminating the disciplinary prosecution, or addressing with personal recommendation letter and has to address the HCJ for final approval. Nevertheless, one of the judge respondents made a negative assessment of the authorities of the Council Secretary.

### *2.5 The rule for making decision on disciplinary issues at the HCJ*

According to the acting legislation, the decisions made by the HCJ on disciplinary issues, can be regarded as adopted if they were supported by at least 2/3 of all the members.<sup>27</sup> Considering the rule of formation of the HCJ, these types of decisions can only be made if at least 10 of the Council members support the decision. This rule is definitely positive, although it is difficult to obtain the majority of votes in reality. The recent practice of the HCJ is a good proof of it.

At the same time, the legislation does not require majority of votes at various stages of disciplinary proceedings. Therefore it is unclear, at which stage is it needed to obtain 2/3 of votes for the adoption of the decision. The acting wording of the law can be interpreted in a way, that 10 votes is necessary for any decision. But in this regard, the issue of termination of consideration of the disciplinary case is still unclear. The law does not state whether the failure to obtain 2/3 of votes on a specific case would lead to the termination of disciplinary prosecution. Termination of disciplinary prosecution actually is one of the forms of decision, that may need the votes of 10 members according to the above mentioned legal logic.

This type of inharmonic procedure regulation may become the reason for critical situations and delay of adjudication of cases. Therefore, the conclusion of the Venice Convection should be taken into account and the tools for avoiding the crisis should be developed. If at any stage of the disciplinary proceedings at least 10 of the Council members do not vote for continuing the proceedings, it may mean, that the case proceedings shall be terminated on the given case and there is no need to conduct a separate vote any more.

While considering the rule of making decisions by the Council, the issue of standard of proof should be taken into account. According to the primary version of the law regulating the disciplinary liability of judges, the decision on initiating the disciplinary prosecution could have been taken in case of availability

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<sup>27</sup> Paragraphs 3 and 4 of the article 50 of the Organic Law of Georgia on Common Courts.

of substantiated assumption.<sup>28</sup> But later, the reference on substantiated assumption disappeared from the law and accordingly the standard needed for the Council to make a decision was abolished. Evidently, unavailability of standard does not facilitate the strengthening of the guarantees for the protection of interests of the judge.

### *2.6 Participation of the judge in the process of considering the disciplinary case by the High Council of Justice of Georgia*

According to the law, the High Council of Justice of Georgia considers the termination of the disciplinary proceedings against the judge, as well as bringing disciplinary liability against the judge and the related materials at the Council hearing. The Council has the right to summon the judge and the applicant (who submitted the complaint) at the hearing and hear their testimony and explanations.<sup>29</sup>

Therefore, the High Council of Justice is authorized to make decision on termination of disciplinary proceedings against the judge, addressing the judge with private recommendation letter, bringing the disciplinary charges against the judge in his/her absence, which may not be fair considering the legal outcomes of the given decision. However, it should be outlined, that the consideration of the complaint filed against the judge may not detect any fact of misconduct and the HCJ may decide not to study the disciplinary case. Therefore it is important that the protection guarantees of the judge should be properly fit to all possible proceedings.

According to the statistical data, the HCJ receives considerable amount of complaints, although proceedings are terminated on majority of them. Therefore, it will not be proper, if the Council summons the judge on all the complaints that served as the bases for initiating disciplinary proceedings regardless of whether proceedings will continue or not. This approach will lead to delay, ineffectiveness and hindering of the disciplinary proceedings. But on the other hand, it is important for the judge to have the possibility to appear before the Council members and present his/her position if the Council decision may impact his/her position. This possibility may be guaranteed if the Council is made obliged to summon the judge after they decide to examine the case.

### *2.7 Time frames for disciplinary proceedings*

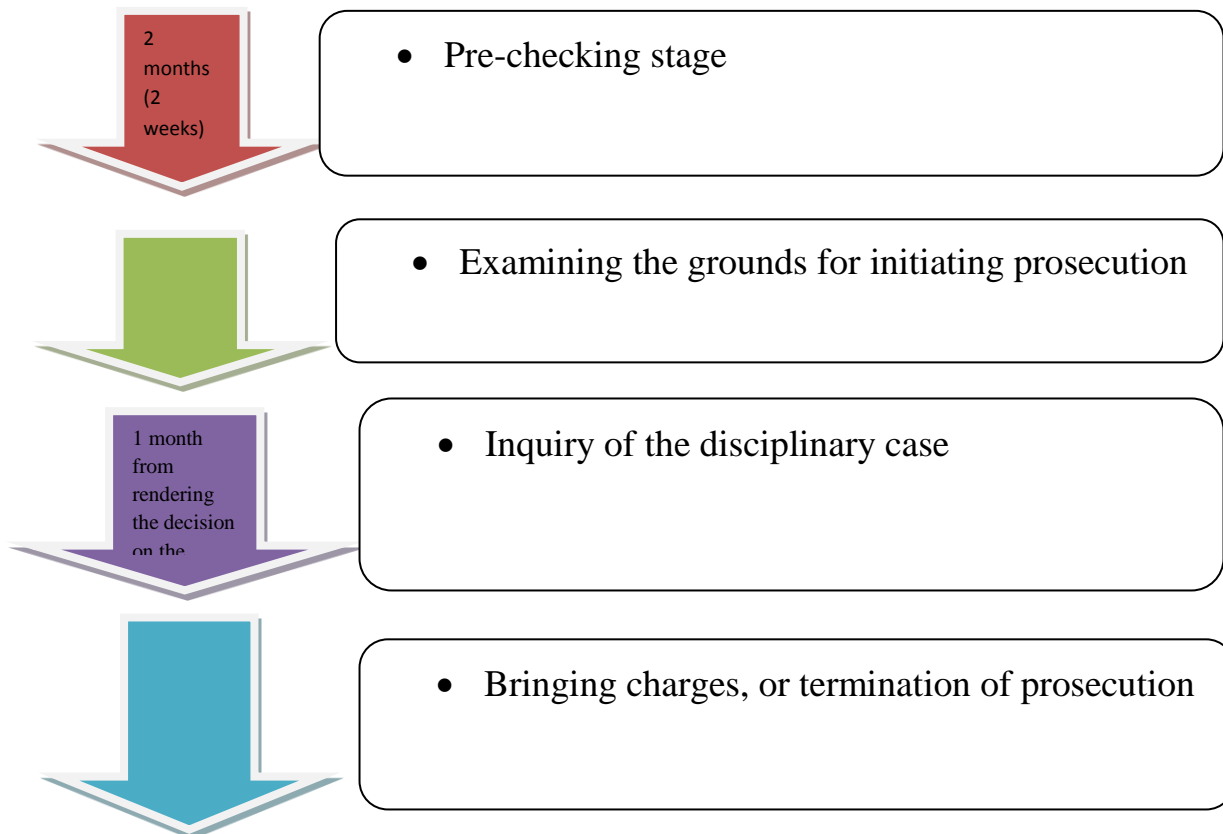
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<sup>28</sup> Law of Georgia on "Disciplinary proceeding and disciplinary liability of Judges", 2000

<sup>29</sup> Article 17 of the Law of Georgia on "Disciplinary liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia"

Timeframes in disciplinary proceedings are linked with the expectation and the interest of the public towards the disciplinary proceedings and its results, as well as on the interests of the judges for the disciplinary prosecution to be over in specific period.

According to the acting legislation, the following timeframes are determined for different stages of proceedings:



It should be noted, that none of the relevant legislative acts define the timeframes when the hearing of the HCJ on disciplinary issues should be held, where the Council should make a decision on bringing disciplinary charges against the judge, or termination of the proceedings.

Accordingly, timeframe for making final decision on the issue of disciplinary prosecution against specific judge depends upon the general statutes of limitations prescribed by the law.<sup>30</sup> In these circumstances, the provision of the law, that regulates timeframes for the revision and examination of the disciplinary case

<sup>30</sup> The judge shall not be subjected to disciplinary liability, if 5 years have passed since the day of commission of disciplinary misconduct and 1 year since rendering the decision on bringing disciplinary liability.

become meaningless. Absence of mentioned regulations leads to groundless delay of the adjudication of the disciplinary case.

To avoid groundless delay of the case proceedings, it is recommended to add a paragraph to the Law of Georgia on “Disciplinary liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia. The paragraph will define the timeframes for calling the session and making the final decision on disciplinary issues by the High Council of Justice of Georgia.

Concerning the timeframes, it is also important to examine the grounds for suspension of the disciplinary proceedings.

The acting legislation determines 2 grounds leading to the suspension of the case proceedings:

- a. Examination of the disciplinary case materials clearly reflects that the judge has committed an offence. In this case the materials of the disciplinary case are transferred to the investigative body;
- b. Objective challenge, or problem emerged during the examination of the disciplinary case (sickness of the judge, who was subjected to disciplinary prosecution, or other case), that makes it temporarily impossible to examine the case.

For example: In the US<sup>31</sup>, disciplinary proceedings will be suspended, if the judge is considering the case, that is the subject of the complaint/application filed against him/her. This way, the disciplinary body provides more guarantees of the independence of the judge and the judiciary. In addition, the party does not have the possibility to manipulate with the decision rendered against the judge by the disciplinary body.

Nowadays they are criticizing the fact, that the disciplinary case proceedings administered parallel to case proceedings in the court, provides the possibility of intervening in the court activities of the body undertaking the disciplinary proceedings and the party participating in the case consideration.

However, it should be noted, that the body undertaking the disciplinary proceedings and the party participating in the case consideration are protected from the intervention in their court activities by the norm<sup>32</sup>, that states that the decision rendered as a result of the disciplinary proceedings shall be sent to the party (author of the complaint/application) only after the case, in relation to which the disciplinary proceedings were conducted, is no longer pending. This norm reduces the risk of the party manipulating with the decision rendered against the judge by the disciplinary body.

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<sup>31</sup> See Victoria Henley, Overview of Judicial Disciplinary Systems, Materials for the workshop held in Tbilisi, Georgia, 2011.

<sup>32</sup> Paragraph 2, Article 5 of the Law of Georgia on

Even if the case, in relation to which the disciplinary proceedings were conducted, is still pending in the court, the disciplinary proceedings shall not be suspended, since it will cause the delay of the proceedings. While working on this study, an important example of negative result of the case delayed by the lawyer was provided. According to the lawyer, the judge may generate negative feelings towards the lawyer who has addressed the Council against him/her and this negative attitude may impact case proceedings and its results. The delay of the disciplinary case consideration and obtaining of its results may encourage the unprofessional and unethical attitudes and actions of the judges, since they feel safe from the responsibility.

### *2.8 Restriction of promotion of a judge*

The acting legislation restricts the right of the judge to be promoted or to be assigned a classification rank unless his/her disciplinary punishment has been annulled. In addition, relevant body, or official shall not grant a rank, or appoint to the court of higher instance judge, unless disciplinary punishment against him/her has been annulled. While working on the study, the Ministry of Justice of Georgia developed a draft law, according to which, the judge shall not be promoted if disciplinary proceedings against him/her are undergoing, or disciplinary punishment has not been annulled.

Disciplinary proceedings is a broad term and it covers number of stages starting from submitting an application to the High Council of Justice of Georgia, till the Disciplinary Chamber renders judgment. These procedures may take even over a year.

Frequently the proceedings initiated based on the application of the citizen is terminated because of lack of grounds in the complaint. The delay of the pending disciplinary cases are often related with the fact, that the law does not regulate timeframes.

Therefore, restriction of the promotion of a judge only because an application was filed against him/her and at the same time disciplinary proceedings are undergoing is not fair. In case of imposition of such restriction, it should be specified at what stage of the disciplinary proceedings can not the judge be promoted, so that this restriction is considered as the equal means.

## *2.9 Rendering of the decision by the Disciplinary Panel*

According to the law, the disciplinary panel determines following 3 circumstances while rendering decision: has the judge committed the specific action, whether this action is a disciplinary misconduct and is the judge guilty of committing the misconduct. The law does not define the standard of proof to be used for reasoning the commission of a disciplinary misconduct by the judge. Therefore the disciplinary panel is not obliged to check compliance with such standard prior to determining whether the judge has committed a disciplinary misconduct.

Absence of the standard of proof in the disciplinary proceedings has negative impact on the legal interests of the judge and leaves him without relevant protection. In addition, absence of the standard leads to nonuniform practice<sup>33</sup> and provides more possibilities for the preferred interpretation from the part of the HCJ, as well as the disciplinary panel. To avoid these risks and ensure the right to fair trial, it is important for the law to determine the common case consideration standard, that will be high enough to be compliant with the requirement of the evidences to be clear and persuasive.

One more important issue related with the decision making process of the disciplinary panel is the number of needed votes. According to the law, the panel makes the decision by majority of the present members. In addition, the panel is authorized to consider the case and render decision when over half of the panel members are present. Taking into account the composition of the disciplinary panel, it is authorized to consider the case if at least 3 members of the panel are attending hearing. Even in these circumstances, the decision shall be considered approved, if two of three panel members voted for the decision. In other words it means, that 2 members of the panel have rendered the decision on the disciplinary case, which is less than half of the panel members.

It is important to review the panel composition compared to the decision making procedure. Three judges are the majority in the panel, 2 non-judge members are minority. This representation of judges is incompliant with the best principles of staffing the body considering the disciplinary issues. But the law should provide adequate guarantees that the non-judge members of the panel are not completely excluded from the decision-making process. The present regulations empower three judges to make decision without the approval of the non-judge members. It directly points to the problem of participation level of non-judge members.

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<sup>33</sup> See the judgments by the Disciplinary Panel dated 12 April, 2013

## Chapter 3: Transparency of Disciplinary Proceedings

### *3.1 Goals of transparency and confidentiality of the procedure*

Confidentiality is one of the significant aspects of the disciplinary proceedings. On the one hand, it aims to protect the public interest – support the proper, comprehensive and smooth justice administration, and on the other hand ensure the interest of a specific judge – support the independence and prestige of the judge. Some time ago, the legislator decided to make all the procedure stages secret in order to achieve the above mentioned goal.

One of the interviewees stated, that *“A citizen is not an interested party in the disciplinary proceedings. Therefore, although legally disciplinary procedure is not a dispute, it is a dispute between a citizen and the judge from the moral point of view. If the citizen believes that the system always protects and supports the judge, the disciplinary procedure will be damaged”*.

The case of “Public Defender of Georgia and Ketevan Bakhtadze, the citizen of Georgia against the Parliament” was considered by the Constitutional Court of Georgia and the main topic was the confidentiality of the disciplinary proceedings. The court outlined, that confidentiality of the disciplinary proceedings is related with the public image of the court and the judge and protection-maintaining of that image. The court stated that “the basic principles of judicial independence” prescribe that “the case of a judge should be confidential at the starting stage, unless the judge himself/herself demands otherwise”. Accordingly, article 41 of the Constitution of Georgia does not imply the freedom of information if it may serve as the bases for ungrounded and unjustified restriction of rights or freedoms, or the public interests. In addition, while assessing the disputed norms, provision of the article 24 of the Constitution need to be taken into account, since it limits the freedom of receiving the information, if it damages the independence and impartiality of the judiciary.<sup>34</sup>

This definition makes it clear, that while observing the confidentiality of the disciplinary proceedings, the personal interest of the judge and the interest of the justice need to be protected.

The interviewed respondents, including the prosecutors, lawyers, non-judge respondents and even judges are of contradictory opinions of the confidentiality and transparency of disciplinary proceedings. Some of them believe, that the judgment of the High Council of Justice rendered against the judge should be published without disclosing the personal data of the judge. The others support the idea, that the materials should become public only if the judge himself/herself requests their disclosure.

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<sup>34</sup> Decision of the Constitutional Court of Georgia rendered on 28 June, 2004 - “Public Defender of Georgia and Ketevan Bakhtadze, the citizen of Georgia against the Parliament of Georgia”



They are also arguing, whether the Panel should disclose the information about the deliberation process and judgment of the case. Some of the respondents believe, that disclosing of the information on case consideration process and the judgment itself, will pose threat to the image and the public confidence towards the judiciary. The others believe, that it will facilitate the prevention of commission of disciplinary violations.

### *3.2 Development of the disciplinary proceedings from full confidentiality to disclosure*

The Law of Georgia on “Disciplinary Liabilities and Disciplinary Proceedings of the judges of Common Courts of Georgia” was adopted on 23 February, 2000. By the time when the law entered into force, the article 5 of the law determined the confidentiality of the disciplinary proceedings for the High Council of Justice, as well as for the disciplinary panel and chamber.

On 27 March, 2012 significant changes were entered to the law on making the disciplinary proceedings public. In other words, a new provision was added to the law. According to the new provision, upon the written request of the author of the complaint, the notification on the rendered decision should be sent to the applicant, if the case was not pending in the common courts.

In addition, publishing of the decisions rendered by the disciplinary panel and the disciplinary chamber on the official web-page without disclosing the personal data became mandatory. The disciplinary panel and the disciplinary chamber were empowered to publish the full versions of the decisions rendered by them.

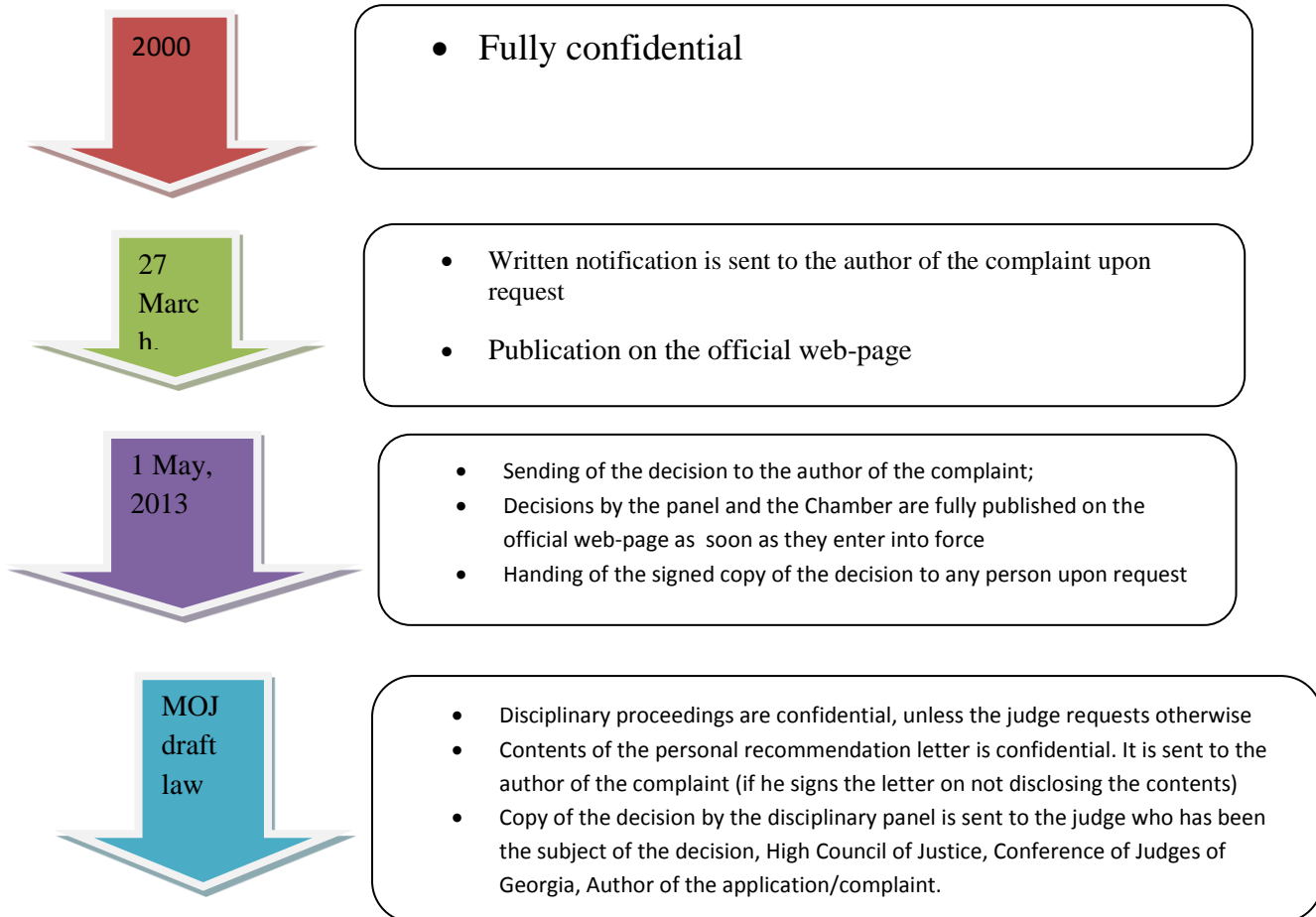
On 1 May, 2013 number of amendments were entered to the law on the disclosure of the disciplinary proceedings. According to the changes dated back to 1 May, instead of sending the notification on the decision, it has become obligatory to send the decision (decision on bringing the disciplinary charges, terminating or suspending disciplinary prosecution against the judge by the authorized body, or official, personal recommendation letter) of the disciplinary panel to the author of the complaint. Besides, immediately after the decision of the disciplinary panel and the disciplinary chamber enter into force, they should be fully published on the official web-page and upon request, signed copies of the decisions shall be handed to the interested party.

After the mentioned changes, the decisions<sup>35</sup> of the disciplinary panel were published on the official web-page of the High Council of Justice without disclosing the personal data.

The below presented chart reflects the stages of transformation of the disciplinary liability system from confidentiality to transparency:

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<sup>35</sup> <http://hcoj.gov.ge/ge/saqrtvelos-saerto-sasamartloebis-mosamartleta-sadistsiplino-kolegiis-gadatskvetilebebi>



Confidentiality of the disciplinary proceedings and the closure of the system in general is a problematic issue not only for the citizens who addressed the disciplinary body with an application or a complaint, but for the judiciary as well. Majority of respondents believe, that *“the judges should be aware of what is the disciplinary misconduct and what is not. Defining the disciplinary conduct is a challenging issue all over the world, since no comprehensive list of violations is available, and whatever is available is too general. Therefore the judges should be aware of the case law, what was considered as a disciplinary violation by relevant body and what was not. This practice should always be available to the judges. It is extremely important for the effectiveness of the system”*.

### 3.3 Transparency of the disciplinary proceedings on the level of High Council of Justice

Statistical data on disciplinary proceedings is published on the official web page of the HCJ, but the reasoned judgment of the Council is not accessible to the author of the complaint, or any other interested

party. Therefore it is not clear why the Council has made the decision to terminate disciplinary prosecution, or continue with the case proceedings against a judge on each particular case.

Although the amendments entered to the law during 2012-2013 made the disciplinary proceedings more transparent, this positive change did not cover the decision making stage of the Council. So one of the most important stages of the disciplinary proceedings has been left without relevant supervision. One of the former judges made the following comment regarding the transparency of the Council activities:

*“I would assign the Council to draft detailed recommendations for judges in order to generalize the practice – what was considered as a violation in the previous cases, so that the judges are aware of what to expect. The judge may not realize that his/her action was a violation of the law. In this case, the judges will have the possibility to respond if something is not going properly in reality. The practice should be published without disclosing the personal data”.*

One of the (non-judge) respondents argued that transparency of the disciplinary proceedings on the level of HCJ was not proper: *“Until the judge is subjected to disciplinary charges, informing the public about this issue is not proper, because the proceedings may be terminated, or the council may not bring disciplinary charges against the judge, or the statute of limitations may expire, there are many reasons why the case may not be transferred to the panel”.*

While working on the study, the Ministry of Justice of Georgia drafted changes to be entered to the law on disciplinary proceedings. According to the MOJ draft, the disciplinary proceedings are confidential unless the judge requests otherwise.<sup>36</sup> The same applies to the case consideration procedure in the disciplinary panel.

According to the MOJ draft, the contents of the private recommendation letter is confidential, although it is sent to the author of the complaint, if the later confirms with his/her signature to keep the contents confidential.<sup>37</sup>

The draft, that envisages making of the disciplinary proceedings public by the judge, is of positive nature, since confidentiality of the disciplinary proceedings is aimed at protection of the rights of judges. If the judge believes, that his/her case should be public, the law should not restrict this possibility.

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<sup>36</sup> Article 5 of the Law of Georgia on “Disciplinary liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia”

<sup>37</sup> Article 51 of the Law of Georgia on “Disciplinary liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia”

In a conclusion, it should be mentioned, that to improve the legal-institutional framework and practice of the disciplinary proceedings (body administering the disciplinary proceedings – session of the members of the Council, panel and chamber, voting procedure), it can be confidential and the decision rendered based on this proceedings will be public. For this purpose, relevant changes should be entered to the law. According to the change, the decision on bringing disciplinary liability against the judge, terminating, or suspending disciplinary prosecution, addressing the judge with private recommendation letter should be handed to the applicant (author of the complaint); In addition the full version of the judgment should be published on the official web-page of the HCJ to enable the public to be in control of the processes related with the disciplinary proceedings and not lose confidence towards the reasoning behind the rendered judgment.

In addition, the law may take into account the alternative to publishing the full copy of the decision rendered by the High Council of Justice concerning the disciplinary issues– and instead publish the anonymous resumes of the rendered decisions on its web page, similar to the practice of the State of California.<sup>38</sup> It will enable the judges, as well as the public to assess the proportionality of the HCJ activities. At the same time, the judges will be aware of what is considered as a disciplinary misconduct and what is considered as a legal error. This change will help to keep balance between the protection need of the body administering the proceedings on the one hand and the specific judge involved in proceedings on the other hand.

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<sup>38</sup> Victoria Henley, Overview of Judicial Disciplinary Systems, Confidentiality Issues, Georgia 2011

## Chapter 4. Line between the disciplinary liability and criminal responsibility of the judge

### *4.1. Importance of drawing line between disciplinary liability and criminal responsibility*

Independence and freedom from possible internal and external pressures of each individual judge, as well as the whole system is crucial for the effective functioning of the judicial system. Together with the other factors, independence of the judiciary is directly linked with the freedom of judges and fostering of the practice according to which, the judges are accountable only in front of the law and the political, or other interests of outside subjects can not influence the activities and faith of an individual judge. To establish this practice, the grounds of the responsibility of judges should be fair, adequate and most importantly regulated by clear legal norms.

While defining the possible liability related with the judge's execution of his/her authorities, it is necessary to make clear distinction between the grounds for disciplinary liability and criminal responsibility. Unfortunately, nowadays, there is not a clear line between the above-mentioned two systems. The reason for this can be that the criminal code does not provide precise definitions of some of the norms. Besides, the grounds of disciplinary liability provide the possibilities for various interpretations. In addition to all these, Georgia does not have sufficient judicial practice, that would make it easier to draw a line between disciplinary liability and criminal responsibility. In these circumstances, the only way of achieving the goal is the analysis of the legal framework. The given chapter is dedicated to the review of the normative materials.

### *4.2. Criminal responsibility system of Judges*

Majority of the crimes related to exercising of the office authorities of the judge are covered in the Chapter 34 of the Criminal Code of Georgia. This chapter refers to the crimes related to public service, more specifically the ones, such as the abuse of official authority, misuse of power, passive bribery, trading in influence, accepting a gift prohibited by the law, service-related negligence and etc.<sup>39</sup> One of the judge respondents believes, that together with the corruptive offence, criminal prosecution should be undertaken in case of conflict of interests, or when the judge does not request self-recusal and for example considers the case of a close relative.

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<sup>39</sup> Articles 332-342<sup>2</sup> of the Criminal Code of Georgia

While exercising professional duties, the judge may also violate personal secret, which also represents to be a punishable crime.<sup>40</sup> Deriving from the fact, that the subject of the listed offences is not a specifically a judge, but a public servant in general, and in some cases no special executors are available, the disposition of norms are not sufficiently detailed and it provides for the possibility to be adjusted to broad public. Accordingly, the analysis of the article crucial for the study is needed, in order to summarize the specific cases and the qualifications used for imposing criminal liability upon a judge.

### 4.3. *Offence of Corruption*

According to the Law of Georgia on Conflict of interests and Corruption in the Public Service, “Offence of Corruption” is an action, which contains elements of corruption and entails a disciplinary, administrative or criminal liability prescribed by Law .<sup>41</sup> The same law provides the definition of elements of corruption. Particularly, *Corruption in the public services is the abuse of power and the opportunities related to that power by a public official for the purpose of obtaining property or other material benefits*. Unfortunately, the Georgian legislation does not provide more detailed and specific definition of corruption and therefore it is very difficult to explain the case, when a person may be subjected to disciplinary, or criminal liability for the commission of corruptive violation.

It should be noted, that the “Criminal Law Convention on Corruption” that was ratified by Georgia in 2006, prescribes active and passive forms of bribery.<sup>42</sup> The relevant article of the Criminal Code of Georgia<sup>43</sup> fully covers the both elements of the bribery prescribed by the Convention. According to the Article 338 of the Criminal Code of Georgia, passive bribery is the *receipt or request by a public official or a person with an equal status directly or indirectly of money, securities, property, material benefit or any other undue advantage, or acceptance of an offer or a promise of such an advantage, for himself or herself or for anyone else, to act or refrain from acting in the course of carrying out his/her official rights and duties, in favor of the bribe-giver or other person, as well as use his or her official position for that end or to exercise official patronage*. This definition clearly reflects, that the offence of bribery is quite broad and it implies any action undertaken in order to obtain undue benefit by an official under his/her official capacity that is aimed at active bribery, or satisfaction of the interest of other person. It is not necessary for the judge to commit an illegal action, or misuse power to determine the bribery crime.

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<sup>40</sup> Articles 157 of the Criminal Code of Georgia

<sup>41</sup> Paragraph 2, Article 3 of the Law of Georgia on Conflict of interests and Corruption in the Public Service

<sup>42</sup> Articles 2 and 3, Criminal Law Convention on Corruption

<sup>43</sup> Articles 338 and 339, Criminal Code of Georgia

The above presented facts clearly reflect, that bribery as meant by ratification fully fits within the criminal justice. Article 338 of the CPC applies to any action involving corruptive elements; therefore it becomes impossible to apply administrative, or disciplinary sentences.<sup>44</sup> Corruption offence should be differentiated from the acceptance of gift prohibited by law. The comments provide an interesting explanation concerning this issue stating, that “the crucial precondition for criminal liability is that the action of an official should have been guided by bribery. If it was not prearranged to accept the bribe and according to the case circumstances the official could not have known in advance that a bribe-reward would be offered to him/her for the given action, then it should not be considered as the offence of bribe, especially if the official was acting within the law. Granting of a gift after the action should be considered as acceptance of a gift prohibited by law, instead of a bribe. All this is derived from the contents of the Article 338. Based on these, one can not say, that if a person did not intend to take a bribe and acted, or refrained from the action that was afterwards gifted with a present, an item, or money, it is not acceptance of a bribe. Sometimes accepting a gift in the similar situation does not lead to criminal liability, if the value of the gift is not very high. In this case, the official may be subjected to disciplinary liability.”<sup>45</sup> Accordingly, while talking about the corruption offence, the most important is whether the judge realized, or was aware that he/she would receive some type of a profit/advantage for the undue action.

If the judge acted without having any information and as a result he/she received a gift, or an advantage, it can not be regarded as a bribe, although the issue of liability for accepting the gift prohibited by the law arises (Article 340 of the Criminal Code of Georgia). In this case, the value of the accepted gift, or advantage is of crucial importance. *Throughout the whole year, the sum of the presents received by the judge shall not exceed 15% of the whole year wages. A present received once shall not exceed 5%, if these presents are not received from the same source.*<sup>46</sup> In case of violation of this provision, the judge shall be subjected to criminal liability. But it is not clear whether incompliance to these conditions will lead to disciplinary liability.

#### 4.4. Abuse of official authorities

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<sup>44</sup> The only exception is the failure to submit the property declarations within the set deadlines that is considered to be a corruption offence according to the law.

<sup>45</sup> Special part of the Criminal Law (Book II), pg. 163

<sup>46</sup> Article 5 of the Law of Georgia on Conflict of interests and Corruption in the Public Service

On the one hand, the line between bases of the criminal liability - abuse of official authorities<sup>47</sup> and disciplinary misconduct – abuse of authority against the interest of justice and service interests is distinct.<sup>48</sup> **To qualify an action as a crime, together with the abuse of official authorities by the judge, this action has to cause substantial violation of legal interests of specific person, public, or state. In addition, availability of the link between the undue exercise of the authority and harmful result is needed.**<sup>49</sup> The incurred harm should be substantial. Its concept is evaluative and it should be determined taking into account the individual circumstances of the case. Besides, the judge should have a specific goal – obtain benefit or advantage for oneself or others. It should be mentioned, that Article 332 of the Criminal Code of Georgia is too general: it does not specify whether the abuse of official authorities implies any undue action undertaken in relationship to the office authorities. Often it is difficult to determine what type of harm should be regarded as substantial; In addition the goal of advantage can be interpreted in various manners. This empowers the prosecutor’s office to interpret the given norm more broadly if needed and use it against specific judges.

As a result of the analysis of the norms, the following assumptions can be made: To qualify the action of a judge damaging interests of justice and office while exercising official authority, as an abuse of official authorities, the following elements should be present:

- Abuse of authority against the goals of the law;
- Substantial harm caused by the action;
- The commission of the actions should intend to get advantage, or benefit.

In case if these actions exist in cumulative manner the action of the judge can be qualified as disciplinary misconduct. Concerning the possibility of applying the abuse of authority over judges, the explanations provided by the court of Appeal and the Supreme Court are crucial. In the recent years, the courts of upper instances considered several cases on the responsibility of judges in compliance with the Article 332 of the Criminal Code of Georgia. Particularly on deleting the illegal judgment from the law and fitting the actions under the article 332. This issue is reviewed in the chapter concerning the practice.

#### *4.5. Service-related negligence*

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<sup>47</sup> Article 332 of the Criminal Code of Georgia

<sup>48</sup> Article 2 of the Law of Georgia on “Disciplinary liability and Disciplinary Proceedings of the Judges of Common Courts of Georgia”

<sup>49</sup> Special part of the criminal Code (Section II) pg. 139



It is important to establish difference between the non-performance, or improper performance of the judicial duties and the service-related negligence (Article 342 of the Criminal Code). Service-related negligence would be non-performance, or improper performance of official duties as a result of negligence. Criminal qualification will be assigned to the case only if the activity caused substantial violation of the rights of physical or legal person, legal interests of public or state. **Substantiality of violation of rights and interests should be resolved individually in each particular case. However substantial damage is the major sign that takes the action beyond the disciplinary borders and leads to criminal liability.** Since every decision of the judge makes special impact on public, as well as specific persons, any type of misconduct committed by the judge may lead to significant legal results. For example: it is difficult to tell whether delay of the case for several hours by the judge that resulted in undue detention of a person, is a criminal action, or a disciplinary misconduct. Therefore, it is not fair to draw line between the two responsibility systems only based on the substance of the damage.

Subjective element can also be used as an additional criteria for distinction: “if the judge is not performing, or improperly performing his/her official duties because of lack of experience, knowledge or qualification and not because of the service-related negligence, his/her action can not be qualified as service-related negligence. But if relevant circumstances are available, measure of disciplinary effect can be applied against him/her and it can even mean dismissal from the office.”<sup>50</sup>

One of the judge respondents mentioned, that there has been a real case, when the custody deadline expired, but the judge did not prolong the deadline and left the person in custody. The judge was subjected to disciplinary liability for this action, but he/she was not fired from the office. This decision led to custody of a person up to 2 months or even longer. The judge was not fired, but a fine was imposed upon him/her. The authors of the research found a criminal case against a judge, who was charged with leaving a person in custody without prolonging the custody period (detention over 3 months without prolongation). In the given case, the judge was justifying this action by enormous case load and lack of specialization in criminal cases and other circumstances. Regardless of this, the judge was found guilty.

The following circumstances should be taken into consideration while making distinction between the disciplinary misconduct and legal error: number of cases assigned to the judge, the complicity of the cases, specialization of the judge and the category of the case to be considered. As well as all the other factors, that may exclude any cruel, dishonest or inexcusable action from the side of the judge. Evidently when acting in good faith the judge should be protected from the threat of any criminal liability.

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<sup>50</sup> Special part of the Criminal Code (Section II),pg.187

#### *4.6. Keeping professional secret*

Keeping professional secret is mandatory for a judge according to the rules of ethics, as well as Criminal law. Therefore line between the two fields of responsibilities need to be established.

According to the law, disclosing the secret of the judicial session, or professional secret can serve as the ground for disciplinary liability. The criminal Code does not provide specific norm, that would order the judges, or public officials to keep professional secret, although in this case article 157 of the Criminal Code can be applied. The article states that the unlawful obtaining, storing, or dissemination of personal or family secret that caused significant damage is a punishable action. The aggravating factor of the same article is the commission of the above mentioned act by a person who was obliged to keep the secret because of his/her office duties, professional activities, or other circumstances.<sup>51</sup> According to the General Administrative Code, professional secret is the information concerning the personal data of other person, or commercial secret obtained by a person in the course of exercising official duties.<sup>52</sup> Information obtained by a judge while exercising judicial duties is a professional secret disclosing of which may serve as the bases of imposing various sanctions. Since the criminal legislation is not very clear in this regard, the only element according to which the disclosing of the secret information by a judge would lead to criminal sanction is the substantial damage. However, significant damage is a new element for this article (Article 157 of the CC) and up to 2012, the criminal liability would arise immediately on the stage of disclosing the information, regardless of whether it would cause any damage or not. Therefore, up to 2012, it was even more difficult to determine the type of responsibility to be imposed upon the judge – would it be disciplinary liability or criminal responsibility.

**It is vague, whether disclosing of the jury discussions is the action punishable by criminal code. The Article 367<sup>1</sup> of the Criminal Code envisages imposing responsibility for the violation of the secrecy of jury discussions and ballot, although the similar norm is not available in regards to judges. The definition of the article 157 is too broad and it would not be fair to make the violation of secrecy punishable based on this article.**

#### *4.7. Illegal imprisonment*

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<sup>51</sup> Part 3, article 157 of the Criminal Code of Georgia

<sup>52</sup> Article 27<sup>3</sup> of the General Administrative Code of Georgia

Intentionally subjecting an innocent person to criminal liability (article 146 of the CC) and illegal release of an accused from criminal liability are punishable by legislation (article 334 of the CC). But the judge can not be the subject of these crimes, since only the prosecutor is authorized to bring the charge, or initiate prosecution against a person. **However, article 147 of the CC, referring to the responsibility for the intentional illegal imprisonment of a person, is essential for the assessment of the responsibility of a judge.** Criminal procedure legislation provides detailed grounds and clearly defined procedure of imposing imprisonment as a means of preventive measure. In addition, the law provide the possibility of appealing the judgment and addressing the court with a request to replace, or abolish the preventive measure. Obviously the possibility to appeal in the higher instance court is the admission of the fact, that consideration of any case may involve some type of impreciseness, misinterpretation, or misuse of substantial, or procedure norm from the part of the judge that needs to be examined by a higher instance court. Unlawfulness of the judgment is one of the grounds for the higher instance court to abolish it. In addition, determining of the unlawfulness of the judgment is the exclusive authority of the courts of higher instance.

The article on intentional unlawful imprisonment envisages the imposing of the liability against a judge for the groundless violation of the deadlines of reviewing the preventive measures in case of imposition, or replacing, or refusal to abolishing the imprisonment. In addition, the disposition of the given norm outlines the need for the presence of intention. Regardless of this, the norm is not clear enough to exclude the responsibility of the judge in other cases, for the interpretation of the norm, assessment of the evidences, or/and the contents of the decision rendered based on the submitted evidences.

The analysis of the criminal cases against the former judges proves, that in some cases, the prosecutor's office, as well as the judiciary would interpret the "intention" as the fact of realizing once own actions and anticipated results by the judge, which is the analogy of the "ill faith".

Therefore using of the term "intention" can not reduce the risks related with the responsibility of the judge for the rendered decision. **In addition, the procedural part of the case is also vague. Particularly, how to determine the lawfulness of the decision on imprisonment without requesting report of the given case. Requesting the report of the case is against the Georgian Constitution.**

**To conclude discussions on the criminal liability system of the judiciary, we can say, that it is important for the law to determine adequate standard according to which, imposition of criminal responsibility is not allowed if the judge acted in good faith and was confident that the available grounds were sufficient to render acquittal or the verdict of guilty, his/her action was not driven by case related personal interest, wish/expectation to obtain undue advantage or benefit.**

In case of dissatisfaction, the party has the possibility to appeal the decision in the higher instance court. Regardless of the assessment of the case circumstances by the appellate court, the above mentioned factors can not serve as the bases for the liability of a judge. Concerning the decision rendered by judge, one of the respondents (prosecutor) believes, that *“if the decision of the judge is clearly offensive, the responsibility issue may arise. However if we follow this practice in case of all types of decisions, the independence of judiciary may become risky and the judges may find themselves under constant fear”*.

#### *4.9. Rules of bringing criminal charges against judge*

The legislation is aware of the protection measures of a judge, such as approval of the chairman of the Supreme Court on undertaking the criminal prosecution against a judge.

Concerning the approval on undertaking criminal prosecution against a judge, some of the interviewed respondents stated, that it was better if the collegial body would make such decisions. According to the former judge *“it is questionable whether the chairman of the Supreme Court should have the unilateral right to issue approval, since this right was abused in the past”*. The same judge announced, that *“it is not the competence of the Council, although criminal chamber of the Supreme Court may review this issue”*.

Another former judge had a different opinion and believed, that no permission should be needed to undertake criminal prosecution – *“this is the management tool. In the past prosecution of the judge of the Supreme Court was not allowed, but the norm has changed after they needed to manage the judge. Based on the past experience, I would exclude the option of assigning the chairman the right to issue permissions.”*

One of the judge respondents believes, that when referring to the liability of a judge, there should be a different standard for the Supreme Court judge and the judges of the courts of other two instances. They should benefit from equal protection and social guarantees: *“It is obvious, that the status of the Supreme Court member is higher, but the issues related with status and responsibility should absolutely be equal among these persons, since it is the same legal framework, they are the part of the same judiciary and therefore I believe differences should not exist among them.*

Regardless of the contradictory opinions regarding the procedures of bringing charges against judge, the tool of “unilateral consent” is still regarded as containing some risks. One of the respondents believes that the possibility to issue consent is harmful for the judicial independence in general.

Besides the approval tool, scope of immunity of a judge, that is absolute according to the acting legal framework, is one more important issue related with the criminal liability of a judge. Therefore, in case of any type of crime (whether its public service related, or any other), the consent of the Chairman of the Supreme Court is needed.

Procedural issues, related with the development of the criminal case against the judge are also important. The Constitution of Georgia prohibits requesting the judge to provide a report concerning the specific case. It is obvious, that the Constitution within the judicial authorities protects the decisions rendered by the judges from improper impact. However, it is clear, that this provision in the Constitution does not provide criminal, or disciplinary immunity to a judge in general and does not prohibit the responsibility of the judge even in cases of crimes related to public service.

The disposition of the mentioned norm of the Constitution with the procedure legislation that does not contain special provision on judiciary needs to be taken into account. The procedure code allows the possibility of interrogating judge, similar to undertaking any other procedure or investigative activity. Regardless of numerous criminal cases launched against the prosecutors within the recent years, unfortunately the practice development could find the answers to the questions such as: what is the scope, or specifics of procedure norms in relationship to the judges. For example, what procedure and scope should be used for the interrogation of judges without violating the provision of the Constitution on requesting the report.

General, or insufficiently clear nature of the procedure norms also contains risks for the independence of judiciary compared to existence of the elements of specific crimes in the Criminal Code. Therefore, it is important for the legislation, as well as the guideline principles of the prosecutors to clearly determine the nature and scope of procedure measures that may be used against the judges.

#### *4.10 Concluding assessments*

It can be assumed, that the vagueness of the legal regulations reviewed in the given document hinders the development of continuous, predictable and objective practice that is crucial for the justice independence. As outlined above, the structure of the disciplinary liability system is not well developed and the contents are not sufficiently clear.

In some cases, the grounds of disciplinary misconduct provide for the possibility of subjectivism of the body undertaking the disciplinary prosecution. In addition, the legislation does not provide clear

difference between the actions punishable by disciplinary and criminal procedure. Based on some general dispositions, undertaking of the criminal prosecution against judged from the part of the prosecution is threatening and relatively risky.

It is important to develop the system for distinguishing disciplinary and criminal liability from each other. Appealing on general concepts, such as ‘substantial nature of damage’ is not a reasonable line for transferring a case from disciplinary field to criminal. It unfairly grants the prosecution high level of discretion. The prosecution is the party during the proceedings and frequently may also be the subject unsatisfied with the decision of the judge.

For the protection guarantees of the judge, it is important to further develop the norms of the Criminal Code concerning the liability of a judge while exercising official authorities. The action of the judge considered to be over the disciplinary boundaries, should be strictly defined. Revision of the dispositions of misuse of official authority and service related negligence is especially important.

All the above mentioned is important in order to avoid providing the prosecution bodies with the possibility to be biased and act arbitrarily. In additions it should be predictable for the judiciary what can be the potential results of their actions. Promoting the effective, independent and qualified functioning of an individual judge and the judicial system as a whole can not be achieved without establishing well-developed, clear, strictly defined disciplinary and criminal liability systems and practice.

## Part II. Review of the International Standards and Legal Frameworks of other States

### *Chapter 1: Review of the general issues/principles*

#### **1.1. Goals and basic principles of the judicial disciplinary liability system**

Judicial independence is one of the basic principles reinforced through international legal documents, state legislation and practice.<sup>53</sup> However, it should be outlined that independence of the judiciary entails its independence from the other two branches of power and not freedom from the accountability in front of the public and the law. Judicial independence requires a judge to commit to following the constitution, the statutes, common law principles, and precedent without intrusion from or intruding upon other branches of government.<sup>54</sup> If the judge fails to devote relevant attention to case consideration because of laziness, or is obviously incompetent in considering them,<sup>55</sup> or abuses the law, violates human rights, or otherwise violates justice, he/she should be subjected to punishment for nobody stands above the law in the democratic society.

The disciplinary liability system of the judiciary shall serve the above mentioned purposes – ensure the accountability of the judge in front of the public and the law.<sup>56</sup> It shall be prohibited to use the accountability system of judiciary for the purpose, or in a manner to restrict, or pose threat to independence and impartiality of an individual judge, or the judicial authority in general.

For the effective performance of its duties and at the same time, not become the tool for putting pressure over the judiciary; the disciplinary system should comply with certain conditions that can be briefly formulated as follows:

- Disciplinary proceedings against a judge shall be administered only on the grounds and in line with the procedure/rules predetermined by the law.<sup>57</sup>

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<sup>53</sup> See, for example: Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; Also see: Recommendation No. R (94) 12 of the Committee of Ministers to Member States of the Independence, Efficiency and Role of Judges (Adopted by the Committee of Ministers, 1994) [here in after referred as - COE Recommendation No. R (94) 12

<sup>54</sup> In re Hammermaster, 985 P.2d 935 (Wash. 1999)

<sup>55</sup> CCJE (2007) OP.no 10

<sup>56</sup> CCJE (2002) Op. N° 3

<sup>57</sup> The Universal Statute of the Judge, international Association of Judges (1999) [here in after referred to as The Universal Statute of the Judge].

- Disciplinary case against the judge shall be administered following the principle of fair trial; which means, that the case shall be considered by an independent and impartial body, presumption of innocence of a judge should be followed during the case proceedings, the accessibility to case materials and the right to present own arguments and etc. should be guaranteed for the judge.<sup>58</sup>
- More than half of the disciplinary body members responsible for imposing disciplinary liability shall be the elected judges.<sup>59</sup>
- Disciplinary sanctions/punishments shall be prescribed by the law and the principle of proportionality shall be guiding for their imposition.<sup>60</sup>
- A judge shall have the right to appeal the rendered decision with another independent body.<sup>61</sup>
- Grounds for launching disciplinary proceedings, the proceedings itself and the rendered decisions should comply with the relevant level of transparency to exclude selective usage of system of disciplinary proceedings.<sup>62</sup>
- Besides, the law regulating the issues of disciplinary proceedings of judiciary should comply with the predetermined standards of clarity and predictability.<sup>63</sup> It means, that it is not enough for the norm to be prescribed in the law. It is crucial for the results of the functioning of the norm be predictable for those to whom they apply: It should be clear for the judge whether the results of the functioning of the norm will cause disciplinary liability and what kind of liability will it be (whether it will be dismissal from the office or any other type of punishment).<sup>64</sup>

## **1.2. Systems of disciplinary liability of judiciary and appealing decisions in the higher instance courts – conflict or complementarity**

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58 OSCE/ODIHR Opinion on the Law 29/1967 Concerning the Judicial System, the Supreme Council of the Judiciary and the Status of Judges in Tunisia [hereinafter OSCE/ODIHR Opinion on the Law 29/1967]

59 European Charter on the statute for judges of 8-10 July 1998 (Department of Legal Affairs of the Council of Europe, Document (98)23)

<sup>60</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, par. 58, also see: Venice Commission Opinion No. 408 / 2006

<sup>61</sup> Venice Commission, Opinion No. 408 / 2006 (Strasbourg, 19 March 2007), par.9

<sup>62</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/23/43/Add.3, Mission to Maldives, 21 May 2013, par. 45

<sup>63</sup> Venice Commission Opinion No. 408 / 2006.

<sup>64</sup> OSCE/ODIHR Opinion on the Law 29/1967



If the violation committed during the justice administration can be corrected in the higher instance court, no disciplinary proceedings shall be launched.<sup>65</sup> Revision and amendment of the rendered decision shall not be the goal of the disciplinary proceedings. Rendered decision shall be revised only through appeal procedures prescribed by the law.<sup>66</sup> The goal of the disciplinary procedure is the evaluation of the conduct of the judge and its compliance with the office held.

But there are exceptions from this approach as well. The concept and need of the exception is clearly stated in the decisions of the US courts. The decisions reflect, that the possibility of appeal in the higher instance court, serves the purpose of eradicating an alleged violation committed against a particular person in the past. The disciplinary proceedings system is aimed at prevention of the possible violations (misconduct from the side of the judge) in the future.<sup>67</sup> So obviously these two systems have different goals. Therefore, in some cases it is necessary to use not only the possibility of appealing the rendered decisions, but also the disciplinary liability system of judges.<sup>68</sup> Because correction of the unfairness committed against a specific person, does not automatically provide the protection guarantees to the public against the same judge reoffending (improper conduct), or abusing authority.<sup>69</sup>

Even more, realization of the goals of the judicial disciplinary liability system should not depend upon whether any of the parties decides to appeal the case in the higher instance court.<sup>70</sup> Accordingly appealing the case in the higher instance court does not necessarily and automatically mean that it should not be considered by the body responsible for reviewing the disciplinary cases.

### **1.3. Disciplinary liability system and judicial professional ethics**

It is widely recognized, that the judges being the representatives of one of the most responsible and important professions should uphold the rules of professional ethics. The code of ethics assists the judges in deciding how not to act, realize their roles and responsibilities and that the entrusted power poses crucial responsibilities in front of themselves and the public.<sup>71</sup> On the other hand, it helps the citizens to

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<sup>65</sup> Ibid

<sup>66</sup> COE Recommendation No. R (94) 12

<sup>67</sup> Laster, 274 N.W.2d at 745; In re Lichtenstein, 685 P.2d 204, 209 (Colo. 1984).

<sup>68</sup> In re Schenck, 870 P.2d 185 (Or. 1993)

<sup>69</sup> Harrod v. Ill. Courts Comm'n, 372 N.E.2d 53, 65 (Ill. 1977).

<sup>70</sup> In re Schenck, 870 P.2d 195 (Or. 1993).

<sup>71</sup> CCJE (2002) Op. N° 3

understand the legitimate anticipations concerning the judicial conduct. In addition, it promotes the credibility of the judicial independence and impartiality among public.<sup>72</sup>

Although the codes of ethics have significant roles, Consultative Council of European Judges (CCJE) outlines in one of its opinions, that only the principles of ethical conduct are not enough for the protection of judicial independence and impartiality. They need to be further reinforced with various laws and rules of disciplinary liability.<sup>73</sup> **Therefore, rules of professional ethics of judiciary do not replace the need of the disciplinary liability system of judges and visa-versa.**

According to the council of Europe recommendation, the principles of professional ethics cover the below presented responsibilities, the violation of which may serve as the bases for disciplinary liability of a judge.<sup>74</sup> However according to the CCJE violation of the rules of professional conduct – taken apart – should not be considered as disciplinary misconduct, civil or criminal violation.<sup>75</sup>

It is recognized, that the judges should play the leading role in drafting the ethics codes.<sup>76</sup> CCJE also allows the possibility of other bodies drafting the codes, but the body should be different from the one responsible for the discipline of judges.<sup>77</sup>

There are several ways for identifying the body competent in the issues of judicial ethics: 1. This task should be assigned to the justice council, unless the functions of the council cover the disciplinary issues, or incorporating special disciplinary body with separate composition; ii. Or, Ethics committee should be established faintly with the justice council with a single function of drafting the rules of professional ethics and monitoring of their implementation. In case of the second option, problems may arise in regards to the criteria for the selection of committee members and a risk of conflict, or disagreement between the committee and the justice council. In addition, the ethics body will provide the judges with consultancy on the issues of professional ethics they may face throughout their career.<sup>78</sup>

CCJE also considers it fair to involve the representatives of non-judicial field in the process of drafting the principles of ethics, to avoid the perception of self-interest and self-protection and to provide the judges with the possibility to determine their own rules of professional ethics.<sup>79</sup>

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<sup>72</sup> Recommendation CM/Rec(2010)12

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> CCJE (2002) Op. N° 3

<sup>76</sup> Recommendation CM/Rec(2010)12

<sup>77</sup> CCJE (2007) Op. N° 10

<sup>78</sup> Ibid

<sup>79</sup> Ibid

## *Chapter 2: Concept and types of disciplinary misconduct*

Kyiv recommendations define the grounds for applying the disciplinary liability as the “professional misconduct, that is grave and inexcusable and discredits the reputation of judiciary, as the institution”.<sup>80</sup> The recommendation also provides the explanations about what should not be considered as a disciplinary misconduct (for example: improper interpretation of the law).<sup>81</sup>

The grounds for the imposition of disciplinary liability differ according to the states, although as a rule the laws on judicial conduct and the ethics codes are bounding the judges to refrain from the activities that may damage/cause questions regarding the good faith and independence of a judge, or the judicial authority as a whole.<sup>82</sup> However, this provision may be interpreted in various ways and to avoid the abuse of disciplinary proceedings and prosecution of judges with improper motives, it is necessary for the national legislation to be as clear and detailed as possible, instead of being ambiguous and broad. The legislation should clearly define what is the disciplinary misconduct leading to the disciplinary liability of a judge.<sup>83</sup> At the same time, it is widely recognized, that the law can not always be completely precise and reasonable balance should be achieved in this regard,<sup>84</sup> and the general formulations can be balanced if continues practice, that can be interpreted more narrowly is available.<sup>85</sup>

The following may serve as the bases for the imposition of disciplinary liability upon a judge: Regular delay of the performance of entrusted work (Slovenia)<sup>86</sup>; gross and repeated negligence of judicial duties (Sweden)<sup>87</sup>; non-performance of the judicial duties, for example gross and intentional violation of procedure norms, that provide essential guarantees for the rights of a party (France)<sup>88</sup>; abuse of judicial authority to obtain undue advantage for oneself or the others (Italy), membership of secret union, or an association objectively incompliant with the judicial duties (Italy)<sup>89</sup>; violation of the rules of case

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<sup>80</sup> OSCE Office for Democratic Institutions and Human Rights/Max Planck Minerva Re- search Group on Judicial Independence, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), Kyiv Recommendations, Rec. 25 [hereinafter Kyiv Recommendations]

<sup>81</sup> Kyiv Recommendations, Rec. 25

<sup>82</sup> Opinion No. 408 / 2006, OPINION ON THE LAW ON DISCIPLINARY RESPONSIBILITY AND DISCIPLINARY PROSECUTION OF JUDGES OF COMMON COURTS OF GEORGIA adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)

<sup>83</sup> Venice Commission Opinion on the Law on Disciplinary Responsibility Prosecution of Judges of Common Courts of Georgia (adopted by the Venice Commission at its 70th Plenary Session, Venice, 16-17 March 2007); also see: Opinion No. 408 / 2006.

<sup>84</sup> see. OLEKSANDR VOLKOV v. UKRAINE JUDGMENT (MERITS)

<sup>85</sup> OLEKSANDR VOLKOV v. UKRAINE JUDGMENT (MERITS)

<sup>86</sup> European Judicial systems, edition of 2012 (based on the data of 2010), Council of Europe, CEPEJ, 2012

<sup>87</sup> Judicial Independence in Europe: The Swedish, Italian and German Perspectives

<sup>88</sup> Securing Justice, The Disciplinary System for Judges in Russian Federation, Report of an ICJ Mission, 2012 [here in after - ICJ Report, 2012]

<sup>89</sup> Ibid

assignment and registration; violation of rules defining the jurisdiction; non-appliance of measures on an application, complaint or a case consideration within the times frames determined by the law; violation of the obligation on impartial consideration of a case, particularly nonperformance of the obligation on self-recusal; regular, or serious violation of judicial ethics discrediting the image of the justice, disclosure of confidential information, including the disclosure of the information on closed procedure; failure to complete, or late submission of financial declaration, or filling in incorrect information in the declaration form (the Ukraine)<sup>90</sup>; improper treatment of colleagues and staff members, making improper comments, having negative prejudice or generating it among outside persons; commenting on a pending case; improper communication with one of the parties or the parties (ex parte communications); acceptance of gifts, loans and other type of assistance, improper business activities; improper political activities; abuse of judicial authorities; nonperformance of judicial functions (for example sleeping during the trial, missing the trial), on inability to perform judicial duties; abuse of power during the judicial activities, as well as while the person is not exercising judicial authorities (for example: abuse of received information); irrelevant gender related comments in the office, sexual harassment (State of California)<sup>91</sup>; misconduct in the court room (shouting, gender bias, racist comments), making public statements concerning the pending case, considering of a case, the result of which is related with the financial interest of a judge, support of a specific political candidate, or activities undertaken separate from the judicial authorities, for example: sexual harassment, theft, driving under intoxication, threat, racist comments and etc. (State of Texas).<sup>92</sup>

### *Chapter 3: Disciplinary liability measures (punishments/sanctions)*

The national legislation shall define the measures (punishments) of disciplinary liability in details. In addition, it should define the level of gravity of the misconduct leading to certain disciplinary sanction.<sup>93</sup>

Disciplinary sanction should be proportional to the committed violation.<sup>94</sup> For the sake of this principle, it

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<sup>90</sup> Official web-page of the High Qualification Commission of Judges of Ukraine  
<http://www.vkksu.gov.ua/en/disciplinary-proceedings/disciplinary-liability-of-a-judge/>

<sup>91</sup> State of California, Commission on Judicial Performance, see at  
<http://www.cjp.ca.gov/res/docs/appendix/Chart%20-%20Types%20of%20Misconduct.pdf> The example of California is interesting since in California, commission of a criminal offence by a judge is also a ground for bringing disciplinary liability against him/her; Another interesting fact is that, in California, similar to Germany, disciplinary liability is applied not only against the practicing judges, but also against the former judges for the disciplinary misconduct committed throughout the office term.

<sup>92</sup> Texas State, State Commission on Judicial Conduct, see at <http://www.scjc.state.tx.us/faqs.asp#faq12>

<sup>93</sup> Venice Commission Opinion No. 408 / 2006; also see, Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, par. 57 and CCJE (2002) Op. N° 3

<sup>94</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, par. 58, also see Venice Commission Opinion No. 408 / 2006

is recommended for the national legislation to refrain from strictly limiting the numbers and types of the sanctions to be used.<sup>95</sup> Dismissal of the judge from the office, being the strictest sanction, it is recommended to determine the types of disciplinary misconduct that will constitute to dismissal from the office and other grounds, that would cause appliance of more lenient disciplinary measures.

### **3.1. Dismissal from the office as a measure of disciplinary liability**

Immunity is one of the essential guarantees of the independence of the judiciary and a specific judge throughout the office term.<sup>96</sup> Therefore dismissing the judge from the office should be an exceptional case and be used only as a measure of last resort. Particularly, when the judge is unable (physical inability, or mental incapacity) to exercise his/her authorities, or has committed an action incompatible with the status of a judge, such as a criminal offence, or grave violation of disciplinary rules.<sup>97</sup>

It is interesting, that in some of the cases, dismissal of a judge from the office may infringe not only the right of fair trial, but also the privacy right.<sup>98</sup>

### **3.2. Other measures of disciplinary liability**

Different states are using different sanctions as measures of disciplinary punishments; for example: **Official warning (Bosnia and Herzegovina, Moldova, Turkey), remark – (Bulgaria), or guidance on the conduct required from the judge (England and wales), review of the costs of proceedings (Austria), review of the conduct of the judge (Azerbaijan), written warning (the Netherlands)<sup>99</sup>, temporary suspension of the authority before the final decision on termination of authority is**

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<sup>95</sup> OLEKSANDR VOLKOV v. UKRAINE JUDGMENT (MERITS) In this case, the court stated, that since the legislation prescribed only three types of sanctions, it was impossible to follow the proportionality principle.

<sup>96</sup> CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irrevocability of judges, parags 52 and 57.

<sup>97</sup> Recommendation No. R (94) 12; Commonwealth (Latimer House) Principles on the Three Branches of Government (2003).

<sup>98</sup> See the decisions rendered by the European Court on the cases OLEKSANDR VOLKOV v. UKRAINE JUDGMENT (MERITS)

<sup>99</sup> European judicial systems, 2012 (this sanction is allowed to be applied, for example: when a judge commits a conduct that is negligent to the honor or tasks associated with the office, or related with the violation of specific rules, such as rules on confidentiality, or rules prohibiting improper communication. If the judge commits the same action that caused written warning for the second time, the measure of punishment imposed upon him/her shall be the dismissal from the office).

**rendered (the Netherlands); warning or reprimand – for more lenient violations (Belgium), warning, salary reduction, dismissal from the office, or impeachment (Sweden).**<sup>100</sup>

Committee of Ministers of the Council of Europe recommendations allows the using of disciplinary punishments such as: withdrawal of the case from the judge, moving the judge to other judicial tasks within the court, economic sanctions such as a temporary reduction of salary, and suspension.<sup>101</sup>

Therefore, the disciplinary sanctions available throughout the European countries can be grouped into three types: moral (for example – reprimand), financial (for example – salary reduction, fine) and other strict sanctions (for example – moving to other court, temporary suspension, removal from the office).<sup>102</sup>

In regards to the sanction, the German example is interesting, since one of the sanctions envisages deprivation of the pension in case of retired judge.

In the US different states are practicing different sanctions like public ones (for example: criticism, or public criticism, when the information is made public), as well as confidential sanctions, for example confidential reprimand, or recommendation letter, that does not envisage making the information about the disciplinary sanction used against the judge publicly (State of California).<sup>103</sup>

In the US, the judge may be subjected to additional training as a measure of punishment. This measure is applied when the case materials depict, that the judge was acting by violating the rules of procedure, or exceeded authority, however he/she was not acting in bad faith. This sanction can be applied together with other sanctions as well. (for example State of Texas).<sup>104</sup>

In the state of Texas, a judge may also be subjected to suspension of authority, if the later is charged with criminal offence, or office related misconduct. The suspended judge may retain the salary or be deprived of the right to receive salary until rendering the final decision on his/her removal from the office. The disciplinary commission may also address the Supreme Court of the State of Texas with a request to suspend the judge from the office.<sup>105</sup>

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<sup>100</sup> Judicial Independence in Europe , The Swedish, Italian and German Perspectives, by John Adenitire, available at <http://www.ucl.ac.uk/constitution-unit/research/judicial-independence/judicial-independence-in-europe.pdf> [hereinafter Judicial Independence in Europe The Swedish, Italian and German Perspectives]

<sup>101</sup> COE Recommendation No. R (94) 12

<sup>102</sup> A comparative analysis of Disciplinary Systems for European judges and prosecutors, 2012

<sup>103</sup> Official web-page of the Commission on Judicial Performance of the State of California

[http://cjp.ca.gov/complaint\\_process.htm](http://cjp.ca.gov/complaint_process.htm) , however the Constitution of the State of California obliges the Commission on the Judicial Appointments to provide the personal reprimand, or the recommendations letter against the judge, if the latter is nominated for the reappointment, to the State governor, the President of the US or the CJA if requested by any of them.

<sup>104</sup> Official web page of the State Commission on Judicial Conduct of the State of Texas <http://www.scjc.state.tx.us/>

<sup>105</sup> Ibid

In compliance with the legislation of the State of Texas, a judge may choose to resign from the office instead of being subjected to disciplinary punishment. In this case, the judge will need relevant approval of the Commission.<sup>106</sup>

## *Chapter 4: Disciplinary proceedings, Parties of the proceedings, their rights-duties and etc.*

### **4.1. Body authorized to impose disciplinary liability**

The international standards acknowledge that the body authorized to bring disciplinary sanctions against judges should be basically composed of the judges.<sup>107</sup> The members can be either the practitioner, or the former judges.<sup>108</sup> Membership of the scientists and the representatives of other law professions was also positively assessed.<sup>109</sup> As for the membership of the representatives of executive, or legislative bodies, this practice contradicts the principle of institutional independence<sup>110</sup> and is incompliant with the international standards.<sup>111</sup>

In the context of disciplinary proceedings, one more important principle is that the body authorized to initiate proceedings should be separate from the body authorized to make decisions.<sup>112</sup> The members of the decision-making body should not be under the influence of, or have the other members having the right to initiate proceedings.<sup>113</sup>

In the European countries, several bodies are authorized to bring disciplinary liability against judges. In some cases, it can be a court (Belgium, Germany, Ireland, Netherlands), higher instance court, or supreme court (Belgium, Estonia, Germany, Ireland, Netherlands), High Council of Justice (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, France, Italy, Malta, Moldova,

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<sup>106</sup> Ibid

<sup>107</sup> The Universal Charter of the Judge, Also see Venice Commission Opinion No. 408 / 2006, Par. 9

<sup>108</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul A/HRC/23/43/Add.3, Mission to Maldives, 21 May 2013

<sup>109</sup> Ibid

<sup>110</sup> The Universal Charter of the Judge

<sup>111</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul A/HRC/23/43/Add.3, Mission to Maldives, 21 May 2013 (In the Maldives, the members of the council are the chairman of the Parliament, one member of the Parliament, prosecutor and others, together with the judges) paras. 43-44

<sup>112</sup> Kyiv Recommendations, par. 26

<sup>113</sup> OSCE/ODIHR Opinion on the Law 29/1967.

Monaco, Montenegro, Spain, Switzerland), Ombudsman (Finland), Parliament (Ireland), Minister of Justice (Germany).<sup>114</sup>

#### **4.2. Persons/institutions authorized to request imposition of disciplinary liability upon judges**

The request to impose a disciplinary liability upon a judge can be made by: a citizen (Finland, France, Island, Lithuania, Norway, Russia), High Council of Justice (Azerbaijan, Bulgaria, Cyprus, Hungary, Island, Lithuania, Malta, Moldova, Monaco, Portugal, Norway, Slovakia, Slovenia, Spain, Turkey), Specialized disciplinary panel, or disciplinary body (Austria, Belgium, Bulgaria, Dania, Germany, Island, Norway, Poland, Serbia, Spain, Slovenia), Ombudsman (Finland, Slovakia, Sweden), Parliament (Switzerland, Island, Malta), Minister of Justice (Bulgaria, Croatia, Check republic, Albania, France, Germany, Norway), Court (Belgium, Bulgaria, Croatia, Check republic, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxemburg, Netherlands, Norway, Sweden), higher instance court (Croatia, Check republic, Spain).<sup>115</sup>

It is interesting to review the German example, where even the judge himself/herself can request to launch disciplinary proceedings, if he/she wants to prove his/her innocence and diminish the existing doubts.<sup>116</sup> The State of California empowers quite a wide net of persons to submit a complaint: parties of the dispute, lawyers, juries, persons working in the court, supervisors of the court trials, court administration, public representatives, legislator, or a judge by himself/herself. In the Ukraine, the complaint against a judge can be submitted not only by the parties of the proceedings, but any person having the information on alleged misconduct of a judge.

In one of its opinions, the Venice Commission explained, that the right to submit a disciplinary complaint shall be assigned only to the persons with “legal interest” towards the case and not to any interested person. The Commission gave a negative assessment of the fact, that any person had the right to request disciplinary proceedings on the case he/she came aware about from the media.<sup>117</sup> The Commission outlined, that this rule may pose unnecessary pressure over the judges.

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<sup>114</sup> European Judicial systems, 2012 (based on the data of 2010), Council of Europe, CEPEJ (here in after referred as European Judicial Systems, 2012)

<sup>115</sup> European Judicial Systems, 2012

<sup>116</sup> Judicial Independence in Europe: The Swedish, Italian and German Perspectives

<sup>117</sup> Venice Commission Opinion no. 755 / 2014



### 4.3. Drafting and submitting complaint to disciplinary body

In the states, where the citizens are granted with the right to submit disciplinary complaint to the disciplinary body, or other body authorized to transfer the complaint determined the requirements that need to be complied when drafting the complaint. Otherwise the complaint will not be considered. But in the State of California, the relevant Commission receives anonymous complaints, or cases that a person came to know about from the media sources for example, or from the Commission during the investigation period.

For example, in England and Wales, if the charge against the judge referred in the complaint is not sufficiently proofed, it may not be considered. In Ukraine, they do not consider the anonymous complaints and the ones that do not specify the identity of the judge.<sup>118</sup>

The complaint shall be in a written manner. For example, in the Ukraine, the official web-page of the disciplinary body provides the standard application form, that should be filled in and sent by the interested party. The State of California allows a person either to fill in the officially adopted standard application form, or just write an ordinary complaint letter. The letter can be sent electronically to the official el. address of the Commission.<sup>119</sup>

Normally the National Legislation (and the standard form of complaint) defines the information to be covered in the disciplinary complaint. For example, the State of California prescribes that the complaint shall reflect the following: Identity of the judge, the court where the judge is working, and the detailed description of the conduct considered as misconduct by the plaintiff. It should not be the assumptions (for example: the judge was biased), but the description of the actions and the words of the judge. Copy of the available evidence (video or audio recording) can be attached to the complaint, or it should be noted in the complaint that the evidence is available. In addition, the complaint should reflect the date of the commission of the violation, type of the case during which the violation was committed and the relationship of the plaintiff to the case (whether he/she is the party or any other person).<sup>120</sup>

In some countries, the cases of judges with different ranks are considered by different bodies. For example: in the Ukraine, the disciplinary proceedings function is divided between two institutions: High Council of Justice is dealing with the cases of judges of specialized higher instance courts and the

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<sup>118</sup> High Qualification Commission of Judges of Ukraine, Disciplinary Liability of a Judge, see at <http://www.vkksu.gov.ua/en/disciplinary-proceedings/disciplinary-liability-of-a-judge/>

<sup>119</sup> See the official web page, of the Commission of Judicial Performance of the State of California [http://cjp.ca.gov/complaint\\_process.htm](http://cjp.ca.gov/complaint_process.htm)

<sup>120</sup> Ibid

Supreme Court. The Commission deals with the cases of the judges of the local and appellate courts.<sup>121</sup> In Sweden the case of disciplinary responsibility of a judge is considered by the National Disciplinary Board, that is also authorized to consider the disciplinary misconduct committed by any high rank official.<sup>122</sup>

In island, Monaco and Norway, different bodies are making decision concerning the removal of the judge from the office on the one hand and imposing more lenient sanction on the other hand.<sup>123</sup>

#### **4.4. Pre-examination of the facts provided in the complaint**

In California, the Disciplinary Body sends a written confirmation on the receipt of the complaint to each plaintiff. Afterwards, the complaint is considered, or is examined, in order to determine, whether there are available facts to launch investigation. If the complaint is not reasoned, then the case shall be terminated. The commission contacts the judge, or any other person only after the decision on the initiation of the investigation is made. However, in order for the commission to make the decision on initiating, or not initiating the investigation the legal unit of the commission, can make the inquiries on the legal issues related with the case and obtain additional information on the case from the plaintiff.

During the investigation stage, the commission takes relevant measures to keep the identity of the plaintiff and the witnesses confidential. The plaintiff can be summoned at the hearing in order to provide testimony.

According to the Constitution of the State of California and the Commission Regulations, the Commission is not allowed to confirm, or deny admission of the case and whether it is under investigation. The persons contacted during the investigation stage, are informed about the confidentiality rules.<sup>124</sup>

#### **4.5. Stages of Disciplinary Proceedings**

The entire procedure of the disciplinary proceedings against the judge, can be well illustrated with the help of the Ukrainian example, where the procedure consists of 4 stages:

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<sup>121</sup> High Qualification Commission of Judges of Ukraine, Disciplinary Liability of a Judge, see at <http://www.vkksu.gov.ua/en/disciplinary-proceedings/disciplinary-liability-of-a-judge/>

<sup>122</sup> Judicial Independence in Europe: The Swedish, Italian and German Perspectives

<sup>123</sup> European Judicial Systems, 2012

<sup>124</sup> State of California, Commission on Judicial Performance, at [http://www.cjp.ca.gov/complaint\\_process.htm](http://www.cjp.ca.gov/complaint_process.htm)

After the Commission receives a complaint, they start to check the information to determine whether there are sufficient grounds to initiate disciplinary proceedings. This process is undertaken by one of the Commission members as prescribed by the law. The Commission member is selected using the automatic system. Based on the undertaken work, the Commission member drafts a written conclusion on launching or terminating the disciplinary proceedings. The conclusion/opinion together with the materials collected during the inquiry is sent to the Commission. Three disciplinary inspectors are assisting each Commission member to effectively conduct the inquiry process. Based on their inquiries, they are drafting the initial draft conclusion/opinion.

The final decision on initiating or not initiating the disciplinary proceedings is rendered by the Commission. Not later than 3 days, from rendering the decision, the copy of the decision is sent to relevant judge and person/body who submitted the complaint against the judge. The written conclusion/opinion of the judge undertaking the pre-examination is also sent to the judge.

Not later, than 10 days prior to the court hearing, the Commission shall publish the information on the date and place of the hearing on its official web-page. The judge, the plaintiff and if needed other interested person will be summoned to the hearing. If the judge is unable to attend the hearing for excusable reasons, he/she has the right to submit his/her opinions in a written manner, which will be attached to the case file. The submitted conclusion/opinion will be read out at the Commission session. If the judge fails to appear on the hearing for the second time, the hearing will be held in absentia.

The procedure is adversarial. The commission hears the reporter member, judge, or his/her representative and other interested parties if they wish to make statements. The judge has the right to ask questions, express opposing opinion, request recusal and etc.

The trial shall be recorded using technical means. The decision-making process of the commission is closed and neither the judge, nor any interested party can attend this process. The decision is rendered with the majority of votes.

After the commission decides, that there are not enough grounds to proceed with the disciplinary prosecution, it renders relevant judgment and informs the interested parties about it.

After the consideration of the case, the Commission can send the Council recommendation on dismissing the judge from the office, if relevant grounds are available. The Commission members are allowed to have different opinions that should be reflected in a written manner.

The decision on imposing a sanction upon a judge, together with the information on the used sanction shall be published on the official web page of the Commission.

A judge in the Ukraine has the right to appeal the decision of the Commission to the High Council of Justice, or the Supreme Administrative Court within a month from the day, when the copy of the decision was received by him/her. Filing of an appeal regarding the decision of the Commission will lead to suspension of the imposition of the sanction.<sup>125</sup>

#### **4.6. Rights of the applicant during the disciplinary proceedings**

The State of Texas has interesting practice, where the applicant has the right to request the Commission to review the decision on inadmissibility/non-consideration of his/her complaint. The applicant can exercise this right only once. The letter informing the applicant about the decision of the Commission provides the revision rules and special revision request form, that needs to be completed by the applicant. The request shall include additional evidence (for example: witness testimony, or etc.) that has not been considered by the Commission before. The requests that do not comply with the prescribed requirements shall not be considered. If the Commission decides to consider the review request, it will vote to either to support the initial decision, or re-examine the complaint. The later will mean, that the case will be investigated once again by a commission member that has not been involved in the initial investigation. The applicant shall be informed about the decision in a written manner.

England and Wales also have interesting disciplinary proceedings systems. A citizen, or even a judge himself/herself can address the Judicial Appointments and Conduct Ombudsman with an appeal on improper administration of the initial complaint (requesting the initiation of disciplinary proceedings) by relevant body. If the appeal meets all the criteria, the Ombudsman will study contents of the case and if he/she finds out that the initial disciplinary complaint was not properly considered, he/she can address the Review Body with a recommendation to study the investigation, or the rendered decision concerning the mentioned case. He/she can also address the relevant institution with a request to apologize in front of the plaintiff. In some cases the request may involve compensation of the damage that has been incurred to a person and is the immediate result of the improper consideration of the disciplinary appeal according to the Ombudsman.<sup>126</sup>

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<sup>125</sup> High Qualification Commission of Judges of Ukraine, Disciplinary Liability of a Judge, see at <http://www.vkksu.gov.ua/en/disciplinary-proceedings/disciplinary-liability-of-a-judge/>

<sup>126</sup> Ibid

#### **4.7. Right of the judge during the disciplinary proceedings – right to fair trial**

It is universally recognized, that the judges have the right to fair trial throughout the disciplinary proceedings.<sup>127</sup> It envisages the right to adequate time to prepare their defense,<sup>128</sup> right to have a legal representative, right to attend the trial and possibility to express one's opinion, reasonable timeframes for the proceedings and etc.

##### **4.7.1. Right to access case materials**

The Venice Commission approved the practice of Tunisia, where the judges are granted access to the evidence against them in the disciplinary proceedings.<sup>129</sup>

##### **4.7.2. Right to legal consultancy and legal representative**

The Venice Commission also provided positive evaluation of the fact, that in Tunisia the judge is provided with the possibility to get legal advice/consultancy<sup>130</sup>. In France, the judge has the right to receive legal assistance from his/her colleague, lawyer, other layer on the stage of investigation, as well as on the trial stage.<sup>131</sup> In Belgium, the judge can be represented by any person on the stage of disciplinary investigation, as well as on the trial stage. However, the body performing the investigation is empowered to request the judge to appear in person, which does not exclude the right of having the legal representative.

##### **4.7.3. Adequate time to prepare the defense**

The Venice Commission recommends to provide the judges with adequate time to prepare one's defense in the disciplinary proceedings.<sup>132 133</sup>

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<sup>127</sup> UN Basic Principles on the Independence of the Judiciary

<sup>128</sup> OSCE/ODIHR OPINION ON THE LAW 29/1967

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul A/HRC/23/43/Add.3, Mission to Maldives, 21 May 2013, par. 46

<sup>132</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul A/HRC/23/43/Add.3, Mission to Maldives, 21 May 2013, par. 46, Also see OSCE/ODIHR Opinion on the Law 29/1967

<sup>133</sup> Ibid

#### **4.7.4. The right to attend the disciplinary hearing**

The Venice Commission provides, that the right to be present at one's disciplinary hearing is a fundamental right and therefore in absentia hearings should be used as a measure of last resort only in exceptional circumstances, if the judge unjustifiably, or repeatedly fails to appear at the hearing. Also, in cases where decisions are rendered in absentia, re-trial should be granted upon request of the summoned judge.<sup>134</sup>

#### **4.7.5. Right to present defense and challenge the charge**

The judge should be provided with every possibility to respond to all the charges raised against him/her.<sup>135</sup>

**In Italy**, the judge is informed about the disciplinary proceedings carried out against him/her from the initial stage and he should be provided with the possibility to receive the assistance from the judge, or lawyer. **In Serbia**, the right of immediate notification is guaranteed; In addition, the judge can have the access to the case materials and other complimentary materials. He/she has the right to submit own arguments and evidences personally, or through representative. **In France**, the judge can present his/her disposition personally, or via representative even on the investigation stage.<sup>136</sup>

The case against Croatia referred to the legality of the removal of the Chairman of the Supreme court from the office. The European Court of Human Rights determined the violation of the Article 6 for several factors, the following being one of them: the national authorities' refusal to examine any of the defense witnesses led to a limitation of the applicant's ability to present his case in a manner incompatible with the guarantees of a fair trial enshrined in Article 6 of the European Convention.<sup>137</sup>

#### **4.7.6. Presumption of Innocence**

The UN special reporter on judicial independence issues in Maldives focused on number of issues while evaluating the acting system. She/he gave negative assessment to the fact, that judge was not benefiting from the presumption of innocence during the trial. Besides, the system provided the possibility to make

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<sup>134</sup> Ibid

<sup>135</sup> Recommendation No.R (94) 12, Principle 4, Kyiv Recommendations, par. 26

<sup>136</sup> Judicial Independence in Europe: The Swedish, Italian and German Perspectives

<sup>137</sup> European Court of Human Rights, *Olujic v. Croatia*, (Application no. 22330/05), Judgement, 2009, par. 85

the good faith of the judge questionable in front of the media and general public before the suspicions concerning him/her were investigated in a relevant manner.<sup>138</sup>

#### **4.7.7. Right to appeal the decision<sup>139</sup>**

Some states allow for the decision rendered by the High Council of Justice to be appealed (Azerbaijan, Bosnia and Herzegovina, Moldova, Poland, Slovakia, and Slovenia). Normally, the appeal can be submitted in the supervising body of the same institution, or in the higher instance court (Estonia, Hungary, France). In Andorra, it is not allowed to appeal the decision of the High Council of Justice.<sup>140</sup> The disciplinary Court of the Czech Republic is composed of 6 members: three judges (The President is the judge from the Supreme Administrative Court), 1 prosecutor, 1 member of the Bar Association, 1 lawyer practicing in various fields of law.<sup>141</sup>

The right to appeal the decision rendered as a result of the disciplinary proceedings in the higher instance body is guaranteed by international instruments. Accordingly it is obligatory to have the system of revising these decisions by the independent bodies.<sup>142</sup>

For example, the legislation of the State of California a judge can appeal the decision of the disciplinary body to the Supreme Court.<sup>143</sup>

The State of Texas has the following appeal mechanism: Within 30 days of the date the State Commission on Judicial Conduct issues a public or private sanction, or order of education, the judge may appeal the sanction by filing a written request with the Chief Justice of the Supreme Court of Texas requesting the appointment of three appellate justices to act as a Special Court of Review.

Within 15 days after the Special Court of Review is appointed, the Commission sends the Court the case decision and the accompanied materials. Any hearings on the matter before the Special Court of Review are public, as well as any evidence introduced during a hearing, and pleadings filed with the clerk. Within 30 days of filing the charging document, a de novo trial is held. The Texas Rules of Civil Procedure apply, except that the judge is not entitled to a jury. The Special Court of Review may dismiss the case,

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<sup>138</sup> Report of the Special Reporter on the independence of judges and lawyers, Gabriela Knaul A/HRC/23/43/Add.3, Mission to Maldives, 21 May 2013, par. 46

<sup>139</sup> Kyiv Recommendations, par.26

<sup>140</sup> European Judicial Systems, 2012

<sup>141</sup> *ibid*

<sup>142</sup> UN Basic Principles on the Independence of the Judiciary; Recommendation No.R (94) 12, Principle 4; European Charter of Judges

<sup>143</sup> State of California, Commission on Judicial Performance, at [http://www.cjp.ca.gov/complaint\\_process.htm](http://www.cjp.ca.gov/complaint_process.htm)

affirm the Commission's decision, impose a greater or lesser sanction, or order the Commission to file formal proceedings. The decision of the Special Court of Review is final.<sup>144</sup>

#### **4.7.8. Right of a judge to reasoned decision**

According to the Kyiv recommendations, the court decision shall be reasoned.<sup>145</sup> This obligations also enshrined in other international tools providing the right to appeal the decision rendered by disciplinary body. The effective implementation of the given right, requires the decision rendered by the disciplinary body to be well reasoned.

For example, in France, the case consideration process is close but the decision is stated publicly. The decision shall be reasoned and it shall be communicated to the opposing party. In the Netherlands, the motivation of the decision on removal of the judge is announces publically and sent to the Ministry of Justice and the superior judge. In Belgium, the reasoned decision is sent to the judge and in case of appliance of strict sanction, to the persons/institutions responsible for executing the sanction (for example, the superior judge). The decision shall also indicate the right to appeal and deadlines for appealing the decision.<sup>146</sup>

#### **4.7.9. Mandatory hearing of a witness / witness testimony**

Some states prescribe the obligation to hear the witness testimony in the law. For example, in France, a person selected as a reporter for a disciplinary case, has to interview the witnesses from both parties. In Belgium, a reporter/official conducting the investigation has the right to take all the needed/useful measures in order to exercise assigned functions, including interviewing the witnesses. In the Netherlands, in the cases related with the removal of the judge from the office, the witness can be summoned at the trial to provide testimony on the decision of the prosecutor, party, or the supreme court itself.<sup>147</sup>

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<sup>144</sup> State of Texas, State Commission on Judicial Conduct, at <http://www.scjc.state.tx.us/faqs.asp#faq12>

<sup>145</sup> Kyiv Recommendations, par. 26

<sup>146</sup> ICJ Report, 2012

<sup>147</sup> ICJ Report, 2012



#### 4.7.10. Timeframes for disciplinary proceedings

In one of the cases, the European Court defined the significance of the time frames during the disciplinary proceedings and the result of their presence in the context of the rights guaranteed by the Article 6 (right to fair trial) of the Convention. The Court stated, that applying time limits over the criminal, disciplinary and other types of disputes is the traditional characteristic of the European legal system and explained, that the imposition of time frames serves number of important goals: The first is the legal certainty, the second is the protection of the defendant against the old arguments that will be difficult for them to defend, since a lot of time has passed and the evidences may not be trustworthy and/or may not be well-preserved any more. In the given example, the judge had to respond to the facts that have taken place in 2003 and 2006 in 2010. The court decided that this factor put the judge in an challenging situation.

In the given case, the legislation of the state of the defendant did not provide any timeframes that would restrict the initiation of the disciplinary case. The court decided that setting a specific deadline was beyond its competence. However, it assumed that the approach when holding a judge likably was not restricted by some timeframe, posed serious threats to the principle of legal certainty. Therefore, the court established that the Article 6 of the Convention was violated.<sup>148</sup>

### *Chapter 5: Transparency of Disciplinary Proceedings*

The transparency of the grounds for the initiation of disciplinary proceedings, the proceedings and the rendered decisions are safeguarded by international standards.

According to the UN Basic Principles on the Independence of the Judiciary, the examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.<sup>149</sup> Kyiv recommendations proclaim that the case consideration procedure shall be public and transparent except for the case, when the judge is requesting to have a closed session. In case of such a request, relevant body shall consider whether it is justified to close the procedure.<sup>150</sup> The court decision shall be published regardless of whether the trial was closed, or not.<sup>151</sup>

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<sup>148</sup> European Court of Human Rights, CASE OF YURIY VOLKOV v. UKRAINE, (Application no. 45872/06) (2013)

<sup>149</sup> UN Basic Principles on the Independence of the Judiciary, Principles 17

<sup>150</sup> Kyiv Recommendations, par. 26

<sup>151</sup> Beijing Statement of Principles of the Independence of the Judiciary, also see Kyiv Recommendations, par. 26

Universal approach towards this issue is not available in the European states. For example in Bulgaria and Spain, the case is not considered publicly. However it is allowed to be public in France (except for the cases, when the public order may be violated), Belgium, Poland, Italy and Rumania.<sup>152</sup>

UN special reporter in Maldives assess the acting system as incompliant with the international standards and principles. One of the negative sides named by the reporter was the lack of transparency. The reporter specified, that frequently after appearing in front of the Commission, the judge is not informed about the outcome of the case: whether it is suspended, undergoing or any other decision was rendered.<sup>153</sup>

The European Court of Human Rights does not determine the universal standard requiring the considering of the disciplinary case to be open and public. However, in one of the cases against Croatia concerning the illegal removal of the Chairman of the Supreme court through disciplinary proceedings, the court established the following: taking into account, the public status and high level of popularity of the applicant and considering, that by the time of trial, the public perception of his/her political persecution, it was in the interest of the applicant, as well as the public interest for the case proceedings to be public. In the given circumstances, the court did not approve the opinion of the State, that there was a legitimate ground determined in the Article 6(1) of the EU Convention for the proceedings to be closed for the public.<sup>154</sup> And finally, the court pointed out, that the fact that the proceedings were close was not corrected on the following stages either, when the case was considered by the relevant Parliament Chamber and the Constitutional Court. Considering all the above mentioned, the court decided that right of the applicant to fair trial, particularly the right to public trial prescribed in the Article 6(1) was violated.<sup>155</sup>

In this context, the example of the State of California is interesting, for the public, as well as confidential punishments are used. In case when the later is used, the Commission informs the applicant that relevant measures have been taken against the specific judge. However, the information about what type of sanction was imposed to the judge is not provided to the applicant.<sup>156</sup>

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<sup>152</sup> A comparative analysis of Disciplinary Systems for European judges and prosecutors (2011)

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<sup>153</sup> Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul A/HRC/23/43/Add.3, Mission to Maldives, 21 May 2013, par.46

<sup>154</sup> *Olujic v. Croatia*, par.75

<sup>155</sup> *Ibid*, par. 76

<sup>156</sup> State of California, Commission on Judicial Performance, at [http://www.cjp.ca.gov/complaint\\_process.htm](http://www.cjp.ca.gov/complaint_process.htm)

## 5.1. Publishing the Decisions rendered by the Disciplinary Commission

In the State of California, following the imposition of the confidential sanction, the Commission publishes the brief information without disclosing the identity of the judge. The summary of the case is reflected in the annual reports of the Commission. For the confidentiality reasons, some other details of the case may also be confidential, or mentioned vaguely in the report. Sometimes, the short summaries are less informative, but they are aimed at public information and assistance of the judge to avoid misconduct. The Commission believes, that it is better to inform the public with short summaries rather than not publish them at all. The case summaries are listed according to the measures imposed upon the judge. The cases when the judge committed more than one misconduct are listed at the end of the list.<sup>157</sup>

### *Chapter 6: Immunity of judge*

**One of the main guarantees of the judicial independence is an immunity granted by criminal prosecution and civil sanction<sup>158</sup>. Immunity for judges should be guaranteed by the Constitution or equivalent and that procedures for lifting immunity should be inscribed in law<sup>159</sup>.**

When defining the limits of immunity, it is significant to separate the following actions of a judge from each other: action, committed in the exercise of his/her authority or in relation to it, and the action, committed by a judge just as a mere citizen, independent from his/her judicial powers<sup>160</sup>.

Immunity of a judge, to the extent the international law recognizes it, is of functional character, i.e. it refers to only those actions, which are committed in the exercise of judicial powers<sup>161</sup>. For an action committed by a judge out of his judicial office, as a mere citizen (i.e. not related to his/her judicial powers, e.g. drunk driving), he/she should be held liable for civil, criminal or administrative violations in the same form as any other citizen would be<sup>162</sup>. In some countries, imposition of criminal liability on a judge may also serve as grounds for the imposition of disciplinary sanction (e.g. in Sweden)<sup>163</sup>.

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<sup>157</sup> Ibid.

<sup>158</sup> UN Basic Principles on the independence of the Judiciary, (1985) Principles 16; Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/11/41, 24 March 2009, par. 66

<sup>159</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, par. 98

<sup>160</sup> COE Recommendation CM/Rec (2010)12

<sup>161</sup> Ibid

<sup>162</sup> Ibid. See also Magna Carta of Judges (Fundamental Principles) and Consultative Council of European Judges, Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality [hereinafter CCJE (2002) Op. N° 3]

<sup>163</sup> Judicial Independence in Europe The Swedish, Italian and German Perspectives

## 6.1. Criminal immunity of judge

As mentioned above, when a criminal offence is committed by a judge out of his/her judicial office, he/she shall be generally held liable and not enjoy the immunity<sup>164</sup>. According to one of the CCJE opinions, when a judge commits an action which in any circumstances is regarded as a crime (e.g. accept bribe), he/she cannot claim immunity from ordinary criminal process<sup>165</sup>. Judges have immunity only for the actions committed in the exercise of their powers, except for intentional offence (e.g. corruption)<sup>166</sup>. There is one more significant exception, when a judge may be held liable under criminal law for the action carried out within his/her judicial authority. Specifically, (wrong) interpretation of the law, assessment of facts or weighing of evidence carried out by a judge with malice may give rise to his/her liability<sup>167</sup>.

Laws of several European countries provide for holding a judge criminally liable for the violations defined in the Criminal Code, e.g. extortion or corruption, misuse of authority, etc. (e.g. Italy)<sup>168</sup>.

## 6.2. Immunity of judge from appeals on the compensation of damage

It is considered that a private person cannot file a complaint against a judge and require for compensation. Restriction of the right of the accessibility to court, when it concerns filing a complaint against a judge by a private person, was considered reasonable by the European Court of Human Rights. It explained that the restriction of the right of filing complaints against judges by the state is a legitimate aim for the protection of judicial independence<sup>169</sup>.

It does not mean that a disciplinary sanction cannot be imposed on a judge or the aggrieved person does not have a right to appeal against a decision or require for compensation from the state, as such right is recognized by international law<sup>170</sup>. But, only the state must be entitled to initiate civil proceedings against a judge in case when the state had to pay compensation for the decision taken by the judge<sup>171</sup>. The state can demand from the judge to pay the compensation (recover) within definite time limits with the

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<sup>164</sup> Recommendation CM/Rec (2010)12

<sup>165</sup> CCJE (2002) Op. no.3

<sup>166</sup> Venice Commission, Report on the Independence of the Judicial System – Part I: The Independence of Judges, CDL-AD(2010)004, para. 61.

<sup>167</sup> Recommendation CM/Rec(2010)12

<sup>168</sup> Judicial Independence in Europe The Swedish, Italian and German Perspectives (in Italy, there is no particular procedure applied for criminal liability of judges, there is only a rule, according to which a judge cannot be adjudicated by the court where he/she was assigned. Appeals concerning the charges for committing criminal offence are sent to the Minister of Justice, which in its turn can refer them to the Judicial Inspectorate for investigation).

<sup>169</sup> European Court of Human Rights, *X v. United Kingdom*, (Application no. 7215/75), Judgement, 1981; *Golder v United Kingdom*, Series A, No. 18, 21 February 1975, (1979-80) (J. Fitzmaurice separate opinion, par.15).

<sup>170</sup> Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, Introduction, adopted at the 6th Conference of Chief Justices, held in Beijing in August 1997)

<sup>171</sup> Recommendation CM/REC(2010)12

observance of adequate legal procedures, in case the judge made hard (serious) and inexcusable violation of judicial duties<sup>172</sup>.

According to the legislation of several countries, it is admissible to impose criminal and civil liabilities on judges for the action committed in the exercise of their judicial authority. Such practice is in Italy and Germany.

**In Italy**, civil sanction may be imposed on a judge for the damage that was inflicted on a person as a result of the judge's intentional action or serious negligence and that caused denial of justice. Though, a judge cannot be held liable for wrong interpretation of the law, facts or evidence. In such case, a measure for the correction of this action shall be appealing of a decision. If as a result of appeal it is determined that for instance a judge made a wrong interpretation of the law, the damage inflicted hereupon shall be compensated by the state. The state, in its turn, has a right to recover the amount of money paid to the aggrieved person within a period of one year. But, pursuant to the law, the recoverable amount should not exceed half of a monthly salary of a judge, except in the case where the damage is inflicted on a person due to a judge's intentional action<sup>173</sup>.

**In Germany**, civil sanction (fine) may be imposed on a judge for the decision taken by him/her, only in case if it is confirmed that the judge committed a criminal offence (e.g. miscarriage of justice) in the exercise of his/her authority and in the delivery of a final decision. This system, by establishing a very high standard, aims at the protection of judicial independence. The state has a right to recover from judge the sum paid as compensation to the aggrieved, only in case if the judge made a deliberate violation or gross negligence. A person may have a right to require imposing civil liability on a judge if he/she takes some specific actions, namely, if he/she appeals a decision or acts otherwise for minimizing the caused damage<sup>174</sup>.

**In Sweden and Austria**, financial sanction (fine) may be imposed on a judge for gross negligence (e.g. putting or keeping someone in prison for too long)<sup>175</sup>. But, this practice is not recognized by international experts<sup>176</sup>. According to the opinion of the Consultative Council of European Judges formed by the Council of Europe, "a judge should not have to operate under the threat of a financial penalty, the presence of which may, however sub-consciously, affect his judgment"<sup>177</sup>. The CCJE considers that in countries where criminal or disciplinary proceedings can be started at the instigation of a private

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<sup>172</sup> European Charter on the Status of Judges (1998)

<sup>173</sup> Judicial Independence in Europe The Swedish, Italian and German Perspectives

<sup>174</sup> Ibid.

<sup>175</sup> CCJE (2002) Op. #3

<sup>176</sup> Ibid.

<sup>177</sup> CCJE (2002) Op. #3

individual, there should be a mechanism for preventing or stopping such proceedings against a judge where there is no proper basis for suggesting that any criminal liability exists on the part of the judge<sup>178</sup>.

### 6.3. Actions which do not give rise to a judge's liability

A judge cannot be held liable for the contents of the decision taken, legal error, (wrong) interpretation of the law, assessment of facts or weighing of evidence or for the fact that the decision rendered by him/her was changed or annulled by a higher instance court<sup>179</sup>.

It is acknowledged that **the interpretation of the law, facts or evidence** is a sphere of a judge's independent action – interference in his/her work is inadmissible<sup>180</sup>. The fundamental right of judge's independence is that he be allowed to interpret the law as he considers best in the particular case<sup>181</sup>. Therefore, imposition of disciplinary (and *fortiori* criminal) sanctions on a judge for the legal error made by him in the decision-making process shall be interference in the judicial independence<sup>182</sup>.

Also, it is recognized that a judge cannot be held liable for the fact that **a decision rendered by him/her was changed or annulled by the higher instance court**<sup>183</sup>.

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<sup>178</sup> Ibid.

<sup>179</sup> Kyiv Recommendations, par. 25; Report of the Special Rapporteur on the Independence of Judges and Lawyers, 24 March 2009, par. 58; Recommendation CM/Rec(2010)12, par. 66.

<sup>180</sup> Recommendation No. R (94) 12, principle 1., para 18 ; Venice Commission Opinion No. 408 / 2006.

<sup>181</sup> Expert Opinion on International Legal Standards Regarding Judicial Independence for the European Court of Human Rights in the case of Baltazar Gazron v. Spain, by Professor Carlos Ayala, Judge Azhar Cachalia, Param Cumaraswamy, Leandro Despouy, Professor Manfred Nowak, Professor Stefan Trechsel,

[http://www.interights.org/userfiles/Annex\\_2\\_Judicial\\_Independence\\_filed.pdf](http://www.interights.org/userfiles/Annex_2_Judicial_Independence_filed.pdf)

<sup>182</sup> Human Rights Committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007); See also: Human Rights Committee's Concluding Observations on Vietnam, CCPR/CO/75/VNM(2002), par. 10, Concluding Observations on Uzbekistan CCPR/CO/71/UZB(2001), par. 14.) and Concluding observation on the Democratic People's Republic of Korea ("the DPRK") CCPR/CO/72/PRK(2001), para. 8 (e.g. the UN Human Rights Committee expressed its concern in regard to Democratic People's Republic of Korea that in this country, it was allowed to apply criminal sanction against a judge for rendering "unfair decisions". In relation to this, the Committee stated: "such expression made in the law has a negative effect on human rights protection and undermines judicial independence").

INTER-AMERICAN COURT OF HUMAN RIGHTS , CASE OF APITZ BARBERA ET AL. ("FIRST COURT OF ADMINISTRATIVE DISPUTES") V. VENEZUELA, Judgment of August 5, 2008, (PRELIMINARY OBJECTION, MERITS, REPARATIONS AND COSTS) ; see also Principle A, para. 4 (n) 2 of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted as part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of the African Union, held in Maputo, Mozambique, from 4 to 12 July 2003. (The court indicated that judge's dismissal from office with the motive that he made "inexcusable legal error" destroys the obligation undertaken by the state for ensuring independent judiciary). See also UN Human Rights Committee's Concluding Observations on Syria /C/SYR/CO/1(2010), para. 12; CAT, Concluding Observations on Armenia,(2000), par. 37(c).

<sup>183</sup> Case of Apitz Barbera et al, para. 84

#### 6.4. Doctrine “More than legal error”<sup>184</sup>

Wrong interpretation of the laws or facts, in exceptional cases, may become grounds for the imposition of liability on a judge. This exception is recognized in the legal systems of Europe as well as American Continent. For instance, in accordance with the **European Council’s recommendation**, imposition of a disciplinary liability on a judge is admissible if in the process of the interpretation of the law and evaluation of facts and evidences, the judge acts with malice or gross negligence<sup>185</sup>. The legislation of Ukraine serves as an example of consolidating such approach in the European States’ national law; according to the law of Ukraine, reversal or alteration of a court decision by a higher instance shall not be a ground for disciplinary action against the judge who took part in passing it, unless the decision involved intentional violation of legal norms or improper/careless execution of his/her duties<sup>186</sup>.

**European Charter for the statute for judges** is also very interesting, according to which each individual must have the possibility of submitting, without specific formality, a complaint relating to *the miscarriage of justice* in a given case to an independent body. This body must have the power to refer the matter to the disciplinary authority or to an authority normally competent in accordance with the statute to make such a reference<sup>187</sup>.

As acknowledged by **the US legislation and practice**, a legal error, separately, cannot be considered as a disciplinary misconduct. But, if there are some “additional factors”, it may become the grounds for the imposition of a disciplinary liability on a judge<sup>188</sup>.

In one of the cases, a sanction was imposed on a judge for making (along with other actions) improper threats of life imprisonment and death penalty to the parties involved in the case, if they would not pay the fine imposed. The judge was held disciplinary liable. The court on this case stated that using threats which exceed judicial authority is unacceptable, even if the judge believes such threats are the only way to coerce compliance<sup>189</sup>.

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<sup>184</sup> This section of the study is based on Cynthia Gray’s article where are reviewed the practice of the relevant US organs in relation to the judicial disciplinary liability. See: THE LINE BETWEEN LEGAL ERROR AND JUDICIAL MISCONDUCT: BALANCING JUDICIAL INDEPENDENCE AND ACCOUNTABILITY, Cynthia Gray, HOFSTRA LAW REVIEW (2004); [http://www.hofstra.edu/PDF/law\\_lawrev\\_Gray\\_vol32no4.pdf](http://www.hofstra.edu/PDF/law_lawrev_Gray_vol32no4.pdf) [hereinafter THE LINE BETWEEN LEGAL ERROR AND JUDICIAL MISCONDUCT (2004)]

<sup>185</sup> Recommendation CM/Rec(2010)12

<sup>186</sup> High Qualification Commission of Judges of Ukraine, Disciplinary Liability of a Judge, see at <http://www.vksu.gov.ua/en/disciplinary-proceedings/disciplinary-liability-of-a-judge/>

<sup>187</sup> European Charter on the statute for judges (1998)

<sup>188</sup> THE LINE BETWEEN LEGAL ERROR AND JUDICIAL MISCONDUCT (2004)

<sup>189</sup> Re Hammermaster, 985 P.2d 924 (Wash. 1999)

In another case, a judge was held disciplinary liable for the fact that in the decision his/her statements expressed stereotypical views that cast doubt on the judge's impartiality in regard to the parties involved. The court noted that a judge may comment on the law and even express disapproval of the law, as long as his/her fairness and impartiality are not compromised<sup>190</sup>.

In one of the cases, a judge was held disciplinary liable for the following action: he/she called the courtroom audience to be involved in the process of the administration of justice and vote for the decision to be taken by him/her. By such conduct, the judge gave the impression that he/she based his/her decision on something other than the evidence presented at trial. The body imposing the disciplinary liability on the judge explained that this type of behavior from judge undermines public confidence in the judiciary<sup>191</sup>.

In one of the cases, America's Court, in regard to a judge, whose considered case was changed by a higher instance, noted that although the judge made a legal error, this was not a disciplinary violence. As an argument, the court stated that the law did not give clear indications how the judge could act in that specific case and judges indeed could decide the matter differently. The court indicated that though the judge made a legal error in the case concerned, he/she was motivated by good intention for unimpeded implementation of justice and the affected individual's interests, notwithstanding that the deprivation of the individual's rights was caused by this decision<sup>192</sup>.

Legal error may serve as the basis for disciplinary misconduct in case:

1. **If a judge by his action contradicts the clear and determined law** about which there is no confusion or controversy as to its interpretation<sup>193</sup>. To say otherwise, if a prudent and competent judge would conclude that the action, being considered, was both obviously and seriously wrong in every situation, the judge concerned would be held disciplinary liable for it. Legal error shall not be a disciplinary misconduct in case when the error is not evidently wrong or there is a controversy on its accuracy/legality<sup>194</sup>.
2. **If a legal error represents a part of a number of errors.** Particularly, if a judge repeatedly (several times) makes a legal error (e.g. imposes a sanction not provided for by the law on the

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<sup>190</sup> Gaeta, Order, (N.J.Sup.Ct. May 7, 2003)

<sup>191</sup> In re Best, 719 So. 2d 432, 435 (La. 1998)

<sup>192</sup> In re Curda, 49 P.3d255 (Alaska 2002)

<sup>193</sup> In re Curda, 49 P.3d 255 (Alaska 2002)

<sup>194</sup> 487 A.2d 1158 (Me. 1985)



person), he/she shall be held liable under the disciplinary rule<sup>195</sup>. Though, none of the court decisions discuss how many errors are required for determining that there were made a whole number of errors<sup>196</sup>. In one of the cases, it was explained that for determining a number of errors, it is not necessary that a judge has made one and the same error<sup>197</sup>.

3. **If a legal error was made with (improper) malice.** This is an action committed by a judge within his/her judicial authority, though with an improper motive, that is a motive other than the faithful discharge of judicial duty; when it is clearly and directly expressed that the action was committed by a judge with bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law or by any other motive other than the faithful discharge of judicial duty<sup>198</sup>. But, for disciplinary sanction it is not necessary that several errors were made with such malice. Even one legal error, made with improper motive or constituting willful violation of law, shall serve as the grounds for the imposition of a disciplinary sanction<sup>199</sup>.
4. **If a legal error is egregious** – it is a type of error for which appealing of a rendered decision in higher instance as well as imposing of a disciplinary sanction on a judge can be justified<sup>200</sup>. Egregious error is a subjective term requiring further interpretation. The most vivid example of such error is a deprivation of individual's constitutional rights<sup>201</sup>. Even one such error may serve as the basis for disciplinary misconduct<sup>202</sup>.

And finally, the doctrine “more than legal error” is also acknowledged by the Inter-American Court in one of its cases, according to which, even if it is determined that a judge made an inexcusable legal error, such error, taken separately, cannot serve as the basis for the imposition of a disciplinary liability on him/her. Along with the legal error, there should be other autonomous basis for imposing disciplinary liability<sup>203</sup>.

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<sup>195</sup> THE LINE BETWEEN LEGAL ERROR AND JUDICIAL MISCONDUCT (2004) (e.g. such errors are as follows: statement that defendants agree to waive their rights to have a speedy examination or timely trial without obtaining by a judge of the defendants' personal waivers of these rights); illegally incarcerating individuals in non-criminal matters to satisfy a civil fine; judge's inactivity to explain to defendant in criminal case about his/her procedure and constitutional rights, etc.)

<sup>196</sup> THE LINE BETWEEN LEGAL ERROR AND JUDICIAL MISCONDUCT (2004)

<sup>197</sup> 837 So. 2d 1257 (La. 2003) (in this case the court explained that the errors taken separately were not severe and were not made with malice, but they, taken in whole, were of the same type – judge, by making these mistakes, could not observe and apply the law ). See also *In re Quirk*, 705 So. 2d 172, 178 (La. 1997)

<sup>198</sup> 975 P.2d 663 (Cal.1999)

<sup>199</sup> *Comm'n on Judicial Performance v. Lewis*, 830 So. 2d 1138 (Miss. 2002)

<sup>200</sup> EFFREY SHAMAN, ET AL., *JUDICIAL CONDUCT AND ETHICS*, 2.02 (3d ed. 1995))

<sup>201</sup> THE LINE BETWEEN LEGAL ERROR AND JUDICIAL MISCONDUCT (2004)

<sup>202</sup> See *Quirk*, 705 So. 2d at 178. Author, *In re Landary*, 789 So. 2d 1271 (La.2001), *Illiams, Determination* (N.Y. State Comm'n on Judicial Conduct Nov. 19, 2001); *Radcliffe, Order* (Ill. Cts. Comm'n Aug. 23, 2001). E.g. such error is when a judge conducts proceedings with a violation of procedural rules, for instance, conducting a civil case by the negligence/violation of the adversarial principle, or when a judge does not give a right to a defendant to express his/her position at trial.

<sup>203</sup> *Inter-American Court of Human Rights Case of the Constitutional Court v. Peru, Judgement of January 31, 2001* (Merits, Reparations and Costs, paras. 74-85)

## 6.5. The line between disciplinary liability and criminal responsibility of judges

Venice Commission's recommendation supports the strict separation of the system of disciplinary liability from the system of criminal responsibility of a judge<sup>204</sup>. It also implies that a disciplinary organ must be able to itself determine facts in any case, aside from criminal proceedings<sup>205</sup>. On the other hand, a disciplinary sanction against a judge may be applied even in case if he/she is acquitted in criminal case or the proceedings against him/her is terminated, but in such case judge's presumption of innocence must not be infringed on by disciplinary proceedings<sup>206</sup>.

As mentioned above, wrong interpretation or application of law or facts, existence of some additional circumstances may serve as the grounds for the imposition of a disciplinary liability as well as criminal liability or financial sanction on a judge. The recommendation of the Council of Europe gives some references in regard to which type of liability is proper (admissible) to impose in such situation; according to the recommendation, the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence<sup>207</sup>. The interpretation of the law, assessment of facts or weighing of evidence should not give rise to criminal liability, except in cases of malice<sup>208</sup>.

## *Chapter 7: Other Issues*

### 7.1. Considering judge as being under no effect of disciplinary penalty after some period of time

Information on imposition of a disciplinary sanction, as a rule, is recorded in a judge's personal file. Yet, in some countries, such information is deleted from a file after some period of time has elapsed. For instance, **in Bulgaria**, a disciplinary sanction, with the exception of dismissal from an office, is deleted one year after having been served. A disciplinary sanction may be also deleted prior to the expiry of the aforementioned term, but not earlier than 6 months following its imposition, by the body which has imposed it, provided the judge has not committed any other offence in this time period. The same practice of deleting the information from a file is **in Germany**. For instance, in Lower Saxony, information on the imposition of a penalty/fine is erased after 3 years, on downgrading - after 7 years, etc. **In Czech**

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<sup>204</sup> Venice Commission Opinion no. 755/2014

<sup>205</sup> European Court of Human Rights, *Allen v. the United Kingdom* {GC}, no. 25424/09 {Gc}, (2013)

<sup>206</sup> Venice Commission Opinion no. 755/2014

<sup>207</sup> Recommendation CM/Rec (2010)12

<sup>208</sup> *Ibid.*

**Republic**, after 5 years, the person, on whom a disciplinary punishment was imposed, is looked upon as he/she committed no offence. The same opportunity is envisaged by the legislation of **Ukraine**.

It is desirable if the law could envisage that a judge, sanctioned by a disciplinary penalty, be considered as being under no effect of a disciplinary penalty after some period of time, in case he/she has not committed any disciplinary misconduct in this period of time<sup>209</sup>.

It means that if a judge is considered as being under the effect of a disciplinary penalty, this will have some negative impact on his/her career. For instance, in Hungary, a judge under the effect of a disciplinary penalty cannot be promoted to a higher position, transferred to a higher salary grade, cannot be granted a title of a higher judicial office and receive premiums or other incentives<sup>210</sup>. During the evaluation of Moldova's legislation, according to which a judge under the effect of a disciplinary penalty could not be transferred to other court, could not be promoted in other court or appointed as a chairman or deputy chairman in his court, the Venice Commission stated that in such case the prohibition of promotion was understandable unlike the prohibition of transferring to another court<sup>211</sup>.

## **7.2. Obligation of reinstatement of illegally dismissed judge**

Pursuant to the international law, security of tenure and irremovability are one of the key elements of the independence of judges, with some little exceptions (such as the commission of a disciplinary misconduct)<sup>212</sup>. **Accordingly, judges should have guaranteed tenure until an expiry of a term.** Based on this principle, the Inter-American Court stated that **the state shall be obliged to ensure reinstatement in office of those judges, which have been removed from office deliberately or/and illegally.** Judges should be reinstated in the same positions they held before their dismissal with the same rank, remuneration and social guarantees<sup>213</sup>. In case of the absence of such obligation, the states will have an opportunity to interfere in the judiciary without any control. At the same time, such action from the state may arouse a fear in other judges that even in case when their colleagues are dismissed illegally they will not be reinstated in positions. The fears may affect negatively on the independence of the judiciary, as in

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<sup>209</sup> Comparative EU Law Study on Courts Inspection Service and Disciplinary Liability

<sup>210</sup> Comparative EU Law Study on Courts Inspection Service and Disciplinary Liability, Higgins, John, European Journal on Comparative Law, Vol. 12 (2011), (hereinafter Comparative EU Law Study on Courts Inspection Service and Disciplinary Liability)

<sup>211</sup> Recommendation CM/Rec(2010)12, see also EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) DIRECTORATE OF HUMAN RIGHTS (DHR) OF THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW OF THE COUNCIL OF EUROPE, OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE/ODIHR), JOINT OPINION ON THE DRAFT LAW ON DISCIPLINARY LIABILITY OF JUDGES OF THE REPUBLIC OF MOLDOVA, Opinion no.755/ 2014

<sup>212</sup> E.g. see Recommendation CM/Rec (2010)12)

<sup>213</sup> Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela , IACHR, Merits, reparations and Costs, 5 August 2008, par. 55

such situation, the judges might follow the directives/instructions or refrain from expressing their position different from those bodies initiating disciplinary proceedings and imposing sanctions. Thus, the procedure by which the illegality of a judge's dismissal is determined should be necessarily followed by the reinstatement in the position<sup>214</sup>.

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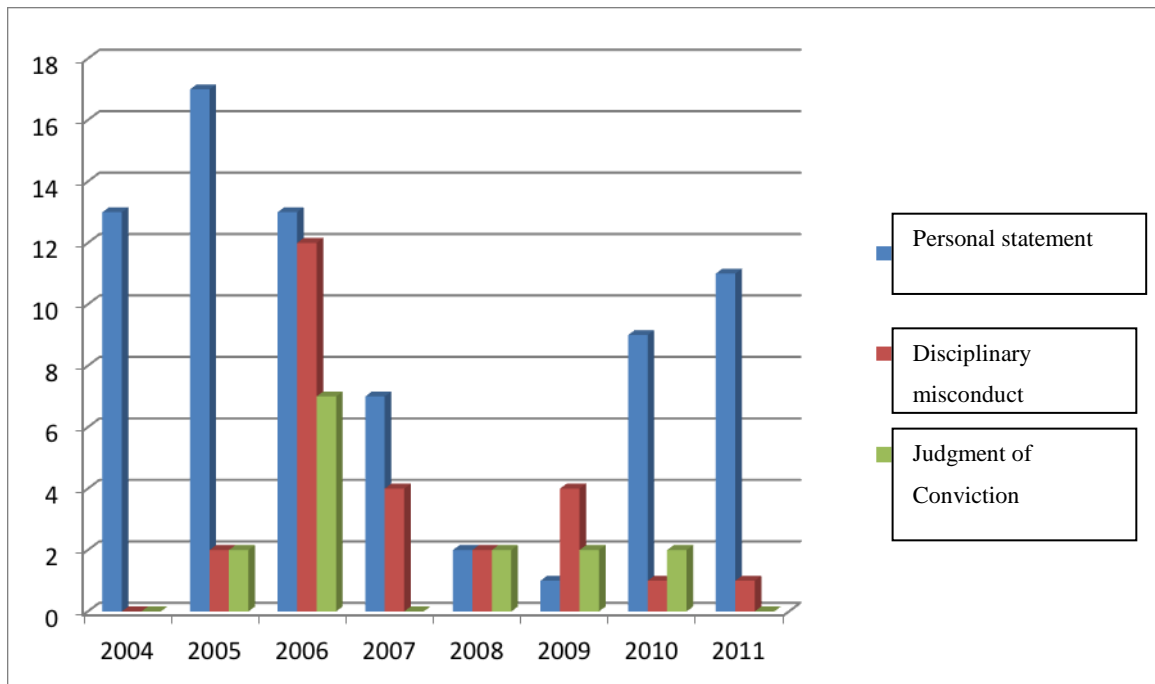
<sup>214</sup> Case of Reverón Trujillo v. Venezuela Judgment of June 30, 2009, IACHR, (Preliminary Objection, Merits, Reparations, and Costs), par. 83

### Part III. Analysis of Judicial Liability Practice

This part of study refers to the analysis of judicial liability practice. Its aim is to identify and analyze tendencies developed in recent years, which is an essential component for a better comprehension of the liability system of judges.

For the purposes of this part, judge’s liability includes both disciplinary liability and criminal responsibility. Accordingly, in this part of study information on the practice of disciplinary and criminal liabilities will be presented.

For the analysis of liability practice, some statistical data are of interest. According to information received from the High Council of Justice, in 2012 and 2013, there was not any case of leaving a court by a judge by personal statement, when in previous years, specifically in 2004-2011, a particular amount of judges were leaving the judiciary by personal statements.<sup>215</sup> Under the law, termination of a judicial power of a judge shall serve as the grounds for the termination of disciplinary proceedings.<sup>216</sup> Such establishment by the law might be taken into consideration when comprehending statistical information.



<sup>215</sup> Letter #163/1754/1755/122-03-o of the High Council of Justice as of 29 January, 2014

<sup>216</sup> Article 14 of the Law of Georgia “on Disciplinary Liability and Disciplinary Proceedings of Judges”

## Chapter 1: Disciplinary liability of judges in 2012-2013

Analysis of disciplinary liability practice was always particularly difficult, as the process of disciplinary proceedings as well as its results were confidential. The confidentiality of a disciplinary liability system did not allow any kind of supervision over the process. In the interview with the authors of the study, a non-judicial respondent, when evaluating the disciplinary liability system, stated: “there does not exist any academic and expert evaluations on disciplinary proceedings (2005-2011), since it was a closed system and there are only some very episodic and fragmented comments on it”.

As a result of changes made to the legislation in March of 2012, it became possible to get acquainted with the decisions taken by the Disciplinary Panel and Disciplinary Chamber, as the relevant bodies were obliged by the law to publish the decisions. The changes carried out in 2012 were very crucial and reasonable legal reform that made the system open for external supervision and public control. Nevertheless, the study of the development of the tendencies of disciplinary liability practice remained as a problem. The published materials are not sufficient for evaluating a change of practice according to years. The more important is that it cannot be determined whether the transparency of the system facilitated the growth of the substantiation and impartiality in the process of a disciplinary case review.

It is noteworthy that in the process of this study, 2 non-judicial members of the Disciplinary Panel prepared a document of practice generalization concerning the practices of the Disciplinary Panel of judges in 2007-2013. The most thorough analysis of disciplinary practice is presented in this document that is used in this study too. Though, practice analysis is based on those publicly available decisions, which have been published since 2012 on the web-page of the High Council of Justice.

**From 2012 up to date, 6 decisions of the Disciplinary Panel were publicly published, from which 4 decisions were published in 2012 and 2 decisions – in 2013.**

In spite of the fact that the materials to be analyzed are very insufficient, they still display the main tendencies of practice. The important fact in regard to disciplinary liability is that in 2012-2013, the decisions of the Disciplinary Panel were taken without a participation of non-judicial members of the Panel. According to the decisions, they were taken only by the participation of judicial members of the Panel.

### *1.1. Disciplinary Liability Practice of 2012*

844 complaints were filed in the High Council of Justice in 2012. According to the official statistical information, from the applications considered, explanations were taken from judges only in 11 cases. Disciplinary prosecution was terminated on 201 disciplinary cases, more than 600 complaints/applications were consolidated with other documentation, and consideration of several cases was moved into 2013. 4 judges were held disciplinary liable out of 11 cases, on which explanations were taken from judges, and respectively, consideration of these cases proceeded in the format of the Disciplinary Panel<sup>217</sup>.

Under the law, the process of case consideration in the Council is not public. Accordingly, the specifics of those cases, which could not reach to the Disciplinary Panel is unknown. Proceeding from the fact that the majority of filed complaints are completed just at the consideration stage in the Council, such cases are always of particular interest. But, at this point, the Council does not have any obligation to process and publish information on such cases, or ensure publicity of such information in any other form. Creation of an entire standard of processing of information on such cases by the Council is very essential that will ensure accessibility to information on the matters of principle, such as periodical reports on practice generalization.

#### *Types of Disciplinary Misconduct*

In 2012, from 4 cases considered by the Disciplinary Panel, **in 3 cases the Council used an improper fulfillment of judge's obligations as the grounds for disciplinary prosecution. In one case, on which the Panel terminated disciplinary proceedings, gross violation of the law was indicated as the basis for disciplinary misconduct**<sup>218</sup>. In 3 cases, where judges were prosecuted for an improper fulfillment of obligations, the Disciplinary Panel determined the commission of disciplinary misconduct and a guilty act of a judge. In one case, the Panel terminated case proceedings due to a person's removal from the reserve list.

From the above-said 3 cases relating to improper fulfillment of obligations, in 2 ones the subject of dispute was time frames of case review. In both cases, the Panel noted that there was a breach of time frames prescribed by the procedure laws.

The tendency relating to the grounds of disciplinary misconduct is very interesting. **The vast majority (5 cases out of 6) of cases considered in 2012 and 2013 related to improper fulfillment of judicial obligations that served as the basis for disciplinary misconduct. This form of misconduct is**

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<sup>217</sup> See statistical information at: <http://hcoj.gov.ge/files/pdf%20files/Disciplinuri%20Statistika%202013%20clis.pdf>

<sup>218</sup> Before the changes made on 27 March 2012, gross violation of the law was one of the forms of disciplinary misconduct

**criticized by many representatives of the judiciary, which require its alteration or removal.** Its opponents make arguments about a vagueness of this norm. Specifically, those demanding abrogation of this principle consider that by the existence of such formulation in the law, the disciplinary body may interfere into judicial independence, assess the decision rendered by a judge or /and make an interpretation of law. These fears are quite real, though in the discussion, the aforementioned statistical information should be also taken into account. According to the practice of the last two years, improper fulfillment of judicial obligations has been the most widespread grounds for disciplinary prosecution. Even in cases when the circumstances of the case pointed to the problem of statutory delays in time limits, the case was qualified/determined as an improper fulfillment of obligations. The objective of this study is not to verify precision of case qualification, especially against the background of such scant information available for the authors of the study. Though, it is fact that the High Council of Justice and 3 judicial members of the Disciplinary Panel considered cases mostly with these grounds and consequently, determined the commission of such disciplinary misconduct.

Within the framework of the discussion relating to the grounds of disciplinary misconduct, it is important that the persons (old and new members of the Panel and the Council) involved in the review of disciplinary cases make an explanation in regard to: what kind of importance was attributed to different forms of misconduct and why most of the cases were qualified as “improper fulfillment of obligations”. Otherwise, it will be difficult to have a substantial discussion on this matter.

#### *Participation of judge in the consideration of a case*

As a result of the analysis of published decisions, there is nowhere depicted that the Disciplinary Panel invited and listened to a judge under prosecution, when in all of the decisions it is indicated that “the Panel reviewed the disciplinary case, examined case materials, heard the prosecution, and found the factual side of disciplinary charges determined”. Pursuant to the law, “after hearing the report, the floor shall be given to the parties involved, first to a representative of the body initiating a disciplinary liability against a judge, for bringing disciplinary charges and then to the accused judge for replying to the charges”. The law enables a judge to defend himself and his interests and if required, to have the assistance of a lawyer. It cannot be directly stated whether the judges represent their interests themselves before the Panel, as there are not anywhere indicated in the Panel’s decisions that the judges were called and made any explanations.



The same was indicated by one of the respondents in relation to the above matter: *“the negative side is that explanations are not presented in any of the decisions, you can hardly find a decision including judge’s explanations. Under the law, explanations of a judge should be a part of the decision, so as to know the judge’s position; in many decisions, the position of a judge is not presented, whether the judge pleaded himself guilty, opposed to charges or presented any arguments against it.”* According to the respondent, this is a *deficiency* of a decision.

Maybe the judges participated in the process of case review, but their positions and explanations are not indicated in the decisions anywhere. Consequently, there are presented only the arguments of the prosecution. As to the protection of the interests of judges under prosecution, according to information received from the Disciplinary Panel, since 2007 up to present none of the judges have used the assistance of a lawyer<sup>219</sup>.

➤ Standard of proof in disciplinary cases

One more issue identified during the analysis of the decisions is related to evidence. It is not indicated in the decisions which evidences were examined by the Disciplinary Panel, what was the standard of proof of disciplinary misconduct or which evidences served as the basis for the Panel’s decision. Generally, it is not clear what standard of evidences was used by the Disciplinary Panel in the decision-making process. One of the respondent judges says that *“during the examination of his/her disciplinary case, the Council did not investigate the valid reasons of laches and the number of cases assigned to him/her during 3 years, the Council did not examine anything at all. It did not consider the complexity and precedent-setting of the case or how a reference time is generally determined. The decision taken by the Disciplinary Panel was just a copy of the resolution of the Council on commencing of proceedings. In the latter document none of his/her arguments were repealed”*.

### 1.2. Disciplinary liability practice of 2013

In 2013, 239 disciplinary complaints were filed, in due form, in the Council.<sup>220</sup> This number totally differs from the number of complaints lodged in previous years and requires additional analysis. As per the statistics published on the Council’s web page, proceedings of 213 cases have been still ongoing that shows that in 2013 the indicator of case considerations was very low.

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<sup>219</sup> Letter #7/03 of the Disciplinary Panel of judges of Common Courts as of 7 April 2014

<sup>220</sup> <http://hcoj.gov.ge/files/pdf%20files/Disciplinuri%20Statistika%202013%20clis.pdf>

It is interesting why the consideration of disciplinary cases has been delayed in the Council. Here, it should be taken into account the situation created in 2013: formation of a new High Council of Justice, some crisis in the decision-making process in the Council, minimal indicator of the ability of consensus of the Council's new composition, etc.; as well as the draft project of amendments prepared by the Supreme Court that provided for the annulment of all the principles of disciplinary misconduct, except for the violation of ethic norms. Pursuant to this draft project, in case of its adoption, all the cases initiated on all other grounds before its adoption would be terminated. Certainly, separately all these circumstances in regard to disciplinary cases are not sufficient for the analysis of the Council's inertness, but in whole, they create a context that could affect the indicator of case consideration.

➤ *Substantial discrepancies in the decisions taken by the Panel*

In 2013, explanations were taken from judges only in 4 disciplinary cases, from which, the Panel reviewed 2 disciplinary cases and took decisions on both cases on April 12, 2013.

**Despite the fact that both decisions were taken on the same day by the same composition of the Panel, appreciable difference between the structure, content, grounds and argumentation of the decisions is evident.**

In the decision as of April 12, 2013 on case #1/03-12, the Disciplinary Panel follows the same structure and line of the consideration of decisions taken in 2012 and as a main argument it indicates the following: “though during the explanation of a decision, the judge went beyond a content of the decision, the above said action did not produce any negative effect, namely, it did not cause any harm to the rights and legal interests of the parties”. This is a main motivation of the Panel and a factor stipulating the result. Despite the fact that the Panel determines the commission of a particular action by the judge, considers the action as a disciplinary misconduct and determines guilty act of the judge, based on the provided arguments, the Panel does not find it necessary to impose a punishment for such misconduct and applies a measure of disciplinary effect, in the form of a private recommendation letter.

However, the second decision on case #1/04-12 taken by the Panel on the same day is totally different from the first one. In second decision, the Disciplinary Panel absolutely changed the practice established, line of discussion and previously existed standards of case consideration. In this case, the Panel discussed a difference between a disciplinary misconduct and a legal error and stated some criteria differentiating

them. According to the decision of the Panel, **“a possibility of correcting a mistake, its quality, repetitive nature, good faith and motive of a judge are the main factors of forming a boundary between a disciplinary misconduct and a legal error”**. Also, it was indicated that a disciplinary liability may be imposed on a judge only in case of a disciplinary misconduct. A judge cannot be prosecuted for a legal error. Though, there was not definitely indicated in the decision about the cumulation or alternativeness of the above mentioned criteria. If these criteria are of alternative nature then it is important to define their power and priority on each other.

It remains unclear why the members of the Panel did not use the same line of consideration in other decision taken on the same day. But, it is a fact that by the decision of April 12, 2013 on case #1/04-12, the Panel made a step by which the disciplinary body in some way bound itself in the review of cases in future. Nevertheless, the boundary indicated in the decision requires on one hand, an institutional strengthening and on other hand, to be established as a precedent.

### *1.3. Filing of appeal in the Disciplinary Chamber*

As for the filing of appeals against decisions of the Disciplinary Panel, according to the information provided by the Supreme Court, in 2012 and 2013 there were not appealed any of the decisions of the Panel in the Disciplinary Chamber.<sup>221</sup> One of the respondents (a former judge) evaluated activities of the Disciplinary Chamber as follows *“it seemed that the Disciplinary Chamber was a body setting seals on the decisions of the Disciplinary Panel and it was a centralized system: the Council stated, the Panel would repeat and the Chamber would agree as well”*.

### *1.4. Conclusions on Disciplinary Practice of 2012-2013*

Despite many questions, the decision of April 12, 2013 points to the development of disciplinary practice. But, in the conditions when the development does not have any institutional basis, its course is always at risk and doubtful. **From the analysis of practices of 2012 and 2013, it is evident how improper is the system of the disciplinary case review and how it is dependent on various internal or external factors. As a result of such disorder, there remains a space for bona fide as well as for mala fide actions.** The fact *that during the consideration of a disciplinary case, the law fails to clearly provide for lawful procedures of case review (including rights of judges), and that the standard of proof, gathering of evidences, the question of permissibility and legal force, the essence of disciplinary misconduct,*

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<sup>221</sup> Letter #V-1324-13 as of 23 December, 2013 of the Supreme Court of Georgia

*explanations of disciplinary violations, etc. are not clear*, does not provide a guarantee that the practice of disciplinary liability will maintain the right course of development. In such condition, the questions of judicial liability will be dependent on good faith and explanations of the members of the Panel.

## Chapter 2: Tendencies of Criminal Responsibility Practice of Judges

The study of the criminal responsibility practice is based only on the court's conclusive decisions, since case materials are not available for third parties.

Therefore, this study cannot be considered as a deep analysis of particular criminal cases. The aim of the study was taking into consideration the past practice and probably still existing risks in the process of the analysis of the judges responsibility system. To this effect, the authors of this study researched and analyzed the judgments passed against judges since 2000 up to now.

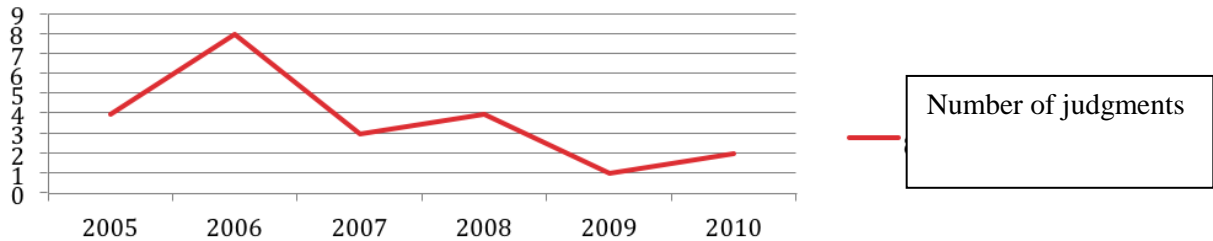
During the study, some public information on criminal prosecution against judges was requested from several agencies. Pursuant to the information received from the Chief Prosecutor's Office of Georgia, they have statistical information on criminal prosecutions initiated against high officials only since 2012. In the period of 2012 and 2013, there were not initiated any criminal prosecutions against judges.<sup>222</sup>

According to the information received from the Supreme Court of Georgia, in the period of 2000-2013, judgments were rendered against 22 judges by the first instance courts.

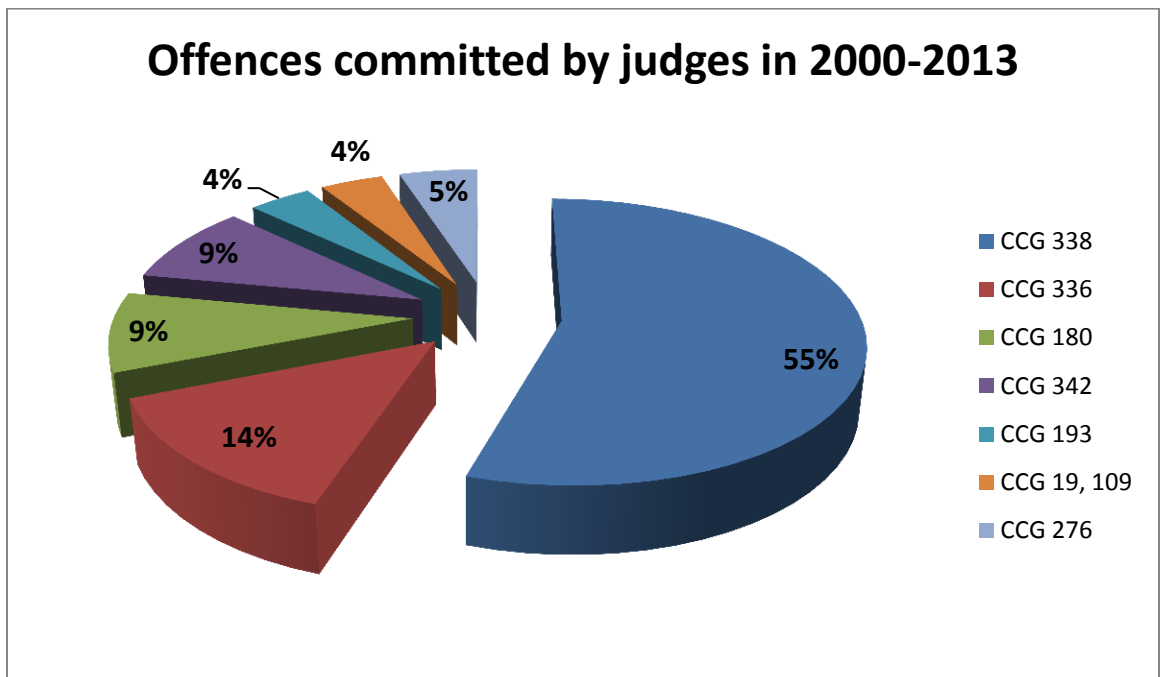
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<sup>222</sup> Letter #13/5736 as of 31 January, 2014 of the Chief Prosecutor's office of Georgia

## Judgments rendered against judges in 2005-2010



12 judges were convicted under article 338 of the Criminal Code of Georgia (CCG) (taking bribes), 3 judges – under article 336 of the Criminal Code of Georgia (illegal judgment), 2 judges – under article 180 of the Criminal Code of Georgia (fraud), 2 judges – under article 342 of the Criminal Code of Georgia (neglect of duty), 1 judge – under article 193 of the Criminal Code of Georgia (false entrepreneurship), 1 judge – under article 19-109 of the Criminal Code (premeditated murder under aggravating circumstances), 1 judge – under article 276 of the Criminal Code (violation of traffic safety rule).<sup>223</sup>



<sup>223</sup> Letter #303 as of 11 March, 2014 of the Supreme Court of Georgia

The authors of the study applied to respective courts and archive services for obtaining all judgments. But it was not possible to receive full information. In whole, this analysis was prepared on the basis of 35 court decisions on criminal responsibilities for different offences of judges of various courts at different time periods. They include court decisions of first and second instances as well as decisions and rulings of the Supreme Court on the inadmissibility of cassation appeal.

In the judgments received from different courts, there were also cases of non-service related offences (e.g. attempt of murder). Though, in view of the aims of this study, its authors made analysis of only judgments related to official malfeasance.

On the basis of the judgments studied, there can be marked out several main groups of the issues, the related practice of which is significant in the study of the of criminal responsibility system of judges.

- Practice established in relation to illegal judgments;
- Interpretation of the negligence of duty and exceeding authority by a judge;
- Bribe and fraud.

As a result of the judgments analysis, the following basic tendencies have been highlighted:

a) Periods of judgments delivery;

According to the judgments, delivery of illegal judgments or other court decisions under article 336 of the CCG was frequent in 2005-2006. There were 2 cases of judicial responsibility for neglect of duty in 2007 and 2008. The facts of passive bribery of a judge were of frequent character since 2005. The last fact on the responsibility of a judge for taking a bribe was in 2010.

b) General evaluation of judgments studied;

To evaluate generally, the studied judgments are not clearly formulated, reasoned and logically worded, that does not make it easily readable and understandable for an interested person.

From the technical and stylistic point of view, judgment texts need substantial improvements. In some cases, the existing model of hatching makes a text unreadable.

Furthermore, in some parts of judgments, court's discussion and motivation is not easily understandable. Descriptive part of a judgment, factual circumstances and others are repeated in a motivation part of the judgment, and the part on the imposition of a punishment is vague.

In addition, in some judgments there are not presented any evidences, such as the judgment of 15 September, 2006 of Gori District Court delivered against a former judge of Khashuri District Court in regard to the case of passive bribery. The Court found the judge guilty, but in the judgment there are not stated about any specific evidences.

Similarly, the judgment (2006) of Rustavi City Court does not discuss any specific evidences, it just indicates the following: “I consider that the evidences gathered on the case justify the charges brought against (name)”.

c) Actions qualified as the delivery of illegal court decisions;

From the judgments studied, in three cases, delivery of illegal judgment served as the basis for a judge’s conviction. The above three cases were considered by Tskaltubo District Court in 2006, Zugdidi District Court in 2006 and Poti City Court in 2005.

➤ Case of a judge of Tskaltubo District Court

In the decision of Tskaltubo District Court (2006), calculation of a term of the commencement of imprisonment in non-compliance with the requirements of the Criminal Procedural Code of Georgia is considered as a delivery of illegal judgment. Pursuant to the decision, the accused judge delivered a judgment in 2005, where as the date of the beginning of imprisonment was indicated the day of committing a crime. Upon the delivery of the judgment, the judge made changes to the decision twice by way of a resolution. In the first change, the day of awarding a judgment was indicated as the date of the beginning of imprisonment and in the second change made on the same day, the judge returned to his/her first version.

The judgment was appealed in the Court of Appeals. Kutaisi Appeal Court made the punishment stricter and made a change to it in regard to the calculation of a term of punishment, which would begin from the day of awarding an imprisonment.

Under article 336 of the CCG, the Prosecutor’s Office commenced criminal prosecution against the judge of the first instance court. During the review of the case, the accused was appealing to the fact that only a court of higher instance had a right of changing a decision taken by the court. The accused did not find any guilty action committed by him/her. He also indicated that he had acted as a judge with an inner faith and there was no damage inflicted on. According to the judgment, the judge noted about the pressure

from the High Council of Justice. It was indicated in the judgment that the judge deliberately did wrong calculation of a term of imprisonment, so that the person could evade prison until the determination of the case in the Court of Appeal. **Though, the judgment does not provide clearly and reliably any arguments in regard to the fact that the judge had such an intention. Furthermore, it is not indicated in the judgment what kind of personal interest or benefit could have the judge from such results.** It is not also stated in the judgment whether the judge had a previous communication with a defendant/lawyer. In spite of this, the court found the judge of Tskaltubo District Court guilty and awarded him a deprivation of liberty with the term of two years.

This decision was appealed by a lawyer in the Courts of Appeals and Cassation. The courts gave significant explanations that will be discussed below.

➤ Case of a judge of Poti City Court

In 2005, Poti City Court found a former judge of this court guilty in regard to the resolution had been passed by this judge in 2001. According to the judgment, the judge, by the resolution on the establishment of a fact of legal significance, transferred strategically important facility for the state, owned by the Ministry of Defense - 61 000 square meter plot of land to LTD “Kolkhi” by a right of ownership.

Besides, pursuant to the judgment, this judge violated the rule of the use of conditional sentence in criminal cases. The following fact was considered by the court as an illegal adjudication: the judge applied conditional sentence to 2 persons in such case when they had committed premeditated grave crime in a probation period.

The former judge did not plead himself guilty in any of the parts of the case. In regard to the establishment of a fact of legal significance, the judge stated that a rejection of the application of LTD “Kolkhi” would denote a refusal to legal proceedings and would cause disciplinary prosecution against him/her. But, in the judgment delivered against the judge, it was indicated that there was a gross procedural violation causing a grave result – transferring of a state-owned land to the ownership of a legal entity of private law. Also, it was stated in the judgment that the court excluded the fact of negligence and error in the action of the judge and considers it as a direct intent.

Though, according to the judgment, it remains unclear what kind of intention it was and how its existence was alleged. In the judgment, it is indicated that the accused judge does not find any mistakes in his/her



action, but the fact that he/she understands his/her action, does not mean he/she had realized illegality of his/her action, result of such an action and a desire for such a result, which are essential elements of a direct intent.

As for the conditional sentence, the judge noted that the use of a conditional sentence for the second time was not prohibited by the law. He also stated that when applying the conditional sentence, he/she followed the principles of humanism, as one of the accused had stolen 15 kg. scrap metal and later a sum – GEL 2,50, and another defendant was the only breadwinner of the family with an unemployed spouse.

In this case too, the judgment does not clearly formulate what kind of interest or intention the judge could have when applying the conditional sentence.

➤ Case of a judge of Zugdidi District Court

In 2006 Zugdidi District Court rendered a judgment of conviction against a judge of the same court under article 336 of the CCG for the delivery of an illegal court decision.

Consideration of the imposition of a measure of restraint by the former judge without a participation of a prosecutor in a closed trial was regarded as a delivery of an illegal decision by the court, while in the original Order and minutes of the court, participation of the prosecutor was indicated.

It is noteworthy that the Order on the measure of restraint was issued in 2000 and the indictment against the judge was made in 2005. Herewith, the evidence-related problems should be also noted. The prosecutor, participation of which was disputable, some years before 2005, confirmed his/her participation in the proceedings in a written explanation submitted by him/her to the former prosecutor of the district. But after the commencement of the prosecution against the judge, the prosecutor changed his/her position. According to the judgment, the prosecutor confirmed his/her participation some years ago with the aim that he/she did not want to strain relations with the judge. In relation to the explanation made by the prosecutor, in the judgment it is noted that an explanation is not admitted as an evidence in criminal proceedings.

**d) Actions which were qualified as negligence;**

➤ Case of a judge of Gori District Court

In 2007, Gori District Court rendered a judgment of guilt against a former judge of the same court for the neglect of duty. Pursuant to the judgment, despite the conclusion received from a mental hospital on a recovery of the patient/prisoner, the judge did not consider the matter of changing or repealing a compulsory measure of medical character and reopening case proceedings according to general rules. According to the judgment, as a result of such a negligence of duty, the prisoner was transferred from a mental hospital to a penitentiary facility without any grounds.

The prosecutor's office made a plea bargain with the defendant. Unfortunately, in the decision on the plea bargain, there are not presented any arguments or/and explanations of the former judge in relation to the above-said matter. But, it is known that the term of powers of this judge was terminated in July 2005, and the judgment against him was rendered in 2007.

Besides, in accordance with the judgment, as a result of negligence of official duty, the person was unlawfully placed in the penitential facility. But, it is not discussed in the judgment how the prisoner was placed in the particular facility without the judge's order. Also, it is not clear whether the administration of this particular institution was held responsible for this fact. It is evident that substantial violation of legal interests is considerable for the composition of negligence of duty. Also, violation of interests must be a result of negligent attitude to his/her (judicial) powers. Though, in this case, the judgment does not show any explicit and proved relationship between the unlawful imprisonment of the person for several months and inactivity of the judge.

➤ Case of a judge of Khelvachauri District Court

In 2008, Kutaisi City Court found a judge of Khelvachauri District Court guilty in regard to the negligence of official duty. According to the judgment, as a result of the judge's failure to fulfill his/her duties, after the expiration of the term of imprisonment, a person was held in prison unlawfully for 3 month and 19 days. Pursuant to the judgment, the judge pleaded himself guilty and stated that he had been fulfilling his/her duties alone in the court; he had cases of all three categories in proceedings, including the cases of hard category.

On the example of this case, it becomes clear how important is a specialization between judges. From this judgment it can be seen that the judge tried to determine the question of procedural time limits in criminal

proceedings through the communication with different persons. Obviously, the lack of specialization creates a danger of making mechanical mistakes by judges that will affect on the rights of individuals. At the same time, judges are under constant stress, as they have to consider cases of such categories which fall outside their specialization. The judge's liability for the fact of negligence in itself means that the judge did not have a malicious intent to hold the person in prison. A reason of the breach of procedural time limits could be workload of the judge, amount and categories of cases assigned to him/her, lack of specialization, etc. But, this fact was not discussed in the judgment. Respectively, the breach of procedural time limits by the judge was qualified as a negligence of his/her duties.

#### **e) Cases on bribery and fraud**

Criminal charges against judges in most cases were brought for bribe-taking. In total, there were such 12 cases, wherefrom plea bargains were made on 7 cases. In other 5 cases, only one defendant pleaded himself/herself guilty, in 4 cases lawyers appealed to the abuse of powers from the side of law enforcement officials, forgery of evidences and provocation of crime.

During the study of the judgments, there was noticed a tendency that the judges considering cases admitted evidences, as a rule, without their substantial examination, the lawfulness and authenticity of which were put in doubt by lawyers due to illegal actions of law enforcement officials. In all judgments there were presented the same evidences: minutes of detention and search/seizure, evidences of those law enforcement officials and experts which were directly involved in the operations of detention or seizure of money given as a bribe. For the prosecution a significant witness is a person who cooperated with the investigation and gave a bribe to an official during the operative operation. It is noteworthy that such persons, or their relatives, in some cases were defendants in other criminal cases. To evaluate generally, it may be said that the objectivity of a witness, which in a fear of an anticipated heavy sentence can easily come under the influence of law enforcement officials, is often doubtful.

#### **➤ Case of Tbilisi City Court as of 2005 (paragraph 3 (b) of article 180 of CCG)**

According to the judgment, a judge was convicted for a fraudulent misappropriation of GEL 10 000. This case related to one of the criminal cases of Tbilisi District Court, where a prosecutor demanded deprivation of liberty of a person with 3-year term that would be counted as conditional with 5-year probation period. As per the judgment, the defendant, in order to avoid custodial sentence, applied for help to his relative – a judge of Rustavi City Court, who had a long time acquaintance with the judge

considering the case. The convicted (judge of Rustavi Court) did not refuse his relative for help, but later he said that GEL 10 000 was required to be given as a bribe to the judge considering the case. Pursuant to the judgment, the convicted had initially intended to misappropriate this sum. For this fact, the victim applied to relevant bodies and a special operation of giving a bribe to the judge was planned. “The victim” gave the sum GEL 10 000 folded in envelope to the judge in his cabinet, after which the judge was detained.

In this case, the evidences required for the judgment of conviction are not sufficiently presented. Particularly, it is unclear what kind of conversation was held between “the victim” and the judge in the process of giving the envelope, what was the aim of “the victim” when leaving the envelope in the cabinet and whether the judge was aware of how much money was in the envelope or if there was any sum at all. Despite the fact that through the lighting of ultraviolet rays on the convicted person’s hand, there appeared an invisible paint by which the given money was processed, the paint could move to his hand through his contact just with the envelope. The motivation of the victim is vague too when he did not face custodial sentence and could receive 5-year conditional sentence. In view of this, the intention of the convicted judge is illogical – to misappropriate money from a relative with the aim to guarantee him from custodial sentence when he even did not face such punishment.

In this case, one of the main evidences was the victim’s testimonies submitted in the process of investigation, whose case was being considered in the court. But it was not possible to interrogate him in the court as he was fugitive. During the review of the case, a lawyer submitted the victim’s letter to the court, according to which he had pressure from the law enforcement officials to cooperate with the investigation, make provocation of crime and give desirable testimonies to the investigation. In view of all the above-said, when it was not possible to interrogate the main witness before the court and the authenticity of testimonies given by him was doubtful, in such case there indeed might be a provocation of crime.

➤ Case of Kutaisi City Court as of 2006 (article 338 (part one) of the CCG)

According to the judgment, a judge had a case in the proceedings where a person was accused for a crime envisaged by articles 333 and 160 of the CCG. At the beginning of the proceedings, the judge considered taking a bribe and through the lawyer of Senaki advocacy required USD 3000 from the defendant’s uncle, in exchange for not applying a deprivation of liberty as a punishment. After that the defendant was sure the judge would not take a decision desirable for him without giving a bribe, he applied to Samegrelo-

Zemo Svaneti District Prosecutor's Office and declared about the judge's demand for bribe. Based on this, the defendant was given specially processed notes of money of the amount of USD 3000 which he gave to the lawyer. The lawyer gave this sum as a bribe to the judge on the same day. The judge was arrested at his house the same day after the meeting with the lawyer.

The convicted did not plead himself guilty. He alleged that the charges brought against him was some kind of revenge for his refusal some months before to legalize investigative actions carried out with a gross violation of law in the village Zanati of Abasha region. According to him, the evidences were false, since he had not demanded and taken any bribe. There is no exact information in the case when or how the bribe - USD 3000 was given to the convicted, even the lawyer admitted that the judge had not demanded any bribe. The arrest of the judge and the search of his dwelling place (when USD 3000 was seized) were carried out with a gross violation of the law.

In spite of the existence of some unclear facts in the case, the court considered the charges brought against the convicted as substantiated. The testimony of the detained lawyer, that the judge had not asked him any bribe, was not considered as true and reliable by the court. In addition, the judge's allegation on his unlawful arrest and search/seizure was repudiated by the court by the argument that the judge was allegedly caught in the process of committing an offence - taking a bribe. Though, based on the judgment, the moment of giving the bribe is not known at all, as the money was seized later from the dwelling place of the convicted person. Respectfully, the stage of committing an offence should have been completed by this time and the law enforcement officers needed a relevant consent for the arrest of the judge and search of his own dwelling place that they did not have.

➤ Case of Tbilisi District Court as of 2005 (338 (part one) of the CCG)

A judge was convicted for taking a bribe with the amount of USD 1000. According to the judgment, he, on the case in his proceedings, demanded USD 1000 from a lawyer of a defendant in exchange for applying a personal bail as a measure of restraint. The lawyer informed relevant bodies about this fact and an operation was planned, when the specially processed money was given to the judge.

In accordance with the judgment, the convicted judge did not plead himself guilty and stated that he had a long time acquaintance with the lawyer and he never demanded bribe from him. The judge put the money offered by the lawyer on the table instead of putting it in the pocket that justifies the fact that he had no intention to take bribe. The main witness on the case, the lawyer, which according to the judgment on his

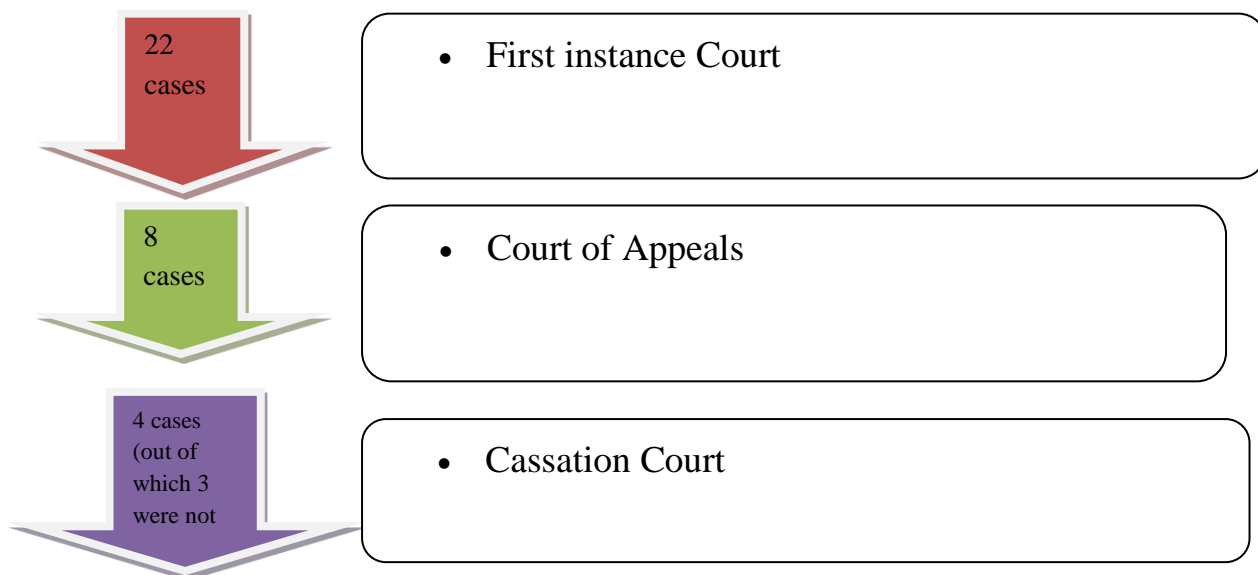
own initiative had applied to the law enforcement body with the above-said information, substantially changed his earlier testimonies in the court and declared that he was under coercion from the side of law enforcement officials. Earlier, the lawyer was once arrested without any grounds, then he was enforced by law enforcement officials to sign false documents by fraud and under the threat of an anticipating criminal responsibility for this action, he was induced to make a provocation of the crime of bribery against the judge.

The court did not consider the witness's testimony as reliable and satisfactory. The judgment of conviction was based on the testimonies of investigators and other witnesses, which merely attested that the convicted judge had indeed had that particular case in proceedings.

As for the fact of giving a bribe, the lawyer was specially equipped to make an audio- and video records of the bribe-giving process. In the record it is not directly mentioned about the bribe, precise amount of the given sum or the aim of its giving. Only as a result of the interpretation of the encrypted record, it became possible to prove that in fact the judge met with the lawyer with the aim of taking a bribe. Though, this interpretation is not definite.

f) Appealing in higher instances

According to the information provided by the Supreme Court, statistics of appealing the judgments delivered against judges is as follows:



Criminal proceedings against judges are characterized by particular risks and respectively, by high interest. Existence of direct signs of offence is necessary for the initiation of prosecution of judges, especially when there is a case of bringing charges against a judge for official malfeasance under XXXIX chapter of the Criminal Code of Georgia. Against the background of the above, it is significant to know what impacts the mechanisms of appealing had on the processes and to what extent the prosecuted judges used such legal remedies.

**Based on the judgments studied, in 8 cases, judgments of conviction rendered by the first instance court were appealed in the Court of Appeals, from which only in one case the claim was partially satisfied and the court reviewed only some part of punishment. 4 cases were appealed in cassation, but the Supreme Court declared 3 cassation appeals inadmissible. And, in one case it did not change the judgment of the Court of Appeals.**

In most cases, there were appealed the judgments rendered for the offences provided for by article 336 (illegal judgment) and article 338 (passive bribery) of the CCG. The appellants convicted under the mentioned articles had different argumentation.

The persons convicted for bribery mostly were appealing to the provocation of the crime and falsification of evidences. The appellant's position was often consolidated by the fact that it was not possible to interrogate the main witness on the case, by help of which an operative operation of bribe-giving was carried out, or the witness substantially changed his testimonies given during the investigation.

It is noteworthy that under the existing criminal procedure legislation, parties can dispute on the admissibility of evidences only during a preliminary court hearing. In case, any of the parties does not agree with the admissibility of evidence by the court, one of the main legal mechanisms of the dispute on the legality of evidence is its appealing in higher instance court along with the judgment. The above-said reality gives much more significance to the case consideration process in higher instance and obliges the court to pay more attention to the claims concerning the legality and authenticity of evidences. According to the judgments studied, the board of appeals did not agree with appellants in none of the cases in regard to the illegality of evidences. There is nowhere noticed in the judgments, what sort of interest was expressed by the court in relation to the claims to really determine their legality or illegality. In the judgments one can read such stereotyped phrases as for instance: "the Court of Appeals cannot share the

appellants' opinion on evidences", "the weight of evidences on the case is sufficient for rendering a judgment of conviction", etc.

The persons convicted for the delivery of illegal judgments, in their complaints, were mostly appealing to the interpretation of the law and the consistency of the decisions taken by them with the law, rather than to factual incompatibility. In view of the above, the courts of higher instances had much more challenges to make substantial explanations and strengthen the lower court's decisions with additional arguments, or on the contrary, satisfy an appellant's complaint. But, as evaluated by the authors of the study, according to the analysis of the decisions taken by the courts of higher instances, the courts refrained from making significant explanations despite existing challenges. As a rule, the courts of higher instances formally corroborate legality and lawfulness of a decision taken by a first instance court without a substantial examination.

In spite of the fact that the Court of Cassation several times had an opportunity to provide an explanation for the offence provided for by article 336 of the CCG, bounds of subjective elements of the offence and for the factor distinguishing this offence from the abuse of office or exceeding one's powers, the court refrained from using such opportunity. The composition of an illegal judgment was interpreted only after the mentioned offence (article 336 of the CCG) was removed from the Criminal Code. According to this explanation of the Supreme Court, delivery of an illegal judgment was a particular case of the abuse of official position and exceeding one's powers<sup>224</sup>, respectively, by deleting this offence from the CCG, as a result, this action has not been decriminalized. Such explanation, in itself, requires much more arguments and substantiation, but the Court of Cassation does not indicate what was a reference point of the peculiarity of the annulled norm in relation to other norms of official malfeasance. On the other hand, such interpretation of the Supreme Court points to the fact that even today judges may be held liable for those actions under article 332 and article 333, which some years ago were considered as a delivery of illegal judgments.

At a time when the court was in a transitional period, with a problem of a prevalence of judicial malfeasances, in need of judges' independence and their defense from external influence, the Supreme Court could play a decisive role by making useful interpretations for the independence of the judiciary and by developing the relevant practice. It should be noted that the explanation made on illegal judgments by the Supreme Court is still in force. Respectively, it is still of concern that a wrong interpretation of the

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<sup>224</sup> <http://www.nplg.gov.ge/gsd/cgi-bin/library.exe?e=d-01000-00---off-0period--00-1--0-10-0--0-0---0prompt-10--.%2e-4----4---0-11--11-en-10---10-preferences-50--00-3-help-00-0-00-11-1-0utfZz-8-00-0-11-1-0utfZz-8-00&a=d&c=period&cl=CL4.10&d=HASH3f43836ff6f20fc572d7e3.3.4>



law by a judge, maybe based on his inner belief and views, may serve as the grounds for this judge's criminal responsibility.

As a conclusion, according to the evaluation of the authors of this study, during a criminal prosecution of judges, the legal mechanisms of appealing in higher instances did not display a sense of effectiveness of the protection of rights and interests. The courts of higher instances acted with the principle of self-restraint and were moderate when making significant explanations that could have its effect on the independence and power of judges.