Analysis of responsibility system of judges

(National legislation, international standards and local practices)

Short summary of the research

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1. About the Research

The subject of this Research is the system of criminal responsibility and disciplinary liability of judges. It is prepared within the Coalition for an Independent and Transparent Judiciary.

The Research analyses national legislation on the responsibility of judges, as well as international standards and the best practices of other states. The research also focuses on the main tendencies of practice related to the disciplinary liability and criminal responsibility of judges.

The objective of this Research is to contribute to the establishment of a fair, objective and transparent system of responsibility of judges that should be based on the principles of judicial independence and accountability and the balance between them. To achieve the stated goal the Research presents set of recommendations developed by the authors related to the bases of disciplinary offences, disciplinary proceedings, transparency, and delineation between disciplinary and criminal responsibilities, etc.

The recommendations were developed taking into account the challenges of judicial independence in Georgia, the existing practices on the responsibility of judges and international best practices concerning the balance between judicial independence and accountability.

The Research process included the analysis of legal acts, the study of international standards and practice of other countries, focus-group meetings with representatives of local and international organizations, interviews with judges, legal councils, prosecutors and others and a review of decisions on criminal and disciplinary cases.

2. Main Findings

The study has revealed the following key findings:

General Problems:

- The disciplinary liability system at the institutional and legislative level is unstable, which enables the development of inconsistency and biased practices towards judges.
- The volume of disciplinary liability is limited by the judges of the general courts. The legislation doesn't recognize a supervision mechanism for the regulation of ethical standards in relation to the Supreme Council of Justice and/or members of Disciplinary Bodies.

With Regard to the Grounds of Disciplinary Responsibility:

- The general definition of a disciplinary offense as the basis of disciplinary liability at the legislative level is not identified, nor are the specific types of disciplinary offenses.
- The law does not specify a list of the actions for which a judge may not be held liable, for example, a legal error. Since the law does not provide an explanation of the types

of disciplinary misconduct, it is possible for the uniform actions of judges to be estimated differently by the disciplinary bodies, which will interfere to create the predictable legal sphere;

- On the grounds of disciplinary liability, removal of the "Rough Violation of Law" should be assessed positively. However, the possibility still remains that the actions that have been considered as “rough violation of law” today should be placed under the definition of “improper performance of judicial duties.” Thus, after legislative changes, the risk of interference, is actually not decreased in the judicial activities;
- Since 2012, after the removal the “Rough Violation of Law" from the types of misconduct and before conducting this research (April, 2014), the majority of decisions made by the Disciplinary Panel (5 cases out of the 6 decisions) concerned the improper performance of duties;
- The current judicial ethical standards are too general in nature and, therefore, for judges it is unclear what obligations are imposed on them, and for the public, it is still unclear in what circumstances the judge may be required to answer;
- It is unclear what is meant under "Corruption Offense, which does not lead to Criminal Liability", which is actually one of the types of disciplinary misconduct, in the circumstances, when the 338th article of the Criminal Code covers all general features of the corruption crime.
- Interviews with both present and former judges revealed that they have no clear idea of on what basis it is possible to bring disciplinary sanctions;
- Certain types of disciplinary offenses (e.g., the improper conduct of a judge), are an independent kind of misconduct, given both in the law, and in the standards in the Code of Ethics. Violation of the code of ethics, in accordance with the law, is actually an independent type of offense;
- Activity incompatible with the position of judges on the one hand is a kind of disciplinary offense, but on the other hand, it is grounds for automatic dismissal (of judges).
- There is no legal possibility of dispersion and / or return to judicial system for judges dismissed for disciplinary reasons.

With Regard to Procedure of Disciplinary Pursuit:

- For the independence of judges, it is risky for there to be a note, according to which disciplinary proceedings may be initiated based on the report sheet of the officer of the High Council of Justice (HCoJ). This feature provides the right proactively, without any reason, to start an investigation on the activity of judge in order to find the offence;
- The right of the heads of the courts to start unitary disciplinary proceedings against judges, regardless of the HCoJ, is also a risk to the independence of judges and could possibly become, in the judicial system, the determinant of an unhealthy relationship.
- The law does not define the stages of disciplinary proceedings, and also does not determine the authorized person who can make decisions at a certain stage;

- To resolve disciplinary matters in accordance with the law, it is necessary to have two thirds of the member of the council in support, although the legislation does not specify at what stage or stages of the disciplinary proceedings there must be this two-thirds support, which means that at least 10 members of the council should support all kinds of decisions related to disciplinary matters.
- The request of two-third majority to terminate the prosecution may cause a delay in the proceedings, and in the remoteness period, keep the case under consideration.
- The procedural rights of the judge during the disciplinary process require strengthening. Among them, the law doesn't define the possibility of access to the files of the disciplinary case, adequate timing for the preparation of the position, the right to the motivated decision, etc.
- In accordance with the law, the deadline for making decisions regarding disciplinary matters is not defined, which leads to the delay of the disciplinary process;
- The legislation do not clearly formulate the fair processes in disciplinary proceedings (including the rights of judges). Furthermore, the standards of proof, evidence, admissibility, and the issue of legal force are not clear;
- A complaint or application automatically leads to prosecution against a judge, regardless of the appropriateness/reasonability and thoroughness of the complaint.
- The decision in the Disciplinary board shall be taken by a majority of those present, which could theoretically be less than half of the members of board (i.e. decision/s - made by two members);

With Regard to Transparency of the Disciplinary Liability System:

- In the HCoJ, the confidentiality of a decision makes it impossible to examine and analyze the practice of disciplinary responsibility, so for judges, complainants, and, in general, society, it remains unclear as to how the council defines certain actions.
- Information about disciplinary cases is limited to only the publication of statistical information (by the HCoJ). The Council does not generalize the practice, which has also negatively been assessed by the respondents.
- A judge, for whom it is important to hold public hearings to protect his/her own interests, has no legal leverage to demand the transparency of the process, which could harm his/her interest;
- The majority of respondents negatively assessed the total confidentiality of the disciplinary process in the past, and expressed their wish for the process to be more transparent. However, all respondents indicated that it is important to make a balance between justice for individual judges and the legitimate public interests.

With Regard to Criminal Liability System:

- The sequence, provided in the chapter of malfeasances of the Criminal code, doesn't consider special indication concerning judges; therefore in a wide range of relations it gives the chance for adjustment, which can be quite risky.

- It is difficult to establish the distinction between certain disciplinary violations and the crimes given in the Criminal Code.
- The difference between activities (including signs of corruption) which are considered disciplinary offenses and those considered crimes is unclear. The distinction between the abuse of power and positional justice and detriment of the interest of duty is unclear, particularly in regards to which of these are disciplinary offenses.
- In most cases, essential damage is the main sign which brings an action out of the sphere of disciplinary prosecutions and introduces it into acts of crimes; however, the concept of essential damage is evaluative, and thus confers unreasonably large powers on prosecution bodies.
- The general dispositions of the Criminal Code should be clarified, such as the abuse of power and negligence, so it can be clear under what circumstances they can be used towards the judges.
- The disposition of "Deliberate Illegal Detention" in the Criminal Code includes the risk that a judge can be accused on the basis of the content of a decision made by him/her;
- In terms of criminal liability, the "Unilateral Consent" of the Chairman of the Supreme Court is not a sufficient guarantee of the protection of the independence of the judiciary and furthermore, creates the risk of an unhealthy relationship between judges and the chairman of the Supreme Court.
- Judicial immunity has an absolute character, which means that, in the case of the accusation of judges, it is necessary to be provided with the proper consent to all types- including the crimes - not connected with their duties.
- In addition to the material standards, procedural provisions of the law can have a risk which, for example, doesn't cover the special / different principle of interrogation of judges. It therefore, can be in contradiction with the paragraph of the constitution which declares that for judges the obligation to report on his/her decisions cannot be **established.**

3. Review of National Legislation

It is important that national legislation is clear and consistent and that its application does not threaten independence of the judiciary. Some provisions related to the disciplinary liability of judges need to be further specified and clarified. The Research focuses on disciplinary offences, procedures of disciplinary prosecution, and the transparency of the process, etc.

3.1. Grounds for disciplinary responsibility

Legislation provides that disciplinary prosecution of judges could be based on eight different offences, as specified in the law. Some disciplinary offences are defined very broadly, which creates room for inconsistent interpretation; **the law does not define specific disciplinary offences; even more so, the law does not provide a definition of disciplinary offence or a**

distinction between a disciplinary offence and a legal error, as the last should not incur judicial responsibility. Thus the scope of application of the law is not foreseeable for judges and society, and the application of relevant provisions greatly depend upon the interpretation of the members of disciplinary bodies. This finding was proved to be valid also during interviews of judges. A review of international standards and practice of other countries identified that legislation should precisely define behaviour incompatible with the status of judges that could lead to disciplinary prosecution. Provisions that are worded broadly and vaguely create threats to judicial independence.

In 2012 amendments to the law were adopted that abolished one basis for disciplinary liability: the grave violation of the law by a judge. However, the provision on improper fulfilment of duties of a judge as a basis for disciplinary proceedings is still pertained in the law and could be interpreted very broadly, potentially including cases previously covered by the norm on grave violation of the law. International standards provide that a judge should not carry liability for contents of his/her decision, legal error, interpretation of facts or evidence or because his/her decision is changed or nullified by higher instance court. As the term "improper fulfilment of duties of judges" is general and vague, it threatens the protection of the aforementioned principle. The analysis of the practice showed that the relevant provision is applied quite frequently as five disciplinary proceedings out of six in the period of 2012-2013 were related to improper fulfilment of duties.

At the time of the preparation of this research, the possibility of limiting the disciplinary liability of judges with a Code of Ethics was actively discussed. However, it should be noted that **the existing Code of Ethics cannot replace the statutory regulations. Additionally, the discussion identified another issue - creation the self-regulatory system of judiciary.** The main question in this respect would be whether it is feasible for the liability of judges to be regulated by the Code of Ethics adopted by the judiciary; if the answer is yes, this would have led to a self-regulated judicial system. While analyzing the meaning and significance of the system of judges' disciplinary liability, it was identified that there is a need to create a system that increases society's trust in the justice, impartiality and professionalism of judges. Therefore it is vital that the system is not closed and fully self-regulated. Accordingly, it is important that statutory provisions are clearly drafted, are fair and foreseeable, and do not exclude the liability of judges for improper, unqualified, and unethical behaviour.

3.2. Procedures of Disciplinary Proceedings

The most important procedural issues are the delineation of the different stages of disciplinary proceedings and the identification of those responsible for decision-making, in order to ensure that decisions are not made without the participation of the council. The existing law is not sufficiently clear on this issue. The practices of other states show that the different stages of proceedings are clearly delineated from each other.

The timeframes of proceedings are also problematic. The law does not specify the time-frame within which the High Council of Justice (HCJ) has to adopt a final decision on disciplinary

proceedings; thus the law leaves room for unreasonably protracted proceedings that negatively influences the independence of judges. International standards provide that an accusation or complaint against a judge should be reviewed quickly and without delay.

It is vital that the principle of fair trial be respected in disciplinary proceedings. International practice and standards provide that a judge enjoys the right to a fair trial in disciplinary proceedings. The law does not regulate the standard of evidence, the admissibility of evidence, the availability of adequate time, the possibility for a judge to protect himself/herself, the right to justified decision, etc.

Decision-making by the HCJ and disciplinary board is also problematic. While the law requires that a decision be made by two-thirds of the HCJ members, this is quite difficult to implement in practice. However, **it is not clear whether the proceedings are terminated if two-thirds of the council does not vote for the continuation of the proceedings.** As for the decision-making of the disciplinary board, the law provides that decisions shall be made by the majority of the members attending the meeting that is not justified; hypothetically, such a majority could be only two members of the board, that is, less than half of the full composition.

3.3. Transparency of Disciplinary Proceedings

Internationally recognised standards provide that the grounds for initiating disciplinary process, procedural aspects and adopted decisions should be transparent. For years disciplinary proceedings were confidential. However, recent amendments to the law were positive steps towards the openness of the process, as the decisions adopted by the disciplinary board and disciplinary chamber are now open and accessible.

Yet the amendments did not affect the disciplinary hearings held at the High Council of Justice, which are a very important stage of the disciplinary proceedings. The **decisions of the HCJ (on the termination of proceedings or the commencement of disciplinary measures) are confidential and are not published, thus hindering the monitoring of this stage of disciplinary proceedings.**

Taking into account international standards, it may be concluded that the different levels of transparency of proceedings are allowed at different stages. If a judge requests public hearings, confidential process may violate his/her right to fair trial. It is considered that the final decision should be published publicly, the transparency/confidentiality of the hearings notwithstanding.

3.4. The line between disciplinary liability and criminal responsibility

The delineation of disciplinary liability and criminal responsibility is difficult under the existing regulations, as the line between them is relatively vague. As a general rule, a disciplinary offence and a crime are differentiated based on the gravity of the damaged caused by the act; however, in practice it is quite difficult to implement this principle objectively. A

good example is the difference between a crime – (an abuse of official powers) and a disciplinary offence (a misuse of a public office doing harm to justice and official interests.)

Alongside the vagueness of the test of damage caused, which negatively influences the independence of judges, overlaps of crime and disciplinary offences are also problematic. An example would be a crime of corruption that is regulated by the Criminal Code of Georgia; however corruption law violation is also a basis for disciplinary liability.

The criminal responsibility of a judge is safeguarded with immunity. Only the Chief Justice of Georgia has the authority to give consent or reject a request to initiate the criminal prosecution of a judge. The mechanism of individual decision-making does not create sufficient safeguards for the protection of judges, and at the same time facilitates that the process is closed. It is noteworthy that judicial immunity is absolute in Georgia. However, international standards provide that judicial immunity should be functional, which means that the immunity of a judge only applies to acts committed in his/her official capacity.

4. Main Tendencies of Practice in Georgia

The authors of this Research analysed all six decisions adopted by the disciplinary board that were published and open to public. In addition, 35 judgments made by different instance courts at different times were reviewed to analyze the tendencies of practices on the criminal responsibility of judges.

4.1. Tendencies of Disciplinary Proceedings

The practice of application of bases for the initiation of disciplinary proceedings is interesting. In 2012 and 2013 **the majority of cases (five out of six) were based on the improper fulfilment of duties.**

The analysis of the published decisions do not show whether the disciplinary board invited and listened to the judge who was charged. The law entitles a judge to protect himself/herself and his/her interest if he/she wishes to, and even to be represented by a lawyer. It is hard to say whether the judges were invited to protect their interests in the proceedings, as the decisions do not refer to the invitation of the interested judge or the explanations given by him/her.

One more issue identified during the analysis of the decisions is related to evidence. The decisions do not identify which evidence was examined by the disciplinary board , the standard of proof of the disciplinary offence, or which evidence served as a basis for the decision. In general, it is not clear what standard of proof was used by the board.

In 2013 a new tendency was identified – the number of applications decreased and the proceedings were more protracted. In 2013 the disciplinary board examined two disciplinary cases and the decisions on both cases were adopted on April 12 2013. **Despite the fact that both decisions were made on the same day, by the same board, with an identical**

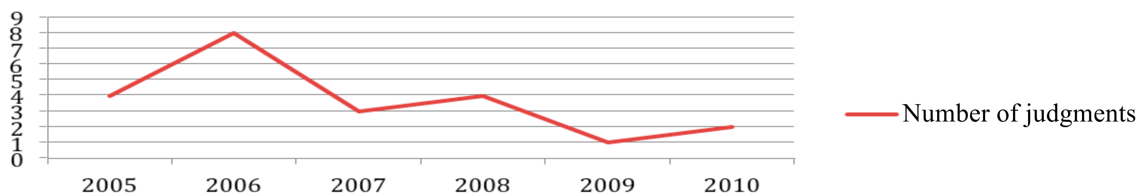
composition, major differences in the structure, contents and justification of the decisions were found. According to one of the decisions, the board substantially changed the standard for proving that a judge had committed disciplinary offence. In the same decision the board used, for the first time, the distinction between disciplinary offence and legal error, and the act committed by the judge was not found to be a disciplinary offence.

According to the data obtained from the Supreme Court of Georgia, in the period of 2012-2013 the decisions of the disciplinary board were not appealed. Accordingly, it was impossible to evaluate the operation of the disciplinary Chamber.

4.2. Tendencies of Criminal Responsibility

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

Judgments against judges, 2005-2010



12 judges were found guilty under article 338 of Criminal Code of Georgia (CCG) (Accepting Bribes), 3 – article 336 of the CCG (Delivering Illegal Sentence or Other Court Decision), 2 – article 180 of the CCG (Forgery), 2 – article 342 of the CCG (Neglect), 1 – article 193 of the CCG (False Entrepreneurship), 1 – article 19-109 of the CCG (Murder in aggravating circumstances), and 1 – article 276 of the CCG (Violation of Traffic Safety or Maintenance Rule).

The general observation of the analysis of all decisions is that all judgments are structured vaguely, which made the process of analysis complicated. In some cases the list of evidence that served as the basis for the conviction judgment is missing. In general, the standard of proof is not clear as the justifications of the majority of judgments are general and the standard cannot be considered to be sufficient. This issue was especially essential for those judgments that were dealing with illegal decisions made by judges.

The analysis revealed that the "Adoption of an illegal decision" was used when a judge used a method for the calculation of the date of starting imprisonment different from the one specified in the Criminal Procedural Code of Georgia; in cases where a judge violated a rule on the application of conditional sentence, namely the latter was used while a person committed an intentional grave crime while he/she was under probation; the transfer of property of the Ministry of Defence to private entity based on statement of legal facts; a decision on a preventive measure was made without the participation of a prosecutor. **The authors of this Research did not find that the judgments clearly and undoubtedly proved intention, motive, or some other personal interest of the judge and/or his/her understanding of the illegitimacy of the specific action; accordingly it has created negative senses towards the quality of substantiation of judgments.**

As for Neglect as a basis for criminal responsibility of a judge, it was used in one case where a prisoner was transferred from a mental health institution to a penitentiary facility without discussing the basis for the termination or change of mandatory medical treatment or initiating general proceedings. Another instance related to Neglect was a case where a person was held unlawfully in a penitentiary institution for 3 months and 19 days, after the expiration of the term of imprisonment, as a preventive measure. This specific case revealed the negative influence **of no specialisation in some courts and the extreme load of judges on their responsibility system.**

In the majority of cases, judges were convicted for bribery. In 7 out of 12 cases a plea bargain agreement was made. As for other 5 cases, only 1 person plead guilty, while others claimed that law-enforcement bodies exceeded their powers, evidence was forged, and the crime was provoked.

The issue of evidence was especially significant in cases where a plea bargain deal was agreed upon. According to the analysed judgments, in some cases the main witness could not show up for the court hearings and/or she/he changed her/his testimony, etc. The general tendency in bribery cases was that the main witness of the prosecution was a person who cooperated with the investigation and delivered a bribe to a judge in the course of operative actions. It is noteworthy that in some cases these persons (witnesses) or their relatives were accused of other crimes.

According to the information obtained from the Supreme Court of Georgia, eight judgments were appealed in the Court of Appeal and four in the Supreme Court. Based on the analysis of the decisions of the second and third instance courts, authors concluded that the **legal remedy of appeal in courts of higher instance did not create sufficient safeguards for the protection of rights and interests of person. The courts of higher instances used self-limitation and abstained from providing significant definitions, even though in some cases their definitions could be milestone and significant.**

It is noteworthy that the review of criminal cases is based on judgments, as the case materials cannot be accessed by third parties. Accordingly, the findings in this chapter are based on the

final judgments, which are not sufficient sources for thorough analysis of criminal cases. Therefore, the cited examples were used only for the visualisation of tendencies.

5. Recommendations

The following recommendations have been developed by the authors of the research:

General Questions:

- The law should clearly define the purpose of disciplinary liability. It is also important to expand the capacity of a system of responsibility, in order not to ignore the ethical issues concerning the members of the HCoJ and disciplinary bodies.
- The rules of the formation of the disciplinary chamber have to be changed and replenished, instead of the plenum, by the Judicial Conference.

Grounds for disciplinary responsibility and Sanctions:

- The interpretation of each disciplinary offense has to appear in the law;
- In the case of the repeating of the disciplinary bases between the Code of Ethics of judges and the law on disciplinary proceedings, then the infringement has to be left only in the Ethical Code.
- There should be an indication in the law of the specific violations of ethics which can lead to the disciplinary responsibility of the judge;
- The Judicial Conference should get to work on updating the Code of Ethics;
- Corruption offenses have to be removed from the types of disciplinary misconducts and completely placed under the criminal code.
- An action incompatible with judicial duties has to be left only as a type of disciplinary offense and removed from the subjects of dismissal (of judges).
- Disciplinary bodies shouldn't define the failure or the improper performance of judicial duties of judges without introducing all actions within this offense – which were originally/previously qualified as rough violation of the law;
- The law should indicate which sanction/s and the degree/s of influence should be used under the certain disciplinary offenses.
- The law should determine the specific grounds for, and the content and purpose of the issuance of a private letter of recommendation.
- The law has to specify the mechanism and procedure for reviewing the cases of those (judges) who have an assumption that they were dismissed illegally; in case the wrongful dismissal is confirmed, the law has to provide the opportunity for the restoration of them to the same position / rank.
- If the above-mentioned recommendation can't be implemented, it is desirable to abolish the blanket ban according to which the judge, dismissed for disciplinary offense, cannot be recovered again to the judicial position.

Procedural Issues:

- The stages of disciplinary proceedings, including the authorized officer/s making the decisions at a certain stage, have to be logically marked off in the law.
- A certain period for making the decisions on disciplinary cases for the HCoJ should be determined by the law.
- During disciplinary proceedings, the law should clearly define the issues of the standards of proof, as in the HCoJ, as well as in the Disciplinary board.
- The law should specify the issues relating to evidence, its admissibility, and the legal forces of disciplinary cases.
- The rights of the staff members of the HCoJ to initiate disciplinary proceedings against a judge on the basis of an explanatory note should be abolished.
- Only the HCoJ has to have the authority to initiate disciplinary process;
- The law should determine the obligation of the HCoJ and Disciplinary Board, during the review of a case, to arrange the hearing of the judge.
- The law shall determine what decisions require the consent of two-thirds of the HCoJ members. It is also important to consider that that a higher quorum must be used in the event of accusation towards the judge, and not for stopping the prosecution against him/her.
- It is necessary to reconsider the quorum issue of the disciplinary board, in order to avoid the making of a decision by only two members of the board theoretically.
- It is necessary to make amendments to the law, so that the complaint cannot lead directly to disciplinary prosecution.
- The law should specify the Procedural rights of judges and appellants/complainants.
- The law should provide procedural rights, such as: the right to access to materials, the right to a sufficient amount of time to prepare for the position and the motivated decision.

Transparency:

- The law shall regulate the right of judges to demand the publicity of any stage of the disciplinary procedure.
- At all stages of disciplinary proceedings the HCoJ should make an argumentative / documented decision about the disciplinary case.
- The decision, made by the HCoJ, on a disciplinary case shall be published, while ensuring the safety of personal information, on the website of the council.

Criminal Liability:

- The chapter of the Criminal code concerning servants' crime deals with all public servants, including judges, so it is necessary to create special rules that apply only to judges. Furthermore, with the exception of the material standards, it is necessary to conform the Procedural legislation with the specifics of judicial authority (including the rules of interrogation, etc.);
- The article about deliberate unlawful arrest should be revised.

- The main difference between disciplinary misconduct and a crime is the “Substantial Damage", which requires more clarification and objectivity.
- It is necessary to change the mechanism of "Unilateral Consent" used for prosecution of judges, and the volume of absolute immunity should be revised. The Collegial body should be given the mentioned authority within the qualified majority. This can be either the HCoJ with a two-thirds majority or the Plenum of the Supreme Court.